THE CODE

OF

CIVIL PROCEDURE.

THIS CODE SHOULD BE CITED AS

FAIRALL'S CODE CIV. PROC.

THE

CODE OF CIVIL PROCEDURE

OF THE

STATE OF CALIFORNIA.

APPROVED MARCH 11, 1872.

WITH AMENDMENTS UP TO AND INCLUDING THOSE OF THE FORTY-FIRST SESSION OF THE LEGISLATURE, 1915.

With Annotations

EMBRACING THE DECISIONS OF THE COURTS OF LAST RESORT OF THE STATE OF CALIFORNIA

AND

WITH FREQUENT REFERENCE TO THE DECISIONS OF THE COURTS OF LAST RESORT OF OTHER STATES, AND OF THE FEDERAL COURTS.

BY

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IN TWO VOLUMES.

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TO

CHARLES JOSEPH HEGGERTY, ESQ.

OF THE SAN FRANCISCO BAR,

This Work

IS RESPECTFULLY DEDICATED.

PREFACE.

This annotated edition of the Code of Civil Procedure is the result of labors extending over a period of seven years, and while the editor was actively engaged in the practice of the law. The primary object in publishing this edition was to give the profession a practical, workable annotated code. To reduce the annotations to narrative form would seem more truly to subserve the real purpose of an annotated code: to place before the practitioner a general outline of the law bearing on each section as construed by the appellate courts.

The result of this effort is now submitted to the judgment of the profession; and the editor gives, at the outset, the assurance of a faithful attempt in what he believes to be the right direction, and that he has spared neither time nor effort in the attempt.

The only satisfaction the editor may expect from the result of his labors is the approval of the profession; for no pecuniary compensation, calculated upon the commercial value of the work, could be at all commensurate with the effort made and the work actually performed. It is therefore hoped that the profession, to whom the work is submitted, and for whom alone it was undertaken, will realize and understand not only the difficulties encountered, but also the prodigious labor involved.

While endeavoring always, in this edition, to keep in view the principal object of the framers of the code, viz., to make legal proceedings more intelligible, more certain, more speedy, and less expensive, the constant aim has been to combine what have been proven by usage to be the best features of code compilation and annotation—to combine: 1. A genuine text; 2. Ample cross-references; 3. A complete history of the legislation of each section; 4. Full annotations; and 5. The original notes of the code commissioners.

The aim has been, also, throughout the work, to give the law as it exists, and the construction placed upon it by the court; to harmonize the decisions wherever a conflict was apparent; to explain discrepancies and contradictions, by reference to the law controlling the case under consideration, avoiding, wherever possible, any statement where there is a conflict of opinion, but where such conflict cannot be explained, to give authorities upon which the rule is based.

A genuine text is the first essential of a code: the law as enacted by the legislature, and not the law as issued by the printer, is desired. Because of errors of so palpable a nature accumulating in each edition of the codes as issued, the copy of this code has been diligently compared with the original documents and engrossed bills on file in the office of the secretary of state, so that the present text goes to press free from the errors found in previous editions.

In this effort to secure accuracy, much light was thrown on the origin of the statutes. Thus, among other things, it was found that §§ 798, 799, 800, and 801 had never been officially published in the statutes, but were enacted April 1, 1872, and inserted in the original edition of the code published in

that year. It will be remembered that the Code of Civil Procedure was approved by Governor Booth on March 11, 1872.

Cross-references are made not only to the different parts, or departments, of this code, but also to the other codes, as well as to the judicial decisions and annotations of various standard annotated reports published in America.

The legislative history of each section has been prepared with great care, and with attention to detail; the object in view being, to give not only the source of the statute, but also the amendments made by the legislature from time to time. The value of this department of the code is manifest, showing, as it does, the text of each section governing the action or proceeding at the time the decision of the appellate court therein was rendered. A fuller use of this legislation will, it is believed, explain many apparent conflicts in the decisions of the appellate courts.

The annotations in this edition are extensive and complete. The arrangement of the notes is in a convenient form, with headings in black-faced type, that appropriately indicate the subject-matter, and aptly refer to the text of the statute.

The notes of the code commissioners have been reprinted in this edition for the purpose of further explaining and construing the sections to which they relate. These notes show not only the legislation upon which the section is based, but also the decisions of the supreme court; and in many cases it will be found that the code section was based upon a judicial decision of this or of a sister state, as well as upon decisions of English courts, and in some instances upon statements of law contained in standard text-books of law-writers. These notes of the code commissioners therefore furnish the truest guide to the proper construction of the code; and it is unfortunate that hitherto they have not been readily accessible to the profession, as a more frequent reference to them, and a careful study of the cases cited therein, might have tended to simplify our practice.

A careful and analytical study of the decisions of the appellate courts construing the inapt legislative expressions in frequent amendments will convince the profession that the only solution of the question of the simplification of practice is to take that matter entirely out of the hands of the legislature, and regulate practice by rules of court, as has been done successfully in several states.

The great mass of decisions which have accumulated upon questions of practice must necessarily have a disheartening effect upon a student of the law. We find decision after decision upon questions so simple that they never should have been entertained by any court. It has been said, and truly said, that three fourths of the decisions of our appellate courts are based upon questions of practice, and it may be further truthfully asserted, that at least fifty per cent of these questions of practice have been raised and decided many times, all of which will be clear from an examination of the authorities cited in the annotations in these volumes.

CHARLES H. FAIRALL.

San Francisco, California.

GENESIS AND GROWTH OF THE CODES.

The adoption of the codes in 1872 grew out of an effort to revise and compile the laws of the state. In 1868, J. B. Harmon, John Currey, and Henry P. Barber were appointed as commissioners "to revise and compile all the laws of this state," by "An Act to provide for the revision and compilation of the laws of the state of California and the publication thereof," approved March 28, 1868 (Stats. 1867–68, p. 435).

For reasons not published, this commission was not permitted to complete its labors, but the legislature, by "An Act establishing a commission for the revision of the laws," approved April 4, 1870 (Stats. 1869–70, p. 774), provided for the appointment of another commission, consisting of three persons, to be appointed by the governor, to "continue the labors" of that appointed in 1868, and "to revise all the statutes of this state, including those enacted at the present session of the legislature, and correct verbal errors and omissions, and suggest such improvements as will introduce precision and clearness into the wording of the statutes, and by a supplemental report thereto to designate the acts or parts of acts which, in the opinion of the commission, should be repealed, and prepare substitutes therefor when necessary; to recommend all such enactments as shall, in the judgment of the commission, be necessary to supply the defects of and give completeness to the existing legislation of the state, and prepare and present the bills therefor; to examine all special acts, and such as are confined in their operation to particular counties or cities, and to propose such measures as shall be necessary to give unity and uniformity thereto, and especially to propose, when possible, general acts, which shall supersede the same; to arrange the statutes in the most systematic and convenient form, and furnish a complete and alphabetical list of the matters contained therein, which, in future, may be made the basis of an index."

The second code commission was composed of Creed Haymond, John C. Burch, and Charles Lindley. Differences of opinion arising, John H. McKune was appointed commissioner upon the retirement of Judge Lindley, and the complete drafts of the four codes were issued by the state printer in 1871–72.

While the legislature adopted the drafts of the codes substantially as reported, yet many amendments were made, both in the arrangement of the subject-matter and in the language of the text submitted, as will be seen upon consulting the enrolled bills signed by Governor Booth in 1872.

The code system is, for convenience and partial classification, divided into four codes, to each of which a name is given; but they are inseparably interwoven with one another, and no one of them is complete in itself, or absolutely confined to a particular subject. (See Enos v. Snyder, 131 Cal. 72; 63 Pac. 170; Lewis v. Dunne, 134 Cal. 294; 66 Pac. 478.)

The idea prevails generally, in California, that our code is but a reproduction of that of New York, while, in fact, our Code of Civil Procedure is based largely upon the Practice Act and the Probate Act of 1851. Although many of the sections of these two acts were substantially the same as exist-

ing New York statutes, yet, as a whole, they bear a more striking resemblance to the statutes of 1850 and to the decisions of our own state. It is true that David Dudley Field and his collaborators in New York had drafted a code system for that state as early as 1849–65, but it was not adopted until after 1850, and indeed their draft of a Code of Civil Procedure was never adopted by that state.

Our Probate Act and Practice Act were based almost entirely upon certain acts of the first session of our legislature (1849–50) at San José. In short, they were mere codifications of those statutes. As to the origin of the statutes themselves we are left in doubt. At that time the report of the code commissioners of New York, covering the subject of procedure, was not available, and was not given to the legislature of that state until December 31, 1849.

While it is true that many of the provisions of the acts of that first session of our legislature are substantially the same as the New York statutes, yet such acts are in no sense copies of the laws of any particular state. Such legislation was undoubtedly the work of the legislative judiciary committees, supplemented by the investigations of members of the San Francisco bar, who were strenuously opposing the proposition to adopt the civil law, (as recommended by Governor Burnett in his message,) instead of the common law. The advocates of the common law finally prevailed, and it was made the rule of decision in this state. The completion of the labors of these men was the embodiment, in several acts, of the principles of common-law procedure, as modified by legislation in the several states of the Union. The rules of that practice, far from being the work of any particular body of men, were the common heritage of the English-speaking people, and the result of the experience of ages.

The statutes of all the states, and the decisions of the courts, both of America and England, were drawn upon for the principles embodied in our first legislative enactments, and harmonized to fit the conditions of the new state.

On March 18, 1872, after the adoption of our code, David Dudley Field sent the following telegram to the code commissioners of this state: "All honor to you for your great work accomplished! It will be the boast of California, that, first of English-speaking states, she set the example of written laws as the necessary complement of a written constitution for a free people."

C. H. F.

ANALYSIS OF CONTENTS OF VOLUME I.

TITLE OF ACT.

§ 1. Title and division of this volume.

PRELIMINARY PROVISIONS.

§ 2. When this code takes effect.
§ 3. Not retroactive.
§ 4. Rule of construction of this code.
§ 5. Provisions similar to existing laws, how construed.
§ 6. Tenure of offices preserved.
§ 7. Construction of repeal as to certain offices.
§ 8. Actions, etc., not affected by this code.
§ 9. Limitations shall continue to run.
§ 10. Holidays.
§ 11. Same.
§ 12. Computation of time.
§ 13. Certain acts not to be done on holidays.
§ 14. "Seal" defined.
§ 15. Joint authority.
§ 16. Words and phrases.
§ 17. Certain terms used in this code defined.
§ 18. Statutes, etc., inconsistent with code repealed.
§ 19. This act, how cited, enumerated, etc.
§ 20. Judicial remedies defined.
§ 21. Division of judicial remedies.
§ 22. Action defined.
§ 23. Special proceeding defined.
§ 24. Division of actions.
§ 25. Civil actions arise out of obligations or injuries.
§ 26. Obligation defined.
§ 27. Division of injuries.
§ 28. Injuries to property.
§ 29. Injuries to the person.
§ 30. Civil action, by whom prosecuted.
§ 31. Criminal actions.
§ 32. Civil and criminal remedies not merged.

PART I.

COURTS OF JUSTICE.

TITLE I.

ORGANIZATION AND JURISDICTION.

Chapter I. Courts of Justice in General. §§ 33, 34.
II. Court of Impeachment. §§ 35–39.
III. Supreme Court. §§ 40–64.
IV. Superior Courts. §§ 65–79.
V. Justices' Courts. §§ 82–119.
Article I. Justices' Courts in Cities and Counties. §§ 85–100.
II. Justices' Courts in Townships. §§ 103–109.
III. Justices of the Peace and Justices' Courts in General. §§ 110–119.
VI. Police Courts. § 121.
VII. General Provisions Respecting Courts of Justice. §§ 124–153.
Article I. Publicity of Proceedings. §§ 124, 125.
II. Incidental Powers and Duties of Courts. §§ 128–131.
III. Judicial Days. §§ 133–135.
IV. Proceedings in Case of Absence of Judge. §§ 139, 140.
V. Provisions Respecting Places of Holding Courts. §§ 142–144.
VI. Seals of Courts. §§ 147–153.

CHAPTER I.

COURTS OF JUSTICE IN GENERAL.

§ 33. Courts of justice in general.
§ 34. Courts of record.

CHAPTER II.

COURT OF IMPEACHMENT.

§ 35. [Amended and renumbered section.]
§ 36. Members of the court.
§ 37. Jurisdiction.
§ 38. Officers of the court.
§ 39. Trial of impeachments provided for in the Penal Code.

CHAPTER III.

SUPREME COURT.

§ 40. Justices, elections, and terms of office.
§ 41. Computation of years of office.
§ 42. Vacancies.
§ 43. Departments.
§ 44. Apportionment of business.
§ 45. Court in bank.
§ 46. Absence or disability of chief justice.
§ 47. Sessions. Expenses.
§ 48. Adjournments.
§ 49. Decisions in writing.
§ 50. Jurisdiction of two kinds.
§ 51. Original jurisdiction.
§ 52. Appellate jurisdiction.
§ 53. Powers in appealed cases.
§ 54. Concurrence necessary to transact business.
§ 55. Transfer of books, papers, and actions.
§ 56. Remittiturs in transferred cases.
§ 57. Appeals in probate proceedings and contested election cases.
§ 58. [Related to terms of district court. Repealed. §§ 59–64. Same.]

CHAPTER IV.

SUPERIOR COURTS.

§ 65. Judges and elections.
§ 66. Counties having two or more judges.
§ 67. Superior court of the city and county of San Francisco.
§ 67a. Superior court of Los Angeles County.
§ 67b. Extra sessions of the superior court.
§ 68. Terms of office.
§ 69. Computation of years of office.
§ 70. Vacancies.
§ 71. Superior courts, by judges of other counties.
§ 72. Judges pro tempore.
§ 73. Sessions.
§ 74. Adjournments.
§ 75. Jurisdiction of two kinds.
§ 76. Original jurisdiction.
§ 77. Appellate jurisdiction.
§ 78. Process.
§ 79. Transfer of books, papers, and actions.

CHAPTER V.

JUSTICES' COURTS.

Article I. Justices' Courts in Cities and Counties. §§ 82–98.
II. Justices' Courts in Townships. §§ 99–109.
III. Justices of the Peace and Justices' Courts in General. §§ 110–119.

ARTICLE I.

JUSTICES' COURTS IN CITIES AND COUNTIES.

§ 82. [Related to county courts. Repealed. §§ 83, 84. Same.]
§ 85. Justices' courts and justices.
§ 86. Clerks of justices' courts.
§ 87. Sheriff and deputies.
§ 88. Offices and office hours.
§ 89. Actions.
§ 90. Reassignment and transfer of actions.
§ 91. Payment of fees.
§ 92. Certificates, transcripts, and other papers.
§ 93. Justices' docket.
§ 94. Territorial extent of jurisdiction.
§ 95. Practice and rules.
§ 96. Attorney. Who shall not act as.
§ 97. Salaries.
§ 98. What justices successors of others.

ARTICLE II.

JUSTICES' COURTS IN TOWNSHIPS.

§ 99. Justices' courts and justices in townships having a population between two hundred and fifty thousand and four hundred thousand.
§ 100. Return of process.
§ 101. Appointment of justices' clerk.
§ 102. Duties of justices' clerk.
§ 102a. Fees.
§ 102b. Salaries of justices and clerks.
§ 103. Justices' courts and justices. In counties. In cities of various classes. Jurisdiction. Qualifications. Salaries. Fees.
§ 103½. Clerk to justice's court in cities of second and one half and third classes, duties, etc.
§ 103a. Justices' clerks, additional powers of.
§ 103b. Justices' clerks in counties of the seventh class, appointed when, and powers and duties of.
§ 104. Courts, where held.
§ 105. What justice may hold court for another.
§ 106. Territorial extent of civil jurisdiction.
§ 107. What justices successors of others.
§ 108. [Related to municipal criminal court of San Francisco. Repealed. § 109. Same.]

ARTICLE III.

JUSTICES OF THE PEACE AND JUSTICES' COURTS IN GENERAL.

§ 110. Term of office.
§ 111. Vacancies.
§ 112. Civil jurisdiction.
§ 113. Concurrent jurisdiction.
§ 114. Civil jurisdiction restricted.
§ 115. Criminal jurisdiction. [Repealed.]
§ 116. [Amended and renumbered section. §§ 117–119. Same.]

CHAPTER VI.

POLICE COURTS.

§ 121. Provided for in Political Code.

CHAPTER VII.

GENERAL PROVISIONS RESPECTING COURTS OF JUSTICE.

Article I. Publicity of Proceedings. §§ 124, 125.
II. Incidental Powers and Duties of Courts. §§ 128–131.
III. Judicial Days. §§ 133–135.
IV. Proceedings in Case of Absence of Judge. §§ 139, 140.
V. Provisions Respecting Places of Holding Courts. §§ 142–144.
VI. Seals of Courts. §§ 147–153.

ARTICLE I.

PUBLICITY OF PROCEEDINGS.

§ 124. Sittings, public.
§ 125. Sittings, when private.

ARTICLE II.

INCIDENTAL POWERS AND DUTIES OF COURTS.

§ 128. Powers respecting conduct of proceedings.
§ 129. Courts of record may make rules.
§ 130. When rules take effect.
§ 131. Probationary treatment of juvenile offenders.

ARTICLE III.

JUDICIAL DAYS.

§ 133. Days on which courts, etc., may be held.
§ 134. Non-judicial days.
§ 135. Appointments on non-judicial days.

ARTICLE IV.

PROCEEDINGS IN CASE OF ABSENCE OF JUDGE.

§ 139. Adjournment for absence of judge.
§ 140. Adjournment till next regular session. [Repealed.]

ARTICLE V.

PROVISIONS RESPECTING PLACES OF HOLDING COURTS.

§ 142. Change in certain cases of place of holding court.
§ 143. Parties to appear at place appointed.
§ 144. When sheriff to provide courtrooms, etc.

ARTICLE VI.

SEALS OF COURTS.

§ 147. What courts shall have seals.
§ 148. Seal of supreme court.
§ 149. Seals of superior courts.
§ 150. Seals of police courts of cities and counties.
§ 151. Seals, how provided; private seals, when used.
§ 152. Clerk of court to keep seal.
§ 153. Seals of courts, to what documents affixed.

TITLE II.

JUDICIAL OFFICERS.

Chapter I. Judicial Officers in General. §§ 156–162.
II. Powers and Duties of Judges at Chambers. §§ 165–167.
III. Disqualifications of Judges. §§ 170–173.
IV. Incidental Powers and Duties of Judicial Officers. §§ 176–179.
V. Miscellaneous Provisions Respecting Courts and Judicial Officers. §§ 182–188.

CHAPTER I.

JUDICIAL OFFICERS IN GENERAL.

§ 156. Qualifications of justices of supreme court.
§ 157. Qualifications of superior judges.
§ 158. Residence of superior judges.
§ 159. Residence and qualification of justices of the peace.
§ 160. Judges holding superior courts at request of governor.
§ 161. Justices and judges ineligible to other than judicial office.
§ 162. County or probate judge who may hold term in another county. How designated. [Repealed.]

CHAPTER II.

POWERS AND DUTIES OF JUDGES AT CHAMBERS.

§ 165. Powers of justices of supreme court at chambers.
§ 166. Powers of superior judges at chambers.
§ 167. [Related to powers of probate judges at chambers. Repealed.]

CHAPTER III.

DISQUALIFICATIONS OF JUDGES.

§ 170. Disqualification of judicial officer to sit or act.
§ 171. Judges and county clerks, when prohibited from practicing law.
§ 172. No judicial officer to have partner practicing law.
§ 173. [Renumbered and amended section.]

CHAPTER IV.

INCIDENTAL POWERS AND DUTIES OF JUDICIAL OFFICERS.

§ 176. Powers of justice or judge out of court.
§ 177. Powers of judicial officers as to conduct of proceedings.
§ 178. To punish for contempt.
§ 179. To take acknowledgments and affidavits.

CHAPTER V.

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

§ 182. Subsequent applications for orders refused, when prohibited.
§ 183. Violations of preceding section.
§ 184. Proceedings not affected by vacancy in office.
§ 185. Proceedings to be in English language.
§ 186. Abbreviations and figures.
§ 187. Means to carry jurisdiction into effect.
§ 188. Disposition of funds paid to clerk or treasurer by order of court.

TITLE III.

PERSONS SPECIALLY INVESTED WITH POWERS OF A JUDICIAL NATURE.

Chapter I. Jurors. Articles I–XII. §§ 190–254.
II. Court Commissioners. §§ 258, 259.

CHAPTER I.

JURORS.

Article I. Jurors in General. §§ 190–195.
II. Qualifications and Exemptions of Jurors. §§ 198–202.
III. Of Selecting and Returning Jurors for Courts of Record. §§ 204–211.
IV. Of Drawing Jurors for Courts of Record. §§ 214–221.
V. Of Summoning Jurors for Courts of Record. §§ 225–228.
VI. Of Summoning Jurors for Courts not of Record. §§ 230–232.
VII. Of Summoning Juries of Inquest. § 235.
VIII. Obedience to Summons, how Enforced. § 238.
IX. Of Impaneling Grand Juries. §§ 241–243.
X. Of Impaneling Trial Juries in Courts of Record. §§ 246–248.
XI. Of Impaneling Trial Juries in Courts not of Record. §§ 250, 251.
XII. Of Impaneling Juries of Inquest. § 254.

ARTICLE I.

JURORS IN GENERAL.

§ 190. Jury defined.
§ 191. Different kinds of juries.
§ 192. Grand jury defined.
§ 193. Trial jury defined.
§ 194. Number of a trial jury.
§ 195. Jury of inquest defined.

ARTICLE II.

QUALIFICATIONS AND EXEMPTIONS OF JURORS.

§ 198. Who competent to act as juror.
§ 199. Who not competent to act as juror.
§ 200. Who exempt from jury duty.
§ 201. Who may be excused.
§ 202. Affidavit of claim to exemption.

ARTICLE III.

OF SELECTING AND RETURNING JURORS FOR COURTS OF RECORD.

§ 204. Jury-lists, by whom and when to be made.
§ 205. Selection and listing of persons suitable and competent to serve as jurors.
§ 206. Lists to contain how many names.
§ 207. Person who served as juror during preceding year not to be selected. [Repealed.]
§ 208. Certified list to be filed with clerk of superior court.
§ 209. Duty of clerk. Jury-boxes.
§ 210. Regular jurors to serve one year.
§ 211. Jurors to be drawn from boxes.

ARTICLE IV.

OF DRAWING JURORS FOR COURTS OF RECORD.

§ 214. Order of judge or judges for drawing of jury.
§ 215. When clerk shall draw.
§ 216. Sheriff and judge to witness drawing. [Repealed.]
§ 217. Drawing, when to be adjourned. [Repealed.]
§ 218. Shall proceed, when. [Repealed.]
§ 219. Drawing, how conducted.
§ 220. Preservation of ballots drawn.
§ 221. Copy of list to be furnished by clerk. [Repealed.]

ARTICLE V.

OF SUMMONING JURORS FOR COURTS OF RECORD.

§ 225. Sheriff to summon jurors, how.
§ 226. Of drawing and summoning jurors to attend forthwith.
§ 227. Of summoning jurors to complete a panel.
§ 228. Compensation of elisor.

ARTICLE VI.

OF SUMMONING JURORS FOR COURTS NOT OF RECORD.

§ 230. Jurors for justices' or police courts.
§ 231. How to be summoned.
§ 232. Officer's return.

ARTICLE VII.

OF SUMMONING JURIES OF INQUEST.

§ 235. How to be summoned.

ARTICLE VIII.

OBEDIENCE TO SUMMONS, HOW ENFORCED.

§ 238. Attachment and fine.

ARTICLE IX.

OF IMPANELING GRAND JURIES.

§ 241. Grand juries, when and by whom impaneled.
§ 242. How constituted.
§ 243. Manner of impaneling prescribed in Penal Code.

ARTICLE X.

OF IMPANELING TRIAL JURIES IN COURTS OF RECORD.

§ 246. Clerk to call list of jurors summoned.
§ 247. Manner of impaneling prescribed in part two.
§ 248. Counties having more than one judge.

ARTICLE XI.

OF IMPANELING TRIAL JURIES IN COURTS NOT OF RECORD.

§ 250. Proceedings in forming jury.
§ 251. Manner of impaneling.

ARTICLE XII.

OF IMPANELING JURIES OF INQUEST.

§ 254. Manner of impaneling.

CHAPTER II.

COURT COMMISSIONERS.

§ 258. Appointment and qualifications.
§ 259. Powers of court commissioners.

TITLE IV.

MINISTERIAL OFFICERS OF COURTS OF JUSTICE.

Chapter I. Of Ministerial Officers Generally. § 262.
II. Secretaries and Bailiffs of the Supreme Court. §§ 265, 266.
III. Phonographic Reporters. §§ 268–274b.

CHAPTER I.

OF MINISTERIAL OFFICERS GENERALLY.

§ 262. Election, terms, powers, and duties, where prescribed.

CHAPTER II.

SECRETARIES AND BAILIFFS OF THE SUPREME COURT.

§ 265. Appointment.
§ 266. Tenure of office, and duties.

CHAPTER III.

PHONOGRAPHIC REPORTERS.

§ 268. Phonographic reporters for supreme court, where provided for.
§ 269. Phonographic reporters for superior courts, their appointment, and duties.
§ 270. Qualifications and test of competency. Pro tempore reporters.
§ 271. Attention to duties. Reporters pro tempore.
§ 272. Oath of office.
§ 273. Reports prima facie correct statements.
§ 274. Fees.
§ 274a. Transcribing of opinions and instructions, a county charge.
§ 274b. Fees and compensation of phonographic reporter.

TITLE V.

PERSONS SPECIALLY INVESTED WITH MINISTERIAL POWERS RELATING TO COURTS OF JUSTICE.

Chapter I. Attorneys and Counselors at Law. §§ 275–299.
II. Other Persons Invested with Such Powers. § 304.

CHAPTER I.

ATTORNEYS AND COUNSELORS AT LAW.

§ 275. Who may be admitted as attorneys.
§ 276. Qualifications.
§ 277. Certificate of admission and license.
§ 278. Oath.
§ 279. Attorneys of other states.
§ 280. Roll of attorneys.
§ 280a. Effect of diploma granted by Hastings College of the law.
§ 280b. Admission to practice law on diplomas from certain universities.
§ 281. Penalty for practicing without license.
§ 282. Duties.
§ 283. Authority.
§ 284. Change of attorney.
§ 285. Notice of change.
§ 286. Death or removal of attorney.
§ 287. Causes for which court may remove attorney.
§ 288. Conviction of felony.
§ 289. Proceedings for removal or suspension.
§ 290. Accusation.
§ 291. Verification.
§ 292. Citation of accused by publication.
§ 293. Appearance.
§ 294. Objections to accusation.
§ 295. Demurrer.
§ 296. Answer.
§ 297. Trial.
§ 298. Reference to take depositions.
§ 299. Judgment.

CHAPTER II.

OTHER PERSONS INVESTED WITH SUCH POWERS.

§ 304. Receivers, executors, administrators, and guardians.

PART II.

CIVIL ACTIONS.

TITLE I.

FORM OF CIVIL ACTIONS.

§ 307. One form of civil action only.
§ 308. Parties to actions, how designated.
§ 309. Special issues not made by pleadings, how tried.

TITLE II.

TIME OF COMMENCING CIVIL ACTIONS.

Chapter I. Time of Commencing Actions in General. § 312.
II. Time of Commencing Action for Recovery of Real Property. §§ 315–328.
III. Time of Commencing Actions Other than for Recovery of Real Property. §§ 335–349.
IV. General Provisions as to Time of Commencing Actions. §§ 350–363.

CHAPTER I.

TIME OF COMMENCING ACTIONS IN GENERAL.

§ 312. Commencement of civil actions.

CHAPTER II.

TIME OF COMMENCING ACTIONS FOR RECOVERY OF REAL PROPERTY.

§ 315. When the people will not sue.
§ 316. When action cannot be brought by grantee from the state.
§ 317. When actions by the people or their grantees are to be brought within five years.
§ 318. Seisin within five years, when necessary in action for real property.
§ 319. Such seisin, when necessary in action or defense arising out of title to or rents of real property.
§ 320. Entry on real estate.
§ 321. Possession, when presumed. Occupation deemed under legal title, unless adverse.
§ 322. Occupation under written instrument or judgment, when deemed adverse.
§ 323. What constitutes adverse possession under written instrument or judgment.
§ 324. Premises actually occupied under claim of title deemed to be held adversely.
§ 325. What constitutes adverse possession under claim of title not written.
§ 326. Relation of landlord and tenant as affecting adverse possession.
§ 327. Right of possession not affected by descent cast.
§ 328. Certain disabilities excluded from time to commence actions.

CHAPTER III.

TIME OF COMMENCING ACTIONS OTHER THAN FOR RECOVERY OF REAL PROPERTY.

§ 335. Periods of limitation prescribed.
§ 336. Within five years.
§ 337. Within four years.
§ 338. Within three years.
§ 339. Within two years.
§ 340. Within one year.
§ 341. Within six months.
§ 342. Same.
§ 343. Actions for relief not hereinbefore provided for.
§ 344. Where cause of action accrues on mutual account.
§ 345. Actions by the people subject to the limitations of this chapter.
§ 346. Action to redeem mortgage.
§ 347. Same, when some of mortgagors are not entitled to redeem.
§ 348. No limitations where money deposited in bank.
§ 349. Time for commencing actions under "local improvement act of 1901."

CHAPTER IV.

GENERAL PROVISIONS AS TO TIME OF COMMENCING ACTIONS.

§ 350. When an action is commenced.
§ 351. Exception, where defendant is out of the state.
§ 352. Exception, as to persons under disabilities.
§ 353. Provision where person entitled dies before limitation expires.
§ 354. In suits by aliens, time of war to be deducted.
§ 355. Provision where judgment has been reversed.
§ 356. Provision where action is stayed by injunction.
§ 357. Disability must exist when right of action accrued.
§ 358. When two or more disabilities exist, etc.
§ 359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed.
§ 360. Acknowledgment or new promise must be in writing.
§ 361. Limitation laws of other states, effect of.
§ 362. Existing causes of action not affected.
§ 363. "Action" includes a special proceeding.

TITLE III.

PARTIES TO CIVIL ACTIONS.

§ 367. Action to be in name of party in interest.
§ 368. Assignment of thing in action not to prejudice defense.
§ 369. Executor, trustee, etc., may sue without joining the persons beneficially interested.
§ 370. Married woman as party to action.
§ 371. Wife may defend, when.
§ 372. Appearance of infant, etc., by guardian. May compromise.
§ 373. Guardian, how appointed.
§ 374. Unmarried female may sue for her own seduction.
§ 375. Father, etc., may sue for seduction of daughter, etc.
§ 376. Father, etc., may sue for injury or death of child.
§ 377. When representatives may sue for death of one caused by the wrongful act of another.
§ 378. Who may be joined as plaintiffs.
§ 379. Who may be joined as defendants.
§ 380. Parties defendant in an action to determine conflicting claims to real property.
§ 381. Parties holding title under a common source, when may join.
§ 382. Parties in interest, when to be joined. When one or more may sue or defend for the whole.
§ 383. Plaintiff may sue in one action the different parties to commercial paper or insurance policies.
§ 384. Tenants in common, etc., may sever in bringing or defending actions.
§ 385. Action, when not to abate by death, marriage, or other disability. Proceedings in such case.
§ 386. Another person may be substituted for the defendant. Conflicting claims, how made.
§ 387. Intervention, when it takes place, and how made.
§ 388. Associates may be sued by name of association.
§ 389. Court, when to decide controversy or to order other parties to be brought in.
§ 390. Actions against fire departments.

TITLE IV.

PLACE OF TRIAL OF CIVIL ACTIONS.

§ 392. Certain actions to be tried where the subject or some part thereof is situated.
§ 393. Other actions, where the cause or some part thereof arose.
§ 394. Place of trial of actions against counties.
§ 395. Actions to be tried in county in which defendant resides, etc. If defendant does not reside in state.
§ 396. Action may be tried in any county, unless the defendant demand a trial in the proper county.
§ 397. Place of trial may be changed in certain cases.
§ 398. When judge is disqualified, cause to be transferred.
§ 399. Papers to be transmitted. Costs, etc. Jurisdiction, etc.
§ 400. Proceedings after judgment in certain cases transferred.

TITLE V.

MANNER OF COMMENCING CIVIL ACTIONS.

§ 405. Actions, how commenced.
§ 406. Complaint, how indorsed. When summons may be issued, and how waived.
§ 407. Summons, how issued, directed, and what to contain.
§ 408. Manner and time of issuing alias summons.
§ 409. Notice of the pendency of an action affecting the title to real property.
§ 410. Summons, how served and returned.
§ 411. Summons, how served.
§ 412. Cases in which service of summons may be by publication. Certificate of residence.
§ 413. Manner of publication.
§ 414. Proceedings where there are several defendants, and part only are served.
§ 415. Proof of service, how made.
§ 416. When jurisdiction of action acquired.

TITLE VI.

PLEADINGS IN CIVIL ACTIONS.

Chapter I. Pleadings in General. §§ 420–422.
II. Complaint. §§ 425–427.
III. Demurrer to Complaint. §§ 430–434.
IV. Answer. §§ 437–442.
V. Demurrer to Answer. §§ 443, 444.
VI. Verification of Pleadings. §§ 446–449.
VII. General Rules of Pleading. §§ 452–465.
VIII. Variance. Mistakes in Pleadings and Amendments. §§ 469–476.

CHAPTER I.

PLEADINGS IN GENERAL.

§ 420. Definition of pleadings.
§ 421. This code prescribes the form and rules of pleadings.
§ 422. What pleadings are allowed.

CHAPTER II.

COMPLAINT.

§ 425. Complaint, first pleading.
§ 426. Complaint, what to contain.
§ 426a. Statement of facts in divorce complaint.
§ 427. What causes of action may be joined.

CHAPTER III.

DEMURRER TO COMPLAINT.

§ 430. When defendant may demur.
§ 431. Demurrer must specify grounds. May be taken to part. May answer and demur at same time.
§ 432. What proceedings are to be had when complaint is amended.
§ 433. Objection not appearing on complaint, may be taken by answer.
§ 434. Objections, when deemed waived.

CHAPTER IV.

ANSWER.

§ 437. Answer, what to contain.
§ 437a. Actions to recover insurance. What defendant claiming exemption must set up.
§ 438. When counterclaim may be set up.
§ 439. When defendant omits to set up counterclaim.
§ 440. Counterclaim not barred by death or assignment.
§ 441. Answer may contain several grounds of defense. Defendant may answer part and demur to part of complaint.
§ 442. Cross-complaint.

CHAPTER V.

DEMURRER TO ANSWER.

§ 443. When plaintiff may demur to answer.
§ 444. Grounds of demurrer.

CHAPTER VI.

VERIFICATION OF PLEADINGS.

§ 446. Verification of pleadings.
§ 447. Copy of written instrument contained in complaint admitted, unless answer is verified.
§ 448. When defense is founded on written instrument set out in answer, its execution admitted, unless denied by plaintiff under oath.
§ 449. Exceptions to rules prescribed by two preceding sections.

CHAPTER VII.

GENERAL RULES OF PLEADING.

§ 452. Pleadings to be liberally construed.
§ 453. Sham and irrelevant answers, etc., may be stricken out.
§ 454. How to state an account in a pleading.
§ 455. Description of real property in a pleading.
§ 456. Judgments, how pleaded.

§ 457. Conditions precedent, how to be pleaded.
§ 458. Statute of limitations, how pleaded.
§ 459. Private statutes, how pleaded.
§ 460. Libel and slander, how stated in complaint.
§ 461. Answer in such cases.
§ 462. Allegations not denied, when to be deemed true. When to be deemed controverted.
§ 463. A material allegation defined.
§ 464. Supplemental complaint and answer.
§ 465. Pleadings subsequent to complaint must be filed and served.

CHAPTER VIII.

VARIANCE. MISTAKES IN PLEADINGS AND AMENDMENTS.

§ 469. Material variance, how provided for.
§ 470. Immaterial variance, how provided for.
§ 471. What not to be deemed a variance.
§ 472. Amendments of course, and effect of demurrer.
§ 473. Amendments by the court. Enlarging time to plead and relieving from judgments, etc.
§ 474. Suing a party by a fictitious name, when allowed.
§ 475. No error or defect to be regarded unless it affects substantial rights.
§ 476. Time to amend or answer, running of.

TITLE VII.

PROVISIONAL REMEDIES IN CIVIL ACTIONS.

Chapter I. Arrest and Bail. §§ 478–504.
II. Claim and Delivery of Personal Property. §§ 509–521.
III. Injunction. §§ 525–533.
IV. Attachment. §§ 537–560.
V. Receivers. §§ 564–570.
VI. Deposit in Court. §§ 572–574.

CHAPTER I.

ARREST AND BAIL.

§ 478. No person to be arrested except as prescribed by this code.
§ 479. Cases in which defendant may be arrested.
§ 480. Order for arrest, by whom made.
§ 481. Affidavit to obtain order, what to contain.
§ 482. Security by plaintiff before order of arrest.
§ 483. Order, when made, and its form.
§ 484. Affidavit and order to be delivered to the sheriff, and copy to defendant.
§ 485. Arrest, how made.
§ 486. Defendant to be discharged on bail or deposit.
§ 487. Bail, how given.
§ 488. Surrender of defendant.
§ 489. Same.
§ 490. Bail, how proceeded against.
§ 491. Bail, how exonerated.
§ 492. Delivery of undertaking to plaintiff, and its acceptance or rejection by him.
§ 493. Notice of justification. New undertaking, if other bail.
§ 494. Qualifications of bail.
§ 495. Justification of bail.
§ 496. Allowance of bail.
§ 497. Deposit of money with sheriff.
§ 498. Payment of money into court by sheriff.
§ 499. Substituting bail for deposit.
§ 500. Money deposited, how applied or disposed of.
§ 501. Sheriff, when liable as bail, and his discharge from liability.
§ 502. Proceedings on judgment against sheriff.
§ 503. Motion to vacate order of arrest or reduce bail. Affidavits on motion.
§ 504. When the order vacated or bail reduced.

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 509. Delivery of personal property, when it may be claimed.
§ 510. Affidavit and its requisites.
§ 511. Requisition to sheriff to take and deliver the property.
§ 512. Security on the part of the plaintiff, and proceedings in serving the order.
§ 513. Exception to sureties and proceedings thereon, or on failure to accept.
§ 514. Defendant, when entitled to redelivery.
§ 515. Justification of defendant's sureties.
§ 516. Qualification of sureties.
§ 517. Property, how taken when concealed in building or inclosure.
§ 518. Property, how kept.
§ 519. Claim of property by third person.
§ 520. Notice and affidavit, when and where to be filed.
§ 521. Protection of plaintiff in possession of property.

CHAPTER III.

INJUNCTION.

§ 525. Injunction, what is, and who may grant it.
§ 526. When it may be granted.
§ 526a. Actions by taxpayers to enjoin illegal expenditure or waste by public officers.
§ 527. Injunction. Notice. Party obtaining order must be ready. Defendant entitled to continuance. Procedure.
§ 528. Injunction after answer.
§ 529. Security upon injunction.
§ 530. When injunction for use of water may be refused upon defendant giving bond.
§ 531. Injunction to suspend business of a corporation, how and by whom granted.
§ 532. Motion to vacate or modify injunction. Bond on modification.
§ 533. When to be vacated or modified.

CHAPTER IV.

ATTACHMENT.

§ 537. Attachment, when and in what cases may issue.
§ 538. Affidavit for attachment, what to contain.
§ 539. Undertaking on attachment. Exceptions to sureties.
§ 540. Writ, to whom directed and what to state.
§ 541. Shares of stock and debts due defendant, how attached and disposed of.
§ 542. How real and personal property shall be attached.
§ 542a. Lien of attachment.
§ 543. Attorney to give written instructions to sheriff what to attach.
§ 544. Garnishment, when garnishee liable to plaintiff.
§ 545. Citation to garnishee to appear before a court or judge.
§ 546. Inventory, how made. Party refusing to give memorandum may be compelled to pay costs.
§ 547. Perishable property, how sold. Accounts without suit to be collected.
§ 548. Property attached may be sold as under execution, if the interests of the parties require.
§ 549. When property claimed by a third party, how tried.
§ 550. If plaintiff obtains judgment, how satisfied.
§ 551. When there remains a balance due, how collected.
§ 552. When suits may be commenced on the undertaking.
§ 553. If defendant recovers judgment, what the sheriff is to deliver.
§ 554. Proceedings to release attachments.
§ 555. Attachment, in what cases it may be released and upon what terms.
§ 556. When a motion to discharge attachment may be made, and upon what grounds.
§ 557. When motion made on affidavit, it may be opposed by affidavit.
§ 558. When writ must be discharged.
§ 559. When writ to be returned.
§ 560. Release of real property from attachment.

CHAPTER V.

RECEIVERS.

§ 564. Appointment of receiver.
§ 565. Appointment of receivers upon dissolution of corporations.
§ 566. Receiver, restrictions on appointment. Ex parte application, undertaking on.
§ 567. Oath and undertaking of receiver.
§ 568. Powers of receivers.
§ 569. Investment of funds.
§ 570. Disposition of unclaimed funds in hands of receiver.

CHAPTER VI.

DEPOSIT IN COURT.

§ 572. Deposit in court.
§ 573. Money paid to clerk must be deposited with county treasurer.
§ 574. Manner of enforcing the order.

TITLE VIII.

TRIAL AND JUDGMENT IN CIVIL ACTIONS.

Chapter I. Judgment in General. §§ 577–583.
II. Judgment upon Failure to Answer. § 585.
III. Issues. Mode of Trial, and Postponements. §§ 588–596.
IV. Trial by Jury. §§ 600–628.
Article I. Formation of Jury. §§ 600–604.
II. Conduct of Trial. §§ 607–619.
III. The Verdict. §§ 624–628.
V. Trial by Court. §§ 631–636.
VI. References and Trials by Referees. §§ 638–645.
VII. Provisions Relating to Trials in General. §§ 646–663a.
Article I. Exceptions. §§ 646–653.
II. New Trials. §§ 656–663a.
VIII. Manner of Giving and Entering Judgment. §§ 664–680½.

CHAPTER I.

JUDGMENT IN GENERAL.

§ 577. Judgment defined.
§ 578. Judgment may be for or against one of the parties.
§ 579. Judgment may be against one party and action proceed as to others.
§ 580. The relief to be awarded to the plaintiff.
§ 581. Action may be dismissed, or nonsuit entered.
§ 581a. Dismissal of action for failure to issue summons, when.
§ 581b. Dismissal of actions after transfer.
§ 582. All other judgments are on the merits.
§ 583. Dismissal of actions.

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

§ 585. In what cases judgment may be had upon failure of defendant to answer.

CHAPTER III.

ISSUES. MODE OF TRIAL, AND POSTPONEMENTS.

§ 588. Issue defined, and the different kinds.
§ 589. Issue of law, how raised.
§ 590. Issue of fact, how raised.
§ 591. Issue of law, how tried.
§ 592. Issue of fact, how tried. When issues both of law and fact, the former to be first disposed of.
§ 593. Clerk must enter causes on the calendar, to remain until disposed of. When may be restored.
§ 594. Parties may bring issue to trial.
§ 595. Motion to postpone a trial involving title to mining claim.
§ 596. In cases of adjournment a party may have the testimony of any witness taken.

CHAPTER IV.

TRIAL BY JURY.

Article I. Formation of Jury. §§ 600–604.
II. Conduct of Trial. §§ 607–619.
III. Verdict. §§ 624–628.

ARTICLE I.

FORMATION OF JURY.

§ 600. Jury, how drawn.
§ 601. Challenges. Each party entitled to four peremptory challenges.
§ 602. Challenge of jurors for cause.
§ 603. Challenges, how tried.
§ 604. Jury to be sworn.

ARTICLE II.

CONDUCT OF TRIAL.

§ 607. Order of proceeding on trial.
§ 608. Charge to the jury. Court must furnish, in writing, upon request, the points of law contained therein.
§ 609. Special instructions.
§ 610. View by jury of the premises.
§ 611. Admonition when jury permitted to separate.
§ 612. Jury may take with them certain papers.
§ 613. Deliberation of jury, how conducted.
§ 614. May come into court for further instructions.
§ 615. Proceedings if juror becomes sick.
§ 616. When prevented from giving verdict, the cause may be again tried.
§ 617. While jury are absent, court may adjourn from time to time. Sealed verdict.
§ 618. Verdict, how declared. Form of. Polling the jury.
§ 619. Proceedings when verdict is informal.

ARTICLE III.

VERDICT.

§ 624. General and special verdicts defined.
§ 625. When a general or special verdict may be rendered.
§ 626. Verdict in actions for recovery of money or on establishing counterclaim.
§ 627. Verdict in actions for the recovery of specific personal property.
§ 628. Entry of verdict.

CHAPTER V.

TRIAL BY COURT.

§ 631. When and how trial by jury may be waived.
§ 632. Upon trial by court, decision to be in writing and filed within thirty days.
§ 633. Facts found and conclusions of law must be separately stated. Judgment on.
§ 634. Waiving findings of fact.
§ 635. Findings, how prepared. [Repealed.]
§ 636. Proceedings after determination of issue of law.

CHAPTER VI.

REFERENCES AND TRIALS BY REFEREES.

§ 638. Reference ordered upon agreement of parties, in what cases.
§ 639. Reference ordered on motion, in what cases.
§ 640. Referees in eminent-domain proceedings involving city, etc.
§ 641. A party may object. Grounds of objection.
§ 642. Objections, how disposed of.
§ 643. Referees to report within twenty days.
§ 644. Effect of referee's finding.
§ 645. How excepted to, etc.

CHAPTER VII.

PROVISIONS RELATING TO TRIALS IN GENERAL.

Article I. Exceptions. §§ 646–653.
II. New Trials. §§ 656–663a.

ARTICLE I.

EXCEPTIONS.

§ 646. "Exception" defined. When taken.
§ 647. Verdict or order in absence of party, deemed excepted to.
§ 648. Exception, form of.
§ 649. Bill of exceptions, when to be presented, etc.
§ 650. Bill of exceptions. Presentment of bill. Duty of judge to strike out useless matter.
§ 651. Exceptions after judgment.
§ 652. Proceedings if judge refuse to allow bill of exceptions.
§ 653. Settlement of bill of exceptions.

ARTICLE II.

NEW TRIALS.

§ 656. New trial defined.
§ 657. When a new trial may be granted.
§ 658. Motion for new trial. Papers.
§ 659. Notice of motion. Upon whom served, and what to contain.
§ 660. Motion, when to be heard.
§ 661. Record on appeal. [Repealed.]
§ 662. New trial on court's own motion. [Rpld.]
§ 663. Vacation of judgment.
§ 663a. Notice of intention, service of.

CHAPTER VIII.

MANNER OF GIVING AND ENTERING JUDGMENT.

§ 664. Judgment to be entered in twenty-four hours, etc.
§ 665. Case may be brought before the court for argument.
§ 666. When counterclaim established exceeds plaintiff's demand.
§ 667. In replevin, judgment to be in the alternative, and with damages. Gold coin or currency judgment.
§ 668. Judgment-book to be kept by the clerk.
§ 669. If a party die after verdict, judgment may be entered, but not to be a lien.
§ 670. Judgment roll, what constitutes.
§ 671. Judgment lien, when it begins and when it expires.
§ 672. Docket defined. How kept, and what to contain.
§ 673. Docket to be open for inspection without charge.
§ 674. Transcript to be filed in any county, and judgment to become a lien there.
§ 675. Satisfaction of a judgment, how made.
§ 675a. Satisfaction of mortgage recorded. Form of satisfaction.
§ 676. Undertaking in actions to set aside transfer of property.
§ 677. Conditions of undertaking.
§ 677½. Filing and serving undertaking.
§ 678. Objections to sureties.
§ 678½. Justification of sureties. Approval and disapproval of undertaking.
§ 679. Objection because estimated value in undertaking less than market value. New undertaking.
§ 679½. Justification of sureties.
§ 680. When undertaking becomes effective.
§ 680½. Judgment against sureties.

TITLE IX.

EXECUTION OF JUDGMENT IN CIVIL ACTIONS.

Chapter I. Execution. §§ 681–713½.
II. Proceedings Supplemental to Execution. §§ 714–721.

CHAPTER I.

EXECUTION.

§ 681. Within what time execution may issue.
§ 681a. Stay of execution.
§ 682. Who may issue the execution, its form, to whom directed, and what it shall require.
§ 683. When made returnable.
§ 684. Money judgments and others, how enforced.
§ 685. Execution after five years.
§ 686. When execution may issue against the property of a party after his death.
§ 687. Execution, how and to whom issued.
§ 688. What liable to be seized on execution. Property not affected until levy made.
§ 689. When property claimed by third party. Indemnity.
§ 690. What exempt from execution.
§ 691. Writ, how executed.
§ 692. Notice of sale under execution, how given.
§ 693. Selling without notice, what penalty attached.
§ 694. Sales, how conducted. Neither the officer conducting it nor his deputy to be a purchaser. Real and personal property, how sold. Judgment debtor, if present, may direct order of sale, and the officer shall follow his directions.
§ 695. If purchaser refuses to pay purchase-money, what proceedings.
§ 696. Officer may refuse such purchaser's subsequent bid.
§ 697. These two sections not to make officer liable beyond a certain amount.

§ 698. Personal property not capable of manual delivery, how delivered to purchaser.
§ 699. Personal property not capable of manual delivery, how sold and delivered.
§ 700. Sale of real property. What purchaser is substituted to and acquires.
§ 700a. When sales are absolute. What certificate must show.
§ 701. Real property so sold, by whom it may be redeemed.
§ 702. When it may be redeemed, and redemption-money.
§ 703. When judgment debtor or another redemptioner may redeem.
§ 704. In cases of redemption, to whom the payments are to be made.
§ 705. What a redemptioner must do in order to redeem.
§ 706. Until the expiration of redemption-time, court may restrain waste on the property. What considered waste.
§ 707. Rents and profits.
§ 708. If purchaser of real property be evicted for irregularities in sale, what he may recover, and from whom. When judgment to be revived. Petition for the purpose, how and by whom made.
§ 709. Party who pays more than his share may compel contribution.
§ 710. Collection of moneys due from judgment debtor. Procedure.
§ 710. Claimant of property may give undertaking and release property.
§ 710½. Claim of property. Undertaking, amount and conditions of.
§ 711. Claim of property. Undertaking, filing and serving.
§ 711½. Claim of property. Undertaking, objections to.
§ 712. Claim of property. Justification, approval and disapproval.
§ 712½. Claim of property. Undertaking, estimate of value, and new undertaking.
§ 713. Claim of property. Undertaking, justification of sureties.
§ 713½. Claim of property. Undertaking, when becomes effectual.

CHAPTER II.

PROCEEDINGS SUPPLEMENTAL TO EXECUTION.

§ 714. Debtor required to answer concerning his property, when.
§ 715. Proceedings to compel debtor to appear. In what cases he may be arrested. What bail may be given.
§ 716. Any debtor of the judgment debtor may pay the latter's creditor.
§ 717. Examination of debtors of judgment debtor, or of those having property belonging to him.
§ 718. Witnesses required to testify.
§ 719. Judge may order property to be applied on execution.
§ 720. Proceedings upon claim of another party.
§ 721. Disobedience of orders, how punished.

TITLE X.

ACTIONS IN PARTICULAR CASES.

Chapter I. Actions for Foreclosure of Mortgages. §§ 726–729.
II. Actions for Nuisance, Waste, and Willful Trespass, in Certain Cases, on Real Property. §§ 731–735.
III. Actions to Determine Conflicting Claims to Real Property, and Other Provisions Relating to Actions concerning Real Estate. §§ 738–751.
IV. Actions for Partition of Real Property. §§ 752–801.
V. Actions for Usurpation of an Office or a Franchise. §§ 802–810.
VI. Actions against Steamers, Vessels, and Boats. §§ 813–827.

CHAPTER I.

ACTIONS FOR FORECLOSURE OF MORTGAGES.

§ 726. Proceedings in foreclosure suits.
§ 727. Surplus money to be deposited in court.
§ 728. Proceedings when debt secured falls due at different times.
§ 729. Oath and undertaking of commissioner. Report and account of sale. Compensation of commissioner.

CHAPTER II.

ACTIONS FOR NUISANCE, WASTE, AND WILLFUL TRESPASS, IN CERTAIN CASES, ON REAL PROPERTY.

§ 731. Nuisance defined. Abatement of. Actions instituted, by whom.
§ 732. Waste, actions for.
§ 733. Trespass for cutting or carrying away trees, etc., actions for.
§ 734. Measure of damages in certain cases under the last section.
§ 735. Damages in actions for forcible entry, etc., may be trebled.

CHAPTER III.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE.

§ 738. Parties to action to quiet title. Wills in evidence. Right to jury trial.
§ 739. When plaintiff cannot recover costs.
§ 740. Where plaintiff's right terminates pending suit, what he may recover.
§ 741. When value of improvements can be allowed as a set-off.
§ 742. An order may be made to allow a party to survey and measure the land in dispute.
§ 743. Order, what to contain, and how served. If unnecessary injury done, the party surveying to be liable therefor.
§ 744. A mortgage must not be deemed a conveyance, whatever its terms.
§ 745. When court may grant injunction; during foreclosure; after sale on execution, before conveyance.
§ 746. Damages may be recovered for injury to the possession after sale and before delivery of possession.
§ 747. Action not to be prejudiced by alienation pending suit.
§ 748. Mining claims, actions concerning, to be governed by local rules.
§ 749. How service may be made in actions relating to real property. [Repealed.]
§ 749. Determination of adverse claims to real property. Unknown defendants. Lis pendens.
§ 750. Summons; service, and proof of service. Publication of summons.
§ 751. Judgment must not be entered by default. When entered, is conclusive. Remedy is cumulative.

CHAPTER IV.

ACTIONS FOR PARTITION OF REAL PROPERTY.

§ 752. Who may bring actions for partition.
§ 753. Interests of all parties must be set forth in the complaint.
§ 754. Lienholders not of record need not be made parties.
§ 755. Plaintiff must file notice of lis pendens.
§ 756. Summons. To whom directed, and must contain what.
§ 757. Unknown parties may be served by publication.
§ 758. Answer of defendants. What to contain.
§ 759. Rights of all parties may be put in issue and determined in action.
§ 760. Partial partition.
§ 761. Rights of lienholders. Appointment of referee.
§ 762. Lienholders must be notified to appear before the referee appointed.
§ 763. Partition of real property. Referees. In incorporated city. Action of court. Sale. Deed. In case of death of party. Attorney's fees.
§ 764. Partition must be according to rights of parties. Sale of undivided interests. Allotment of shares of each party.
§ 765. Referees must make a report of their proceedings.
§ 766. Court many confirm, etc., report. Judgment binding on whom.
§ 767. Judgment not to affect tenants for years to the whole property.
§ 768. Expenses of partition must be apportioned among the parties.
§ 769. A lien on an undivided interest of any party is a charge only on the share assigned to such party.
§ 770. Estate for life or years may be set off in a part of the property not sold, when not all sold.
§ 771. Application of proceeds of sale of encumbered property.
§ 772. Party holding other securities may be required first to exhaust them.
§ 773. Proceeds of sale, disposition of.
§ 774. When paid into court, cause may be continued for determination of claims of parties.
§ 775. Sales by referees may be public or private.
§ 776. Court must direct terms of sale or credit.
§ 777. Referees may take securities for purchase-money.
§ 778. Tenant whose estate has been sold shall receive compensation.
§ 779. Court may fix such compensation.
§ 780. Court must protect tenants unknown.
§ 781. Court must ascertain and secure the value of future contingent or vested interests.
§ 782. Terms of sale must be made known at the time. Lots must be sold separately.
§ 783. Who may not be purchasers.
§ 784. Referees must make report of sale to court. Confirmation or rejection of sale.
§ 785. If sale confirmed, order must be made to execute conveyances.
§ 786. Proceeding if a lienholder becomes a purchaser.
§ 787. Conveyances must be recorded, and will be a bar against parties.
§ 788. Proceeds of sale belonging to parties unknown must be invested for their benefit.
§ 789. Investment must be made in the name of the clerk of the county.
§ 790. When the interests of the parties are ascertained, securities must be taken in their names.
§ 791. Duties of the clerk making investments.
§ 792. When unequal partition is ordered, compensation may be adjudged in certain cases.
§ 793. The share of an infant may be paid to his guardian.
§ 794. The guardian of an insane person may receive the proceeds of such party's interest.
§ 795. Guardian may consent to partition without action, and execute releases. [Repealed.]
§ 796. Costs of partition a lien upon shares of parceners.
§ 797. Court, by consent, may appoint single referee. [Repealed.]
§ 798. Apportionment of expenses of litigation.
§ 799. Abstract of title in action for partition. When cost of, allowed.
§ 800. Abstract, how made and verified.
§ 801. Interest allowed on disbursements made under direction of the court.

CHAPTER V.

ACTIONS FOR USURPATION OF AN OFFICE OR A FRANCHISE.

§ 802. Sire facies [scire facias] abolished.
§ 803. Action may be brought against any party usurping, etc., any office or franchise.
§ 804. Name of person entitled to office may be set forth in the complaint. If fees have been received by the usurper, he may be arrested.
§ 805. Judgment may determine the rights of both incumbent and claimant.
§ 806. When rendered in favor of applicant.
§ 807. Damages may be recovered by successful applicant.
§ 808. When several persons claim the same office, their rights may be determined by a single action.
§ 809. If defendant found guilty, what judgment to be rendered against him.
§ 810. Actions on information. Undertaking.

CHAPTER VI.

ACTIONS AGAINST STEAMERS, VESSELS, AND BOATS.

§ 813. When vessels, etc., are liable. Their liabilities constitute liens.
§ 814. Actions, how brought.
§ 815. Complaint must be verified.
§ 816. Summons may be served on owners, etc., of vessels.
§ 817. Plaintiff may have such vessel, etc., attached.
§ 818. The clerk must issue the writ of attachment.
§ 819. Such writ must be directed to the sheriff.
§ 820. Sheriff must execute such writ without delay.
§ 821. The owner, master, etc., may appear and defend such vessel.
§ 822. Discharge of attachment.
§ 823. After appearance, attachment may, on motion, be discharged.
§ 824. When not discharged, such vessel, etc., may be sold at public auction. Application of proceeds.
§ 825. Mariners and others may assert their claim for wages, notwithstanding prior attachment.
§ 826. Proof of the claims of mariners and others.
§ 827. Sheriff's notice of sale to contain measurement, tonnage, etc.

TITLE XI.

PROCEEDINGS IN JUSTICES' COURTS.

Chapter I. Place of Trial of Actions in Justices' Courts. §§ 832–838.
II. Manner of Commencing Actions in Justices' Courts. §§ 839–850.
III. Pleadings in Justices' Courts. §§ 851–860.
IV. Provisional Remedies in Justices' Courts. §§ 861–870.
Article I. Arrest and Bail. §§ 861–865.
II. Attachment. §§ 866–869.
III. Claim and Delivery of Personal Property. § 870.
V. Judgment by Default in Justices' Courts. §§ 871, 872.
VI. Time of Trial and Postponements in Justices' Courts. §§ 873–877.
VII. Trials in Justices' Courts. §§ 878–887.
VIII. Judgments (Other than by Default) in Justices' Courts. §§ 889–900.
IX. Executions from Justices' Courts. §§ 901–905.
X. Contempts in Justices' Courts. §§ 906–910.
XI. Dockets of Justices. §§ 911–918.
XII. General Provisions Relating to Justices' Courts. §§ 919–926.

CHAPTER I.

PLACE OF TRIAL OF ACTIONS IN JUSTICES' COURTS.

§ 832. Actions, where must be commenced.
§ 833. Place of trial may be changed in certain cases.
§ 834. Limitation on the right to change.
§ 835. To what court transferred.
§ 836. Proceedings after order changing place of trial.
§ 837. Effect of an order changing place of trial. [Repealed.]
§ 838. Transfer of cases to the superior court.

CHAPTER II.

MANNER OF COMMENCING ACTIONS IN JUSTICES' COURTS.

§ 839. Actions, how commenced.
§ 840. Summons may issue within a year.
§ 841. Defendant may waive summons.
§ 842. Parties may appear in person or by attorney.
§ 843. When guardian necessary, how appointed.
§ 844. Summons, how issued, directed, and what to contain.
§ 845. Time for appearance of defendant.
§ 846. Alias summons.
§ 847. Same.
§ 848. Service of summons outside of county.
§ 849. Summons, by whom and how served and returned.
§ 850. Notice of hearing. Form. Service. Service by mail. Docket entries.

CHAPTER III.

PLEADINGS IN JUSTICES' COURTS.

§ 851. Form of pleadings.
§ 852. Pleadings in justices' courts.
§ 853. Complaint defined.
§ 854. When demurrer to complaint may be put in.
§ 855. Answer, what to contain.
§ 856. If the defendant omit to set up counterclaim.
§ 857. When plaintiff may demur to answer.
§ 858. Proceedings on demurrer.
§ 859. Amendment of pleadings.
§ 860. Answer or demurrer to amended pleadings.

CHAPTER IV.

PROVISIONAL REMEDIES IN JUSTICES' COURTS.

Article I. Arrest and Bail. §§ 861–865.
II. Attachment. §§ 866–869.
III. Claim and Delivery of Personal Property. § 870.

ARTICLE I.

ARREST AND BAIL.

§ 861. Order of arrest, and arrest of defendant.
§ 862. Affidavit and undertaking for order of arrest.
§ 863. A defendant arrested must be taken before the justice immediately.
§ 864. The officer must give notice to the plaintiff of arrest.
§ 865. The officer must detain the defendant.

ARTICLE II.

ATTACHMENT.

§ 866. Issue of writ of attachment.
§ 867. Attachment, undertaking on. Exceptions to sureties.
§ 868. Writ of attachment, substance of. Officer may take an undertaking instead of levying.
§ 869. Certain provisions apply to all attachments in justices' courts.

ARTICLE III.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 870. How claim and delivery enforced.

CHAPTER V.

JUDGMENT BY DEFAULT IN JUSTICES' COURTS.

§ 871. Judgment when defendant fails to appear.
§ 872. Judgment against defendant on demurrer.

CHAPTER VI.

TIME OF TRIAL AND POSTPONEMENTS IN JUSTICES' COURTS.

§ 873. Time when trial must be commenced.
§ 874. When court may, of its own motion, postpone trial.
§ 875. Postponement by consent.
§ 876. Postponement upon application of a party.
§ 877. No continuance for more than ten days to be granted, unless upon filing of undertaking.

CHAPTER VII.

TRIALS IN JUSTICES' COURTS.

§ 878. Issue defined, and the different kinds.
§ 879. Issue of law, how raised.
§ 880. Issue of fact, how raised.
§ 881. Issue of law, how tried.
§ 882. Issue of fact, how tried.
§ 883. Jury, how waived.
§ 884. Either party failing to appear, trial may proceed at request of other party.
§ 885. Challenges to jurors.
§ 886. Manner of pleading a written instrument.
§ 887. Complaint, when accompanying instrument deemed genuine.

CHAPTER VIII.

JUDGMENTS (OTHER THAN BY DEFAULT) IN JUSTICES' COURTS.

§ 889. Judgment by confession.
§ 890. Judgment of dismissal entered in certain cases without prejudice.
§ 891. Judgment upon verdict.
§ 892. Entry of judgment in thirty days.
§ 893. Judgment. Form. What must state, where defendant subject to arrest. Service and entry.
§ 894. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted.
§ 895. Offer to compromise before trial.
§ 896. Costs may be included in the judgment.
§ 897. Abstract of judgment.
§ 898. Abstract may be filed and docketed in superior court.
§ 899. Effect of docketing.
§ 900. Judgment no lien unless recorded.

CHAPTER IX.

EXECUTIONS FROM JUSTICES' COURTS.

§ 901. Execution may issue at any time within five years.
§ 901a. Stay of execution of judgment.
§ 902. Execution, contents of.
§ 903. Renewal of execution.
§ 904. Duty of officer receiving execution.
§ 905. Proceedings supplementary to execution.

CHAPTER X.

CONTEMPTS IN JUSTICES' COURTS.

§ 906. Contempts a justice may punish for.
§ 907. Proceedings for contempts.
§ 908. Same.
§ 909. Punishments for contempts.
§ 910. The conviction must be entered in the docket.

CHAPTER XI.

DOCKETS OF JUSTICES.

§ 911. Docket, what to contain.
§ 912. Entries therein prima facie evidence of the fact.
§ 913. An index to the docket must be kept.
§ 914. Dockets must be delivered by justice to his successor, or to county clerk.
§ 915. Proceedings when office becomes vacant, and before a successor is appointed.
§ 916. A justice may issue execution or other process upon the docket of his predecessor.
§ 917. Successor of a justice, who shall be deemed.
§ 918. Two justices deemed successors, superior court shall designate one.

CHAPTER XII.

GENERAL PROVISIONS RELATING TO JUSTICES' COURTS.

§ 919. Justices may issue subpœnas and final process to any part of the county.
§ 920. Blanks must be filled in all papers issued by a justice, except subpœnas.
§ 921. Justices to receive all moneys collected and pay same to parties.
§ 922. In case of disability of justice, another justice may attend on his behalf.
§ 923. Justices may require security for costs.
§ 924. Who entitled to costs. Attorney's fee.
§ 925. What provisions of code applicable to justices' courts.
§ 926. Deposit in lieu of undertaking.

TITLE XII.

PROCEEDINGS IN CIVIL ACTIONS IN POLICE COURTS.

§ 929. How commenced.
§ 930. Summons must issue on filing complaint.
§ 931. Defendant may plead orally or in writing.
§ 932. Trial by jury, when defendant is entitled to.
§ 933. Proceedings to be conducted as in justices' courts.

TITLE XIII.

APPEALS IN CIVIL ACTIONS.

Chapter I. Appeals in General. §§ 936–959.
II. Appeals to Supreme Court. §§ 963–971.
III. Appeals to Superior Courts. §§ 974–981.
IV. Appeals from Probate Courts. [Repealed.]
V. Appeals to County Courts. [Repealed.]

CHAPTER I.

APPEALS IN GENERAL.

§ 936. Judgment and orders may be reviewed.
§ 937. Orders made out of court, without notice, may be reviewed by the judge.
§ 938. Party aggrieved may appeal. Names of parties.
§ 939. Within what time appeal may be taken.
§ 940. Appeal, how taken.
§ 941. Undertaking or deposit on appeal.
§ 941a. Appeals. Alternative method.
§ 941b. Notice of appeal, what to contain.
§ 941c. Effect of appeal.
§ 942. Undertaking on appeal from a money judgment.
§ 943. Appeal from a judgment for delivery of documents.
§ 944. Appeal from a judgment directing execution of a conveyance, etc.
§ 945. Undertaking on appeal concerning real property.
§ 946. Release of property under levy, on appeal. Attachment not continued.
§ 947. Undertaking may be in one instrument or several.
§ 948. Justification of sureties on undertakings on appeal.
§ 949. Undertakings in cases not specified.

§ 950. What papers to be used on appeal from the judgment.
§ 951. What papers used on appeals from orders, except orders granting new trials.
§ 952. What papers to be used on appeal from an order granting a new trial.
§ 953. Copies and undertakings, how certified.
§ 953a. Preparation of papers on appeal. Notice to county clerk.
§ 953b. Payment of cost of transcript.
§ 953c. Clerk to transmit the prepared record on appeal.
§ 954. When an appeal may be dismissed. When not.
§ 955. Effect of dismissal.
§ 956. What may be reviewed on appeal from judgment.
§ 957. Remedial powers of an appellate court.
§ 958. On judgment on appeal, remittitur must be certified to the clerk of the court below.
§ 959. Provisions of this chapter not applicable to appeals to superior courts.

CHAPTER II.

APPEALS TO SUPREME COURT.

§ 963. Cases in which an appeal may be taken from superior court.
§ 964. Appeals; in what cases appealed from justices' courts.
§ 965. Appeals by executors and administrators.
§ 966. Acts of executors and administrators, where appointment vacated.
§ 967, § 968. [None so numbered.]
§ 969. Appeal from probate court, when may be taken. [Repealed.]
§ 970. Executors and administrators not required to give undertaking on appeal. [Repealed.]
§ 971. Acts of acting administrator, etc., not invalidated by reversal of order appointing him. [Repealed.]

CHAPTER III.

APPEALS TO SUPERIOR COURTS.

§ 974. Appeal from judgment of justice's or police court.
§ 975. Appeal on questions of law. Statement.
§ 976. Appeal on questions of fact, or law and fact.
§ 977. Transmission of papers to appellate court.
§ 978. Undertaking on appeal.
§ 978a. Filing of undertaking. Exception to and justification of sureties.
§ 979. Stay of proceedings on filing undertaking.
§ 980. Powers of superior court on appeal.
§ 981. Fees payable on filing appeal.

CHAPTER IV.

APPEALS FROM PROBATE COURTS.

[Repealed]

CHAPTER V.

APPEALS TO COUNTY COURTS.

[Repealed]

TITLE XIV.

MISCELLANEOUS PROVISIONS.

Chapter I. Proceedings against Joint Debtors. §§ 989–994.
II. Offer of Defendant to Compromise. § 997.
III. Inspection of Writings. § 1000.
IV. Motions and Orders. §§ 1003–1007.
V. Notices, and Filing and Service of Papers. §§ 1010–1019.
VI. Costs. §§ 1021–1039.
VII. General Provisions. §§ 1045–1059.

CHAPTER I.

PROCEEDINGS AGAINST JOINT DEBTORS.

§ 989. Parties not summoned in action on joint contract may be summoned after judgment.
§ 990. Summons in that case, what to contain, and how served.
§ 991. Affidavit to accompany summons.
§ 992. Answer. What it may contain.
§ 993. What constitute the pleadings in the case.
§ 994. Issues, how tried. Verdict, what to be.

CHAPTER II.

OFFER OF DEFENDANT TO COMPROMISE.

§ 997. Proceedings on offer of the defendant to compromise after suit brought.

CHAPTER III.

INSPECTION OF WRITINGS.

§ 1000. A party may demand inspection and copy of a book, paper, etc.

CHAPTER IV.

MOTIONS AND ORDERS.

§ 1003. Order and motion defined.
§ 1004. Motions and orders, where made.
§ 1005. Notice of motion. When must be given.
§ 1006. Transfer of motions and orders to show cause.
§ 1007. Order for payment of money, how enforced.

CHAPTER V.

NOTICES, AND FILING AND SERVICE OF PAPERS.

§ 1010. Notices and papers, how served.
§ 1011. When and how served.
§ 1012. Service by mail, when.
§ 1013. Service by mail, how.
§ 1014. Appearance. Notices after appearance.
§ 1015. Service on non-residents.
§ 1016. Preceding provisions not to apply to proceeding to bring party into contempt.
§ 1017. Service by telegraph.
§ 1018. [No section with this number.]
§ 1019. Service of pleadings in action for divorce for adultery.

CHAPTER VI.

COSTS.

§ 1021. Compensation of attorneys. Costs to parties.
§ 1022. When allowed of course to plaintiff.
§ 1023. Several actions brought on a single cause of action can carry costs in but one.
§ 1024. Defendant's costs must be allowed of course, in certain cases.
§ 1025. Costs, when in the discretion of the court.
§ 1026. When the several defendants are not united in interest, costs may be severed.
§ 1027. Costs on appeal
§ 1028. Referee's fees.
§ 1029. Continuance, costs may be imposed as condition of.
§ 1030. Costs when a tender is made before suit brought.
§ 1031. Costs in action by or against an administrator, etc.
§ 1032. Costs in a review other than by appeal.
§ 1033. Filing of and affidavit to bill of costs.
§ 1034. Costs on appeal, how claimed and recovered.
§ 1035. Interest and costs must be included by the clerk in the judgment.
§ 1036. When plaintiff is a non-resident or foreign corporation, defendant may require security for costs.
§ 1037. If such security be not given, the action may be dismissed.
§ 1038. Costs when state is a party.
§ 1039. Costs when county is a party.

CHAPTER VII.

GENERAL PROVISIONS.

§ 1045. Lost papers, how supplied.
§ 1046. Papers without the title of the action, or with defective title, may be valid.
§ 1046a. Filing of papers nunc pro tunc.
§ 1047. Successive actions on the same contract, etc.
§ 1048. Consolidation of several actions into one.
§ 1049. Actions, when deemed pending.
§ 1050. Action to determine adverse claims, and by sureties.
§ 1051. Testimony, when to be taken by the clerk.
§ 1052. The clerk must keep a register of actions.
§ 1053. Two of three referees, etc., may do any act.
§ 1054. Time within which an act is to be done may be extended.
§ 1055. Action against officer for official acts.
§ 1056. Corporations may become sureties on undertakings and bonds.
§ 1057. Undertakings mentioned in this code, requisites of.
§ 1057a. Justification by corporate security on bonds. Procedure. County clerk to issue certificate. Fee.
§ 1058. People of state not required to give bonds when state is a party.
§ 1059. Surety on appeal substituted to rights of judgment creditor.

THE
CODE OF CIVIL PROCEDURE
OF THE
STATE OF CALIFORNIA.
IN FOUR PARTS.

TITLE OF ACT. § 1.

PRELIMINARY PROVISIONS. §§ 2–32.

PART I. COURTS OF JUSTICE. §§ 33–304.

II. CIVIL ACTIONS. §§ 307–1059.

III. SPECIAL PROCEEDINGS OF A CIVIL NATURE. §§ 1063–1822f.

IV. EVIDENCE. §§ 1823–2104.

THE

CODE OF CIVIL PROCEDURE

OF THE

STATE OF CALIFORNIA.

AN ACT

TO ESTABLISH A CODE OF CIVIL PROCEDURE.

[Approved March 11, 1872.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

TITLE OF ACT.

§ 1. Title and division of this volume.

§ 1. Title and division of this volume. This act shall be known as The Code of Civil Procedure of California, and is divided into four parts, as follows:

Part I. Of Courts of Justice.
II. Of Civil Actions.
III. Of Special Proceedings of a Civil Nature.
IV. Of Evidence.

This act, how cited. See post, § 19.
Construction of the codes and of their various sections. See Pol. Code, §§ 4478 et seq.

Legislation § 1. Enacted March 11, **1872.**

Constitutionality of statute embracing more than one subject. See note 61 Am. Dec. 337.
Statutes embracing subjects not embraced in title. See note 69 Am. Dec. 648.

When title embraces more than one subject, and what it may include. See note 79 Am. St. Rep. 456.
Construction of constitutional provisions relative to titles of statutes. See note 1 Ann. Cas. 584.
Single statute embodying title of statute or compilation of laws as affected by prohibition against plurality of subjects. See note 55 L. R. A. 840.

PRELIMINARY PROVISIONS.

§ 2. When this codes takes effect.
§ 3. Not retroactive.
§ 4. Rule of construction of this code.
§ 5. Provisions similar to existing laws, how construed.
§ 6. Tenure of offices preserved.
§ 7. Construction of repeal as to certain offices.
§ 8. Actions, etc., not affected by this code.
§ 9. Limitations shall continue to run.
§ 10. Holidays.
§ 11. Same.
§ 12. Computation of time.
§ 13. Certain acts not to be done on holidays.
§ 14. "Seal" defined.
§ 15. Joint authority.
§ 16. Words and phrases.
§ 17. Certain terms used in this code defined.
§ 18. Statutes, etc., inconsistent with code repealed.
§ 19. This act, how cited, enumerated, etc.
§ 20. Judicial remedies defined.
§ 21. Division of judicial remedies.
§ 22. Action defined.
§ 23. Special proceeding defined.
§ 24. Division of actions.
§ 25. Civil actions arise out of obligations or injuries.
§ 26. Obligation defined.
§ 27. Division of injuries.
§ 28. Injuries to property.
§ 29. Injuries to the person.
§ 30. Civil action, by whom prosecuted.
§ 31. Criminal actions.
§ 32. Civil and criminal remedies not merged.

§ 2. When this code takes effect. This code takes effect at twelve o'clock noon, on the first day of January, eighteen hundred and seventy-three.

Effect of codes generally. See Pol. Code, §§ 4478 et seq.
Similar provisions. See Civ. Code, § 2; Pol. Code, § 2; Pen. Code, § 2.

Legislation § 2. Enacted March 11, **1872.**

Laws passed at the same session at which the codes were adopted prevail over the codes (Babcock v. Goodrich, 47 Cal. 488; Ex parte Newton, 53 Cal. 571); but § 3891 of the Political Code declares that provisions concerning revenue are to be considered as if passed and approved on the last day of the session, and all acts passed during the session are repealed, except acts amendatory of or carrying into effect the codes. Mitchell v. Crosby, 46 Cal. 97; Rosasco v. Tuolumne County, 143 Cal. 432; 77 Pac. 148.

§ 3. Not retroactive. No part of it is retroactive, unless expressly so declared.

Effect on pending proceedings and vested rights. See post, § 8.
Effect of code on existing statutes. See post, § 18.
Similar provisions. See Pen. Code, § 3; Pol. Code, § 3; Civ. Code, § 3.

Legislation § 3. Enacted March 11, **1872.**

Retrospective law, what is. Justice Story, in Society v. Wheeler, 2 Gall. (U. S.) 139, Fed. Cas. No. 13156, declares, "Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." See also note to American Mercantile Exchange v. Blunt, 120 Am. St. Rep. 468.

Remedial statutes should be given a retrospective effect, where a repealing or amending statute has no saving clause, and such a construction is necessary to preserve the rights of the parties in pending actions. Bensley v. Ellis, 39 Cal. 309.

Changing procedure. Where the change affects merely the remedy, and the method of enforcing the right, not the right itself, it is within the control of the legislature. Oullahan v. Sweeney, 79 Cal. 537; 12 Am. St. Rep. 172; 21 Pac. 960. When a legal liability exists, a remedy may be given for such liability, where none existed before. Chapman v. State, 104 Cal. 690; 43 Am. St. Rep. 158; 38 Pac. 457. This principle is equally applicable to criminal cases: an offender may be tried by a procedure which did not exist when the offense was committed, provided the act was, at the time of its commission, punishable by law (Ex parte Gutierrez, 45 Cal. 429; People v. Mortimer, 46 Cal. 114; People v. Soto, 49 Cal. 67); and this change may be made to apply to pending actions, where the time within which an act may be done is extended (Bensley v. Ellis, 39 Cal. 309), or shortened. Kerckhoff-Cuzner Mill etc. Co. v. Olmstead, 85 Cal. 80; 24 Pac. 648.

Construction of amendments to codes. This provision also affects amendments to the original code. Hibernia Sav. & L. Soc. v. Hayes, 56 Cal. 297; Sharp v. Blankenship, 59 Cal. 288; Bank of Ukiah v. Moore, 106 Cal. 673; 39 Pac. 1071; Cook v. Cockins, 117 Cal. 140; 48 Pac. 1025. Amendments are adjusted to the original enactments, so that, in conjunction, they shall form a perfect code; and the portion of the amended section left unchanged must be considered as having been the law continuously, with the new or changed portions as new enactments that shall not be retroactive. Central Pacific R. R. Co. v. Shackelford, 63 Cal. 261. An amendment merely shortening the time within which an act may be done, and affecting only the remedy, leaving an adequate and available remedy, is in no sense retroactive (Kerckhoff-Cuzner Mill etc. Co. v. Olmstead, 85 Cal. 80; 24 Pac. 648); but an amendment cannot change the rights or obligations of the parties, nor extend the time for the commencement of an action. Allen v. Allen, 95 Cal. 184; 16 L. R. A. 646; 30 Pac. 213. Registry laws will not be given a retroactive effect; and an amendment authorizing the recordation will not operate as a constructive notice of an instrument, where it was not valid, and did not have that effect, when executed. Bank of Ukiah v. Moore, 106 Cal. 673; 39 Pac. 1071. A statute prescribing not merely a rule of evidence, but a rule of property, cannot be given a retroactive effect. Cook v. Cockins, 117 Cal. 140; 48 Pac. 1025.

Construction of Practice Act. The Practice Act was given a like construction. People v. Hays, 4 Cal. 127; Seale v. Mitchell, 5 Cal. 402; Stockton etc. R. R. Co. v. Common Council, 41 Cal. 147.

Legislative expression. What is an express declaration of an intention to give a retroactive operation may rest on construction. Dunne v. Mastick, 50 Cal. 244; Tulley v. Tranor, 53 Cal. 274; Cummings v. Howard, 63 Cal. 503.

Ex post facto law. See note to Hart v. State, 88 Am. Dec. 752.

CODE COMMISSIONERS' NOTE. It is a rule of construction founded on the principles of general jurisprudence that a statute is not to have a retroactive effect beyond the time of its enactment. See the very elaborate and learned opinion of Justice Wells, and also the dissenting opinion of Justice Heydenfeldt, in People v. Hays, 4 Cal. 127, and numerous cases there cited. See Civ. Code, § 3, and note.

§ 4. Rule of construction of this code. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no applica-

tion to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.

Construction of codes with relation to each other, and reconciling conflicts between titles, chapters, and articles. See Pol. Code, §§ 4480 et seq.

Rules for construction of statutes. See post, §§ 1858, 1859, 1866.

Similar provisions. See Pen. Code, § 4; Pol. Code, § 4; Civ. Code, § 4.

Legislation § 4. Enacted March 11, 1872.

Constitutional provisions part of law. The law of the state is contained in the constitution as well as in the codes. Pasadena v. Superior Court, 157 Cal. 781; 109 Pac. 620.

Strict construction. The common-law rule, that statutes in derogation thereof should have a strict construction, was adopted in this state when the common-law rule was made the rule of decision in 1850, and prevailed until the adoption of the codes (Hotaling v. Cronise, 2 Cal. 63; People v. Buster, 11 Cal. 215; Turner v. Tuolumne County Water Co., 25 Cal. 397; 1 Morrison's Min. Rep. 107; Pina v. Peck, 31 Cal. 359), when this rule of construction was changed (Blythe v. Ayres, 96 Cal. 532; 19 L. R. A. 40; 31 Pac. 915; Robinson v. Southern Pacific Co., 105 Cal. 526; 28 L. R. A. 773; 38 Pac. 94, 722), and the law of the subject to which it relates established (Canavan v. Gray, 64 Cal. 7; 27 Pac. 788; Smith v. McDermott, 93 Cal. 421; 29 Pac. 34; Miller v. Carr, 116 Cal. 378; 58 Am. St. Rep. 180; 48 Pac. 324).

Liberal construction. This provision, requiring the code to be given a liberal construction, is equivalent to a command to the courts (Plummer v. Brown, 64 Cal. 429; 1 Pac. 703; Bewick v. Muir, 83 Cal. 368; 23 Pac. 389); but, while it applies to the codes, it has no application to the statutes of the state, as such statutes, when in derogation of the common law, are to be strictly construed (Pina v. Peck, 31 Cal. 359; Estate of Jessup, 81 Cal. 408; 6 L. R. A. 594; 21 Pac. 976; 22 Pac. 742, 1028), where such construction does not favor the imposition of a penalty or forfeiture. Snell v. Bradbury, 139 Cal. 379; 73 Pac. 150. Provisions affirmative of the common law are to be interpreted as are the rules of the common law (Baker v. Baker, 13 Cal. 95; Emeric v. Alvarado, 90 Cal. 444; 27 Pac. 356); but those in derogation of the common law, or out of its course, are to be construed strictly (Hotaling v. Cronise, 2 Cal. 60); and re-enacted statutes are to be construed in accordance with the principles in force at the time of the enactment (Blythe v. Ayres, 96 Cal. 532; 19 L. R. A. 40; 31 Pac. 915; Dixon v. Pluns, 98 Cal. 384; 35 Am. St. Rep. 180; 20 L. R. A. 698; 33 Pac. 268; Estate of Healy, 122 Cal. 162; 54 Pac. 736), in the same manner as if they were new and original pieces of legislation. Donlon v. Jewett, 88 Cal. 530; 26 Pac. 370. The repeal of an act effects the repeal of an act amendatory of the act repealed. Hemstreet v. Wassum, 49 Cal. 273. Under the code, statutes remedial in their nature are to be liberally construed in favor of the remedy (Estate of McManus, 87 Cal. 292; 22 Am. St. Rep. 250; 10 L. R. A. 567; 25 Pac. 413; Buck v. Eureka, 97 Cal. 135; 31 Pac. 845; Brackett v. Banegas, 99 Cal. 623; 34 Pac. 344; Continental Building etc. Ass'n v. Hutton, 144 Cal. 609; 78 Pac. 21; Union Lumber Co. v. Simon, 150 Cal. 751; 89 Pac. 1077, 1081; Malone v. Big Flat Gravel Min. Co., 93 Cal. 384; 28 Pac. 1063; Stonesifer v. Kilburn, 94 Cal. 33; 29 Pac. 332; Melde v. Reynolds, 129 Cal. 308; 61 Pac. 932), even where it inflicts a penalty. Burns v. Superior Court, 140 Cal. 1; 73 Pac. 597. Courts should always look to the substance of the thing, rather than to its name (Ex parte Spencer, 83 Cal. 460; 17 Am. St. Rep. 266; 23 Pac. 395); and each provision should be referred to the object for which it was intended or to which it relates. Holbrook v. McCarthy, 61 Cal. 216; Ex parte Reis, 64 Cal. 233; 30 Pac. 806; Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371. The statute should be construed with the plain legislative intent. Blythe v. Ayres, 96 Cal. 532; 19 L. R. A. 40; 31 Pac. 915.

Rules of procedure. Except in matters which are jurisdictional, rules of procedure should be liberally construed (Smith v. Whittier, 95 Cal. 279; 30 Pac. 529; Buck v. Eureka, 97 Cal. 135; 31 Pac. 845); and not given a narrow or technical construction (Howell v. Budd, 91 Cal. 342; 27 Pac. 747), but should be made to serve their true purpose, of expediting the disposition of causes upon their merits, rather than of obstructing the action of the court. Flagg v. Puterbaugh, 98 Cal. 134; 32 Pac. 863; Warner v. F. Thomas etc. Works, 105 Cal. 409; 38 Pac. 960. A liberal construction should be given to § 1238, post (San Joaquin etc. Irrigation Co. v. Stevinson, 164 Cal. 221; 128 Pac. 924), and also to § 473, post. Palmer & Rey v. Barclay, 92 Cal. 199; 28 Pac. 226. The rule that statutes in derogation of the common law are to be strictly construed has no application to the taking of depositions. Bollinger v. Bollinger, 153 Cal. 190; 94 Pac. 770. It will be assumed, where necessary to give effect to a proceeding, that the party in interest will act in a lawful rather than in an unlawful manner. Clark v. Palmer, 90 Cal. 504; 27 Pac. 375.

Construction of codes with relation to each other. "With relation to each other, the provisions of the four codes must be construed (except as in the next two sections provided) as though all such codes had been passed at the same moment of time, and were parts of the same statute." Pol. Code, § 4480. While the code provisions are controlling where they assume to cover a given subject (McBride v. Fallon, 65 Cal. 301; 4 Pac. 17), yet they do not necessarily embody the whole law of that subject, as there may be other statutory provisions not embraced in the code. Estate of Apple, 66 Cal. 432; 6 Pac. 7. Where the provisions of the several codes are not contradictory, they should be read together, when dealing with the same subject-matter (St. Louis Nat. Bank v. Gay, 101 Cal. 286; 35 Pac. 876; People v. Applegarth, 64 Cal. 229; 30 Pac. 805), and construed as though passed in view of each other (Robinson v. Southern Pacific Co., 105 Cal. 526; 28 L. R. A. 773; 38 Pac. 94, 722), and as parts of the same statute. Estate of Weed, 120 Cal. 634; 53 Pac. 30. Thus, where a term is defined in one code, its use in another code must be deemed to have been with reference to such definition. Bruner v. Superior Court, 92 Cal. 239; 28 Pac. 341; Keyes v. Cyrus, 100 Cal. 322; 38 Am. St. Rep. 296; 34 Pac. 722. Where one code authorizes or requires a thing to be done, and another provides the means (Page v. Superior Court, 122 Cal. 209; 54 Pac. 730), or limits and defines a power, and enumerates the circumstances under which it may be exercised, they are to be construed as one statute (People v. Fellows, 122 Cal. 233; 54 Pac. 830), and the general provisions of one are modified by the specific provisions of another (People v. Norris, 144 Cal. 422; 77 Pac. 998); and the provisions of the various codes bearing upon the same subject-matter must be construed in pari materia. Estate of Miner, 143 Cal. 194; 76 Pac. 968. Such a construction must therefore be given to the provisions of each, that all may, if possible, have effect (Gonzales v. Wasson, 51 Cal. 295); and every word of each have its proper meaning. Ex parte Reis, 64 Cal. 233; 30 Pac. 806. It is only where there is a conflict between the provisions of the different codes that it is necessary to determine which shall prevail (Clarke v. Mead, 102 Cal. 516; 36 Pac. 862), but conflicts should be reconciled, if possible (Ex parte Reis, 64 Cal. 233; 30 Pac. 806), and harmonized and construed together. Weber v. McCleverty, 149 Cal. 316; 86 Pac. 706.

Rules of construction in case of conflict. The following rules are laid down for the construction of the several codes, and the different titles, chapters, and sections thereof, where there is a conflict.

Conflict between titles. "If the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title." Pol. Code, § 4481. This rule applies only where there is a conflict; it implies that where there is no conflict a provision will be valid, although, in the sense of that rule, it is not in regard to a question arising out of the subject-matter of the title. Malone v. Bosch, 104 Cal. 680; 38 Pac. 516. It is a cardinal rule of statutory construction, that specific provisions upon a particular subject control the general provisions for the class to which that subject belongs (London etc. Bank v. Parrott, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164); but where it is evident from the language used, and from the incongruity of the nature of the different provisions, that they are to be understood as referring respectively to distinct classes, the rule requiring the statutes to be construed together does not apply. People v. Norris, 144 Cal. 422; 77 Pac. 998. The subject-matter of the title should be ascertained, not so much from its head-lines as from its contents. People v. Freese, 76 Cal. 633; 18 Pac. 812. The particular provision of one title in relation to the subject-matter will prevail over the general provision of another title (Fessenden v. Summers, 62 Cal. 484), especially when the general provision is silent on the point (State v. Campbell, 3 Cal. App. 604; 86 Pac. 840); but if there is any provision of law, in any other title, specially governing the subject-matter, it must prevail (Woods v. Varnum, 83 Cal. 46; 23 Pac. 137); for the provisions specially adapted to the subject will always govern (People v. Central Pacific R. R. Co., 83 Cal. 393; 23 Pac. 303); but all the provisions of the code bearing upon a single subject-matter are to be construed together harmoniously if possible. Estate of Clarke, 148 Cal. 108; 113 Am. St. Rep. 197; 7 Ann. Cas. 306; 1 L. R. A. (N. S.) 996; 82 Pac. 760.

Conflict between chapters. "If the provisions of any chapter conflict with or contravene the provisions of another chapter of the same title, the provisions of each chapter must prevail as to all matters and questions arising out of the subject-matter of such chapter." Pol. Code, § 4482. Where two chapters both relate to the same general subject-matter, but one relates specifically to the particular subject-matter under consideration, the latter must govern. Ham v. Santa Rosa Bank, 62 Cal. 125; 45 Am. Rep. 654. Resort must always be had to the subject-matter, to determine whether it falls more naturally in one chapter than in another (Southern Pacific R. R. Co. v. Painter, 113 Cal. 247; 45 Pac. 320); and the headings of the chapters and titles may be examined for this purpose. Keyes v. Cyrus, 100 Cal. 322; 38 Am. St. Rep. 296; 34 Pac. 722.

Conflict between articles. "If the provisions of any article conflict with or contravene the provisions of another article of the same chapter, the provisions of each article must prevail as to all matters and questions arising out of the subject-matter of such article." Pol. Code, § 4483. In case of conflict, the provision of the article must prevail, under which the subject-matter more properly comes (Odd Fellows' Sav. Bank v. Banton, 46 Cal. 604; People v. Freese, 83 Cal. 453; 23 Pac. 378), and which deals specifically therewith. Estate of Bergin, 100 Cal. 376; 34 Pac. 867.

Conflicting sections of the same chapter or article. "If conflicting provisions are found in different sections of the same chapter or article, the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article." Pol. Code, § 4484. This rule does not apply where the sections were passed at different times, as it is an old and well-settled rule, that when two laws upon the same subject-matter, passed at different times, are inconsistent with each other, the one last passed must prevail; so it has always been the rule, that, when different provisions of a statute, all passed at the same time, could not be reconciled, the one last in point of position must prevail; this was upon the theory that effect should always be given to the later rather than to an earlier expression of the legislative will; the presumption being that the latter part of the statute was last considered: there is no indication in § 4484 of the Political Code of any intent to change this well-established rule. People v. Dobbins, 73 Cal. 257; 14 Pac. 860. In the construction of statutes, all parts are to be considered together, keeping in view the subject-matter in order to ascertain the legislative intent: one clause may enlarge or limit other provisions; but no construction should be given which will lead to absurdities, if it can be reasonably avoided. San Diego v. Granniss, 77 Cal. 511; 19 Pac. 875. The sections of a statute in pari materia must be read together and effect given to each, and so construed as not to render nugatory the restrictions of any section. Gleason v. Spray, 81 Cal. 217; 15 Am. St. Rep. 47; 22 Pac. 551; People v. Broadway Wharf Co., 31 Cal. 33; Nicolson Pavement Co. v. Painter, 35 Cal. 699. The different sections of a chapter must be construed so as to reconcile apparent conflicts, if possible. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. They must be read together, and that interpretation should be placed upon the language which will, if possible, give effect to each section, and make it compatible with common sense and the plain dictates of justice. People v. Waterman, 31 Cal. 412; Cullerton v. Mead, 22 Cal. 95; People v. Seeley, 137 Cal. 13; 69 Pac. 693. Effect must be given, as far as possible, to all the sections upon the same subject, providing a complete scheme covering the subject-matter. People v. Golden Gate Lodge, 128 Cal. 257; 60 Pac. 865.

Effect to be given headings. While the headings of chapters may be resorted to, to determine the correct interpretation of the sections thereof, yet they are not conclusive of the question of the power of the legislature to pass the statute. Ex parte Koser, 60 Cal. 177. Each article of the code is preceded by head-notes, numbered to correspond with the sections following, and purporting to give, in brief, the subject of each of such sections; they are parts of the statute, limiting and defining the sections to which they refer: to refuse to give effect to them according to their import, would be to make the law, not to administer it. Sharon v. Sharon, 75 Cal. 1; 16 Pac. 345. These head-notes are entitled to more consideration, in explaining the intention of the different sections, where the language is doubtful, than the title of the entire act (Barnes v. Jones, 51 Cal. 303), and may be examined for the purpose of determining the particular intent of the legislature with regard to the chapter in which the section to be construed is placed. Keyes v. Cyrus, 100 Cal. 322; 38 Am. St. Rep. 296; 34 Pac. 722. In construing doubtful statutes, the title of an act is sometimes resorted to, in order to ascertain the legislative intent (People v. Abbott, 16 Cal. 358; State v. Conkling, 19 Cal. 501; People v. Board of Supervisors, 36 Cal. 595), but it is never allowed to enlarge or control the body of the statute. Hagar v. Board of Supervisors, 47 Cal. 222.

CODE COMMISSIONERS' NOTE. The rules of statutory construction present one of the widest fields of learning known to the lawyer. While it is a general principle that the will of the legislature, as expressed in a statute, is to be carried into full effect, and that, for the purpose of ascertaining it, every source of information is to be resorted to, such as its title, its preamble, its history, and attendant circumstances, and above all, the evil aimed at and the remedy intended to be applied, it is equally well settled that a more stringent rule was applicable to a certain class of statutes, namely: to those of a penal nature, and those which are, as it was termed, in derogation of the common law. Within this latter category have been classed statutes prescribing the practice of the courts, in respect to which it was remarked by the supreme court of New York (commenting upon provisions in the Practice Code of that state, which is in most respects similar to this code), that "the rules and practice of the court, being established by the court, may be made to yield to circumstances to promote the ends of justice. Not so as to a statute; it is unbending, requiring implicit obedience as well from the court as from its suitors." Jackson v. Wiseburn, 5 Wend. 137. Without stopping to inquire how far this principle is applicable to statutory provisions prescribing, for example, the time within which a particular act must be done (which was the case in the instance referred to), it certainly should not apply in all its severity to a system of regulation having in view as its sole object the furtherance of justice and a disregard of tech-

nical strictness. This is the great principle running through all the provisions of this code. The chief design and the merit of the code, if it has any, is its attempt to make the attainment of justice the paramount object, and the use of forms mere auxiliaries, which, when they come in conflict with the ends of justice, are to be relaxed. This section was intended to obviate much of the difficulty under which courts have labored, and to render the code, instead of a rigid and unbending statute, as construed by some, a rule of procedure susceptible of easy adaptation to the purposes of justice which it alone has in view. See the opinion of Justice Cope, Jones v. Steamship Cortes, 17 Cal. 487; 79 Am. Dec. 142. See also Lucas v. Payne, 7 Cal. 92; Ward v. Severance, 7 Cal. 126; Chamberlain v. Bell, 7 Cal. 292; 68 Am. Dec. 260. See Civ. Code, § 4, and note.

§ 5. Provisions similar to existing laws, how construed. The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments.

Effect of codes on existing statutes. See post, § 18.

Similar provisions. See Civ. Code, § 5; Pen. Code, § 5; Pol. Code, § 5.

Legislation § 5. 1. Enacted March 11, **1872. 2.** Amendment by Stats. **1901**, p. 117, and held unconstitutional, in Lewis v. Dunne, 134 Cal. 291; Mr. Justice McFarland saying, "The said act . . . is unconstitutional, and void for all purposes, and is inoperative to change or in any way affect the law of the state as it stood immediately before the approval of said act. . . . The act covers one hundred and fifty pages of the published statutes of 1901; it amends over four hundred sections; it repeals nearly one hundred sections; it changes the numbers of other sections; it adds a great many new sections; and it contains this clause, 'Certain title and chapter headings . . . are hereby inserted, changed, and amended,' and then follow several pages of insertions, changes, and amendments of such headings. . . . We are forced to the conclusion that this act is a revision, and void for want of re-enactment and publication at large of the revised law." Thus the attempted repeals or attempted amendments of the Code of Civil Procedure as embodied in the act of the legislature of 1901 were declared unconstitutional and void. This act was the result of an act approved March 25, 1895 (Stats. 1895, p. 345), whereby the legislature created and established "a commission for revising, systematizing, and reforming the laws of this state," and provided that "said commission, to be known as 'The Commissioners for the Revision and Reform of the Law,' should be appointed by the governor." This commission was duly appointed, and thereafter filed with the secretary of state a report recommending, among other things, a revision of the Code of Civil Procedure, and the legislature (Stats. 1901, p. 117) embodied their recommendations in the act declared "unconstitutional, and void for all purposes."

New enactments. The codes were framed with a view to a complete system of law, with the intent to disturb the existing state of things as little as possible (People v. Bissell, 49 Cal. 407), and so far as they are substantially the same as existing statutes or common law, they must be construed as continuations thereof. Churchill v. Pacific Improvement Co., 96 Cal. 490; 31 Pac. 560. If the statute of limitations had commenced to run before the codes took effect, it continued to run, notwithstanding the passage of the codes, and was not lengthened by them. Benjamin v. Eldridge, 50 Cal. 612.

Construction. The word "construed" does not mean, simply, "to interpret," "to explain," "to translate," or "to show the meaning of," but is intended to mean "regarded" or "considered." Churchill v. Pacific Improvement Co., 96 Cal. 490; 31 Pac. 560. This section is, in part, a rule of construction, and its meaning is, that words used in a former statute on the same subject have the same meaning in this code as in the former statute. Ex parte Reis, 64 Cal. 233–241; 30 Pac. 806.

Constitutionality of code amendments and revisions. See note 86 Am. St. Rep. 267.

CODE COMMISSIONERS' NOTE. The Political Code contains a general provision that the repeal of existing statutes shall not revive any law heretofore repealed or suspended, nor any office heretofore abolished, and therefore such a provision has not been incorporated herein. See People v. Craycroft, 2 Cal. 243; 56 Am. Dec. 331.

§ 6. Tenure of offices preserved. All persons who at the time this code takes effect hold office under any of the acts repealed, continue to hold the same according to the tenure thereof, except those offices which are not continued by one of the codes adopted at this session of the legislature.

Similar provision. See Pol. Code, § 6.

Legislation § 6. Enacted March 11, **1872.**

§ 7. Construction of repeal as to certain offices. When any office is abolished by the repeal of any act, and such act is not in substance re-enacted or continued in either of the codes, such office ceases at the time the codes take effect.

Repeals by implication. See post, § 18.

Legislation § 7. Enacted March 11, **1872.**

Abolition of office. Where the act creating an office is repealed, but the office is continued by the Political Code, the incumbent is authorized to occupy the office, until his successor qualifies. People v. Bissell, 49 Cal. 407. In the absence of a constitutional inhibition, the legislature has power to alter or abridge a term of office created by it (People v. Haskell, 5 Cal. 357; People v. Squires, 14 Cal. 12;

Cohen v. Wright, 22 Cal. 293; In re Bulger, 45 Cal. 553; Spring Valley Water Works v. Board of Supervisors, 61 Cal. 3; Pennie v. Reis, 80 Cal. 266; 22 Pac. 176; People v. Banvard, 27 Cal. 470), and may extend the term of an incumbent, provided the extension does not exceed the limitations fixed by the constitution. Christy v. Board of Supervisors, 39 Cal. 3; and see Miller v. Kister, 68 Cal. 142; 8 Pac. 813. The legislature may also make the enjoyment of an elective office dependent upon conditions (Brodie v. Campbell, 17 Cal. 11), and may take away from the office the duties and emoluments thereof, before the expiration of the term. People v. Squires, 14 Cal. 12. An incumbent has no proprietary interest in an office created by the legislature: it has full control over such office, unless restricted by the constitution (Miller v. Kister, 68 Cal. 142; 8 Pac. 813; Pennie v. Reis, 80 Cal. 266; 22 Pac. 176); nor has an incumbent any vested right in the office, which would impair the right of the legislature to increase or diminish the salary, or impose new duties, or wholly abolish the office (Cohen v. Wright, 22 Cal. 293); nor has he any contractual relation with the state, or obligation, which may be impaired by the abolition of the office or the diminution of the salary. Myers v. English, 9 Cal. 341. There is a clear distinction, however, between an office-holder, as such, and one holding a contract with the state for the performance of services. McDonald v. Yuba County, 14 Cal. 444.

§ 8. Actions, etc., not affected by this code. No action or proceeding commenced before this code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this code as far as applicable.

Similar provisions. See Civ. Code, § 6; Pol. Code, § 8. See also repealing clause at end of this code.

Legislation § 8. 1. Enacted March 11, **1872. 2.** Amendment by Stats. **1901**, p. 117; unconstitutional. See note ante, § 5.

Pending actions. Actions commenced before the code went into effect were governed by the law in force at the time of commencement (Caulfield v. Doe, 45 Cal. 221; Hancock v. Thom, 46 Cal. 643; Strueven v. His Creditors, 62 Cal. 45); the clear implication from this section being, that actions not commenced and rights not vested prior to the adoption of the codes were to be controlled by the codes; the codes therefore applying only to new actions, and to causes of action which, under the existing statutes, were not barred by limitation. Allen v. Allen, 95 Cal. 184; 16 L. R. A. 646; 30 Pac. 213. A proceeding for a new trial after the codes went into effect, being a new proceeding, is governed by the code provisions (Kelly v. Larkin, 47 Cal. 58; and see also Hodgdon v. Griffin, 56 Cal. 610); but proceedings for a new trial instituted before the codes went into effect were governed by the Practice Act. Macy v. Davila, 48 Cal. 646.

"Right accrued." This expression embraces all civil and political rights, absolute and qualified, under the law as it existed prior to the codes, whether arising out of past contracts express or implied, or ownership of property, or in other words, all vested rights. Dewey v. Lambier, 7 Cal. 347; Cohen v. Davis, 20 Cal. 187; Welch v. Sullivan, 8 Cal. 511; White v. Moses, 21 Cal. 34; Scott v. Dyer, 54 Cal. 430. The code, being remedial in its nature, is confined to the remedy, and does not extend to vested rights; a remedy is not a vested right; thus, a motion for a new trial is a remedy, and not a right. Kelly v. Larkin, 47 Cal. 58; Townley v. Adams, 118 Cal. 382; 50 Pac. 550.

CODE COMMISSIONERS' NOTE. The repeal of a statute conferring rights or prescribing remedies would have the effect to extinguish actions instituted under it, and which were pending when the repeal went into operation, if no provision were made enabling the court to proceed to try and determine them. McMinn v. Bliss, 31 Cal. 122. Where an inchoate right accrued under the statutes as they existed previous to the adoption of the code, and by the code the proceedings to perfect the right are regulated and prescribed, such regulations and requirements must be pursued, or the party is remediless. See particularly People v. Livingston, 6 Wend. 526; Sedgwick on Stat. and Const. Law, 679; see post, § 18.

§ 9. Limitations shall continue to run. When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this code goes into effect, and the same or any limitation is prescribed in this code, the time which has already run shall be deemed part of the time prescribed as such limitation by this code.

Existing actions not affected. See post, § 362.
Limitation of actions. See post, §§ 312 et seq.
Similar provision. See Pol. Code, § 9.

Legislation § 9. 1. Enacted March 11, **1872. 2.** Amended by Code Amdts. **1873–74**, p. 279; (1) words "goes into effect" substituted for "takes effect"; and (2) the last clause substituted for "the time of limitation continues to run and has the like effect as if the whole period had begun and ended after its adoption." **3.** Amendment by Code Amdts. **1901**, p. 117; unconstitutional. See note ante, § 5.

Limitation of actions. Where the statute of limitations commenced to run before the codes went into effect, it continued to run, and was not extended by the enactment of the codes; the running of the statute, in such case, being governed by the law in force at the time of the passage of the codes. Benjamin v. Eldridge, 50 Cal. 612. New and amended sections of the code are governed by this section; but they are not taken to have been the law prior to the time they take effect. Central Pacific R. R. Co. v. Shackelford, 63 Cal. 261.

Retrospective operation of statutes. See note 11 Am. Dec. 98.

When retrospective operation of statutes is permissible. See note 10 Am. Dec. 131.

Retrospective operation of statute of limitations. See note 111 Am. St. Rep. 455.

Retroactive operation of statute of limitations. See notes Ann. Cas. 1912A, 1041; 4 Ann. Cas. 166.

CODE COMMISSIONERS' NOTE. Necessary, because the statutes of limitations for civil actions and proceedings are embodied in this code.

§ 10. Holidays. Holidays within the meaning of this code, are every Sunday, the first day of January, twelfth day of February, to be known as Lincoln day, twenty-second day of February, thirtieth day of May, fourth of July, ninth day of September, first Monday in September, twelfth day of October, to be known as "Columbus day," twenty-fifth day of December, every day on which an election is held throughout the state, and every day appointed by the President of the United States or by the governor of this state for a public fast, thanksgiving or holiday. If the first day of January, twelfth day of February, twenty-second day of February, the thirtieth day of May, the fourth day of July, the ninth day of September, the twelfth day of October or the twenty-fifth day of December falls upon a Sunday, the Monday following is a holiday. Every Saturday from twelve o'clock noon until twelve o'clock midnight is a holiday as regards the transaction of business in the public offices of this state, and also in political divisions thereof where laws, ordinances or charters provide that public offices shall be closed on holidays; provided, this shall not be construed to prevent or invalidate the issuance, filing, service, execution or recording of any legal process or written instrument whatever on such Saturday afternoons; and provided further, that the public schools of this state shall close on Saturday, Sunday, the first day of January, the thirtieth day of May, the fourth day of July, the twenty-fifth day of December and on every day appointed by the President of the United States or the governor of this state for a public fast, thanksgiving or holiday. Said public schools shall continue in session on all other legal holidays and shall hold proper exercises commemorating the day. Boards of school trustees and city boards of education shall have power to declare a holiday in the public schools under their jurisdiction when good reason exists therefor.

Non-judicial days. See post, § 134.

Last day falling on holiday. See post, § 13.

Similar provisions. See Civ. Code, § 7; Pol. Code, § 10.

Legislation § 10. 1. Enacted March 11, **1872,** and then read: "Holidays, within the meaning of this code, are: every Sunday, the first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, every day on which an election is held throughout the state, and every day appointed by the President of the United States, or by the governor of this state, for a public fast, thanksgiving or holiday."

2. Amended by Code Amdts. **1880,** p. 59, adding (1) "the thirtieth (30th) day of May"; and, at end, (2) "If the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, or the twenty-fifth day of December, fall upon a Sunday, the Monday following is a holiday."

3. Amended by Stats. **1889,** p. 46, adding "the ninth day of September" in both places.

4. Amended by Stats. **1893,** p. 186, adding "the first Monday in October."

5. Amended by Stats. **1897,** p. 15, changing "the first Monday in October" to "the first Monday in September."

6. Amended by Stats. **1907,** p. 561; the code commissioner saying, "Merely adds the Saturday half-holiday sentence, in order to make this section correspond to the amendment adopted to § 10 of the Political Code in 1905 and § 7 of the Civil Code in 1907."

7. Amended by Stats. Extra Sess. **1907,** p. 7, (1) adding, at end of first sentence, "and such days as the governor may declare as special holidays"; (2) changing "this" to "that such" after "provided"; (3) adding a second proviso, reading, "Provided further that the governor of the state may declare special holidays and he may in one proclamation designate one or any number of consecutive days, as special holidays, and during any such special holidays no public duty shall be suspended or prohibited except such as affect the administration of justice in

the courts of this state as prescribed by section 135 of this code for the control of such courts."

8. Amended by Stats. **1909**, p. 22, (1) adding (a) "the twelfth day of October, to be known as 'Discovery Day,'" and (b) "the twelfth day of October"; (2) canceling the amendments of extra session of 1907, noted supra.

9. Amended by Stats. **1911**, p. 1122, (1) in first sentence, (a) omitting comma after "Holidays," thus making the following phrase restrictive; (b) adding "twelfth day of February, to be known as 'Lincoln Day'"; (c) substituting "Columbus Day" for "Discovery Day"; (2) in second sentence, (a) adding "twelfth day of February"; (b) substituting the verb "falls" for "fall," thus changing the mood; (3) in the first two sentences of the old section, the definite article "the" was used before the day of the month, in each instance; (4) in third sentence, (a) substituting "shall" for "may," in the clause "public offices shall be closed"; (b) adding all the matter after the end of the first provision, from "and provided further," to the end of the section.

Where last day is a holiday. Where the last day appointed for the performance of an act falls upon a holiday, the act may be performed at any time during the next succeeding day (Muir v. Galloway, 61 Cal. 498; Blackwood v. Cutting Packing Co., 71 Cal. 461; 12 Pac. 493; Diggins v. Hartshorne, 108 Cal. 154; 41 Pac. 283; Northey v. Bankers' Life Ass'n, 110 Cal. 547; 42 Pac. 1079; Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074; California Improvement Co. v. Quinchard, 119 Cal. 87; 51 Pac. 24; Crane v. Crane, 121 Cal. 99; 53 Pac. 433; Frassi v. McDonald, 122 Cal. 400; 55 Pac. 139, 772); and this is the rule, also, where both of the last two days are holidays (Crane v. Crane, 121 Cal. 99; 53 Pac. 433); and where the last day is a holiday falling on a Sunday, and by § 11 of this code the Monday following is a holiday, in both of which cases the time is extended so as to include the third succeeding day. Estate of Rose, 63 Cal. 346.

Saturday afternoon. Courts should treat Saturday afternoon as a legal holiday. People v. Heacock, 10 Cal. App. 450; 102 Pac. 543.

Special holidays. The superior court has jurisdiction, on a day declared to be a special holiday, to proceed with the trial of a charge of felony. Risser v. Superior Court, 152 Cal. 531; 93 Pac. 85.

Judicial act performed on holiday. A prisoner convicted of a felony cannot be sentenced upon a legal holiday. In re Smith, 152 Cal. 566; 93 Pac. 191.

Effect of invalid holiday. The duration of an invalid holiday cannot operate to extend the time to be computed for serving a statement on motion for a new trial. Donovan v. Ætna Indemnity Co., 10 Cal. App. 723; 103 Pac. 365.

Judicial notice. Courts take judicial notice of special holidays declared by the governor. Poheim v. Meyers, 9 Cal. App. 31; 98 Pac. 65.

§ 11. **Same.** If the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the ninth day of September, the twelfth day of October or the twenty-fifth day of December fall upon a Sunday, the Monday following is a holiday.

Last day falling on holiday. See post, § 13.
Similar provision. See Pol. Code, § 11.

Legislation § 11. 1. Enacted March 11, **1872**.
2. Amended by Code Amdts. **1873–74**, p. 280, adding "the fourth day of July."
3. Repeal by Stats. **1901**, p. 117; unconstitutional. See note ante, § 5.
4. Amended by Stats. **1909**, p. 22, adding (1) "the thirtieth day of May" and (2) "the ninth day of September, the twelfth day of October."

Holiday falling on Sunday. Where any of the holidays mentioned in this section fall on a Sunday, the succeeding Monday is a holiday, and is not to be counted in the computation of time in which an act is to be done (Estate of Rose, 63 Cal. 346); and where, by contract executed on a Sunday, a party is given all of the following day within which to perform, no portion of the third day is included. Ropes v. Rosenfeld's Sons, 145 Cal. 671; 79 Pac. 354.

Transfer of holiday from Sunday to Monday. See note 19 L. R. A. 320.

§ 12. **Computation of time.** The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded.

Time, how computed. Year, week, and day, defined. Pol. Code, §§ 3255 et seq.
Similar provisions. See Civ. Code, § 10; Pol. Code, § 11.

Legislation § 12. Enacted March 11, **1872**.

Time, when directory. The time prescribed to a public body, in the exercise of a function in which the public is concerned, is merely directory, unless there are negative words restraining the exercise of the power to that time. Tuohy v. Chase, 30 Cal. 524; People v. Board of Supervisors, 33 Cal. 487; Hagenmeyer v. Board of Equalization, 82 Cal. 214; 23 Pac. 14.

Day of the act excluded. It has been uniformly held, from an early day, to be the rule in this state, that, in the computation of time, the first day is excluded and the last day included; differing from the English practice, which was the inclusive method, under which the time began to run upon the day of the happening of the event (Scoville v. Anderson, 131 Cal.

590; 63 Pac. 1013; Dingley v. McDonald, 124 Cal. 90; 56 Pac. 790; Perham v. Kuper, 61 Cal. 331; Misch v. Mayhew, 51 Cal. 514; Hagenmeyer v. Board of Equalization, 82 Cal. 214; 23 Pac. 14; Landregan v. Peppin, 86 Cal. 122; 24 Pac. 859; Derby v. Modesto, 104 Cal. 515; 38 Pac. 900; Bates v. Howard, 105 Cal. 173; 38 Pac. 715; Bellmer v. Blessington, 136 Cal. 3; 68 Pac. 111); but, under our rule, the last day cannot be excluded also. Landregan v. Peppin, 86 Cal. 122; 24 Pac. 859. Apparently, however, the inclusive rule seems to have obtained at one time in this state. People v. Clark, 1 Cal. 406; Price v. Whitman, 8 Cal. 412. The exclusive rule applies, except where the intent to include is apparent. Savings and Loan Society v. Thompson, 32 Cal. 347; Derby v. Modesto, 104 Cal. 515; 38 Pac. 900; Petition of Los Angeles Trust Co., 158 Cal. 603; 112 Pac. 56.

Last day falling on a holiday. The last day is to be excluded when it falls upon a holiday (Muir v. Galloway, 61 Cal. 498; Estate of Rose, 63 Cal. 346; Northey v. Bankers' Life Ass'n, 110 Cal. 547; 42 Pac. 1079; Robinson v. Templar Lodge, 114 Cal. 41; 45 Pac. 998; Crane v. Crane, 121 Cal. 99; 53 Pac. 433; Frassi v. McDonald, 122 Cal. 400; 55 Pac. 139, 772; Baxter v. Vineland Irrigation District, 136 Cal. 185; 68 Pac. 601; Blackwood v. Cutting Packing Co., 71 Cal. 461; 12 Pac. 493; Jenness v. Bowen, 77 Cal. 310; 19 Pac. 522); but this rule does not apply to matters pending in the supreme court, that court being always open for the transaction of business (Adams v. Dohrmann, 63 Cal. 417), nor does it apply to other courts, where the business is not judicial. Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074.

Definition of terms. A day is defined by § 3259 of the Political Code as the period of time between any midnight and the midnight following; and fractions of a day are not regarded in law, unless the order of successive events is to be ascertained, or justice requires it (Derby v. Modesto, 104 Cal. 515; 38 Pac. 900; People v. Clark, 1 Cal. 406; Craig v. Godfroy, 1 Cal. 415; 54 Am. Dec. 299); and where the order of occurrence involves the legality or propriety of private rights, fractions may be regarded. People v. Beatty, 14 Cal. 566; Scoville v. Anderson, 131 Cal. 590; 63 Pac. 1013. A week is defined by the codes to be a period of seven consecutive days. Derby v. Modesto, 104 Cal. 515; 38 Pac. 900. A month is a calendar month, and not a lunar month, unless otherwise designated. Videau v. Griffin, 21 Cal. 389; Savings and Loan Society v. Thompson, 32 Cal. 347; Sprague v. Norway, 31 Cal. 173. A year is three hundred and sixty-five days; a half-year, one hundred and eighty-two days; a quarter-year, ninety-one days; the added day of a leap-year, and the day immediately preceding it, if they occur in any such period, must be reckoned together as one day. Pol. Code, § 3257; Brown v. Anderson, 77 Cal. 236; 19 Pac. 487.

Computation of time. See notes 7 Am. Dec. 250; 78 Am. St. Rep. 372.

How time within which an act is to be done is computed. See note 46 Am. Rep. 410.

Inclusion of day of accrual of action in computing limitation against action. See notes Ann. Cas. 1913D, 1068; 12 Ann. Cas. 58.

Holidays as first or last day of time computed. See note 49 L. R. A. 203.

CODE COMMISSIONERS' NOTE. Price v. Whitman, 8 Cal. 412; Iron Mountain Co. v. Haight, 39 Cal. 540; Soldier's Voting Bill, 45 N. H. 612. A day is not to be considered a unit to the prejudice of the rights of a party, and an examination may be had as to the very point of time when the act was done. Craig v. Godfroy, 1 Cal. 415, 54 Am. Dec. 299; People v. Clark, 1 Cal. 406. Whenever time becomes important, courts will inquire into a day, or even a fractional portion of a day. People v. Beatty, 14 Cal. 566.

§ 13. Certain acts not to be done on holidays. Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed.

Similar provisions. See Civ. Code, § 11; Pol. Code, § 13.

Legislation § 13. Enacted March 11, 1872.

Where day appointed by law is a holiday. The supreme court, under the constitution, being always open for the transaction of business, is not affected by this section (Adams v. Dohrmann, 63 Cal. 417; Herrlich v. McDonald, 83 Cal. 505; 23 Pac. 10; Niles v. Edwards, 95 Cal. 41; 30 Pac. 134); neither is the performance of ministerial acts affected thereby. Young v. Patterson, 9 Cal. App. 469; 99 Pac. 552; Heisen v. Smith, 138 Cal. 216; 94 Am. St. Rep. 39; 71 Pac. 180; Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074. Thus, a criminal information may be filed (People v. Helm, 152 Cal. 532; 93 Pac. 99), and a sale may be made by a tax-collector (Young v. Patterson, 9 Cal. App. 469; 99 Pac. 552), on a legal holiday.

Contract to be performed on holiday. Where the day of performance of a contract falls upon a holiday, it may be performed on the succeeding day. Hibernia Sav. & L. Soc. v. O'Grady, 47 Cal. 579; Northey v. Bankers' Life Ass'n, 110 Cal. 547; 42 Pac. 1079. And this is the rule in cases of stipulations of attorneys (Blackwood v. Cutting Packing Co., 71 Cal. 461;

12 Pac. 493); and if the time expires on a holiday, and the next day is a Sunday, the act may be performed on the succeeding Monday (Crane v. Crane, 121 Cal. 99; 53 Pac. 433); and if the last day for the performance of an act falls on a Sunday, it may be done on the following Monday. Wilcox v. Engebretsen, 160 Cal. 288; 116 Pac. 750. This section amounts to no more than a legal permission for the postponement of the act, and does not prohibit it from being done upon the day designated. People v. Helm, 152 Cal. 532; 93 Pac. 99.

Computation of time for performance of act required by statute, when last day falls on Sunday. See notes 20 Ann. Cas. 1318; 7 Ann. Cas. 325; 38 L. R. A. (N. S.) 1162.

Validity of contract completed on secular day, where preliminary negotiations are conducted on Sunday. See note 16 Ann. Cas. 632.

Computation of days of grace allowed for payment of insurance premium or assessment, where date of payment or expiration of such period falls on Sunday or holiday. See note 23 L. R. A. (N. S.) 759.

CODE COMMISSIONERS' NOTE. Sunday is not regarded. McGill v. Bank of United States, 12 Wheat. 511; 6 L. Ed. 711.

§ 14. "Seal" defined. When the seal of a court, public officer, or person is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone as well as upon wax or a wafer affixed thereto.

Seals. See post, §§ 147–153, 1929–1934.
Abolition of seals. See Civ. Code, § 1629.
Similar provision. See Pol. Code, § 14.

Legislation § 14. Enacted March 11, 1872.

Seal, defined. A seal, at common law, meant an impression upon wax or wafer, or some other tenacious substance capable of being impressed; but in this state a seal is sufficient, where the impression is made upon paper only, and not upon wax (Connolly v. Goodwin, 5 Cal. 220; Hastings v. Vaughn, 5 Cal. 315); and it may be made as well by a pen as by a stamp. Hastings v. Vaughn, 5 Cal. 315. The court will assume from the word "(Seal)," after the certificate of a notary, printed in a transcript, that the original was properly executed. Touchard v. Crow, 20 Cal. 150; 81 Am. Dec. 108. In copying a sealed instrument, it is not necessary to transcribe the seal. Jones v. Martin, 16 Cal. 165; Smith v. Dall, 13 Cal. 510. The omission of the county recorder to make any mark for the seal does not vitiate the writing. Smith v. Dall, 13 Cal. 510.

Seal of court. The seal affixed to a document, bearing the inscription of the court to which it belongs, sufficiently designates the court, and the omission to designate the officer's official connection with the court is immaterial. Touchard v. Crow, 20 Cal. 150; 81 Am. Dec. 108.

Seal of corporation. A corporation may adopt the private seal of the several trustees, or of any one of them (Gashwiler v. Willis, 33 Cal. 11; 91 Am. Dec. 607); but the seal of an individual, when not so adopted by the corporation, is not sufficient. Richardson v. Scott River Water etc. Co., 22 Cal. 150.

"Seal," defined. See note 50 Am. St. Rep. 156.
What is "seal." See note Ann. Cas. 1912C, 42.
"Seal," as sufficient seal. See note 11 Ann. Cas. 1110.
"L. S.," as sufficient seal. See note 11 Ann. Cas. 250.
Sufficiency of scroll as seal. See note 1 L. R. A. 861.

CODE COMMISSIONERS' NOTE. An impression upon paper constitutes a good seal. Connolly v. Goodwin, 5 Cal. 220. There is "no good reason why such impression should not be made with a pen as well as with what is technically a stamp. The object is to give character to the instrument. . . . This is as well effected by a scrawl with the word 'seal' within it, or with the initials 'L. S.'" Hastings v. Vaughn, 5 Cal. 315.

§ 15. Joint authority. Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

Similar provisions. See Civ. Code, § 12; Pol. Code, § 15.

Legislation § 15. Enacted March 11, 1872.

Authority of majority. Before the adoption of this section, a grant of joint authority required the presence and participation of the whole number to whom the authority was granted, a majority of whom, however, could decide the question (Talcott v. Blanding, 54 Cal. 289; People v. Coghill, 47 Cal. 361; Wilbur v. Lynde, 49 Cal. 290; 19 Am. Rep. 645; People v. Ahern, 52 Cal. 208); but this section authorizes a majority of a quorum to act, and to decide any question (People v. Harrington, 63 Cal. 257; People v. Hecht, 105 Cal. 621; 45 Am. St. Rep. 96; 27 L. R. A. 203; 38 Pac. 941); so a majority of the grand jury may present an accusation, if not an indictment. Coffey v. Superior Court, 2 Cal. App. 457; 83 Pac. 580.

§ 16. Words and phrases. Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition.

Similar provisions. See Civ. Code, § 13; Pol. Code, § 16.

Legislation § 16. Enacted March 11, **1872.**

Construction of words and phrases. The rule here announced prevailed before the adoption of the codes, and applies alike to contracts, wills, statutes, and the constitution. Quigley v. Gorham, 5 Cal. 418; 63 Am. Dec. 139; Gross v. Fowler, 21 Cal. 392; Appeal of Houghton, 42 Cal. 35; People v. Eddy, 43 Cal. 331; 13 Am. Rep. 143; Weill v. Kenfield, 54 Cal. 111; San Francisco v. Flood, 64 Cal. 504; 2 Pac. 264; Cottle v. Spitzer, 65 Cal. 456; 52 Am. Rep. 305; 4 Pac. 435.

Words of common use. Words of common use are to be taken in their plain and ordinary import; forced constructions, which extend or limit the terms, are not permissible. Sprague v. Norway, 31 Cal. 173; Rosenberg v. Frank, 58 Cal. 387; Miller v. Dunn, 72 Cal. 462; 1 Am. St. Rep. 67; 14 Pac. 27.

Technical words. Technical words will be presumed to be used in a technical sense (Bruner v. Superior Court, 92 Cal. 239, 28 Pac. 341), unless a different intent is manifest from the context. Estate of Lufkin, 131 Cal. 291; 63 Pac. 469. If a technical word is manifestly used in an untechnical sense, however, the court will give it the meaning intended by the party using it (Central Pacific R. R. Co. v. Beal, 47 Cal. 151); and if it has both a popular and a technical signification, it will be given its popular meaning, unless the subject or context indicates that it was used in its technical sense. Weill v. Kenfield, 54 Cal. 111; Towle v. Matheus, 130 Cal. 574; 62 Pac. 1064. The word "assessment," in § 4 of article VI of the constitution, conferring appellate jurisdiction in cases at law involving "the legality of tax, impost, assessment, toll, or municipal fine," refers to assessments relating to public taxation, or to raise funds for local public improvements: it has no reference to assessments of corporate stock. Bottle Mining etc. Co. v. Kern, 154 Cal. 96; 97 Pac. 25. The word "near," as used in the street-assessment law, does not signify any precise measure of distance; it is a relative term, and its meaning must be determined by a reference to the subject-matter. Haughawout v. Percival, 161 Cal. 491; Ann. Cas. 1913D, 115; 119 Pac. 649. The words "husband" and "wife," as applied to domestic relations, have each but one meaning: "husband," a man that has a wife; "wife," a woman that has a husband; the words cannot mean an unmarried man and an unmarried woman, nor a divorced man and a divorced woman. Zanone v. Sprague, 16 Cal. App. 333; 116 Pac. 898.

§ 17. Certain terms used in this code defined. Words used in this code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word "person" includes a corporation as well as a natural person; the word "county" includes "city and county"; writing includes printing and typewriting; oath includes affirmation or declaration; and every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose"; signature or subscription includes mark, when the person cannot write, his name being written near it by a person who writes his own name as a witness; provided, that when a signature is by mark it must, in order that the same may be acknowledged or may serve as the signature to any sworn statement, be witnessed by two persons who must subscribe their own names as witness thereto.

The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "property" includes both real and personal property;

2. The words "real property" are coextensive with lands, tenements, and hereditaments;

3. The words "personal property" include money, goods, chattels, things in action, and evidences of debt;

4. The word "month" means a calendar month, unless otherwise expressed;

5. The word "will" includes codicil;

6. The word "writ" signifies an order or precept in writing, issued in the name of the people, or of a court or judicial officer; and the word "process" a writ or summons issued in the course of judicial proceedings;

7. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories; and the words "United States" may include the district and territories;

8. The word "section" whenever hereinafter employed, refers to a section of this code, unless some other code or statute is expressly mentioned.

9. The word "affinity" when applied to the marriage relation, signifies the connection existing in consequence of marriage, between each of the married persons and the blood relatives of the other.

Notice, defined. See Pol. Code, § 4175.
Process, defined. See Pol. Code, § 4175.
Words used in boundaries, defined. See Pol. Code, §§ 3903–3907.
Words and phrases, defined. See Pen. Code, § 7; Pol. Code, § 17; Civ. Code, § 14.

Legislation § 17. 1. Enacted March 11, **1872,** based on Practice Act, § 647, which read: "Words used in this act in the present tense shall be deemed to include the future as well as the present; words used in the singular number shall be deemed to include the plural, and the plural the singular; writing shall be deemed to include printing or printed paper; oath to include affirmation or declaration; signature or subscription, to include mark when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness." As enacted in 1872, § 17 read: "Whenever the terms mentioned in this section are employed in this code they are employed in the senses hereafter affixed to them, except where a different sense plainly appears: 1. The term 'signature' includes any name, mark, or sign, written with intent to authenticate any instrument or writing. 2. The term 'writing' includes both printing and writing. 3. The term 'land,' and the phrases 'real estate' and 'real property,' includes lands, tenements, and hereditaments, and all rights thereto, and interests therein. 4. The words 'personal property' include money, goods, chattels, evidence of debt, and 'things in action.' 5. The word 'property' includes personal and real property. 6. The word 'month' means a calendar month, unless otherwise expressed; and the word 'year,' and also the abbreviation 'A. D.,' is equivalent to the expression 'year of our Lord.' 7. The word 'oath' includes 'affirmation' in all cases where an affirmation may be substituted for an oath; and in like cases the word 'swear' includes the word 'affirm.' Every mode of oral statement under oath or affirmation is embraced by the term 'testify,' and every written one in the term 'depose.' 8. The word 'state,' when applied to the different parts of the United States, includes the District of Columbia and the territories; and the words 'United States' may include the district and territories. 9. Where the term 'person' is used in this code to designate the party whose property may be the subject of any offense, action, or proceeding, it includes this state, any other state, government, or country which may lawfully own any property within this state, and all public and private corporations or joint associations, as well as individuals. 10. The word 'person' includes bodies politic and corporate. 11. The singular number includes the plural, and the plural the singular. 12. Words used in the masculine gender comprehend as well the feminine and neuter. 13. Words used in the present tense include the future, but exclude the past. 14. The word 'will' includes codicils. 15. The word 'writ' signifies an order or precept in writing, issued in the name of the people, or of a court, or judicial officer. 16. 'Process' is a writ or summons issued in the course of judicial proceedings. 17. The word 'vessel,' when used with reference to shipping, includes ships of all kinds, steamboats, and steamships, canal-boats, and every structure adapted to be navigated from place to place. 18. The term 'peace-officer' signifies any one of the officers mentioned in § 817 of the Penal Code. 19. The term 'magistrate' signifies any one of the officers mentioned in § 808 of the Penal Code."

2. Amended by Stats. **1873–74,** p. 280, to read as at present, except for the changes of 1903.

3. Amendment by Stats. **1891,** p. 117; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1903,** p. 134, (1) adding the clause, "the word 'county' includes 'city and county,'" after the words "a natural person"; (2) changing, after words "written near it," from "and witnessed by a person who writes his own name as a witness" to read to end of paragraph as at present; and (3) adding subds. 8, 9.

Gender. The masculine includes the feminine and the neuter gender. Foltz v. Hoge, 54 Cal. 28; People v. Pico, 62 Cal. 50; People v. Monteith, 73 Cal. 7; 14 Pac. 373. Thus, the term "horse" includes all animals of the horse kind, male and female (People v. Pico, 62 Cal. 50), as well as a gelding. People v. Monteith, 73 Cal. 7; 14 Pac. 373.

Number. The singular number includes the plural, and vice versa. Simonson v. Burr, 121 Cal. 582; 54 Pac. 87; Quint v. Dimond, 135 Cal. 572; 67 Pac. 1034; Downing v. Rademacher, 136 Cal. 673; 69 Pac. 415; People v. Kelly, 146 Cal. 119; 79 Pac. 846. In applying this section to the construction of §§ 938, 941, and 963, post, such sections must be read as if the words "appeal," "appellant," and "party aggrieved" were plural. Estate of Sutro, 152 Cal. 249; 92 Pac. 1027.

Person. The word "person" includes an artificial as well as a natural person. Spring Valley Water Works v. Schottler,

62 Cal. 69; Douglass v. Pacific Mail S. S. Co., 4 Cal. 304; Central Pacific R. R. Co. v. State Board of Equalization, 60 Cal. 35; People v. Riverside, 66 Cal. 288; 5 Pac. 350.

Writing A printed signature instead of a written one is sufficient, when appended to a published resolution of a board of supervisors (Williams v. McDonald, 58 Cal. 527); and an attorney's printed signature to a pleading will not render void a judgment. Hancock v. Bowman, 49 Cal. 413. Though not expressly authorized by statute, the printed signature of the clerk is sufficient, where the seal of the court is attached to the document (Ligare v. California Southern R. R. Co., 76 Cal. 610; 18 Pac. 777); and the facsimile of an autograph may be adopted by a person, and papers issued with such an autograph printed thereon, issued by his direction, are valid. Pennington v. Baehr, 48 Cal. 565.

Property. The word "property," when used in its ordinary, popular sense, includes not only visible and tangible property, but choses in action also, such as solvent debts secured by mortgage (People v. Eddy, 43 Cal. 331; 13 Am. Rep. 143); and the right to appeal an action is property (People v. Cadman, 57 Cal. 562); but the word "property" does not include "credits," within § 13 of article XI of the constitution of 1849, concerning revenue (People v. Hibernia Sav. & L. Soc., 51 Cal. 243; 21 Am. Rep. 704; Bank of Mendocino v. Chalfant, 51 Cal. 369; Mackay v. San Francisco, 113 Cal. 392; 45 Pac. 696); nor does it include a business, occupation, or calling (People v. Coleman, 4 Cal. 46; 60 Am. Dec. 581); nor a license to retail intoxicating liquors. Hevren v. Reed, 126 Cal. 219; 58 Pac. 536; Ex parte Christensen, 85 Cal. 208; 24 Pac. 747.

Real property. "Real property" is coextensive with lands, tenements, and hereditaments. Summerville v. Stockton Milling Co., 142 Cal. 529; 76 Pac. 243.

Personal property. A promissory note, under the third subdivision of this section, is personal property (Hoxie v. Bryant, 131 Cal. 85; 63 Pac. 153), as is also money (Butler v. Baber, 54 Cal. 178); and an undivided interest in real property converted into a right to receive money in lieu thereof. John M. C. Marble Co. v. Merchants' Nat. Bank, 15 Cal. App. 347; 115 Pac. 59.

Undertaking on appeal. This section does not apply to an undertaking on appeal; its signification is to be determined from the language used. Bergevin v. Wood, 11 Cal. App. 643; 105 Pac. 935.

"At." The word "at," when applied to the place or location of an object is not treated as definitely locative; it denotes nearness or proximity, and is less definite than "in" or "on." Los Angeles County v. Hannon, 159 Cal. 37; Ann. Cas. 1912B, 1065; 112 Pac. 878.

"Person," as including private corporation. See note 20 Ann. Cas. 737.

Who or what is included in the term "person." See note 19 L. R. A. 222.

What is sufficient signature. See note 55 Am. Rep. 651.

Signature by mark. See note 22 L. R. A. 370.

"Deposition," defined. See note 13 L. R. A. 366.

As to whether ability to write invalidates signature made by mark or aid of other person guiding pen. See note 7 L. R. A. (N. S.) 1193.

"Property," as including standing timber, within meaning of fire-insurance policy. See note 6 Ann. Cas. 569.

"Property," within false-pretenses statute, as including bills and notes. See note 9 Ann. Cas. 970.

"Personal property," in will, as including money. See note Ann. Cas. 1913D, 857.

What is "month," in computation of time. See note 78 Am. St. Rep. 384.

Meaning of "month." See note 12 L. R. A. 770.

"Affinity," defined. See note 11 L. R. A. 630.

§ 18. Statutes, etc., inconsistent with code repealed. No statute, law, or rule is continued in force because it is consistent with the provisions of this code on the same subject; but in all cases provided for by this code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed and abrogated. This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this code provided; nor does it affect any private statute not expressly repealed.

Effect of code on prior statutes. See ante, § 8; also repealing clause at the end of this code.

Limitations, effect of code on. See ante, § 9.

Retroactive effect. See ante, § 3.

Statutes continued in force. See Pol. Code, §§ 18, 19.

Vested rights. See ante, § 8.

Legislation § 18. 1. Enacted March 11, **1872. 2.** Amendment by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

Cases not provided for by the code. In cases not provided for by the code, the existing statutes governing the same are not repealed (Whitaker v. Haynes, 49 Cal. 596; Heppe v. Johnson, 73 Cal. 265; 14 Pac. 833; Wheatland Mill Co. v. Pirrie, 89 Cal. 459; 26 Pac. 964; Fanning v. Leviston, 93 Cal. 186; 28 Pac. 943; Golden Gate

Lumber Co. v. Sahrbacher, 105 Cal. 114; 38 Pac. 635); nor are subsequent statutes passed at the same session. Smith v. McDermott, 93 Cal. 421; 29 Pac. 34.

Consistent statutes. Before the enactment of the codes, the rule was, that, where a later statute showed a clear intent to prescribe the only rule which should govern in the cases provided for, the former statute was repealed thereby, whether consistent or inconsistent (Sacramento v. Bird, 15 Cal. 294; Ex parte Smith, 40 Cal. 419); but where such intent did not appear, both statutes were allowed to stand together, unless the repugnancy between them was irreconcilable. Perry v. Ames, 26 Cal. 372.

Inconsistent provisions. A repeal is either by express words or by necessary implication: a repeal by implication takes place whenever it is apparent from the subsequent legislation that the legislature did not intend that the former act should remain in force (Christy v. Board of Supervisors, 39 Cal. 3); but repeals by implication are not favored by the courts (Merrill v. Gorham, 6 Cal. 41; Scofield v. White, 7 Cal. 400; People v. San Francisco etc. R. R. Co., 28 Cal. 254; In re Yick Wo, 68 Cal. 294; 58 Am. Rep. 12; 9 Pac. 139); and it is only where there is a plain and unavoidable repugnance that a repeal by implication will take place (Estate of Wixom, 35 Cal. 320; Ex parte Smith, 40 Cal. 419; People v. Linn, 23 Cal. 150; People v. Sargent, 44 Cal. 430); and where the former statute regulates the matter only incidentally, the later statute, which is made to govern the whole subject-matter, repeals so much of the former statute as is in conflict (Dobbins v. Board of Supervisors, 5 Cal. 414; People v. McGuire, 32 Cal. 140), and then only so far as the repugnancy extends (Crosby v. Patch, 18 Cal. 438); but, where possible, such a construction will be given the two statutes as will enable both to have effect. Crosby v. Patch, 18 Cal. 438; Pond v. Maddox, 38 Cal. 572; Cerf v. Reichert, 73 Cal. 360; 15 Pac. 10.

Express continuance in force. Where an act contains a clause repealing all laws in conflict therewith, a previous repugnant law is repealed thereby, unless the terms of the act show an intention to keep such previous law in force (People v. Grippen, 20 Cal. 677); but where such an act does not repeal a prior act, by name, on the same subject-matter, it leaves in force such provisions thereof as are not in conflict with the later act (People v. Durick, 20 Cal. 94); and where the subsequent statute designates certain sections or portions of the former act as repealed by implication, the portions not mentioned are continued in force (Crosby v. Patch, 18 Cal. 438), and in such cases the two acts will be construed together as one act (Manlove v. White, 8 Cal. 376); but a mere declaration in a subsequent statute, that a repealing statute shall not repeal certain laws or provisions of a prior act, will not exempt them from the repealing effect of such prior act, nor will it revive the laws so repealed. State v. Conkling, 19 Cal. 501.

Revival of former laws. Where a general act is repealed as to a part thereof, and is afterwards amended as thus partially repealed, the amendment will not revive the act as to the portion repealed. People v. Tyler, 36 Cal. 522. The repeal of a repealing act does not revive the former act, nor give it any force or effect; to revive the former, it must be re-enacted (People v. Hunt, 41 Cal. 435; Meek v. McClure, 49 Cal. 623; Thomason v. Ruggles, 69 Cal. 465; 11 Pac. 20); but where a subsequent special statute controls the provisions of a general statute, the latter is revived by an amendment of the former, calculated to give effect to the general law. People v. Phœnix, 6 Cal. 92; People v. Wells, 11 Cal. 329.

Effect of pending proceeding. The portions of the amended sections of the code, which are merely copied in the new enactment without change, are not to be considered as repealed thereby and again re-enacted, but to have been the law continuously, and the new parts or changed portions are not to be taken as having been the law at any time prior to the passage of the amended act. Central Pacific R. R. Co. v. Shackelford, 63 Cal. 261; People v. Sutter Street Ry. Co., 117 Cal. 604; 49 Pac. 736.

Implied repeal of statute by code, revision or re-enactment. See notes 88 Am. St. Rep. 287; 5 Ann. Cas. 502.

CODE COMMISSIONERS' NOTE. "Every statute must be considered according to what appears to have been the intention of the legislature, and even though two statutes relating to the same subject be not in terms repugnant or inconsistent, if the latter statute was clearly intended to prescribe the only rule which should govern in the case provided for, it will be construed as repealing the original act." City and County of Sacramento v. Bird, 15 Cal. 295; Sedgwick on Stat. and Const. Law, p. 124; also note to § 8, ante. "Whether consistent or not with the provisions of this code." See Perry v. Ames, 26 Cal. 382, where it is held that, "as all laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable." See also Bowen v. Lease, 5 Hill, 221, from which this language is quoted. In view of this decision, the language of the text was necessary repealing all former laws on the same subject, whether consistent or not.

§ 19. This act, how cited, enumerated, etc. This act, whenever cited, enumerated, referred to, or amended, may be designated simply as "The

Code of Civil Procedure," adding, when necessary, the number of the section.

Legislation § 19. Enacted March 11, 1872.

§ 20. **Judicial remedies defined.** Judicial remedies are such as are administered by the courts of justice, or by judicial officers empowered for that purpose by the constitution and statutes of this state.

Legislation § 20. Enacted March 11, 1872.

CODE COMMISSIONERS' NOTE. Introduced as a concise and convenient definition of judicial remedies.

Definition of "remedy." "The action or means given by law for the recovery of a right." Tomlin's Law Dict. "The means employed to enforce a right or redress an injury." Bouv. Law Dict. The definition in the text is introduced as a concise and convenient definition of judicial remedies. Every original application to a court of justice for a judgment or order is a remedy. Belknap v. Waters, 11 N. Y. 478; Matter of Cooper, 22 N. Y. 87; 11 Abb. Pr. 329; 20 How. Pr. 8.

§ 21. **Division of judicial remedies.** These remedies are divided into two classes:

1. Actions; and,
2. Special proceedings.

Legislation § 21. Enacted March 11, 1872.

CODE COMMISSIONERS' NOTE. In the Matter of Dodd, 27 N. Y. 633, a special proceeding is said to be limited to a litigation in a court of justice. So, also, the same views are held in People v. Heath, 20 How. Pr. 307; People v. Board of Police, 39 N. Y. 506; affirming S. C., 40 Barb. 626; but see contra, People v. Boardman, 4 Keyes, 59; see People v. Commissioners of Highways, 27 How. Pr. 158, and cases there commented on; Wait's N. Y. Code, § 1.

§ 22. **Action defined.** An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

Legislation § 22. Enacted March 11, 1872.

Distinction between terms. An action, as distinguished from the suit in which it is enforced, is simply the right or power to enforce an "obligation," or "what is owed to the plaintiff"; the "action" springs from the "obligation" which it seeks to enforce, and the "cause of action" is simply the "obligation," regardless of whether the action is ex contractu or ex delicto, or for compensation, or for damages, or for restitution, or in rem or in personam; the "cause of action" is to be distinguished from the "remedy," which is simply the means by which the "obligation," or the corresponding action, is effectuated, and is also to be distinguished from the "relief" sought. Frost v. Witter, 132 Cal. 421; 84 Am. St. Rep. 53; 64 Pac. 705.

Special proceedings. According to the course of the common law, probate matters belonged to ecclesiastical jurisdiction; thus, a proceeding in probate is not an action at law, as defined by this section (Estate of Moore, 72 Cal. 335; 13 Pac. 880; McLeran v. Benton, 73 Cal. 329; 2 Am. St. Rep. 814; 14 Pac. 879); nor are proceedings in insolvency (In re Dennery, 89 Cal. 101; 26 Pac. 639); nor proceedings in eminent domain. John Heinlen Co. v. Superior Court, 17 Cal. App. 660; 121 Pac. 293.

CODE COMMISSIONERS' NOTE. An action is a lawful demand of a man's right—Co. Litt., p. 285a, § 492; Comyn's Digest, "Action"; Bank of Commerce v. Rutland etc. R. R. Co., 10 How. Pr. 9; see Mayhew v. Robinson, 10 How. Pr. 164. Any judicial proceeding which, if conducted to a termination, will result in a judgment, is an action. People v. County Judge of Rensselaer, 13 How. Pr. 400; see remarks of Justice Potter, in People v. Colborne, 20 How. Pr. 380. Not every judicial decision which terminates in a judgment constitutes an action. Coe v. Coe, 37 Barb. 233; 14 Abb. Pr. 88; see 2 Wait's Law and Practice, p. 40.

What are actions. Under a similar provision in the New York code, it was held that a proceeding supplementary to execution was not a special proceeding under the code, but a proceeding in the action. Dresser v. Van Pelt, 15 How. Pr. 19; Seeley v. Black, 35 How. Pr. 369; Lawrence v. Farmer's L. & T. Co., 6 Duer, 689; Bank of Genesee v. Spencer, 15 How. Pr. 412. An order or decree having been made in an action, if a party to the action institutes proceedings to enforce it, it is a proceeding in the action, and not a special proceeding. Pitt v. Davison, 37 N. Y. 235; 24 How. Pr. 374; 3 Abb. Pr. (N. S.) 405. Held otherwise, however, if proceeding be for punishment, as for contempt, of party disobeying order. See Holstein v. Rice, 24 How. Pr. 135; 15 Abb. Pr. 307; Forbes v. Willard, 54 Barb. 520. Proceedings for partition of lands by summons and complaint are actions. Myers v. Rasback, 2 Code R., p. 13; 4 How. Pr. 83; Backus v. Stilwell, 1 Code R., p. 70; 3 How. Pr. 318; contra, see Traver v. Traver, 3 How. Pr. 351; affirmed 3 How. Pr. 368; 1 Code R., p. 112; explained in Row v. Row, 4 How. Pr. 133. The following have been held actions: A proceeding to enforce mechanic's lien. People v. County Judge of Rensselaer, 13 How. Pr. 398. To compel a determination of claims relating to real property. Mann v. Provost, 3 Abb. Pr. 446. To obtain the remedy given by a writ of mandate where return is made and issues joined. People v. Lewis, 28 How. Pr. 159; 28 How. Pr. 470; People v. Colborne, 20 How. Pr. 382. A proceeding by the attorney-general to annul a patent granting lands. People v. Clarke, 11 Barb. 337; 9 N. Y. 349.

What are not actions. A submission of a controversy under § 1138, post, of this code, would not be an action. See decision on a similar section of New York code, Lang v. Ropke, 1 Duer, 701. Neither would an application to vacate a judgment rendered upon confession. Belknap v. Waters, 11 N. Y. 477. Nor proceedings on the reference of claims against executors or administrators. Coe v. Coe, 37 Barb. 232; 14 Abb. Pr. 86; Akely v. Akely, 17 How. Pr. 21. Nor a proceeding to punish a party for contempt in disobeying order in proceedings supplementary to execution. Holstein v. Rice, 24 How. Pr. 135; Gray v. Cook, 15 Abb. Pr. 308; Forbes v. Willard, 54 Barb. 520. Nor an application for admission as attorney and an order denying it. Matter of Cooper, 22 N. Y. 67; Matter of the Graduates, 20 How. Pr. 1; 11 Abb. Pr. 301. Nor a summary proceeding to remove tenant from possession of demised premises. People v. Hamilton, 15 Abb. Pr. 328; 39 N. Y. 107; People v. Boardman, 4 Keyes, 59. Nor an application for injunction, which before answer is not an ordinary proceeding in the action. Becker v. Hager, 8 How. Pr. 68; see Wait's N. Y. Code, § 2.

§ 23. Special proceeding defined. Every other remedy is a special proceeding.

Special proceedings of a civil nature. See post, Part III, §§ 1063 et seq.

Legislation § 23. Enacted March 11, **1872.**

Special proceedings. Any proceeding in a court, which, under the common-law and equity practice, was not either an action at law or a suit in equity, is a special proceeding, under this section. In re Central Irrigation District, 117 Cal. 382; 49 Pac. 354; Yuba County v. North America etc. Mining Co., 12 Cal. App. 223; 107 Pac. 139. Thus, a contest to revoke the probate of a will is a special proceeding (Estate of Joseph, 118 Cal. 660; 50 Pac. 768); and so is a proceeding to determine heirship, under § 1664, post (Smith v. Westerfield, 88 Cal. 374; 26 Pac. 206; Estate of Burton, 93 Cal. 459; 29 Pac. 36; Estate of Blythe, 110 Cal. 226; 42 Pac. 641; Estate of Sutro, 143 Cal. 487; 77 Pac. 402), and an insolvency proceeding (In re Dennery, 89 Cal. 101; 26 Pac. 639); and also an action to determine, upon reference by the surveyor-general, the right to purchase school-lands from the state (Risdon v. Prewett, 8 Cal. App. 435; 97 Pac. 73), and an application for a writ of mandate (Jones v. Board of Police Commissioners, 141 Cal. 96; 74 Pac. 696); but the entry of judgment on an appeal bond, against the sureties thereon, is not a special proceeding. Hawley v. Gray Brothers etc. Co., 127 Cal. 560; 60 Pac. 437. In a special proceeding the court is limited by the terms and conditions of the statute under which such proceedings are authorized. Smith v. Westerfield, 88 Cal. 374; 26 Pac. 206.

CODE COMMISSIONERS' NOTE. What is a special proceeding? Punishment of contempts. See Holstein v. Rice, 24 How. Pr. 135; 15 Abb. Pr. 307; Forbes v. Willard, 54 Barb. 520; 37 How. Pr. 193. Mandamus a special proceeding. See People v. Schoonmaker, 19 Barb. 658; but see People v. Lewis, 28 How. Pr. 159; Ct. of App., S. C., 28 How Pr. 470. Proceedings supplementary to execution have been held not to be special proceedings. Dresser v. Van Pelt, 6 Duer, 688; 15 How. Pr. 19. In the Matter of Dodd, 27 N. Y. 629, it was held that "to be a special proceeding in the sense of the New York code, there must be a litigation in a court of justice"; but a different opinion is entertained in People v. Commissioners of Highways, 27 How. Pr. 158; People v. Boardman, 4 Keyes, 59. Part III of this code treats of all such special proceedings as writs of mandate and prohibition. §§ 1067–1110. Contesting elections. §§ 1111–1127. Summary proceedings. §§ 1132–1178. Enforcement of liens. §§ 1180–1206. Contempts. §§ 1209–1222. Voluntary dissolution of corporations. §§ 1227–1233. Eminent domain (condemnation of private property). §§ 1237–1263. Escheated estates. §§ 1269–1272. Change of names. §§ 1275–1278. Arbitrations. §§ 1281–1290. Proceedings in probate courts. §§ 1298–1346. Of sole traders. §§ 1811–1821. Proceedings in insolvency. § 1822. "Special cases" have been defined to be "special proceedings," characteristically differing from ordinary suits at common law, but embracing such matters as writs of quo warranto, mandamus, inquisitions of lunacy, and the like. People v. Day, 15 Cal. 91; Saunders v. Haynes, 13 Cal. 145; People v. Schoonmaker, 19 Barb. 657; Kundolf v. Thalheimer, 12 N. Y. 593; see, however, Parsons v. Tuolumne Water Co., 5 Cal. 43; 63 Am. Dec. 76; and Brock v. Bruce, 5 Cal. 279. Proceedings for partition are special proceedings. Waterman v. Lawrence, 19 Cal. 218, 79 Am. Dec. 212.

§ 24. Division of actions. Actions are of two kinds:

1. Civil; and,
2. Criminal.

Civil action, form of. See post, § 307.
Criminal action. See post, § 31.

Legislation § 24. Enacted March 11, **1872.**

Civil actions. A civil action is one arising out of an obligation or an injury, whether it be at law or in equity. Ex parte Harker, 49 Cal. 465. Thus, a proceeding for the arrest of a defendant in a civil action is civil, and not criminal. Ex parte Harker, 49 Cal. 465.

Criminal actions. A criminal action is defined by § 683 of the Penal Code.

§ 25. Civil actions arise out of obligations or injuries. A civil action arises out of—

1. An obligation;
2. An injury.

Legislation § 25. Enacted March 11, **1872.**

§ 26. Obligation defined. An obligation is a legal duty, by which one person is bound to do or not to do a certain thing, and arises from:

1. Contract; or,
2. Operation of law.

Obligation, what is. See Civ. Code, §§ 1427, 1428.

Legislation § 26. **1.** Enacted March 11, **1872,** and then read: "An obligation is a legal duty, by which one person is bound to the performance of an act towards another, and arises from: 1. The contract of the parties; or, 2. The operation of law."

2. Amended by Code Amdts. **1873–74,** p. 281, to read as at present.

3. Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

§ 27. Division of injuries. An injury is of two kinds:

1. To the person; and,
2. To property.

Legislation § 27. **1.** Enacted March 11, **1872.** **2.** Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

§ 28. Injuries to property. An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it.

Legislation § 28. **1.** Enacted March 11, **1872.** **2.** Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

§ 29. Injuries to the person. Every other injury is an injury to the person.

Legislation § 29. **1.** Enacted March 11, **1872.** **2.** Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

§ 30. Civil action, by whom prosecuted. A civil action is prosecuted by one party against another for the enforcement or protection of a right, or the redress or prevention of a wrong.

Forms of action. See post, § 307.

Legislation § 30. **1.** Enacted March 11, **1872.** **2.** Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

Assignment of lien. Where the existence of a lien does not depend upon possession, it may be assigned, and the assignment of the claim carries with it the right to the lien as an incident. Duncan v. Hawn, 104 Cal. 14; 37 Pac. 626.

§ 31. Criminal actions. The Penal Code defines and provides for the prosecution of a criminal action.

Criminal action, defined. See Pen. Code, § 683.

Legislation § 31. **1.** Enacted March 11, **1872.** **2.** Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

§ 32. Civil and criminal remedies not merged. When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

Legislation § 32. Enacted March 11, **1872.**

CODE COMMISSIONERS' NOTE. Civil remedies are not merged in felonies, nor are they suspended until the conviction of the offender. Gordon v. Hostetter, 37 N. Y. 99; 4 Abb. Pr. (N. S.) 263; 4 Trans. App. 375; Wait's Ann. N. Y. Code, § 7.

PART I.

COURTS OF JUSTICE.

TITLE I. ORGANIZATION AND JURISDICTION. §§ 33–153.

II. JUDICIAL OFFICERS. §§ 156–188.

III. PERSONS SPECIALLY INVESTED WITH POWERS OF A JUDICIAL NATURE. §§ 190–259.

IV. MINISTERIAL OFFICERS OF COURTS OF JUSTICE. §§ 262–274.

V. PERSONS SPECIALLY INVESTED WITH MINISTERIAL POWERS RELATING TO COURTS OF JUSTICE. §§ 275–304.

Legislation Part I. (Titles I–V, §§ 33–304.)
1. Enacted March 11, **1872.**
2. Amended by Code Amdts. **1880,** p. 21, by "An Act to amend Part One of the Code of Civil Procedure, and each and every title, chapter, article, and section of said Part One, and substituting a new Part One to take the place thereof in said Code, relating to Courts of Justice, and various officers connected therewith." This act was declared unconstitutional, in People v. Ransom, 58 Cal. 558.

TITLE I.

ORGANIZATION AND JURISDICTION.

Chapter I. Courts of Justice in General. §§ 33, 34.
II. Court of Impeachment. §§ 35–39.
III. Supreme Court. §§ 40–64.
IV. Superior Courts. §§ 65–79.
V. Justices' Courts. §§ 82–119.
Article I. Justices' Courts in Cities and Counties. §§ 85–100.
II. Justices' Courts in Townships. §§ 103–109.
III. Justices of the Peace and Justices' Courts in General. §§ 110–119.
VI. Police Courts. § 121.
VII. General Provisions respecting Courts of Justice. §§ 124–153.
Article I. Publicity of Proceedings. §§ 124, 125.
II. Incidental Powers and Duties of Courts. §§ 128–131.
III. Judicial Days. §§ 133–135.
IV. Proceedings in Case of Absence of Judge. §§ 139, 140.
V. Provisions respecting Places of Holding Courts. §§ 142–144.
VI. Seals of Courts. §§ 147–153.

CHAPTER I.

COURTS OF JUSTICE IN GENERAL.

§ 33. Courts of justice in general.
§ 34. Courts of record.

§ 33. Courts of justice in general. The following are the courts of justice of this state:

1. The court of impeachments;
2. The supreme court;
3. The superior courts;
4. The justices' courts;
5. The police courts, and such other inferior courts as the legislature may establish in any incorporated city or town, or city and county.

Judicial department. See Const., arts. III, VI. Subd. 5. See Const., art. VI, § 13.

Jurisdiction of above courts considered, post, in the various chapters treating thereof.

Court of impeachment. See post, §§ 36 et seq.

Supreme court. See post, §§ 40 et seq.

District courts of appeal. See Stats. 1903, p. 737.

Superior courts. See post, §§ 65 et seq.

Justices' courts. See post, §§ 85 et seq.

Police courts. See post, § 121.

Legislation § 33. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 333), and then read: "The following are the courts of justice of this state; 1. The court for the trial of impeachments; 2. The supreme court; 3. The district courts; 4. The county courts; 5. The probate courts; 6. The municipal criminal court of San Francisco; 7. The justices' courts; 8. The police courts."

2. Amended by Code Amdts. **1880,** p. 21.

3. Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

Juvenile court. The Juvenile Court Law of 1911 is constitutional. Moore v. Williams, 19 Cal. App. 600; 127 Pac. 509.

Police court. A police judge, though a judicial officer, is also a municipal officer. People v. Henry, 62 Cal. 557.

CODE COMMISSIONERS' NOTE. Based upon act of 1863 (Stats. 1863, p. 333), with the court for the trial of impeachments and the municipal criminal court of San Francisco added, and "police courts" substituted in the place of the sixth subdivision of that act, which reads "Recorders' and other inferior municipal courts."

1. Jurisdiction of courts in general. The first point decided by any court, although it may not be in terms, is that the court has jurisdiction. Clary v. Hoagland, 6 Cal. 688.

2. Void judgment if jurisdiction be wanting. The judgment of any court is void where there is a want of jurisdiction. Hahn v. Kelly, 34 Cal. 402; 94 Am. Dec. 742.

3. Jurisdiction of courts before adoption of constitutional amendments. Effect of amendments to constitution on jurisdiction of the courts existing prior to their adoption. See Gillis v. Barnett, 38 Cal. 393. And as to jurisdiction of courts existing prior to adoption of constitution, in 1849, and intendments in favor of their judgments, see Ryder v. Cohn, 37 Cal. 69.

4. "Amount in controversy." The "amount in controversy" means the sum claimed in the complaint or declaration, so far as relates to the jurisdiction of the court. Costs of suit, etc., are mere incidents, not controlling the jurisdiction; so a judgment may be for more than the "amount in controversy" and not affect the matter of jurisdiction. Bradley v. Kent, 22 Cal. 169.

5. Jurisdiction by certiorari. The jurisdiction of a court by certiorari (writ of review) does not depend upon the amount in controversy (overruling People v. Carman, 18 Cal. 693). Winter v. Fitzpatrick, 35 Cal. 273.

6. Common-law jurisdiction. The phrase, "courts having common-law jurisdiction," discussed and defined in Matter of Conner, 39 Cal. 98; 2 Am. Rep. 427.

7. Inquiry by one court into jurisdiction of another. The power of a court of law to inquire into the jurisdiction of a court of original juris-

diction by which the judgment was rendered is fully recognized, but the inquiry is limited to an inspection of the record, and if it does not appear affirmatively upon the face of the record that the court had no jurisdiction, the impeachment, for all purposes of a defense to the action at law, has failed. The jurisdiction in courts of original jurisdiction need not appear affirmatively upon the face of the record, the presumption thereof coming to the aid of the record. Carpentier v. City of Oakland, 30 Cal. 439.

8. **Presumption in favor of jurisdiction.** It is presumed (where judgment is rendered by a court of original jurisdiction) that the court had jurisdiction over the person of the defendant, unless the contrary affirmatively appears in the record. Sharp v. Daugney, 33 Cal. 507.

9. **When jurisdiction presumed in courts of record.** As to courts of record, all intendments are in favor of the regularity of their proceedings. People v. Blackwell, 27 Cal. 65; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Barrett v. Carney, 33 Cal. 530; Quivey v. Porter, 37 Cal. 458; People v. Connor, 17 Cal. 361; People v. Hobson, 17 Cal. 424; People v. Robinson, 17 Cal. 368; People v. Lawrence, 21 Cal. 372. See generally Ryder v. Cohn, 37 Cal. 69.

10. **Want of jurisdiction, how taken advantage of.** In courts of general jurisdiction, the cause of action need only to be stated, and the want of jurisdiction arising from the insufficient value of the subject-matter in dispute must be taken advantage of in some other way. Doll v. Feller, 16 Cal. 432. In a court of limited and special jurisdiction, every fact essential to confer jurisdiction must be alleged. But the rule is otherwise in courts of general jurisdiction. A demurrer to their jurisdiction only lies where the want of such jurisdiction appears affirmatively upon the face of the complaint.

11. **Jurisdiction not presumed in courts not of record.** The jurisdiction of courts not of record being special and limited, the law presumes nothing in favor of their jurisdiction, and a party who asserts a right under a judgment rendered in such a court must show affirmatively every fact necessary to confer such jurisdiction. Rowley v. Howard, 23 Cal. 401; Swain v. Chase, 12 Cal. 283; Whitwell v. Barbier, 7 Cal. 54; Lowe v. Alexander, 15 Cal. 296; King v. Randlet, 33 Cal. 318; Jolley v. Foltz, 34 Cal. 321.

12. **Meaning of "within the jurisdiction of the court."** By the phrase "within the jurisdiction of the court" is meant "within the state," so far as to the necessity of producing a subscribing witness or accounting for an omission so to do. Stevens v. Irwin, 12 Cal. 306.

13. **Appeals from state to Federal courts; transfer of causes; conflicts of jurisdiction; admiralty and maritime cases, etc.** As to appeals from state courts to the supreme court of the United States, when allowed, how taken, etc., see Ferris v. Coover, 11 Cal. 175; Hart v. Burnett, 20 Cal. 171; Greely v. Townsend, 25 Cal. 610. It was held that no cause can be transferred from a state court to any court of the United States. The Federal and state courts have in some cases concurrent jurisdiction, but the court which first has possession of the subject must decide it. Neither a writ of error nor appeal lies to take a case from a state court to the supreme court of the United States. An appeal is allowed when the decision of the state court is adverse to a law of Congress, treaty, etc. Johnson v. Gordon, 4 Cal. 368. See this case reviewed in Warner v. Steamship Uncle Sam, 9 Cal. 697, and finally overruled, in most particulars, in Greely v. Townsend, 25 Cal. 613; see also Martin v. Hunter's Lessees, 1 Wheat. 304, 372; 4 L. Ed. 97, 113; Cohen v. Virginia, 6 Wheat. 264; Waring v. Clark, 5 How. 461; 12 L. Ed. 237. As to jurisdiction and removal of cause between state and Federal courts, see Calderwood v. Hager, 20 Cal. 167; Hart v. Burnett, 20 Cal. 169. The judge of the United States district court for the district of Oregon has not jurisdiction, while holding the circuit court of the United States for the district of California, to issue a citation on a writ of error from the supreme court of the United States to the supreme court of this state. He has not jurisdiction either to take or approve security required in order to make the writ of error a supersedeas, etc. The citation and security taken would not operate as a supersedeas in such a case. Tompkins v. Mahoney, 32 Cal. 240. The jurisdiction of the courts of the United States in admiralty and maritime causes is not exclusive; the states have power to confer upon their courts all admiralty and maritime jurisdiction. Congress has not power to make this jurisdiction exclusive in the Federal courts. State and Federal courts have in these cases concurrent original jurisdiction. Johnson v. Gordon, 4 Cal. 368; see, however, Greely v. Townsend, 25 Cal. 613, overruling this case; Taylor v. Steamer Columbia, 5 Cal. 268; Warner v. Steamship Uncle Sam, 9 Cal. 697; Ord v. Steamer Uncle Sam, 13 Cal. 369; and see The Moses Taylor, 4 Wall. (U. S.) 411; 18 L. Ed. 397; The Hine v. Trevor, 4 Wall. (U. S.) 556; 18 L. Ed. 451. See particularly Appendix Pol. Code, vol. 2, p. 344, note to art. III, § 2, Federal Constitution.

14. **Actions against steamers and vessels.** The provisions of the code, §§ 813–827, post, providing for actions against steamers, vessels, and boats, confers upon the district court admiralty jurisdiction pro tanto. The rule in regard to action in rem, in both admiralty and common-law courts, gives exclusive jurisdiction in a given case to that tribunal which has acquired it by a judicial seizure of the thing, and such seizure has always been essential to a proceeding in rem. But our statute alters the rule. It makes the service of the process upon a person standing in a particular relation to the thing equivalent to its seizure for the purpose of conferring jurisdiction; and it necessarily follows that jurisdiction in rem may exist in several courts at the same time. The court, however, whose mesne or final process has first made actual seizure must have exclusive power over its disposal and the distribution of the funds arising therefrom. The judgments of other courts, if filed in the court having custody of the fund, are complete adjudications of the subject-matter of litigation which they disclose, and entitled to distribution according to their respective merits. Averill v. The Hartford, 2 Cal. 308; but see The Moses Taylor, 4 Wall. (U. S.) 411; 18 L. Ed. 397; The Hine v. Trevor, 4 Wall. 556; 18 L. Ed. 451; see Appendix Pol. Code, vol. 2, p. 344, note to art. III, § 2, Federal Constitution.

15. **Admiralty cases.** A cause of action, to be cognizable in admiralty, whether arising out of a contract, claim, service, or obligation or liability of any kind, must relate to the business of commerce and navigation. People v. Steamer America, 34 Cal. 679; see also this case for the manner of raising in the state courts the issue of jurisdiction as to whether the action is within maritime jurisdiction.

16. **Maritime causes.** In a case clearly arising on questions belonging to admiralty and maritime transactions, it has been intimated that a state court might hold its jurisdiction where the people of the state were plaintiffs, and the action was for the collection of state revenues. See People v. Steamer America, 34 Cal. 681.

17. **Suits between citizens and foreigners.** United States courts have no jurisdiction over suits between alien and alien, but are confined to actions between citizens and foreigners (Mossman v. Higginson, 4 Dall. 12; 1 L. Ed. 720; Montalet v. Murray, 4 Cranch, 46; 2 L. Ed. 545; Hodgson v. Bowerbank, 5 Cranch, 303; 3 L. Ed. 108; Jackson v. Twentyman, 2 Pet. 136; 7 L. Ed. 374); and where both parties to a suit are aliens, the action cannot be on that account transferred from a state to a Federal court. Orosco v. Gagliardo, 22 Cal. 83.

18. **When state courts have jurisdiction over foreign seamen, etc.** When a foreign master of a foreign vessel discharges a foreign seaman for no wrongful act, the seaman may maintain an action for his wages in a state court. All persons in time of peace (in such matters as these) have the right to resort to the tribunals of the

nation where they may happen to be, for the protection of their rights. The jurisdiction of courts over them is complete, except where it is excluded by treaty. Pugh v. Gillam, 1 Cal. 485; The Jerusalem, 2 Gall. 191; Fed. Cas. No. 7293; Moran v. Baudin, 2 Pet. Adm. Decis. 415; Fed. Cas. No. 9785.

19. **State courts no jurisdiction over crimes against United States.** The state tribunals have no jurisdiction to punish crimes against the laws of the United States, as such. But the same act may be an offense against both the laws of the United States and of this state. People v. Kelly, 38 Cal. 145; 99 Am. Dec. 360. State tribunals have no jurisdiction to punish perjury against the United States. State v. Adams, 4 Blackf. 146; State v. Pike, 15 N. H. 83; People v. Kelly, 38 Cal. 145; 99 Am. Dec. 360.

20. **Jurisdiction of state courts over action of United States land department.** It has been questioned whether the courts of California have jurisdiction to review the action of the United States land department upon contests of rights of pre-emption when the subject-matter of the investigation, and upon which the preference depended, were not transactions which occurred in the contest, but before it. Quinn v. Kenyon, 38 Cal. 499.

21. **Trespass committed by United States officer.** The fact that a trespass was committed by a marshal of the United States, or by a deputy, under cover of his office, does not deprive the district court of jurisdiction over the same. Hirsch v. Rand, 39 Cal. 315.

22. **Jurisdiction of one court cannot encroach upon that of another.** Each branch of the judicial department has its functions assigned by the constitution. The sixth article of the constitution seems to have been drawn with great skill and care, and endeavors to establish a complete judicial system. It not only provides for the establishment of the several judicial tribunals, but also distributes among these tribunals their several powers. It would derange our judicial system if the legislature could confer on one court the functions and powers which the constitution has conferred on another. Zander v. Coe, 5 Cal. 230.

23. **Courts of concurrent jurisdiction cannot interfere with each other's actions.** One court has no power to interfere with the judgments and decrees of another court of concurrent jurisdiction. The only case in which it will be allowed is where the court in which the action or proceeding is pending is unable, by reason of its jurisdiction, to afford the relief sought. Anthony v. Dunlap, 8 Cal. 26; Rickett v. Johnson, 8 Cal. 34; Chipman v. Hibbard, 8 Cal. 268; Phelan v. Smith, 8 Cal. 520; Uhlfelder v. Levy, 9 Cal. 607; see also Gorham v. Toomey, 9 Cal. 77. Nor does it make any difference if, in a suit in equity, new parties are brought in strangers to the action at law sought to be enjoined. Uhlfelder v. Levy, 9 Cal. 607. There are exceptions to the general rule, however, as, for instance, the same fraudulent debtor might confess different fraudulent judgments in different judicial districts. It would not then be necessary for creditors to bring a different suit in each different court. So, also, where the code requires the action to be tried in a particular county, it must be brought there. Uhlfelder v. Levy, 9 Cal. 607. Compare this case with Heyneman v. Dannenberg, 6 Cal. 376; 65 Am. Dec. 519. Nor can a state court enjoin the proceedings of a Federal court. Phelan v. Smith, 8 Cal. 520.

24. **When court has jurisdiction by mandamus.** If a court entertained jurisdiction of the action, its proceedings, however erroneous they may have been, could not have been reviewed in proceedings for a mandamus. People v. Pratt, 28 Cal. 166; 87 Am. Dec. 110; Cariaga v. Dryden, 29 Cal. 307. But if the court refused to act in the case, the question whether it rightfully so refused may be entertained in this proceeding. Beguhl v. Swan, 39 Cal. 411. Where the district court has ordered a cause commenced therein to be transferred to the United States circuit court, the supreme court has no jurisdiction to issue a writ of mandate to compel the district judge to proceed with the trial of the cause. Francisco v. Manhattan Ins. Co., 36 Cal. 283.

25. **When by certiorari.** A writ of certiorari will not lie to an inferior court to annul an order which is merely erroneous, but not void in a matter of which such court has acquired jurisdiction. People v. Elkins, 40 Cal. 647.

26. **Jurisdiction in injunction proceedings.** It is well settled that under our judicial system one court has no jurisdiction to enjoin the execution of a decree of another court of co-ordinate jurisdiction, unless it plainly appear that the court rendering the judgment or decree under which proceedings are sought to be stayed "is unable by reason of its jurisdiction to afford the relief sought." Anthony v. Dunlap, 8 Cal. 27; Rickett v. Johnson, 8 Cal. 35; Chipman v. Hibbard, 8 Cal. 270; Gorham v. Toomey, 9 Cal. 77; Uhlfelder v. Levy, 9 Cal. 614; Hockstacker v. Levy, 11 Cal. 76; Grant v. Quick, 5 Sandf. 612. The fact that parties to an injunction proceeding are not the same as the parties to the judgment or decree sought to be enjoined does not relieve the case from the operation of this rule, nor can the consent of the parties change the rule. It is established and enforced not so much to protect the rights of the parties as to protect the rights of the courts of co-ordinate jurisdiction, to avoid conflict of jurisdiction, confusion, and delay in the administration of justice. Revalk v. Kraemer, 8 Cal. 71; 68 Am. Dec. 304. Proceedings for such purpose should always be commenced in the court rendering the judgment or decree and having control of its execution. Crowley v. Davis, 37 Cal. 268.

27. **Jurisdiction in injunction proceedings.** A court has jurisdiction to issue a restraining order when at the time of issuance there was a suit pending between the parties. Prader v. Purkett, 13 Cal. 588.

28. **Explanation of exclusive and concurrent jurisdiction. Their effect.** There is nothing in the nature of jurisdiction as applied to courts which renders it exclusive. It is not like a grant of property which cannot have several owners at the same time. It is a matter of common experience that two or more courts may have concurrent powers over the same parties and the same subject-matter. Jurisdiction is not a right or privilege belonging to the judge, but an authority or power to do justice in a given case, when it is brought before him. There is no instance in the whole history of the law where the mere grant of jurisdiction to a particular court without any words of exclusion has been held to oust any other court of the powers which it before possessed. Creating a new forum with concurrent jurisdiction may have the effect of withdrawing from the courts which before existed a portion of the cause which would otherwise have been brought before them, but it cannot affect the power of the old courts to administer justice when it is demanded at their hands. Courtwright v. Bear River etc. Mining Co., 30 Cal. 580; quoting from Delafield v. State of Illinois, 2 Hill, 164.

29. **Exclusive jurisdiction.** Where a new right is provided by law, together with a particular remedy for its violation, and the statute prescribes that the remedy must be pursued in a certain court, the jurisdiction on that subject is exclusive in such court. Reed v. Omnibus R. R. Co., 33 Cal. 212.

30. **Concurrent jurisdiction.** Where the constitution grants original jurisdiction of a particular class of cases to one court, without expressly excluding other courts from exercising any jurisdiction therein, those other courts are not for that reason necessarily excluded from exercising concurrent jurisdiction in the same class of cases. Courtwright v. Bear River etc. Mining Co., 30 Cal. 580 (commenting on and in some particulars overruling Zander v. Coe, 5 Cal. 230; Caulfield v. Stevens, 28 Cal. 118; while the case of Perry v. Ames, 26 Cal. 383; Conant v. Conant, 10 Cal. 249; 70 Am. Dec. 717, in matters of concurrent jurisdiction, etc., are approved).

31. **Concurrent jurisdiction of equity and law courts.** Where courts of law and equity have

concurrent jurisdiction, if a court of law has first acquired jurisdiction and decided a case, a court of equity will not interfere to set aside the judgment, unless the party has been prevented by some fraud or accident from availing himself of the defense at law. Dutil v. Pacheco, 21 Cal. 438; 82 Am. Dec. 749; Truly v. Wanzer, 5 How. (U. S.) 141; 12 L. Ed. 88; Allen v. Hopson, 1 Freem. (Miss.) 276; Norton v. Wood, 22 Wend. 524; Smith v. McIver, 9 Wheat. 532, 6 L. Ed. 152; Haden v. Garden, 7 Leigh (Va.), 157.

32. **Equity and law jurisdiction over fraud.** A court of equity will take jurisdiction in cases of fraud, even if founded on the express provisions of statutes, and especially to guard against the fraudulent acts of a debtor. Heyneman v. Dannenberg, 6 Cal. 376; 65 Am. Dec. 519; Adams v. Woods, 8 Cal. 156; 68 Am. Dec. 313. Equity exercises concurrent jurisdiction with courts of law in questions involving fraud, accident, or confidence, and there are cases where, even though an action at law might be maintained, yet a bill in equity is equally proper. See New York Ins. Co. v. Roulet, 24 Wend. 505; Story Eq., p 64; People v. Houghtaling, 7 Cal. 348.

33. **Equity jurisdiction, specific performance, etc.** The ground of the interference of chancery in bills quia timet, and to enforce the specific execution of an agreement, is that there is no other adequate remedy. If a plain, speedy, unembarrassed remedy exists at law, equity will not interfere. As a general rule, equity will not interfere in cases sounding in damages. But there are exceptions to this rule. See Buxton v. Lister, 3 Atk. 384; Adderley v. Dixon, 1 Sim. & S. 607. In these exceptional cases, the jurisdiction is put on the ground that compensation in damages would not afford a full, complete, and satisfactory remedy, and it is denied when this is attainable at law. The jurisdiction attaches also in cases of apprehended injury, as by sureties, etc., where no loss has as yet followed. 2 Story Eq., p. 35. It has been held that in cases of a general covenant to indemnify, although sounding in damages, equity will decree specific performance. See Ranelaugh v. Hayes, 1 Vern. 189; Champion v. Brown, 6 Johns. Ch. 398; Chamberlain v. Blue, 6 Blackf. (Ind.) 491; White v. Fratt, 13 Cal. 521. But equity will not assume jurisdiction where a remedy at law exists, and compel the surrender or cancellation, or enjoin the collection of a promissory note or other instrument. Smith v. Sparrow, 13 Cal. 596, affirming Lewis v. Tobias, 10 Cal. 574. See authorities cited in last-named case.

34. **Equity jurisdiction over judgments fraudulently altered, etc.** When a judgment was rendered, and afterward fraudulently altered so as to include a new party not in the first instance included in the judgment, and who had never been served with process, equity has jurisdiction of the case, and may vacate the judgment. (The remedy by appeal might suffice in ordinary cases where there was a want of service. See facts of case.) It made no difference that the judgment was void on its face, as the party was liable to be harassed by it and it was about to be enforced against him. Chester v. Miller, 13 Cal. 558.

35. **Equity jurisdiction complete between partnership and individual creditors.** A court of equity has jurisdiction in cases where there is a conflict between partnership and individual creditors. Conroy v. Woods, 13 Cal. 626; 73 Am. Dec. 605; Place v. Sweetzer, 16 Ohio, 142; Washburn v. Bank of Bellows Falls, 19 Vt. 278–286.

36. **Equity jurisdiction to decree execution of deed, etc.** Jurisdiction of a court of equity, to decree a re-execution of a deed, is unquestionable. The jurisdiction is maintained in such cases where the destruction would create a defect in the deraignment of the party's title and thus embarrass the assertion of his rights to the property. Cummings v. Coe, 10 Cal. 529.

37. **Equity jurisdiction to decree alimony.** A court of equity has jurisdiction to decree alimony in an action which has no reference to a divorce or separation. Galland v. Galland, 38 Cal. 265; see dissenting opinion in same case.

38. **Jurisdiction of court over infants in partition suits.** The proceeding for partition is a special proceeding, and the statute prescribes its course and effect; and though after jurisdiction has attached errors in the course of the cause cannot be collaterally shown to impeach a judgment, yet, so far at least as the rights of infants are involved, the court has no jurisdiction, except over the matter of partition, and has no power to render a decree divesting an infant's estate, not for the purpose of partition, but upon an adverse claim by other parties. Waterman v. Lawrence, 19 Cal. 210; 79 Am. Dec. 212.

39. **Jurisdiction of courts over fugitives from justice from other states.** A court of general original jurisdiction, exercising the usual powers of a common-law court, has jurisdiction to hear and determine all matters, and to issue all necessary writs for the arrest and transfer of a fugitive criminal to the authorized agent of the state from whence he fled. Where a right is established by law, such courts can apply the appropriate remedy and issue the necessary writs without special legislation. Matter of Romaine, 23 Cal. 585.

40. **Jurisdiction to review judgment on appeal lost, if appeal is not taken in time.** If a court has jurisdiction to review a judgment on an appeal taken within one year after rendition of the same, yet that jurisdiction is lost at the expiration of the year. Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323; affirmed in Milliken v. Huber, 21 Cal. 166.

41. **Effect of adjournment of court for term on its jurisdiction of cases pending and decided.** A court does not lose jurisdiction by adjournment before the case has been finally determined; and the court may vacate a default if final judgment has not been entered, even though the court has adjourned for the term. Wilson v. Cleaveland, 30 Cal. 193 (and De Castro v. Richardson, 25 Cal. 49, and Willson v. McEvoy, 25 Cal. 169, were held not to be inconsistent with this ruling). In a proceeding to condemn land the district court did not lose its power or control over the case by reason of its adjournments at any time. It was unfinished business, and necessarily continued in court until the deed was made and the money paid over under the order of the court. Stanford v. Worn, 27 Cal. 174.

42. **Jurisdiction of courts over cases decided is lost by adjournment for the term.** After the adjournment of the term the court loses all control over cases decided, unless its jurisdiction is saved by some motion or proceeding at the time, except in the single case provided by statute, where the summons has not been served, in which the party is allowed six months to move to set the judgment aside (Suydam v. Pitcher, 4 Cal. 280; Robb v. Robb, 6 Cal. 21; Morrison v. Dapman, 3 Cal. 255; Shaw v. McGregor, 8 Cal. 521; Bell v. Thompson, 19 Cal. 706; Lattimer v. Ryan, 20 Cal. 632); but the court has power to make an order nunc pro tunc, or to correct a mere clerical error. Swain v. Naglee, 19 Cal. 127; De Castro v. Richardson, 25 Cal. 49; see Willson v. McEvoy, 25 Cal. 169.

43. **Where general jurisdiction exists, court has full jurisdiction in all particulars of the case.** When a court has general jurisdiction of a subject it has power to make a full disposition of the matter and conclude litigation respecting it. Kennedy v. Hammer, 19 Cal. 387.

44. **Jurisdiction cannot be conferred by agreement of parties.** A stipulation by parties waiving all objections to jurisdiction cannot confer on a district court jurisdiction to try a cause in one county, when by operation of law the court is adjourned in that county and its term commenced in another. Bates v. Gage, 40 Cal. 184; Smith v. Chichester, 1 Cal. 409; Domingues v. Domingues, 4 Cal. 186; Norwood v. Kenfield, 34 Cal. 329. To sustain a personal judgment the court must have jurisdiction of the subject-matter and of the person. Where the jurisdiction of the court, as to the subject-matter, has been limited by the constitution or by statute, the consent of parties cannot confer jurisdiction. But when the limit regards certain persons, they may, if competent, waive their privilege, and this will give the court jurisdiction. If, how-

ever, a party has not been brought into court, and does not of himself come in and waive the necessity of service, the court has no jurisdiction over him. Gray v. Hawes, 8 Cal. 562. There is in these cases, however, a decided distinction between want of jurisdiction and irregularity in procuring jurisdiction. Whitwell v. Barbier, 7 Cal. 63.

45. **Jurisdiction cannot be divested by agreement of parties.** The agreements of parties cannot divest the courts of law or equity of their proper jurisdiction. Muldrow v. Norris, 2 Cal. 74; 56 Am. Dec. 313. The consent of parties cannot alter the jurisdiction of courts. Biddle Boggs v. Merced Mining Co., 14 Cal. 279. Nor can any stipulation made by them affect their jurisdiction. Reed v. Bernal, 40 Cal. 628.

46. **Jurisdiction by publication of summons.** The statutory provisions for acquiring jurisdiction of the person of the defendant, by publication of the summons instead of a personal service, must be strictly pursued. People v. Huber, 20 Cal. 81; Jordan v. Giblin, 12 Cal. 100; Evertson v. Thomas, 5 How. Pr. 45; Kendall v. Washburn, 14 How. Pr. 380.

47. **Jurisdiction in cases of publication, notice, summons, etc.** Stanford v. Worn, 27 Cal. 174; Steinbach v. Lesse, 27 Cal. 295; McMinn v. Whelan, 27 Cal. 300; Braly v. Seaman, 30 Cal. 610; Sharp v. Daugney, 33 Cal. 507; Townsend v. Tallant, 33 Cal. 45; 91 Am. Dec. 617; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Quivey v. Porter, 37 Cal. 458; McDonald v. Katz, 31 Cal. 169; Forbes v. Hyde, 31 Cal. 342; Eitel v. Foote, 39 Cal. 439; see post, §§ 1010–1017, inclusive.

48. **Jurisdiction by appearance of party in court.** A court has jurisdiction of the person where he voluntarily put in an appearance without the issuance of summons. Hayes v. Shattuck, 21 Cal. 51.

49. **Jurisdiction of the person by appearance in an action. What is an appearance?** See post, § 1014; Steinbach v. Lesse, 27 Cal. 295; Seale v. McLaughlin, 28 Cal. 668; see post, § 406.

50. **Jurisdiction by admission of service.** See Sharp v. Brunnings, 35 Cal. 528.

51. **Jurisdiction over persons appearing by attorney.** Court acquires jurisdiction only of those for whom the attorney finally appears. Forbes v. Hyde, 31 Cal. 342.

52. **Jurisdiction of special cases. Actions to abate nuisance.** The constitution permits the legislature to confer on county courts jurisdiction in "special cases"; but the term "special cases" was not meant to include any class of cases for which the courts of general jurisdiction had always supplied a remedy. The special cases, therefore, must be confined to such new cases as are the creation of statutes and the proceedings under which are unknown to the general framework of courts of common law and equity. The action to prevent or abate nuisances is not one of these, and is amply provided for in courts of general jurisdiction. In conferring this power upon county courts, the legislature exceeded its constitutional authority, and the portion of the act which contains it is invalid. Parsons v. Tuolumne County Water Co., 5 Cal. 43; 63 Am. Dec. 76; see, however, People v. Day, 15 Cal. 91.

53. **Jurisdiction of inferior courts.** Inferior courts cannot go beyond the authority conferred upon them by the statute under which they act. Winter v. Fitzpatrick, 35 Cal. 273.

54. **Jurisdiction of courts of executive of the state by writ of mandate, etc.** Courts having jurisdiction of writ of mandamus may issue such a writ to the governor to compel certain ministerial acts. Harpending v. Haight, 39 Cal. 189; 2 Am. Rep. 432 (Temple, J., dissenting in an elaborate opinion). Under the distribution of powers by the constitution the judiciary are not denied jurisdiction in cases where a fugitive from justice from another state is held in custody by virtue of a warrant issued by the executive of this state. The very object of the habeas corpus was to reach just such cases, and while the courts of the state possess no power to control the executive discretion and compel a surrender, yet he having once acted, that discretion may be examined into in every case where the liberty of the subject is involved. Ex parte Manchester, 5 Cal. 237.

55. **Jurisdiction of courts to inquire into legislative proceedings, constitutionality of laws, etc.** Many provisions of the constitution are addressed solely to the legislative department, and it may be said that all those provisions which require the legislature to do certain things, leaving the means and manner within the legislative discretion, are entirely beyond the reach of the judiciary, whose functions are wholly different from those of the law-making power. Some of the restrictions upon the powers of that body are addressed solely to the legislature. As an instance, I may mention those provisions relating to the qualifications, elections, and returns of its own members; and although the constitution expressly requires certain qualifications to constitute a member of either house, yet each house is expressly constituted the exclusive judge of those questions, and this court could not, in any manner, review such a decision. The true rule seems to be this: that when the right to determine the extent and effect of the restriction is either expressly or by necessary implication confided to the legislature, then the judiciary has no right to interfere with the legislative construction, but must take it to be correct. But in all other cases or restriction it is the right and duty of this court to decide the effect and extent of the restriction in the last resort. And as to the question whether the right to determine the extent and effect of the restriction is vested in the legislature or in the judiciary, this court must equally determine in the last resort. Nougues v. Douglass, 7 Cal. 65; see also Ex parte Shrader, 33 Cal. 279. But a court cannot review the act of the legislature upon a question whether or not a certain enterprise (such as a railroad) is a public benefit or use. The legislative declaration seems to be held final as to such matters. Napa Valley R. R. Co. v. Board of Supervisors, 30 Cal. 437; also, as to jurisdiction of the supreme court over a legislative act declaring certain improvements a "public use," see Sherman v. Buick, 32 Cal. 241; 91 Am. Dec. 577.

56. **Power of legislature over courts and judicial officers.** A special law directing a certain court to grant an order transferring an indictment pending therein against a party, for murder, to another district court, is constitutional. People v. Judge of Twelfth Dist., 17 Cal. 547. This case also comments on the general power of the legislature over courts. It has been held that the legislature can impose no duties upon the judiciary but such as are of a judicial character. The legislature cannot delegate to a court the power of establishing town governments or incorporating colleges and the like. People v. Nevada, 6 Cal. 143; Burgoyne v. Board of Supervisors, 5 Cal. 9; Phelan v. San Francisco, 20 Cal. 39; affirming S. C., 6 Cal. 531. Nor can it authorize a county judge to designate the time and place of holding an election; such is not a judicial act. Dickey v. Hurlburt, 5 Cal. 343.

57. **Miscellaneous.** See also as to jurisdiction, etc., of the several courts mentioned, post, §§ 42, 43, 44, 57, 34, 85, 86, 97, 106, 114, 115, 116, 117, 121, 128, 129, 165, 187, 259, and notes.

§ 34. Courts of record.

The courts enumerated in the first three subdivisions of the last preceding section are courts of record.

Courts of record. See Const., art. VI, § 12.

Legislation § 34. 1. Enacted March 11, **1872.**

2. Amended by Code Amdts. **1880.** p. 21, changing word "six" to "three," before "subdivisions."

3. Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

Courts of record. At common law, a court of record is one proceeding accord-

ing to the course of the common law (Ex parte Thistleton, 52 Cal. 220), in which the acts and judicial proceedings are enrolled for a perpetual memorial and testimony. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. Any court having a clerk and bailiff, and power to fine and imprison, is a court of record; and it is not necessary, to constitute such a court, that it have a seal. Ex parte Thistleton, 52 Cal. 220.

CODE COMMISSIONERS' NOTE. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742.

CHAPTER II.

COURT OF IMPEACHMENT.

§ 35. [Amended and renumbered section.]
§ 36. Members of the court.
§ 37. Jurisdiction.
§ 38. Officers of the court.
§ 39. Trial of impeachments provided for in the Penal Code.

§ 35. [See Legislation § 36.]

§ 36. Members of the court. The court of impeachment is the senate; when sitting as such court the senators shall be upon oath; and at least two thirds of the members elected shall be necessary to constitute a quorum.

Legislation § 36. **1.** Enacted March 11, **1872**, as § 35, and then read: "The court for the trial of impeachments is composed of the members of the senate, or a majority of them."

2. Amended by Code Amdts. **1880**, p. 22, and renumbered § 36.

3. Repeal by Stats. **1901**, p. 118; unconstitutional. See note ante, § 5.

§ 37. Jurisdiction. The court has jurisdiction to try impeachments, when presented by the assembly, of the governor, lieutenant-governor, secretary of state, controller, treasurer, attorney-general, surveyor-general, chief justice of the supreme court, associate justices of the supreme court, and judges of the superior courts, for any misdemeanor in office.

Officers liable to impeachment. See Const., art. IV, § 18; Pen. Code, § 737.

Legislation § 37. **1.** Enacted March 11, **1872**, as § 36, and then read: "The court has power to try impeachments, when presented by the assembly, of the governor, lieutenant-governor, secretary of state, controller, treasurer, attorney-general, surveyor-general, justices of the supreme court, and judges of the district courts, for any misdemeanor in office."

2. Amended by Code Amdts. **1880**, p. 22, and renumbered § 37.

3. Repeal by Stats. **1901**, p. 118; unconstitutional. See note ante, § 5.

Trial of other civil officers. Civil officers, other than those mentioned in this section, are to be tried for misdemeanor in office, as the legislature may provide (In re Marks, 45 Cal. 199), and a complaint may be filed by any private person. Woods v. Varnum, 85 Cal. 639; 24 Pac. 843.

CODE COMMISSIONERS' NOTE. Const. 1849, art. IV, § 18.

§ 38. Officers of the court. The officers of the senate are the officers of the court.

Legislation § 38. **1.** Enacted March 11, **1872**, as § 37.

2. Re-enacted by Code Amdts. **1880**, p. 22, as § 38, in amending Part I.

3. Repeal by Stats. **1901**, p. 118; unconstitutional. See note ante, § 5.

§ 39. Trial of impeachments provided for in the Penal Code. Proceedings on the trial of impeachments are provided for in the Penal Code.

Proceedings for removal. See Pen. Code, §§ 737 et seq.

Legislation § 39. **1.** Enacted March 11, **1872**, as § 38.

2. Re-enacted by Code Amdts. **1880**, p. 22, as § 39, in amending Part I.

3. Repeal by Stats. **1901**, p. 118; unconstitutional. See note ante, § 5.

CODE COMMISSIONERS' NOTE. See Pen. Code, §§ 737–753, inclusive.

CHAPTER III.

SUPREME COURT.

§ 40. Justices, elections, and terms of office.
§ 41. Computation of years of office.
§ 42. Vacancies.
§ 43. Departments.
§ 44. Apportionment of business.
§ 45. Court in bank.
§ 46. Absence or disability of chief justice.
§ 47. Sessions. Expenses.
§ 48. Adjournments.
§ 49. Decisions in writing.
§ 50. Jurisdiction of two kinds.
§ 51. Original jurisdiction.
§ 52. Appellate jurisdiction.
§ 53. Powers in appealed cases.
§ 54. Concurrence necessary to transact business.
§ 55. Transfer of books, papers, and actions.
§ 56. Remittiturs in transferred cases.
§ 57. Appeals in probate proceedings and contested election cases.
§ 58. [Related to terms of district court. Repealed. §§ 59–64. Same.]

§ 40. Justices, elections, and terms of office. The supreme court shall consist of a chief justice, and six associate justices, who shall be elected by the qualified electors of the state at large, at the general state elections next preceding the expiration of the terms of office of their predecessors respectively, and hold their offices for the term of twelve years from and after the first Monday after the first day of January next succeeding their election; provided, that of the justices elected at the general state election of eighteen hundred and seventy-nine, the chief justice shall go out of office at the end of eleven years, and the six associate justices shall have so classified, or shall so classify themselves, by lot, that two of them shall go out of office at the end of three years, two of them at the end of seven years, and two of them at the end of eleven years from the first Monday after the first day of January, eighteen hundred and eighty; and an entry of such classification shall have been, or shall be made in the minutes of the court in bank, signed by them, and a duplicate thereof filed in the office of the secretary of state.

Supreme court. See Const., art. VI, §§ 2, 3.
Eligibility. See post, § 156.
Jurisdiction of supreme court. See post, §§ 50–53.
Acts relating to supreme court commission. See post, Appendix, tit. "Courts."

Legislation § 40. **1.** Enacted March 11, **1872,** and then read: "The supreme court consists of a chief justice and four associate justices, elected at the judicial elections, and holding their offices for the term of ten years from the first day of January next after their election."
2. Amended by Code Amdts. **1880,** p. 22.
3. Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

Eligibility. Under the constitution of 1849, justices were not required to be lawyers, nor even licensed attorneys. People v. Dorsey, 32 Cal. 296.

Title to office. The title to office, of a judge of the supreme court, cannot be questioned, except in an action brought for that purpose (People v. Olds, 3 Cal. 167; 58 Am. Dec. 398; People v. Scannell, 7 Cal. 432; Satterlee v. San Francisco, 23 Cal. 314); and one entering into possession of the office by color of right, becomes a judge de facto. People v. Sassovich, 29 Cal. 480; Hull v. Superior Court, 63 Cal. 179.

CODE COMMISSIONERS' NOTE. Const., art. VI, §§ 2, 3. In the case of People v. Wells, 2 Cal. 198, the question was raised whether, in the case where a judge was absent from the state, the legislature could authorize the governor to make an appointment during the temporary absence of such judge. The question was not decided at the time, the court disagreeing, but was afterward considered, and it was decided (S. C., 2 Cal. 610) that such an absence was not a vacancy in office which could be filled by appointment of the governor, and that a law authorizing such an appointment was unconstitutional. Who are eligible to the office of justice of the supreme court. See post, § 156.

§ 41. Computation of years of office. The years during which a justice of the supreme court is to hold office are to be computed respectively from and including the first Monday after the first day of January of any one year to and excluding the first Monday after the first day of January of the next succeeding year.

Term, when commenced. See Const., art. VI, § 3.

Legislation § 41. **1.** Enacted March 11, **1872,** and then read: "The justice having the shortest term to serve is the chief justice."
2. Amended by Code Amdts. **1880,** p. 23.
3. Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

§ 42. **Vacancies.** If a vacancy occur in the office of a justice of the supreme court, the governor shall appoint an eligible person to hold the office until the election and qualification of a justice to fill the vacancy, which election shall take place at the next succeeding general election; and the justice so elected shall hold the office for the remainder of the unexpired term of his predecessor.

Vacancy in office. See Const., art. VI, § 3.
Vacancy. See subject generally, Pol. Code, §§ 995 et seq.
Absence or inability of chief justice to act. See post, § 46.
Vacancy in office of judge does not affect pending proceedings. See post, § 184.

Legislation § 42. **1.** Added by Code Amdts. **1880,** p. 23. The present § 50 is an amendment of the original § 42.
2. Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

Absence on leave. Absence of a judge from the state on leave is not such a vacancy as can be supplied by the executive under legislative authority. People v. Wells, 2 Cal. 198; People v. Mizner, 7 Cal. 519; People v. Whitman, 10 Cal. 38.

Vacancy and removal. It is only in cases where there is no incumbent to hold over, that the appointee of the executive can fill the office. People v. Whitman, 10 Cal. 38. The executive has no power to remove an officer whose term is fixed by the constitution or statute. People v. Mizner, 7 Cal. 519.

§ 43. **Departments.** There shall be two departments of the supreme court, denominated respectively department one and department two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time; provided, that the associate justices shall be competent to sit in either department, and may interchange with one another by agreement among themselves, or if no such agreement be made, as ordered by the chief justice. The chief justice may sit in either department, and shall preside when so sitting; but the justices assigned to each department shall select one of their number as presiding justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions in relation to the court in bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers; but one or more of the justices may adjourn from time to time with the same effect as if all were present, and the concurrence of three justices shall be necessary to pronounce a judgment; provided, that if three do not concur, the cause may be reheard in the same department, or transmitted to the other department, or to the court in bank.

Departments. See Const., art. VI, § 2.

Legislation § 43. **1.** Added by Code Amdts. **1880,** p. 23. The present § 51 is an amendment of the original § 43.
2. Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

Where justices are equally divided. Where the justices qualified to act are equally divided, there must, of necessity, be an affirmance of the judgment. Luco v. De Toro, 88 Cal. 26; 11 L. R. A. 543; 25 Pac. 983; and see Ayres v. Bensley, 32 Cal. 632; and see also Frankel v. Deidesheimer, 93 Cal. 73; 28 Pac. 794; Santa Rosa City Railroad v. Central Street Railway Co., 112 Cal. 436; 44 Pac. 733. Where the division of the justices is as to the reversal or affirmance of the judgment on appeal or writ of error, the judgment must be affirmed; the general rule is, that, where the motion is such as to make an affirmative decision indispensable to further progress of the action, an equal division will stop the action; but where the motion is in arrest of the progress of the action, an equal division is equivalent to a denial of the motion, and the case proceeds as if the motion had not been made; thus, a rehearing will be denied by an equal division of the judges, and likewise a motion for a new trial, an appeal from judgment, and an application for the admission of testimony. Ayres v. Bensley, 32 Cal. 632.

Rehearing. Power to grant a hearing in the supreme court, after a determination in a district court of appeal, expires thirty days after the judgment has been pronounced in said district court of appeal; but it is not necessary to file the order granting such hearing in the office of the

clerk of the supreme court within that time. People v. Ruef, 14 Cal. App. 581; 114 Pac. 48, 54.

Number of judges necessary to transact business of court. See note Ann. Cas. 1912A. 1251.

§ 44. Apportionment of business. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in bank. The order may be made before or after judgment pronounced by a department; but when a cause has been allotted to one of the departments, and a judgment pronounced therein, the order must be made within thirty days after such judgment, and concurred in by two associate justices; and if so made, it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a cause to be heard in bank. If the order be not made within the time above limited, the judgment shall be final; provided, that no judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice in writing, with the concurrence of two associate justices.

Similar provision in constitution. See Const., art. VI, § 2.

Legislation § 44. 1. Added by Code Amdts. **1880,** p. 23. The present § 52 is an amendment of the original § 44.

2. Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

§ 45. Court in bank. The chief justice or any four justices may convene the court in bank at any time, and the chief justice shall be the presiding justice of the court when so convened. The presence of four justices shall be necessary to transact any business, and the concurrence of four justices present at the argument shall be necessary to pronounce a judgment in the court in bank; provided, that if four justices so present do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument, but to render a judgment a concurrence of four justices shall be necessary; and every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments, and in such cases the judgment of the court in bank shall be final, unless within thirty days after such judgment an order be made in writing, signed by five justices, granting a rehearing.

Court in bank. See Const., art. VI, § 2.

Legislation § 45. 1. Added by Code Amdts. **1880,** p. 24. The present § 53 is an amendment of the original § 45.

2. Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

Hearing in bank. A rehearing in bank will not be granted, in a case where the cause has been heard and decided by the supreme court in department, and afterwards by the court in bank. Hegard v. California Insurance Co., 72 Cal. 535; 14 Pac. 180, 359.

Concurrence of four judges. Where a case is submitted on briefs alone, all the justices, having an equal opportunity to read the argument, are deemed to have been present at the argument, within the meaning of the constitution, and all or any of them are qualified to join in the decision. Philbrook v. Newman, 148 Cal. 173; 82 Pac. 772.

Rehearing. The clause requiring the order granting a rehearing to be "signed by five justices," is unconstitutional. Estate of Jessup, 81 Cal. 408; 6 L. R. A. 594; 21 Pac. 976; 22 Pac. 742, 1028.

§ 46. Absence or disability of chief justice. In case of the absence of the chief justice from the place at which the court in bank is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

Absence or disability of chief justice. See Const., art. VI, § 2.

Legislation § 46. **1.** Added by Code Amdts. **1880,** p. 24. The present § 54 is an amendment of the original § 46.

2. Repeal by Stats. **1901,** p. 118; unconstitutional. See note ante, § 5.

§ 47. Sessions. Expenses. The supreme court shall always be open for the transaction of business. It shall hold regular sessions for the hearing of causes, either in bank, or in one or both of its departments, at the capital of the state, commencing on the first Mondays of May and second Mondays of November; at the city and county of San Francisco, commencing on the second Mondays of January and third Mondays of July; and at the city of Los Angeles, commencing on the first Mondays of April and second Mondays of October; and special sessions at either of the above-named places at such other times as may be prescribed by the justices thereof. The justices and officers of the supreme court shall be allowed their actual traveling expenses in going to and from their respective places of residence upon the business of the court, or to attend its sessions. If proper rooms in which to hold the court, and for the accommodation of the officers thereof, are not provided by the state, together with attendants, furniture, fuel, lights, and stationery, suitable and sufficient for the transaction of business, the court, or any three justices thereof, may direct the clerk of the supreme court to provide such rooms, attendants, furniture, fuel, lights, and stationery; and the expenses thereof, certified by any three justices to be correct, shall be paid out of the state treasury, for which expenses, and to defray the traveling expenses of the justices and officers of the supreme court above mentioned, a sufficient sum shall be annually appropriated out of any funds in the state treasury not otherwise appropriated. The moneys so appropriated shall be subject to the order of the clerk of the supreme court, and be by him disbursed on proper vouchers, and the same shall be accounted for by him in annual settlements with the controller of state on the first Monday of December of each year.

Always open. See Const., art. VI, § 2; and post, § 134.

Legislation § 47. **1.** Enacted March 11, **1872,** as § 50, and then read: "The terms of this court must be held at the capital of the state. If proper rooms in which to hold the court, and for the chambers of the justices, are not provided by the state, together with attendants, furniture, fuel, lights, and stationery, suitable and sufficient for the transaction of business, the court may direct the sheriff of the county in which it is held to provide such rooms, attendants, furniture, fuel, lights, and stationery; and the expenses thereof, certified by a majority of the justices to be correct, must be paid out of the state treasury."

2. Amended by Code Amdts. **1877–78,** p. 22, (1) by changing the first sentence to read, "The January and July terms of this court shall be held at the city and county of San Francisco, the April and October term at the city of Los Angeles, and the May and November terms at the state capitol"; (2) by changing the words "chambers of the justices" to "accommodation of the officers thereof"; and (3) by adding, at the end of the section, the words, "for which expenses, and to defray the traveling expenses of the justices and officers of the court, as specified in § 51 of this code, a sufficient sum shall be annually appropriated out of any funds in the state treasury not otherwise appropriated; said moneys shall be subject to the order of the clerk of said court, and by him disbursed on proper vouchers, and the same shall be accounted for by him, in annual settlements with the controller of state, on the first Monday of December of each year." The § 51 referred to supra was embodied in the present § 47 in 1880, when Part I was amended, and was added by Code Amdts. 1877–78, p. 22, and read, "The justices and officers of the court shall be allowed their actual traveling expenses in going to and from San Francisco, Los Angeles, and the state capitol for the purpose of holding terms of court, as prescribed in sections forty-nine and fifty of this chapter."

3. Amended by Code Amdts. **1880,** p. 24, and renumbered § 47.

Payment of expenses. An irregularity in the indorsement of the state controller's warrant for the expenses of the court does not render it non-transferable by indorsement; and the fact that the items of expense ordered and allowed have not been actually paid by the clerk will not justify the treasurer in refusing payment. National Bank v. Herold, 74 Cal. 603; 5 Am. St. Rep. 476; 16 Pac. 507.

§ 48. Adjournments. Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court, or either of its departments, from sitting at any time.

Terms of courts. This section, with § 74, post, does away with the terms of courts. And see post, §§ 88, 104, as to justices' courts.

Legislation § 48. **1.** Added by Code Amdts. **1880,** p. 25, to supersede §§ 46, 48, 49, providing for adjournments and terms of court, and to conform to the new constitution.

2. Repeal by Stats. **1901,** p. 119; unconstitutional. See note ante, § 5.

§ 49. Decisions in writing. In the determination of causes, all decisions of the supreme court in bank, or in departments, shall be given in writing, and the grounds of the decision shall be stated.

Decisions to be in writing. See Const., art. vi, § 2.

Legislation § 49. **1.** Added by Code Amdts. **1880,** p. 25; based on Stats. 1863, p. 334, but was not codified in 1872, as the supreme court, in Houston v. Williams, 13 Cal. 24 [73 Am. Dec. 565], had held unconstitutional the provision requiring that "the reasons or grounds of the decision shall be given in a written opinion accompanying the same"; the objectionable feature being eliminated in the present section.

2. Repeal by Stats. **1901,** p. 119; unconstitutional. See note ante, § 5.

CODE COMMISSIONERS' NOTE. The provision of the act of 1863 (Stats. 1863, p. 334), requiring the court to give written opinion in important cases, has been omitted. In Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565, it was held that the constitutional duty of the court was discharged by the rendition of decisions; that the legislature could no more require the court to state the reasons for its decisions than the court could require the legislature to accompany the statutes with the reasons for their enactment. Says Justice Field: "No such power can exist in the legislative department, or be sanctioned by any court which has the least respect for its own dignity and independence."

§ 50. Jurisdiction of two kinds. The jurisdiction of the supreme court is of two kinds:

1. Original; and,
2. Appellate.

Jurisdiction generally. See subsequent sections of this chapter.

Legislation § 50. **1.** Enacted March 11, **1872,** as § 42.

2. Amended by Code Amdts. **1880,** p. 25, (1) renumbering the section § 50, and (2) changing the word "this" to "supreme."

3. Repeal by Stats. **1901,** p. 119; unconstitutional. See note ante, § 5.

§ 51. Original jurisdiction. In the exercise of its original jurisdiction the supreme court shall have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus; and it shall also have power to issue all other writs necessary and proper to the complete exercise of its appellate jurisdiction.

Original jurisdiction. See Const., art. vi, § 4.
Mandamus. See Const., art. vi, § 4; see also post, §§ 54, 76, 165, 1084 et seq., 1108–1110.
Certiorari. See Const., art. vi, § 4; see also post, §§ 54, 76, 165, 1067 et seq., 1108–1110.
Prohibition. See Const., art. vi, § 4; see also post, §§ 54, 76, 165, 1102 et seq., 1108–1110.
Habeas corpus. See Const., art. vi, § 4; also post, §§ 54, 76, 165. Generally. Pen. Code, §§ 1473 et seq.
Injunction. Post, §§ 54, 76, 165, 356, 525 et seq., 745, 1341.
Scire facias abolished. Post, § 802.
Quo warranto. Post, §§ 76, 803–810.
Writ.
1. **Defined.** Ante, § 17.
2. **Seal.** Post, § 153.
3. **Issuance.** Post, § 54.
4. **Service by telegraph.** Post, § 1017.

Powers of single justice to issue writs. See post, § 54.
Ne exeat. See post, §§ 478 et seq.

Legislation § 51. **1.** Enacted March 11, **1872,** as § 43 (based on Stats. 1863, p. 334), and then read: "Its original jurisdiction extends to the issuance of writs of mandate, review, prohibition, habeas corpus, and all writs necessary to the exercise of its appellate jurisdiction."

2. Amended by Code Amdts. **1880,** p. 25, and renumbered § 51.

3. Repeal by Stats. **1901,** p. 119; unconstitutional. See note ante, § 5. For original § 51, see ante, Legislation § 47.

Certiorari. The jurisdiction of the supreme court, upon certiorari, is limited to those cases which call in question the jurisdiction of an inferior court, board, or officer (People v. Johnson, 30 Cal. 98); and the writ will be granted, only when the act complained of is judicial in its character. Spring Valley Water Works v. Bryant, 52 Cal. 132; Lamb v. Schottler, 54 Cal. 319; People v. Board of Education, 54 Cal. 375; Spring Valley Water Works v. San Francisco, 82 Cal. 286; 16 Am. St. Rep. 116; 6 L. R. A. 756; 22 Pac. 910, 1046; Quinchard v. Board of Trustees, 113 Cal. 664; 45 Pac. 856. The writ cannot be used as a substitute for an appeal, where the time for taking the appeal has elapsed (Faut v. Mason, 47 Cal. 7), as it does not lie where there is an appeal (People v. Shepard, 28 Cal. 115; Stuttmeister v. Superior Court, 71 Cal. 322; 12 Pac. 270), or where there is any other plain, speedy, or adequate remedy (Faut v. Mason, 47 Cal. 7; Noble v. Superior Court, 109 Cal. 523; 42 Pac. 155); neither can it be used as a writ of error, to correct errors, either of law or of fact, committed within the jurisdiction of the lower court or tribunal. Central Pacific R. R. Co. v. Board of Equalization, 46 Cal. 667; Buckley v. Superior Court, 96 Cal.

119; 31 Pac. 8; Sherer v. Superior Court, 96 Cal. 654; 31 Pac. 565; Johnston v. Board of Supervisors, 104 Cal. 390; 37 Pac. 1046.

Mandamus. The supreme court has original jurisdiction to issue the writ, which is provided for by §§ 54, 76, 165, 1084, 1108, 1110, post. Hyatt v. Allen, 54 Cal. 353; Scott v. Boyle, 164 Cal. 321; 128 Pac. 941. An application for the writ will not be entertained by the district court of appeal, unless accompanied by a showing why it was not applied for in the lower court, and the reason for its being made in the first instance in the appellate court. Gray v. Mullins, 15 Cal. App. 118; 113 Pac. 694.

Prohibition. At common law, the writ of prohibition was an original remedial writ, provided as a remedy for the encroachment of jurisdiction; and, notwithstanding this section empowers the courts of this state to issue the writ to municipal corporations, or to boards clothed with governmental functions, it still retains its character as a prerogative writ, to be issued only in the sound discretion of the court. It ought not to issue to arrest any legislation pending before a body authorized to legislate with reference to matters of public interest. Spring Valley Water Works v. San Francisco, 52 Cal. 111; and see Maurer v. Mitchell, 53 Cal. 289; Lamb v. Schottler, 54 Cal. 319; People v. Board of Election Commissioners, 54 Cal. 404; Camron v. Kenfield, 57 Cal. 550; Spring Valley Water Works v. Bartlett, 63 Cal. 245; Hobart v. Tillson, 66 Cal. 210; 5 Pac. 83; Spring Valley Water Works v. San Francisco, 82 Cal. 286; 16 Am. St. Rep. 116; 6 L. R. A. 756; 22 Pac. 910, 1046. A district court of appeal has concurrent jurisdiction with the supreme court in original proceedings for a writ of prohibition; and a denial, by the district court of appeal, of an application for the writ, on its merits, is a bar to a subsequent application in the supreme court; and the only effectual method of obtaining the intervention of the supreme court, in proceedings before a district court of appeal for a writ of prohibition, is an application for a transfer of the case to the supreme court for review. Dawson v. Superior Court, 158 Cal. 73; 110 Pac. 109.

Habeas corpus. This writ is provided for by §§ 1473 et seq of the Penal Code. If the justices of a district court of appeal are unable to concur in a judgment upon application for a discharge on habeas corpus, the writ must be denied. Application of Ladue, 15 Cal. App. 188; 117 Pac. 586; Application of Galivan, 17 Cal. App. 624; 120 Pac. 1123.

Writs abolished. The writ of ne exeat is abolished (§ 24, ante, § 478, post), as is also the writ of scire facias (§ 802, post).

Necessary to appellate jurisdiction. The phrase "all other writs" includes such other writs as are not enumerated, which can issue only for the purpose of completing the exercise of its appellate jurisdiction by the supreme court. Hyatt v. Allen, 54 Cal. 353. The supreme court has power to frame and issue all writs and make all rules necessary to the exercise of its appellate jurisdiction, where the statute has not provided one (Somers v. Somers, 81 Cal. 608; 22 Pac. 967); and in those cases where the constitution has conferred a right of appeal to the supreme court, and the legislature has failed to provide a mode of appeal, that court will adopt a suitable mode. People v. Jordan, 65 Cal. 644; 4 Pac. 683.

Original jurisdiction of court of last resort in mandamus. See notes 20 Ann. Cas. 184; 58 L. R. A. 833; 38 L. R. A. (N. S.) 1000.

CODE COMMISSIONERS' NOTE. Const., art. vi, § 4; Stats. 1863, p. 334. The provision, that the writ of habeas corpus may be issued by each of the justices, and made returnable before the court, or any justice thereof, or before any district court, etc., relates rather to practice than power of the court, and has been inserted in the Penal Code, under the chapter relating to habeas corpus, Part II, Title XII.

1. **Issuance of the writs generally.** Before the amendments of 1862 to article vi of the state constitution, the supreme court had only appellate jurisdiction to issue any of the writs mentioned in the text, except habeas corpus. But the supreme court, even then, might issue any of these writs in aid of its appellate powers. See Ex parte Attorney-General, 1 Cal. 85; White v. Lighthall, 1 Cal. 347; People v. Turner, 1 Cal. 143; 52 Am. Dec. 295; People v. Turner, 1 Cal. 152; People v. Shear, 7 Cal. 139; Warner v. Hall, 1 Cal. 90; Purcell v. McKune, 14 Cal. 230; Miliken v. Huber, 21 Cal. 166. Since the amendments to the constitution it has original jurisdiction to issue these writs. Tyler v. Houghton, 25 Cal. 26; Miller v. Board of Supervisors, 25 Cal. 93. See the above-cited cases as to when these writs lie.

2. **Writ of mandate (mandamus).** See cases cited above, and also People v. Weston, 28 Cal. 640; People v. Hubbard, 22 Cal. 36; People v. Judge of Twelfth District, 17 Cal. 547; People v. Sexton, 24 Cal. 79; People v. Pratt, 28 Cal. 166; 87 Am. Dec. 110; Hopper v. Kalkman, 17 Cal. 517; Brooks v. Calderwood, 19 Cal. 124; Francisco v. Manhattan Ins. Co., 36 Cal. 283. It will compel the performance of a ministerial act. Harpending v. Haight, 39 Cal. 189; 2 Am. Rep. 432. As to when this writ lies, its effect, application, etc., see post, §§ 1084–1097.

3. **Writ of review (certiorari).** As to cases where a writ of review (certiorari) has been held to issue, see Clary v. Hoagland, 5 Cal. 476; California Northern R. R. Co. v. Board of Supervisors, 18 Cal. 671; Comstock v. Clemens, 19 Cal. 77; Murray v. Board of Supervisors, 23 Cal. 492; Chard v. Harrison, 7 Cal. 113; Ex parte Field, 1 Cal. 187; People v. Turner, 1 Cal. 143; 52 Am. Dec. 295; People v. Turner, 1 Cal. 152; Wratten v. Wilson, 22 Cal. 465; People v. Supervisors of El Dorado County, 8 Cal. 58; Miller v. Board of Supervisors, 25 Cal. 94; Hastings v. San Francisco, 18 Cal. 49. It does not lie when an appeal may be taken. Clary v. Hoagland, 13 Cal. 173; People v. Shepard, 28 Cal. 115; Gray v. Schupp, 4 Cal. 185. It cannot be taken before the inferior tribunal has completed its judgment. Wilson v. Board of Supervisors, 3 Cal. 386; and see also, as to its issuance and effect, People v. Board of Delegates, 14 Cal. 479; Robinson v. Board of Supervisors, 16 Cal. 208; El Dorado County v. Elstner, 18 Cal. 144; see also Central Pacific R. R. Co. v. Board of Equalization, 32 Cal. 582; 34 Cal. 352.

4. **Review.** The jurisdiction of the supreme court, under the amended constitution, to review the proceedings of inferior courts, boards, and officers upon certiorari, is limited by the very nature of the writ to cases where the jurisdiction of the inferior court, board, or officer is impeached. People v. Johnson, 30 Cal. 101.

Certiorari, or writ of review, lies to review the proceedings of inferior tribunals, etc., only when there has been an excess of jurisdiction. People v. Johnson, 30 Cal. 98; see Ex parte Perkins, 18 Cal. 60; Coulter v. Stark, 7 Cal. 244; Ex parte Hanson, 2 Cal. 263; People v. Dwinelle, 29 Cal. 632; Application of Spring Valley Water Works, 17 Cal. 132. But not to correct, merely, errors of law. People v. Burney, 29 Cal. 459. Under the provisions of the constitution, a writ of review (certiorari) can be rightfully issued from the office of the clerk of the supreme court, only upon an order of the court. Smith v. Oakland, 40 Cal. 481; see further, post, §§ 1066–1077.

5. Writ of prohibition. Original jurisdiction of supreme court. Tyler v. Houghton, 25 Cal. 26; see cases cited in note 1, supra; and also, further, post, §§ 1102–1105.

6. Habeas corpus. See Ex parte Rowe, 7 Cal. 175; 7 Cal. 181; 7 Cal. 184; Ex parte Ellis, 11 Cal. 222; Ex parte Perkins, 18 Cal. 60; In re Corryell, 22 Cal. 178; In re Romaine, 23 Cal. 585; In re Perkins, 2 Cal. 424; In re Manchester, 5 Cal. 237; People v. Turner, 1 Cal. 143; 52 Am. Dec. 295; People v. Turner, 1 Cal. 152; People v. Smith, 1 Cal. 9; In re Ring, 28 Cal. 247; Ex parte Branigan, 19 Cal. 133; Ex parte Bird, 19 Cal. 130; Ex parte Queen of the Bay, 1 Cal. 157; Ex parte Gibson, 31 Cal. 619, 91 Am. Dec. 546; see further, Pen. Code, §§ 1473–1505, inclusive.

§ 52. Appellate jurisdiction. The supreme court shall have appellate jurisdiction:

1. In all cases in equity, except such as arise in justices' courts.

2. In all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars.

3. In all cases of forcible entry and detainer, proceedings in insolvency, actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law.

4. In all special proceedings.

5. In all criminal cases prosecuted by indictment, or information, in a court of record, on questions of law alone.

Appellate jurisdiction. See Const., art. vi, § 4.
Appeals.
1. In general. Post, §§ 936 et seq.
2. To supreme court. Post, §§ 963 et seq.

Legislation § 52. **1.** Enacted March 11, **1872**, as § 44, and then read: "Its appellate jurisdiction extends: 1. To all civil actions for relief formerly given in courts of equity; 2. To all civil actions in which the subject of litigation is not capable of pecuniary estimation; 3. To all civil actions in which the subject of litigation is capable of pecuniary estimation which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; 4. To all special proceedings; 5. To all cases arising in the probate courts; and, 6. To all criminal actions amounting to felony, on questions of law alone."

2. Amended by Code Amdts. **1880**, p. 25, and renumbered § 52.

3. Repeal by Stats. **1901**, p. 119; unconstitutional. See note ante, § 5.

Appellate jurisdiction. The essential criterion of appellate jurisdiction is, that it revises proceedings already instituted, and does not institute them. People v. Turner, 1 Cal. 143; 52 Am. Dec. 295; and the legislature cannot impair the exercise of the appellate power conferred by the constitution. Haight v. Gay, 8 Cal. 297; 68 Am. Dec. 323; People v. Bingham, 82 Cal. 238; 22 Pac. 1039. Where the supreme court has no jurisdiction, it will not decide any legal questions raised (People v. Johnson, 30 Cal. 98), but will dismiss the proceeding, of its own motion. Bienenfeld v. Fresno Milling Co., 82 Cal. 425; 22 Pac. 1113. Under the constitution of 1849, which conferred no original jurisdiction, except in habeas corpus, it was held that the clause granting to the supreme court power to issue all writs and process necessary to the exercise of its appellate jurisdiction, conferred authority to issue mandamus and other prerogative writs, only in aid of its appellate jurisdiction (People v. Turner, 1 Cal. 143; 52 Am. Dec. 295; Hyatt v. Allen, 54 Cal. 353; Ex parte Hollis, 59 Cal. 405; White v. Lighthall, 1 Cal. 347; Cowell v. Buckelew, 14 Cal. 640; Hicks v. Michael, 15 Cal. 107); but, under the present constitution, the supreme court has, as it had under the amendment to the constitution of 1849, original jurisdiction in the issuance of such writs. Hyatt v. Allen, 54 Cal. 353.

Suits in equity. The supreme court has jurisdiction in divorce cases, on appeal; and its jurisdiction is as broad as the original jurisdiction in matters of equity. Sharon v. Sharon, 67 Cal. 185; 7 Pac. 456, 635; 8 Pac. 709; Wadsworth v. Wadsworth, 81 Cal. 182; 15 Am. St. Rep. 38; 22 Pac. 648.

Cases at law. This term, as used in the constitution, means civil cases, as distinguished from criminal cases. People v. Johnson, 30 Cal. 98; Wheeler v. Donnell, 110 Cal. 655; 43 Pac. 1.

Title to and possession of real estate. Where a question of title to or right to the possession of lands is necessarily involved, the supreme court has appellate jurisdiction (Holman v. Taylor, 31 Cal. 338); but where a complaint in the superior court, after transference from a justice's court, is amended, alleging ownership of lands,

and asking damages for a sum less than three hundred dollars, to which no answer is filed, and judgment is taken by default, the supreme court has no jurisdiction. Gorton v. Ferdinando, 64 Cal. 11; 27 Pac. 941; Henigan v. Ervin, 110 Cal. 37; 42 Pac. 457.

Tax, toll, municipal fine. The supreme court has appellate jurisdiction in all cases at law involving "the legality of any tax, impost, assessment, toll, or municipal fine." Bottle Mining etc. Co. v. Kern, 154 Cal. 96; 97 Pac. 25. Pilotage allowed by an act establishing pilots is not a toll, and an appeal does not lie, unless within the jurisdictional amount. Harrison v. Green, 18 Cal. 94; and see People v. Johnson, 30 Cal. 98. A municipal fine, within the provision of the constitution of 1849, is a fine imposed by the local laws of particular places, such as towns and cities. People v. Johnson, 30 Cal. 98.

Amount in controversy. The amount in controversy controls the jurisdiction of the supreme court in actions to recover money; and the amount sued for, not the amount recovered, is the test of the jurisdiction. People v. Madden, 134 Cal. 611; 66 Pac. 874. The demand spoken of in the constitution is the demand for judgment, evidenced by the prayer of the complaint, and the statement of facts which can uphold the judgment prayed for. Derby v. Stevens, 64 Cal. 287; 30 Pac. 82. The demand, exclusive of interest, must amount to three hundred dollars (Doyle v. Seawall, 12 Cal. 280; Hopkins v. Cheeseman, 28 Cal. 180; Solomon v. Reese, 34 Cal. 28; Maxfield v. Johnson, 30 Cal. 545); and the sum for which the judgment is recovered does not affect the jurisdiction on appeal. Solomon v. Reese, 34 Cal. 28; Pennybecker v. McDougal, 48 Cal. 160; McKiernan v. Hesse, 51 Cal. 594; Sanborn v. Superior Court, 60 Cal. 425. While the ad damnum clause in the complaint is the best test of jurisdiction on appeal (Bailey v. Sloan, 65 Cal. 387; 4 Pac. 349; Maxfield v. Johnson, 30 Cal. 545; Solomon v. Reese, 34 Cal. 28; Erving v. Napa Valley Brewing Co., 17 Cal. App. 367; 119 Pac. 940); yet it is not conclusive, where the complaint shows that the sum is feignedly or purposely added for the sole purpose of obtaining jurisdiction. Lehnhardt v. Jennings, 119 Cal. 192; 48 Pac. 56; 51 Pac. 195. Where the amount involved is less than three hundred dollars, the proceeding will be dismissed by the supreme court, of its own motion, although the question of jurisdiction is not raised by counsel. Bienenfeld v. Fresno Milling Co., 82 Cal. 425; 22 Pac. 1113. The pleading of a counterclaim in excess of three hundred dollars does not confer jurisdiction (Maxfield v. Johnson, 30 Cal. 545); nor does the statement of jurisdictional facts in a counterclaim on an independent contract (Griswold v. Pieratt, 110 Cal. 259; 42 Pac. 820); but where a set-off, less than three hundred dollars in amount, exclusive of interest, is pleaded as purely defensive matter in reduction or extinguishment of the claim of the complaint, the court may very properly entertain jurisdiction (Hart v. Cooper, 47 Cal. 77; Griswold v. Pieratt, 110 Cal. 259, 265; 42 Pac. 820); and if the aggregate amount of the different counts of a complaint exceeds three hundred dollars, the court has jurisdiction. Ventura County v. Clay, 114 Cal. 242; 46 Pac. 9. In certiorari, the amount in controversy does not affect the jurisdiction (Heinlen v. Phillips, 88 Cal. 557; 26 Pac. 366). Costs are not included in determining the jurisdictional amount (Maxfield v. Johnson, 30 Cal. 545), where the amount demanded in the complaint is insufficient to confer jurisdiction (Henigan v. Ervin, 110 Cal. 37; 42 Pac. 457); neither is a percentage, added by authority of statute. Zabriskie v. Torrey, 20 Cal. 173.

Insolvency proceedings. An appeal also lies in insolvency proceedings, to review the judgment (Fisk v. His Creditors, 12 Cal. 281; and see People v. Shepard, 28 Cal. 115; People v. Rosborough, 29 Cal. 415); which is not now a special proceeding (People v. Rosborough, 29 Cal. 415; Fisk v. His Creditors, 12 Cal. 281); but neither certiorari (People v. Shepard, 28 Cal. 115) nor error lies in such cases. People v. Shepard, 28 Cal. 115; Kohlman v. Wright, 6 Cal. 230; Fisk v. His Creditors, 12 Cal. 281.

Probate matters. In probate matters an appeal lies from an order directing payment of a debt or claim, regardless of the amount thereof. Ex parte Orford, 102 Cal. 656, 36 Pac. 928.

Special proceedings. An appeal lies to the supreme court from a judgment in certiorari (Winter v. Fitzpatrick, 35 Cal. 269; Morley v. Elkins, 37 Cal. 454); in mandamus (Palache v. Hunt, 64 Cal. 473; 2 Pac. 245) to compel a trial judge to settle a statement on motion for a new trial (People v. Rosborough, 29 Cal. 415; Wood v. Strother, 76 Cal. 545; 9 Am. St. Rep. 249; 18 Pac. 766); in prohibition (Santa Cruz Gap etc. Co. v. Board of Supervisors, 62 Cal. 40); in an action to determine, upon reference by the surveyor-general, the rights of the respective parties to purchase school-lands from the state (Risdon v. Prewett, 8 Cal. App. 434; 97 Pac. 73); and in an action brought, under the Bank Commissioners' Act, to force a bank into liquidation. People v. Bank of San Luis Obispo, 152 Cal. 261; 92 Pac. 481; but there is no appellate jurisdiction in the supreme court in contempt cases (In re Vance, 88 Cal. 262; 26 Pac. 101; Tyler v. Connolly, 65 Cal. 28; 2 Pac. 414; Sanchez v. Newman, 70 Cal. 210; 11 Pac. 645), although the amount of the fine is within its jurisdiction (Tyler v. Connolly, 65 Cal. 28; 2 Pac. 414; Ruggles v. Superior Court, 103

Cal. 128; 37 Pac. 211), and the proceeding is classed as criminal. Tyler v. Connolly, 65 Cal. 28; 2 Pac. 414.

Criminal cases. Under the constitution of 1849, the supreme court had no appellate jurisdiction of misdemeanors, or crimes less than a felony, and none could be conferred by the legislature in such cases (People v. Applegate, 5 Cal. 295; People v. Shear, 7 Cal. 139; People v. Vick, 7 Cal. 165; People v. Fowler, 9 Cal. 85; People v. Cornell, 16 Cal. 187; People v. War, 20 Cal. 117; People v. Burney, 29 Cal. 459; People v. Johnson, 30 Cal. 98; People v. Apgar, 35 Cal. 389), but, under the present constitution an appeal lies to the supreme court in cases of misdemeanor prosecuted by indictment or information (People v. Pingree, 61 Cal. 141; People v. Jordan, 65 Cal. 644; 4 Pac. 683), and from a judgment rendered in a prosecution for misdemeanor in office. People v. Kalloch, 60 Cal. 113. The district court of appeal has jurisdiction of an appeal by the people, from an order made before judgment, setting aside an information charging the crime of murder. People v. White, 161 Cal. 310; 119 Pac. 79.

Appeal to wrong court. An appeal wrongly taken to the supreme court will be ordered transferred to a district court of appeal for decision (Bottle Mining etc. Co. v. Kern, 154 Cal. 96; 97 Pac. 25; People v. White, 161 Cal. 310; 119 Pac. 79); and an appeal improperly taken to a district court of appeal must be transferred to the supreme court. Erving v. Napa Valley Brewing Co., 17 Cal. App. 367; 119 Pac. 940; Asiatic Club v. Biggy, 160 Cal. 713; 117 Pac. 912; Risdon v. Prewett, 8 Cal. 434; 97 Pac. 73. The jurisdiction of a district court of appeal is limited to cases where the value of the property in controversy is less than two thousand and more than three hundred dollars. Erving v. Napa Valley Brewing Co., 17 Cal. App. 367; 119 Pac. 940; Bottle Mining etc. Co. v. Kern, 154 Cal. 96; 97 Pac. 25.

CODE COMMISSIONERS' NOTE. 1. Construction of the section generally. This section is intended to clearly define the appellate jurisdiction of the supreme court. Section 4 of article vi of the constitution, so far as it related to the appellate power, as it stood prior to amendments of 1862, was as follows: "The supreme court shall have appellate jurisdiction in all cases where the matter in dispute exceeds two hundred dollars, when the legality of any tax or impost, or municipal fine, is in question, and in all criminal cases amounting to felony, on questions of law alone. . . ." And, as amended in 1862, is as follows: "The supreme court shall have appellate jurisdiction in all cases in equity; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; also, in all cases arising in the probate courts; and also in all criminal cases amounting to felony, on questions of law alone. . . ." To have simply followed the terms of the constitution in defining the jurisdiction would have conveyed to one not familiar with the construction placed upon those terms by our court of last resort, but a faint idea of the extent or limit of that jurisdiction. In Conant v. Conant, 10 Cal. 252, 70 Am. Dec. 717, which was an action for a divorce from the bonds of matrimony by the wife against her husband, an objection was taken to the hearing of the appeal, based upon the ground of want of appellate jurisdiction, because no question of property was involved. Said Field, J., delivering the opinion of the court [quoting at length].

In Knowles v. Yates, 31 Cal. 84, which was a proceeding under the act of 1850, providing for contesting elections, it was contended that, under the amendment of 1862, the appellate jurisdiction of the court was confined to the class of cases enumerated in article iv, as amended, viz.:

1. To cases in equity;
2. To the cases at law involving questions of property or the legality of a tax, etc.;
3. To cases arising in the probate courts;
4. To criminal cases;

—And that therefore there was no appellate jurisdiction over special proceedings, or any class of cases not included within the constitutional enumeration. After argument and reargument, the court, Currey, C. J., delivering the opinion, sustained the jurisdiction. Said the learned justice, speaking for the court [quoting at length].

In constructing this section the commission kept steadily in view these authoritative expositions of the constitution, and have endeavored to engraft their results upon the text of the amendments of 1862. They do not use the phrases, "cases in equity," "cases at law," and it is a little singular, to say the least, that those phrases were inserted in the constitution more than ten years after the adoption of the Practice Act, the first section of which declared that there should be one form of civil actions, obliterating at once the distinctions between actions at law and suits in equity, abolishing the forms of all such actions and placing in their stead the proceedings under the Practice Act. The continued use of those phrases, and of the terms "ejectment," "trespass," "replevin," etc., when applied to proceedings in our courts, leads but to confusion, and has retarded the enforcement of the Practice Act in the spirit of its conception. An enumeration of the particular orders, etc., which are applicable per se, is omitted in this part of the code; they will be found in Part II, under the title "Appeals in Civil Actions."

2. Divorce decree. The supreme court possesses appellate jurisdiction from a decree rendered in a suit for divorce. Conant v. Conant, 10 Cal. 249; 70 Am. Dec. 717.

3. Real property. Cases involving title to or possession of real property. Doherty v. Thayer, 31 Cal. 140; see also Paul v. Silver, 16 Cal. 73.

4. Distinction between civil and criminal cases involving municipal fines, etc. "Cases at law or civil actions involving legality of tax, impost, assessment, toll, or municipal fine," defined, and held to refer to civil cases as distinguished from criminal cases. The supreme court has not jurisdiction of a criminal case whenever it may be claimed the validity of a tax, etc., is involved. People v. Johnson, 30 Cal. 98.

5. Money demands. Value of property in controversy. Before the amendments to the constitution (which went into effect January 1, 1863), the appellate jurisdiction of the supreme court over money demands extends only to cases where the amount in dispute exceeded two hundred dollars. Luther v. Ship Apollo, 1 Cal. 15; Simmons v. Brainard, 14 Cal. 278; Crandall v. Blen, 15 Cal. 406; People v. Carman, 18 Cal. 693; Zabriskie v. Torrey, 20 Cal. 173; Malson v. Vaughn, 23 Cal. 61; Skillman v. Lachman, 23 Cal. 199; 83 Am. Dec. 96; Meeker v. Harris, 23 Cal. 285; Bolton v. Landers, 27 Cal. 106. And it made no difference, although the enforcement of a mechanic's lien or foreclosure of a mortgage by which the demand was secured was asked for in the same case. Poland v. Carrigan, 20 Cal. 174. Since the adoption of the amendments (January 1, 1863), the appellate jurisdiction of the supreme court has extended over money demands, etc., only where the amount in controversy was for the sum of three hundred dollars or more. Hopkins v. Cheeseman, 28 Cal. 180; Maxfield v.

Johnson, 30 Cal. 545; Solomon v. Reese, 34 Cal. 28.

6. Definition and explanation of phrases, "amount in controversy," "value of property in controversy," etc. In Gordon v. Ross, 2 Cal. 156, and Doyle v. Seawall, 12 Cal. 280, it was held that costs might be added to the judgment of the court below, for the purpose of conferring appellate jurisdiction on the supreme court; and if, when added, the total amount exceeded two hundred (now three hundred) dollars, the supreme court had jurisdiction on appeal; but these cases were overruled in Dumphy v. Guindon, 13 Cal. 28, and it was held that costs were merely incidental to the suit, and formed no part of it for the purpose of an appeal. See, too, Votan v. Reese, 20 Cal. 89; Maxfield v. Johnson, 30 Cal. 545; Bolton v. Landers, 27 Cal. 106; Zabriskie v. Torrey, 20 Cal. 173; see also Conant v. Conant, 10 Cal. 250; 70 Am. Dec. 717. It was held, also, that where the plaintiff is appellant, and the judgment is for the defendant, the jurisdiction of the supreme court is determined by the amount claimed by the complaint, for that is the amount in dispute in such cases. Gillespie v. Benson, 18 Cal. 410; Votan v. Reese, 20 Cal. 89. And in the last-cited case it was said that if the appeal is by the plaintiff, from a judgment in his favor, then the amount in dispute is the difference between the amount of the judgment and the sum claimed by the complaint; but this part of that decision was overruled in Solomon v. Reese, 34 Cal. 33. In Skillman v. Lachman, 23 Cal. 201, 83 Am. Dec. 96, after quoting from and commenting on Gillespie v. Benson, and Votan v. Reese, the court held: "So, upon the same principle, if the appeal is taken by the defendant from a judgment rendered against him for a sum exceeding two hundred dollars, exclusive of costs and percentage, the supreme court had [prior to 1863, when amendments to article vi of the state constitution went into operation] jurisdiction of the case, because the amount of the judgment is the matter in dispute on appeal. So, too, if the appeal is taken by the defendant from a judgment in his favor when he has set up a counterclaim, if that judgment is for a sum more than two [now, since 1863, three] hundred dollars less than he claims in his answer, this court has jurisdiction. The interest due on the demand sued for forms a part of the amount to be included in the estimate of the 'amount in dispute.'" But Justice Sanderson, in reviewing these cases, says: "In actions for the recovery of money, this court has jurisdiction, if 'the demand, exclusive of interest, amounts to three hundred dollars.' Const., art. vi, § 4. The demand, exclusive of interest, in this case amounts to five hundred and fifty dollars. The language of the constitution in respect to the jurisdiction of this court is the same as it is in respect to the jurisdiction of the district court, and there can be, therefore, no difference in the rules by which questions as to jurisdiction of the subject-matter are to be determined in the two courts. For the purpose of ascertaining whether the district court has jurisdiction, we look to the complaint, and in this class of cases, if the sum sued for amounts to three hundred dollars, exclusive of interest, that court has jurisdiction, and by parity of reason this court has jurisdiction on appeal. The amount sued for, exclusive of interest, is the test of the jurisdiction of this court, regardless of the judgment of the latter court. We dissent entirely from the dictum of the court in the case of Votan v. Reese, 20 Cal. 90, to the effect that where the plaintiff recovers in the district court less than he sues for, the test of the jurisdiction of this court, in the event the plaintiff appeals, is the difference between the judgment of the district court and the demand made in the complaint, exclusive of interest. All civil cases which the district courts have jurisdiction to try, this court has jurisdiction to review, no matter what the judgment of the district court may have been. If the plaintiff sues to recover a demand for five hundred dollars, and the district court gives him a judgment for three hundred only, his demand does not thereby become converted into a demand for two hundred dollars for the purpose of an appeal, should he be dissatisfied with the judgment and desire to bring his case to this court. On the contrary, in the sense of the constitution his demand in this court is precisely the same that it was in the court below, and is to be ascertained by looking to the complaint, and not by deducting the judgment of the district court from the demand alleged in the complaint. In other words, the ad damnum clause in the complaint is the test of jurisdiction in the court below." Maxfield v. Johnson, 30 Cal. 546; Solomon v. Reese, 34 Cal. 33.

7. Certiorari. Appeal from writ of certiorari. The supreme court has jurisdiction over appeals in cases of certiorari. Morley v. Elkins, 37 Cal. 454; see, however, People v. Carman, 18 Cal. 693.

8. Election cases. The supreme court has appellate jurisdiction over the decisions of county courts in election cases. Knowles v. Yates, 31 Cal. 82; Dickinson v. Van Horn, 9 Cal. 207.

9. Insolvency proceedings. It was decided in Kohlman v. Wright, 6 Cal. 231, and in Fisk v. His Creditors, 12 Cal. 281, not only that the supreme court had jurisdiction in error in insolvency cases, but that such errors might be brought up by appeal. (This was prior to the adoption of the amendments to Const., art. vi.) The jurisdiction in error has not been withdrawn by the constitutional amendments. Section 939 (§ 336) of the Practice Act gives an appeal from final judgment in special proceedings. People v. Shepard, 28 Cal. 117.

10. Criminal cases. The supreme court has no appellate jurisdiction in criminal cases of a lesser grade than felony (not even on a writ of error, certiorari, or on appeal). People v. Shear, 7 Cal. 139; People v. Vick, 7 Cal. 165; People v. Applegate, 5 Cal. 295; People v. Fowler, 9 Cal. 86; People v. Cornell, 16 Cal. 187; People v. War, 20 Cal. 117; People v. Burney, 29 Cal. 459; People v. Johnson, 30 Cal. 98. And the judgment of conviction of the lower court, and not the indictment, determines the character of this class of cases for the purposes of appeal. If the indictment be for a felony, but the judgment is for only a misdemeanor, the supreme court has no appellate jurisdiction. People v. Apgar, 35 Cal. 391, and cases cited. A distinction is made where there is no evidence of a material fact, and where there is some evidence, but not enough to sustain a verdict. The supreme court has jurisdiction on appeal in criminal cases over the question, whether the verdict is contrary to the evidence in one case, as well as in the other. Whether a defendant in a criminal action is entitled to a new trial upon the ground that the verdict is contrary to the evidence, is a question of law, and not a question of fact, within the meaning of article vi, § 4, of the constitution. People v. Jones, 31 Cal. 565. See the several opinions in the case.

11. Generally, judgments, whether by default or otherwise, subject to appeal. It was held that, as to the right of appeal, there is no distinction between judgment by default and judgment after issue joined and a trial. There is no force in the suggestion that the supreme court exercises original interest of appellate jurisdiction, if it reviews errors on appeal from judgments by default. Although in such a case, as a matter of fact, the court below does not pass upon the sufficiency of the complaint, yet as a matter of law it does. Though entered by the clerk without the direction of the judge, it is as much the judgment of the court as if it had been announced from the bench, and the defendants are as much entitled to the opinion of the supreme court upon the sufficiency of the complaint as they would have been had they appeared and demurred. Questions of jurisdiction and of the sufficiency of the complaint upon the point whether the facts stated constituted a cause of action are never waived in any case, and may be made for the first time in the supreme court. Hallock v. Jaudin, 34 Cal. 173.

12. Order refusing transfer from district court to United States circuit court not appealable. It was held that from an order refusing to transfer an action from a district court of this state to the circuit court of the United States no appeal lies. The remedy is by mandamus in such cases. Hopper v. Kalkman, 17 Cal. 517; Brooks v. Calderwood, 19 Cal. 124.

13. **Law of the case.** When a decision is rendered in a particular case by the supreme court, such decision, whether right or wrong, becomes the law of the case, and is not subject to revision on a second appeal. It is conclusive of the rights of the parties. Davidson v. Dallas, 15 Cal. 75 (see cases cited therein); Dewey v. Gray, 2 Cal. 376; Clary v. Hoagland, 5 Cal. 476; 6 Cal. 685; Gunter v. Laffan, 7 Cal. 592; Washington Bridge Co. v. Stewart, 3 How. (U. S.) 413, 424; 11 L. Ed. 658; Leese v. Clark, 20 Cal. 387.

14. **When remittitur has issued, jurisdiction of case is lost.** When a remittitur has issued, and the court has adjourned for the term at which judgment was given, the supreme court has then lost all further jurisdiction over the case. Davidson v. Dallas, 15 Cal. 76. The supreme court has no appellate jurisdiction over its own judgments. Leese v. Clark, 20 Cal. 387; but see note to § 45, [§ 53,] post.

15. **Legislature can regulate mode of appeal.** While the legislature cannot substantially impair the right of appeal, it is competent to regulate the mere mode in which this right must be exercised. Haight v. Gay, 8 Cal. 297; 63 Am. Dec. 323. And for fuller information on the subject of jurisdiction, see notes to §§ 33, 43, ante, and 84, 85, 97, 104, 114, post.

§ 53. Powers in appealed cases. The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. The decision of the court shall be given in writing, and in giving its decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. Its judgment in appealed cases shall be remitted to the court from which the appeal was taken.

Errors and defects are to be disregarded. Post, § 475.

Records, though not conclusive, are presumed correctly to determine the rights of the parties. Post, § 1963, subd. 17.

Costs on appeal. Post, § 1027.

Remittitur. Post, § 958.

Legislation § 53. 1. Enacted March 11, **1872,** as § 45, and then read: "The court may reverse, affirm, or modify any order or judgment appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. Its judgment must be remitted to the court from which the appeal was taken."

2. Amended by Code Amdts. **1880,** p. 25, and renumbered § 53.

3. Repeal by Stats. **1901,** p. 119; unconstitutional. See note ante, § 5.

Decision as to moot questions. The court will not decide question not directly involved in the case, and not necessary to the judgment (West v. Smith, 5 Cal. 96), nor indulge in the discussion of abstract questions in a case over which it has no jurisdiction (People v. Johnson, 30 Cal. 98), nor decide moot cases (People v. Pratt, 30 Cal. 223), nor moot questions of law raised by counsel. State v. McGlynn, 20 Cal. 233; 81 Am. Dec. 118; Phelan v. Supervisors of San Francisco, 9 Cal. 15.

Affirmance of judgment. The dismissal of an appeal is, in effect, an affirmance of the judgment. Rowland v. Kreyenhagen, 24 Cal. 52.

Reversal of judgment. The effect of a reversal of judgment is to restore the rights of the parties to the same condition in which they were before the rendition of the judgment reversed. Argenti v. San Francisco, 30 Cal. 458; Falkner v. Hendy, 107 Cal. 49; 20 Pac. 21, 386; Ryan v. Tomlinson, 39 Cal. 639; Phelan v. Supervisors of San Francisco, 9 Cal. 15; Stearns v. Aguirre, 7 Cal. 443. It does not necessarily bar further proceedings in the action. Id.; Sharp v. Miller, 66 Cal. 98; 4 Pac. 1065; Myers v. McDonald, 68 Cal. 162; 8 Pac. 809. Where the appellate court directs the kind of judgment to be rendered, instead of directing a modification of the judgment, there is, in effect, a reversal. Argenti v. San Francisco, 30 Cal. 458.

Modification of judgment. The appellate court may render such judgment as the court below should have rendered (Gahan v. Neville, 2 Cal. 81; Grayson v. Guild, 4 Cal. 122; Anderson v. Parker, 6 Cal. 197; Crosby v. McDermitt, 7 Cal. 146; Wallace v. Eldredge, 27 Cal. 495; People v. Sierra Buttes Quartz Mining Co., 39 Cal. 511; Foucault v. Pinet, 43 Cal. 136; Noonan v. Hood, 49 Cal. 293); and may add to the judgment of reversal, directions that the cause be tried de novo, or may direct that partial issue be tried, leaving all other facts already found by the court as facts in the case, or it may enter or direct that the lower court enter judgment upon certain specified facts (Argenti v. San Francisco, 30 Cal. 458; and see Marziou v. Pioche, 10 Cal. 545; Soule v. Dawes, 14 Cal. 247; Soule v. Ritter, 20 Cal. 522; Myers v. McDonald, 68 Cal. 162; 8 Pac. 809); or it may modify an erroneous judgment to conform to the facts, and, as modified, affirm it (Swan v. Talbot, 152 Cal. 142; 17 L. R. A. (N. S.) 1066; 94 Pac. 238; American-Hawaiian etc. Co. v. Butler, 17 Cal. App. 764; 121 Pac. 709; Welch v. Ware, 161 Cal. 641; 119 Pac. 1080; Sterling v. Gregory, 149 Cal. 117; 85 Pac. 305; People v. Kerr, 15 Cal. App. 273; 114 Pac. 584; Coghlan v. Quartararo, 15 Cal. App. 662; 115 Pac. 664; Mannix v. Tryon, 152 Cal. 31; 91 Pac. 983; Petitpierre v. Maguire, 155 Cal. 242; 100 Pac. 690; Sheppard v. Sheppard, 161 Cal. 348; 119 Pac. 492), without directing an entire reversal of the judgment. Redwood City Salt Co. v. Whitney, 153 Cal. 421; 95 Pac. 885; Petitpierre v. Maguire, 155 Cal. 242; 100 Pac. 690; Sheppard v. Sheppard, 15 Cal.

App. 619; 115 Pac. 751. Modification of the judgment appealed from will be ordered, where justice can be done, without remanding for a new trial. Atherton v. Fowler, 46 Cal. 320; Daves v. Southern Pacific Co., 98 Cal. 19; 35 Am. St. Rep. 133; 32 Pac. 708. Judgment may be modified by consent (Pearsall v. Henry, 153 Cal. 314; 95 Pac. 159), and a decree, erroneous in form, may, without a reversal, be modified to conform to the findings (Barrett-Hicks Co. v. Glas, 14 Cal. App. 289, 303; 111 Pac. 760); as, where the appellant was entitled to recover costs on the trial, it may be modified as to such costs, without reversal. Petitpierre v. Maguire, 155 Cal. 242; 100 Pac. 690. A modification of a fraudulent judgment does not operate to set it aside. Clark v. Dunnam, 46 Cal. 204.

When new trial results. Unless there is something in the opinion or order of the court to the contrary, an order reversing and remanding simply accords a new trial (Myers v. McDonald, 68 Cal. 162; 8 Pac. 809); but where a new trial is not authorized by the language of the judgment, any judgment rendered upon a new trial is null and void. Argenti v. San Francisco, 30 Cal. 458. The effect of the order, "reversed and remanded," is, simply, to set aside the judgment and to grant a new trial (Ryan v. Tomlinson, 39 Cal. 639). A case may be remanded for a new trial upon a particular issue (Mayberry v. Whittier, 144 Cal. 322; 78 Pac. 16); but where the new trial is granted only on a single issue, the former determination of the trial court upon the remaining issues is allowed to stand. Duff v. Duff, 101 Cal. 1; 35 Pac. 437. Thus, a judgment against two, where only one appeals, may be reversed as to the one who appeals, and affirmed as to the other (Minturn v. Baylis, 33 Cal. 129); or it may be affirmed upon remission of damages. Doll v. Feller, 16 Cal. 432; De Costa v. Massachusetts Flat Water etc. Co., 17 Cal. 613; Muller v. Boggs, 25 Cal. 175; Lamping v. Hyatt, 27 Cal. 99; Carpentier v. Gardiner, 29 Cal. 160; Atherton v. Fowler, 46 Cal. 320. A new trial will be awarded, and not a modification, where the wrong construction is placed upon a written instrument in evidence. Hicks v. Coleman, 25 Cal. 122; 85 Am. Dec. 103. Where the construction placed by the lower court upon its findings is doubtful, a new trial should be ordered. Estate of Richardson, 94 Cal. 63; 15 L. R. A. 635; 29 Pac. 484. The appellate court will direct a new trial, where the findings require judgment for a party other than the one for which judgment was had, where the findings were based on evidence erroneously admitted or excluded; otherwise it will modify the judgment. Sun Ins. Co. v. White, 118 Cal. 468; 50 Pac. 546. A party will not be entitled to a new trial, however, where the judgment is for such a small amount that the court may apply the maxim, De minimis non curat lex. Willson v. McEvoy, 52 Cal. 169.

Direct proper judgment. The supreme court, on reversal of the judgment, has power to order judgment in favor of the other party (Argenti v. San Francisco, 30 Cal. 458; Pollard v. Putnam, 54 Cal. 630; Schroeder v. Schweizer Lloyd etc. Gesellschaft, 60 Cal. 467; 44 Am. Rep. 61); or it may direct affirmance upon the remission of excessive damages, and if the excess is not remitted, order the cause remanded for a new trial. Carpentier v. Gardiner, 29 Cal. 160; Atherton v. Fowler, 46 Cal. 323; Daves v. Southern Pacific Co., 98 Cal. 19; 35 Am. St. Rep. 133; 32 Pac. 708. The supreme court, under the plenary powers vested in it by this section, will order a judgment only in a proper case, and a new trial where the action seems to demand it. Alden v. Mayfield, 164 Cal. 6; 127 Pac. 44.

New trial. While the parties have a right to retry the cause after judgment reversed, yet they cannot do so in disregard of the opinion of the supreme court, as the directions thereof become a part of the judgment. Davidson v. Dallas, 15 Cal. 75. The superior court can enter no other judgment than the one directed. Argenti v. Sawyer, 32 Cal. 414. The lower court, having passed on the merits of the controversy on reversal of the judgment, can take no further proceedings, unless authorized by the supreme court, except such as may be necessary to give effect to the judgment on appeal: the whole matter is res adjudicata (Crowell v. Gilmore, 17 Cal. 194; Soule v. Ritter, 20 Cal. 522; McLaughlin v. Kelly, 22 Cal. 211; Marshall v. Shafter, 32 Cal. 176; Satterlee v. Bliss, 36 Cal. 489; Argenti v. Sawyer, 32 Cal. 414). The reversal, by the supreme court of the United States, of a judgment of affirmance of the state supreme court, does not immediately reverse the judgment of the superior court: upon the coming down of the remittitur, the appeal is still pending in the state supreme court, for further disposition not inconsistent with the decision of the Federal supreme court. Harding v. Harding, 148 Cal. 397; 83 Pac. 434. If the appellant dies after the submission of the appeal, and the judgment and order appealed from are affirmed, the affirmance will be entered nunc pro tunc as of the date of the submission. Estate of Dolbeer, 149 Cal. 227; 86 Pac. 695. Where the appellate court affirms an order granting a new trial, it is proper to grant the new trial, rather than to order judgment. Pollitz v. Wickersham, 150 Cal. 238; 88 Pac. 911. A new trial will be awarded, and not a modification, where a wrong construction is placed upon a written instrument in evidence. Hicks v. Coleman, 25 Cal. 122; 85 Am. Dec. 103. Extreme caution should be exercised in refusing a new trial on reversal; it should be refused only in cases

where it is plain, either from the pleadings or from the nature of the controversy, that the party against whom the reversal is procured cannot prevail. Schroeder v. Schweizer Lloyd etc. Gesellschaft, 60 Cal. 467; 44 Am. Rep. 61; Oakland Paving Co. v. Bagge, 79 Cal. 439; 21 Pac. 855; Estate of Richardson, 94 Cal. 63; 15 L. R. A. 635; 29 Pac. 484.

Written decisions. While the constitution requires that all decisions shall be in writing, yet the legislature cannot require the supreme court to give in writing the reasons for its decision. Houston v. Williams, 13 Cal. 24; 73 Am. Dec. 565; and see also Estate of Jessup, 81 Cal. 408; 6 L. R. A. 594; 21 Pac. 976; 22 Pac. 742, 1028. There is a distinction between the decision of the court and the opinion; the decision is the judgment of the court, while the opinion is the reasons given for the judgment. Houston v. Williams, 13 Cal. 24; 73 Am. Dec. 565; Wilson v. Wilson, 64 Cal. 92; 27 Pac. 861. The trial court may give a wrong reason for its decision; yet if it is correct in law, it will not be reversed, as the appellate court will not review the reasons for its decision: the statute does not make it incumbent upon the prevailing party to defend the logic of the trial judge (Chabot v. Tucker, 39 Cal. 434; Davey v. Southern Pacific Co., 116 Cal. 325; 48 Pac. 117; Groome v. Almstead, 101 Cal. 425; 35 Pac. 1021; Shanklin v. Hall, 100 Cal. 26; 34 Pac. 636; White v. Merrill, 82 Cal. 14; 22 Pac. 1129; People v. Crowey, 56 Cal. 36; Clarke v. Huber, 25 Cal. 593; Hubbard v. Sullivan, 18 Cal. 508; Bleven v. Freer, 10 Cal. 172; Helm v. Dumars, 3 Cal. 454); besides, any unnecessary expression of opinion by the judge does not settle the law of the case. State v. McGlynn, 20 Cal. 233; 81 Am. Dec. 118.

Remittitur. The effect of filing the remittitur in the lower court, where everything is regular, and free from fraud or imposition, is to deprive the supreme court of jurisdiction, unless for some valid reason the remittitur is recalled and the jurisdiction resumed. Grogan v. Ruckle, 1 Cal. 193; Mateer v. Brown, 1 Cal. 231; Phelan v. San Francisco, 20 Cal. 39; Blanc v. Bowman, 22 Cal. 23; Rowland v. Kreyenhagen, 24 Cal. 52; Vance v. Peña, 36 Cal. 328; Hanson v. McCue, 43 Cal. 178; People v. Sprague, 57 Cal. 147; People v. McDermott, 97 Cal. 247; 32 Pac. 7; Estate of Levinson, 108 Cal. 450; 41 Pac. 483; 42 Pac. 479. Jurisdiction, however, is not lost until the remittitur is filed in the lower court. Grogan v. Ruckle, 1 Cal. 193; Mateer v. Brown, 1 Cal. 231. Where accident, fraud, imposition, inadvertence, or mistake is shown, the supreme court may recall the remittitur and stay proceedings. Rowland v. Kreyenhagen, 24 Cal. 52; Vance v. Peña, 36 Cal. 328; Estate of Jessup, 81 Cal. 408; 6 L. R. A. 594; 21 Pac. 976; 22 Pac. 742, 1028. If the clerk improperly or improvidently sends the remittitur to the lower court, the supreme court is not thereby deprived of jurisdiction (Grogan v. Ruckle, 1 Cal. 193; Mateer v. Brown, 1 Cal. 231); as where he makes a wrong entry and transmits the wrong remittitur. Vance v. Peña, 36 Cal. 328. In such cases the supreme court does not lose jurisdiction, and may recall the remittitur even after it has been filed, correct any error, vacate the judgment, and restore the cause to the calendar. Vance v. Peña, 36 Cal. 328; Hanson v. McCue, 43 Cal. 178; Bernal v. Wade, 46 Cal. 640. On the death of one of the parties after argument and submission but before decision, if the remittitur has been sent to the lower court, it may be ordered returned, judgment set aside, and the court may render a decision as of the date of the submission. Black v. Shaw, 20 Cal. 68; Savings and Loan Society v. Gibb, 21 Cal. 595; Holloway v. Galliac, 49 Cal. 149. A petition for rehearing, deposited in an express-office so as to reach the clerk within the limit of time fixed by the rule, will be held, in contemplation of law, to be in the hands of the clerk, and the remittitur, having gone down, will be recalled (Hanson v. McCue, 43 Cal. 178; Bernal v. Wade, 46 Cal. 640); but a printed transcript in course of transmission is not within this rule. Ward v. Healy, 110 Cal. 587; 42 Pac. 1071. The remittitur will not be recalled after a dismissal for failure to file a brief. People v. McDermott, 97 Cal. 247; 32 Pac. 7.

CODE COMMISSIONERS' NOTE. 1. When court will not reverse judgment of lower court. The supreme court will not reverse an order made by a judge, refusing to grant a new trial, unless there has been a gross abuse of discretion in the premises. The court will not review the verdict of a jury, where the evidence is contradictory, or where the jury refuse to give full credit to the testimony of witnesses. Duell v. Bear River etc. Mining Co., 5 Cal. 86. The findings of a court, etc., will be taken to be correct, unless it clearly appears to the contrary. Every intendment is in favor of the correctness of a court of general jurisdiction, unless it clearly appears to the contrary. McHenry v. Moore, 5 Cal. 90; Ford v. Holton, 5 Cal. 319; Morgan v. Hugg, 5 Cal. 409; Ellis v. Jeans, 26 Cal. 272; Dickinson v. Van Horn, 9 Cal. 207; Owen v. Morton, 24 Cal. 378.

2. Setting aside order granting new trial. The supreme court have repeatedly decided that the power to grant new trials is one of legal discretion, and the abuse of that discretion, only, will justify an interference with the order. It is only in rare instances and upon very strong grounds that the supreme court will set aside an order granting a new trial. Quinn v Kenyon, 22 Cal. 82.

3. When court will not direct entry of final judgment of lower court. The supreme court will not direct the entry of a final judgment when there are controverted facts to be decided. Lick v. Diaz, 37 Cal. 446.

4. Correction of false or mistaken entry or order in minutes of supreme court. When there is a false order entered by mistake by the clerk of the supreme court, the minutes of the chief justice may be used in a direct proceeding to amend the record for the purpose of correcting the minutes of the clerk, even after a remittitur has issued. Vance v. Pena 36 Cal. 328.

5. Correction of errors in records of lower court. The supreme court cannot correct errors in the

records of a lower court. Applications for that purpose must be made to the court in the record of which the error exists. Boston v. Haynes, 31 Cal. 107.

6. **Power of court to make rules.** The power of the court to make rules for its government, and the time when such rules take effect, is provided for in §§ 129, 130, post.

§ 54. Concurrence necessary to transact business. The concurrence of three justices of the supreme court is necessary for the issuance of any writ, or the transaction of any business, except such as can be done at chambers; provided, that each of the justices shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the supreme court, or any department, or judge thereof, or before any superior court in the state, or any judge thereof.

Concurrence of judges. See Const., art. vi, § 2.
Business at chambers. Post, § 165.
Habeas corpus. See U. S. Const., art. v, Amdts.; Const., art. vi, § 4. See also post, §§ 76, 165. **Generally.** Pen. Code, §§ 1268 et seq., 1473 et seq., 1492 et seq.

Legislation § 54. 1. Enacted March 11, **1872,** as § 46, and then read: "The presence of three justices is necessary for the transaction of business, but one or more of the justices may transact such business as can be done at chambers, and may adjourn the court from day to day, with the same effect as if all were present."
2. Amended by Code Amdts. **1880,** p. 25, and renumbered § 54.
3. Repeal by Stats. **1901,** p. 119; unconstitutional. See note ante, § 5.

Concurrence, defined. The joint concurrence of four justices, necessary for the transaction of business by the court, means a union in action and design of the required number of justices qualified, with power to act at the very moment of the decision; the functions of a justice absent from the state are suspended, and a previous concurrence of such absent justice, in an order made during his absence, is of no effect. People v. Ruef, 14 Cal. App. 576, 581; 114 Pac. 48, 54. A judgment of the district court of appeal becomes final, unless within thirty days after such judgment a valid order is made by the supreme court that the cause be heard and determined by the court last named. People v. Ruef, 14 Cal. App. 581; 114 Pac. 48. Two justices of a district court of appeal cannot render a judgment (Daggett v. Southwest Packing Co., 155 Cal. 762; 103 Pac. 202): the three judges of that court must concur in the judgment. Application of Ladue, 15 Cal. App. 188; 117 Pac. 586; Application of Woods, 17 Cal. App. 323; 123 Pac. 1135; Application of Galivan, 17 Cal. App. 624; 120 Pac. 1123.

§ 55. Transfer of books, papers, and actions. All records, books, papers, causes, actions, proceedings, and appeals lodged, deposited, or pending in the supreme court abolished by the constitution, are transferred to the supreme court herein provided for, which has the same power and jurisdiction over them as if they had been in the first instance lodged, deposited, filed, or commenced therein, or, in cases of appeal, appealed thereto.

Transfer of papers. Const., art. xxii, § 3.
Legislation § 55. 1. Added by Code Amdts. **1880,** p. 25.
2. Repeal by Stats. **1901,** p. 119; unconstitutional. See note ante, § 5.

§ 56. Remittiturs in transferred cases. In all cases of appeal transferred to the supreme court, its judgments shall be remitted to the superior courts of the counties, or cities and counties from which the appeals were taken respectively, with the same force and effect as if said cases had been appealed to the supreme court from such superior courts.

Remittitur. See post, § 958.
Legislation § 56. Added by Code Amdts. **1880,** p. 26.

§ 57. Appeals in probate proceedings and contested election cases. Appeals in probate proceedings and contested election cases shall be given preference in hearing in the supreme court, and be placed on the calendar in the order of their date of issue, next after cases in which the people of the state are parties.

Legislation § 57. 1. Added by Stats. **1887,** p. 82, and then read: "Appeals in probate proceedings shall be given preference in hearing in the supreme court, and be placed on the calendar

in the order of their date of issue, next after cases in which the people of the state are parties."

2. Amended by Stats. **1903**, p. 69.

The original § 57 related to jurisdiction of district courts.

Speedy determination. The law contemplates a speedy determination of probate cases and election contests. Estate of Heywood, 154 Cal. 312; 97 Pac. 825; Bass v. Leavitt, 11 Cal. App. 582; 105 Pac. 771.

§ 58. [Related to terms of court in first district. Repealed.]

Legislation § 58. 1. Enacted March 11, **1872**.
2. Amended by Code Amdts. **1873–74**, p. 397.
3. Amended by Code Amdts. **1875–76**, p. 83.
4. Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

§ 59. [Related to terms of court in second district. Repealed.]

Legislation § 59. 1. Enacted March 11, **1872**.
2. Amended by Code Amdts. **1875–76**, p. 83.
3. Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

§ 60. [Related to terms of court in third district. Repealed.]

Legislation § 60. 1. Enacted March 11, **1872**.
2. Amended by Code Amdts. **1877–78**, p. 93.
3. Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

§ 61. [Related to terms of court in fourth district. Repealed.]

Legislation § 61. 1. Enacted March 11, **1872**.
2. Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

§ 62. [Related to terms of court in fifth district. Repealed.]

Legislation § 62. 1. Enacted March 11, **1872**.
2. Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

§ 63. [Related to terms of court in sixth district. Repealed.]

Legislation § 63. 1. Enacted March 11, **1872**.
2. Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

§ 64. [Related to terms of court in seventh district. Repealed.]

Legislation § 64. 1. Enacted March 11, **1872**.
2. Amended by Code Amdts. **1875–76**, p. 84.
3. Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

CODE COMMISSIONERS' NOTE. The constitution, art. vi, § 5, [1849,] does not provide fully for the election of district judges. Statutory regulations are required to give efficacy to the constitution, which is not self-executing. The legislature is required to pass laws providing for and regulating the conduct of the election. And an election for district judge would be invalid, unless made in pursuance of the statutory regulations. People v. Weller, 11 Cal. 49; 70 Am. Dec. 854; see further, for elections to fill vacancy, term, etc., People v. Weller, 11 Cal. 77; People v. Burbank, 12 Cal. 378; Brodie v. Campbell, 17 Cal. 11. See Pol. Code, §§ 1042, 1043.

CHAPTER IV.

SUPERIOR COURTS.

§ 65. Judges and elections.
§ 66. Counties having two or more judges.
§ 67. Superior court of the city and county of San Francisco.
§ 67a. Superior court of Los Angeles County.
§ 67b. Extra sessions of the superior court.
§ 68. Terms of office.
§ 69. Computation of years of office.
§ 70. Vacancies.
§ 71. Superior courts, by judges of other counties.
§ 72. Judges pro tempore.
§ 73. Sessions.
§ 74. Adjournments.
§ 75. Jurisdiction of two kinds.
§ 76. Original jurisdiction.
§ 77. Appellate jurisdiction.
§ 78. Process.
§ 79. Transfer of books, papers, and actions.

§ 65. Judges and elections. There shall be in each of the organized counties, or cities and counties of the state, a superior court, for each of which one judge, and for some of which two or more judges, as hereinafter in subsequent sections specially provided, shall be elected by the qualified electors of the county, or city and county, at the general state elections, next preceding the expiration of the terms of office of their predecessors respectively; provided, that in and for the counties of Yuba and Sutter combined only one superior judge shall be elected, who shall hold the superior courts of both said counties, and in accordance with such rules for the dispatch of business in both said counties as he may adopt.

Number of superior judges. See Const., art. vi, § 6.

Jurisdiction of superior courts. See post, §§ 75–78.

Separate judges for Sutter and Yuba. See Stats. 1897, p. 48.

Legislation § 65. 1. Added by Code Amdts. **1880**, p. 26, to conform to Const. 1879. The

original § 65 was included in original code chapter iv, §§ 54–78, Title I, which fixed the terms, etc., of the district courts in the seventeen judicial districts of the state, and was repealed by Code Amdts. **1880**, p. 21, in amending Part I.

2. Repeal by Stats. **1901**, p. 119; unconstitutional. See note ante, § 5.

§ 66. Counties having two or more judges. In each of the counties of Alameda, Los Angeles, Sacramento, San Joaquin, Santa Clara, and Sonoma, there shall be elected two judges of the superior court; and in each of said counties, and in any county, or city and county, other than the city and county of San Francisco, in which there shall be more than one judge of the superior court, the judges of such court may hold as many sessions of said court at the same time as there are judges thereof, and shall apportion the business among themselves as equally as may be.

Number of superior judges. See Const., art. vi, §§ 6, 7.

Legislation § 66. **1.** Added by Code Amdts. **1880**, p. 26, to conform to Const. 1879.

2. Repeal by Stats. **1901**, p. 119; unconstitutional. See note ante, § 5.

See ante, Legislation, § 65, for repeal of original § 66.

§ 67. Superior court of the city and county of San Francisco. In the city and county of San Francisco, there shall be sixteen judges of the superior court, any one or more of whom may hold court; and there may be as many sessions of said court at the same time, as there are judges thereof. The said judges shall choose from their own number, a presiding judge, who may at any time be removed as presiding judge, and another chosen in his place by a vote of any nine of them. The presiding judge shall distribute the business of the court among the judges thereof, and prescribe the order of business, and perform such other duties as the judges of said court may by rule provide. The judgments, orders and proceedings of any session of the superior court, held by any one or more of the judges of said court, shall be equally as effective as if all of said judges of said court presided at such session.

Within ninety days after this act becomes a law, the governor shall appoint four judges of the superior court in the city and county of San Francisco, in addition to the twelve superior court judges already provided for by law, in and for said city and county of San Francisco, state of California, who shall hold office until the first Monday after the first day of January, nineteen hundred and fifteen. At the next general election to be held in November, nineteen hundred and fourteen, four additional judges of the superior court shall be elected in the city and county of San Francisco, who shall be successors of the judges appointed hereunder for the term prescribed by the constitution and by law. The salaries of the said additional judges shall be the same in amount and be paid in the same manner and at the same time as the salaries of the other judges of the superior court in and for the city and county of San Francisco, and now authorized by law.

Number of superior judges. See Const., art. vi, § 6.

Process. Post, § 78.

Legislation § 67. **1.** Added by Code Amdts. **1880**, p. 26, to conform to Const. 1879.

2. Repeal by Stats. **1901**, p. 119; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1913**, p. 48, (1) in first sentence substituting "there shall be sixteen judges" for "there shall be elected twelve judges"; (2) in second sentence, (a) adding "as presiding judge," after "removed," and (b) substituting "nine of them" for "seven of them," at end of sentence; (3) in third sentence, adding at end, "and perform such other duties as the judges of said court may by rule provide"; (4) in fourth sentence, substituting "equally as effective as if all of said judges" for "equally effective as if all the judges"; (5) adding the second paragraph.

See ante, Legislation § 65, for repeal of original § 67.

§ 67a. Superior court of Los Angeles County. In counties of the first class there shall be eighteen judges of the superior court, any one or more

of whom may hold court, and there may be as many sessions of said court at the same time as there are judges thereof. The said judges shall choose from their own number a presiding judge, who may at any time be removed as presiding judge and another judge chosen in his place by a vote of any twelve of them. The presiding judge shall distribute the business of the court among the judges thereof, and prescribe the order of business and perform such other duties as the judges of the said court may by rule provide. The judgments, orders and proceedings of any session of the superior court held by any one or more of the judges of said court shall be equally as effective as if all the said judges of said court presided at such session. Within thirty days after this act goes into effect, the governor shall appoint six additional judges of the superior court in counties of the first class in addition to the twelve superior court judges already provided by law in and for the said counties of the first class who shall hold office until the first Monday after the first day of January, nineteen hundred and fifteen. At the next general election to be held in November, A. D. nineteen hundred and fourteen, six additional judges of the superior court shall be elected in counties of the first class, who shall be successors of the judges appointed hereunder, to hold office for the term prescribed by the constitution and by law. The salaries of said additional judges shall be the same in amount and be paid in the same manner and at the same time as the salaries of the other judges of the said counties of the first class now authorized by law.

Legislation § 67a. **1.** Added by Stats. **1909**, p. 11.

2. Amended by Stats. **1913**, p. 334, (1) in first sentence, substituting "In counties of the first class there shall be eighteen judges" for "In counties of the second class there shall be twelve judges"; (2) at end of second sentence, substituting "by a vote of any twelve of them" for "by a vote of any seven of them"; (3) at end of fourth sentence, substituting "presided at such session" for "presided as such session," the "as" of the original section being evidently a typographical error; (4) recasting the fifth sentence, the original reading, "Within thirty days after this act becomes a law, the governor shall appoint three additional judges of the superior court in counties of the second class in addition to the nine superior court judges already provided for by law in and for the said county of Los Angeles, state of California, who shall hold office until the first Monday after the first day of January, 1911"; (5) in sixth sentence, substituting (a) "in November, A. D. 1914, six additional judges" for "in November, A. D. 1910, three additional judges," and (b) "counties of the first class" for "counties of the second class"; (6) in seventh (the last) sentence, substituting "said counties of the first class" for "superior court of Los Angeles County."

§ 67b. **Extra sessions of the superior court.** Whenever, in the opinion of the judge or a majority of the judges of the superior court of any county, or city and county, the public interests so justify or require, one or more sessions of said superior court, to be known as extra sessions of said superior court, may be held in addition to and at the same time as the sessions of said court spoken of in sections numbered sixty-six and sixty-seven of this code.

Whenever the judge or a majority of the judges of the superior court of any county or city and county shall decide that an extra session of said court shall be held, said judge or a majority of said judges shall appoint the time when said extra session shall be held, but no extra session of any superior court shall continue beyond the thirty-first day of December of the year in which such session is established. The judge or a majority of the judges of said superior court shall likewise appoint a place, within the county seat of said county or city and county, where such extra session of said court shall be held, and shall have the same power and authority to provide a place for holding such extra session of said court as is had by a judge of a superior court to provide a place for holding a session of a superior court.

Whenever, in a county or city and county having but one judge of the superior court, said judge shall provide for an extra session of said court, he shall, at the time of so providing or from time to time during the continuance of said extra session, apportion to the judge who may preside over said extra session such portion of the business of said court as he may desire, and at the close of such extra session shall order such portions of said business so apportioned and not transacted to be transferred to himself.

Whenever, in any county or city and county having more than one judge of the superior court, a majority of said judges shall provide for an extra session of said court, a majority of said judges, at the time of so providing or from time to time during the continuance of said extra session, shall order transferred to the judge who may preside over such extra session from the judges to whom they have been assigned according to law or the rules of said court, such portions of the business of said court as they may select; and, at the close of such extra session shall order retransferred to the judges of said court such portions of said business so transferred as shall not have been transacted. Except as above provided, any rules of any superior court relating to the transfer of any business from one judge of said court to another shall apply to the transfer of any business duly assigned to the judge presiding over any extra session from said judge to any judge of said court.

Whenever an extra session of the superior court of any county or city and county has been provided for, the judge or a majority of the judges of said superior court shall invite and authorize a judge of the superior court of some other county or city and county to hold and preside over such extra session, and upon such invitation and authorization such judge may so serve.

Upon the request of the judge or a majority of the judges of the superior court of any county or city and county, the governor of the state shall designate and authorize, to hold and preside over such extra session of the superior court of said county or city and county, a judge of the superior court of some other county or city and county; and upon such designation and authorization by the governor such judge must so serve.

The judgments, orders, and proceedings of any extra session of any superior court, held in accordance with the provisions of this section, shall be equally effective as if any or all of the judges of said court presided at such session. Any judge or any number of the judges of any superior court may hold and preside over any extra session of said court, with or without, the judge designated and authorized to hold and preside over said session. Any judge of any superior court may perform in connection with any business duly assigned to the judge presiding over any extra session of said court any act which he could perform in connection with any business assigned to any other judge of said court. Any judge, holding or presiding over any extra session of a superior court, may perform in chambers or in court, in connection with any business duly assigned to him, any act which could be performed by any judge of said court, in chambers or in court, in connection with such business if duly assigned to himself; but no judge, holding or presiding over any extra session of any superior court, shall perform, in chambers or in court, any act in connection with any business that has not been duly assigned to him.

All provisions of the laws of this state applying to the compensation of a judge of a superior court, holding the superior court in a county other than his home county, shall apply to judges holding extra sessions of a superior court in any county other than his home county.

Legislation § 67b. Added by Stats. **1909**, p. 1004.

Majority action. A request, made by a majority of the judges of a superior court, necessarily constitutes a request made by one judge. Williams v. Hawkins, 20 Cal. App. 161; 128 Pac. 754.

§ 68. Terms of office. The term of office of judges of the superior court shall be six years from and after the first Monday of January next succeeding their election; provided, that the twelve judges of the superior court elected in the city and county of San Francisco at the general state election of eighteen hundred and seventy-nine shall have so classified, or shall so classify themselves, by lot, that four of them shall go out of office at the end of one year, four of them at the end of three years, and four of them at the end of five years from the first Monday of January, eighteen hundred and eighty; and the entry of such classification shall have been, or shall be, made in the minutes of the court, signed by them, and a duplicate thereof filed in the office of the secretary of state; and provided further, that all the other superior judges elected at the general state election of eighteen hundred and seventy-nine shall go out of office at the end of five years from the first Monday of January, eighteen hundred and eighty.

Term of office. See Const., art. vi, § 6.

Legislation § 68. **1.** Added by Code Amdts. **1880**, p. 27, to conform to Const. 1879.

2. Repeal by Stats. **1901**, p. 119; unconstitutional. See note ante, § 5.

See ante, Legislation § 65, for repeal of original § 68.

§ 69. Computation of years of office. The years during which a judge of a superior court is to hold office are to be computed respectively from and including the first Monday of January of any one year to and excluding the first Monday of January of the next succeeding year.

Computation of time. See Const., art. vi, § 6. See ante, § 41.

Legislation § 69. **1.** Added by Code Amdts. **1880**, p. 27, to conform to Const. 1879.

2. Repeal by Stats. **1901**, p. 119; unconstitutional. See note ante, § 5.

See ante, Legislation § 65, for repeal of original § 69.

Excluding Monday. The constitution of the state seems to exclude the first Monday, in computing the term of the judges of the superior court. Merced Bank v. Rosenthal, 99 Cal. 39; 31 Pac. 849; 33 Pac. 732.

§ 70. Vacancies. If a vacancy occur in the office of judge of a superior court, the governor shall appoint an eligible person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Vacancy.

1. Filling. See Const., art. vi, § 6. See ante, § 42.

2. In office, and mode of supplying. See Pol. Code, §§ 995 et seq.

3. Does not affect pending proceedings. See post, § 184.

Legislation § 70. **1.** Added by Code Amdts. **1880**, p. 27, to conform to Const. 1879.

2. Repeal by Stats. **1901**, p. 119; unconstitutional. See note ante, § 5.

See ante, Legislation § 65, for repeal of original § 70.

§ 71. Superior courts, by judges of other counties. A judge of any superior court may hold the superior court in any county, at the request of the judge or judges of the superior court thereof, and, upon the request of the governor, it shall be his duty to do so; and in either case the judge holding the court shall have the same power as a judge thereof.

Sitting for another judge. See Const., art. vi, § 8. See post, § 160.

Legislation § 71. 1. Added by Code Amdts. 1880, p. 27, to conform to Const. 1879.
2. Repeal by Stats. 1901, p. 119; unconstitutional. See note ante, § 5.
See ante, Legislation § 65, for repeal of original § 71.

Holding court by request. This section provides a mode of securing the attendance of another judge, where the judge of the court is disqualified; a change of the place of trial in criminal cases, on the ground of the disqualification of the judge, is not authorized by law (People v. McGarvey, 56 Cal. 327), but it is permissible in civil cases. Gage v. Downey, 79 Cal. 140; 21 Pac. 527, 855. A judge so holding court in another county is presumed to be acting legally, and upon a proper request, in the absence of any showing to the contrary. Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146; 16 Pac. 887; People v. Ah Lee Doon, 97 Cal. 171; 31 Pac. 933.

Power of judge acting out of county. The provision giving a judge, holding court in another county on request, the same power as the judge of that county, is constitutional (Gardner v. Jones, 126 Cal. 614; 59 Pac. 126; and see also Kirkwood v. Soto, 87 Cal. 394; 25 Pac. 488); and a judge so acting has the same power as the judge for whom he acts. Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146; 16 Pac. 887; People v. Ah Lee Doon, 97 Cal. 171; 31 Pac. 933.

§ 72. **Judges pro tempore.** Any cause in a superior court may be tried by a judge pro tempore, who must be a member of the bar admitted to practice before the supreme court, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the cause; and his action in the trial of such cause shall have the same effect as if he were a judge of such court. A judge pro tempore shall, before entering upon his duties in any cause, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm, as the case may be,) that I will support the constitution of the United States and the constitution of the state of California, and that I will faithfully discharge the duties of the office of judge pro tempore in the cause wherein —— is plaintiff, and —— is defendant, according to the best of my ability."

Judge.
1. Pro tempore. Const., art. vi, § 8.
2. Superior, must be admitted before supreme court. See post, § 157.

Legislation § 72. 1. Added by Code Amdts. 1880, p. 27, to conform to Const. 1879.
2. Repeal by Stats. 1901, p. 119; unconstitutional. See note ante, § 5.
See ante, Legislation § 65, for repeal of original § 72.

§ 73. **Sessions.** The superior courts shall be always open (legal holidays and non-judicial days excepted), and they shall hold their sessions at the county seats of the several counties, or cities and counties, respectively. They shall hold regular sessions, commencing on the first Mondays of January, April, July, and October, and special sessions at such other times as may be prescribed by the judge or judges thereof; provided, that in the city and county of San Francisco the presiding judge shall prescribe the times of holding such special sessions.

Duties of superior judges, generally. See Pol. Code, §§ 4150, 4151.
Always open. See Const., art. vi, § 5; post, § 134.
Holidays, etc. See ante, § 10; post, §§ 134, 135.

Legislation § 73. 1. Added by Code Amdts. 1880, p. 27, to conform to Const. 1879.
2. Repeal by Stats. 1901, p. 119; unconstitutional. See note ante, § 5.
See ante, Legislation § 65, for repeal of original § 73.

Superior court always open. Terms of the superior court were abolished by the constitution of 1879. In re Gannon, 69 Cal. 541; 11 Pac. 240. Prior to that time, it was held, under § 76, post, which then provided therefor and expressly authorized it, that the superior court was always open to hear special proceedings of a civil nature. Stewart v. Mahoney Mining Co., 54 Cal. 149.

Ministerial acts may be performed on holiday. See note ante, § 13.

Sessions of superior court. A session of court means the time during which the court is in fact held at a place appointed, and engaged in the transaction of business. In re Gannon, 69 Cal. 541; 11 Pac. 240; Falltrick v. Sullivan, 119 Cal. 613; 51 Pac. 947.

Recess. By the term "recess" is meant the time in which the court is not actually engaged in business. In re Gannon, 69 Cal. 641; 11 Pac. 240; Falltrick v. Sullivan, 119 Cal. 613; 51 Pac. 947.

§ 74. Adjournments. Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time.

Adjournments from time to time mere recesses in the sessions. See ante, § 48.

Legislation § 74. 1. Added by Code Amdts. 1880, p. 28, to conform to Const. 1879.
2. Repeal by Stats. 1901, p. 119; unconstitutional. See note ante, § 5.
See ante, Legislation § 65, for repeal of original § 74.

Adjournment presumed. It will be presumed, in favor of a judgment, that the court regularly adjourned, although the record fails to show it. Doty v. Jenkins, 112 Cal. 497; 77 Pac. 1104.

§ 75. Jurisdiction of two kinds. The jurisdiction of the superior courts is of two kinds:

1. Original; and,

2. Appellate.

Legislation § 75. 1. Enacted March 11, 1872, as § 84, and then applied to county courts.
2. Amended by Code Amdts. 1880, p. 28, (1) renumbering the section § 75, and (2) changing the words "this court" to "the superior courts."
3. Repeal by Stats. 1901, p. 119; unconstitutional. See note ante, § 5.

Jurisdiction, defined. While jurisdiction has been defined to be the power to hear and determine (Hickman v. O'Neal, 10 Cal. 292; Central Pacific R. R. Co. v. Board of Equalization, 43 Cal. 365; Ex parte Bennett, 44 Cal. 84), and does not depend upon the rightfulness of the decision (Sherer v. Superior Court, 96 Cal. 653; 31 Pac. 565), yet it may be understood that the power to pronounce the resulting judgment constitutes a part of the subject-matter over which jurisdiction extends. Crew v. Pratt, 119 Cal. 131; 51 Pac. 44.

§ 76. Original jurisdiction. The superior courts shall have original jurisdiction:

1. In all cases in equity;

2. In all civil actions in which the subject of litigation is not capable of pecuniary estimation;

3. In all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars.

4. Of actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate a nuisance, of all matters of probate, of divorce and for annulment of marriage, and of all such special cases and proceedings as are not otherwise provided for.

5. In all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for. Said courts shall have the power of naturalization, and to issue papers therefor. Said courts and their judges, or any of them, shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and of habeas corpus on petition by or on behalf of any person in actual custody, in their respective counties. Injunctions and writs of prohibition may be issued and served on legal holidays and non-judicial days.

Jurisdiction of superior court. See Const., art. vi, § 5.

Jurisdiction in eminent domain. See post, § 1243.

Venue of actions. Post, §§ 392 et seq.

Nuisance. Post, § 731.

Act conferring upon superior judges powers of probate, district, and county judges. See Stats. 1880, p. 23 (Bancroft ed., p. 115).

Legislation § 76. 1. Added by Code Amdts. 1880, p. 28; based on original code §§ 57, 85, defining the respective jurisdiction of the district courts and the county courts created by Const. 1849. Original code § 57 read: "The jurisdiction of the district courts extends: 1. To all civil actions for relief formerly given in courts of equity; 2. To all civil actions in which the subject of litigation is not capable of pecuniary estimation; 3. To all civil actions (except actions of forcible entry and detainer) in which the subject of litigation is capable of pecuniary estimation, which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; 4. To all special proceedings not within the jurisdiction of the county and probate courts, as defined in this code; 5. To the issuance of writs of mandate, review, prohibition, habeas corpus, and all writs necessary to the exercise of

its powers; 6. To the trial of all indictments for treason, misprision of treason, murder, and manslaughter." Original code § 85 read: "Its original jurisdiction extends: 1. To actions to prevent or abate a nuisance; 2. To actions of forcible entry and detainer; 3. To proceedings in insolvency; 4. To all special cases or proceedings in which the law giving the remedy or authorizing the proceedings confers the jurisdiction upon it; 5. To the issuance of writs of mandate, review, prohibition, habeas corpus, and all writs necessary to the exercise of its powers; 6. To inquire, by the intervention of a grand jury, of all public offenses committed or triable in the county; 7. To the trial of all indictments, except for treason, misprision of treason, murder, and manslaughter."

2. Repeal by Stats. **1901**, p. 119; unconstitutional. See note ante, § 5.

The original § 76 related to the duration of the terms of the district courts.

Original jurisdiction. Defining the jurisdiction of a court limits it (Ex parte Attorney-General, 1 Cal. 85), but the grant of original jurisdiction, without words of exclusion, does not deprive other courts of concurrent jurisdiction. Courtwright v. Bear River etc. Mining Co., 30 Cal. 573; Willis v. Farley, 24 Cal. 490; Stoppelkamp v. Mangeot, 42 Cal. 316; Rosenberg v. Frank, 58 Cal. 387; Learned v. Castle, 67 Cal. 41; 7 Pac. 34. Thus, where jurisdiction is conferred on a justice's court in certain cases, the district court is not deprived of jurisdiction in those cases where the amount in controversy is within its jurisdiction. Hicks v. Bell, 3 Cal. 219; Yolo County v. Sacramento, 36 Cal. 193; Rosenberg v. Frank, 58 Cal. 387. Where jurisdiction is conferred by the constitution on courts of general jurisdiction, it cannot be taken away by statute. Hicks v. Bell, 3 Cal. 219; Fitzgerald v. Urton, 4 Cal. 235; Caulfield v. Stevens, 28 Cal. 118; Courtwright v. Bear River etc. Mining Co., 30 Cal. 573; Yolo County v. Sacramento, 36 Cal. 193; Stoppelkamp v. Mangeot, 42 Cal. 316.

Equitable jurisdiction. Original jurisdiction over suits in equity is conferred by the constitution, and any act of the legislature seeking to take away that jurisdiction, or transfer it to another court, is unconstitutional. Willis v. Farley, 24 Cal. 490; and see Wilson v. Roach, 4 Cal. 362; Clarke v. Perry, 5 Cal. 58; 63 Am. Dec. 82; Griggs v. Clark, 23 Cal. 427. The court, while keeping within the rules and principles upon which equitable jurisdiction is founded, will adapt and apply its jurisdiction to such new suits in equity as may arise (Dougherty v. Creary, 30 Cal. 290; 89 Am. Dec. 116; and see Aldrich v. Willis, 55 Cal. 81); and, having the same power in suits in equity as the court of chancery had, it will set aside a judgment for fraud and collusion (Sanford v. Head, 5 Cal. 297), appoint a master to execute a deed for a deceased sheriff (People v. Boring, 8 Cal. 406; 68 Am. Dec. 331), compel the surrender and cancellation of papers (Lewis v. Tobias, 10 Cal. 574), complete the foreclosure of a mortgage after the death of the mortgagee (Belloc v. Rogers, 9 Cal. 123), settle partnership accounts (Griggs v. Clark, 23 Cal. 427), prevent, by injunction, irreparable injury (Lewis v. Tobias, 10 Cal. 574; Pixley v. Huggins, 15 Cal. 127), construe the will of a testator after it had been admitted to probate (Rosenberg v. Frank, 58 Cal. 387; Williams v. Williams, 73 Cal. 99; 14 Pac. 394; Siddall v. Harrison, 73 Cal. 560; 15 Pac. 130; McDaniel v. Pattison, 98 Cal. 86; 27 Pac. 651; 32 Pac. 805); but it should never entertain a suit to construe a will that has been probated, except where there is some special reason for seeking its interpretation. Siddall v. Harrison, 73 Cal. 560; 15 Pac. 130. Testamentary and probate matters are not exclusively under the jurisdiction of the probate court; most of the powers of the probate court belong peculiarly and originally to a court of chancery, and courts of equity still retain jurisdiction. Clarke v. Perry, 5 Cal. 58; 63 Am. Dec. 82; Deck v. Gerke, 12 Cal. 433; 73 Am. Dec. 555; Brodrib v. Brodrib, 56 Cal. 563; Rosenberg v. Frank, 58 Cal. 387; Wilson v. Roach, 4 Cal. 362. In all cases where there are peculiar circumstances of embarrassment, the superior court will assume jurisdiction, in probate matters, to prevent waste, delay, and expense, and thus conclude the action without vexatious litigation (Deck v. Gerke, 12 Cal. 433; 73 Am. Dec. 555); and a guardian's account may be opened by a court of equity, after approval by the probate court (Brodrib v. Brodrib, 56 Cal. 563); and where the powers of the probate court are inadequate to do justice, a court of equity alone can and will afford relief; but it cannot go into an accounting of a copartnership, nor determine the ownership of shares of stock not yet a part of the estate. Raisch v. Warren, 18 Cal. App. 655; 124 Pac. 95.

Prohibition. The writ does not lie to restrain the prosecution of an action by city authorities to condemn a right of way for public purposes. Bishop v. Superior Court, 87 Cal. 226; 25 Pac. 435; Pacific Railway Co. v. Wade, 91 Cal. 449; 25 Am. St. Rep. 201; 13 L. R. A. 754; 27 Pac. 768.

Injunction. One court has no power to interfere with the judgments and decrees of another court of concurrent jurisdiction, unless the latter court, by reason of want of jurisdiction, is unable to afford relief (Anthony v. Dunlap, 8 Cal. 26; Revalk v. Kraemer, 8 Cal. 66; 68 Am. Dec. 304; Chipman v. Hibbard, 8 Cal. 268; Phelan v. Smith, 8 Cal. 520; Gorham v. Toomey, 9 Cal. 77; Uhlfelder v. Levy, 9 Cal. 607; Hockstacker v. Levy, 11 Cal. 76; Crowley v. Davis, 37 Cal. 268; Flaherty v. Kelly, 51 Cal. 145; Porter v. Garrissino, 51 Cal. 559; Wilson v. Baker, 64 Cal. 475; 2 Pac. 253; Buell v. San Francisco Sav. Union, 65 Cal. 292; 4 Pac. 14): a state court cannot enjoin proceedings in a Federal court (Phelan v. Smith, 8 Cal. 520), nor can one superior court restrain another from exe-

cuting its orders and decrees. Rickett v. Johnson, 8 Cal. 34; Revalk v. Kraemer, 8 Cal. 66; 68 Am. Dec. 304; Flaherty v. Kelly, 51 Cal. 145; Judson v. Porter, 51 Cal. 562; Waymire v. San Francisco etc. Ry. Co., 112 Cal. 646; 44 Pac. 1086. This rule is not based on the personal rights of the parties which they can waive, but upon the rights of courts of co-ordinate jurisdiction. Uhlfelder v. Levy, 9 Cal. 607. With respect to jurisdiction, the superior courts of two different counties of the state stand on the same footing. Raisch v. Warren, 18 Cal. App. 655; 124 Pac. 95. The courts of this state cannot restrain persons within the state from prosecuting pending actions in a foreign or domestic court, except to prevent a multiplicity of suits (Spreckels v. Hawaiian Commercial etc. Co., 117 Cal. 377; 49 Pac. 353); but the rule that one court will not restrain another does not extend to actions restraining sales of land under execution, as such actions are not against the court (Pixley v. Huggins, 15 Cal. 127); nor does this rule extend to proceedings which, by law, are required to be brought in a particular county; for if brought in the wrong county, the court has no jurisdiction. Uhlfelder v. Levy, 9 Cal. 607. Proceedings to restrain execution should be instituted in the court rendering the judgment. Crowley v. Davis, 37 Cal. 268; Wilson v. Baker, 64 Cal. 475; 2 Pac. 253; Buell v. San Francisco Savings Union, 65 Cal. 292; 4 Pac. 14; Waymire v. San Francisco etc. Ry. Co., 112 Cal. 646; 44 Pac. 1086.

Title to and possession of real estate. The superior court has original jurisdiction of all questions pertaining to the title to or the possession of real property; and, having jurisdiction of the parties in an appeal from a justice's court, may properly try an issue as to the right of possession of land. Hart v. Carnall-Hopkins Co., 103 Cal. 132; 37 Pac. 196. Where the right of recovery depends upon whether the defendant had a defective or a good title to land, the case involves title to land, and the superior court has jurisdiction. Copertini v. Oppermann, 76 Cal. 181; 18 Pac. 256.

Tax, impost, assessment, etc. The superior court has jurisdiction in cases involving less than three hundred dollars, where the legality of a tax, impost, assessment, toll, or municipal fine is involved. Williams v. Mecartney, 69 Cal. 556; 11 Pac. 186; Bottle Mining Co. v. Kern, 154 Cal. 96; 97 Pac. 25. An action to recover a penalty for exacting illegal toll does not, however, give the court jurisdiction, regardless of the amount involved (Brown v. Rice, 52 Cal. 489); neither does an action to recover unpaid taxes (People v. Mier, 24 Cal. 61; Bell v. Crippen, 28 Cal. 327; People v. Olvera, 43 Cal. 492); but where the action is for the purpose of enforcing a tax lien by sale of the property, it is an equitable action, and the superior court has jurisdiction, regardless of the amount. People v. Mier, 24 Cal. 61; People v. Olvera, 43 Cal. 492; Mahlstadt v. Blanc, 34 Cal. 577. An action against an assessor for a wrongful and malicious act is not within the jurisdiction of the superior court, unless the amount involved is three hundred dollars. Perkins v. Ralls, 71 Cal. 87; 11 Pac. 860.

Amount in controversy. Jurisdiction is determined by the amount for which judgment is asked, and not by the averment of damage. Sanborn v. Superior Court, 60 Cal. 425. The ad damnum clause is the test of the jurisdiction. Maxfield v. Johnson, 30 Cal. 545; Greenbaum v. Martinez, 86 Cal. 459, 461; 25 Pac. 12. The demand of the complaint, regardless of the finding, is the test of jurisdiction for the value of property claimed. J. Dewing Co. v. Thompson, 19 Cal. App. 85; 124 Pac. 1035. While the amount claimed by the plaintiff in the suit is the test of the jurisdiction of the court (Solomon v. Reese, 34 Cal. 28; Tulare v. Hevren, 126 Cal. 226; 58 Pac. 530), yet it does not conclude that question, regardless of the allegations upon which the liability is founded. Lehnhardt v. Jennings, 119 Cal. 192; 48 Pac. 56; 51 Pac. 195. Costs constitute no part of the amount in controversy, and are not included for the purpose of making the jurisdictional amount. Maxfield v. Johnson, 30 Cal. 545; Zabriskie v. Torrey, 20 Cal. 173; Votan v. Reese, 20 Cal. 89. The superior court has no jurisdiction of an action upon a note for two hundred dollars, though the principal and interest exceed the jurisdictional amount. Gallagher v. McGraw, 132 Cal. 601; 64 Pac. 1080. The settled rule is, that the amount sued for, exclusive of interest, is the test of jurisdiction in all cases where actions are brought to recover money. Dashiell v. Slingerland, 60 Cal. 653; Christian v. Superior Court, 122 Cal. 117; 54 Pac. 518; Howe v. Halsey, 6 Cal. Unrep. 148; 54 Pac. 748; Gallagher v. McGraw, 132 Cal. 601; 64 Pac. 1080. Thus, the superior court has not jurisdiction, where the claims do not amount to three hundred dollars, in an action for a money judgment (Reeg v. McArthur, 17 Cal. App. 203; 19 Pac. 105); nor in an action for damages for injury to land, in a sum less than three hundred dollars (Stewart v. Birchfield, 15 Cal. App. 378; 14 Pac. 999); and an action to foreclose a mechanic's lien, for an amount less than three hundred dollars, must show a substantial compliance with the statute creating the lien (Davis v. Treacy, 8 Cal. App. 395; 97 Pac. 78); but there are cases where the court has jurisdiction, regardless of the amount involved (Bailey v. Sloan, 65 Cal. 387; 4 Pac. 349; Lord v. Thomas, 3 Cal. Unrep. 424; 27 Pac. 410); as, where the action puts in issue the title to real estate. Randolph v. Kraemer, 106 Cal. 199; 39 Pac. 533. If the plaintiff, by

mistake, alleges an amount which gives the court jurisdiction, the subsequent discovery of the error does not deprive the court of jurisdiction. Rodley v. Currey, 120 Cal. 541; 52 Pac. 999. The several liabilities of different defendants cannot be combined to give jurisdiction (Thomas v. Anderson, 58 Cal. 99; Bailey v. Sloane, 65 Cal. 387; 4 Pac. 349; Galloway v. Jones, 13 Pac. 712; Derby v. Stevens, 64 Cal. 287; 30 Pac. 820); and parties having separate claims, each under three hundred dollars, but no joint interest in the aggregate, cannot, by joinder of their claim, in one action, confer jurisdiction on the superior court. Winrod v. Wolters, 141 Cal. 399, 403; 74 Pac. 1037. Thus, the court has no jurisdiction in an action to recover from each of several stockholders of a corporation his proportion of a debt, where the amount sued for is less than three hundred dollars, though the aggregate amount sought is more than that sum (Evans v. Bailey, 2 Cal. Unrep. 457; 6 Pac. 428; Derby v. Stevens, 64 Cal. 287; 30 Pac. 820); but where the several liability of sureties is less than the jurisdictional amount, the superior court has jurisdiction. Moore v. McSleeper, 102 Cal. 277; 36 Pac. 593. Where the court renders a judgment within its jurisdiction, the fact that the complaint prayed a recovery in excess does not affect the jurisdiction. Reed v. Calderwood, 22 Cal. 463. If the jurisdictional amount is pleaded in the complaint, the defendant may set up as a counterclaim a demand arising upon a contract, although it is insufficient in amount to give the court jurisdiction (Freeman v. Seitz, 126 Cal. 291; 58 Pac. 690); but where the counterclaim so set up is less than the jurisdictional amount, and shows that the plaintiff's action is unfounded, the defendant is not entitled to judgment on his counterclaim. Griswold v. Pieratt, 110 Cal. 259; 42 Pac. 820. See also note ante, § 52.

Insolvency. The state courts have jurisdiction of an action prosecuted by an assignee, appointed under the United States Bankruptcy Act, to recover the assets of a bankrupt (Dambmann v. White, 48 Cal. 439); and the authority of an assignee, under the state insolvent act, to maintain such an action cannot be collaterally attacked. Fitzgerald v. Neustadt, 91 Cal. 600; 27 Pac. 936.

In probate proceedings. The probate jurisdiction of the superior court is separate and distinct from its jurisdiction in ordinary civil actions (Guardianship of Allgier, 65 Cal. 228; 3 Pac. 849; Estate of Hudson, 63 Cal. 454); but most of its general powers belong peculiarly and originally to the court of chancery. Clarke v. Perry, 5 Cal. 58; 63 Am. Dec. 82. While probate courts are to be regarded as courts of limited and inferior jurisdiction (Townsend v. Gordon, 19 Cal. 188), yet, in probate matters, they are upon the same footing with courts of superior common-law jurisdiction. Irwin v. Scriber, 18 Cal. 499. The grant of jurisdiction in probate matters is part of the general jurisdiction of the superior court (Burris v. Kennedy, 108 Cal. 331; 41 Pac. 458); and where there are two or more judges of the superior court, each judge has jurisdiction in probate matters. Estate of Pearsons, 113 Cal. 577; 45 Pac. 849, 1062. In the exercise of its probate powers, the jurisdiction of the superior court is special and limited (Smith v. Westerfield, 88 Cal. 374; 26 Pac. 206; Grimes's Estate v. Norris, 6 Cal. 621; 65 Am. Dec. 545); and it has only such powers as are given by statute, with the incidental power necessary to the exercise of the power conferred (Strong's Estate, 119 Cal. 663; 51 Pac. 1078; Ryder's Estate, 141 Cal. 366; 74 Pac. 993); but the jurisdiction conferred upon it by the constitution cannot be limited by statute. Heydenfeldt v. Jacobs, 107 Cal. 373; 40 Pac. 492. The statute, however, does not confer on the superior court jurisdiction of all matters relating to estates of deceased persons. Bush v. Lindsey, 44 Cal. 121. It has no power to determine suits between heirs or devisees and strangers as to the title to property in probate (Buckley v. Superior Court, 102 Cal. 6; 41 Am. St. Rep. 135; 36 Pac. 360; Ryder's Estate, 141 Cal. 369; 74 Pac. 993; Heydenfeldt v. Jacobs, 107 Cal. 373; 40 Pac. 492), except in appropriate proceedings, and under proper pleadings, in the manner prescribed by the code. Reither v. Murdock, 135 Cal. 197; 67 Pac. 784; Estate of Heeney, 3 Cal. App. 548; 86 Pac. 842. It has the same jurisdiction in matters of probate as in suits in equity, in actions at law, or in special proceedings (Estate of Burton, 93 Cal. 459; 29 Pac. 36), and has jurisdiction to try and determine issues of fact arising in the proceedings before it (Keller v. De Franklin, 5 Cal. 432); its authority to award costs comes from the statute. Henry v. Superior Court, 93 Cal. 569; 29 Pac. 230. The probate court has exclusive jurisdiction to settle the accounts of a living guardian (Allen v. Tiffany, 53 Cal. 16; Anderson v. Fisk, 41 Cal. 308), but it has no jurisdiction of controversies between a guardian and his ward, after the estate has been expended for the benefit of the ward, and he has become of age. Guardianship of Kincaid, 120 Cal. 203; 52 Pac. 492. Nor has it equitable jurisdiction (Meyers v. Farquharson, 46 Cal. 190; Estate of Clary, 112 Cal. 292; 44 Pac. 569), although it proceeds in accordance with the principles of equity. Estate of Clary, 112 Cal. 292; 44 Pac. 569. Nor can it determine questions of title to a homestead (Davis v. Caldwell, 12 Cal. 125); nor has it the requisite machinery to try questions of fraud (Curtis v. Schell, 129 Cal. 208; 79 Am. St. Rep. 107; 61 Pac. 951); nor can it divide a homestead between the widow

and the heirs (Estate of James, 23 Cal. 415), although it has power to set apart a homestead for the use of the family (Rich v. Tubbs, 41 Cal. 34), but, after the homestead has been set apart, it has no jurisdiction over it for the purpose of distribution (Estate of Gilmore, 81 Cal. 240; 22 Pac. 655), nor has it jurisdiction to try adverse claims to the homestead (Estate of Kimberly, 97 Cal. 281; 32 Pac. 234), nor to determine the rights of those claiming adversely to the estate (Plass v. Plass, 121 Cal. 135; 53 Pac. 148), nor to determine the quality of the title to the property which it distributes (Estate of Dunn, Myr. Prob. 122); but it may delay the final decree until the rights of the parties can be determined in another forum. Estate of Burdick, 112 Cal. 387; 44 Pac. 734. Nor has the probate court jurisdiction to inquire into the consideration or validity or operation of a deed of separation between a testator and his widow. Corker v. Corker, 87 Cal. 643; 25 Pac. 922. The court which granted administration upon the estate of a person supposed to be deceased, but who afterwards appears, has power to vacate the order and annul the proceedings (Stevenson v. Superior Court, 62 Cal. 60), but it has no power, after the vacation of probate proceedings, to make any order in the premises. Costa v. Superior Court, 137 Cal. 79; 69 Pac. 840.

Criminal cases. The superior court has original jurisdiction in habeas corpus cases, and in all criminal cases amounting to felony (Ex parte Williams, 87 Cal. 78; 24 Pac. 602; 25 Pac. 248; Smith v. Hill, 89 Cal. 122; 26 Pac. 644; People v. Colby, 54 Cal. 184), and in cases of misdemeanor not otherwise provided for. In re Grosbois, 109 Cal. 445; 42 Pac. 444; Green v. Superior Court, 78 Cal. 556; 21 Pac. 307, 541; People v. Joselyn, 80 Cal. 544; 22 Pac. 217; In re Marks, 45 Cal. 199; People v. Lawrence, 82 Cal. 182; 22 Pac. 1120; Ex parte Wallingford, 60 Cal. 103; Gafford v. Bush, 60 Cal. 149; Ex parte Noble, 96 Cal. 362; 31 Pac. 224. The legislature has "not otherwise provided for" the following misdemeanors, and the superior court has original jurisdiction in such cases: 1. Assaults or batteries committed upon public officers in the discharge of their duties; 2. Willful injuries to property; and 3. When the punishment is by fine exceeding five hundred dollars, or by imprisonment exceeding six months, or both. In re Grosbois, 109 Cal. 445; 42 Pac. 444; Thomas v. Justice's Court, 80 Cal. 40; 22 Pac. 80. The superior court also has jurisdiction of crimes which may be punishable either as a felony or a misdemeanor; such as obtaining money by false pretenses (Ex parte Neustadt, 82 Cal. 273; 23 Pac. 124), assault by means likely to produce great bodily injury (People v. Fahey, 64 Cal. 342; 30 Pac. 1030), a public nuisance injurious to health (Application of Kurtz, 68 Cal. 412; 9 Pac. 449); but the presentment of a misdemeanor, of which the justice's court has jurisdiction by indictment, does not give the superior court jurisdiction. Ex parte Wallingford, 60 Cal. 103; Green v. Superior Court, 78 Cal. 556; 21 Pac. 307, 541. The jurisdiction of the superior court over a criminal case is not dependent upon a compliance with the provisions of § 925 of the Penal Code. People v. Delhantie, 163 Cal. 461; 125 Pac. 1066.

Original writs. Mandamus. The superior court, and a judge thereof, has original jurisdiction to issue mandamus, certiorari, prohibition, quo warranto, and habeas corpus (Perry v. Ames, 26 Cal. 372; Reynolds v. County Court, 47 Cal. 601; Spring Valley Water Works v. Bryant, 52 Cal. 132; Garretson v. Board of Supervisors, 61 Cal. 54), and may issue such writs to run out of the county in which the court is held. Kings County v. Johnson, 104 Cal. 198; 37 Pac. 870.

Quo warranto. The mode of proceeding in quo warranto has not, in modern times, been very uniform; but in this state, if the proper parties are before the court.. the action may be brought in the name of the attorney-general. People v. Dashaway Ass'n, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277.

Habeas corpus. The superior court has jurisdiction, in habeas corpus, to test the legality of the imprisonment of one held under authority of the warrant of the governor of the state for the purposes of extradition (In re Robb, 64 Cal. 431; 1 Pac. 881; In re Manchester, 5 Cal. 237); but the only thing that can be inquired into is, whether the prisoner is properly detained, under the constitution and laws (In re Manchester, 5 Cal. 237); and the judges of the superior court have the same authority as the supreme court would have, under a writ issued by the supreme court, and made returnable before a judge of the superior court. People v. Booker, 51 Cal. 317; Ex parte Marks, 49 Cal. 680.

CODE COMMISSIONERS' NOTE. 1. Construction of this section. Section 6 of article vi of the constitution, which defines the jurisdiction of the district court, follows the language (so far as civil jurisdiction is concerned) of § 4 of the same article relating to the jurisdiction of the supreme court, and it must, from the very nature of things, receive the same construction. We would look in vain, giving to its terms their ordinary import, for any power or authority over that large class of cases in which the subject of litigation is incapable of pecuniary estimation, and which did not fall within the jurisdiction of courts of equity, or over that other class known as special proceedings, or for the power to issue writs of certiorari, mandamus, or prohibition. The truth is, that the amendments of 1862, in so far as they attempt to fix and define the jurisdiction of the several courts of record, were so framed that to have given their terms any fair or reasonable construction, would have emasculated our whole judicial system. To support this proposition we need but refer the lawyer to the terms of those amendments, and invoke a comparison between the power there conferred and the power now exercised by our courts of record, and to the

same end we need but refer the layman to the case of Knowles v. Yates, cited and quoted from at length in the note to § 44, [§ 52,] ante, and to the able and elaborate opinion of Justice Rhodes, in Courtwright v. Bear River etc. Mining Co., 30 Cal. 578. In the latter case, said the learned justice, speaking for the court: "It is a matter of some doubt whether that article [article vi, before the amendments] deserved the commendation of having been drawn with great skill, . . . but there is less question that the same cannot be said of the article [article vi] as it now stands." See also Perry v. Ames, 26 Cal. 383. The supreme court, by judicial construction, has fixed the limit of the jurisdiction of the different courts. From the very necessities of the case that tribunal was driven to the adoption of the broadest rules of constitutional construction. Indeed, it may well be doubted whether any rule, save that of "necessity which knows no law," could have been invoked to work out the results at which our courts have arrived. We have referred to these matters at some length in this and the note to § 44, [§ 52,] ante, in order to present the inherent difficulties surrounding the subject, and to call the special attention of the profession to the questions involved.

2. **No appellate jurisdiction.** The legislature has no power to confer appellate jurisdiction on district courts. Clary v. Hoagland, 6 Cal. 688; Townsend v. Brooks, 5 Cal. 52; Caulfield v. Hudson, 3 Cal. 389; Zander v. Coe, 5 Cal. 230. The district court has no appellate jurisdiction. The legislature cannot provide for appeals from inferior courts to the district court. People v. Peralta, 3 Cal. 379; Caulfield v. Hudson, 3 Cal. 389; Hernandes v. Simon, 3 Cal. 464; Gray v. Schupp, 4 Cal. 185; Reed v. McCormick, 4 Cal. 342; Townsend v. Brooks, 5 Cal. 52. No appellate jurisdiction exists, even from probate courts. Reed v. McCormick, 4 Cal. 342; Pond v. Pond, 10 Cal. 495. Nor can a district court review proceedings in a justice's court, if the error complained of might have been corrected by an appeal to the county court. Gray v. Schupp, 4 Cal. 185.

3. **Admiralty jurisdiction.** District courts have admiralty jurisdiction pro tanto (post, §§ 813 et seq). Averill v. The Hartford, 2 Cal. 308.

4. **Jurisdiction of mining claims.** Although jurisdiction of mining claims is given to justices of the peace, that of the district court remains unaffected, if the amount in controversy exceeds two hundred [now three hundred] dollars. Hicks v. Bell, 3 Cal. 224.

5. **Loses jurisdiction of decided cause after adjournment for term.** A court loses all power over a cause upon the adjournment of the term, and cannot disturb its judgments, except in cases provided by the statute. Suydam v. Pitcher, 4 Cal. 280; Whipley v. Dewey, 17 Cal. 314.

6. **Jurisdiction by appearance.** An appearance entered by attorney is a good and sufficient appearance to bind the party. Such appearance amounts to an acknowledged waiver of service. Suydam v. Pitcher, 4 Cal. 280.

7. **Actions to abate nuisance.** District courts have jurisdiction in actions to abate nuisances. An act giving jurisdiction of cases of nuisance to the county court cannot avail to take away the jurisdiction given to the district courts by the constitution. Fitzgerald v. Urton, 4 Cal. 235. District and county courts, under the amended constitution, have concurrent jurisdiction in actions to abate nuisance. Courtwright v. Bear River etc. Mining Co., 30 Cal. 576; Yolo County v. Sacramento, 36 Cal. 193. An action to abate a nuisance is a case in equity, and the district court has jurisdiction thereof, without regard to the amount in controversy. Courtwright v. Bear River etc. Mining Co., 30 Cal. 573. And county courts have concurrent jurisdiction in these cases. People v. Moore, 29 Cal. 427. District courts have jurisdiction in cases of nuisance, and because an act gives jurisdiction in like cases to the county court it does not avail to take away the jurisdiction of the district court in these matters. Fitzgerald v. Urton, 4 Cal. 235. But it was decided that county courts did not have jurisdiction in actions to abate a nuisance. Parsons v. Tuolumne County Water Co., 5 Cal. 43; 63 Am. Dec. 76; see, however, People v. Day, 15 Cal. 91.

8. **Forcible entry and unlawful detainer.** District courts have no jurisdiction in actions of forcible entry and unlawful detainer. Townsend v. Brooks, 5 Cal. 52.

9. **Removal of causes from one district to another.** The district court is a court of general original jurisdiction. Its process is coextensive with the state. Causes may be removed from one district or county to another county or district in the manner provided by statute. But this would not be permitted after the party had appeared and answered to the merits. Reyes v. Sanford, 5 Cal. 117.

10. **Verity of records. Correction of records.** An application for mandamus was made to compel a district judge to sign what was alleged by applicant as a true bill of exceptions, which the judge refused to sign. The judge, in answer, stated he did sign a bill of exceptions, which he believed to be correct. Applicant claims the right to try the issue by a jury. Held, such issues could not be tried by jury. The record of a district court cannot be corrected by the verdict of a jury. Courts of such extended jurisdiction and grave responsibility as the district courts must be trusted as to the fidelity of their own records. People v. Judge Tenth Judicial District, 9 Cal. 19.

11. **Cannot restrain courts of co-ordinate jurisdiction.** District courts cannot restrain the execution of the judgments or orders of courts of coordinate jurisdiction. All such proceedings must be had in the courts having control of such judgments. Gorham v. Toomey, 9 Cal. 77; see also Uhlfelder v. Levy, 9 Cal. 607.

12. **Chancery supervision over and control of minors.** District courts have the same control over the persons of minors, as well as their estates, that the courts of chancery in England possess. The jurisdiction is conferred by the constitution, and cannot be divested by any legislative enactment. Wilson v. Roach, 4 Cal. 366.

13. **Issues sent up formerly from probate courts.** Power of district court over issues sent up from probate courts, and over testamentary and probate matters generally, see Pond v. Pond, 10 Cal. 495; Deck v. Gerke, 12 Cal. 433; 73 Am. Dec. 555; Hope v. Jones, 24 Cal. 89. The necessary provisions for trials in the probate court are now made.

14. **Supervision over inferior tribunals.** The general power of supervision over inferior tribunals which pertains to the court of king's bench in England pertains to the district courts of this state. Miliken v. Huber, 21 Cal. 169; Gurnee v. Maloney, 38 Cal. 85; 99 Am. Dec. 352.

15. **Action for charging excessive railroad fare.** Jurisdiction of district court in certain actions provided for by statute; forfeitures imposed on railroad company for charging passengers excess of fare (see Stats. 1863, p. 296). Reed v. Omnibus R. R. Co., 33 Cal. 212; Smith v. Omnibus R. R. Co., 36 Cal. 281.

16. **District court to enter judgment prescribed by supreme court.** When the district court is directed by the supreme court to enter a certain judgment, its duty is to enter a judgment in conformity with the order of the supreme court. Argenti v. Sawyer, 32 Cal. 414. It cannot even add interest to the judgment so ordered. Meyer v. Kohn, 33 Cal. 484.

17. **Judgment of district court to meet the exigencies of the case.** District courts have power, when not expressly limited by the constitution or by a statute, to pronounce such judgment as the exigencies of each case require. Stewart v. Levy, 36 Cal. 160.

18. **Court to direct payment of fees to indigent witnesses in criminal cases.** District courts may, in a criminal case, when witness is poor or has come from another county, direct the county treasurer to pay the witness such a sum as the court may name. Sargent v. Cavis, 36 Cal. 552.

19. **Judgment of district court, only void when in excess of jurisdiction.** When the district court has jurisdiction of the person of the defendant and of the subject-matter of the action, its judgment, no matter how erroneous, is not void. A judgment of a justice's court which was in excess of its jurisdiction, and therefore void, was rendered, and the district court rendered a judgment

founded upon the judgment rendered by the justice of the peace. Held: that though the judgment of the district court was erroneous, yet it was not void, and that it was valid against a collateral attack. Moore v. Martin, 38 Cal. 426.

20. Stipulation cannot confer jurisdiction. See Wicks v. Ludwig, 9 Cal. 173. A stipulation by parties, waiving all objections to jurisdiction, cannot confer on a district court jurisdiction to try a suit in one county, when on that day, by operation of law, the court is adjourned in that county and its term commenced in another county of that district. Batea v. Gage, 40 Cal. 183.

21. Jurisdiction over actions for usurpation of office, franchise, etc. Title to office comes from the will of the people as expressed through the ballot-box, and they have a prerogative right to enforce their will, when it has been so expressed, by excluding usurpers, and putting in power such as have been chosen by themselves. For that purpose the attorney-general, either upon his own suggestion or upon the complaint of a private party, may bring an action against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within the state. The district court has jurisdiction in these cases. People v. Holden, 28 Cal. 123. See also County Court Jurisdiction in Contested Elections.

22. Disposal of community property by one district court, when divorce was granted in another court. Another court than the one decreeing a divorce may acquire jurisdiction to dispose of the community property if it be otherwise competent. De Godey v. Godey, 39 Cal. 157.

23. Custody of children, alimony, etc., in such a case. Where a wife sued for divorce, the judge of the court where the suit was pending had no jurisdiction, "pending the action, to hear and determine in the district court of an adjoining county of the same district an application by the wife for an allowance pendente lite, and for the care and custody of the children of the marriage." Bennett v. Southard, 35 Cal. 691. An order for alimony and for the custody of the children, pendente lite, can only be made by the court in which the action for divorce is pending. Id.

24. Supervision over decrees, orders, etc., of inferior tribunals. Correction of decrees fraudulently entered. It was held that the district judge, whilst sitting as in an equity case, is possessed of all the powers of a court of chancery. The district court, being a court of general jurisdiction, can, in a case in equity, where fraud and collusion are charged against a judge in entering an order or decree, review the same, and annul it if the facts justify such a conclusion. Unless a court of general jurisdiction possessed such a power over limited and inferior tribunals, such as probate courts, the rights of heirs and orphans might be at any time endangered without remedy. Sanford v. Head, 5 Cal. 297.

25. Fraud, accident, mistake, etc. The jurisdiction of courts of equity originally embraced all cases involving questions of fraud, accident, or confidence. In many cases of this sort, courts of common law have for a long time exercised jurisdiction, and in many other cases, in which anciently no such remedy was allowed, is now expanded so as to reach them: but the jurisdiction of courts of equity is not destroyed or impaired merely because courts of law exercise an equitable jurisdiction; jurisdiction in such cases is concurrent. People v. Houghtaling, 7 Cal. 348.

26. Suit against administrator. It was held that an administrator might be sued in the district court as a court of equity, by the people, to compel him to pay over certain moneys which were collected by the intestate as a tax-collector. See People v. Houghtaling, 7 Cal. 348. The district court has no jurisdiction over an action against an administrator when he attempts to make charges against the estate for expenses in administering thereon. See Gurnee v. Maloney, 38 Cal. 85; 99 Am. Dec. 352.

27. Jurisdiction over claims against estate of decedent. The fact that a claim against the estate of a deceased person has not been presented to the administrator does not take away from the district court jurisdiction over such claim. Hentsch v. Porter, 10 Cal. 555; see Fallon v. Butler, 21 Cal. 24; 81 Am. Dec. 140, commenting on the cases of Ellissen v. Halleck, 6 Cal. 386, and Falkner v. Folsom's Exrs., 6 Cal. 412; see also Pechaud v. Rinquet, 21 Cal. 76. The district court has no jurisdiction over the allowance or apportionment of the commissions of the executors and administrators, and if it can interfere at all with the decree of the probate court, it can only do so as a court of chancery, and can go no further than to set aside the decree on the ground of fraud, or other like ground of equitable interference, and leave the parties to make another settlement in the probate court. Searles v. Scott, 14 Sm. & M. (Miss.) 94; Hope v. Jones, 24 Cal. 89.

28. Foreclosure of mortgages upon estate of decedent. District courts have jurisdiction over an action for the foreclosure of mortgages upon the estates of decedents, even though the debt was presented as a claim against the estate to the administrator or executor, and allowed by him and also by the probate judge. If the object sought to be attained is to subject the lands mortgaged to sale for the satisfaction of the debt, and no judgment is asked to bind the estate or for the payment of any moneys out of the estate (overruling Ellissen v. Halleck, 6 Cal. 386, and Falkner v. Folsom's Exrs., 6 Cal. 412). Fallon v. Butler, 21 Cal. 24; 81 Am. Dec. 140; see also Pechaud v. Rinquet, 21 Cal. 76. In some of the earlier cases it was held that a mortgage creditor whose claim was allowed could not maintain an action in the district court for the foreclosure of his mortgage, but that his debt must abide the administration and settlement of the estate under the supervision of the probate court. Ellissen v. Halleck, 6 Cal. 392; Falkner v. Folsom's Exrs., 6 Cal. 412. But the doctrine of these cases in this respect may be said to have been disapproved by the court in its later decisions, mainly, if not entirely, on the ground that the district court had, under the constitution as it then existed, original jurisdiction in law and equity in all cases where the amount in dispute exceeded two hundred dollars, exclusive of interest. Belloc v. Rogers, 9 Cal. 123; Hentsch v. Porter, 10 Cal. 559; Fallon v. Butler, 21 Cal. 30; 81 Am. Dec. 140. By the constitution as amended, it is provided that the district courts shall have original jurisdiction in all cases in equity. Const., art. vi, § 6. The foreclosure of mortgages and the sales of premises for the payment of debts thereby secured are matters of purely equitable cognizance. Hence, a creditor of an estate of a decedent whose debt is secured by mortgage may, after having duly presented it to the executor or administrator and probate judge, whether it be allowed or rejected, proceed at once to foreclose his mortgage in the proper court of original equitable jurisdiction. Willis v. Farley, 24 Cal. 491.

29. Equitable and complete relief to be administered. It is the duty of the court, as a court of equity, while keeping within the rules and principles on which its remedial jurisdiction is founded, to adapt its course of proceeding, as far as possible, to the existing state of things, and to apply its jurisdiction to all those new cases which, from the diversified transactions among men, are continually arising, and to administer justice and enforce right, for which there is no remedy save in a court of equity. Taylor v. Salmon, 4 Myl. & C. 141; Walworth v. Holt, Id. 635; Dougherty v. Creary, 30 Cal. 297; 89 Am. Dec. 116. See this case as to mining matters, abandonment of water, on tailings, etc.

30. Enjoining erection of wharves, etc. The equity jurisdiction with which our district courts are invested under the constitution is that administered in the high court of chancery in England. People v. Davidson, 30 Cal. 390; and see this case as to power of district courts to enjoin erection of wharves, public nuisance, and as to its equity powers generally. Id.

31. Annulment of decree of county court condemning land. Powers of district court as a court of equity to annul condemnation of land for certain uses, had by order of county court. See

San Francisco etc. Water Co. v. Alameda Water Co., 36 Cal. 639.

32. **Title or possession of real property.** Construction of the phrase, "The district court shall have original jurisdiction in all cases at law which involve the title or possession of real property." See Holman v. Taylor, 31 Cal. 338. It was held that it was not necessary, however, that the title or possession be put in issue, if either is alleged in the pleadings on either side; as an issuable fact it is sufficient to give the district court jurisdiction. Actions for damages without reference to the amount for trespass upon lands, are within the jurisdiction of the district court. Holman v. Taylor, 31 Cal. 338. But this case was materially modified by the same justice, in Pollock v. Cummings, 38 Cal. 684; see, too, Doherty v. Thayer, 31 Cal. 144; see note to § 114, [§ 112,] post, "Justices' Courts." Two actions were commenced in a justice's court to recover damages to real property. The amount claimed was two hundred dollars. The answer of the defendants put in issue the ownership of the property, and moved to transfer the cases to the district court. The motions were overruled. On appeal to the county court the order was made granting transfer to the district court. Held: the county court had authority to transfer the cases to the district court, under § 838 (§ 581) of the code. The fact that the title of the property was involved, and not the amount claimed in damages, established the jurisdiction of the district court. Cullen v. Langridge, 17 Cal. 67.

33. **Legality of any tax, impost, assessment, etc.** In People v. Mier, 24 Cal. 61, the supreme court held that in actions to recover taxes (under the somewhat anomalous condition in which the law then stood: Revenue Laws 1861–62), the character of the action, as to whether it was a case at law or in equity, must be determined by the relief sought in the prayer of the complaint; and that when the amount of the taxes sued for was less than three hundred dollars, and there was no prayer for the foreclosure of the tax lien, order of sale, etc., the district court had no jurisdiction. Adhered to in Bell v. Crippen, 28 Cal. 327. If the defense set up in an answer involves the legality of the tax (in an action in a justice's court, brought for the recovery of a money judgment), the jurisdiction of the justice would be ousted on the filing of the answer. People v. Mier, 24 Cal. 61.

34. **Value or amount of property in controversy.** Before the amendments to the state constitution (adopted 1862), the district court had jurisdiction, where the amount sued for, exclusive of interest, exceeded two hundred dollars. Arnold v. Van Brunt, 4 Cal. 89; Page v. Ellis, 9 Cal. 248. But a judgment could be rendered for a less amount than the sum prescribed by the constitution, limiting the jurisdiction of the court in the commencement of the action. Jackson v. Whartenby, 5 Cal. 94. In actions for the recovery of money, the district courts have jurisdiction, if the demand in the complaint, exclusive of interest, amounts to three hundred dollars. Solomon v. Reese, 34 Cal. 32; see particularly note 6, § 44, [§ 52,] ante.

35. **Insolvency proceedings.** Proceedings in insolvency (state law) are not, strictí juris, either proceedings in law or equity, but a new remedy or proceeding, created by statute, the administration of which has been vested in the district courts of this state, independently of their common-law or chancery powers, as courts of general jurisdiction; and second, wherever a new right is created by statute, and the enforcement of such right is committed to a court even of general original jurisdiction, that such court, quoad hoc, is an inferior court, and must pursue the statute strictly. The district court acts as a court of limited or inferior jurisdiction in these matters. Cohen v. Barrett, 5 Cal. 195.

36. **Writs of mandate.** District courts have jurisdiction to issue writs of mandate. Perry v. Ames, 26 Cal. 372; Cariaga v. Dryden, 30 Cal. 246; Courtwright v. Bear River etc. Mining Co., 30 Cal. 573.

37. **Writ of review (certiorari).** District courts have not jurisdiction, by certiorari (writ of review), over the judgment rendered in a justice's court in cases where the error might have been corrected by an appeal to the county court. Gray v. Schupp, 4 Cal. 185. When district courts have jurisdiction to review cases by certiorari (or writ of review), see People v. Hester, 6 Cal. 680 (and cases cited in brief of petitioner); see further, Chard v. Harrison, 7 Cal. 113; and People v. El Dorado County Supervisors, 8 Cal. 58, overruling People v. Hester, supra; also examine Murray v. Board of Supervisors, 23 Cal. 492; Perry v. Ames, 26 Cal. 372; Morley v. Elkins, 37 Cal. 454; see also, on habeas corpus, Perry v. Ames, 26 Cal. 372.

38. **Formation of new districts. Jurisdiction over causes arising previous to formation of district.** Where a new county is created or a new district is formed by statute, the district court of the new county or (of the new district) has jurisdiction to try all indictments for murder found in the county court of the old county, but committed in the new county after the passage of the act creating such new county, provided the trial is not had until the new county or district is organized. See People v. McGuire, 32 Cal. 140.

§ 77. Appellate jurisdiction. The superior courts shall have appellate jurisdiction in such cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law.

Appellate jurisdiction. See Const., art. vi, § 5. **Appeals to superior court.** See post, §§ 974–980.

Legislation § 77. 1. Added by Code Amdts. **1880**, p. 28, to conform to Const. 1879.

2. Repeal by Stats. **1901**, p. 119; unconstitutional. See note ante, § 5.

Original § 77, "Adjournment of [district] court."

Appellate jurisdiction. This section limits the appellate jurisdiction of the superior court to the extent and mode prescribed. (Sherer v. Superior Court, 94 Cal. 354; 29 Pac. 716): the court has appellate jurisdiction only as prescribed by law. People v. Treadwell, 66 Cal. 400; 5 Pac. 686; Shealor v. Superior Court, 70 Cal. 564; 11 Pac. 653.

CODE COMMISSIONERS' NOTE. [§ 57, original code.] **No appellate jurisdiction.** The legislature has no power to confer appellate jurisdiction on district courts. Clary v. Hoagland, 6 Cal. 668; Townsend v. Brooks, 5 Cal. 52; Caulfield v. Hudson, 3 Cal. 389; Zander v. Coe, 5 Cal. 230. The district court has no appellate jurisdiction. The legislature cannot provide for appeals from inferior courts to the district court. People v. Peralta, 3 Cal. 379; Caulfield v. Hudson, 3 Cal. 389; Hernandes v. Simon, 3 Cal. 464; Gray v. Schupp, 4 Cal. 185; Reed v. McCormick, 4 Cal. 342; Townsend v. Brooks, 5 Cal. 52. No appellate jurisdiction exists even from probate courts. Reed v. McCormick, 4 Cal. 342; Pond v. Pond, 10 Cal. 495. Nor can a district court review proceedings in a justice's court if the error complained of might have been corrected by an appeal to the county court. Gray v. Schupp, 4 Cal. 185.

§ 78. Process. The process of the superior courts shall extend to all parts of the state; provided, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated.

Process runs throughout state. Const., art. vi, § 5.
Place of trial. Const., art. vi, § 5; post, § 392.

Legislation § 78. 1. Added by Code Amdts. **1880,** p. 28.
2. Repeal by Stats. **1901,** p. 119; unconstitutional. See note ante, § 5.
The original § 78 was entitled "Judgments may be entered in vacation."

Process runs throughout state. Raisch v. Warren, 18 Cal. App. 655; 124 Pac. 95.
Venue of actions affecting real property is in any county in which part of the land affected by the action is situated. Kimball v. Tripp, 136 Cal. 631; 69 Pac. 428.

§ 79. Transfer of books, papers, and actions. All records, books, papers, causes, actions, proceedings, and appeals lodged, deposited, or pending in the district court or courts, county court, probate court, municipal criminal court, or municipal court of appeals, of, in, or for any county, or city and county, of the state, abolished by the constitution, are transferred to the superior court of such county, or city and county, which has the same power and jurisdiction over them as if they had been in the first instance lodged, deposited, filed, or commenced therein, or, in cases of appeal, appealed thereto.

Transfer of books, papers, and actions. See Const., art. xx, § 3; ante, §§ 55, 56.
Act conferring upon superior court powers of former courts. See Stats. 1880, p. 23.
Act transferring to superior court business, etc., of former courts. See Stats. 1880, p. 2.

Legislation § 79. 1. Added by Code Amdts. **1880,** p. 28.
2. Repeal by Stats. **1901,** p. 119; unconstitutional. See note ante, § 5.
Judicial officers. Justices of the peace are judicial officers, within the constitution. Kahn v. Sutro, 114 Cal. 316; 33 L. R. A. 620; 46 Pac. 87; In re Mitchell, 120 Cal. 384; 52 Pac. 799.

CHAPTER V.

JUSTICES' COURTS.

Article I. Justices' Courts in Cities and Counties. §§ 82–98.
II. Justices' Courts in Townships. §§ 99–109.
III. Justices of the Peace and Justices' Courts in General. §§ 110–119.

ARTICLE I.

JUSTICES' COURTS IN CITIES AND COUNTIES.

§ 82. [Related to county courts. Repealed. §§ 83, 84. Same.]
§ 85. Justices' courts and justices.
§ 86. Clerks of justices' courts.
§ 87. Sheriff and deputies.
§ 88. Offices and office hours.
§ 89. Actions.
§ 90. Reassignment and transfer of actions.
§ 91. Payment of fees.
§ 92. Certificates, transcripts, and other papers.
§ 93. Justices' docket.
§ 94. Territorial extent of jurisdiction.
§ 95. Practice and rules.
§ 96. Attorney. Who shall not act as.
§ 97. Salaries.
§ 98. What justices successors of others.

§§ 82, 83, 84. [Related to county courts. Repealed.]

Legislation §§ 82, 83, 84. 1. Enacted March 11, **1872,** and related to county courts.
2. Repealed by Code Amdts. **1880,** p. 21, in amending Part I.

§ 85. Justices' courts and justices. There shall be in every city and county of more than four hundred thousand population a justice's court for which five justices of the peace shall be elected by the qualified electors at the general state election next preceding the expiration of the terms of office of their predecessors. Any of said justices may hold court and there may be as many sessions of said court at the same time as there are justices thereof. Said justices shall choose one of their number to be presiding justice who may at any time be removed and another appointed in his place by a vote of a majority of them; providing, that in the case of the temporary absence or disability of the presiding justice, any one of the other justices, to be designated by the presiding justice, may act as presiding justice during such absence or disability. Each justice of the peace so elected must at the time of his election be an elector of such city and county, and qualified to practice in all the courts of this state.

Justices, number, etc. Const., art. vi, § 11.
Justices' courts. Compare §§ 103, 110, post.
Act organizing San Francisco justices' court (Stats. 1865–66, p. 423; 1869–70, p. 56; 1871–72, p. 758) governed before 1880.

Legislation § 85. **1.** Added by Code Amdts. **1880**, p. 29.
2. Amended by Stats. **1915**, p. 1440, (1) in first sentence, (a) substituting "four hundred thousand population" for "one hundred thousand population," and (c) striking out "of such city and county" after "qualified electors"; (2) in second sentence, striking out "one" after "Any"; (3) in third sentence, (a) striking out "The" as the initial word of the sentence, and (b) adding "the" before "case"; (4) adding the final sentence.
The original § 85 defined the original jurisdiction of county courts.

§ 86. **Clerks of justices' courts.** The supervisors of such city and county shall appoint a justices' clerk on the written nomination and recommendation of said justices, or a majority of them, who shall hold office during good behavior, and who shall receive a salary of three thousand dollars a year. Said justices' clerk shall take the constitutional oath of office, and give bond in the sum of ten thousand dollars for the faithful discharge of the duties of his office, and in the same manner as is or may be required of officers of such city and county. A new or additional bond may be required by the supervisors of such city and county, and in such amount as may be fixed by said supervisors, whenever they may deem it necessary. The said clerk may appoint a chief deputy and a cashier, each at a salary of eighteen hundred dollars a year, and three deputy clerks and one messenger each at a salary of fifteen hundred dollars a year. Said justices' clerk, and each of said appointees shall have authority to administer oaths, take and certify affidavits and issue and sign writs, summons, and all other processes, in any action, suit or proceeding in said justices' court, and generally to do all the acts specified in sections one hundred and two and one hundred and two a of this code. They shall be at their respective offices for the dispatch of official business daily, except Sundays, holidays and Saturday afternoons, from the hour of nine o'clock a. m. until five o'clock p. m. The salaries of said justices' clerk and his appointees shall be paid out of the treasury of said city and county in the same manner that salaries of officers of such city and county are paid, and shall be in lieu of all fees collected by them, and all persons appointed to such positions shall, after they have served a period of six months in their respective positions, be entitled to all the benefits of the civil service laws of this state.

Legislation § 86. **1.** Added by Code Amdts. **1880**, p. 29.
2. Amended by Stats. **1915**, p. 58, (1) in first sentence, substituting the final clause for "who shall hold office for two years, and until his successor is in like manner appointed and qualified"; (2) in second sentence, striking out "other" before "officers"; (3) substituting the present four final sentences for the former two final sentences, which read, "The justices' clerk shall have authority to appoint two deputy clerks, for whose acts he shall be responsible on his official bond, the said deputy clerks to hold office during the pleasure of said clerk. Said justices' clerk and deputy shall have authority to administer oaths, and take and certify affidavits in any action, suit, or proceeding in said justices' court."
The amending act of 1915 contained a repealing clause, reading, "Sec. 2. All acts or parts of acts in conflict herewith are hereby repealed."
The original § 86 defined the appellate jurisdiction of county courts.

Liability of clerks of courts: 1. On official bonds. See note 91 Am. St. Rep. 562; 2. To individuals for non-performance of official duties. See note 95 Am. St. Rep. 89.

§ 87. **Sheriff and deputies.** The sheriff of such city and county shall be ex officio an officer of said court, and it shall be his duty to serve or execute, or cause to be served and executed, each and every process, writ, or order that may be issued by said justices' court; provided, that a summons issued from said court may be served and returned as provided in section eight hundred and forty-nine of this code; and that subpœnas may be issued by the justices' clerk and served as provided in section one thousand nine hundred and eighty-seven and one thousand nine hundred and eighty-eight of this code. The said sheriff may appoint, in addition to the other deputies allowed by law, three deputies, whose duty it shall be to assist said sheriff in serving and executing the process, writs, and orders of the said justices' court. Said deputies shall receive a salary of one hundred and twenty-five

dollars per month each, payable monthly, out of the city and county treasury, and out of the special fee fund, after being first allowed and audited as other demands are by law required to be audited and allowed. One of said deputies shall remain in attendance during the sessions of said court, and at such other times as the said court or the presiding justice thereof may order and direct, for the purpose of attending to such duties as may be imposed on said sheriff or said deputies as herein provided, or required by law. The said sheriff shall be liable on his official bond for the faithful performance of all duties required of him, or any of his said deputies.

Sheriff, generally. See Pol. Code, §§ 4175 et seq.
Legislation § 87. Added by Code Amdts. 1880, p. 30.
The original § 87 defined presumptions in favor of judgments of county courts.

§ 88. **Offices and office hours.** The supervisors of such city and county shall provide, in some convenient locality in the city and county, a suitable office, or suite of offices for said presiding justice, justices' clerk, deputy clerk, and deputy sheriff, and offices suitable for holding sessions of said court, and separate from one another, for each of said justices of the peace, together with attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business; and if they are not provided, the court may direct the sheriff to provide the same, and the expenses incurred, certified by the justices to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof. The said justices, justices' clerk, and deputy clerk, shall be in attendance at their respective offices for the dispatch of official business, daily, from the hour of eight o'clock a. m. until five o'clock p. m.

Legislation § 88. Added by Code Amdts. 1880, p. 30.
The original § 88 provided for terms of county courts in the several counties.

§ 89. **Actions.** All actions, suits, and proceedings in such city and county whereof justices of the peace or justices' courts have jurisdiction, except those cases of concurrent jurisdiction that may be commenced in some other court, shall be entitled "In the Justices' Court of the City and County of ——" (inserting the name of the city and county), and commenced and prosecuted in said justices' court, which shall be always open. The original process shall be returnable, and the parties summoned required to appear before the presiding justice, or before one of the other justices of the peace, to be designated by the presiding justice, at his office; but all complaints, answers, and other pleadings and papers, required to be filed, shall be filed, and a record of all such actions, suits, and proceedings made and kept in the clerk's office aforesaid; and the presiding justice, and each of the other justices shall have power, jurisdiction, and authority to hear, try, and determine any action, suit, or proceeding so commenced, and which shall have been made returnable before him, or may be assigned or transferred to him, or any motion, application, or issue therein (subject to the constitutional right of trial by jury), and to make any necessary and proper orders therein.

Concurrent jurisdiction. See post, § 113.
Jurisdiction of justice's court. See post, §§ 112 et seq.
Legislation § 89. Added by Code Amdts. 1880, p. 30.
The original § 89 declared county courts always open for certain purposes.

§ 90. **Reassignment and transfer of actions.** In case of sickness or disability or absence of a justice of the peace (on the return of a summons or at the time appointed for trial) to whom a cause has been assigned, the pre-

siding justice shall reassign the cause to some other justice, who shall proceed with the trial and disposition of said cause in the same manner as if originally assigned to him; and if, at any time before the trial of a cause or matter returnable or pending before any of said justices, either party shall object to having the cause or matter tried before such justice, on the ground that such justice is a material witness for either party, or on the ground of the interest, prejudice, or bias of such justice, and such objection be made to appear in the manner prescribed by section eight hundred and thirty-three of this code, the said justice shall suspend proceedings, and the presiding justice, on motion and production before him of the affidavit and proofs, shall order the transfer of the cause or matter for trial before some other justice, to be designated by him. The presiding justice may, in like manner, assign or transfer any contested motion, application, or issue in law, arising in any cause returnable or pending before him or any other justice, to some other justice; and the said justice, to whom any cause, matter, motion, application, or issue shall be so as aforesaid assigned or transferred, shall have power, jurisdiction, and authority to hear, try, and determine the same accordingly.

Legislation § 90. Added by Code Amdts. 1880, p. 31. The original § 90 provided for place of holding county courts.

§ 91. **Payment of fees.** All legal process of every kind in actions, suits, or proceedings in said justices' court, for the issue or service of which any fee is or may be allowed by law, shall be issued by the said justices' clerk upon the order of the presiding justice, or upon the order of one of the justices of the peace, acting as presiding justice, as in this article provided; and the fees for issuance and service of all such process, and all other fees which are allowed by law for any official services of justices, justices' clerk, or sheriff, shall be exacted and paid in advance into the hands of said clerk, and be by him daily, or weekly, or monthly, as the supervisors may require, and before his salary shall be allowed, accounted for in detail, under oath, and paid into the treasury of such city and county as part of the special fee fund thereof; provided, that such payment in advance shall not be exacted from parties who may prove to the satisfaction of the presiding justice that they have a good cause of action, and that they are not of sufficient pecuniary ability to pay the legal fees; and no judgment shall be rendered in any action before said justices' court, or any of said justices, until the fees allowed therefor, and all fees for previous services therein, which are destined to be paid into the treasury, shall have been paid, except in cases of poor persons, as hereinbefore provided.

Fees. See Const., art. vi, § 15.

Legislation § 91. 1. Added by Code Amdts. 1880, p. 31.

2. Amendment by Stats. 1901, p. 119; unconstitutional. See note ante, § 5.

Process on order of presiding justice. An order of the presiding justice is necessary to secure issuance of process; and mandamus will not lie to compel the clerk to issue process without such order. Kosminsky v. Williams, 126 Cal. 26; 58 Pac. 310. The signature to the process may be by the clerk, who should sign as "justice's clerk": the process need not be signed by the presiding justice. Helms v. Dunne, 107 Cal. 117; 40 Pac. 100. Where the process recites that it was issued upon the order of the presiding justice, it may be proved that the order was in fact made by the presiding justice, though there is a mistake in his name. Helms v. Dunne, 107 Cal. 117; 40 Pac. 100.

Fees. The fee for entering judgment is two dollars, but the justice is not authorized to receive the same: it must be paid to the clerk. Reid v. Groezinger, 115 Cal. 551; 47 Pac. 374; Miller v. Curry, 113 Cal. 644; 45 Pac. 877.

§ 92. Certificates, transcripts, and other papers. Cases which by the provisions of law are required to be certified to the superior court, by reason of involving the question of title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, shall be so certified by the presiding justice and justices' clerk; and for that purpose, if such question shall arise on the trial, while the case is pending before one of the other justices, such justice shall certify the same to the presiding justice. All abstracts and transcripts of judgments and proceedings in said court, or in any of the dockets or registers of or deposited in said court, shall be given and certified from any of such dockets or registers, and signed by the presiding justice and clerk, and shall have the same force and effect as abstracts and transcripts of justices of the peace in other cases. Appeals from judgments rendered in said court shall be taken and perfected in the manner prescribed by law; but the notice of appeal, and all the papers required to be filed to perfect it, shall be filed with the justices' clerk. Statements on appeal shall be settled by the justice who tried the cause. Sureties on appeal, or on any bond, or undertaking given in any cause or proceeding in said court, when required to justify, may justify before any one of the justices.

Transfer to superior court. See post, § 838.
Appeals. See post, §§ 974 et seq.

Legislation § 92. Added by Code Amdts. 1880, p. 32.

Undertaking on appeal. An undertaking on appeal from a justice's court, defective merely, and not a nullity, may be cured by filing in the superior court a sufficient undertaking, in pursuance of leave first obtained from that court. Werner v. Superior Court, 161 Cal. 209; 118 Pac. 709. After a case in the justice's court of the city and county of San Francisco has been assigned for trial to a particular justice, the justification of sureties on an undertaking on appeal may, after due notice to the adverse party, be taken before any other justice of the same court. Werner v. Superior Court, 161 Cal. 209; 118 Pac. 709.

§ 93. Justices' docket. In a suitable book, strongly bound, the justices' clerk shall keep a permanent record of all actions, proceedings, and judgments commenced, had, or rendered in said justices' court, which book shall be a public record, and be known as the "justices' docket," in which docket the clerk shall make the same entries as are provided for in section nine hundred and eleven of this code, and which said docket and entries therein shall have the same force and effect as is provided by law in reference to dockets of justices of the peace. To enable the clerk to make up such docket, each of the justices shall keep minutes of his proceedings in every cause returnable before or assigned or transferred to him for trial or hearing; and upon judgment or other disposition of a cause, such justice shall immediately certify and return the said minutes, together with all pleadings and papers in said cause, to the clerk's office, who shall immediately thereupon file the same and make the proper entries under the title of the action in the docket aforesaid.

Docket.
1. **Generally.** Post, §§ 911 et seq.
2. **Effect of.** Post, § 912.

Legislation § 93. Added by Code Amdts. 1880, p. 32.

Effect of entry in docket. The entry in the justice's docket is primary evidence of the facts therein alleged, where they are not rebutted by anything else in the record. Rauer v. Justice's Court, 115 Cal. 84; 46 Pac. 870.

§ 94. Territorial extent of jurisdiction. The jurisdiction of the justices' court of such city and county extends to the limits of the city and county, and its process may be served in any part thereof.

Jurisdiction. Post, §§ 112 et seq., 925.
Process, where runs. See post, § 106.
Legislation § 94. Added by Code Amdts. **1880**, p. 32.
The original § 94 provided that a probate court must be held in each county.

§ 95. **Practice and rules.** The justices' court and the justices of the peace of every such city and county shall be governed in their proceedings by the provisions of law regulating proceedings before justices of the peace, so far as such provisions are not altered or modified in this article, and the same are or can be made applicable in the several cases arising before them. The justices' courts of such city and county shall have power to make rules not inconsistent with the constitution and laws for the government of such justices' court and the officers thereof; but such rules shall not be in force until thirty days after their publication; and no rules shall be made imposing any tax or charge on any legal proceeding, or giving any allowance to any justice or officer for services.

Provisions applicable. See post, §§ 832–926.
Rules of courts, generally. See post, § 129.
Legislation § 95. Added by Code Amdts. **1880**, p. 32.
Original § 95: "Judges of" [probate court].

Rules of court. Rules of practice are properly within the jurisdiction of the court. Ex parte Thistleton, 52 Cal. 220; People v. Jordan, 65 Cal. 644; 4 Pac. 683.

§ 96. **Attorney. Who shall not act as.** It shall not be lawful for any justice of the peace, justices' clerk, or sheriff of any such city and county, or any of their deputies, to appear or advocate, or in any manner act as attorney, counsel, or agent for any party or person in any cause, or in relation to any demand, account, or claim pending, or to be sued or prosecuted before said court or justices, or either of them; nor shall any person other than an attorney at law, duly admitted to practice in courts of record, be permitted to appear as attorney or agent for any party in any cause or proceeding before said justices' court, or any of said justices, unless he produce a sufficient power of attorney to that effect, duly executed and acknowledged before some officer authorized by law to take acknowledgments of deeds, which power of attorney, or a copy thereof, duly certified by one of the justices (who, on inspection of the original, and being satisfied of its genuineness, shall certify such copy), shall be filed among the papers in such cause or proceeding.

Judges, disqualifications of. Post, §§ 170–172.
Legislation § 96. Added by Code Amdts. **1880**, p. 33.
The original § 96 provided for the election of a probate judge in the city and county of San Francisco.

§ 97. **Salaries.** The justices of the peace shall receive for their official services the following salaries and no other or further compensation, payable monthly, out of the city and county treasury, after being first allowed and audited, as other similar demands are by law required to be allowed and audited; to each of the justices of the peace four thousand two hundred dollars per annum.

Legislation § 97. **1.** Added by Code Amdts. **1880**, p. 33, and then read: "The justices of the peace, and justices' clerk, and his deputy shall receive for their official services the following salaries, and no other or further compensation, payable monthly, out of the city and county treasury, and out of the special fee fund thereof, after being first allowed and audited as other similar demands are by law required to be allowed and audited: To the presiding justice, twenty-seven hundred dollars per annum; to the other justices of the peace and the justices' clerk, each, twenty-four hundred dollars per annum; to the deputy of the justices' clerk, twelve hundred dollars per annum."
2. Amended by Stats. **1905**, p. 9.
3. Amended by Stats. **1915**, p. 1440, substituting "four thousand two hundred dollars" for "thirty-six hundred dollars."
The original § 97 defined the jurisdiction of probate courts.

§ 98. **What justices successors of others.** The justices of the peace elected in any such city and county at the general election of eighteen hundred and seventy-nine, or persons appointed to fill their places, are successors of the justices of the peace of such city and county who held office at the time of such election; and all records, registers, dockets, books, papers,

causes, actions, and proceedings lodged, deposited, or pending before the justices' court, or any justice of any such city and county, are transferred to the justices' court of such city and county, herein provided for, which shall have the same power and jurisdiction over them as if they had been in the first instance lodged, deposited, filed, or commenced therein.

Similar provisions.
1. Supreme court. Ante, § 55.
2. Superior court. Ante, § 79.
What justices successors of others. See post, § 107.

Legislation § 98. Added by Code Amdts. **1880**, p. 33.
The original § 98 defined presumptions in favor of judgments of probate courts.

ARTICLE II.

JUSTICES' COURTS IN TOWNSHIPS.

§ 99. Justices' courts and justices in townships having a population between two hundred and fifty thousand and four hundred thousand.
§ 100. Return of process.
§ 101. Appointment of justices' clerk.
§ 102. Duties of justices' clerk.
§ 102a. Fees.
§ 102b. Salaries of justices and clerks.
§ 103. Justices' courts and justices. In counties. In cities of various classes. Jurisdiction. Qualifications. Salaries. Fees.
§ 103½. Clerk to justice's court in cities of second and one half and third classes, duties, etc.
§ 103a. Justices' clerks, additional powers of.
§ 103b. Justices' clerks in counties of the seventh class, appointed when, and powers and duties of.
§ 104. Courts, where held.
§ 105. What justice may hold court for another.
§ 106. Territorial extent of civil jurisdiction.
§ 107. What justices successors of others.
§ 108. [Related to municipal criminal court of San Francisco. Repealed. § 109. Same.]

§ 99. Justices' courts and justices in townships having a population between two hundred and fifty thousand and four hundred thousand. There shall be in each township having a population of more than two hundred and fifty thousand and less than four hundred thousand, one justices' court composed of six justices of the peace, which shall have the powers and jurisdiction prescribed and conferred by law upon justices of the peace. Said justices shall choose one of their number to be presiding justice, and in case of his disability or temporary absence he may designate any one of the other justices to act in his stead. Any of said justices may hold court and there may be as many sessions of said court at the same time as there are justices thereof. The supervisors shall provide in a convenient locality a suitable office for the presiding justice, justices' clerk, and rooms suitable for holding sessions of said court, separate from each other, for each of said justices of the peace. The said justices, justices' clerk, and deputy clerk, shall be in attendance at their respective offices for the dispatch of official business daily from nine o'clock a. m. until five p. m.

Nothing in this act shall affect the tenure of office of any justice of the peace now holding office.

Legislation § 99. **1.** Added by Stats. **1911**, p. 442; the act (adding §§ 99–102b) containing a saving clause, reading, "Sec. 7. Nothing in this act shall in any way interfere with or terminate the term of office of any person now holding the office of either justice of the peace or clerk of the justices' court, but immediately upon this act taking effect said justice of the peace shall organize said court under the provision of this act."
2. Amended by Stats. **1915**, p. 215, (1) in first sentence, substituting "six justices of the peace" for "four justices of the peace"; (2) adding the saving clause at the end of the section.
The original § 99 related to probate courts.

§ 100. Return of process. The original process in actions or proceedings begun in said justices' court shall be returnable and the parties summoned required to appear before said court.

Legislation § 100. **1.** Added by Stats. **1911**, p. 442 (see ante, Legislation § 99), and then read: "The original process in all actions or proceedings begun in said justices' court shall be returnable, and the parties summoned required to appear before the presiding justice or before one of the other justices of the peace to be designated by the presiding justice, and each of the justices shall have power, jurisdiction and authority to hear, try and determine any action or proceeding so commenced and which may have been made returnable before him or may be assigned or transferred to him."
2. Amended by Stats. **1913**, p. 1326.
The original § 100 (a part of article i) related to places of holding probate courts, and was enacted March 11, 1872, and repealed by Code Amdts. 1880, p. 21, in amending Part I.

Process, how returnable. Under this section as added in 1911, a summons commanding the defendant to appear and

answer before the "justices' court" was insufficient to give jurisdiction: it should have required him to appear before either the presiding justice or one of the other justices designated and named therein. Nellis v. Justices' Court, 20 Cal. App. 394; 129 Pac. 472.

§ 101. **Appointment of justices' clerk.** Said justices shall appoint a justices' clerk and assistant justices' clerk, who shall hold office at the pleasure of said justices and shall give such bond for the faithful performance of the duties of his office as said justices may require. Each justice shall also appoint one deputy clerk who shall hold office at the pleasure of the justice appointing him and perform such duties as shall be required by said justice or justices' clerk. Said justices' clerk, said assistant justices' clerk and said deputy clerks shall be authorized to administer oaths and take and certify affidavits. And they shall each be authorized to issue and sign writs, summons and all other processes in any actions or proceedings in said justices' courts in the name of the presiding justice or the acting presiding justice substantially as follows: ——, Presiding Justice. By ——, Clerk.

Legislation § 101. **1.** Added by Stats. **1911,** p. 442. See ante, Legislation § 99.

2. Amended by Stats. **1913,** p. 1326, (1) in first sentence, adding "and assistant justices' clerk"; (2) recasting the section after the second sentence, the original section, after that sentence, reading, "Said justices' clerk, and said deputy clerks shall be authorized to administer oaths and take and certify affidavits and to issue writs, summons and all other processes in any action or proceeding in said justices' court."

§ 102. **Duties of justices' clerk.** All papers to be filed with the clerk, all legal process of every kind in actions or proceedings in said justices' court, shall be issued by one of said justices or by said justices' clerk, assistant justices' clerk or deputy justices' clerk. Any one of said justices or the said justices' clerk, assistant justices' clerk or said deputy clerks shall issue, sign and certify in the name of the presiding justice or acting presiding justice to any and all papers, transcripts or records which are required to be issued, signed or certified by said justices of the peace. All complaints, answers and other pleadings and papers required to be filed in said justices' court shall be filed with said justices' clerk who shall keep a permanent record of all such actions and proceedings in said justices' docket now provided by law to be kept.

Legislation § 102. **1.** Enacted by Stats. **1911,** p. 443 (see ante, Legislation § 99), the section then reading, "§ 102. All legal processes of every kind in actions or proceedings in said justices' court shall be issued by the said justices' clerk upon the order of the presiding justice. The said justices' clerk shall issue, sign and certify to any and all papers, transcripts or records which are required to be issued, signed or certified by the said justice of the peace. All complaints, answers and other pleadings and papers required to be filed in the justices' court, shall be filed with the said justices' clerk, who shall keep a permanent record of all such actions and proceedings in the justices' docket, now provided by law to be kept."

2. Amended by Stats. **1913,** p. 1327.

Issuance of process. Under this section as added in 1911, the clerk cannot issue the summons, unless the presiding justice, after the commencement of the action, makes an order, in writing, directing him to do so: a general order to the clerk to sign all necessary legal process is insufficient. Nellis v. Justices' Court, 20 Cal. App. 394; 129 Pac. 472.

§ 102a. **Fees.** The fees for issuance of all processes and all other fees, which are allowed by law for any official service of the justices of the peace shall be exacted and paid in advance into the hands of said justices' clerk and be by him accounted for in detail under oath at such times as may be required by the board of supervisors, and paid into the treasury of the county, and all fees, fines and penalties received or collected in said justices' court shall be and become the property of the county.

Legislation § 102a. Added by Stats. **1911,** p. 443. See ante, Legislation § 99.

§ 102b. Salaries of justices and clerks. Said justices of the peace shall receive a salary of three thousand dollars per year, and said justices' clerk shall receive a salary of eighteen hundred dollars per year, and said deputy clerks shall each receive a salary of one thousand two hundred dollars per year, each payable in like manner and out of the same funds and at like times as county officers are paid, and such salaries provided to be paid to said justices of the peace shall be in lieu of all fees due and to become due such justices of the peace for the performance of any official act.

Legislation § 102b. Added by Stats. **1911,** p. 443. See ante, Legislation § 99.

§ 103. Justices' courts and justices. In counties. In cities of various classes. Jurisdiction. Qualifications. Salaries. Fees. There shall be at least one justices' court in each of the townships of the state, for which one justice of the peace must be elected by the qualified electors of the townships, at the general state election next preceding the expiration of the term of office of his predecessor. In any county where in the opinion of the board of supervisors the public convenience requires it, the said board may, by order, provide that two justices' courts may be established in any township, designating the same in such order; and in such case, one justice of the peace must be elected in the manner herein provided for each of said courts. In every city or town of the first and one half class there must be five justices of the peace, and in every city or town of the second class there must be two justices of the peace, and in every city or town of the second and one half class there must be one justice of the peace, and in every city or town of the third and fourth classes there must be one justice of the peace, to be elected in like manner by the electors of such cities or towns respectively; and such justices of the peace of cities or towns shall have the same jurisdiction, civil and criminal, as justices of the peace of townships and township justices' courts. Said justices of the peace of cities and justices' courts of cities shall also have jurisdiction of all proceedings for the violation of any ordinance of any city in which courts are established, both civil and criminal, and of all actions for the collection of any license required by any ordinance of any such city or town, and generally exercise all powers, duties and jurisdiction civil and criminal, of police judges, judges of police courts, recorder's court or mayor's court, within such city. No person is eligible to the office of justice of the peace in any city or town of the first, first and one half, second, second and one half or third class, who has not been admitted to practice law in a court of record; and no justice of the peace is permitted to practice law before another justice of the peace in the city, town or county in which he resides, or to have a partner engaged in the practice of law in any justices' court in such city, town or county. Every city justice of the peace in any city or town of the first and one half class shall receive a salary of three thousand dollars per annum, and every city justice of the peace in any city or town of the second class shall receive a salary of three thousand six hundred dollars per annum, and every city justice of the peace in any city or town of the second and one half class shall receive a salary of three thousand dollars per annum, and every city justice of the peace in any city or town of the third class shall receive a salary of two thousand dollars per annum, and every city justice of the peace in any city or town of the fourth

class shall receive a salary of one thousand five hundred dollars per annum; and each justice of the peace shall be provided by the city or town authorities with a suitable office in which to hold his court. Where the compensation of the justice of the peace of any city or town is by salary it shall be paid by warrants drawn each month upon the salary fund, or if there be no salary fund, then upon the general fund of such city or town; such warrants to be audited and paid as salaries of any other city officials. All fees which are chargeable by law for services rendered by such city justice of the peace in cities or towns aforesaid shall be by them respectively collected, and on the first Monday of each month every such city or town justice shall make a report, under oath, to the city or town treasurer, of the amount of fees so by him collected, and pay the amount so collected into the city or town treasury, to the credit of the general fund thereof. Said salaries shall be the sole compensation of the said city justice.

Act of Stats. 1883, p. 63. This section superseded the act of Stats. 1883, p. 63, fixing jurisdiction and providing compensation for justices of the peace.

Justices of the peace.

1. Eligibility. See post, § 159.
2. Disabilities. See post, §§ 170 et seq.
3. Fees. See Const., art. vi, § 15.

Legislation § 103. **1.** Added by Code Amdts. **1880,** p. 34, and then read: "There shall be at least one justices' court in each of the townships of the state, for which one justice of the peace shall be elected by the qualified electors of the township, at the general state election next preceding the expiration of the term of office of his predecessor; provided, that in any county where, in the opinion of the board of supervisors the public convenience requires it, the said board may, by order, provide that two justices' courts may be established in any township, designating the same in such order, and in such case one justice of the peace shall be elected in the manner herein provided for each of such courts. In every city having ten thousand and not more than twenty thousand inhabitants there shall be one justice of the peace, and in every city having twenty thousand and not more than one hundred thousand inhabitants two justices of the peace, to be elected in like manner by the electors of such cities respectively. No person shall be eligible to the office of justice of the peace in any city having over ten thousand inhabitants who has not been admitted to practice law in a court of record; and no justice of the peace shall be permitted to practice law before any other justice of the peace in the city or county in which he resides, or to have a partner engaged in the practice of law in any justices' court in such city or county. Every justice of the peace in any city having over ten thousand inhabitants shall receive an annual salary of two thousand dollars per annum, and shall be provided by the city authorities with a suitable office in which to hold his court. All fees which are by law chargeable for services rendered by such justices of the peace in the cities aforesaid, shall be by them respectively collected, and on the first Monday in each month every such city justice of the peace shall make report, under oath, to the city treasurer, of the amount of fees so by him collected, and pay the amount so reported into the city treasury, to the credit of the general fund thereof."

2. Amended by Stats. **1891,** p. 456, (1) by changing the second sentence to read, "In every city having fifteen thousand and not more than thirty-four thousand inhabitants, there shall be one justice of the peace, and in every city having thirty-four thousand and not more than one hundred thousand inhabitants, two justices of the peace, to be elected in like manner by the electors of such cities, respectively; and such justices of the peace of cities, and justice's courts of cities, shall have the same jurisdiction, civil and criminal, as justices of the peace of townships and township justice's courts"; and (2) by changing "ten thousand inhabitants," in both places where subsequently printed, to "fifteen thousand inhabitants."

3. Amended by Stats. **1899,** p. 88, by changing the section, after the first sentence, to read, "In every city or town of the third and fourth class there shall be one justice of the peace, and in every city or town of the second class there shall be two justices of the peace, to be elected in like manner by the electors of such cities, or towns, respectively; and such justices of the peace of cities or towns, and justices' courts of cities or towns, shall have the same jurisdiction, civil and criminal, as justices of the peace of townships, and township justices' courts. Said justices of the peace of cities, and justices' courts of cities, shall also have jurisdiction of all proceedings for the violation of any ordinance of any city in which courts are established, both civil and criminal, and of all actions for the collection of any license required by any ordinance of any such city or town. No person shall be eligible to the office of justice of the peace in any city or town of the first, second, or third class who shall not have been admitted to practice law in a court of record; and no justice of the peace shall be permitted to practice law before another justice of the peace in the city, or town, and county in which he resides, or to have a partner engaged in the practice of law in any justice's court in such city, or town, and county. Every city justice of the peace in any city or town of the fourth class shall receive a salary of fifteen hundred dollars per annum, and every city justice of the peace in any city or town of the second or third class shall receive a salary of two thousand dollars per annum, and each justice of the peace shall be provided by the city or town authorities with a suitable office in which to hold his court. All fees which are chargeable by law for services rendered by such city justices of the peace in the cities or towns aforesaid shall be by them, respectively, collected; and on the first Monday of each month every such city or town justice of the peace shall make a report, under oath, to the city or town treasurer, of the amount of fees so by him collected, and pay the amount so collected into the city or town treasury, to the credit of the general fund thereof. Said salaries shall be the sole compensation of said city justices."

4. Amended by Stats. **1901,** p. 100; (1) in the first sentence, (a) "shall" is changed to "must" twice, where printed, (b) the words "provided, that" are stricken out, and a new sentence begun with the words "In any county," (c) the words "provided that two" are changed to "provide that two"; (2) in the second sentence, (a) the words "the third and fourth class there shall be one justice" are changed to "the third and the fourth class there must be one justice"; (b) the words "the second class there

shall be two justices" are changed to "the first and one half and the second class there must be two justices"; (3) in sentence beginning "Said justices," after the words "such city or town," there is added the clause, "and generally exercise all powers, duties and jurisdiction, civil and criminal, of police judges, judges of the police court, recorder's court, or mayor's court within such city"; (4) entire sentence beginning "No person shall" is changed to read, "No person is eligible to the office of justice of the peace in any city or town of the first, first and one half, second or third class who has not been admitted to practice law in a court of record; and no justice of the peace is permitted to practice law before another justice of the peace in the city, town or county in which he resides, or to have a partner engaged in the practice of law in any justice's court in such city, town or county"; (5) in sentence beginning "Every city justice," the last clause, beginning "and each justice," is changed to read, preceded by a semicolon, "and every city justice of the peace in any city or town of the second or third class shall receive a salary of two thousand dollars per annum; and every city justice of the peace in any city or town of the first and one half class shall receive a salary of twenty-four hundred dollars per annum; and each city justice of the peace shall be provided by the city or town authorities with a suitable office in which to hold his court"; (6) following the words "his court," a new sentence is added, "Where the compensation of the justice of the peace of any city or town is by salary, it shall be paid by warrants drawn each month upon the salary fund, or, if there be no salary fund, then upon the general fund, of such city or town; such warrants to be audited and paid as salaries of other city officials."

5. Amended again by Stats. **1901**, p. 119 (code commission amendment); unconstitutional. See note ante, § 5.

6. Amended by Stats. **1903**, p. 210, by (1) changing, in the last sentence, the words "Said salaries" to "Said salary," and (2) adding the proviso, at the end of the section, "provided, that the provisions of this section as to the establishment of justices' courts and city justices of the peace in cities or towns, shall not apply to cities or towns in which recorders' courts or city or town recorders are now or may hereafter be established, and city justices' courts now existing in such cities or towns are hereby abolished."

7. Amended by Stats. **1905**, pp. 49, 50, (1) in the sentence beginning "In every city or town," the words "first and one half and the second class" were changed to "first and one half class there must be three justices of the peace, and [in] every city or town of the second class"; (2) the sentence fixing the salary was amended to read, "Every city justice of the peace in any city or town of the fourth class shall receive a salary of fifteen hundred dollars per annum, and every city justice of the peace in any city or town of the third class shall receive a salary of two thousand dollars per annum; and every city justice of the peace in any city or town of the first and one half class and the second class[,] shall receive a salary of twenty-four hundred dollars per annum; and each city justice of the peace shall be provided by the city or town authorities with a suitable office in which to hold his court"; and (3) the proviso at the end of the section was stricken out. There were two amendments of § 103 enacted on the same day (March 3, 1905); the first (Stats. 1905, p. 49) was to go into effect immediately, and the second (Stats. 1905, p. 50) on the first Monday after the first day of January, 1907; they were identical, except for the changes indicated supra by brackets, the second amendment, on page 50, being printed minus these changes, and containing, also, several unimportant typographical variations.

8. Amended by Stats. **1907**, p. 190, by changing, in the sentence beginning "In every city or town," the words "there must be three justices" to "there must be four justices."

9. Amended by Stats. **1909**, p. 47, (1) the first two sentences reading the same as the present amendment (1911); (2) the third sentence then reading, "In every city or town of the third and the fourth class, there must be one justice of the peace, and in every city or town of the first and one half class there must be four justices of the peace, and in every city or town of the second class there must be two justices of the peace, to be elected in like manner by the electors of such cities or towns respectively; and such justices of the peace of cities or towns shall have the same jurisdiction, civil and criminal, as justices of the peace of townships, and township justices' courts"; (3) the fourth sentence had (a) a comma after "cities," where it is first printed in the sentence, and (b) the definite article "the" before "police court," in the last clause; (4) the fifth sentence, beginning "No person," did not have the words "second and one half" in the first clause; (5) the sixth sentence, down to the last clause, reading, "Every city justice of the peace in any city or town of the fourth class shall receive a salary of fifteen hundred dollars per annum, and every city justice of the peace in any city or town of the third class shall receive a salary of two thousand dollars per annum, and every city justice of the peace in any city or town of the first and one half class shall receive a salary of three thousand dollars per annum and every city justice of the peace in any city or town of the second class shall receive a salary of thirty-six hundred dollars per annum," the last clause reading the same as the present amendment; (6) the seventh sentence, beginning "Where the compensation," did not have the word "any" before "other city officials," at the end thereof; (7) the eighth sentence had the words "of the peace," after "town justice"; (8) the last sentence then read, "Said salaries shall be the sole compensation of said city justices."

Township justices. This section provides for the selection of township justices (People v. Sands, 102 Cal. 12; 36 Pac. 404; People v. Cobb, 133 Cal. 74; 65 Pac. 325), and also for their tenure of office, which is four years. Bailey v. Board of Supervisors, 66 Cal. 10; 56 Am. Rep. 73; 4 Pac. 768; Milner v. Reibenstein, 85 Cal. 593; 24 Pac. 935; People v. Cobb, 133 Cal. 74; 65 Pac. 325. A justice of the peace, holding office by virtue of general laws, is a "part of the constitutional judicial system of the state." Graham v. Mayor and Board of Trustees, 151 Cal. 465; 91 Pac. 147; Peterbaugh v. Wadham, 162 Cal. 611; 123 Pac. 804.

Number of justices of the peace. Where a judicial township consists entirely of a city having a population of more than five thousand, and is provided, by charter, with a city justice of the peace appointed by the city council, such township is, under § 4101 of the Political Code, entitled to have but one justice of the peace elected at a general election. Odell v. Rihn, 19 Cal. App. 713; 127 Pac. 802. If a township is entitled to two justices of the peace, and two are in fact voted for at an election, two should be declared elected, though the proclamation called for the election of but one. If only one justice is in fact voted for at an election, when two should be elected, there is a failure to choose a second justice. Almon v. McEvoy, 19 Cal. App. 141; 124 Pac. 874.

De facto officer. The incumbent is entitled to discharge the duties and receive

the compensation until his successor qualifies, and also, on the absolute failure of his successor to qualify, to hold the office for the entire term for which his successor was elected. French v. Santa Clara County, 69 Cal. 519; 11 Pac. 30.

City justices. This section also provides for the election of city justices, and for their tenure of office, which is fixed at two years. Ex parte Henshaw, 73 Cal. 486; 15 Pac. 110; Milner v. Reibenstein, 85 Cal. 593; 24 Pac. 935; People v. Sands, 102 Cal. 12; 36 Pac. 404. All city justices' courts in the state, whether in cities with freeholders' charters, or in those organized under the general law, are dependent upon this section, and therefore upon the classification act, for a valid existence (In re Johnson, 6 Cal. App. 734; 93 Pac. 199); and where they exist under a special charter, granted prior to the adoption of the present constitution, they are not disturbed or superseded. Ex parte Armstrong, 84 Cal. 655; 24 Pac. 598. In its broadest sense, the word "elected" means, merely, selected; hence, if a justice of the peace has been selected by the votes of several members of a city council, it is tantamount to an election. Odell v. Rihn, 19 Cal. App. 713; 127 Pac. 802.

Salary of justice of the peace. The inhibition of the constitution against increasing an officer's salary has reference only to the compensation as fixed by law when his term of office began; the legislature has power, pending the term, to lower the compensation, and afterwards raise it to a figure not in excess of that fixed when the term began. Puterbaugh v. Wadham, 162 Cal. 611; 123 Pac. 804. The prohibition of § 9 of article xi of the constitution, against increasing an officer's salary, is directed to the legislature: it has no application to an automatic increase in salary, due to the passing of a city, not by legislative act, but by increased population, from one class to another. Puterbaugh v. Wadham. 162 Cal. 611; 123 Pac. 804. A justice of the peace of a city of the second and one half class had no right to salary until the amendment of this section in 1911. Puterbaugh v. Wadham, 162 Cal. 611; 123 Pac. 804. The salary of city justices is paid by the city, and payments are made monthly. Jenks v. Council of City of Oakland, 58 Cal. 576; Los Angeles County v. Los Angeles, 65 Cal. 476; 4 Pac. 453; Milner v. Reibenstein, 85 Cal. 593; 24 Pac. 935.

City justices under charters. As to cities acting under a freeholders' charter, a city justice of the peace is the same as a township justice, simply a county or township officer performing no municipal functions whatever. Graham v. Mayor and Board of Trustees, 151 Cal. 465; 91 Pac. 147. Justices' courts in municipalities are part of the constitutional judiciary. People v. Ransom, 58 Cal. 558; People v. Sands, 102 Cal. 12; 36 Pac. 404; Kahn v. Sutro, 114 Cal. 316; 33 L. R. A. 620; 46 Pac. 87; In re Mitchell, 120 Cal. 384; 52 Pac. 799. A police court established by a city under a freeholders' charter is purely a municipal affair, and exempt from legislative control. Graham v. Mayor and Board of Trustees, 151 Cal. 465; 91 Pac. 147. The prosecution of offenses against a state law or a county ordinance is not a municipal duty; and the legislature cannot impose the cost of performing this function upon a city. Fleming v. Hance, 153 Cal. 162; 94 Pac. 620. The requirement to furnish city justice of the peace with a suitable office in which to hold his court, is not applicable to a city having a freeholders' charter, since the constitutional amendments of 1896. Graham v. Mayor and Board of Trustees, 151 Cal. 465; 91 Pac. 147.

Commitment on imperfect complaint. When a charge has been examined by a magistrate, and the evidence warrants an order holding the defendant to answer, imperfections in the complaint are cured, and the commitment is legal. People v. Warner, 147 Cal. 546; 82 Pac. 196; Ex parte Stevens, 16 Cal. App. 424; 117 Pac. 1127.

§ 103½. Clerk to justices' court in cities of second and one half and third classes, duties, etc. Every city justices' court in any city or town of the second and one half class and the third class shall have a clerk, who shall be appointed by the justice of the peace of said court, subject to the approval of the board of supervisors of the county, and shall hold office during the pleasure of said justice. Said clerk shall give a bond in the sum of five thousand dollars, with at least two sureties to be approved by the mayor, conditioned for the faithful discharge of the duties of his office. He shall keep a record of the proceedings of said court and issue all process ordered by the justices of said court, and receive and pay into the city treasury all fines, forfeitures and fees paid into said court. He shall render each month to the city council an exact account under oath of all fines, forfeitures and fees paid and collected. He shall prepare bonds, justify bail, when the

amount has been fixed by the court or justice, and may administer and certify oaths and shall remain in the courtrooms of said court during court hours and during such reasonable times thereafter as may be necessary for the proper performance of his duty. He shall have custody of all records and papers of said justice court. Every clerk of the justices' court in any city or town of the second and one half class shall receive an annual salary of one thousand six hundred dollars, and every clerk of the justices' court in any city or town of the third class shall receive an annual salary of one thousand two hundred dollars; said salaries shall respectively be payable in equal monthly installments out of the treasury of said cities and said salaries shall be the full compensation for all services rendered by the clerks of said courts.

Legislation § 103½. **1.** Added by Stats. **1909**, p. 268, being then entitled "Clerks in cities of the third class," and the text then reading, "§ 103½. Every city justice court in any city or town of the third class shall have a clerk, who shall be appointed by the justice of said court, subject to the approval of the board of supervisors of the county, and shall hold office during the pleasure of said justice. Said clerk shall give a bond in the sum of five thousand dollars, with at least two sureties, to be approved by the mayor, conditioned for the faithful discharge of the duties of his office; he shall receive an annual salary of one thousand two hundred dollars, payable in equal monthly installments out of the treasury of said city, which salary shall be the full compensation for all services rendered by him; he shall keep a record of the proceedings of said court and issue all process ordered by the justice of said court, and receive and pay into the city treasury all fines, forfeitures and fees paid into said court. He shall also render each month to the city council, an exact account, under oath, of all fines, forfeitures and fees paid and collected. He shall prepare bonds, justify bail when the amount has been fixed by said court or justice and may administer and certify oaths, and shall remain in the courtrooms of said court during court hours and during such reasonable times thereafter as may be necessary for the proper performance of his duty. He shall have custody of all records and papers of said justice court."

2. Amended by Stats. **1911**, p. 1214, and differed from the present text, in having, (1) in the third sentence, "justice of said court," instead of "justices of said court"; (2) in the fifth sentence, beginning "He shall prepare bonds," a comma after "oaths" (as to the meaning of the change in 1913, quære); (3) in the first clause of the last sentence, "one thousand four hundred dollars," instead of "one thousand six hundred dollars."

3. Amended by Stats. **1913**, p. 68.

§ 103a. Justices' clerks, additional powers of. In every township wherein provision is made by law for a clerk, or clerks, for the justice of the peace, or the justices of the peace, of such township, said clerk or clerks, in addition to the other powers conferred upon them by law, shall have power to administer and certify oaths to affidavits, and all papers, documents or instruments used in, or in connection with, the civil actions or proceedings in such justices courts and to issue summons and other writs in civil actions in said courts in the name of the justice before whom the same is pending or out of whose court the same is issued.

Legislation § 103a. Added by Stats. **1915**, p. 942.

§ 103b. Justices' clerks in counties of the seventh class, appointed when, and powers and duties of. In any township in a county of the seventh class having more than one justice of the peace as provided in section one hundred three of the Code of Civil Procedure, where in the opinion of the board of supervisors of the county, the public convenience requires it, said board may, by order, authorize a justices' court clerk and necessary deputies or a justice's court clerk for each justice of the peace for such township to be appointed, maintained and supported as hereinafter provided. Said justices when so authorized as hereinabove provided shall appoint a justices' clerk, who shall hold office at the pleasure of said justices, and shall give such bond for the faithful performance of the duties of his office in the sum of one thousand dollars. Each justice shall also appoint one deputy clerk when so authorized who shall hold office at the pleasure of

the justice appointing him and perform such duties as shall be required by said justices and justices' clerk. Such justices' clerk, and such deputy clerks shall be authorized to administer oaths, take and certify affidavits; and they shall each be authorized to issue and sign writs, summons, and all other process in any action or proceeding in the justice court of the township for which they are appointed, or pending before any justice of the peace of said township in the name of the justice before whom the same is pending or out of whose court the same is issued, which shall be in substantially the following form: ——, Justice of the Peace.

——, Clerk.

By ——, Deputy Clerk.

All legal papers of every kind in actions or proceedings in such justices' court shall be issued by the said justices' clerk in the manner and form hereinabove set out. The said justices' clerk shall issue, sign and certify to any and all papers, transcripts or records which are required to be issued, signed or certified by the said justice of the peace. All complaints, answers and other pleadings and papers required to be filed in said justices' court shall be filed with such justices' clerk who shall keep a permanent record of all such actions and proceedings in the justices' docket, now provided by law to be kept by the justice; provided, that in the event that the said board of supervisors shall deem one justice's clerk for each justice of the peace sufficient to perform the duties hereinabove set out, said board shall authorize the appointment of one justice's clerk for each justice of the peace and one clerk shall be appointed by each of said justices and no deputy clerks shall be in such event appointed. And each of said clerks so appointed shall exercise the powers and fulfill the duties heretofore provided for a justice's clerk and shall receive a salary of twelve hundred dollars per year each. All fees for the issuance of all process, or other fees, which are by law allowed for any official service of the justice of the peace shall be exacted and paid in advance into the hands of the justice's clerk, which, together with all fees, fines, or penalties received in said justice's court shall be by him accounted for in detail under oath in the manner provided by law and paid into the treasury of the county at the time and in the manner as now required by law of the justice of the peace. Said justices' clerk shall receive a salary of fifteen hundred dollars per year and said deputy clerks shall each receive a salary of twelve hundred dollars per year, which shall be payable in like manner and out of the same funds and at like times as county officers are paid. The board of supervisors shall provide in a convenient locality a suitable office for the justices' clerk. The said justices' clerk shall be in attendance at his respective office in the discharge of official business daily from nine a. m. until five p. m. Nothing in this section shall in any way interfere with or terminate the term of office of any person now holding the office of justice of the peace.

Legislation § 103b. Added by Stats. **1915**, p. 303.

§ 104. Courts, where held. A justices' court may be held at any place selected by the justice holding the same, in the township for which he is elected or appointed; and such court shall be always open for the transaction of business.

Hours of justice. See ante, § 88.

Legislation § 104. Added by Code Amdts. **1880,** p. 34; based on original code §§ 112, 118, which were based on Stats. 1863, p. 340. Original code § 112 read: "Every justice of the peace must hold a justice's court in the town or city in which he is elected." And § 118 read: "These courts may be held at any place selected by the justice holding the same, in the township or city for which he is elected, and they are always open for the transaction of business."

The original § 104 provided for the continuance of the municipal criminal court of San Francisco.

§ 105. What justice may hold court for another. A justice of the peace of any township, or city, or city and county may hold the court of any other justice of the peace of any township, city and county, or city within the same county, at his written request, and while so acting shall be vested with all the powers of the justice for whom he so holds court. In which case the proper entry of the proceedings before the attending justice subscribed by him shall be made in the docket of the justice for whom he so holds the court; and the same shall be prima facie evidence of such proceedings, and form and become a part of the record of any, or any part of any and all actions, causes, or proceedings had before such attending justice while so holding the court.

With respect to superior courts, see ante, § 71.

Legislation § 105. 1. Added by Code Amdts. **1880,** p. 34, and then read: "A justice of the peace of any township may hold the court of any other justice of the peace of the same county, at his request, and while so acting shall be vested with the power of the justice for whom he so holds court, in which case the proper entry of the proceedings before the attending justice, subscribed by him, shall be made in the docket of the justice for whom he so holds the court."

2. Amended by Stats. **1897,** p. 8.

The original § 105 provided for the election of the judge of the municipal criminal court of San Francisco.

Justice holding court outside his township or city. Power is granted to justices, by this section, to hold or conclude preliminary examinations outside of their townships or cities. People v. Sansome, 98 Cal. 235; 33 Pac. 202; People v. Sehorn, 116 Cal. 503; 48 Pac. 495. If there is any irregularity in the proceedings to secure the justice, it does not affect the substantial rights of the accused, and furnishes no grounds for quashing the information. People v. Sehorn, 116 Cal. 503; 48 Pac. 495; People v. Rodrigo, 69 Cal. 601; 11 Pac. 481.

Entry in docket. The order requesting another justice to act need not set forth the reasons therefor; and a failure to subscribe the docket by such other justice, as required by this section, does not affect the substantial rights of the accused: this requirement is merely directory, and not mandatory. People v. Sehorn, 116 Cal. 503; 48 Pac. 495.

Effect of failure to comply with section. A failure to follow the course prescribed by this section renders the judgment invalid, as the justice of the peace acquires no jurisdiction. Harlan v. Gladding, 7 Cal. App. 49; 93 Pac. 400.

§ 106. Territorial extent of civil jurisdiction. The civil jurisdiction of justices' courts extends to the limits of the townships in which they are held; but mesne and final process of any justices' court in a county may be issued to and served in any part of the county.

Jurisdiction. See ante, § 94, and post, §§ 112 et seq.

Process, where runs. See ante, § 94.

Legislation § 106. Added by Code Amdts. **1880,** p. 34; based on original code § 116, which read: "The civil jurisdiction of justice's courts, within an incorporated city, extends to the limits of such city, or township in which the city is situated. Mesne and final process of justices' courts may be issued to any part of the county in which they are held." This enactment was based on Stats. 1863, p. 340.

The original § 106 defined the jurisdiction of the municipal criminal court of San Francisco

Territorial jurisdiction. Where a party has contracted to perform an obligation at a particular place, and resides in a different county, an action to recover damages for a breach of this contract may be brought either in the township or city where the contract was to be performed, or in that in which the defendant resides; if brought in the place of performance, the summons may be served in the county in which the defendant resides. Cole v.

Fisher, 66 Cal. 441; 5 Pac. 915. Since this decision, however, the second subdivision of § 848 has been amended by the insertion of the words "in writing," after the word "contracted," and before the words "to perform," so that summons, in such a case, cannot now be served upon a defendant residing in a different county, except when the contract is in writing.

§ 107. **What justices successors of others.** The justices of the peace elected in the townships at the general state election of eighteen hundred and seventy-nine, or persons appointed to fill their places, are successors of the justices of the peace of the townships, respectively, who held office at the time of such election; and, in case the townships of any county are hereafter changed or altered, the board of supervisors of such county shall make provision as to what justices shall be successors of the justices of townships so changed or altered.

Legislation § 107. Added by Code Amdts. **1880**, p. 34.

The original § 107 defined presumptions in favor of judgments of municipal criminal court of San Francisco.

Change or alteration of township. The constitutional provision as to justices' courts operates, specifically, only by means of local legislation, and establishes, automatically, a justice's court in each township created by the local body, which continues while such township exists, and is merged in another justice's court when two townships are merged into one. Proulx v. Graves, 143 Cal. 243; 76 Pac. 1025.

§ 108. [Related to municipal criminal court of San Francisco. Repealed.]

Legislation § 108. **1.** Enacted March 11, **1872.** **2.** Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

§ 109. [Related to municipal criminal court of San Francisco. Repealed.]

Legislation § 109. **1.** Enacted March 11, **1872.** **2.** Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

ARTICLE III.

JUSTICES OF THE PEACE AND JUSTICES' COURTS IN GENERAL.

§ 110. Term of office.
§ 111. Vacancies.
§ 112. Civil jurisdiction.
§ 113. Concurrent jurisdiction.
§ 114. Civil jurisdiction restricted.
§ 115. Criminal jurisdiction. [Repealed.]
§ 116. [Amended and renumbered section. §§ 117–119. Same.]

§ 110. Term of office. The term of office of justices of the peace shall be four years from and after twelve o'clock meridian on the first Monday after the first day of January next succeeding their election.

Legislation § 110. 1. Enacted March 11, **1872**, as § 113 (based on Stats. 1863, p. 340), and read: "Justices of the peace are elected by the electors of their respective townships or cities, at the judicial elections, and hold their offices for two years from the first day of January next following their election."

2. Amended by Code Amdts. **1877–78**, p. 97, to read: "Justices of the peace are elected by the electors of their respective cities or townships at the general elections, and hold their offices for two years from the first day of January next following their election."

3. Amended by Code Amdts. **1880**, p. 35, and renumbered § 110, and then read: "The term of office of justices of the peace shall be two years from the first day of January next succeeding their election; provided, that all justices of the peace elected at the general state election of eighteen hundred and seventy-nine shall go out of office at the end of one year from the first day of January, eighteen hundred and eighty."

4. Amended by Stats. **1901**, p. 630.

The original § 110 was the last section of chapter vii, and provided for officers and salaries of municipal criminal court of San Francisco.

Term of office. The term of office of justices of the peace within the city and county of San Francisco is two years. In re Mitchell, 120 Cal. 384; 52 Pac. 799.

Creation of office of justice of the peace. The constitution of 1879 did not abolish justices' courts, but expressly retained them. French v. Santa Clara County, 69 Cal. 519; 11 Pac. 30. A justice's court cannot be created by a city charter; the justices of the peace are elected at the general election, and qualify under the general laws of the state. People v. Sands, 102 Cal. 12; 36 Pac. 404; Graham v. Mayor and Board of Trustees, 151 Cal. 469; 91 Pac. 148.

§ 111. Vacancies. If a vacancy occurs in the office of a justice of the peace, the board of supervisors of the county shall appoint an eligible person to hold the office for the remainder of the unexpired term.

Legislation § 111. Added by Code Amdts. **1880**, p. 35.

Vacancy in office. A failure to qualify within the time required causes a vacancy in office (People v. Taylor, 57 Cal. 620; Hull v. Superior Court, 63 Cal. 174; French v. Santa Clara County, 69 Cal. 519; 11 Pac. 30; People v. Perkins, 85 Cal. 509; 26 Pac. 245); and the death of a person elected, after qualification, and before the expiration of his predecessor's term, also causes a vacancy (People v. Ward, 107 Cal. 236; 40 Pac. 538); but a vacancy is not created by resignation before the time of qualification and entering upon the duties of office. Miller v. Board of Supervisors, 25 Cal. 93.

Vacancies, how filled. Vacancies in the office of township justices of the peace are filled by the board of supervisors (People v. Taylor, 57 Cal. 620; French v. Santa Clara County, 69 Cal. 519; 11 Pac. 30; People v. Chaves, 122 Cal. 134; 54 Pac. 596); but the board cannot anticipate a future vacancy, to arise during the term of a newly elected board. People v. Ward, 107 Cal. 236; 40 Pac. 538. Boards of supervisors have power to appoint a justice in a newly created township. People v. Chaves, 122 Cal. 134; 54 Pac. 596. Vacancies in the city of Oakland are filled by the board of supervisors, and not by the mayor; the term of the appointee is the remainder of the unexpired term of the original incumbent. People v. Cobb, 133 Cal. 74; 65 Pac. 325.

§ 112. Civil jurisdiction. The justices' courts shall have civil jurisdiction:

1. In actions arising on contract for the recovery of money only if the sum claimed, exclusive of interest, does not amount to three hundred dollars;

2. In actions for damages for injury to the person or for taking, detaining, or injuring personal property, or for injury to real property where no issue is raised by the verified answer of the defendant involving the title to or possession of the same, if the damage claimed do not amount to three hundred dollars;

3. In actions to recover the possession of personal property, if the value of such property does not amount to three hundred dollars;

4. In actions for a fine, penalty, or forfeiture, not amounting to three hundred dollars, given by statute, or the ordinance of an incorporated city and county, city, or town, where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine;

5. In actions upon bonds or undertakings conditioned for the payment of money, if the sum claimed does not amount to three hundred dollars, though the penalty may exceed that sum;

6. To take and enter judgment for the recovery of money on the confession of a defendant, when the amount confessed, exclusive of interest, does not amount to three hundred dollars.

Local and special legislation with respect to jurisdiction of justice prohibited. Const. 1879, art. iv, § 25.

Jurisdiction of justice's court. See post, § 838.

Justice's court cannot issue writ of—

1. Mandamus. See post, § 1085.
2. Prohibition. See post, § 1103.
3. Certiorari. See post, § 1068.

Confession of judgment in justices' courts. See post, § 1135.

Transfer of cause to superior court, where certain questions involved. See post, § 838.

Legislation § 112. 1. Enacted March 11, **1872,** as § 114, and then read: "The civil jurisdiction of these courts within their respective townships or cities extends: 1. To an action arising on contract, for the recovery of money only, if the sum claimed, exclusive of interest, does not amount to three hundred dollars; 2. To an action for damages for injury to the person, or for taking or detaining personal property, or for injuring personal property, or for an injury to real property, where no issue is raised by the answer involving the plaintiff's title, or possession of the same, if the damages claimed do not amount to three hundred dollars; 3. To an action for a fine, penalty, or forfeiture, not amounting to three hundred dollars, given by statute or the ordinance of an incorporated city or town; 4. To an action upon a bond or undertaking conditioned for the payment of money, not amounting to three hundred dollars, though the penalty exceed that sum; the judgment to be given for the sum actually due. When the payments are to be made by installments, an action may be brought for each installment as it becomes due; 5. To an action to recover the possession of personal property, when the value of such property does not amount to three hundred dollars; 6. To take and enter judgment on the confession of a defendant, when the amount confessed, exclusive of interest, does not amount to three hundred dollars."

2. Amended by Code Amdts. **1880,** p. 35, and renumbered § 112.

The original § 112 provided for the place of holding justices' courts.

Jurisdiction. The jurisdiction of justices' courts is special and limited: there is no presumption in favor of their jurisdiction (Rowley v. Howard, 23 Cal. 401; King v. Randlett, 33 Cal. 318); but they must strictly pursue the powers conferred upon them. Jones v. Justice's Court, 97 Cal. 523; 32 Pac. 575. Consent of the parties cannot confer jurisdiction of the subject-matter (Feillet v. Engler, 8 Cal. 76), but can confer jurisdiction of the party. Ex parte Lou Ah Sun, 7 Pac. 305. The record must affirmatively show the jurisdiction of the justice: nothing can be taken by implication (Joyce v. Joyce, 5 Cal. 449; Van Etten v. Jilson, 6 Cal. 19; Smith v. Andrews, 6 Cal. 652; Swain v. Chase, 12 Cal. 283; Lowe v. Alexander, 15 Cal. 296; Wratten v. Wilson, 22 Cal. 465; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Kane v. Desmond, 63 Cal. 464); and jurisdiction is sufficiently shown by recitals in the docket. Cardwell v. Sabichi, 59 Cal. 490. The record must affirmatively show that the action was brought in the right township; failure to object does not waive the defect (Lowe v. Alexander, 15 Cal. 296); and the record must set forth the facts showing service and return of summons. Lowe v. Alexander, 15 Cal. 296; Blair v. Hamilton, 32 Cal. 49; Central Pacific R. R. Co. v. Board of Equalization, 32 Cal. 582; Jolley v. Foltz, 34 Cal. 321. The burden of showing affirmatively all matter necessary to confer jurisdiction is on the party asserting a right under judgment. Van Etten v. Jilson, 6 Cal. 19; Whitwell v. Barbier, 7 Cal. 54; Swain v. Chase, 12 Cal. 283; Lowe v. Alexander, 15 Cal. 296; Rowley v. Howard, 23 Cal. 401; King v. Randlett, 33 Cal. 318; Jolley v. Foltz, 34 Cal. 321; Ex parte Kearny, 55 Cal. 212; Keybers v. McComber, 67 Cal. 395; 7 Pac. 838; Eltzroth v. Ryan, 89 Cal. 135; 26 Pac. 647. Where the complaint states a cause of action within the jurisdiction of the court, a demurrer, on the ground that the court has no jurisdiction, will be overruled. Thornton, J., concurring, in Schroeder v. Wittram, 66 Cal. 636; 6 Pac. 737. Parol proof of the facts showing jurisdiction must be made to appear, where the record fails to state such facts. Jolley v. Foltz, 34 Cal. 321.

Determination as to jurisdiction and review. The justice's court has power to pass upon and determine the facts upon which its jurisdiction depends (Ex parte Noble, 96 Cal. 362; 31 Pac. 224; In re Grove Street, 61 Cal. 438; Ex parte Sternes, 77 Cal. 156; 11 Am. St. Rep. 251; 19 Pac. 275); and it is questionable whether such decision and determination, being insufficient, can be attacked in a collateral proceeding. Lowe v. Alexander, 15 Cal. 296. Jurisdiction is not affected by an erroneous decision. Karry v. Superior Court, 162 Cal. 281; 122 Pac. 475; 128 Pac. 760. One method of attacking the jurisdiction of a justice's court is by appeal to the superior court; but, after such appeal, no further attack can be made upon the judgment given in the justice's court. American Law Book Co. v. Superior Court,

164 Cal. 327; 128 Pac. 921. The better practice, in such cases, is, not to appeal the case on its merits, but to assail the jurisdiction by certiorari, as it is doubtful whether the appeal will not estop a party from questioning the jurisdiction of the justice's court. Garniss v. Superior Court, 88 Cal. 413; 26 Pac. 351. The mere exercise of jurisdiction by a justice's court cannot be reviewed on certiorari. Karry v. Superior Court, 162 Cal. 281; 122 Pac. 475; 128 Pac. 760.

Notice of trial as affecting jurisdiction. A failure to give notice of trial in writing, where the parties have appeared, renders the judgment void (Jones v. Justice's Court, 97 Cal. 523; 32 Pac. 575; Los Angeles v. Young, 118 Cal. 295; 62 Am. St. Rep. 234; 50 Pac. 534); but no notice is required as to a party in default. Stewart v. Justice's Court, 109 Cal. 616; 42 Pac. 158.

No equitable jurisdiction. A justice's court has no jurisdiction in equitable matters but it may appoint a receiver of rents and profits in an ejectment proceeding at law. Garniss v. Superior Court, 88 Cal. 413; 26 Pac. 351.

Actions arising on contract. A judgment is a contract, within the meaning of this section (Stuart v. Lander, 16 Cal. 372; 76 Am. Dec. 538; Ames v. Hoy, 12 Cal. 11); and an action against a stockholder of a corporation, for his proportion of the indebtedness of the corporation, is an obligation arising upon contract, within the meaning of this section. Dennis v. Superior Court, 91 Cal. 548; 27 Pac. 1031; Kennedy v. California Savings Bank, 97 Cal. 93; 33 Am. St. Rep. 163; 31 Pac. 846; Larrabee v. Baldwin, 35 Cal. 155; Morrow v. Superior Court, 64 Cal. 383; 1 Pac. 354.

Amount in controversy. The test of jurisdiction of the justice's court over the subject-matter of the controversy is the principal sum sued for, exclusive of interest. Zander v. Coe, 5 Cal. 230; Bradley v. Kent, 22 Cal. 169; Solomon v. Reese, 34 Cal. 28; Sanborn v. Superior Court, 60 Cal. 425; Dashiell v. Slingerland, 60 Cal. 653; Shealor v. Superior Court, 70 Cal. 564; 11 Pac. 653; Hoban v. Ryan, 130 Cal. 96; 62 Pac. 296. Prior to 1863, the jurisdiction of the justice's court was only two hundred dollars (Zander v. Coe, 5 Cal. 230; Brock v. Bruce, 5 Cal. 279; Ford v. Smith, 5 Cal. 331; Hart v. Moon, 6 Cal. 161; Small v. Gwinn, 6 Cal. 447; Freeman v. Powers, 7 Cal. 104; Feillett v. Engler, 8 Cal. 76; Malson v. Vaughn, 23 Cal. 61); but since that time it has been three hundred dollars. Cariaga v. Dryden, 29 Cal. 307; Maxfield v. Johnson, 30 Cal. 545; Reed v. Bernal, 40 Cal. 628; Sanborn v. Superior Court, 60 Cal. 425; Bailey v. Sloan, 65 Cal. 387; 4 Pac. 349. The ad damnum clause is the test of jurisdiction (Sanborn v. Superior Court, 60 Cal. 425; Bailey v. Sloan, 65 Cal. 387; 4 Pac. 349; Lord v. Goldberg, 81 Cal. 596; 15 Am. St. Rep. 82; 22 Pac. 1126); but this is not conclusive, regardless of the allegations of the complaint. Lohnhardt v. Jennings, 119 Cal. 192; 48 Pac. 56; 51 Pac. 195. Where the complaint shows an amount beyond the jurisdiction, but the prayer is for judgment within the jurisdiction, there is a waiver of the excess, and the court has power to try the cause. Sanborn v. Superior Court, 60 Cal. 425. The plaintiff has the right to waive any sum, to bring the cause within the jurisdiction of the court (Van Etten v. Jilson, 6 Cal. 19; Grass Valley Quartz Mining Co. v. Stackhouse, 6 Cal. 413; Wratten v. Wilson, 22 Cal. 465); but, the test of jurisdiction being the amount sued for, the waiver must be made before the action is commenced; jurisdiction cannot be conferred by an amendment remitting the sum in excess of the jurisdictional amount. Hoban v. Ryan, 130 Cal. 96; 62 Pac. 296. Where attorneys' fees, stipulated in a note, are demanded in addition to the principal sum due, increasing the amount beyond three hundred dollars, the justice's court is ousted of jurisdiction (Reed v. Bernal, 40 Cal. 628; De Jarnatt v. Marquez, 127 Cal. 558; 78 Am. St. Rep. 90; 60 Pac. 45); and the justice's court has no jurisdiction, where, by trebling the damages in unlawful detainer, the sum demanded exceeds the jurisdictional amount. Hoban v. Ryan, 130 Cal. 96; 62 Pac. 296. A counterclaim, to be available, must be within the jurisdictional amount. Malson v. Vaughn, 23 Cal. 61; Maxfield v. Johnson, 30 Cal. 545. Where two actions in a justice's court are, by stipulation, consolidated for the purpose of trial, a verdict for a specified amount, less than three hundred dollars in each case, is not uncertain nor in excess of jurisdiction, though the verdict specifies the aggregate amount found, which exceeds three hundred dollars. La Due v. Forbes, 19 Cal. App. 124; 124 Pac. 867.

Injury to real property. A justice's court has no jurisdiction to receive evidence in or to try an issue involving title to or possession of real property; where such evidence is offered, it is the duty of the justice to suspend further proceedings, and to certify the cause to the superior court. King v. Kutner-Goldstein Co., 135 Cal. 65; 67 Pac. 10. This section makes no attempt to confer jurisdiction upon justices' courts in actions involving the right to possession of real property. O'Meara v. Hables, 163 Cal. 240; 124 Pac. 1003. It is not enough that possession is in fact in controversy, or incidentally in question, or that the fact of possession is in issue, to oust the justice of jurisdiction, within the meaning of the constitution: the right to the possession must be involved. Pollock v. Cummings, 38 Cal. 683. The justice is not ousted of jurisdiction, where possession only is involved (Livingston v. Morgan, 53 Cal. 23); nor where title to land is

not directly called in question (Schroeder v. Wittram, 66 Cal. 636; 6 Pac. 737), although the question need not necessarily be raised by the pleadings (Copertini v. Oppermann, 76 Cal. 181; 18 Pac. 256; Hart v. Carnall-Hopkins Co., 103 Cal. 132; 37 Pac. 196); but see contra, Schroeder v. Wittram, 66 Cal. 636; 6 Pac. 737; Livingston v. Morgan, 53 Cal. 23; Ghiradelli v. Greene, 56 Cal. 629; Williams v. Mecartney, 69 Cal. 556; 11 Pac. 186. The true rule seems to be this: If the issue of title or right to the possession is so involved that it must be decided in order to determine the case, the superior court has original jurisdiction, whether the involution may be said to be merely incidental or not. Hart v. Carnall-Hopkins Co., 103 Cal. 132; 37 Pac. 196; Holman v. Taylor, 31 Cal. 338; Copertini v. Oppermann, 76 Cal. 181; 18 Pac. 256; Randolph v. Kraemer, 106 Cal. 199; 39 Pac. 533; Baker v. Southern California Ry. Co., 110 Cal. 455; 42 Pac. 975. An action to recover half the value of a partition-fence involves the title of the respective parties to their lands, and the justice's court has no jurisdiction (Holman v. Taylor, 31 Cal. 338); but the title or right to the possession is not put in issue in an action to recover rent due on a written lease, where the action denies the plaintiff's title or right to possession. Ghiradelli v. Greene, 56 Cal. 629. The justice's court has jurisdiction of an action to recover a deposit on the purchase of land, where the amount demanded does not exceed the jurisdictional amount (Schroeder v. Wittram, 66 Cal. 636; 6 Pac. 737); but an action for part payment of the purchase-money, because of a defect of title, involves the title to real property, and is not within the jurisdiction of the justice's court. Copertini v. Oppermann, 76 Cal. 181; 18 Pac. 256.

Transfer of cases to superior court. See note post, § 838.

Conversion. In an action for the conversion of grain, the question of injury does not involve the title to or the right to the possession of the ground on which the grain was grown (Ethridge v. Jackson, 2 Sawy. C. C. 598; 8 Fed. Cas. 801; Fed. Cas. No. 4541); and the justice's court has jurisdiction of an action to recover damages for taking and removing a fence. Livingston v. Morgan, 53 Cal. 23.

Actions to recover personal property. In an action in a justice's court for the recovery of specific personal property, the standard of jurisdiction is "the value of the property"; and it seems that the justice's jurisdiction for the incidental damages for detention is unlimited; at all events, the demand for damages cannot oust the justice of jurisdiction, if the value of the property is less than three hundred dollars. Astell v. Phillippi, 55 Cal. 265; and see post, §§ 509–521.

Action on bonds. A justice's court has jurisdiction of an action to enforce a bond given to secure the payment of the costs of an attachment suit, brought in the superior court and appealed to the supreme court, even though the appeal is pending and undetermined. Karry v. Superior Court, 162 Cal. 281; 122 Pac. 475; 128 Pac. 760.

Fines, penalty, or forfeiture. The justice's court has jurisdiction of actions to recover a fine, penalty, or forfeiture, where the amount sued for is within its jurisdiction, unless a question as to the legality of the tax, impost, toll, assessment, or municipal fine is raised. Williams v. Mecartney, 69 Cal. 556; 11 Pac. 186; and see Randolph v. Kraemer, 106 Cal. 199; 39 Pac. 533.

Confession of judgment. A verified statement by the defendant, consenting to a judgment, specifying the amount, authorizes a judgment in accordance therewith (Pond v. Davenport, 44 Cal. 481); and such a judgment, rendered upon an insufficient statement, is not a nullity, and cannot be attacked collaterally. Lee v. Figg, 37 Cal. 328; 99 Am. Dec. 271. An application to set aside confession of judgment must show that the claim was not just, and that the judgment ought not to have been confessed. Arrington v. Sherry, 5 Cal. 513; Lee v. Figg, 37 Cal. 328; 99 Am. Dec. 271. Where the insolvency laws prohibit the confession of judgment by a bankrupt, the assignee in insolvency can have the judgment declared void, upon proper proceedings for that purpose. Pehrson v. Hewitt, 79 Cal. 594; 21 Pac. 950. It is not necessary for a defendant to be an execution creditor, in order to maintain an action to set aside a confession of judgment to defraud creditors; it is sufficient if he have an attachment (Conroy v. Woods, 13 Cal. 626; 73 Am. Dec. 605), as creditors who have acquired liens upon a debtor's property, before sale, under confessed judgments, may attack the same for fraud (Lee v. Figg, 37 Cal. 328; 99 Am. Dec. 271); but the complaint must set forth the specific facts constituting the fraud (Meeker v. Harris, 19 Cal. 278; 79 Am. Dec. 215; King v. Davis, 34 Cal. 100; Lawrence v. Gayetty, 78 Cal. 126; 12 Am. St. Rep. 29; 20 Pac. 382; 17 Morrison's Min. Rep. 169; People v. McKenna, 81 Cal. 158; 22 Pac. 488; Spring Valley Water Works v. San Francisco, 82 Cal. 286; 16 Am. St. Rep. 116; 6 L. R. A. 756; 22 Pac. 910, 1046), as a general allegation that it is fraudulent, and was intended to hinder and delay creditors, is not sufficient. Pehrson v. Hewitt, 79 Cal. 594; 21 Pac. 950; Albertoli v. Branham, 80 Cal. 631; 13 Am. St. Rep. 200; 22 Pac. 404; Sukeforth v. Lord, 87 Cal. 399; 25 Pac. 497; Cosgrove v. Fisk, 90 Cal. 75; 27 Pac. 56. Such averments are merely the conclusions of the pleader. Oakland v. Carpentier, 21 Cal.

642; Castle v. Bader, 23 Cal. 75; Oroville etc. R. R. Co. v. Supervisors of Plumas County, 37 Cal. 354; Sacramento Sav. Bank v. Hynes, 50 Cal. 195; Payne v. Elliott, 54 Cal. 339; 35 Am. Rep. 80; Pehrson v. Hewitt, 79 Cal. 591; 21 Pac. 950; Albertoli v. Branham, 80 Cal. 631; 13 Am. St. Rep. 200; 22 Pac. 404; Sukeforth v. Lord, 87 Cal. 399; 25 Pac. 497; Cosgrove v. Fisk, 90 Cal. 75; 27 Pac. 56; Heller v. Dyerville Mfg. Co., 116 Cal. 127; 47 Pac. 1016.

Appeals to superior court. See notes post, §§ 974–980.

CODE COMMISSIONERS' NOTE. The preceding action is based upon the act of 1863 (Stats. 1863, p. 340). In the original section the jurisdiction extended in actions upon a contract or to recover damages to an "amount not exceeding three hundred dollars." The constitution (art. vi, § 9) declares that the jurisdiction of these courts shall not trench upon the jurisdiction of courts of record, and § 6 of the same article conferred jurisdiction in this class of cases when the sum in controversy amounts to three hundred dollars. To obviate this constitutional objection, we have stricken out the words "does not exceed three hundred dollars," wherever they occurred in the original section, and inserted instead thereof the words "does not amount to three hundred dollars." Subdivision 5 of the original section gave these courts jurisdiction of actions of foreclosure when the debt secured did not exceed three hundred dollars, trenching upon the equity jurisdiction cast by the constitution upon the district courts; therefore we have omitted this subdivision, and for kindred reasons we have omitted the provisions of the eighth subdivision of the original section, conferring jurisdiction upon justices' courts to determine the right to a mining claim, when the value of the claim did not exceed three hundred dollars.

1. **Jurisdiction to appear from records.** The record of the proceedings of a justice's court must affirmatively show jurisdiction. Jolley v. Foltz, 34 Cal. 321; King v. Randlett, 33 Cal. 318; Rowley v. Howard, 23 Cal. 401; Lowe v. Alexander, 15 Cal. 296.

2. **Legality of tax.** Where the legality of a tax is put in issue, the justice is ousted of jurisdiction. People v. Mier, 24 Cal. 61.

3. **Final judgments of justice cannot be reviewed by him.** A justice has no power to vacate a judgment of dismissal and reinstate the case. O'Connor v. Blake, 29 Cal. 312. A justice has no power to vacate or set aside a judgment made by him, except upon a motion for a new trial. And when this is done the proper remedy is by certiorari from district or county court, and not by appeal. No appeal lies in such a case. The judgment of the district court annulling such order should not, however, affirm the original judgment. Winter v. Fitzpatrick, 35 Cal. 269.

4. **Amendment of complaint, so as to show jurisdiction.** A justice has the right to allow a complaint to be amended in all respects, so that the case may be determined on its substantial merits; and this whether the defect be in the statement, jurisdiction, or other facts. Linhart v. Buiff, 11 Cal. 280; Wratten v. Wilson, 22 Cal. 465. When a complaint in a justice's court avers a good cause of action, and in addition thereto avers and asks relief for matters not within the jurisdiction of the court, the action should not on that account be dismissed, but the court should direct the complaint to be amended, or should disregard the objectionable matter. Howard v. Valentine, 20 Cal. 282; Van Etten v. Jilson, 6 Cal. 19; Grass Valley Quartz Min. Co. v. Stackhouse, 6 Cal. 413; Wratten v. Wilson, 22 Cal. 465.

5. **Granting appeals, stay of executions, etc.** Justices can exercise jurisdiction to grant appeals, and thereupon stay execution, etc. Coulter v. Stark, 7 Cal. 244.

6. **Deserting seamen.** Under the acts of Congress (1790), justices of the peace have jurisdiction to try and commit deserting seamen, and no other court has this power. Ex parte Crandall, 2 Cal. 144.

7. **Money demands. Amount in controversy.** A judgment by confession for a greater amount than (notwithstanding the complaint was within) the jurisdictional amount allowed by the constitution, was held void. Feillett v. Engler, 8 Cal. 76. But this case is commented on, and it was held that the "amount in controversy is what determines the jurisdiction." That this was the amount sued for, exclusive of costs. The judgment may exceed the amount in controversy. Bradley v. Kent, 22 Cal. 169; but see Reed v. Bernal, 40 Cal. 629; see note 6 to § 44, ante. Formerly, under the constitution, the jurisdiction of the justice's court was limited, as to money demands, to an "amount not exceeding two hundred dollars." Feillett v. Engler, 8 Cal. 76; Zander v. Coe, 5 Cal. 230; Ford v. Smith, 5 Cal. 331; Brock v. Bruce, 5 Cal. 279; Hart v. Morn, 6 Cal. 161; Freeman v. Powers, 7 Cal. 104; Small v. Gwinn, 6 Cal. 447; Malson v. Vaughn, 23 Cal. 61. But since 1863 the jurisdiction has been established at any sum not amounting to three hundred dollars. Cariaga v. Dryden, 29 Cal. 307; Maxfield v. Johnson, 30 Cal. 545; see Reed v. Bernal, 40 Cal. 629. Justices' courts would have no jurisdiction where a defendant sets up a counterclaim for a sum exceeding three hundred dollars. Maxfield v. Johnson, 30 Cal. 545. Plaintiff commenced three actions in a justice's court for the recovery of the same property, the action being against several defendants. The property sued for was of value less than three hundred dollars. Under § 1048 of this code (§ 526) the several actions were consolidated. The court held, the value of the property being less than three hundred dollars, that the justice had jurisdiction. Cariaga v. Dryden, 29 Cal. 307.

8. **Trespass on real property.** A justice's court has jurisdiction of an action of trespass on real property, the damages claimed being less than three hundred dollars. Pollock v. Cummings, 38 Cal. 683. But the right of possession must not be put in issue. Cornett v. Bishop, 39 Cal. 319.

9. **Damages for injury to, or detention of, mining claims.** It was held that justices' courts could not take jurisdiction of suits to recover damages for injury to a mining claim, or for its detention. Van Etten v. Jilson, 6 Cal. 19.

10. **Damage for diversion of water. Water rights.** A justice of the peace has no power conferred upon him to try a cause, where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted. Hill v. Newman, 5 Cal. 445; 63 Am. Dec. 140.

11. **Action for penalty for charging excessive fare by railroad company.** See Reed v. Omnibus R. R. Co., 33 Cal. 212.

12. **Judgment on confession of defendant.** Feillett v. Engler, 8 Cal. 76.

§ 113. Concurrent jurisdiction. The justices' courts shall have concurrent jurisdiction with the superior courts within their respective townships:

1. In actions of forcible entry and detainer, where the rental value of the property entered upon or unlawfully detained does not exceed twenty-five dollars per month, and the whole amount of damages claimed does not exceed two hundred dollars;

2. In actions to enforce and foreclose liens on personal property, where neither the amount of the liens nor the value of the property amounts to three hundred dollars.

Concurrent jurisdiction. See Const., art. vi, § 11.
Concurrent jurisdiction in action for forcible entry and detainer. See post, § 1163.
Forcible entry. See post, §§ 1159 et seq.

Legislation § 113. Added by Code Amdts. 1880, p. 35.
The original § 113 provided for terms and election of justices of the peace. See ante, § 110.

Actions of forcible entry and detainer. Justices' courts have jurisdiction concurrent with the superior court in cases of unlawful detainer, where the amount involved brings the action within this section. Ivory v. Brown, 137 Cal. 603; 70 Pac. 657. The constitutional provision of 1849 giving justices' courts jurisdiction in actions in forcible entry and detainer was held to include unlawful detainers (Caulfield v. Stevens, 28 Cal. 118; Brummagim v. Spencer, 29 Cal. 661; Mecham v. McKay, 37 Cal. 154; Johnson v. Chely, 43 Cal. 299); and this section is given the same construction. Ivory v. Brown, 137 Cal. 603; 70 Pac. 657. The test of jurisdiction in such actions is: 1. That the whole amount of damages claimed must not exceed two hundred dollars; and 2. That the rental value of the property must not exceed twenty-five dollars a month, as a matter of fact (Ballerino v. Bigelow, 90 Cal. 500; 27 Pac. 372); and this amount must be computed by excluding interest. Hoban v. Ryan, 130 Cal. 96; 62 Pac. 296. Where the plaintiff seeks to have the damages trebled, and by so doing exceeds the jurisdictional amount, the court is ousted of jurisdiction (Hoban v. Ryan, 130 Cal. 96; 62 Pac. 296), and also where the evidence shows that the rental involved is in excess of twenty-five dollars a month, as jurisdiction cannot be conferred by the fictitious framing of a complaint to bring the action within the jurisdictional amount, and thus deprive the defendant of the right to submit his case to the proper tribunal. Ballerino v. Bigelow, 90 Cal. 500; 27 Pac. 372.

Concurrent and conflicting jurisdiction. See note 29 Am. St. Rep. 310.
Right to control action as between two courts of concurrent jurisdiction. See note Ann. Cas. 1912A, 150.

§ 114. Civil jurisdiction restricted. Except as in the last preceding section provided, the jurisdiction of the justices' courts shall not, in any case, trench upon the jurisdiction of the several courts of record of the state, nor extend to any action or proceeding against ships, vessels, or boats, for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of this state.

Not to trench upon jurisdiction of courts of record. See Const., art. vi, § 11.
Actions against vessels. Post, §§ 813 et seq.

Legislation § 114. 1. Enacted March 11, 1872, as § 115, and then read: "The jurisdiction conferred by the last section shall not extend, however: 1. To a civil action in which the title or possession of real property is put in issue; 2. Nor to an action or proceeding against ships, vessels, or boats, or against the owners or masters thereof, when the suit or proceeding is for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of this state."
2. Amended by Code Amdts. 1873–74, p. 399, and the words "or against the owners or masters thereof" omitted.
3. Amended by Code Amdts. 1880, p. 36, and renumbered § 114.
The original § 114 defined the civil jurisdiction of justices' courts. See ante, § 112.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 340.

Cases involving title or possession of real property. The constitution confers on the district courts original jurisdiction in all cases at law which involve the title or possession of real property, and on the supreme court appellate jurisdiction in all such cases. Const., art. vi, §§ 4, 6. The ninth section of the same article of the constitution authorizes the legislature to fix by law the powers of justices of the peace, provided such powers shall not in any case trench upon the jurisdiction of the several courts of record; and the act concerning the courts of justice of this state and judicial officers provides that courts of justices of the peace shall not have jurisdiction in a civil action in which the title or possession of real estate shall necessarily come in question. Laws 1863, p. 340, § 49. The objection suggested is untenable, because the action, though commenced in a justice's court for damages in a sum less than three hundred dollars, upon the filing of the defendant's answer involved a question of title to the land on which stood the fence that was destroyed. The cause was transferred from the justice's court to the district court, upon the filing of the defendant's verified answer, showing that the determination of the action would necessarily involve the decision of a question of title to real property, as provided by the five hundred and eighty-first section of the Practice Act (post, § 838), and upon its becoming so transferred, the district court obtained complete jurisdiction in the premises. Doherty v. Thayer, 31 Cal. 144, 145. In Holman v. Taylor, 31 Cal. 338, the title of the respective parties to certain parcels of real estate was in issue, and in ascertaining the meaning of the clause of the constitution, "all cases at law which involve the title or possession of real property," the subject of possession was considered, but only by way of argument, and for the purpose of illustration; and in the discussion the language of the court was not in all respects sufficiently guarded and definite. To constitute a case which involves the possession of real property, it is not enough that the possession is a fact in controversy, or incidentally in question, or that the fact of possession is in issue; but the right of possession must be involved in the action. The paraphrase of the clause of the constitution, given in Holman v. Taylor, would be more accurate, and would more fully express the meaning of that clause, if given in this language: "Cases at law in which the title or right of possession of real

property is a material fact in the case, upon which the plaintiff relies for a recovery, or the defendant for a defense." The allegation of the right of possession is quite different from that of possession in fact, which may constitute merely the basis of some right or claim constituting the cause of action, or the defense to the action. In an action for use and occupation, the possession of the defendant may be alleged on the one side and denied on the other without presenting an issue as to the right of possession. And so, in an action of trespass upon real property, the plaintiff may recover upon alleging and showing, in addition to the injury complained of, his possession of the premises, and his right to the possession is not involved unless the defendant tenders an issue upon that fact, and in such case, as was said in Holman v. Taylor, the right of recovery depends both upon possession in fact and the right of possession. It was not the intention to withdraw from justices of the peace and other inferior courts, and confer upon the district courts, jurisdiction of cases of the character of those mentioned, in which the right of possession is not involved; but it was intended to give to the latter courts jurisdiction of cases involving the right of possession of real property. Pollock v. Cummings, 38 Cal. 685. See also Cornett v. Bishop, 39 Cal. 319; Cullen v. Langridge, 17 Cal. 69.

§ 115. [Related to criminal jurisdiction. Repealed.]

Act conferring power to act as police judges. Act of Stats. 1883, p. 63, was superseded by § 103, ante, as amended by Stats. 1901, p. 100.

Legislation § 115. 1. Enacted March 11, **1872**, as § 117.
2. Amended by Code Amdts. **1873-74**, p. 283.
3. Amended by Code Amdts. **1880**, p. 36, and renumbered § 115 in amending Part I.
4. Repeal by Stats. **1901**, p. 120; unconstitutional. See note ante, § 5.
5. Repealed by Stats. **1907**, p. 682; the code commissioner saying, "Repealed, as it related wholly to prosecution of public offenses, and its provisions were incorporated in the Penal Code, § 1425, as amended in 1905." Stats. 1905, p. 705.

§ 116. [Subject-matter amended, and section renumbered.]

Legislation § 116. 1. Enacted March 11, **1872**.
2. Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

§ 117. [Subject-matter amended, and section renumbered.]

Legislation § 117. 1. Enacted March 11, **1872**.
2. Amended by Code Amdts. **1873-74**, p. 283.
3. Amended by Code Amdts. **1875-76**.
4. Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

§ 118. [Subject-matter amended, and section renumbered.]

Legislation § 118. 1. Enacted March 11, **1872**.
2. Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

§ 119. [Subject-matter amended, and section renumbered.]

Legislation § 119. 1. Added by Code Amdts. **1873-74**, p. 383.
2. Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

CHAPTER VI.

POLICE COURTS.

§ 121. Provided for in Political Code.

§ 121. Provided for in Political Code.

Police courts are established in incorporated cities and counties, cities and towns, and their organization, jurisdiction, and powers provided for in the Political Code, part four.

Proceedings in civil actions. See post, §§ 929 et seq.
Police courts generally, their organization and jurisdiction. See Pol. Code, §§ 4424 et seq.
Act transferring business to, after new constitution. See Stats. 1880, p. 2 (Bancroft ed., p. 2).

Legislation § 121. 1. Enacted March 11, **1872**.
2. Amended by Code Amdts. **1880**, p. 36, and the words "cities and counties" added.

Police courts. Police courts constitute part of the courts of the state, and police judges part of the judiciary (Ex parte Henshaw, 73 Cal. 486; 15 Pac. 110; McGrew v. Mayor and Board of Trustees, 55 Cal. 611; People v. Ransom, 58 Cal. 558; Jenks v. Council of City of Oakland, 58 Cal. 576; Coggins v. Sacramento, 59 Cal. 599; Kahn v. Sutro, 114 Cal. 316; 33 L. R. A. 620; 46 Pac. 87; People v. Provines, 34 Cal. 520); and police judges, though judicial officers, are also municipal officers. People v. Henry, 62 Cal. 557.

CODE COMMISSIONERS' NOTE. People v. Provines, 34 Cal. 520.

CHAPTER VII.

GENERAL PROVISIONS RESPECTING COURTS OF JUSTICE.

Article I. Publicity of Proceedings. §§ 124, 125.
II. Incidental Powers and Duties of Courts. §§ 128–131.
III. Judicial Days. §§ 133–135.
IV. Proceedings in Case of Absence of Judge. §§ 139, 140.
V. Provisions respecting Places of Holding Courts. §§ 142–144.
VI. Seals of Courts. §§ 147–153.

ARTICLE I.

PUBLICITY OF PROCEEDINGS.

§ 124. Sittings, public.
§ 125. Sittings, when private.

§ 124. Sittings, public. The sittings of every court of justice shall be public, except as provided in the next section.

Publicity of proceedings. U. S. Const., art. vi, § 1, Amdts.

Legislation § 124. 1. Enacted March 11, **1872**; based on Stats. 1863, p. 342.

2. Amended by Code Amdts. **1880**, p. 36, and the word "are" changed to words "shall be."

Public sittings. "A public trial" means one not held in secret. People v. Swafford, 65 Cal. 223; 3 Pac. 809. The trial should be public, in the ordinary, common-sense acceptation of the term; the doors of the courtroom kept open; the public admitted; the trial public in all respects; with due regard to the size of the courtroom and the conveniences of the court, with the right in the court to exclude objectionable characters as well as youths of tender years, and to do other things which may facilitate the proper conduct of the trial. People v. Hartman, 103 Cal. 242; 42 Am. St. Rep. 108; 37 Pac. 153. The exclusion of spectators from the courtroom during the trial, against the objection of defendant, is a violation of the constitution; and injury to the defendant will be presumed (People v. Hartman, 103 Cal. 242; 42 Am. St. Rep. 108; 37 Pac. 153; and see People v. Kerrigan, 73 Cal. 222; 14 Pac. 849), but this right to a public trial may be waived by the defendant (People v. Tarbox, 115 Cal. 57; 46 Pac. 896), and, in the absence of any showing, it will be presumed that an excluding order was with the consent of the defendant. People v. Swafford, 65 Cal. 223; 3 Pac. 809. An order excluding from the courtroom all persons, except the judge, jurors, witnesses, and persons connected with the cause, does not violate this statutory provision. People v. Swafford, 65 Cal. 223; 3 Pac. 809; People v. Tarbox, 115 Cal. 57; 46 Pac. 896; People v. Kerrigan, 73 Cal. 222; 14 Pac. 849.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 342.

§ 125. Sittings, when private. In an action for divorce, criminal conversation, seduction, or breach of promise of marriage, the court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the court, the parties, their witnesses, and counsel; provided, that in any cause the court may, in the exercise of a sound discretion, during the examination of a witness, exclude any or all other witnesses in the cause.

Records in divorce and attachment proceedings to be kept secret. See Pol. Code, § 1032.

Exclusion of witnesses. Post, § 2043.

Legislation § 125. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 342), and then read: "§ 125. In an action for divorce the court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons, except the officers of the court, the parties, their witnesses, and counsel."

2. Amended by Code Amdts. **1873–74**, p. 284, the text then reading as at present, except that it did not have proviso.

3. Amended by Code Amdts. **1880**, p. 36, and proviso added.

Private sittings. This section, permitting private sittings of the court, does not apply to criminal cases, but only to civil actions. People v. Hartman, 103 Cal. 242; 42 Am. St. Rep. 108; 37 Pac. 153. The object of this section is to secure decorum in the conduct of trials involving the relation of the sexes, and to protect witnesses of refined sensibilities from giving testimony of a delicate or filthy nature in the presence of a crowd of vulgar or curious spectators; it was not intended for the protection of the public from the influence of revelations often made in such cases, nor to prevent the publication of the evidence. In re Shortridge, 99 Cal. 526; 37 Am. St. Rep. 78; 21 L. R. A. 755; 34 Pac. 227; Ann. Cas. 1912B, 542, note.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 342.

ARTICLE II.

INCIDENTAL POWERS AND DUTIES OF COURTS.

§ 128. Powers respecting conduct of proceedings.
§ 129. Courts of record may make rules.
§ 130. When rules take effect.
§ 131. Probationary treatment of juvenile offenders.

§ 128. Powers respecting conduct of proceedings. Every court shall have power:

1. To preserve and enforce order in its immediate presence;

2. To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority;

3. To provide for the orderly conduct of proceedings before it, or its officers;

4. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein;

5. To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto;

6. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this code;

7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties;

8. To amend and control its process and orders so as to make them conformable to law and justice.

Power of judicial officers. See post, § 177.
Contempt. See post, § 1209.
In justice's court. See post, §§ 906 et seq.
Subd. 6. Attendance of witnesses. See post, §§ 1985 et seq.
Subd 7. Administration of oaths. See post, §§ 2093 et seq.

Legislation § 128. 1. Enacted March 11, **1872**; based on Stats. 1863, p. 342, and on New York code.
2. Amended by Code Amdts. **1880**, p. 37, and words "Every court has power" changed to "Every court shall have power."

Power over conduct of proceedings. It is important that courts of justice should be upheld in the enforcement of all necessary and reasonable rules for the orderly, speedy, and effective conduct of their duties. People v. Kerrigan, 73 Cal. 222; 14 Pac. 849; People v. Swafford, 65 Cal. 223; 3 Pac. 809.

Obedience to orders and judgments. This section provides power to compel obedience to judgments, orders, or processes (Ex parte Smith, 53 Cal. 204); and when an act is within the power of the party to perform, the court may direct him to be imprisoned until he complies with its order. Ex parte Latimer, 47 Cal. 131; People v. Center, 54 Cal. 236; Ex parte Kellogg, 64 Cal. 343; 30 Pac. 1030.

Control conduct of ministerial officers. For the purpose of appeal, the supreme court has power to control the conduct of the clerk of the trial court. People v. Center, 54 Cal. 236; Winder v. Hendrick, 54 Cal. 275; Duncan v. Times-Mirror Co., 109 Cal. 602; 42 Pac. 147.

Control conduct of persons connected with proceedings. The court may order the defendant to allow an expert witness of the plaintiff to examine the machinery of the defendant, in an action for damages occasioned by negligence. Clark v. Tulare Lake Dredging Co., 14 Cal. App. 414, 439; 112 Pac. 564. Where the plaintiff, in an action to recover for personal injuries, offers the testimony of attending physicians to prove the nature and extent of the injuries sustained, the court has power, and it is its duty, to order a physical examination in the presence of the plaintiff's physicians and physicians of the defendant, to ascertain the nature and extent of such injuries. Johnston v. Southern Pacific Co., 150 Cal. 535; 11 Ann. Cas. 841; 89 Pac. 348.

Compel attendance of witnesses. The court has power, under this section, to compel the attendance of witnesses confined in the state prison. Willard v. Superior Court, 82 Cal. 456; 22 Pac. 1120.

Amendment of process. The court has power to amend its process, pending its service. Baldwin v. Foster, 157 Cal. 643; 108 Pac. 714.

Control over process. The court wherein judgment is entered has control of such judgment, and authority to direct issuance and execution of process thereunder, in the interest of the party entitled thereto; and necessarily, as incidental to such power, that of determining, in any instance, who is entitled to such process. Rowe v. Blake,

112 Cal. 637; 44 Pac. 1084; McAuliffe v. Coughlin, 105 Cal. 268; 38 Pac. 730.

Control over record. Every court of record has the inherent right and power to cause its acts and proceedings to be correctly set forth in its records; the clerk is but an instrument and assistant of the court, whose duty it is to make memorial of its orders and directions; and whenever it is brought to the knowledge of the court that the record made by the clerk does not correctly show the order or direction which was in fact made by the court at the time it was given, the authority of the court to cause its record to be corrected in accordance with the facts is undoubted. Kaufman v. Superior Court, 115 Cal. 152; 46 Pac. 904; Crim v. Kessing, 89 Cal. 478; 25 Am. St. Rep. 491; 26 Pac. 1074. While the court has power to correct and set aside an order entered inadvertently, yet it has no authority to do any more than to make those records correspond with the actual facts; it cannot, under the form of an amendment, correct a judicial error, nor make of record an order or judgment which was never in fact given or made (Kaufman v. Shain, 111 Cal. 16; 52 Am. St. Rep. 139; 43 Pac. 393; People v. Curtis, 113 Cal. 68; 45 Pac. 180; People v. Durrant, 116 Cal. 179; 48 Pac. 75); and to correct or set aside an order inadvertently made, the court is not bound by the record, but may receive evidence for that purpose. Kaufman v. Shain, 111 Cal. 16; 52 Am. St. Rep. 139; 43 Pac. 393. This power may be exercised at any time (Kaufman v. Shain, 111 Cal. 16; 52 Am. St. Rep. 139; 43 Pac. 393; Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074; Egan v. Egan, 90 Cal. 15; 27 Pac. 22), even after an appeal, a judgment of affirmance, and the issuance of execution. Rousset v. Boyle, 45 Cal. 64; Sheldon v. Gunn, 57 Cal. 40; Boyd v. Burrel, 60 Cal. 280; People v. Murback, 64 Cal. 369; 30 Pac. 608.

Power of courts to punish contempts. See note 12 Am. Dec. 178.

Power of courts to compel parties to convey land or surrender property or children situated in another state. See note 67 Am. Dec. 95.

Power to punish for contempt at chambers or in vacation. See note Ann. Cas. 1913B, 35.

Power of magistrate to punish for contempt. See note 1 L. R. A. (N. S.) 1135.

CODE COMMISSIONERS' NOTE. Subdivisions 1, 2, 4, and the first clause of subdivision 5, substantially embrace the provisions of § 65 of the act of 1863 (Stats. 1863, p. 342); the other subdivisions are taken from the New York code, because they concisely embody various statutory provisions scattered through our laws, or well-settled common-law principles, applicable to the powers of judicial tribunals. This arrangement presents them in a form convenient to the profession, and in their logical order.

§ 129. Courts of record may make rules. Every court of record may make rules not inconsistent with the laws of this state, for its own government and the government of its officers; but such rules shall neither impose any tax, charge or penalty upon any legal proceeding, or for filing any pleading allowed by law, nor give any allowance to any officer for services.

When rules take effect. Post, § 130.

Legislation § 129. 1. Enacted March 11, **1872**; based on Practice Act, § 643, which read: "The supreme court may make rules not inconsistent with the constitution and laws of the state, for its own government, and the government of the district courts, and the superior court of the city of San Francisco; but such rules shall not be in force until thirty days after their adoption and publication." (The superior court of San Francisco was abolished May 1, 1857.) When enacted in 1872, the first clause of this section was the same as the amendment of 1880 and of the present amendment (1913), the second clause then reading, "but such rules must neither impose a tax or charge upon any legal proceeding nor give an allowance to any officer for services."

2. Amended by Code Amdts. **1880**, p. 37, changing the second clause to read, "but such rules shall neither impose any tax or charge upon any legal proceeding, nor give any allowance to any officer for services."

3. Amended by Stats. **1913**, p. 90, the changes being in the second clause.

Power to make rules. The rules of court are but the means to accomplish the ends of justice (Pickett v. Wallace, 54 Cal. 147), and may be altered or amended from time to time, as the ends of justice or the convenience of the court require. Meyer v. Tupper, 66 U. S. (1 Black) 522; 17 L. Ed. 180; Ex parte Thistleton, 52 Cal. 220. Although the court has power to suspend its own rules, or except particular cases from their operation, whenever the purposes of justice require it (People v. Williams, 32 Cal. 280; Pickett v. Wallace, 54 Cal. 147; Sullivan v. Wallace, 73 Cal. 307; 14 Pac. 789), yet the rules cannot be changed to deprive a party of a statutory right. People v. McClellan, 31 Cal. 101. Rules cannot contravene the statutes of the state (Estate of Jessup, 81 Cal. 408; 6 L. R. A. 594; 21 Pac. 976; 22 Pac. 742, 1028; People v. McClellan, 31 Cal. 101), and the parties have no unqualified right to stipulate for their abrogation. Reynolds v. Lawrence, 15 Cal. 359. They must be construed the same as statutes are construed (Hanson v. McCue, 43 Cal. 178), and they bind the court, as well as the suitor, until they are abrogated. Hanson v. McCue, 43 Cal. 178.

Subjects governed. Such rules may prescribe the time for filing transcripts on appeal (McKay v. Superior Court, 86 Cal. 431; 25 Pac. 10); and may require a deposit of the clerk's costs, on appeal from a justice's court. Behymer v. Superior Court, 18 Cal. App. 464; 123 Pac. 340. A rule of the supreme court, requiring points and authorities in behalf of the respective parties to be filed within a specified time

after the filing of the transcript confers rights that may be enforced by litigants. Barnhart v. Conley, 17 Cal. App. 230; 119 Pac. 200.

Proof of rules. The supreme court will not take judicial notice of the rules of the superior court (Warden v. Mendocino County, 32 Cal. 655; Cutter v. Caruthers, 48 Cal. 178; Sweeney v. Stanford, 60 Cal. 362); and where a party relies upon such rules he must incorporate them in the record. Cutter v. Caruthers, 48 Cal. 178; Sweeney v. Stanford, 60 Cal. 362.

Rules of court. See note 41 Am. St. Rep. 639.
Validity of court rule in contravention of common law or statute. See note 19 Ann. Cas. 801.
Power of court to disregard rules. See note 6 Ann. Cas. 592.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 335; Stats. 1870, p. 528.

§ 130. When rules take effect. Rules adopted by the supreme court shall take effect sixty days, and rules adopted by superior courts, thirty days after their publication. When adopted they shall be spread upon the record of the court, printed and filed in the office of the clerk of the court.

Legislation § 130. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 335), and then read: "The rules adopted by the supreme court take effect sixty days, and those adopted by other courts, thirty days, after their publication."
2. Amended by Code Amdts. **1880**, p. 37.
3. Amended by Stats. **1913**, p. 90, adding the second sentence. Quære as to "printed . . . in the office of the clerk of the court."

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 335.

§ 131. Probationary treatment of juvenile offenders. 1. The judge of the superior court in and for each county or city and county of the state, or where there are more than one judge of said court, a majority of the judges thereof by an order entered in the minutes of such court, may appoint seven discreet citizens of good moral character, and of either sex, to be known as probation committee, and shall fill all vacancies occurring in such committee. The clerk of said court shall immediately notify each person appointed on said committee and thereupon said persons shall appear before the judge of said superior court in said county and qualify by taking oath, to be entered in the minutes of said superior court, to faithfully perform the duties of a member of such probation committee.

2. The members of such probation committee shall hold office for four years, and until their successors are appointed, provided that of those first appointed, one shall hold office for one year, two for two years, two for three years, and two for four years, the terms for which the respective members first appointed shall hold office to be determined by lot as soon after their appointment as may be. When any vacancy occurs in any probation committee by expiration of the term of office of any member thereof, the successor shall be appointed to hold for the term of four years; when any vacancy occurs for any other reason, the appointee shall hold for the unexpired term of his predecessor.

3. The members of the probation committee shall serve without compensation.

4. The superior court or any judge thereof may at any time require said probation committee or a probation officer to examine into the qualifications and management of any society, association or corporation, other than a state institution, applying to receive any child or children under this act, and to report to the court, provided that nothing in this section shall be construed as giving any probation committee or probation officer any power to enter any institution without the consent of such institution.

It shall be the duty of each probation committee prior to December first in each year to prepare a report in writing on the qualifications and management of all societies, associations and corporations, except state institutions,

applying for or receiving any child under this act from the courts of their respective counties, and in said report said committee may make such suggestions or comments as to them may seem fit; said report to be filed in the office of the clerk of the court appointing such committee, for the information of the judges thereof.

5. In counties of the first class there shall be one probation officer and not more than five deputy probation officers; in counties of the second class, one probation officer and not more than one deputy probation officer; in all other counties there shall be one probation officer. In any county or city and county additional deputy probation officers may be appointed and their appointment approved or disapproved as hereinafter provided, from time to time when in the opinion of the court it may be necessary, provided that they serve without salary.

6. The probation officer and deputy probation officers in all the counties of the state shall be allowed such necessary incidental expenses as may be authorized by a judge of the superior court; and the same shall be a charge upon the county in which the court appointing them has jurisdiction, and the said expenses shall be paid out of the county treasury upon a warrant therefor issued by the said court.

7. The offices of probation officers and deputy probation officers are hereby created. The appointments of probation officers and deputy probation officers to serve hereunder in any county or city and county shall be made by the probation committee of said county or city and county from discreet citizens of good moral character. The appointments by each probation committee shall be made in writing, signed by a majority of the members of such committee, and filed with the county clerk of such county, and shall be subject to and shall take effect upon approval by the judge of the superior court appointing such committee, or by a majority of the judges thereof if there be more than one; such approval to be by order entered in the minutes of said court. The term of office of probation officers and of deputy probation officers shall be two years from the date of the said approval of their several appointments. Such probation officers and deputy probation officers may at any time be removed by the judge approving their appointment in his discretion.

8. Any of the duties of the probation officer may be performed by a deputy probation officer and shall be performed by him whenever detailed to perform the same by the probation officer; and it shall be the duty of the probation officer to see that the deputy probation officer performs his duties.

9. It is the intention of this act that the same probation committees, the same probation officers and deputy probation officers shall be appointed and serve under this act as under the act known as the juvenile court act, and entitled "An act defining and providing for the control, protection and treatment of dependent and delinquent children; prescribing the powers and duties of courts with respect thereto; providing for the appointment of probation officers, and prescribing their powers and duties; providing for the separation of children from adults when confined in jails or other institutions; providing for the appointment of boards to investigate the qualifications of organizations receiving children under this act, and prescribing the duties of such boards; and providing when proceedings under this act shall

be admissible in evidence," and approved February 26, 1903; or under any laws amending or superseding the same.

10. Either at the time of the arrest for crime of any person over sixteen years of age, or at the time of the plea or verdict of guilty, the probation officer of the county of the jurisdiction of said crime shall, when so directed by the court, inquire into the antecedents, character, history, family environment and offense of such person, and must report the same to the court and file his report in writing in the records of said court. His report shall contain his recommendation for or against the release of such person on probation. If any such person shall be released on probation and committed to the care of the probation officer, such officer must keep a complete and accurate record in suitable books of the history of the case in court and of the name of the probation officer, and his acts in connection with said case; also the age; sex; nativity; residence; education; habits of temperance; whether married or single; and the conduct, employment and occupation and parents' occupation and condition of such person so committed to his care during the term of such probation, and the result of such probation, which record shall be and constitute a part of the records of the court and shall at all times be open to the inspection of the court or any person appointed by the court for that purpose, as well as of all magistrates and the chief of police or other head of the police, unless otherwise ordered by the court. The said books of record shall be furnished by the county clerk of said county, and shall be paid for out of the county treasury.

11. The probation officer shall furnish to each person released on probation and committed to his care, a written statement of the terms and conditions of his probation, and shall report to the court, judge, or justice appointing him, any violation or breach of the terms and conditions imposed by such court on the person placed in his care.

12. The probation officers and deputy probation officers appointed under this section shall serve as such probation officers in all courts having original jurisdiction of criminal actions in this state.

13. Such probation officer and each deputy probation officer shall have, as to the person so committed to the care of such probation officer or deputy probation officer, the powers of a peace-officer.

Juvenile court law. Stats. 1909, p. 213.

Legislation § 131. 1. Added by Stats. **1903**, p. 36, and then read: "1. The judges and justices of the courts having original jurisdiction of criminal actions in this state shall, from time to time, if in their judgment the interests of justice will be promoted thereby, appoint a person or persons from among the officers of any charity organization, society, associated charities, or any strictly non-sectarian charitable association, or from among the citizens, either men or women, to perform the duties of probation officer, as hereinafter described, within the jurisdiction and under the direction of said court; to hold such office during the pleasure of the judge or justice making such appointment. 2. No probation officer appointed under the provisions of this section shall receive compensation for service as such probation officer; provided, however, that the probation officer shall be allowed his necessary expenses, and the same shall be a charge upon the county in which the court appointing him has jurisdiction, and the said expenses shall be paid out of the county treasury upon a warrant therefor issued by the said court. 3. Every probation officer so appointed shall, when so directed by the court, inquire into the antecedents, character, history, and offense of persons over the age of sixteen years arrested for a crime within the jurisdiction of the court appointing him, and shall report the same to the court. It shall be his duty to make such report of all cases investigated by him, of all cases placed in his care by the court, and of all other duties performed by him in the discharge of his office as shall be prescribed by the court or judge making the appointment, or his successor, or by the court or judge assigning the case to him, or his successor, which report shall be filed with the clerk of the court, or where there is no clerk, the justice thereof. He shall keep a complete and accurate record of each case committed to his care, or investigated by him, in suitable books; also a record of the conduct of the person committed to his care during such term of probation, which record shall be a part of the records of the court, and shall at all times be open to the inspection of the court, or any person appointed by the court for that purpose, as well as of all magistrates and the chief of police or other head officer of police, unless otherwise ordered by the court. 4. He shall furnish to each person released on probation committed to his care a written statement of the

terms and conditions of his probation, and shall report to the court, judge, or justice appointing him, any violation or breach of the terms and conditions imposed by such court on the person placed in his care. 5. Such probation officer shall have, as to the person so committed to his care, the powers of a peace-officer."

2. Amended by Stats. **1905**, p. 780.

ARTICLE III.

JUDICIAL DAYS.

§ 133. Days on which courts, etc., may be held.
§ 134. Non-judicial days.
§ 135. Appointments on non-judicial days.

§ 133. Days on which courts, etc., may be held. Courts of justice may be held and judicial business transacted on any day, except as provided in the next section.

Legislation § 133. **1.** Enacted March 11, **1872** (based on Stats. 1863, p. 343), and then read: "The courts of justice may be held, and judicial business may be transacted, on any day except as provided in the next section."

2. Amended by Code Amdts. **1880**, p. 37.

Non-judicial days. Non-judicial days are defined by this section (Adams v. Dohrmann, 63 Cal. 417), as qualified by § 134, post (Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074); but the supreme court is expressly exempted from its operation. Adams v. Dohrmann, 63 Cal. 417.

Ministerial acts. The filing of a complaint on a legal holiday is not sufficient ground for setting aside the judgment, where no objection was made in the court below (Peterson v. Weissbein, 65 Cal. 42; 2 Pac. 730; Gregory v. Ford, 14 Cal. 138; 73 Am. Dec. 639); and this section does not prohibit the transaction of ministerial acts, such as the service of process (Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074; Heisen v. Smith, 138 Cal. 216; 94 Am. St. Rep. 39; 71 Pac. 180), or the presentation of an information by the district attorney for filing. Ex parte Sternes, 82 Cal. 245; 23 Pac. 38; People v. Nogiri, 142 Cal. 596; 76 Pac. 490; People v. Helm, 152 Cal. 532; 93 Pac. 99.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 343.

§ 134. Non-judicial days. No court, other than the supreme court, must be open for the transaction of judicial business on any of the holidays mentioned in section ten, except for the following purposes:

1. To give, upon their request, instructions to jury when deliberating on their verdict;

2. To receive a verdict or discharge a jury;

3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.

Injunctions and writs of prohibition may be issued and served on any day.

Legal holidays and non-judicial days.
1. Holidays. Ante, §§ 10–13.
2. Courts always open. Const., art. vi, § 5; ante, §§ 47, 73, 104.
3. Injunctions and writs of prohibition, issuance of, on. Ante, § 76, subd. 5; Const., art. vi, § 5.

Legislation § 134. **1.** Enacted March 11, **1872** (based on Stats. 1863, p. 343), the introductory paragraph reading, "No court can be opened, nor can any judicial business be transacted, on Sunday, on the first day of January, on the fourth of July, on Christmas or Thanksgiving day, or on a day on which the general or the judicial election is held, except for the following purposes"; subds. 1, 2, 3 (which ended section) reading as at present.

2. Amended by Code Amdts. **1880**, p. 38, (1) changing introductory paragraph to read: "No court shall be open, nor shall any judicial business be transacted on Sunday, on the first day of January, on the twenty-second day of February, on the fourth day of July, on the twenty-fifth day of December, on a day in which an election is held throughout the state, or on a day appointed by the President of the United States, or by the governor of this state, for a public fast, thanksgiving, or holiday, except for the following purposes"; (2) adding at end of subd. 3, "provided, that the supreme court shall always be open for the transaction of business; and provided further, that injunctions and writs of prohibition may be issued and served on any day."

3. Amended by Stats. **1889**, p. 46, adding "on the thirtieth day of May" and "on the ninth day of September."

4. Amended by Stats. **1893**, p. 187, (1) in introductory paragraph, adding "on the first Monday of October"; (2), in subd. 3, adding, after "supreme court," "and the superior courts."

5. Amended by Stats. **1897**, p. 15, (1) changing "first Monday of September" to "first Monday of October," and (2) omitting "or on a day appointed by the President of the United States."

6. Amendment by Stats. **1901**, p. 120; unconstitutional. See note ante, § 5.

7. Amended by Stats. **1907**, p. 681; the code commissioner saying, "The amendment recast the section, substituting the words 'on any of the holidays mentioned in § 10,' instead of attempting to mention the holidays, which are always changing. The amendments are designed to conform to the section in the constitution: See Reclamation District v. Hamilton, 112 Cal. 610."

Acts permitted on non-judicial days. The constitution does not prohibit legislation allowing or disallowing transactions of any and all classes of judicial business on holidays. People v. Soto, 65 Cal. 621; 4

Pac. 664; Diepenbrock v. Superior Court, 153 Cal. 597; 95 Pac. 1121; Ex parte Smith, 152 Cal. 566; 93 Pac. 191. The service of a statement on motion for a new trial is not judicial business (Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074); neither is the holding of a special election (People v. Loyalton, 147 Cal. 774; 82 Pac. 620); nor the filing of a criminal information (People v. Helm, 152 Cal. 532; 93 Pac. 99); but a prisoner convicted of a felony cannot be sentenced upon a legal holiday. In re Smith, 152 Cal. 566; 93 Pac. 191. All transactions not within the statutory prohibitions may be done on legal holidays. People v. Loyalton, 147 Cal. 774; 82 Pac. 620. The duration of an invalid holiday cannot operate to extend the time to be computed for serving a statement on motion for a new trial. Donovan v. Ætna Indemnity Co., 10 Cal. App. 723; 103 Pac. 365. It is suggested by the supreme court, in People v. Heacock, 10 Cal. App. 450, 459, 102 Pac. 543, that it would be safer to treat Saturday afternoon as a legal holiday, until the question is determined.

Ministerial as distinguished from judicial acts under prohibitory Sunday laws. See notes 1 Ann. Cas. 278; 18 Ann. Cas. 1040.

Transaction of judicial business on holidays. See note 19 L. R. A. 317.

Validity of court business transacted on legal holiday. See note 10 L. R. A. (N. S.) 791.

Receiving verdict on Sunday. See note 39 L. R. A. (N. S.) 844.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 343.

§ 135. Appointments on non-judicial days. On all special holidays the courts of this state shall be open for the transaction of any and all judicial business, except the trial of an action or the rendition of a judgment based upon a contract, expressed or implied, for the direct payment of money. Provided, if any day mentioned in section ten of this code other than a special holiday happen to be the day appointed for the holding or sitting of a court, or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day.

Legislation § 135. **1.** Enacted March 11, **1872**, and then read: "If any of the days mentioned in the last section happen to be the day appointed for the holding of a court, or to which it is adjourned, it is deemed appointed for or adjourned to the next day."

2. Amended by Code Amdts. **1880**, p. 38, to read: "If any day mentioned in the last section happen to be the day appointed for the holding or sitting of a court, or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day."

3. Amendment by Stats. **1901**, p. 120; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 682, to read: "If any day mentioned in section ten be a day appointed for the holding or sitting of any court, other than the supreme court, it is deemed adjourned to the next succeeding judicial day"; the code commissioner saying, "To conform with § 10 and with the amendments made to § 134."

5. Amended by Stats. Extra Sess. **1907**, p. 9.

Exception unconstitutional. The clause in this section, "except the trial of an action or the rendition of a judgment based upon a contract, expressed or implied, for the direct payment of money," is unconstitutional. Diepenbrock v. Superior Court, 153 Cal. 597; 95 Pac. 1121.

Judicial acts on special holidays. The superior court has jurisdiction, on a day declared to be a special holiday, to proceed with the trial of a charge of felony. Risser v. Superior Court, 152 Cal. 531; 93 Pac. 85.

Power of court to sit and try causes on legal holiday other than Sunday. See notes 5 Ann. Cas. 919; 11 Ann. Cas. 559.

ARTICLE IV.

PROCEEDINGS IN CASE OF ABSENCE OF JUDGE.

§ 139. Adjournment for absence of judge.
§ 140. Adjournment till next regular session. [Repealed.]

§ 139. Adjournment for absence of judge. If no judge attends on the day appointed for the holding or sitting of a court, or on the day to which it may have been adjourned, before noon, the sheriff or clerk shall adjourn the same until the next day, at ten o'clock a. m., and if no judge attend on that day, before noon, the sheriff or clerk shall adjourn the same until the following day at the same hour; and so on, from day to day, unless the judge, by written order, directs it to be adjourned to some day certain, fixed in said order, in which case it shall be so adjourned.

Non-judicial day. Ante, §§ 134, 135.

Legislation § 139. **1.** Enacted March 11, **1872** (based on Stats. 1863, p. 344), and then read: "If no judge attend on the day appointed for holding the court, or on the day to which it may have been adjourned, before noon, the sheriff or

clerk must adjourn the court until the next day at ten o'clock; and if no judge attend on that day, before noon, the sheriff or clerk must adjourn the court until the following day, and so on, from day to day, for one week."

2. Amended by Code Amdts. **1880**, p. 38, and then had the words "for one week," after "from day to day."

3. Amended by Stats. **1907**, p. 681; the code commissioner saying, "The change strikes out the words 'for one week.' Neither the sheriff nor the clerk can, under the constitution, be authorized to adjourn court, and thus close it for a definite time, other than from day to day."

Adjournment by clerk or sheriff. The judge may open the court at any hour before the close of the day where it had been adjourned by the clerk or sheriff on his failure to appear by noon (People v. Sanchez, 24 Cal. 17), as the court may sit and exercise jurisdiction in the trial of cases or for the transaction of any legal business at any time, except, of course, on nonjudicial days. In re Gannon, 69 Cal. 541; 11 Pac. 240. Daily adjournments may be had for a full week. Thomas v. Fogarty, 19 Cal. 644.

Meaning of "absent" or "absence" as applied to judge. See note Ann. Cas. 1912C, 353.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 344. Thomas v. Fogarty, 19 Cal. 644; People v. Sanchez, 24 Cal. 17.

§ 140. [Adjournment till next regular session. Repealed.]

Sessions. Ante, § 73.

Legislation § 140. 1. Enacted March 11, **1872**.
2. Amended by Code Amdts. **1880**, p. 38.
3. Repeal by Stats. **1901**, p. 120; unconstitutional. See note ante, § 5.
4. Repealed by Stats. **1907**, p. 681; the code commissioner saying, "Repealed, because both unnecessary and unconstitutional."

ARTICLE V.

PROVISIONS RESPECTING PLACES OF HOLDING COURTS.

§ 142. Change in certain cases of place of holding court.
§ 143. Parties to appear at place appointed.
§ 144. When sheriff to provide courtrooms, etc.

§ 142. Change in certain cases of places of holding court. The judge or judges authorized to hold or preside at a court appointed to be held at a particular place in a city and county, county, city, or town, may, by an order filed with the city and county or county clerk, and published as he or they may prescribe, direct that the court be held or continued at any other place in the city and county, county, city, or town than that appointed, when war, insurrection, pestilence, or other public calamity, or the danger thereof, or the destruction or danger of the building appointed for holding the court may render it necessary; and may in the same manner revoke the order, and in his or their discretion, appoint another place in the same city and county, county, city, or town, for holding the court.

Legislation § 142. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 344), and then read: "A judge authorized to hold or preside at a court appointed to be held in a county, city, or town, may, by an order filed with the county clerk, and published as he may prescribe, direct that the court be held or continued at any other place in the city, town, or county than that appointed, when war, insurrection, pestilence, or other public calamity, or the dangers thereof, or the destruction of the building appointed for holding the court, may render it necessary; and may, in the same manner, revoke the order, and, in his discretion, appoint another place in the same city, town, or county, for holding the court."

2. Amended by Code Amdts. **1880**, p. 38.

Power of trial court to sit at place other than county seat. See note 8 Ann. Cas. 939.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 344.

§ 143. Parties to appear at place appointed. When the court is held at a place appointed, as provided in the last section, every person held to appear at the court must appear at the place so appointed.

Legislation § 143. 1. Enacted March 11, **1872**; based on Stats. 1863, p. 344.
2. Re-enacted by Code Amdts. **1880**, p. 39, in amending Part I.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 344.

§ 144. When sheriff to provide courtrooms, etc. If suitable rooms for holding the superior courts and the chambers of the judges of said courts are not provided in any county by the supervisors thereof, together with the attendants, furniture, fuel, lights and stationery, sufficient for the transaction of business, the courts, or the judge or judges thereof, may direct the sheriff of the county to provide such rooms, attendants, furniture, fuel, lights .

and stationery; and the expenses incurred, certified by the judge or judges to be correct, are a charge against the county treasury, and must be paid out of the general fund thereof.

Legislation § 144. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 345), and then read: "If suitable rooms for holding the district courts, county courts, and probate courts, and the chambers of the judges of such courts, be not provided in any county by the supervisors thereof, together with attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business, the courts may direct the sheriff of such county to provide such rooms, attendants, furniture, fuel, lights, and stationery, and the expenses thereof are a charge against such county."

2. Amended by Code Amdts. **1880**, p. 39, to read as at present, except for the changes noted by the code commissioner, infra, and those bracketed in and following his note.

3. Amendment by Stats. **1901**, p. 120; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 680; the code commissioner saying, "The amendment consists in [(1)] the insertion of the word 'county' in place of 'city and county,' where those last words occur in the section, and in omitting the words 'city and county[, or]' when they occur earlier in the section, they being unnecessary in view of the amendment to § 17 adopted in 1903 (Stats. 1903, p. 134)"; (2) changing the words "courts be not" to "courts are not"; (3) changing the words "shall be a charge" to "are a charge"; and (4) changing, in the last line, the words "and paid out" to "and must be paid out."

Power to provide courtrooms. This section gives the court power to create charges against the county for suitable rooms for holding court, and for the chambers of the judges, where they are not otherwise provided (Ex parte Reis, 64 Cal. 233; 30 Pac. 806), and the expense thereof is to be audited by the judge of the court. Ex parte Widber, 91 Cal. 367; 27 Pac. 733. The grant of power is limited by the express language of the section, and cannot be extended by implication; its exercise is justified only by necessity (Falconer v. Hughes, 8 Cal. App. 56; 96 Pac. 19); and the judges are not authorized to interfere with the action of the board of supervisors in such matters, even though there is an unnecessary and unreasonable delay on the part of the board (Los Angeles County v. Superior Court, 93 Cal. 380; 28 Pac. 1062); nor are the judges authorized to select a particular room, where another room has been provided by the board, if it is suitable for the purpose. San Joaquin County v. Budd, 96 Cal. 47; 30 Pac. 967.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 345.

ARTICLE VI.

SEALS OF COURTS.

§ 147. What courts shall have seals.
§ 148. Seal of supreme court.
§ 149. Seals of superior courts.
§ 150. Seals of police courts of cities and counties.
§ 151. Seals, how provided; private seals, when used.
§ 152. Clerk of court to keep seal.
§ 153. Seals of courts, to what documents affixed.

§ 147. What courts shall have seals. Each of the following courts shall have a seal:

1. The supreme court;
2. The superior courts;
3. The police court of every city and county.

Seal.
1. Defined.
2. Of court, judicial notice taken of. Post, § 1875, subd. 4.
3. Court commissioner may provide official. Post, § 259, subd. 5.

Police courts.
1. Are not courts of record. See ante, §§ 33, 34.
2. Have a seal. Post, § 150.

Legislation § 147. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 344), and then read: "Each of the following courts has a seal: 1. The supreme court; 2. The district courts; 3. The county courts; 4. The probate courts; 5. The municipal criminal court of the city and county of San Francisco; 6. The police court of the city and county of San Francisco."

2. Amended by Code Amdts. **1880**, p. 39.

Effect of seal. The fact that a court has a seal does not necessarily, and of itself, make such court a court of record. Ex parte Thistleton, 52 Cal. 220.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 344.

§ 148. Seal of supreme court. The seal used by the supreme court, abolished by the constitution, shall be the seal of the supreme court herein provided for; but the said court may direct the clerk of the supreme court to provide two duplicates of said seal, each of which shall be considered the same as and have the same force and effect as the original.

Legislation § 148. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 344), and then read: "The seal now used by the supreme court shall be the seal of that court; and where seals have been provided for the district, county and probate courts, municipal criminal and the police court of the city and county of San Francisco, such seals shall continue to be used as the seals of those courts."

2. Amended by Code Amdts. **1880**, p. 39.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 344.

§ 149. Seals of superior courts. The seals of the superior courts shall be circular, not less than one and three fourths inches in diameter, and having in the center any word, words, or design adopted by the judges thereof, and the following inscription surrounding the same: "Superior Court ——, California," inserting the name of the county or city and county; provided, that the seal of any such court, which has been adopted previous to the passage of this act, shall be the seal of such court until another be adopted.

Validating writs, process, and certificates issued from superior courts before seal provided. See Stats. 1880, p. 19.

Legislation § 149. **1.** Enacted March 11, **1872** (based on Stats. 1863, p. 344), and then read: "The several district, county, and probate courts, for which separate seals have not been heretofore provided, shall direct their respective clerks to procure seals, which shall be devised by the respective judges of such courts, and shall have the following inscriptions surrounding the same: 1. For the district courts: 'District Court, —— County, California.' (Inserting the name of the county;) 2. For the county courts: 'County Court. —— County, California.' (Inserting the name of the county;) 3. For the probate courts: 'Probate Court, —— County, California.' (Inserting the name of the county.)"

2. Amended by Code Amdts. **1880,** p. 39.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 344.

§ 150. Seals of police courts of cities and counties. The police court of every city and county may use any seal having upon it the inscription, "Police Court ——," (inserting the name of the city and county).

Legislation § 150. Added by Code Amdts. **1880,** p. 39; based on Stats. 1863, p. 344, and original code § 150, both being identical, and reading, "Until the seals devised, as provided in the last section, are procured, the clerk of each court may use his private seal, whenever a seal is required."

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 344.

§ 151. Seals, how provided; private seals, when used. Courts which have not the necessary seal provided, or the judge or judges thereof, shall request the supervisors of their respective counties, or cities and counties, to provide the same, and in case of their failure to do so may order the sheriff to provide the same, and the expense thereof shall be a charge against the county or city and county treasury, and paid out of the general fund thereof; and until such seal be provided the clerk of each court may use his private seal whenever a seal is required.

Legislation § 151. Added by Code Amdts. **1880,** p. 39; based on Stats. 1863, p. 344, and original code supra, § 150.

§ 152. Clerk of court to keep seal. The clerks of the court shall keep the seal thereof.

Legislation § 152. **1.** Enacted March 11, **1872,** as § 151 (based on Stats. 1863, p. 344), and then read: "§ 152. The clerk of the court must keep the seal thereof."

2. Amended by Code Amdts. **1880,** p. 40, and renumbered § 152.

§ 153. Seals of courts, to what documents affixed. The seal of a court need not be affixed to any proceeding therein or document, except:

1. To a writ;

2. To the certificate of probate of a will or of the appointment of an executor, administrator, or guardian;

3. To the authentication of a copy of a record or other proceeding of a court, or of an officer thereof, or of a copy of a document on file in the office of the clerk.

Legislation § 153. **1.** Enacted March 11, **1872,** as § 152 (based on Stats. 1863, p. 344), and then read: "The seal of the court need not be affixed to any proceedings therein, except: 1. To a writ; 2. To the proof of a will, or the appointment of an executor, administrator, or guardian; 3. To the authentication of a copy of a record or other proceeding of the court, or an officer thereof, for the purpose of evidence in another court."

2. Amended by Code Amdts. **1873–74,** p. 284, to read as at present, except that (1) the words "seal of a court" were printed "seal of the court," and (2) the words "certificate of probate," "certificate of the probate."

3. Amended by Code Amdts. **1880,** p. 40, and renumbered § 153.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 344. The provision permitting seals to be impressed on paper is omitted, as a general provision to the same end is contained in the preliminary provisions of this code.

TITLE II.

JUDICIAL OFFICERS.

Chapter I. Judicial Officers in General. §§ 156–162.
II. Powers and Duties of Judges at Chambers. §§ 165–167.
III. Disqualifications of Judges. §§ 170–173.
IV. Incidental Powers and Duties of Judicial Officers. §§ 176–179.
V. Miscellaneous Provisions respecting Courts and Judicial Officers. §§ 182–188.

CHAPTER I.

JUDICIAL OFFICERS IN GENERAL.

§ 156. Qualifications of justices of supreme court.
§ 157. Qualifications of superior judges.
§ 158. Residence of superior judges.
§ 159. Residence and qualification of justices of the peace.
§ 160. Judges holding superior courts at request of governor.
§ 161. Justices and judges ineligible to other than judicial office.
§ 162. County or probate judge who may hold term in another county. How designated. [Repealed.]

§ 156. Qualifications of justices of supreme court. No person shall be eligible to the office of chief or associate justice of the supreme court unless he shall have been a citizen of the United States and a resident of this state for two years next preceding his election or appointment, nor unless he shall have been admitted to practice before the supreme court of the state.

Judge must be an attorney. Const., art. vi, § 23.

Legislation § 156. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 333), and then read: "No person is eligible to the office of justice of the supreme court who has not been a citizen of the United States and a resident of this state, for two years next preceding his election."

2. Amended by Code Amdts. **1880**, p. 40.

3. Repeal by Stats. **1901**, p. 120; unconstitutional. See note ante, § 5.

Qualification of judges. Under the old constitution, judges of the supreme court were not required to be licensed attorneys. People v. Dorsey, 32 Cal. 296.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 333.

§ 157. Qualifications of superior judges. No person shall be eligible to the office of judge of a superior court unless he shall have been a citizen of the United States and a resident of this state for two years next preceding his election or appointment, nor unless he shall have been admitted to practice before the supreme court of the state.

Legislation § 157. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 335), and then read: "No person is eligible to the office of district judge who has not been a citizen of the United States and a resident of this state for two years, and of the district one year next preceding his election."

2. Amended by Code Amdts. **1880**, p. 40.

3. Repeal by Stats. **1901**, p. 121; unconstitutional. See note ante, § 5.

Eligibility. Effect of promise not to qualify. A promise by a candidate for the office, that he would not qualify if elected, does not affect his eligibility. Bush v. Head, 154 Cal. 277; 97 Pac. 512.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 335. People v. Turner, 20 Cal. 144; People v. De la Guerra, 40 Cal. 311.

§ 158. Residence of superior judges. Each judge of a superior court shall reside at the county seat of the county in which such court is held, or within three miles thereof, and within the county, except that in the counties of Yuba and Sutter the judge may reside in either of said counties; provided, that when there is more than one judge of the superior court in a county, it shall not be necessary for more than one judge to reside at the county seat, as provided herein.

Separate judges provided for Sutter and Yuba counties. Stats. 1897, p. 48.

Legislation § 158. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 335), and then read: "Each district judge must reside in his district, and each county and probate judge must reside at the county seat of his respective county."

2. Amended by Code Amdts. **1880**, p. 40, to read: "Each judge of a superior court shall reside at the county seat of the county in which

such court is held, or within three miles thereof, and within the county, except that in the counties of Yuba and Sutter the judge may reside in either of said counties."

3. Amended by Stats. **1891**, p. 277.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 335.

§ 159. **Residence and qualification of justices of the peace.** Every justice of the peace shall reside in the city and county, or township, in which his court is held, and no person shall be eligible to the office of justice of the peace unless he shall have been a citizen of the United States and a resident of the city and county, or county, in which he is to serve for one year next preceding his election or appointment.

Legislation § 159. Added by Code Amdts. **1880**, p. 41.

The original § 159, enacted March 11, 1872 (based on Stats. 1863, p. 335), read: "A residence in any part of the city and county of San Francisco is, within the meaning of the two preceding sections, a residence in the judicial districts embracing portions of that city."

Effect of change of boundaries of townships. Where the boundaries of a township are changed after the election or appointment of a justice of the peace, so as to make him a non-resident, he is a de facto justice for that township, where he continues to act, and his actions cannot be called in question in collateral proceedings. People v. Sehorn, 116 Cal. 503; 48 Pac. 495; People v. Roberts, 6 Cal. 214; Hull v. Superior Court, 63 Cal. 174; People v. Hecht, 105 Cal. 621; 45 Am. St. Rep. 96; 27 L. R. A. 203; 38 Pac. 941.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 335.

§ 160. **Judges holding superior courts at request of governor.** If by reason of sickness, absence, disability, or other causes, a regular session of the superior court cannot be held in any county by the judge or judges thereof, or by a superior judge requested by him or them to hold such court, a certificate of that fact shall be transmitted by the clerk thereof to the governor, who may thereupon request some other superior judge to hold such court; and a judge so holding a court at the request of the governor, or at the request of the judge or judges of said superior court, shall be allowed his actual and necessary expenses in going to, returning from, and attending upon the business of such court, which shall be a charge against the treasury of the county where such court is held, and paid out of the general fund thereof.

Holding court for another judge. Ante, § 71.

Legislation § 160. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 336), and then read: "A district judge may hold a court in any county in this state, upon the request of the judge of the district in which such court is to be held; and when, by reason of sickness or absence from the state, or from any other cause, a court cannot be held in any county in a district by the judge thereof, a certificate of that fact must be transmitted by the clerk to the governor, who may thereupon direct some other district judge to hold such court."

2. Amended by Code Amdts. **1875–76**, p. 85, by adding, at the end of the section, "A district judge may hear and determine motions in actions pending in any district, upon the request of the judge of the district in which the action is pending, and the stipulation of the parties to the action. All decisions of such motions shall be filed and entered by the clerk of the court in which such action is pending."

3. Amended by Code Amdts. **1880**, p. 41, to read as at present, except that, (1) in first line, a comma was used after the word "If," and the word "causes" was printed "cause"; (2) a comma was used between the words "judge requested," and after the word "court" in the words "court at the request"; and (3) the words "or at the request of the judge or judges of said superior court," and the words "and necessary" before the word "expenses," were not used, as now.

4. Amended by Stats. **1887**, p. 147.

Change of judges during trial. The judges may be changed during the course of a trial, even in criminal cases, with the consent of the defendant. People v. Henderson, 28 Cal. 465. This section cannot be construed to refer to the disqualification of a judge on account of his interest in the matter involved in the proceeding, as mentioned in § 170, post. John Heinlen Co. v. Superior Court, 17 Cal. App. 660; 121 Pac. 293.

Presumption as to acts of judge holding court out of county. In the absence of a showing to the contrary, it is presumed that a judge holding court is acting under the proper authority. Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146; 16 Pac. 887; People v. Ah Lee Doon, 97 Cal. 171; 31 Pac. 933.

Powers of judge out of county. The judge so holding court may grant extensions of time to make and serve a statement on motion for a new trial (Matthews v. Superior Court, 68 Cal. 638; 10 Pac. 128), and may send his findings from another court to the clerk to be filed. Comstock Quicksilver Mining Co. v. Superior Court, 57 Cal. 625.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 336. [See Code Commissioners' Note to § 161, post.]

§ 161. Justices and judges ineligible to other than judicial office. The justices of the supreme court and judges of the superior courts shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected.

Ineligible to public employment. Const., art. vi, § 18.

Legislation § 161. 1. Added by Code Amdts. **1880**, p. 41.

2. Repeal by Stats. **1901**, p. 121; unconstitutional. See note ante, § 5.

The original § 161 provided for county and probate judges holding court in another county.

CODE COMMISSIONERS' NOTE. See People v. Mellon, 40 Cal. 648. The text held to be constitutional. Id. Where the record of the court does not show for what reason the judge of one county holds court for the judge of another, the existence of some one of the causes mentioned in the statute will be presumed. Id.

§ 162. [County or probate judge who may hold term in another county. How designated. Repealed.]

Legislation § 162. 1. Enacted March 11, **1873.**

2. Repealed by Code Amdts. **1873–74**, p. 285.

CHAPTER II.

POWERS AND DUTIES OF JUDGES AT CHAMBERS.

§ 165. Powers of justices of supreme court at chambers.
§ 166. Powers of superior judges at chambers.
§ 167. [Related to powers of probate judges at chambers. Repealed.]

§ 165. Powers of justices of supreme court at chambers. The justices of the supreme court, or any of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application, except writs of mandamus, certiorari, and prohibition; and may, in their discretion, hear applications to discharge such orders and writs.

Powers of judges out of court. Post, § 176.

Legislation § 165. 1. Enacted March 11, **1872. 2.** Amended by Code Amdts. **1880,** p. 41, and (1) the words "or any" changed from "and each," and (2) the words "mandamus, certiorari," changed from "review, mandate."

§ 166. Powers of superior judges at chambers. The judge or judges of a superior court, or any of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application, and may, at chambers, hear and dispose of such orders and writs; and may also, at chambers, appoint appraisers, receive inventories and accounts to be filed, suspend the powers of executors, administrators, or guardians in the cases allowed by law, grant special letters of administration or guardianship, approve claims and bonds, and direct the issuance from the court of all writs and process necessary in the exercise of their powers in matters of probate.

Power of judges out of court. Post, § 176.
Chamber hours for judges. Pol. Code, § 4116.
Power of probate judge at chambers. Post, § 1035.

Legislation § 166. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 336), and then read: "District and county judges, at chambers, may grant all orders and writs which are usually granted in the first instance upon ex parte applications, and may, at chambers, hear and dispose of such writs and of motions for new trials." **2.** Amended by Code Amdts. **1880,** p. 41.

Locus of chambers. The judge may have his chambers at any place, within the jurisdiction of the court, where he may be found. Estate of Lux, 100 Cal. 593; 35 Pac. 341; Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109.

Powers at chambers. Judicial business must be transacted in court; the powers of the judge at chambers are limited to those enumerated in this section. Carpenter v. Nutter, 127 Cal. 61; 59 Pac. 301. The judge may, at chambers, grant all orders and writs which are usually granted in the first instance upon ex parte application, and may, at chambers, hear and dispose of such writs. Real Estate Associates v. Superior Court, 60 Cal. 223; Kenney v. Kelleher, 63 Cal. 442; Matthews v. Superior Court, 68 Cal. 638; 10 Pac. 128; Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109; Estate of Lux, 100 Cal. 593; 35 Pac. 341; Glass v. Glass, 4 Cal. App. 604; 88 Pac. 734. Thus, at chambers, he may dispense with a bond on appeal by a municipal officer (Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109; Estate of Lux, 100 Cal. 593; 35 Pac. 341), extend time in which to prepare and serve a statement on motion for a new trial (Matthews v. Superior Court, 68 Cal. 638; 10 Pac. 128), grant leave to renew a motion (Kenney v. Kelleher, 63 Cal. 442), make an order to show cause, by creditors, why an insolvent should not be discharged (Flint v. Wilson, 36 Cal. 24), and appoint a receiver in insolvency proceedings (Real Estate Associates v. Superior Court, 60 Cal. 223); but he cannot grant a continuance at chambers (Norwood v. Kenfield, 34 Cal. 329), nor discharge a person accused of crime (Carpenter v. Nutter, 127 Cal. 61; 59 Pac. 301); neither can he set aside an execution, nor stay perpetually its enforcement, on the ground that the judgment was erroneous (Bond v. Pacheco, 30 Cal. 530); but he may make an order suspending its operation, pending a hearing to quash or recall. Logan v. Hillegass, 16 Cal. 200; Chipman v. Bowman, 14 Cal. 157; Bell v. Thompson, 19 Cal. 706; Sanchez v. Carriaga, 31 Cal. 170. He cannot, at chambers, hear a motion to strike out pleadings (Bond v. Pacheco, 30 Cal. 530), nor enter an order nunc pro tunc, as having been made and entered by the court. Hegeler v. Henckell, 27 Cal. 491. An appeal lies from an order at chambers, regarding writs authorized to be granted or denied out of court, as such orders are judgments. Bond v. Pacheco, 30 Cal. 530; Brewster v. Hartley, 37 Cal. 15; 99 Am. Dec. 237; Clark v. Crane, 57 Cal. 629.

CODE COMMISSIONERS' NOTE. 1. Granting continuances. It was held that a county judge at chambers cannot grant a continuance of a cause which was pending and set down for trial at a future day in the county court. Norwood v. Kenfield, 34 Cal. 329.

2. Certiorari issued at chambers. The district judge may issue writs of certiorari, and hear them on their return, at chambers. People v. Supervisors of Marin County, 10 Cal. 344.

3. Certain orders nunc pro tunc cannot be made. A judge at chambers cannot make an order directing the clerk to enter in the minutes of the court nunc pro tunc an order alleged to have been made in open court. After the adjournment of a term the court cannot direct the entry nunc pro tunc of an order made during the adjourned term where the records do not show that such an order was made. Hegeler v. Henckell, 27 Cal. 491.

4. Hearing motion to strike out pleadings. The general rule as to powers of judges at chambers is, that all judicial business must be transacted in term, whether there is any express direction to that effect or not. Such business as may be transacted out of court is exceptional, and must find its warrant in some express provision of the statute. Larco v. Casaneuava, 30 Cal. 564. A district judge at chambers has not jurisdiction to hear motions to strike out pleadings. Bond v. Pacheco, 30 Cal. 532.

5. Order setting aside execution, etc. A judge at chambers has no jurisdiction to make an order setting aside an execution and perpetually staying its enforcement. Bond v. Pacheco, 30 Cal. 532.

6. What orders in insolvency proceedings can be made by county judges. Certain orders in insolvency proceedings (under state act) can be made by county judge at chambers. Flint v. Wilson, 36 Cal. 24.

7. Writs of mandate, review, quo warranto, etc. The legislature is not prohibited by the constitution from conferring upon the judge authority to hear and determine actions and proceedings at chambers. Such authority is granted in respect to writs of mandate, review, and quo warranto, and special proceedings, to determine the validity of a corporation election. A decision in these cases is a judgment, and an appeal therefrom is given by § 963, post. Brewster v. Hartley, 37 Cal 15; 99 Am. Dec. 237.

8. Arrest of process issued in void judgment. Where a judgment upon which the execution is based, and the execution itself, are void upon their face, a court has entire control over the process, and may arrest it. A judge at chambers has authority to order a suspension of the execution till a motion before the court to recall or quash it can be heard. Logan v. Hillegass, 16 Cal. 201; see also Chipman v. Bowman, 14 Cal. 158; Bell v. Thompson, 19 Cal. 708; Sanchez v. Carriaga, 31 Cal. 172.

9. Judge at chambers cannot decide certain controversies. "Action for damages for trespass alleged to have been committed by defendants upon certain quartz-mining claims; and also for a perpetual injunction against future trespasses, which was granted. Defendants deny all the allegations of the complaint, and set up ownership of certain mining-ground. Verdict generally 'for defendants,' and judgment in their favor for costs. Defendants move to amend the judgment by dissolving the injunction. Motion denied, but the judgment modified so as to permit defendants to work the ground set up in their answer. After the term had expired, defendants appeal from this order refusing to dissolve the injunction, and subsequently, upon defendants giving bond, the judge, in chambers, made an ex parte order directing plaintiffs to yield possession of the ground described in the answer to defendants, which order plaintiffs refused to obey; and then followed an order to show cause why they should not be punished for contempt. Held: that the court had no power to make the ex parte order for the restitution of possession or the induction of defendants into possession of the premises, as this was in effect, to decide the whole controversy in limine, and to execute the judgment by an ex parte order; that the possession by plaintiffs of the premises was property, and could not be disposed of except in due course of law; and that all the subsequent orders, for contempt, etc., being dependent on this, fall with it." Syllabus in Brennan v. Gaston, 17 Cal. 375.

10. Making order for discharge of guardian, etc. See note to next section.

§ 167. [Related to powers of probate judges at chambers. Repealed.]

Legislation § 167. 1. Enacted March 11, **1872. 2.** Repealed by Code Amdts. **1880, p. 21,** in amending Part **I.**

CHAPTER III.

DISQUALIFICATIONS OF JUDGES.

§ 170. Disqualification of judicial officer to sit or act.
§ 171. Judges and county clerks, when prohibited from practicing law.
§ 172. No judicial officer to have partner practicing law.
§ 173. [Renumbered and amended section.]

§ 170. Disqualification of judicial officer to sit or act. No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding:

1. To which he is a party or in which he is interested;

2. When he is related to either party, or to an officer of a corporation which is a party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity, within the third degree, computed according to the rules of law; provided, however, that if the parties to the action, or the executor, or administrator of the estate, or the guardian of the minor or incompetent person, or the receiver, or the commissioner, or the referee, or the attorney for a party in all special proceedings of a civil or criminal nature, shall sign and file in the action or matter, a stipulation in writing waiving the disqualification herein, the judge or court may proceed with the trial or hearing with the same legal effect as if no such disqualification existed.

3. When in the action or proceeding, or in any previous action or proceeding involving any of the same issues, he has been attorney or counsel for either party; or when he has given advice to either party upon any matter involved in the action or proceeding;

4. When it appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial before any judge of a court of record about to try the case by reason of the prejudice or bias of such judge, said judge shall forthwith secure the services of some other judge, of the same or another county, to preside at the trial of said action or proceeding; provided, that in an action in the superior court of a county, or of a city and county, having more than one department, said action shall be transferred to another department thereof, and tried therein in the same manner as though originally assigned to such department. The affidavit or affidavits alleging the disqualification of a judge, must be filed and served upon the adverse party or the attorney for such party at least one day before the day set for trial of such action or proceeding; provided, counter-affidavits may be filed at least one day thereafter, or such further time as the court may extend the time for filing such counter-affidavits, not exceeding five days, and for this purpose the court may continue the trial; and in no one cause or proceeding can more than one such change of judges be had. But the provisions of this section shall not apply to the arrangement of the calendar, or to the regulation of the order of business, nor the power of transferring the action or proceeding to some other court, or the hearing upon such affidavits and counter-affidavits;

5. In an action or proceeding brought in the superior court or justices' court by or against the reclamation board of the state of California, or any reclamation, levee, swamp-land or drainage district, or any public

agency, or trustee, officer or employee thereof, affecting or relating to any real property or any easement or right of way, levee, embankment, canal, or any work provided for or approved by the reclamation board of the state of California, the judge of the superior court of the county, or justice of the peace of the township in which such real property, or any part thereof, or such easement or right of way, levee, embankment, canal or work, or any part thereof, is situated, shall be disqualified to sit or act, and such action, if brought in the superior court, shall be heard and tried by some other judge of the superior court requested to sit therein by the governor, or if brought in the justices' court, by some other justice of the peace requested to sit therein by the governor; unless the parties to the action shall sign and file in the action or proceeding a stipulation in writing, waiving the disqualification in this subdivision of this section provided, in which case such judge or justice of the peace may proceed with the trial or hearing with the same legal effect as if no such legal disqualification existed. If, however, the parties to the action shall sign and file a stipulation agreeing upon some other judge of the superior court or justice of the peace to sit or act in place of the judge or justice disqualified under the provisions of this subdivision, the judge or justice agreed upon shall be designated by the governor to sit in the action; provided, that nothing herein contained shall be construed as preventing the judge of the superior court of such county from issuing a temporary injunction or restraining order, which shall, if granted, remain in force until vacated or modified by the judge designated by the governor as herein provided.

Nothing in this section contained shall affect a party's right to a change of the place of trial in the cases provided for in title four, part two of this code.

Change of venue. Post, §§ 397 et seq.

Subd. 2. Consanguinity and affinity. See Civ. Code, §§ 1390 et seq.

Subd. 3. Judge cannot act as attorney. Post, §§ 171, 172.

Legislation § 170. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 343), and then read: "A judge cannot act as such in any of the following cases: 1. In an action or proceeding to which he is a party, or in which he is interested; 2. When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law; 3. When he has been attorney or counsel for either party in the action or proceeding; —But this section does not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the cause to another county."

2. Amended by Code Amdts. **1880**, p. 42, and then read: "§ 170. No justice, judge, or justice of the peace, shall sit or act as such in any action or proceeding: 1. To which he is a party, or in which he is interested; 2. When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law; 3. When he has been attorney or counsel for either party in the action or proceeding. But the provisions of this section shall not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the action or proceeding to some other court."

3. Amended by Stats. **1893**, p. 234, and then read: "§ 170. No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding—1. To which he is a party or in which he is interested. 2. When he is related to either party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity within the third degree, computed according to the rules of law. 3. When he has been attorney or counsel for either party in the action or proceeding. But the provisions of this section shall not apply to the arrangement of the calendar, or the regulation of the order of business, nor the power of transferring the action or proceeding to some other court."

4. Amended by Stats. **1897**, p. 287, and then read: "§ 170. No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding: 1. To which he is a party or in which he is interested. 2. When he is related to either party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity, within the third degree, computed according to the rules of law. 3. When he has been attorney or counsel for either party in the action or proceeding. 4. When it appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial before any judge of a court of record about to try the case by reason of the prejudice or bias of such judge, said judge shall forthwith secure the services of some other judge,

of the same or another county, to preside at the trial of said action or proceeding; provided, that in an action in the superior court of a county, or of a city and county, having more than one department, said action shall be transferred to another department thereof, and tried therein in the same manner as though originally assigned to such department. The affidavit or affidavits alleging the disqualification of a judge, must be filed and served upon the adverse party, or the attorney for such party, at least one day before the day set for trial of such action or proceeding; provided, counter-affidavits may be filed at least one day thereafter or such further time as the court may extend the time for filing such counter-affidavits, not exceeding five days, and for this purpose the court may continue the trial; and in no one cause or proceeding can more than one such change of judges be had. But the provisions of this section shall not apply to the arrangement of the calendar, or to the regulation of the order of business, nor the power of transferring the action or proceeding to some other court, or the hearing upon such affidavits and counter-affidavits."

5. Amendment by Stats. **1901**, p. 121; unconstitutional. See note ante, § 5.

6. Amended by Stats. **1905**, p. 467; differing from the text of the amendment of 1915, only in not having subd. 5 and the saving clause.

7. Amended by Stats. **1915**, p. 530, adding subd. 5 and the saving clause.

Where the judge is a party. A judge, made a party defendant to proceedings for the partition of real estate, with the allegation that he has or claims an interest therein, is disqualified to try the cause, and has no jurisdiction arbitrarily to determine that he has no interest, and by an ex parte order, made of his own motion, direct that the complaint be stricken from the files. Younger v. Superior Court, 136 Cal. 682; 69 Pac. 485; McClatchy v. Superior Court, 119 Cal. 413; 39 L. R. A. 691; 51 Pac. 696; Foley v. Foley, 120 Cal. 33; 65 Am. St. Rep. 147; 52 Pac. 122.

Where judge is interested. A judge cannot act in a cause or proceeding in which he is interested, directly or indirectly (Tracy v. Colby, 55 Cal. 67; North Bloomfield Gravel Mining Co. v. Keyser, 58 Cal. 315; Blue Tent Co. v. Keyser, 58 Cal. 329; Howell v. Budd, 91 Cal. 342; 27 Pac. 747; Oakland v. Oakland Water Front Co., 118 Cal. 249; 50 Pac. 268); but his interest must be made clearly to appear, in order to disqualify. Heinlen v. Heilbron, 97 Cal. 101; 31 Pac. 838; Meyer v. San Diego, 121 Cal. 102; 66 Am. St. Rep. 22; 41 L. R. A. 702; 53 Pac. 424. The term "interested," however, embraces only a direct, proximate, substantial, and certain interest in the result of the action, and does not include a remote, indirect, contingent, uncertain, and shadowy interest. Oakland v. Oakland Water Front Co., 118 Cal. 249; 50 Pac. 268; Scadden Flat Gold Mining Co. v. Scadden, 121 Cal. 33; 53 Pac. 440; Higgins v. San Diego, 126 Cal. 303; 58 Pac. 700; 59 Pac. 209. The interest that disqualifies a judge is a property or personal interest, an interest in the event of the suit, in the judgment that may be rendered therein: a mere sentimental interest, or an interest in the facts that the issues make it necessary for a judge to determine and that may tend to induce him to give more weight to the evidence for one party than to that for the other, respecting such facts, is not the interest that will disqualify. Lassen Irrigation Co. v. Superior Court, 151 Cal. 357; 90 Pac. 709. A judge is interested in an action to establish the validity of bonds, where a bank, of which he is a stockholder, is the owner thereof. Adams v. Minor, 121 Cal. 372; 53 Pac. 815. Where the judge has disposed of all his interest in the subject-matter of the action, he is not disqualified (Gregg v. Pemberton, 53 Cal. 251; Scadden Flat Gold Mining Co. v. Scadden, 121 Cal. 33; 53 Pac. 440); but his disqualification is not removed by a disposal of his stock after he has heard the evidence, and before the rendition of judgment. Adams v. Minor, 121 Cal. 372; 53 Pac. 815. The interest of the judge as a taxpayer does not disqualify him, in a suit to collect money demands against the county (Higgins v. San Diego, 126 Cal. 303; 58 Pac. 700; 59 Pac. 209), nor where the action may result in the diminution of taxes (Oakland v. Oakland Water Front Co., 118 Cal. 249; 50 Pac. 268); nor is he disqualified by reason of his having pending an independent action against one of the parties in a case to be tried by him, in no way connected with the matter on trial (Southern California Motor Road Co. v. San Bernardino Nat. Bank, 100 Cal. 316; 34 Pac. 711); but where he claims an interest in the land in controversy, adversely to both parties litigant, he is disqualified, in an action to determine the title to such land (Heilhorn v. Campbell, 3 Cal. Unrep. 204; 23 Pac. 122); and he is also disqualified where he is interested in an estate in probate (Estate of White, 37 Cal. 190), but not where he is a mere creditor. Regents of University v. Turner, 159 Cal. 541; Ann. Cas. 1912C, 1162; 114 Pac. 842.

Power of judge disqualified by interest. A judge, disqualified by reason of interest, may make an order respecting a change of name, fix the time of hearing the application, and direct the giving of the required notice; such action relates solely to the arrangement of the calendar, and regulation of the order of business. Petition of Los Angeles Trust Co., 158 Cal. 603; 112 Pac. 56. There is a marked distinction between the disqualification of the judge under this section, and accidental disqualification under § 160, ante: under § 160, the judge may transfer a case to a judge of his own selection, but he cannot so transfer a case in which he is interested, and where disqualified by reason of interest, it is his legal duty to transfer the proceeding. John Heinlen Co. v. Superior Court, 17 Cal. App. 660; 121 Pac. 293.

Grounds of disqualification. The grounds of disqualification of a judge are only those enumerated in this section (Patterson v. Conlon, 123 Cal. 453; 56 Pac. 105;

McCauley v. Weller, 12 Cal. 500); but the section should be given a broad and liberal, not a technical, construction. North Bloomfield Gravel Mining Co. v. Keyser, 58 Cal. 315. A judge is not disqualified, under this section, for counseling or advising with persons who are not parties to the action (Lassen Irrigation Co. v. Superior Court, 151 Cal. 357; 90 Pac. 709); nor from trying an action to foreclose a mortgage against an estate, though he, as an attorney, before he became judge, signed a petition for letters of administration in the matter of such estate; nor is the decree foreclosing the mortgage invalid because the judge, presiding at the foreclosure suit, drafted the mortgage while practicing as an attorney. Morrissey v. Gray, 160 Cal. 390; 117 Pac. 438. Though the judge, as prosecuting attorney, had, sixteen years previously, prosecuted and convicted a defendant, yet there is no inference that he cannot try the case with perfect impartiality. Hoyt v. Zumwalt, 149 Cal. 381; 86 Pac. 602. The burden is upon the party seeking to show disqualification; the question involved is judicial, to be determined by the tribunal before which it is presented. Dakan v. Superior Court, 2 Cal. App. 52; 82 Pac. 1129.

Relationship to a party. Relationship by consanguinity or affinity within the third degree, to either party to an action, disqualifies the judge from acting therein, and he ought, of his own motion, to decline to sit as a judge, even when no objections are made. People v. De la Guerra, 24 Cal. 73; De la Guerra v. Burton, 23 Cal. 592. The word "party" is not confined to persons who are parties of record, but includes all persons whose interest is represented by such parties. Howell v. Budd, 91 Cal. 342; 27 Pac. 747; North Bloomfield Gravel Mining Co. v. Keyser, 58 Cal. 315; Fredericks v. Judah, 73 Cal. 604; 15 Pac. 305. The rule for computing the degree of relationship is the rule of the civil law (People v. De la Guerra, 24 Cal. 73), and a first-cousin by marriage, or a cousin german, is not within the prohibited degree. Robinson v. Southern Pacific Co., 105 Cal. 526; 28 L. R. A. 773; 38 Pac. 94, 722; but see contra, People v. De la Guerra, 24 Cal. 73. In insolvency proceedings, the term "parties" includes the insolvent and persons who have filed claims. Chinette v. Conklin, 105 Cal. 465; 38 Pac. 1107; In re Chope, 112 Cal. 630; 44 Pac. 1066.

Relationship to attorney. It is not essential to the disqualification of the judge, that an attorney, who was a relative of the judge, should be of record; it is sufficient if he is in fact an attorney for the party. Johnson v. Brown, 115 Cal. 694; 47 Pac. 686. Where the judge is the father of the attorney who is about to try the cause, upon a contingent fee, depending upon the success of the action, the judge is disqualified by reason of relationship to a party. Howell v. Budd, 91 Cal. 342; 27 Pac. 747. Of course, under the existing law, he would be disqualified also by reason of his relationship to the attorney, as such; the law was amended at the session of the legislature immediately after the decision of Howell v. Budd, supra. An order extending time, made by a judge who was disqualified from acting, under this section, prior to its amendment in 1905, was void. Johnson v. German-American Ins. Co., 150 Cal. 336; 88 Pac. 985.

Judge formerly counsel in the proceeding. The judge, having been an attorney or counsel in the proceeding, is disqualified (Barnhart v. Fulkerth, 59 Cal. 130; Finn v. Spagnoli, 67 Cal. 330; 7 Pac. 746), and he is also disqualified where he received a general retainer from one of the parties (Kern Valley Water Co. v. McCord, 70 Cal. 646; 11 Pac. 798); but he is not disqualified where he had previously been the attorney in another action for one of the parties, although such action involved one of the issues in the case on trial. Cleghorn v. Cleghorn, 66 Cal. 309; 5 Pac. 516.

Bias and prejudice. The bias and prejudice of the judge was not a ground for disqualification before the amendment of this section in 1897, when the fourth subdivision was added (People v. Mahoney, 18 Cal. 180; People v. Graham, 21 Cal. 261; People v. Williams, 24 Cal. 31; People v. Shuler, 28 Cal. 490; Hibberd v. Smith, 39 Cal. 145; Bulwer Cons. Mining Co. v. Standard Cons. Mining Co., 83 Cal. 613; 23 Pac. 1109; Patterson v. Conlon, 123 Cal. 453; 56 Pac. 105); and even the expression of an unqualified opinion did not then disqualify a magistrate from holding a preliminary examination (McCauley v. Weller, 12 Cal. 500), as the law established a different rule for determining the disqualification of judges from that applied to jurors. McCauley v. Weller, 12 Cal. 500; People v. Mahoney, 18 Cal. 180. The filing of an affidavit showing bias and prejudice was then a contempt of court (In re Jones, 103 Cal. 397; 37 Pac. 385); but, since the amendment of 1897, facts showing bias and prejudice, being pertinent and relevant, do not constitute contempt. Works v. Superior Court, 130 Cal. 304; 62 Pac. 507. If the affidavit, however, fails to state any facts, and makes charges of corruption against the judge, upon belief merely, it is contempt of court (Lamberson v. Superior Court, 151 Cal. 458; 11 L. R. A. (N. S.) 619; 91 Pac. 100), and the judge is not disqualified from hearing said contempt proceedings by reason of the fact that his integrity has been so attacked. Id.

Affidavits of bias and prejudice. The right to make and file affidavits is not restricted to any particular party. Parrish v. Riverside Trust Co., 7 Cal. App. 95; 93 Pac. 685. Upon a motion to call in another judge, the judge whose bias is alleged

must himself decide the motion, but he must decide it upon the facts averred in the affidavits, without reference to his own knowledge of his own state of mind. Hoyt v. Zumwalt, 149 Cal. 381; 86 Pac. 600; Swan v. Talbot, 152 Cal. 142; 17 L. R. A. (N. S.) 1066; 94 Pac. 238. Under the law prior to the addition of the fourth subdivision, the judge might act upon his own knowledge as to his condition of mind (Southern California Motor Road Co. v. San Bernardino Nat. Bank, 100 Cal. 316; 34 Pac. 711); but, under the present section, the knowledge or belief of the judge as to his qualification cannot affect the fact of his disqualification. Adams v. Minor, 121 Cal. 372; 53 Pac. 815. Unverified statements of the judge cannot be considered in determining the question. Morehouse v. Morehouse, 136 Cal. 332; 68 Pac. 976; People v. Compton, 123 Cal. 403; 56 Pac. 44. Even if the judge knows himself to be disqualified in fact, he cannot deny the motion, if the contrary appears from the affidavit on file. People v. Compton, 123 Cal. 403; 56 Pac. 44. The disqualification of the judge is to be determined wholly from the affidavits and counter-affidavits on file, and if there is no conflict upon the affidavits showing bias and prejudice, the court must grant a change of venue (People v. Compton, 123 Cal. 403; 56 Pac. 44; Bassford v. Earl, 162 Cal. 115; 121 Pac. 395; People v. Compton, 123 Cal. 403; 56 Pac. 44), but in case of conflict the court may pass upon the question of bias and prejudice (People v. Rodley, 131 Cal. 240; 63 Pac. 351), and determine his own qualification. Talbot v. Pirkey, 139 Cal. 326; 73 Pac. 858. A judge must not shirk the painful duty imposed upon him, of being the trier of the question touching his own bias or other disqualification. Swan v. Talbot, 152 Cal. 142; 17 L. R. A. (N. S.) 1066; 94 Pac. 238. It is the duty of a judge, alleged to be biased, to grant a motion to call in another judge, should bias or other disqualification be shown; but it is equally his duty to deny the motion, and to sit in the case himself, if, in his judgment, the disqualifying cause alleged is not sufficiently established by the evidence. Swan v. Talbot, 152 Cal. 142; 17 L. R. A. (N. S.) 1066; 94 Pac. 238; Morehouse v. Morehouse, 136 Cal. 332; 68 Pac. 976; People v. Compton, 123 Cal. 403; 56 Pac. 44; Hoyt v. Zumwalt, 149 Cal. 381; 86 Pac. 600. The finding of the trial judge, on conflicting affidavits, is conclusive on appeal, even though the question in controversy be the disqualification of the judge himself. Estudillo v. Security Loan etc. Co., 158 Cal. 66; 109 Pac. 884. It is not sufficient that the party believes he cannot have a fair and impartial trial, but the facts must be set forth, which would lead a reasonable mind to believe that such was the case. People v. Findlay, 132 Cal. 301; 64 Pac. 472. An affidavit made upon information and belief is not sufficient: the facts must be stated, and the source of the information shown, upon which the belief is based. People v. Williams, 24 Cal. 31; Morehouse v. Morehouse, 136 Cal. 332; 68 Pac. 976. Facts must be shown (Dakan v. Superior Court, 2 Cal. App. 52; 82 Pac. 1129); the conclusions of the party are not sufficient. Hoyt v. Zumwalt, 149 Cal. 382; 86 Pac. 600. Erroneous rulings are not evidence of bias. People v. Williams, 24 Cal. 31.

Test of bias. When the facts would justify a reasonable person in believing that he cannot have a fair and impartial trial before the judge about to try the cause, another judge should be called in. Johnston v. Dakan, 9 Cal. App. 524; 99 Pac. 729.

Power of judge disqualified by bias. In case of disqualification, the judge has no power, except to arrange his calendar, regulate the order of business (People v. De la Guerra, 24 Cal. 73), and transfer the cause to another court (Livermore v. Brundage, 64 Cal. 299; 30 Pac. 848), or grant a motion for change of venue. People v. McGarvey, 56 Cal. 327; Kern Valley Water Co. v. McCord, 79 Cal. 646; 11 Pac. 798. He may transfer the matter from his department to another department of the superior court for hearing, instead of to the superior court of another county. Petition of Los Angeles Trust Co., 158 Cal. 603; 112 Pac. 56. A disqualified judge cannot preside at the arraignment of a defendant, nor hear his plea, nor take any step in the prosecution against him. People v. Ebey, 6 Cal. App. 769; 93 Pac. 379. A disqualification is no ground for change of place of trial in criminal cases. People v. McGarvey, 56 Cal. 327. The motion for a change of place of trial, in civil cases, on account of the disqualification of the judge, must be granted, where the judge is disqualified, and there is no other superior judge present to try the cause; but it is otherwise where another superior judge, who is holding court at the time, and who is qualified to try the cause, has been called for that purpose, and is ready and willing to try it. Upton v. Upton, 94 Cal. 26; 29 Pac. 411; Barnhart v. Fulkerth, 59 Cal. 130; Livermore v. Brundage, 64 Cal. 299; 30 Pac. 848; Finn v. Spagnoli, 67 Cal. 330; 7 Pac. 746. Where a qualified judge has been called in with the consent of both parties, a party is estopped to object, after trial has commenced, upon the ground that such judge was called in by the disqualified judge. Oakland v. Hart, 129 Cal. 98; 61 Pac. 779. The validity of the transfer to another county cannot be questioned in a collateral proceeding. Gage v. Downey, 79 Cal. 140; 21 Pac. 527, 855. Where the judge has jurisdiction to make an order or render a judgment, it is not a subject for collateral attack (Dore v. Dougherty, 72 Cal. 232; 1 Am. St. Rep.

48; 13 Pac. 621; Johnston v. San Francisco Sav. Union, 75 Cal. 134; 7 Am. St. Rep. 129; 16 Pac. 753; Gage v. Downey, 79 Cal. 140; 21 Pac. 527, 855; Hill v. City Cab etc. Co., 79 Cal. 188; 21 Pac. 728; Pehrson v. Hewitt, 79 Cal. 594; 21 Pac. 950); but a judgment by a disqualified judge is void. Estate of White, 37 Cal. 190.

Selection of judge. The law selects the judge to try the action, where undisputed facts showing bias and prejudice are before the court; a disqualified judge can neither try the case nor select his own judge to try it. Parrish v. Riverside Trust Co., 7 Cal. App. 95; 93 Pac. 685. A judge disqualified by relationship to an attorney for a defendant in a criminal case has power to select a qualified judge to try the case. Decision by the supreme court in People v. Ebey, 6 Cal. App. 769, 774; 93 Pac. 379. The express prohibition of this section, that no disqualified judge shall act, applies in construing § 1054, post. Johnson v. German American Ins. Co., 150 Cal. 336; 88 Pac. 985.

Power of judge acting in another county. A judge called to act for a disqualified judge is not required to deliberate upon the case, nor to prepare his findings and order for judgment, in the county in which the cause is pending. Estudillo v. Security Loan etc. Co., 158 Cal. 66; 109 Pac. 884.

Validity of judgment by disqualified judge. See note 84 Am. Dec. 126.

Power of disqualified judge to make formal orders or to perform ministerial acts. See note 5 Ann. Cas. 975.

Effect upon decision of tribunal of participation by disqualified judge whose vote does not produce result. See note 13 Ann. Cas. 336.

Disqualification of judge who is resident or taxpayer in municipality which is party to proceedings before him. See note 6 Ann. Cas. 406.

Disqualification of judge interested in decedent's estate to act in estate matter. See note Ann. Cas. 1912C, 1165.

Degree of relationship to party necessary to disqualify judge. See note 12 Ann. Cas. 516.

Affinity or relationship to party as disqualification of judge. See note 79 Am. St. Rep. 199.

Waiver of objection to disqualified judge. See notes 10 Ann. Cas. 969; Ann. Cas. 1912A, 1072.

Disqualification of judge by prior connection with case. See note 25 L. R. A. 114.

Disqualification of judge for political bias or prejudice. See note 20 Ann. Cas. 424.

Membership in association or body instigating or conducting disbarment proceedings as disqualifying judge to sit in case. See notes Ann. Cas. 1913A, 1229; 39 L. R. A. (N. S.) 116.

Prejudice against liquor traffic as constituting disqualification of judge to try case involving liquor laws. See note Ann. Cas. 1912A, 1203.

Signing petition for local option election as disqualifying judge from action thereon. See note Ann. Cas. 1912C, 1092.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 343. The three causes stated in the text are the only ones which work a disqualification of a judicial officer. The exhibition by a judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper, and reprehensible, as calculated to throw suspicion upon the judgments of the court and bring administration of justice into contempt, are not, under the statute, sufficient to authorize a change of venue on the ground that the judge is disqualified from sitting. The law establishes a different rule for determining the qualification of judges from that applied to jurors. The reason for the distinction is obvious. The province of the jury is to determine from the evidence the issues of fact presented by the parties, and their decision is final in all cases where there is a conflict of testimony. The province of a judge is to decide such questions of law as may arise in the progress of the trial. His decisions upon these points are not final, and if erroneous, the party has his remedy by appeal. McCauley v. Weller, 12 Cal. 500.

§ 171. Judges and county clerks, when prohibited from practicing law. No justice, or judge of a court of record, or county clerk, shall practice law in any court of this state, nor act as attorney, agent, or solicitor in the prosecution of any claim or application for lands, pensions, patent rights, or other proceedings, before any department of the state or general government, or courts of the United States, during his continuance in office; nor shall any justice of the peace practice law before any justices' court in the county in which he resides.

Legislation § 171. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 343); and then read: "A judge cannot act as attorney or counsel in a court in which he is judge, or in an action or proceeding removed therefrom to another court for trial or review, or in an action or proceeding from which an appeal may lie to his own court."

2. Amended by Code Amdts. **1880**, p. 42, to read: "No justice or judge of a court of record shall practice law in any court of this state during his continuance in office, nor shall any justice of the peace practice law before any justice's court in the county where he resides."

3. Amended by Stats. **1881**, p. 78.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 343.

§ 172. No judicial officer to have partner practicing law. No justice, judge, or other elective judicial officer, or court commissioner, shall have a partner acting as attorney or counsel in any court of this state.

Legislation § 172. 1. Enacted March 11, **1872**, as § 173 (based on Stats. 1863, p. 343), and then read: "No judge or other elective judicial officer, or district court commissioner, shall have a partner acting as attorney or counsel in any court of this state."

2. Amended by Code Amdts. **1880**, p. 42, and renumbered § 172.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 343.

§ 173. [Renumbered and amended section.]

Legislation § 173. Renumbered § 172 by Stats. 1880, p. 21, in amending Part I. See ante, Legislation § 172.

CHAPTER IV.

INCIDENTAL POWERS AND DUTIES OF JUDICIAL OFFICERS.

§ 176. Powers of justice or judge out of court.
§ 177. Powers of judicial officers as to conduct of proceedings.
§ 178. To punish for contempt.
§ 179. To take acknowledgments and affidavits.

§ 176. Powers of justice or judge out of court. A justice or judge may exercise out of court all the powers expressly conferred upon a justice or judge, as contradistinguished from the court.

Power of judge.
1. At chambers. Ante, §§ 165, 166.
2. To administer oaths. Post, § 179.

Legislation § 176. 1. Enacted March 11, 1872. 2. Amended by Code Amdts. 1880, p. 42, (1) adding the words "justice or" before the word "judge," in both places where printed, and (2) omitting the comma after "exercise" and after "court," in first line.

Power of judge out of court. This section confers power to extend the time in which to prepare and serve a statement on motion for a new trial, even in a county other than that in which the trial took place. Matthews v. Superior Court, 68 Cal. 638; 10 Pac. 128.

§ 177. Powers of judicial officers as to conduct of proceedings. Every judicial officer shall have power:

1. To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty;

2. To compel obedience to his lawful orders as provided in this code;

3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code;

4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties.

Incidental powers of courts. Ante, § 128.

Legislation § 177. 1. Enacted March 11, 1872. 2. Amended by Code Amdts. 1880, p. 42, (1) in introductory paragraph, substituting "shall have" for "has"; (2) in subd. 1, striking out (a) "the" before "proceedings," and (b) "an" before "official duty"; (3) in subd. 2, striking out a comma after "orders"; (4) in subd. 4, striking out a comma after "necessary."

Power to compel witness to testify. This section gives a judge, in whose court an action is pending, power to order the attendance of a witness before him to make a deposition, and may command the witness to answer proper interrogatories, and if his orders are disobeyed, he may punish the witness for contempt. Burns v. Superior Court, 140 Cal. 1; 73 Pac. 597.

Power to administer oaths. A justice of the peace has power to administer oaths, and to certify to a complaint charging a person with the commission of a crime. People v. Le Roy, 65 Cal. 613; 4 Pac. 649.

§ 178. To punish for contempt. For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt in the cases provided in this code.

Contempt.
1. Generally. Post, § 1209.
2. In justices' courts. Post, § 906.

Legislation § 178. 1. Enacted March 11, 1872. 2. Re-enacted by Code Amdts. 1880, p. 42, in amending Part I.

Power to punish for contempt. A judicial officer has power, under this section, and it is his duty, to punish a witness for contempt for a refusal to answer pertinent questions upon the taking of his deposition, and the supreme court will, by writ of mandate, compel such judicial officer to employ the process of contempt against the witness who so refuses. Crocker v. Conrey, 140 Cal. 213; 73 Pac. 1006.

Power of judges to punish for contempt. See note 117 Am. St. Rep. 956.

Power of magistrate to punish witness for contempt. See note 1 L. R. A. (N. S.) 1135.

CODE COMMISSIONERS' NOTE. See post, §§ 1209 to 1222, inclusive.

§ 179. To take acknowledgments and affidavits. Each of the justices of the supreme court, and judges of the superior courts, shall have power in any part of the state, and every justice of the peace within his city and county, or county, and a judge of a police or other inferior court within his city and county, city, or town, to take and certify:

1. The proof and acknowledgment of a conveyance of real property, or of any other written instrument;

2. The acknowledgment of satisfaction of a judgment of any court;

3. An affidavit or deposition to be used in this state.

Subd. 1. Real property, acknowledgment of conveyance of. See Civ. Code, §§ 1180 et seq.
Subd. 2. Satisfaction of judgment. Post, § 675.
Subd. 3. Affidavit. Post, §§ 2009 et seq.
Deposition. Post, §§ 2019 et seq.

Legislation § 179. 1. Enacted March 11, 1872; based on Stats. 1863, p. 345.
2. Amended by Code Amdts. 1880, p. 42, substituting a new introductory sentence for the original, which read: "The justices of the supreme court, and the judges of the district and county courts, have power in any part of the state, and justices of the peace within their respective counties, and police judges, and judges of municipal courts, within their respective cities or towns, to take and certify."

Power of justice of the peace. A justice of the peace may take acknowledgments, but his jurisdiction in such matters is limited to his own county, and where a certificate of acknowledgment is by the justice of the peace of another county, it must be accompanied by a certificate of the county clerk of that county, before it may be recorded. Middlecoff v. Hemstreet, 135 Cal. 173; 67 Pac. 768.

Power of judge of an inferior court. Where a city recorder has been given the power of a justice of the peace, he may, like a justice of the peace, take and certify acknowledgments and affidavits. Prince v. Fresno, 88 Cal. 407; 26 Pac. 606.

What disqualification prevents officer from taking acknowledgment. See note 32 Am. Dec. 757.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 345.

CHAPTER V.

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

§ 182. Subsequent applications for orders refused, when prohibited.
§ 183. Violations of preceding section.
§ 184. Proceedings not affected by vacancy in office.
§ 185. Proceedings to be in English language.
§ 186. Abbreviations and figures.
§ 187. Means to carry jurisdiction into effect.
§ 188. Disposition of funds paid to clerk or treasurer by order of court.

§ 182. Subsequent applications for orders refused, when prohibited. If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order shall be made to any court commissioner, or any other judge, except of a higher court; but nothing in this section applies to motions refused for informality in the papers or proceedings necessary to obtain the order, or to motions refused with liberty to renew the same.

Orders and motions generally. Post, §§ 1003 et seq.
Orders, appealable. Post, § 939, subd. 3.

Legislation § 182. 1. Enacted March 11, 1872; based on Stats. 1863, p. 345.
2. Amended by Code Amdts. 1880, p. 43, (1) changing "can" to "shall," after words "same order"; (2) omitting word "any" before "informality"; and (3) adding at end of section the clause beginning "or to motions."

Application for order after denial. The court will not enforce the rule of the statute, where it has acted prematurely or inadvertently in making an order (Odd Fellows' Sav. Bank v. Deuprey, 66 Cal. 168; 4 Pac. 1173); nor where there was an informality in the papers or proceedings, and the motion is denied upon that ground. Hitchcock v. McElrath, 69 Cal. 634; 11 Pac. 487. A dismissal of the motion as to one party and a denial as to another, is a final disposition, and a second motion will not be considered (Hellings v. Duvall, 131 Cal. 618; 63 Pac. 1017); but a dismissal without prejudice is not a denial of the motion. Wolff v. Canadian Pacific Ry. Co., 89 Cal. 332; 26 Pac. 825. Striking a motion from the calendar is a denial. Lang v. Superior Court, 71 Cal. 491; 12 Pac. 306, 416. Granting leave to renew motions, where jurisdiction is not limited by statute, is in the discretion of the judge; and this discretion will not be interfered with, except in cases of palpable abuse. Bowers v. Cherokee Bob, 46 Cal. 279; Hitchcock v. McElrath, 69 Cal. 634; 11 Pac. 487;

Johnston v. Brown, 115 Cal. 694; 47 Pac. 686. Leave may be granted after an original motion has been denied. Hitchcock v. McElrath, 69 Cal. 634; 11 Pac. 487; Kenney v. Kelleher, 63 Cal. 442; Johnston v. Brown, 115 Cal. 694; 47 Pac. 686. The doctrine of res adjudicata is not applicable to motions in pending actions. Johnston v. Brown, 115 Cal. 694; 47 Pac. 686; Ford v. Doyle, 44 Cal. 635; Bowers v. Cherokee Bob, 46 Cal. 279. But a party seeking to renew his motion, after a denial thereof, must show either that the denial was for some informality in the papers or proceedings, or that he has been granted permission to renew the same. Victor Power etc. Co. v. Cole, 11 Cal. App. 497; 105 Pac. 758.

Renewal of motion without leave. Where a renewal of the motion is made without leave of court, the papers may be stricken from the files. People v. Center, 61 Cal. 191. If an attorney has rendered services to an executor in the defense of a contest to a will, and his application for compensation is denied, but with the privilege of renewing the same, he may make a second application, after judgment admitting the will to probate and the perfection of an appeal from such judgment. Estate of Riviere, 8 Cal. App. 773; 98 Pac. 46. A second motion for a new trial cannot be made after a denial of the first: the remedy is by appeal from the first order. Coombs v. Hibberd, 43 Cal. 452; Thompson v. Lynch, 43 Cal. 482; People v. Center, 61 Cal. 191; Dorland v. Cunningham, 66 Cal. 484; 6 Pac. 135; Goyhinech v. Goyhinech, 80 Cal. 409, 410; 22 Pac. 175.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 345.

§ 183. Violations of preceding section. A violation of the last section may be punished as a contempt; and an order made contrary thereto may be revoked by the judge or commissioner who made it, or vacated by a judge of the court in which the action or proceeding is pending.

Ex parte order, vacating or modifying. Post, § 937.

Legislation § 183. 1. Enacted March 11, 1872; based on Stats. 1863, p. 345.
2. Amended by Code Amdts. 1880, p. 43, and the words "or commissioner" added before "who made it."

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 345.

§ 184. Proceedings not affected by vacancy in office. No proceeding in any court of justice, in an action or special proceeding pending therein, shall be affected by a vacancy in the office of all or any of the judges thereof.

Legislation § 184. 1. Enacted March 11, 1872 (based on Stats. 1863, p. 345), and then read: "No proceeding in any court of justice, in an action or special proceeding pending therein, is affected by a vacancy in the office of all or any of the judges, or by the failure of a term thereof."
2. Amended by Code Amdts. 1880, p. 43.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 345.

§ 185. Proceedings to be in English language. Every written proceeding in a court of justice in this state shall be in the English language, and judicial proceedings shall be conducted, preserved, and published in no other.

Legislation § 185. 1. Enacted March 11, 1872 (based on Stats. 1863, p. 345), and then read: "Every written proceeding in a court of justice in this state, or before a judicial officer, except in the counties of San Luis Obispo, Santa Barbara, Los Angeles, and San Diego, must be in the English language, and in the excepted counties may be either in the English or Spanish language."
2. Amended by Code Amdts. 1880, p. 43.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 345.

§ 186. Abbreviations and figures. Such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner.

Legislation § 186. 1. Enacted March 11, 1872; based on Stats. 1863, p. 344.
2. Re-enacted by Code Amdts. 1880, p. 43, in amending Part I.

Abbreviations in common use. Under the head "abbreviations" are to be included all conventional expressions or arbitrary signs that have passed into common use, such, for example, as punctuation-marks, the Arabic numerals and other mathematical signs, and similar signs used by merchants; this rule simply applies to judicial proceedings a rule elsewhere universal. Estate of Lakemeyer, 135 Cal. 28; 87 Am. St. Rep. 96; 66 Pac. 961; Raggio v. Palmtag, 155 Cal. 797; 103 Pac. 312.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 344.

§ 187. Means to carry jurisdiction into effect. When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court

or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

Legislation § 187. 1. Enacted March 11, 1872; based on New York code.
2. Amended by Code Amdts. 1880, p. 43, (1) adding, in first line, the words "the constitution or," and (2) changing "the" to "this," before "jurisdiction."

The means necessary. This section is merely declaratory of the common law (Golden Gate Cons. etc. Mining Co. v. Superior Court, 65 Cal. 187; 3 Pac. 628); but, to make it available, there must be some law conferring jurisdiction upon the court (Tulare County v. Kings County, 117 Cal. 195; 49 Pac. 8), as it does not confer jurisdiction: it merely operates to enable the court to exercise a jurisdiction otherwise conferred. Union Collection Co. v. Superior Court, 149 Cal. 790; 87 Pac. 1035. The provision is conformable to the spirit of the code, and is limited to those cases where no course of procedure is pointed out by the code or some statute. Gardner v. Superior Court, 19 Cal. App. 548; 126 Pac. 501. The power should not be exercised when the existing law, by a reasonable construction, provides the process or mode of proceeding. McKendrick v. Western Zinc Min. Co., 165 Cal. 30; 130 Pac. 865. Where neither the legislature nor the rules of court prescribe any means or method for enforcing a right, the court may adopt any appropriate and approved mode of procedure that may have been employed by an aggrieved party. People v. Robinson, 17 Cal. App. 273; 119 Pac. 527. The superior court has power to compel a discovery in all cases, where, under the established rules of chancery practice existing at the time of the adoption of the constitution, a party would have been entitled to such relief. Union Collection Co. v. Superior Court, 149 Cal. 790; 87 Pac. 1035. It has power to determine that the amount of legal taxes due was just and legal, and to require the payment thereof as a condition to the granting of an injunction against the execution of a tax deed (San Diego Realty Co. v. Cornell, 150 Cal. 637; 89 Pac. 603); to take evidence to determine the degree of a crime (People v. Chew Lan Ong, 141 Cal. 550; 99 Am. St. Rep. 88; 75 Pac. 186); to appoint a commissioner to sell land under a decree of foreclosure (Crane v. Cummings, 137 Cal. 201; 69 Pac. 984; Kreling v. Kreling, 118 Cal. 413; 50 Pac. 546); to appoint a receiver to make a conveyance of property under decree of court (Scadden Flat Gold Mining Co. v. Scadden, 121 Cal. 33; 53 Pac. 440); to issue a writ of assistance in a judgment in ejectment (Kirsch v. Kirsch, 113 Cal. 56; 45 Pac. 164); to make interlocutory decrees and orders in equity (Thompson v. White, 63 Cal. 505; Gray v. Palmer, 9 Cal. 616; Packard v. Bird, 40 Cal. 378; Harris v. San Francisco Sugar Refining Co., 41 Cal. 393; McFadden v. McFadden, 44 Cal. 306; Hinds v. Gage, 56 Cal. 486); and to order the withdrawal of an execution after return, for further levy. Weldon v. Rogers, 157 Cal. 410; 108 Pac. 266. Under this section, courts may inquire into frauds, mistakes, and cognate matters. Cerini v. De Long, 7 Cal. App. 398; 94 Pac. 582. Where a foreign court has jurisdiction to compel the holding of a stockholders' meeting, it has jurisdiction to make its judgment in mandamus effective by appointing a commissioner to give notice of the time and place of such meeting (Potomac Oil Co. v. Dye, 14 Cal. App. 674; 113 Pac. 126, 130); but this section does not authorize a proceeding to compel one of many stockholders in a corporation, made defendants to a creditor's bill to reach their unpaid subscriptions to its stock, to testify to or discover the whereabouts of other defendants, to enable the plaintiff to serve them with summons. Union Collection Co. v. Superior Court, 149 Cal. 790; 87 Pac. 1035. There is nothing in the Juvenile Court Law to preclude the district attorney from making the technical accusation against the defendant in the form of an information; that law contemplates an information without any preliminary examination, but such an examination, prior to an information, may be treated as surplusage, and this section, therefore, has no material application to the question. Edington v. Superior Court, 18 Cal. App. 739; 124 Pac. 450; 128 Pac. 338. If any judicial wrong has been committed in the conduct of an election, the superior court may, in the exercise of its equity powers, remedy it. Cerini v. De Long, 7 Cal. App. 398; 94 Pac. 582.

Process and procedure. The court has power, under this section, to adopt a mode of proceeding in setting aside a homestead (Mawson v. Mawson, 50 Cal. 539; Estate of McCauley, 50 Cal. 544; Kearney v. Kearney, 72 Cal. 591; 15 Pac. 769; Brown v. Starr, 75 Cal. 163; 16 Pac. 760; Estate of Burdick, 76 Cal. 639; 18 Pac. 805; Estate of Walkerly, 81 Cal. 579; 22 Pac. 888; Somers v. Somers, 81 Cal. 608; 22 Pac. 967), and dealing with the same, cutting down and limiting it (Estate of Burdick, 76 Cal. 639; 18 Pac. 805); requiring an appraiser to divide the homestead (Brown v. Starr, 75 Cal. 163; 16 Pac. 760); authenticating papers (Somers v. Somers, 81 Cal. 608; 22 Pac. 967); enforcing the constitutional rights of the defendant to have wit-

nesses examined in open court (Willard v. Superior Court, 82 Cal. 256; 22 Pac. 1120); levying taxes for road purposes (Comstock v. Yolo County, 71 Cal. 599; 12 Pac. 728; San Luis Obispo County v. White, 91 Cal. 432; 24 Pac. 864; 27 Pac. 756); adjudicating the insolvency of a banking corporation (People v. Superior Court, 100 Cal. 105; 34 Pac. 492); setting aside and declaring fraudulent proceedings in insolvency (Estudillo v. Meyerstein, 72 Cal. 317; 13 Pac. 869); authorizing service of an order, where a party conceals himself (Golden Gate Cons. etc. Mining Co. v. Superior Court, 65 Cal. 187; 3 Pac. 628); enforcing a stipulation of the parties (Grady v. Porter, 53 Cal. 680); reviewing the ruling of a justice's court on appeal (Maxson v. Superior Court, 124 Cal. 468; 57 Pac. 379); and making up, auditing, and settling the account of a guardian beyond the jurisdiction of the court. Trumpler v. Cotton, 109 Cal. 250, 41 Pac. 1033; Graff v. Mesmer, 52 Cal. 636.

CODE COMMISSIONERS' NOTE. This section is adopted from the New York code. The italicized words ["necessary" and "or the statute"] have been added by this commission.

§ 188. Disposition of funds paid to clerk or treasurer by order of court. When any money is deposited with the clerk of any superior court pursuant to any action or proceeding therein or pursuant to any order, decree or judgment of the court, or when any money is to be paid to the treasurer pursuant to any provision of this code, such money shall be forthwith deposited with such treasurer and a duplicate receipt of the treasurer therefor shall be filed with the auditor. The certificate of the auditor that such duplicate receipt has been so filed shall be necessary before the clerk or party required to deposit such money shall be entitled to a discharge of the obligation imposed upon him to make such deposit. When any money so deposited is to be withdrawn or paid out, the order directing such payment or withdrawal shall require the auditor to draw his warrant therefor and the treasurer to pay the same.

Legislation § 188. Added by Stats. 1915, p. 942.

The original § 188, entitled "Trials and intervening terms," was added by Code Amdts. 1873–74, p. 285, and repealed by Code Amdts. 1880, p. 21, in amending Part I.

TITLE III.

PERSONS SPECIALLY INVESTED WITH POWERS OF A JUDICIAL NATURE.

Chapter I. Jurors. Articles I–XII. §§ 190–254.
II. Court Commissioners. §§ 258, 259.

CHAPTER I.

JURORS.

Article I. Jurors in General. §§ 190–195.
II. Qualifications and Exemptions of Jurors. §§ 198–202.
III. Of Selecting and Returning Jurors for Courts of Record. §§ 204–211.
IV. Of Drawing Jurors for Courts of Record. §§ 214–221.
V. Of Summoning Jurors for Courts of Record. §§ 225–228.
VI. Of Summoning Jurors for Courts not of Record. §§ 230–232.
VII. Of Summoning Juries of Inquest. § 235.
VIII. Obedience to Summons, how Enforced. § 238.
IX. Of Impaneling Grand Juries. §§ 241–243.
X. Of Impaneling Trial Juries in Courts of Record. §§ 246–248.
XI. Of Impaneling Trial Juries in Courts not of Record. §§ 250, 251.
XII. Of Impaneling Juries of Inquest. § 254.

ARTICLE I.

JURORS IN GENERAL.

§ 190. Jury defined.
§ 191. Different kinds of juries.
§ 192. Grand jury defined.
§ 193. Trial jury defined.
§ 194. Number of a trial jury.
§ 195. Jury of inquest defined.

§ 190. Jury defined. A jury is a body of men temporarily selected from the citizens of a particular district, and invested with power to present or indict a person for a public offense, or to try a question of fact.

Jurors.
1. **Qualifications and exemptions.** Post, §§ 198–202.
2. **Selecting and summoning.** Post, §§ 204, 238.
3. **Impaneling.** Post, §§ 241–254.

Legislation § 190. 1. Enacted March 11, **1872.**
2. Re-enacted by Code Amdts. **1880,** p. 44, in amending Part I.

§ 191. Different kinds of juries. Juries are of three kinds:

1. Grand juries;
2. Trial juries;
3. Juries of inquest.

Legislation § 191. 1. Enacted March 11, **1872.**
2. Re-enacted by Code Amdts. **1880,** p. 44, in amending Part I.

§ 192. Grand jury defined. A grand jury is a body of men, nineteen in number, returned in pursuance of law, from the citizens of a county, or city and county, before a court of competent jurisdiction, and sworn to inquire of public offense committed or triable within the county, or city and county.

Grand jury.
1. **Impaneling.** Post, §§ 241–243.
2. **How often drawn.** Const., art. i, § 8.

Legislation § 192. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 630), and then read: "A grand jury is a body of men, not less than thirteen nor more than fifteen in number, returned at stated periods from citizens of the county, before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county."

2. Amended by Code Amdts. **1875–76,** p. 86, to read as at present, except that (1) it did not contain the words "or city and county" in either place; (2) the words "citizens of a county" were printed "citizens of the county"; and (3) the word "offense" was printed "offenses."

3. Amended by Code Amdts. **1880,** p. 44.

Jurisdiction of court. The jurisdiction of the superior court to impanel a grand jury is drawn from the law, and not from

any order of the court. Bruner v. Superior Court, 92 Cal. 239; 28 Pac. 341.

Return of grand jury. It is competent for the court to summon a special venire to complete the panel, instead of drawing the requisite number from the grand jury box. Levy v. Wilson, 69 Cal. 105; 10 Pac. 272. The court has no power to appoint an elisor to summon the grand jury, however, unless both the sheriff and the coroner are disqualified. Bruner v. Superior Court, 92 Cal. 239; 28 Pac. 341.

Number necessary to form grand jury. See note 27 L. R. A. 846.

Number of grand jurors necessary to constitute quorum. See note Ann. Cas. 1912C, 30.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 630.

§ 193. Trial jury defined. A trial jury is a body of men returned from the citizens of a particular district before a court or officer of competent jurisdiction, and sworn to try and determine, by verdict, a question of fact.

Trial by jury. Post, §§ 600–619.

Verdict. Three quarters of jury can find. Const., art. i, § 7. See also post, § 618.

Legislation § 193. 1. Enacted March 11, 1872.

2. Amended by Code Amdts. 1880, p. 44, striking out "unanimous" before "verdict."

§ 194. Number of a trial jury. A trial jury shall consist of twelve men; provided, that in civil actions and cases of misdemeanor, it may consist of twelve, or of any number less than twelve, upon which the parties may agree in open court.

Less than twelve. Const., art. i, § 7.

Legislation § 194. 1. Enacted March 11, 1872, and then read: "A trial jury consists of twelve men, unless the parties to the action or proceeding agree upon a less number."

2. Amended by Code Amdts. 1880, p. 44.

CODE COMMISSIONERS' NOTE. A party failing to appear at the trial, it operated as a consent on his part that the issue should be tried by the court without a jury. The other party could have made this consent mutual by submitting the case to the court; but if such a course is not taken, and the party appearing calls for a jury, he is bound to take the number required by law. Twelve is the number, and a less number will not constitute a legal jury without the consent of the adverse party. Such consent must be express, and entered at the time in the minutes of the court; it cannot be inferred from the mere absence of the adverse party. Gillespie v. Benson, 18 Cal. 411.

§ 195. Jury of inquest defined. A jury of inquest, is a body of men summoned from the citizens of a particular district before the sheriff, coroner, or other ministerial officer, to inquire of particular facts.

Legislation § 195. 1. Enacted March 11, 1872. 2. Re-enacted by Code Amdts. 1880, p. 44.

ARTICLE II.

QUALIFICATIONS AND EXEMPTIONS OF JURORS.

§ 198. Who competent to act as juror.
§ 199. Who not competent to act as juror.
§ 200. Who exempt from jury duty.
§ 201. Who may be excused.
§ 202. Affidavit of claim to exemption.

§ 198. Who competent to act as juror. A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned;

2. In possession of his natural faculties and of ordinary intelligence and not decrepit;

3. Possessed of sufficient knowledge of the English language.

Residence, generally. See Const., art. ii, § 4; Pol. Code, § 52.

Legislation § 198. 1. Enacted March 11, 1872 (based on Stats. 1863, p. 630; Stats. 1863–64, pp. 462, 524), and then read: "A person is competent to act as a juror if he be: 1. A citizen of the United States, an elector of the county, and a resident of the township at least three months before being selected and returned; 2. In possession of his natural faculties and not decrepit; 3. Possessed of sufficient knowledge of the language in which the proceedings of the courts are had; 4. Assessed on the last assessment-roll of his county, on property belonging to him."

2. Amended by Code Amdts. 1875–76, p. 89, inserting, in subd. 1, after the word "county," the words, in parentheses, "(whether his name be enrolled on the great register of the county, or not)."

3. Amended by Code Amdts. 1880, p. 45, the textual differences from the present section being noted infra, par. 5.

4. Amendment by Stats. 1901, p. 121; unconstitutional. See note ante, § 5.

5. Amended by Stats. 1915, p. 826, (1) in subd. 1, substituting "a resident of the state and of the county or city and county for one year immediately before being selected and re-

turned," for "a resident of the state one year, and of the county, or city and county, ninety days before being selected and returned"; (2) striking out subd. 4, which read, "4. Assessed on the last assessment-roll of the county, or city and county, on property belonging to him."

Competency. This and the next section provide the qualifications of all jurors, grand and trial alike. People v. Leonard, 106 Cal. 302, 317; 39 Pac. 617. Lack of qualification affects individual jurors only; objections on that ground cannot be urged to a panel. People v. Young, 108 Cal. 8; 41 Pac. 281; People v. Searcey, 121 Cal. 1; 41 L. R. A. 157; 53 Pac. 359. In impaneling a jury, it is the duty of the parties to an action, whether civil or criminal, to inquire first as to the qualifications prescribed by the first and fourth subdivisions of this section; otherwise there is a waiver of the right to challenge for a want of such qualification. People v. Sampo, 17 Cal. App. 135; 118 Pac. 957. It is the function of the trial court to determine the true state of mind of each member of the panel, touching his qualifications to act. People v. Loper, 159 Cal. 6; Ann. Cas. 1912B, 1193; 112 Pac. 720.

Citizenship. Aliens are expressly prohibited from serving in the capacity of jurors. People v. Chung Lit, 17 Cal. 320; People v. Chin Mook Sow, 51 Cal. 597.

Residence. The juror must have been a resident of the county for ninety days before being selected and returned (People v. Cochran, 61 Cal. 548); and the statute formerly required that he should be an elector of the county in which he was returned. Sampson v. Schaffer, 3 Cal. 107.

Natural capacity. It must be presumed that the hearing of a juror is normal, where misconduct of the juror in listening to the reading of a newspaper article is charged. People v. Wong Loung, 159 Cal. 520; 114 Pac. 829. An objection to the natural capacity of a juror, though not made upon his voir dire examination, is not waived: he may be excused whenever the want of natural capacity appears. People v. Sampo, 17 Cal. App. 135; 118 Pac. 957.

Knowledge of English. The juror's knowledge of the English language must be sufficient to enable him to understand the proceedings. People v. Arceo, 32 Cal. 40.

Property qualification. The juror must have been assessed on property belonging to him: it is not sufficient that he is an heir of a deceased person, who had owned property in the county (People v. Warner, 147 Cal. 546; 82 Pac. 196); but where property is assessed to a partnership, of which the juror is a member, it is sufficient. People v. Owens, 123 Cal. 482; 56 Pac. 251. A person not assessed in the last assessment-roll is not a competent juror. People v. Warner, 147 Cal. 546; 82 Pac. 196; Kitts v. Superior Court, 5 Cal. App. 462; 90 Pac. 977. Lack of property qualification may be waived, and it is waived where the juror is accepted and sworn without objection. People v. Thompson, 34 Cal. 671; People v. Mortier, 58 Cal. 262; People v. Sanford, 43 Cal. 29.

Mistaken identity. A person not summoned is not selected and returned as required by law, although he bears the same name as a venireman whose name is in the box: he is not a qualified juror, and may be challenged; but it is too late to raise the question after verdict. People v. Duncan, 8 Cal. App. 186, 199; 96 Pac. 414.

Juror as "freeholder." See note Ann. Cas. 1913D, 331.

Constitutionality of statute requiring jurors to be taxpayers. See note 32 L. R. A. (N. S.) 414.

Waiver of property qualification of juror. See note 39 L. R. A. (N. S.) 967.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 630; Stats. 1864, p. 462. Sampson v. Schaffer, 3 Cal. 107; People v. Peralta, 4 Cal. 175; People v. Stonecifer, 6 Cal. 405; People v. Chung Lit, 17 Cal. 320.

Subd. 1. "An elector of the county," etc. Sampson v. Schaffer, 3 Cal. 107. "And a resident." Residence depends upon intention, as well as fact, and mere inhabitancy for a short period, against the intention of acquiring a domicile, would not make a resident within the meaning of the law. People v. Peralta, 4 Cal. 175. A citizen of the state who has resided only fourteen days in a county, and then was absent several months from the state, with the intention of returning to that county as his home, and does return, and has resided fourteen days in the county since his return, is qualified to act as a juror, so far as residence is concerned. If he had resided but one day, with the intention, in good faith, of making the county his home, and then left, with the intention of returning (animus revertendi), and actually did return, his residence would have dated from the day of his first settlement or arrival in the county, and not from the date of his return. People v. Stonecifer, 6 Cal. 410. On a motion for a new trial, plaintiff's attorney (the client being absent) made affidavit that since the trial he had discovered that M., one of the jurors, was incompetent, because a resident of the state only three months. M. also made affidavit that he was a resident of the state for that time only. Held: that M. was a competent juror. Thompson v. Paige, 16 Cal. 78. In a criminal case, the objection that one of the jurors was an alien, cannot be taken for the first time upon the motion for a new trial, not even if the defendant was not aware of the juror's alienage at the time of the verdict. The defendant might have examined the juror on this subject and exercised the right of challenge before the juror was sworn. People v. Chung Lit, 17 Cal. 322. See also People v. Stonecifer, 6 Cal. 405.

Subd. 2. The words "and not decrepit" are added to the law as it existed prior to the passage of this code. Want of hearing, or of sight, suffering from physical disease, which prevents him from giving attention to the proceedings of the court, are enough to render a juror disqualified. Montague v. Commonwealth, 10 Gratt. (Va.) 767; People v. Arceo, 32 Cal. 45.

Subd. 3. See the case of People v. Arceo, 32 Cal. 40.

Subd. 4. A person otherwise qualified is not a competent juror, unless he has been assessed on the last assessment-roll of his county, on property belonging to him. People v. Thompson, 34 Cal. 672.

§ 199. Who not competent to act as juror. A person is not competent to act as a juror:

1. Who does not possess the qualifications prescribed by the preceding section;

2. Who has been convicted of malfeasance in office or any felony or other high crime; or

3. Who has been discharged as a juror by any court of record in this state within a year, as provided in section two hundred of this code, or who has been drawn as a grand juror in any such court and served as such within a year and been discharged.

4. A person who is serving as a grand juror in any court of record in this state is not competent to act as a trial juror in any such court.

And a person who is serving as a trial juror in any court of this state is not competent to act as a grand juror in any such court.

Legislation § 199. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 630), and then read: "A person is not competent to act as a juror: 1. Who does not possess the qualifications prescribed by the preceding section; 2. Who has been convicted of a felony or misdemeanor, involving moral turpitude."

2. Amended by Code Amdts. **1880**, p. 45, changing subd. 2 to read as now printed, except that, then ending the section, it did not have, at end, the word "or."

3. Amendment by Stats. **1901**, p. 122; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1905**, p. 70, adding subds. 3 and 4, and the last paragraph; subd. 3 then having the words "section two hundred and three," a manifest error, corrected in 1909. Quære as to the "hinging" of subd. 4 on the introductory paragraph.

5. Amended by Stats. **1909**, c. 645, changing the section number in subd. 3; the act to take effect June 1, 1909.

Service within a year. A trial juror, who has been discharged within a year, is not rendered incompetent to sit upon a grand jury (Application of Ruef, 150 Cal. 665; 89 Pac. 605; People v. Quijada, 154 Cal. 243; 97 Pac. 689; People v. Carson, 155 Cal. 164; 99 Pac. 970); and the validity of an indictment is not affected by the fact that a member of the grand jury was disqualified because he had served and been discharged as a juror in the superior court within a year. Application of Ruef, 150 Cal. 665; 89 Pac. 605; Kitts v. Superior Court, 5 Cal. App. 462; 90 Pac. 977.

Competency of jurors who have previously served in cause involving same or similar facts. See notes 4 Ann. Cas. 965; 68 L. R. A. 871.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 630.

§ 200. Who exempt from jury duty. A person is exempt from liability to act as a juror if he be:

1. A judicial, civil, or military officer of the United States, or of this state;

2. A person holding a county, city and county, city, town or township office;

3. An attorney at law, or the clerk, secretary or stenographer of an attorney at law;

4. A minister of the gospel, or a priest of any denomination following his profession;

5. A teacher in a university, college, academy, or school;

6. A practicing physician, or druggist, actually engaged in the business of dispensing medicines;

7. An officer, keeper or attendant of an almshouse, hospital, asylum, or other charitable institution;

8. Engaged in the performance of duty as officer or attendant of the state prison or of a county jail;

9. Employed on board of a vessel navigating the waters of this state;

10. An express agent, mail-carrier, or a superintendent, employee, or operator of a telegraph or telephone company doing a general telegraph or telephone business in this state, or keeper of a public ferry or toll-gate;

11. An active member of the national guard of California, or an active member of a paid fire department of any city and county, city, town, or village in this state, or an exempt member of a duly authorized fire company;

12. A superintendent, engineer, fireman, brakeman, motorman, or conductor on a railroad; or,

13. A person drawn as a juror in any court of record in this state, upon a regular panel, who has served as such within a year or a person drawn or summoned as a juror in any such court who has been discharged as a juror within a year as hereinafter provided; provided, however, that in counties having less than five thousand population the exemption provided by this subdivision shall not apply.

Exemption, how claimed. Post, § 202.

Subd. 11. Exempt fireman. Pol. Code, §§ 3337–3339.

Members of national guard. See Pol. Code, § 2098.

Legislation § 200. 1. Enacted March 11, **1872** (based on Stats. 1853, p. 59; Stats. 1862, p. 375; Stats. 1863, p. 630; Stats. 1865–66, p. 30), and then read: "A person is exempt from liability to act as a juror if he be: 1. A judicial, civil, or military officer of the United States, or of the state of California; 2. A person holding a county office; 3. An attorney and counselor at law; 4. A minister of the gospel or a priest of any denomination; 5. A teacher in a college, academy, or school; 6. A practicing physician; 7. An officer, keeper, or attendant of an almshouse, hospital, asylum, or other charitable institution; 8. Engaged in the performance of duty as officer or attendant of a county jail or the state prison; 9. Employed on board of a vessel navigating the waters of this state; 10. An express agent, mail-carrier, telegraph-operator, or keeper of a public ferry or toll-gate; 11. An active member of the fire department of any city, town, or village in this state, or an exempt member by reason of five years active service; 12. A superintendent, engineer, or conductor on a railroad."

2. Amended by Code Amdts. **1873–74**, p. 285, (1) in subd. 3, changing "An attorney" to "A practicing attorney"; (2) adding, at the end of subd. 4, the words "following his profession"; (3) adding, at the end of subd. 6, the words "or dentist"; (4) in subd. 10, substituting for "telegraph-operator" the words "superintendent, employee, or operator of a telegraph line doing a general telegraph business in this state"; and (5) adding subd. 13, "An editor or local reporter of a newspaper."

3. Amended by Code Amdts. **1875–76**, p. 86, (1) changing subd. 3 to "An attorney at law"; (2) striking out the words "or dentist" from end of subd. 6; (3) changing subd. 11 to read, "An active member of a fire department of any city, town, or village in the state, or an exempt member of a duly organized fire company, who has become exempt from jury duty before the passage of this act"; (4) changing subd. 13 to read, "A person who served as a juror in any court of record in this state, for a term thereof which has expired within a year; but this exemption shall not extend to a person who is summoned as a juror for the trial of a particular case."

4. Amended by Code Amdts. **1880**, p. 45, (1) at end of subd. 1, changing "the state of California" to "this state"; (2) changing subd. 2, after "county," to read, "city and county, or township office"; (3) in subd. 5, adding "university" before "college"; (4) adding, after "physician," in subd. 6, "or druggist, actually engaged in the business of dispensing medicines"; (5) changing, after "attendant of," in subd. 8, to read, "the state prison, or of a county jail, or the state prison"; (6) changing subd. 11 to read, "An active member of the national guard of California, or an active member of a fire department of any city and county, city, town, or village in this state, or an exempt member of a duly organized fire company who had become exempt from jury duty before the passage of this act"; and (7) changing subd. 13 to read: "A person drawn as a juror in any court of record in this state, upon a regular panel, who has served as such within a year; but this exemption shall not extend to a person who is summoned as a juror for the trial of a particular case."

5. Amended by Stats. **1897**, p. 185, striking from end of subd. 11, "who had become exempt from jury duty before the passage of this act."

6. Amended by Stats. **1905**, p. 71, the text then being the same as at present (1915), except for the subsequent changes noted.

7. Amended by Stats. **1907**, p. 885, (1) in subd. 11, substituting "authorized" for "organized," before "fire company"; (2) in subd. 13, adding the proviso.

8. Amended by Stats. **1915**, p. 1080, adding "fireman" in subd. 12.

Exemption. Exemption is a privilege, and not a ground of challenge. People v. Owens, 123 Cal. 482; 56 Pac. 251.

Constitutionality of laws exempting certain classes of persons. See note 5 Ann. Cas. 783.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 630; Stats. 1853, p. 59; Stats. 1866, p. 30; Stats. 1862, p. 362. Subdivision 12, is new.

§ 201. Who may be excused. A juror shall not be excused by a court for slight or trivial cause, or for hardship or inconvenience to his business, but only when material injury or destruction to his property, or of property intrusted to him, is threatened, or when his own health, or the sickness or death of a member of his family, requires his absence.

Legislation § 201. 1. Enacted March 11, **1872**; based on Stats. 1863, p. 630.

2. Amended by Code Amdts. **1880**, p. 45, (1) changing the first words of the section from "A juror cannot be excused by the court"; (2) omitting a comma after "hardship"; and (3) changing "or of property intrusted" from "or that of the public intrusted."

Court may excuse. The court may, of its own motion, for any good reason, excuse a qualified juror from sitting on the panel in a criminal case. People v. Arceo, 32 Cal. 40.

Rejecting or excusing juror without challenge. See note 1 Am. St. Rep. 519.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 630. It has been held that the court may, for a good reason, on its own motion, excuse or set aside a juror who is free from any statutory disability, and possesses the legal qualifications of a juror. Montague v. Commonwealth, 10 Gratt. (Va.) 767. And "even if a juror has been set aside by the court for an insufficient cause, it is not a matter of error, if the trial has been by a jury duly sworn and impaneled and above all exceptions. Neither the prisoner nor the government in such a case has suffered injury." United States v. Cornell, 2 Mason, 91; Fed. Cas.

No. 14868; Tatum v. Young, 1 Port. (Ala.) 298; Commonwealth v. Hayden, 4 Gray, 19. Where a court willfully and arbitrarily rejects a juror not disqualified under the provisions of the statute, and without a reasonable ground upon which to base its actions, perhaps it might be error. See People v. Arceo, 32 Cal. 40.

§ 202. Affidavit of claim to exemption. If a person, exempt from liability to act as a juror as provided in section two hundred, be summoned as a juror, he may make and transmit his affidavit to the clerk of the court for which he is summoned, stating his office, occupation, or employment; and such affidavit shall be delivered by the clerk to the judge of the court where the name of such person is called, and if sufficient in substance, shall be received as an excuse for non-attendance in person. The affidavit shall then be filed by the clerk.

Legislation § 202. **1.** Added by Code Amdts. 1873–74, p. 286.

2. Amended by Code Amdts. **1880**, p. 46, (1) changing "If a" from "If any," in first line; (2) changing "where" from "when," before "the name."

ARTICLE III.

OF SELECTING AND RETURNING JURORS FOR COURTS OF RECORD.

§ 204. Jury-lists, by whom and when to be made.
§ 205. Selection and listing of persons suitable and competent to serve as jurors.
§ 206. Lists to contain how many names.
§ 207. Person who served as juror during preceding year not to be selected. [Repealed.]
§ 208. Certified list to be filed with clerk of superior court.
§ 209. Duty of clerk. Jury-boxes.
§ 210. Regular jurors to serve one year.
§ 211. Jurors to be drawn from boxes.

§ 204. Jury-lists, by whom and when to be made. In the month of January in each year it shall be the duty of the superior court in each of the counties of this state to make an order designating the estimated number of grand jurors, and also the number of trial jurors, that will, in the opinion of said court, be required for the transaction of the business of the court, and the trial of causes therein, during the ensuing year; and immediately after said order designating the estimated number of grand jurors shall be made, the court shall select and list the grand jurors required by said order to serve as grand jurors in said superior court during the ensuing year, or until new lists of jurors shall be provided, and said selections and listings shall be made of persons suitable and competent to serve as jurors, as set forth and required in sections two hundred and five and two hundred and six of this code, which list of persons so selected shall at once be placed in the possession of the county clerk; and immediately after said order designating the estimated number of trial jurors shall be made, the board of supervisors shall select, as provided in sections two hundred and five and two hundred and six of this code, a list of persons to serve as trial jurors in the superior court of said county during the ensuing year, or until a new list of jurors shall be provided. In counties, and cities and counties having a population of one hundred thousand inhabitants or over, such selection shall be made by a majority of the judges of the superior courts.

Legislation § 204. **1.** Enacted March 11, **1872**, and then read: "The board of supervisors of each county must, at their first regular meeting in each year, or at any other meeting if neglected at the first, make a list of persons to serve as jurors in courts of record for the ensuing year."

2. Amended by Code Amdts. **1873–74**, p. 286, to read: "The district judges of the several districts within or embracing part of the city and county of San Francisco, and the county judge of the county, and the judge of the municipal criminal court of San Francisco, or a majority of such judges, must meet in San Francisco in the month of December of each year, at the time and place designated by the county judge, and make a list of persons to serve as jurors in the courts of record, held in said city and county, for the ensuing year. And the board of supervisors of each of the other counties of the state must, at its first regular meeting in each year, or at any other meeting, if neglected at the first, make a list of persons to serve as jurors in the courts of record in their respective counties until a new list is provided."

3. Amended by Code Amdts. **1875–76**, p. 86, to read: "The district judges of the several judicial districts within or embracing part of the city and county of San Francisco, and the county

judge, probate judge, and judge of the municipal criminal court of said city and county, or a majority of such judges, must meet in said city and county in the month of December of each year, at the time and place designated by the county judge, and select a list of persons to serve as grand jurors in the county court, and another list of persons to serve as trial jurors in the courts of record held in said city and county for the ensuing year. And the board of supervisors of each of the other counties of the state must, at its first regular meeting in each year, or at any other meeting, if neglected at the first, make a list of persons to serve as jurors in the courts of record, in their respective counties, until a new list is provided."

4. Amended by Code Amdts. **1880,** p. 46, to read: "Within thirty days after the passage of this act the superior court in each of the counties of this state shall make an order designating the number of grand jurors, and also the number of trial jurors that, in the opinion of said court, will be required for the transaction of the business of said court during the year ending on the first day of January, eighteen hundred and eighty-one; and thereafter, in the month of January in each year, it shall be the duty of said court to make an order designating the estimated number of grand jurors, and also the number of trial jurors, that will, in the opinion of said court, be required for the transaction of the business of the court, and the court and the trial of causes therein, during the ensuing year. And immediately after said order shall be made, the board of supervisors shall select, as provided in the next section, a list of persons to serve as grand jurors and trial jurors in the superior court of said county during the ensuing year, or until a new list of jurors shall be provided. In cities and counties having over one hundred thousand inhabitants such selection shall be made by the judges of the superior court."

5. Amended by Stats. **1881,** p. 69, to read: "In the month of January in each year, it shall be the duty of the superior court in each of the counties of this state to make an order designating the estimated number of grand jurors, and also the number of trial jurors, that will, in the opinion of said court, be required for the transaction of the business of the court, and the trial of causes therein, during the ensuing year; and immediately after said order shall be made, the board of supervisors shall select, as provided in the next section, a list of persons to serve as grand jurors, and also a list of persons to serve as trial jurors, in the superior court of said county, during the ensuing year, or until new lists of jurors shall be provided. In cities and counties having over one hundred thousand inhabitants, such selection shall be made by the judges of the superior court, or a majority of them if all do not attend."

6. Amended by Stats. **1893,** p. 297.

Designating number of jurors. There is no distinction, in the matter of selection of grand jurors and trial jurors: the names of all the jurors to be selected are placed in the same box, and the court designates separately the number of each class. People v. Crowey, 56 Cal. 36. Until the new list has been certified and filed with the clerk, a trial jury may be selected from the number returned for the preceding year. People v. Richards, 1 Cal. App. 566; 82 Pac. 691.

Order designating number. The order designating the number of jurors for the ensuing year need not be signed; being made in open court, its entry in the minutes is sufficient. People v. Baldwin, 117 Cal. 244; 49 Pac. 186.

Selection by board of supervisors. A failure to show the selection, as the jury was in fact selected, or the selection of fewer than required by order of the court, is not a material departure from the forms prescribed in respect to the drawing of a jury. People v. Sowell, 145 Cal. 292; 78 Pac. 717. The board may select the jurors at either a regular or an adjourned meeting, or at a special meeting called for that purpose. People v. Baldwin, 117 Cal. 244; 49 Pac. 186.

Selection by judges. In cities and counties having a population of more than one hundred thousand, jurors are selected in January by the judges of the superior court, instead of by the supervisors. Bruner v. Superior Court, 92 Cal. 239; 28 Pac. 341; People v. Durrant, 116 Cal. 179; 48 Pac. 75. Where the minutes kept by the secretary of the judges are incomplete, and do not show the true facts as to the selection of jurors, the presiding judge may order the minutes amended, so that they may accurately show what occurred (People v. Durrant, 116 Cal. 179; 48 Pac. 75; People v. Sowell, 145 Cal. 292; 78 Pac. 717), under the inherent power of a court to amend the record of its transactions and proceedings, as to clerical matters, so as to make it speak the truth. People v. Durrant, 116 Cal. 179; 48 Pac. 75; Kaufman v. Shain, 111 Cal. 16; 52 Am. St. Rep. 139; 43 Pac. 393.

Obtaining of jurors. See note 53 Am. Dec. 101.

§ 205. Selection and listing of persons suitable and competent to serve as jurors. The selections and listings shall be made of persons suitable and competent to serve as jurors, and in making such selections they shall take the names of such only as are not exempt from serving, who are in the possession of their natural faculties, and not infirm or decrepit, of fair character and approved integrity, and of sound judgment.

Legislation § 205. 1. Enacted March 11, **1872,** and then read: "They must proceed to select and list from those assessed on the assessment-roll of the previous year, suitable persons, competent to serve as jurors; and in making such selection, they must take the names of such only as are not exempt from serving, who are in possession of their natural faculties, and not infirm or decrepit, of fair character, of approved integrity, and of sound judgment."

2. Amended by Code Amdts. **1880, p. 46,** substituting "last preceding assessment-roll of such county, or city and county," for "assessment-roll of the previous year."

3. Amended by Stats. **1881,** p. 70, the first sentence (stricken out in 1893), reading, "They shall proceed to select and list the grand jurors required by said order of the superior court, and then select and list the trial jurors required by said order"; the remainder of the section being the same as the present text, except for the subsequent changes, noted infra.

4. Amended by Stats. **1893**, p. 298.
5. Amended by Stats. **1915**, p. 826, striking out, after "serve as jurors," the clause, "who are assessed on the last preceding assessment-roll of such county, or city and county."

Effect of summoning persons on panel challenged. That a few persons summoned on a second venire of jurors had also been summoned on the first, is no basis for a challenge to the entire panel. People v. Vincent, 95 Cal. 425; 30 Pac. 581.

§ 206. **Lists to contain how many names.** The lists of jurors, to be made as provided in the preceding section, shall contain the number of persons which shall have been designated by the court in its order. The names for such lists shall be selected from the different wards or townships of the respective counties in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making said lists; and said lists shall be kept separate and distinct one from the other.

Legislation § 206. 1. Enacted March 11, **1872**, and then read: "Such lists must contain not less than one for every hundred inhabitants of each township or ward, having regard to the population of the county, so that the whole number of jurors selected in the county shall amount, at least, to one hundred, and not exceed one thousand."

2. Amended by Code Amdts. **1875–76**, p. 87, to read: "The lists to be made by the board of supervisors shall contain not less than one hundred names and not more than one thousand names, and the grand-jury list for the city and county of San Francisco shall contain not less than one hundred and fifty names and not more than one hundred and eighty names, and the trial-jury list for said city and county shall contain not less than eight hundred names and not more than twelve hundred names; and within the limits above prescribed, the said lists shall contain the names of as many persons as will, in the judgment of the judges, or the board of supervisors, be required as jurors in the county during the year next ensuing. The names for all such lists shall be selected from the different wards or townships of the respective counties, in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making such lists."

3. Amended by Code Amdts. **1880**, p. 46, to read: "The list to be made shall contain the number of persons which shall have been designated by the court. The names for such list shall be selected from the different wards or townships of the respective counties in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making such list."

4. Amended by Stats. **1881**, p. 70.

Construction of section. The provisions of this section are directory, and the action of the judges will not be disturbed, except for an abuse of discretion. People v. Danford, 14 Cal. App. 442; 112 Pac. 474.

Number designated. Where the court orders a number of jurors to be drawn, but, through inadvertence or mistake, an omission to draw two of the numbers on the list does not constitute a material and substantial departure from the law. People v. Sowell, 145 Cal. 292; 78 Pac. 717. The supervisors are at liberty to select, from the names left in the box at the end of the year, the names of such persons as possess the necessary qualifications of jurors, and who have not served the previous year, and make them part of the list for the current year. People v. Rodley, 131 Cal. 240; 63 Pac. 351; People v. Richards, 1 Cal. App. 566; 82 Pac. 691.

Proportionate selection. The list is to be composed of names of persons from wards or townships in proportion to the inhabitants, but, in the absence of a showing to the contrary, it will be presumed, where none are selected from a certain township, that there are no qualified jurors therein. People v. Sowell, 145 Cal. 292; 78 Pac. 717. The population may be estimated from the number of votes cast. People v. Rodley, 131 Cal. 240; 63 Pac. 351.

List to be kept separate and distinct. A failure to keep a separate list of jurors selected from each township is not a material departure from the law. People v. Sowell, 145 Cal. 292; 78 Pac. 717.

§ 207. [Person who served as juror during preceding year not to be selected. Repealed.]

Legislation § 207. 1. Enacted March 11, **1872**.
2. Repealed by Code Amdts. **1875–76**, p. 87.

§ 208. **Certified list to be filed with clerk of superior court.** A certified list of the persons selected to serve as trial jurors shall at once be placed in the possession of and filed with the clerk of the superior court.

Legislation § 208. 1. Enacted March 11, **1872**, and then read: "Certified lists of the persons selected to serve as jurors must at once be placed in the possession of the county clerk."

2. Amended by Code Amdts. **1880**, p. 46, changing "must" to "shall."

3. Amended by Stats. **1881**, p. 70, to read: "Certified lists of the persons so selected to serve as grand jurors and as trial jurors shall at once be placed in possession of the county clerk."

4. Amended by Stats. **1893**, p. 298.

Certification of list. Where the list has been regularly drawn under the order of the court, and the clerk of the board of supervisors is the same person as the clerk of the superior court, it is unnecessary to certify to the list; the clerk may, by testimony, identify the list at the time of trial. People v. Young, 108 Cal. 8; 41 Pac. 281.

§ 209. Duty of clerk. Jury-boxes. On receiving such lists the county clerk shall file the same in his office, and write down the names contained thereon on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon. He shall deposit the pieces of paper having on them the names of the persons selected to serve as grand jurors in a box to be called the "grand-jury box," and those having on them the names of the persons selected to serve as trial jurors in a box to be called the "trial-jury box."

Legislation § 209. **1.** Enacted March 11, **1872**, and then read: "On receiving such lists, the clerk must file the same in his office, and write down the names contained therein on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon, and deposit them in a box to be called the 'jury-box.'"

2. Amended by Code Amdts. **1875–76**, p. 87, to read: "On receiving such lists, the clerk must file the same in his office, and write down the names contained therein on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon; and, in the city and county of San Francisco, he shall deposit the pieces having on them the names of persons selected to serve as grand jurors, in a box to be called the 'grand-jury box,' and those having on them the names of persons selected to serve as trial jurors, in a box to be called the 'trial-jury box,' and in the other counties of the state he shall deposit the said pieces in a box to be called the 'jury-box.'"

3. Amended by Code Amdts. **1880**, p. 47, changing the first sentence to read as at present, and the second sentence to read, "He shall deposit the pieces of paper having on them the names of the persons selected in a box, to be called the 'jury-box.'"

4. Amended by Stats. **1881**, p. 70.

§ 210. Regular jurors to serve one year. The persons whose names are so returned shall be known as regular jurors, and shall serve for one year and until other persons are selected and returned.

Legislation § 210. **1.** Enacted March 11, **1872**.

2. Amended by Code Amdts. **1880**, p. 47, changing (1) "are known" to "shall be known," and (2) "must serve" to "shall serve."

Term of service. This section only limits the time in which the persons selected shall serve for the purpose of the drawing and impanelment of the jury, and imposes no limitations whatever upon the life of a jury, either grand or trial, once drawn and impaneled, and the mere selection, listing, and returning of the grand jurors for the succeeding year does not, of itself, by operation of law, discharge a grand jury then in existence. Halsey v. Superior Court, 152 Cal. 71; 91 Pac. 987. The term of service is one year, and until other persons are selected and returned. In re Gannon, 69 Cal. 541; 11 Pac. 240; Jacobs v. Elliott, 104 Cal. 318; 37 Pac. 942. The action of a grand jury may be considered valid until the body is discharged by the court or by operation of law: the mere expiration of the year does not effect a discharge by operation of law. People v. Leonard, 106 Cal. 302; 39 Pac. 617.

Service of juror. Serving on a jury is the only way in which a juror can serve, within the meaning of this section (Halsey v. Superior Court, 152 Cal. 71, 84; 91 Pac. 987), which is applicable both to grand and to trial jurors. People v. Leonard, 106 Cal. 302; 39 Pac. 617. The order of a trial court discharging a jury upon reaching a verdict in any given case does not prove that the individual jurors are thereby relieved from future jury duty. People v. Gilmore, 17 Cal. App. 737; 121 Pac. 697.

§ 211. Jurors to be drawn from boxes. The names of persons drawn for grand jurors shall be drawn from the "grand-jury box," and the names of persons for trial jurors shall be drawn from the "trial-jury box"; and if, at the end of the year, there shall be the names of persons in either of the said jury-boxes who may not have been drawn during the year to serve, and have not served as jurors, the names of such persons may be placed on the list of jurors drawn for the succeeding year.

Legislation § 211. **1.** Added by Code Amdts. **1875–76**, p. 87, and then read: "In the city and county of San Francisco, the names of persons for grand jurors shall be drawn from the 'grand-jury box,' and the names of persons for trial jurors shall be drawn from the 'trial-jury box,' and in the other counties of the state, the names of persons, whether for grand jurors or trial jurors, shall be drawn from the 'jury-box.'"

2. Amended by Code Amdts. **1880**, p. 47, to read: "The names of persons, whether for grand or trial jurors, shall be drawn from the 'jury-box'; and if, at the end of the year, there shall be the names of persons in the 'jury-box' who may not have been drawn during the year to serve as jurors, the names of such persons may be placed upon the lists of jurors drawn for the succeeding year."

3. Amended by Stats. **1881**, p. 70.

ARTICLE IV.

OF DRAWING JURORS FOR COURTS OF RECORD.

§ 214. Order of judge or judges for drawing of jury.
§ 215. When clerk shall draw.
§ 216. Sheriff and judge to witness drawing. [Repealed.]
§ 217. Drawing, when to be adjourned. [Repealed.]
§ 218. Shall proceed, when. [Repealed.]
§ 219. Drawing, how conducted.
§ 220. Preservation of ballots drawn.
§ 221. Copy of list to be furnished by clerk. [Repealed.]

§ 214. Order of judge or judges for drawing of jury. Whenever the business of the superior court shall require the attendance of a trial jury for the trial of criminal cases, or where a trial jury shall have been demanded in any cause or causes at issue in said court, and no jury is in attendance, the court may make an order directing a trial jury to be drawn, and summoned to attend before said court. Such order shall specify the number of jurors to be drawn, and the time at which the jurors are required to attend. And the court may direct that such causes, either criminal or civil, in which a jury may be required, or in which a jury may have been demanded, be continued, and fixed for trial when a jury shall be in attendance.

Summoning jury. See post, § 226.

Legislation § 214. 1. Enacted March 11, **1872,** and then read: "Not less than ten nor more than thirty days before the commencement of any term of court, the judge thereof, if a jury will be required therefor, must make and file with the county clerk an order that one be drawn. The number to be drawn must be fixed in the order; if to form a grand jury, it must be twenty-four, and if a trial jury, such number as the judge may direct."

2. Amended by Code Amdts. **1873–74,** p. 287, to read: "Before the commencement of any term of court, the judge thereof, if a jury will be required therefor, must make and file with the county clerk, an order that one be drawn. The number to be drawn must be named in the order; if to form a grand jury, it must be twenty-four, and if a trial jury, such number as the judge may direct; and the time must be designated at which the drawing will take place."

3. Amended by Code Amdts. **1875–76,** p. 88, changing the last sentence, down to the word "direct," to read: "If to form a grand jury, it must be not less than twenty-five and not more than thirty; and if to form a trial jury, such number as the judge may direct."

4. Amended by Code Amdts. **1880,** p. 47.

Order directing drawing. The judge is required to make an order for the drawing from the "regular jurors" (Halsey v. Superior Court, 152 Cal. 71; 91 Pac. 987), specifying the number of jurors to be drawn. Jackson v. Baehr, 138 Cal. 266; 71 Pac. 167. An order changing the hour for the drawing, fixed by the presiding judge, does not invalidate the drawing. Levy v. Wilson, 69 Cal. 105; 10 Pac. 272. An order directing the clerk to draw the names of a designated number of good and lawful men to be drawn from the county, is a sufficient order. People v. Wheeler, 65 Cal. 77; 2 Pac. 892. A judge, disqualified to try a particular cause, may order and superintend the drawing of jurors for the ensuing term. People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933.

CODE COMMISSIONERS' NOTE. A substantial compliance with the time of drawing jurors, as prescribed by this chapter, is perhaps sufficient. See People v. Rodriguez, 10 Cal. 50; People v. Stuart, 4 Cal. 218; Thrall v. Smiley, 9 Cal. 537; see also note to § 225, post.

§ 215. When clerk shall draw. Immediately upon the order mentioned in the preceding section being made, the clerk shall, in the presence of the court, proceed to draw the jurors from the "trial-jury box."

Legislation § 215. 1. Enacted March 11, **1872,** in substance, in §§ 215, 216, 217, 218, which then read: "215. At least one day before the drawing, the clerk must notify the sheriff and county judge of the time when such drawing will take place, which time must not be more than three days after the receipt by him of the order for such drawing." "216. At the time so appointed, the sheriff, in person or by deputy, and the county judge, must attend at the county clerk's office to witness such drawing, and if they do so, the clerk must, in their presence, proceed to draw the jurors." "217. If the officers so notified do not appear, the clerk must adjourn the drawing until the next day, and, by written notice, require two electors of the county to attend such drawing on the adjourned day." "218. If, at the adjourned day, the sheriff, county judge, and electors, or any two of such persons, appear, the clerk must in their presence proceed to draw the jurors."

2. By Code Amdts. **1873–74,** p. 287, §§ 215 and 217 were amended to read: "215. Before the drawing, the clerk must notify the sheriff and county judge of the time appointed for such drawing." "217. If the officers named do not appear, the clerk must adjourn the drawing till the next day, and, by written notice, require two electors of the county to attend such drawing on the adjourned day."

3. By Code Amdts. **1880,** p. 47, § 215 was amended to read as at present, except that the word "trial" was omitted before "jury-box."

4. Amended by Stats. **1881,** p. 71.

In the presence of the court. The original section required the clerk to notify the sheriff and the judge of the drawing; but if they were present, although not notified, the drawing was valid. People v. Gallagher, 55 Cal. 462.

§ 216. [Sheriff and judge to witness drawing. Repealed.]

Legislation § 216. See ante, Legislation § 215.

§ 217. [Drawing, when to be adjourned. Repealed.]

Legislation § 217. See ante, Legislation § 215.

§ 218. [Shall proceed, when. Repealed.]

Legislation § 218. See ante, Legislation § 215.

§ 219. **Drawing, how conducted.** The clerk must conduct said drawing as follows:

1. He must shake the box containing the names of the trial jurors so as to mix the slips of paper upon which such names are written as well as possible; he must then draw from said box as many slips of paper as are ordered by the court.

2. A minute of the drawing shall be entered in the minutes of the court, which must show the name on each slip of paper so drawn from said jury-box.

3. If the name of any person is drawn from said box who is deceased or insane, or who may have permanently removed from the county, or who is exempt from jury service, and the fact shall be made to appear to the satisfaction of the court, the name of such person shall be omitted from the list, and the slip of paper having such name on it shall be destroyed and another juror drawn in his place, and the fact shall be entered upon the minutes of the court. The same proceeding shall be had as often as may be necessary until the whole number of jurors required be drawn. After the drawing shall be completed, the clerk shall make a copy of the list of names of the persons so drawn, and certify the same. In his certificate he shall state the date of the order, and of the drawing, and the number of the jurors drawn, and the time when, and the place where such jurors are required to appear. Such certificate and list shall be delivered to the sheriff for service.

Legislation § 219. 1. Enacted March 11, **1872,** and then read: "The clerk must conduct such drawing as follows: 1. He must shake the box containing the names of jurors returned to him, from which jurors are required to be drawn, so as to mix the slips of paper upon which such names were written, as much as possible; 2. He must then publicly draw out of the box as many such slips of paper as are ordered by the judge; 3. A minute of the drawing must be kept by one of the attending officers, in which must be entered the name contained on every slip of paper so drawn, before any other slip is drawn; 4. If, after drawing the whole number required, the name of any person has been drawn who is dead or insane, or who has permanently removed from the county, to the knowledge of the clerk or any other attending officer, an entry of such fact must be made in the minute of the drawing, and the slip of paper containing such name must be destroyed; 5. Another name must then be drawn, in place of that contained on the slip of paper so destroyed, which must, in like manner, be entered in the minutes of the drawing; 6. The same proceedings must be had as often as may be necessary, until the whole number of jurors required are drawn; 7. The minute of the drawing must then be signed by the clerk and the attending officers or persons, and filed in the clerk's office; 8. Separate lists of the names of the persons so drawn for trial jurors, and of those drawn for grand jurors, with their places of residence, and specifying for what court they were drawn, must be made and certified by the clerk and the attending officers or persons, and delivered to the sheriff of the county."

2. Amended by Code Amdts. **1880,** p. 47, to read the same as at present, except that (1) in subd. 1 (a) the words "the trial" were omitted before the word "jurors," and (b) the word "said" was changed from "the"; (2) in subd. 2, after the word "name," the phraseology was changed from "contained on every slip of paper so drawn from the 'jury-box' "; (3) in subd. 3, (a) in first line, "said" was changed from "the," (b) words "having such name on it shall be" were changed from "containing such name be," (c) word "be," between "required" and "drawn," was changed from "are," and (d) word "the" omitted in words "number of the jurors."

3. Amended by Stats. **1881,** p. 71.

Certification of order. The purpose of requiring the clerk to certify to the date of the order and of the drawing is merely for identification; an order otherwise identified is sufficient. People v. Iams, 57 Cal. 115.

§ 220. **Preservation of ballots drawn.** After a drawing of persons to serve as jurors, the clerk shall preserve the ballots drawn, and at the close

of the session or sessions for which the drawing was had, he shall replace in the proper box from which they were taken all ballots which have on them the names of persons who did not serve as jurors for the session or sessions aforesaid, and who were not exempt or incompetent.

Legislation § 220. **1.** Enacted March 11, **1872**, and then read: "After the adjournment of any court at which jurors have been returned, as herein provided, the clerk must inclose the ballots containing the names of those who attended and served as jurors in an envelope, under seal, and the ballots of those who did not attend and serve must be returned to the jury-box. The ballots sealed in envelopes must not be returned to the jury-box until all the ballots therein have been exhausted."

2. Amended by Code Amdts. **1875–76**, p. 88, to read: "After a drawing of persons to serve as jurors, the clerk must preserve the ballots drawn; and at the close of the term of the court for which the drawing was had, must replace in the box from which they were taken, all ballots which have on them the names of persons who did not serve as jurors for the term, and who were not excused because they were exempt or incompetent."

3. Amended by Code Amdts. **1880**, p. 48.

§ 221. [Copy of list to be furnished by clerk. Repealed.]

Legislation § 221. **1.** Enacted March 11, **1872**. **2.** Repealed by Code Amdts. **1880**, p. 21, in amending Part I.

ARTICLE V.

OF SUMMONING JURORS FOR COURTS OF RECORD.

§ 225. Sheriff to summon jurors, how.
§ 226. Of drawing and summoning jurors to attend forthwith.
§ 227. Of summoning jurors to complete a panel.
§ 228. Compensation of elisor.

§ 225. Sheriff to summon jurors, how. The sheriff, as soon as he receives the list or lists of jurors drawn, shall summon the persons named therein to attend the court at the opening of the regular session thereof, or at such session or time as the court may order, by giving personal notice to that effect to each of them, or by leaving a written notice to that effect at his place of residence, with some person of proper age, or by mailing such notice by registered mail, and shall return the list to the court at the opening of the regular session thereof, or at such session or time as the jurors may be ordered to attend, specifying the names of those who were summoned, and the manner in which each person was notified.

Legislation § 225. **1.** Enacted March 11, **1872**, and then read: "As soon as he receives the list of jurors drawn, the sheriff must summon the persons named therein to attend, by giving personal notice to each, or by leaving a written notice at his place of residence, with some person of proper age, and must return the list to the court at the opening thereof, specifying the names of those who were summoned and the manner in which each person was notified."

2. Amended by Code Amdts. **1880**, p. 48.

3. Amended by Stats. **1915**, p. 931, adding "or by mailing such notice by registered mail."

Duty of sheriff. Whether a drawn or a special panel, the sheriff must, in the first instance, execute the order of court in serving the summons; where he was disqualified, the venire, at common law, was directed to the coroner. People v. Vasquez, 9 Cal. App. 545; 99 Pac. 982.

CODE COMMISSIONERS' NOTE. The alleged disqualification of one of the jurors consists in the fact that his name was not on the venire returned by the sheriff. It appears, however, that he had been summoned at the commencement of the term, and that his name was entered on the minutes, and placed in the box, and drawn for the trial, in the same manner as the other jurors were drawn. The objection, if it had any validity, should have been urged at the trial; it comes too late after verdict. The object of the law is to secure honest and intelligent men for the trial, and it is of no practical consequence in what order or at what time during the term they are summoned. It would be productive of great hardship to permit a second trial upon a ground so technical and unsubstantial. Unless the irregularity complained of in the formation of the jury goes to the merits of the trial, or leads to the inference of improper influence upon their conduct, their verdict should not be disturbed. King v. Hart, 4 Barn. & Ald. 430; United States v. Gilbert, 2 Sum. 19; Fed. Cas. No. 15204; People v. Ransom, 7 Wend. 417; Amherst v. Hadley, 1 Pick. (Mass.) 38; Commonwealth v. Justices of Court of Sessions, 5 Mass. 435. In Page v. Inhabitants of Danvers, 7 Met. (Mass.) 327, it was objected that certain of the jurors who sat in the case were not selected in conformity with law, and were not qualified to act, and this fact the parties had for the first time learned since the trial and decision; but the court, per Shaw, C. J., said: "If there was any irregularity in the manner of selecting the jury, and if this would have been good ground of exception, if seasonably taken, still it came too late, after proceeding to trial. The ground is, not that the jurors were interested or prejudiced, or otherwise personally improper, but that there was a mere irregularity, not apparently affecting the merits. Such an objection, if available at all, must be seasonably taken. This results from strong considerations of policy and expediency, rendering it an imperative rule of practice." Thrall v. Smiley, 9 Cal. 537.

§ 226. Of drawing and summoning jurors to attend forthwith. Whenever jurors are not drawn or summoned to attend any court of record or

session thereof, or a sufficient number of jurors fail to appear, such court may order a sufficient number to be forthwith drawn and summoned to attend the court, or it may, by an order entered in its minutes, direct the sheriff, or an elisor chosen by the court, forthwith to summon so many good and lawful men of the county, or city and county, to serve as jurors, as may be required, and in either case such jurors must be summoned in the manner provided in the preceding section.

Elisor. Appointment of, on foreclosure of mortgage. See post, § 726.

Legislation § 226. 1. Enacted March 11, **1872**, and then read: "Whenever jurors are not drawn and summoned to attend any court of record, or a sufficient number of jurors fail to appear, such court may, in its discretion, order a sufficient number to be forthwith drawn and summoned to attend such court; or it may, by an order entered on its minutes, direct the sheriff of the county forthwith to summon so many good and lawful men of his county to serve as jurors as the case may require. And in either case such jurors must be summoned in the manner provided by the preceding section."

2. Amended by Code Amdts. **1873–74**, p. 288, (1) changing the word "such" to "the," in the words "attend the court"; (2) adding the words "an elisor selected by the court, or," before "the sheriff"; and (3) changing the word "his" to "the," in words "men of the county."

3. Amended by Code Amdts. **1880**, p. 48.

Elisor. An elisor is a person appointed to serve process or return a jury, when the sheriff and the coroner are incompetent (Bruner v. Superior Court, 92 Cal. 239; 28 Pac. 341); but, unless both are disqualified, the court has no power to appoint an elisor (Wilson v. Roach, 4 Cal. 362; People v. Fellows, 122 Cal. 233; 54 Pac. 830; People v. Vasquez, 9 Cal. App. 545; 99 Pac. 982); and before appointing an elisor, the court should require a showing that both are disqualified (Bruner v. Superior Court, 92 Cal. 239; 28 Pac. 341; People v. Irwin, 77 Cal. 494; 20 Pac. 56; People v. Yeaton, 75 Cal. 415; 17 Pac. 544); but if it is admitted that the sheriff is disqualified, and the coroner has acted on the jury of inquest, an elisor must be appointed (People v. Sehorn, 116 Cal. 503; 48 Pac. 495); and also where the sheriff is an interested party and there is no coroner (Pacheco v. Hunsacker, 14 Cal. 120), and also where the coroner is unable to act by reason of sickness. People v. Ebanks, 117 Cal. 652; 40 L. R. A. 269; 49 Pac. 1049. The sheriff being disqualified, his deputies are likewise disqualified. People v. Le Doux, 155 Cal. 535; 102 Pac. 517.

Special venire. Where a sufficient number of jurors fail to appear, of those summoned and returned according to law, the court may fill the panel, by special venire, from the body of the county (Levy v. Wilson, 69 Cal. 105; 10 Pac. 272; People v. Vincent, 95 Cal. 425; 30 Pac. 581; People v. Hickman, 113 Cal. 80; 45 Pac. 175; People v. Durrant, 116 Cal. 179; 48 Pac. 75; People v. Sehorn, 116 Cal. 503; 48 Pac. 495); and it is immaterial whether the order for the special venire is made before or after the commencement of the sitting of the court (People v. Williams, 43 Cal. 344; People v. Ah Chung, 54 Cal. 398); and any objection to the order directing the jury to be summoned must be made by challenge to the panel. People v. Kelly, 46 Cal. 355. The court has discretion to order a jury drawn from the box, or to issue a special venire (Levy v. Wilson, 69 Cal. 105; 10 Pac. 272; People v. Leonard, 106 Cal. 302; 39 Pac. 617; People v. Sehorn, 116 Cal. 503; 48 Pac. 495), and it is no ground of objection that the regular jury was not exhausted. People v. Durrant, 116 Cal. 179; 48 Pac. 75; People v. Sehorn, 116 Cal. 503; 48 Pac. 495. While the better practice would be to fill the panel from the jury-box in such cases (Levy v. Wilson, 69 Cal. 105; 10 Pac. 272; People v. Suesser, 142 Cal. 354; 75 Pac. 1093), yet it is not even an irregularity to order a special venire. Leahy v. Southern Pacific R. R. Co., 65 Cal. 150; 3 Pac. 622; People v. Prather, 134 Cal. 436; 66 Pac. 589, 863. The court also has power to direct a special venire, where the jurors, though drawn, have not been summoned (People v. Devine, 46 Cal. 45; People v. Vincent, 95 Cal. 425; People v. Sehorn, 116 Cal. 503; 48 Pac. 495), and where no list of persons to serve during the year has been made by the board of supervisors. People v. Durrant, 116 Cal. 179; 48 Pac. 75; People v. Sehorn, 116 Cal. 503; 48 Pac. 495; People v. Prather, 134 Cal. 436; 66 Pac. 589, 863. As the matter of excusing jurors is largely in the discretion of the court, too great liberality in excusing them does not affect the regularity of the special venire. People v. Hickman, 113 Cal. 80; 45 Pac. 175.

§ 227. Of summoning jurors to complete a panel. When there are not competent jurors enough present to form a panel the court may direct the sheriff, or an elisor chosen by the court, to summon a sufficient number of persons having the qualifications of jurors to complete the panel from the body of the county, or city and county, and not from the bystanders; and the

sheriff or elisor shall summon the number so ordered accordingly and return the names to the court.

Legislation § 227. **1.** Enacted March 11, **1872** (based on Practice Act, § 589), and then read: "When there are not competent jurors enough present to form a panel, the court may direct the sheriff or other proper officer to summon a sufficient number of persons, having the qualification of jurors, to complete the panel, from the body of the county and not from the bystanders, and the sheriff must summon the number so ordered, accordingly, and return the names to the court."

2. Amended by Code Amdts. **1873–74**, p. 288, (1) changing the words "or other proper officer" to "or an elisor selected by the court," and (2) adding the words "or elisor" before "must summon."

3. Amended by Code Amdts. **1880**, p. 48.

Special venire to complete panel. See note ante, § 226.

CODE COMMISSIONERS' NOTE. See notes to §§ 214 and 225, ante.

§ 228. **Compensation of elisor.** An elisor who shall, by order of a court of record, summon persons to serve as jurors, shall be entitled to a reasonable compensation for his services, which must be fixed by the court and paid out of the county, or city and county treasury, and out of the general fund thereof.

Legislation § 228. **1.** Added by Code Amdts. **1875–76**, p. 88, and read as at present, except that (1) the word "the" was used before "order," and (2) the section ended with the words "paid out of the county treasury."

2. Amended by Code Amdts. **1880**, p. 49.

ARTICLE VI.

OF SUMMONING JURORS FOR COURTS NOT OF RECORD.

§ 230. Jurors for justices' or police courts.
§ 231. How to be summoned.
§ 232. Officer's return.

§ 230. **Jurors for justices' or police courts.** When jurors are required in any of the justices' courts, or in any police or other inferior court, they shall, upon order of the justice, or any one of the justices where there is more than one, or of the judge thereof, be summoned by the sheriff, constable, marshal, or policeman of the jurisdiction.

Legislation § 230. **1.** Enacted March 11, **1872**, and then read: "When jurors are required in any police or justice's court, they must, upon the order of the judge or justice thereof, be summoned by the sheriff, marshal, policeman, or constable of the jurisdiction."

2. Amended by Code Amdts. **1880**, p. 49, to read as at present, except that (1) it had the word "the" before "order," and (2) the word "of" was printed "if" before the words "the judge."

3. Amended by Stats. **1907**, p. 680; the code commissioner saying in his note, "The amendment consists in changing the word 'if' to 'of' to correct an error."

By whom summoned. It is the duty of the justice or judge ordering the jury to say, in the first instance, by whom it shall be summoned; and any error therein is not jurisdictional. Wittman v. Police Court, 145 Cal. 474; 78 Pac. 1052.

§ 231. **How to be summoned.** Such jurors must be summoned from the persons competent to serve as jurors, residents of the city and county, township, city, or town in which such court has jurisdiction, by notifying them orally that they are summoned, and of the time and place at which their attendance is required.

Legislation § 231. **1.** Enacted March 11, **1872**, and then read: "Such jurors must be summoned from the persons resident of the city or township, competent to serve as jurors, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required."

2. Amended by Code Amdts. **1880**, p. 49.

§ 232. **Officer's return.** The officer summoning such jurors shall, at the time fixed in the order for their appearance, return it to the court with a list of the persons summoned indorsed thereon.

Legislation § 232. **1.** Enacted March 11, **1872**, and then read: "The officer summoning such jurors must, at the time fixed in the order for their appearance, return it, with a list of the persons summoned indorsed thereon."

2. Amended by Code Amdts. **1880**, p. 49.

ARTICLE VII.

OF SUMMONING JURIES OF INQUEST.

§ 235. How to be summoned.

§ 235. How to be summoned. Juries of inquest shall be summoned by the officer before whom the proceedings in which they are to sit are to be had, or by any sheriff, constable, or policeman, from the persons competent to serve as jurors, resident of the county, or city and county, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required.

Legislation § 235. **1.** Enacted March 11, **1872**, and then read: "Juries of inquest must be summoned by the officer before whom the proceedings are had, or any sheriff, policeman, or constable, from the persons resident of the county competent to serve as jurors, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required."

2. Amended by Code Amdts. **1880**, p. 49.

ARTICLE VIII.

OBEDIENCE TO SUMMONS, HOW ENFORCED.

§ 238. Attachment and fine.

§ 238. Attachment and fine. Any juror summoned, who willfully and without reasonable excuse fails to attend, may be attached and compelled to attend; and the court may also impose a fine not exceeding fifty dollars, upon which execution may issue. If the juror was not personally served, the fine must not be imposed until upon an order to show cause an opportunity has been offered the juror to be heard.

Legislation § 238. **1.** Enacted March 11, **1872**; based on Stats. 1863, p. 630.

2. Amended by Code Amdts. **1880**, p. 49, changing the words "one hundred dollars" to "fifty dollars."

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 630.

ARTICLE IX.

OF IMPANELING GRAND JURIES.

§ 241. Grand juries, when and by whom impaneled.
§ 242. How constituted.
§ 243. Manner of impaneling prescribed in Penal Code.

§ 241. Grand juries, when and by whom impaneled. Every superior court, whenever in the opinion of the court the public interest requires it, must make and file with the county clerk, an order directing a jury to be drawn, and designate the number, which, in case of a grand jury, shall not be less than twenty-five nor more than thirty. In all counties there shall be at least one grand jury drawn and impaneled in each year. Such order must designate the time at which the drawing will take place. The names of such jurors shall be drawn, the list of names certified and summoned, as provided for drawing and summoning trial jurors; and the names of any persons drawn, who may not be impaneled upon the grand jury, may be again placed in the grand-jury box.

Summoning grand jury. Const., art. i, § 8.

Legislation § 241. **1.** Enacted March 11, **1872**, and then read: "At the opening of each regular term of the county court (unless otherwise directed by the judge), and as often thereafter as to the judge may seem proper, a grand jury may be impaneled."

2. Amended by Code Amdts. **1880**, p. 50, to read: "Every superior court, whenever in the opinion of the court the public interests may require it, must make and file with the county clerk of their respective counties an order directing a jury to be drawn, and designating the number which, in case of a grand jury, shall not be less than twenty-five nor more than thirty. In all counties having less than three superior judges there shall be one grand jury drawn and impaneled in each year, and in all counties having three or more superior judges there shall be two grand juries drawn and impaneled in each year. Such order must designate the time at which the drawing will take place. The names of such jurors shall be drawn, the list of names certified

and summoned as provided for drawing and summoning trial jurors; and the names of any persons drawn who may not be impaneled upon the grand jury may be again placed in the 'jury-box.'"

3. Amended by Stats. **1881**, p. 71, (1) transposing the words "may" and "must" in the second line, thus changing the words to "must require it, may make" (sic); (2) inserting "court" between the words "superior judges," in both instances; and (3) inserting "grand" before "jury-box," in last line.

4. Amended by Stats. **1901**, p. 122; unconstitutional. See note ante, § 5.

5. Amended by Stats. **1905**, p. 139.

Impanelment. A grand jury impaneled in accordance with this section and § 226, ante, is valid. People v. McDonnell, 47 Cal. 134; Levy v. Wilson, 69 Cal. 105; 10 Pac. 272. The grand jury was formerly a part of the old county court system. Halsey v. Superior Court, 152 Cal. 71; 91 Pac. 987.

Time of drawing, and official existence. The time of drawing and of the official existence of the grand jury is not fixed. In re Gannon, 69 Cal. 541, 545; 11 Pac. 240. A grand jury, regularly impaneled and organized, does not become discharged, by operation of law, by the mere selection, listing, and returning of the grand jurors for the succeeding year. Halsey v. Superior Court, 152 Cal. 71; 91 Pac. 987.

§ 242. **How constituted.** When, of the persons summoned as grand jurors and not excused, nineteen are present, they shall constitute the grand jury. If more than nineteen of such persons are present, the clerk shall write their names on separate ballots, which he must fold so that the names cannot be seen, place them in a box, and draw out nineteen of them, and the persons whose names are on the ballots so drawn shall constitute the grand jury. If less than nineteen of such persons are present, the panel may be filled as provided in section two hundred and twenty-six of this code. And whenever, of the persons summoned to complete a grand jury, more shall attend than are required, the requisite number shall be obtained by writing the names of those summoned and not excused on ballots, depositing them in a box, and drawing as above provided.

Legislation § 242. **1.** Enacted March 11, **1872** (based on Stats. 1863, p. 634), and then read: "When, of the jurors summoned, not less than thirteen nor more than fifteen attend, they shall constitute the grand jury. If more than fifteen attend, the clerk must call over the list summoned, and the fifteen first answering shall constitute the grand jury. If less than thirteen attend, the panel may be filled to fifteen as provided in section two hundred and twenty-six."

2. Amended by Code Amdts. **1875–76**, p. 88, to read as at present, except that (1) in the first line the word "persons" was changed from "jurors," and the words "as grand jurors" were added after "summoned"; (2) the words "clerk shall" were changed from "clerk must"; and (3) the words "of this code" were added after "section two hundred and twenty-six."

3. Amended by Code Amdts. **1880**, p. 50.

Special venire to complete panel. For any defect in the original panel, a special venire may be ordered (Levy v. Wilson, 69 Cal. 105; 10 Pac. 272); and where the impanelment differs only in form from the requirements of the statute, it will not vitiate a panel as made up finally from a special venire. People v. Prather, 134 Cal. 436; 66 Pac. 589, 863; People v. Leonard, 106 Cal. 302; 39 Pac. 617.

Number of grand jurors. Where nineteen persons are present, they constitute a grand jury, and should the number be less, the panel may be filled by special venire. Bruner v. Superior Court, 92 Cal. 239; 28 Pac. 341. The number of grand jurors, prior to the amendment of this section in 1876, was not less than thirteen nor more than fifteen. People v. Hunter, 54 Cal. 65.

§ 243. **Manner of impaneling prescribed in Penal Code.** Thereafter such proceedings shall be had in impaneling the grand jury as are prescribed in part two of the Penal Code.

Formation of grand jury. See Pen. Code, §§ 894–901.

Legislation § 243. **1.** Enacted March 11, **1872**.

2. Re-enacted by Code Amdts. **1880**, p. 50, in amending Part I.

ARTICLE X.

OF IMPANELING TRIAL JURIES IN COURTS OF RECORD.

§ 246. Clerk to call list of jurors summoned.
§ 247. Manner of impaneling prescribed in part two.
§ 248. Counties having more than one judge.

§ 246. **Clerk to call list of jurors summoned.** At the opening of court on the day trial jurors have been summoned to appear, the clerk shall call the names of those summoned, and the court may then hear the excuses of

jurors summoned. The clerk shall then write the names of the jurors present and not excused upon separate slips or ballots of paper, and fold such slips so that the names are concealed, and there, in the presence of the court, deposit the slips or ballots in a box, which must be kept sealed or locked until ordered by the court to be opened.

Legislation § 246. 1. Enacted March 11, **1872**, and read as at present, except that (1) the word "shall," after "clerk," was changed from "must," in both instances; (2) the words "there," before "in the presence," was changed from "then"; and (3) it did not contain the words "or locked," after the word "sealed."

2. Amended by Code Amdts. **1880**, p. 50.

All names must be placed in the jury-box. The names of all jurors must be put in the jury-box at the beginning of the impanelment of the jury, unless some of the jurors are actually engaged in deliberating upon a verdict at the time; and when discharged from that verdict, it is the duty of the clerk to return their names to the jury-box, and if this is not done, it is the duty of the court to discharge those jurors who have already been sworn on such latter jury and commence the impanelment anew. People v. Edwards, 101 Cal. 543; 36 Pac. 7.

§ 247. Manner of impaneling prescribed in part two. Whenever thereafter a civil action is called by the court for trial, and a jury is required, such proceedings shall be had in impaneling the trial jury as are prescribed in part two of this code. If the action be a criminal one, the jury shall be impaneled as prescribed in the Penal Code.

Formation of jury.
1. **In civil action.** See post, §§ 600–604.
2. **Criminal cases.** See Pen. Code, §§ 1055–1089.

Legislation § 247. 1. Enacted March 11, **1872**, and then read: "When thereafter an action is called for trial by the court, such proceedings shall be had in impaneling the trial jury as are prescribed in Part II of this code."

2. Amended by Code Amdts. **1880**, p. 51.

General examination of jurors. See note ante, § 198.

§ 248. Counties having more than one judge. In any county having two or more judges of the superior court, a separate panel of jurors may be drawn, summoned and impaneled for each judge, or one panel may be drawn, summoned and impaneled by any one of the judges for use in the trial of cases before any two or more of the judges, as occasion may require. In such counties, when a panel of jurors is in attendance for service before one or more of the judges, whether impaneled for common use or not, the whole or any number of the jurors from such panel may be required to attend and serve in the trial of cases, or to complete a panel, or jury, before any other of the judges. If one of the judges has a separate panel of jurors, no part thereof shall, without his consent, be taken to serve before another judge.

Legislation § 248. Added by Stats. **1907**, p. 680; the code commissioner saying, "A new section settling the practice with reference to panels of jurors in the superior court in counties having two or more judges of that court."

Box must be full. A defendant in a criminal case is entitled to have the jury-box full before exercising his peremptory challenges; and the panel, if incomplete, may be completed from the trial-jury panel summoned in another department of the same superior court. People v. Loomer, 13 Cal. App. 654; 110 Pac. 466.

ARTICLE XI.

OF IMPANELING TRIAL JURIES IN COURTS NOT OF RECORD.

§ 250. Proceedings in forming jury.
§ 251. Manner of impaneling.

§ 250. Proceedings in forming jury. At the time appointed for a jury trial in justices', police, or other inferior courts, the list of jurors summoned must be called, and the names of those attending and not excused must be written upon separate slips of paper, folded so as to conceal the names, and placed in a box, from which the trial jury must be drawn.

Legislation § 250. 1. Enacted March 11, 1872 (based on Practice Act, § 588), and then read: "At the time appointed for a jury trial, in police or justices' courts, the list of jurors summoned must be called, and the names of those attending must be written upon separate slips of paper, folded so as to conceal the names, and placed in a box, from which the trial jury may be drawn."

2. Amended by Code Amdts. 1880, p. 51.

§ 251. Manner of impaneling. Thereafter, if the action is a criminal one, the jury must be impaneled as provided in the Penal Code; if a civil one, as provided in part two of this code.

Similar provision. See ante, § 247.

Legislation § 251. 1. Enacted March 11, 1872.

2. Re-enacted by Code Amdts. 1880, p. 51, in amending Part I.

ARTICLE XII.

OF IMPANELING JURIES OF INQUEST.

§ 254. Manner of impaneling.

§ 254. Manner of impaneling. The manner of impaneling juries of inquest is prescribed in the provisions of the different codes relating to such inquests.

Legislation § 254. 1. Enacted March 11, 1872, and then read: "The mode and manner of impaneling juries of inquest are provided for in the provisions of the different codes relating to such inquests."

2. Amended by Code Amdts. 1880, p. 51.

CODE COMMISSIONERS' NOTE. The commissioners reported the preceding chapter as a substitute for the then existing statutes on the same subject. We had a jury law applicable to thirty-three counties; another, entirely different in its provisions, applicable to sixteen counties; and still another, differing from both, applicable to San Francisco alone (Stats. 1861, p. 573; Stats. 1863, p. 630; Stats. 1864, p. 524); and various statutes of local application.

CHAPTER II.

COURT COMMISSIONERS.

§ 258. Appointment and qualifications.
§ 259. Powers of court commissioners.

§ 258. Appointment and qualifications. The superior court of every city and county in the state may appoint six commissioners, to be designated each as "court commissioner" of such city and county; and the superior court of every other county in the state may appoint one commissioner, to be designated as "court commissioner" of such county. Such commissioners shall be citizens of the United States, and residents of the city and county, or county, in which they are appointed, and hold offices during the pleasure of the courts appointing them.

Court commissioners. See Const., art. vi, § 14.

Legislation § 258. 1. Enacted March 11, 1872 (based on Stats. 1863, p. 338; Stats. 1864, p. 229), and then read: "The district courts may appoint, for each county of their respective districts, a commissioner, to be designated as 'court commissioner' of the county. If portions of a single county are assigned to different districts, then a commissioner may be appointed to reside in each portion of the county thus assigned."

2. Amended by Code Amdts. 1880, p. 51.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 338; Stats. 1864, p. 229.

§ 259. Powers of court commissioners. Every court commissioner shall have power:

1. To hear and determine ex parte motions for orders and writs, except orders or writs of injunction in the superior court of the county, or city and county, for which he is appointed; provided, that he shall have power to hear and determine such motions only in the absence or inability to act of the judge or judges of the superior court of the county, or city and county;

2. To take proof and report his conclusions thereon as to any matter of fact other than an issue of fact raised by the pleadings, upon which information is required by the court; but any party to the proceedings may except

to such report within five days after written notice that the same has been filed, and may argue his exceptions before the court on giving notice of motion for that purpose;

3. To take and approve bonds and undertakings whenever the same may be required in actions or proceedings in such superior courts, and to examine the sureties thereon when an exception has been taken to their sufficiency, and to administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this state; or in any matter or proceeding whatever, and to take acknowledgments and proof of deeds, mortgages, and other instruments requiring proof or acknowledgment for any purpose under the laws of this state;

4. To charge and collect the same fees for the performance of official acts as are now or may hereafter be allowed by law to notaries public in this state for like services; provided, that this subdivision shall not apply to any services of such commissioner, the compensation for which is expressly fixed by law;

5. To provide an official seal, upon which must be engraved the words "court commissioner" and the name of the county, or city and county, in which said commissioner resides;

6. To authenticate with his official seal his official acts.

Judicial powers, persons having, order enforced before. Ante, § 128, subd. 2.

References and trials by referees. See post, §§ 638 et seq.

Subd. 4. Fees of notaries public. See Pol. Code, § 798.

Justices of the peace and court commissioners are the only judicial officers authorized to receive fees. Const., art. vi, § 15.

Subd. 5. Official seals, defined. See ante, § 14.

Legislation § 259. 1. Enacted March 11, **1872** (based on Stats. 1863, p. 338; Stats. 1864, p. 229), and then read: "Every such commissioner has power: 1. To hear and determine ex parte motions for orders and writs (except orders or writs of injunction) in the district and county courts of the county for which he is appointed; 2. To take proof and report his conclusions thereon, as to any matter of fact (other than an issue of fact raised in the pleadings), upon which information is required by the court; but any party to the proceedings may except to such report within four days after written notice that the same has been filed, and may argue his exceptions before the court, on giving notice of motion for that purpose; 3. To take and approve bonds and undertakings whenever the same may be required in actions or proceedings in such district and county courts, and to examine the sureties thereon when an exception has been taken to their sufficiency, and to administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this state, or in any matter or proceeding whatever."

2. Amended by Code Amdts. **1877–78**, p. 98, to read as at present, except that (1) the introductory paragraph, "Every court commissioner shall have power," evidently through some error, was omitted; (2) in subd. 1, (a) the words "superior court" were then printed "district and county courts," (b) and the words "or city and county," before "for which," had not then been added; (3) in subd. 2, the words "five days" were printed "four days"; (4) in subd. 3, the words "superior courts" were then printed "district and county courts"; (5) in subd. 4, the word "now" was not used before "expressly"; and (6) subd. 5 then read: "5. To provide, at the expense of the proper county, an official seal, upon which must be engraved the arms of this state, the words 'court commissioner,' and the name of the county in which such commissioner resides."

3. Amended by Code Amdts. **1880**, p. 51.

Power of court commissioner. The power of a court commissioner cannot be enlarged by consent. Jackson v. Puget Sound Lumber Co., 123 Cal. 97; 55 Pac. 788.

Ex parte motions. The court commissioner has no power to hear a motion (Quiggle v. Trumbo, 56 Cal. 626), or to make an order in reference to the dissolution of an injunction, unless the court refers such motion to him. Stone v. Bunker Hill Copper etc. Mining Co., 28 Cal. 497.

Trial of issue. The court commissioner, as such, has no authority to try an issue of fact raised in the proceedings (Jackson v. Puget Sound Lumber Co., 123 Cal. 97; 55 Pac. 788); but the taking of an account by reference in an action for an accounting, where the issue is the plaintiff's right to an accounting, is not a trial of an issue, within the meaning of the code. Harris v. San Francisco Sugar Refining Co., 41 Cal. 393.

Approval of bonds. The court commissioner has no power to approve the bond of a receiver, whom he was without jurisdiction to appoint. Quiggle v. Trumbo, 56 Cal. 626.

Administration of oaths. This is a general authority given to executive and judicial officers, and cannot be limited by judicial construction to particular kinds of oaths. Haile v. Smith, 128 Cal. 415; 60 Pac. 1032.

Acknowledgments. Acknowledgments may be taken before the commissioner. Malone v. Bosch, 104 Cal. 680; 38 Pac. 516; People v. Pacific Improvement Co., 130 Cal. 442; 62 Pac. 739.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 338; Stats. 1864, p. 229.

Subd. 1. "Except orders, or writs of injunction," the court commissioner has no jurisdiction to hear motions relative to the dissolution of an injunction. Stone v. Bunker Hill Copper etc. Mining Co., 28 Cal. 497. Whether an appeal may be taken from an order of a court commissioner dissolving an injunction, without first applying to the district court to correct the error, was a question stated by the court, but not decided. Id. It was held, that under the Practice Act, § 195, as it existed before the code (compare § 661 of this code), the court commissioner was authorized to extend the time for filing the statement on motion for new trial, twenty days in addition to the five or ten days given by statute.

Commissioners in equity were purposely omitted by the legislature.

TITLE IV.

MINISTERIAL OFFICERS OF COURTS OF JUSTICE.

Chapter I. Of Ministerial Officers Generally. § 262.
II. Secretaries and Bailiffs of the Supreme Court. §§ 265, 266.
III. Phonographic Reporters. §§ 268–274b.

CHAPTER I.

OF MINISTERIAL OFFICERS GENERALLY.

§ 262. Election, terms, powers, and duties, where prescribed.

§ 262. Election, terms, powers, and duties, where prescribed. The modes and times of election, terms, powers, and duties of the attorney-general, clerk of the supreme court, reporter of the decisions of the supreme court, clerks, sheriffs, and coroners, are prescribed in the Political and Penal Codes.

Attorney-general. See Pol. Code, §§ 470 et seq.
Clerk of supreme court. Pol. Code, §§ 749 et seq.
Reporter of supreme court decisions. Pol. Code, §§ 771 et seq.
County clerks. Pol. Code, §§ 4178, 4179.
Sheriffs. Pol. Code, §§ 4157 et seq.; Pen. Code, §§ 1216 et seq., 1601 et seq.
Coroners. Pol. Code, §§ 4143 et seq.; Pen. Code, § 1510.

Legislation § 262. 1. Enacted March 11, **1872.**
2. Amended by Code Amdts. **1880,** p. 52, adding the words (1) "and times," (2) "terms," and (3) "decisions of the," where they are now printed.

CODE COMMISSIONERS' NOTE. For duties of attorney-general, see Pol. Code, § 470; clerk of supreme court, see Pol. Code, § 750; reporter of supreme court, see Pol. Code, § 771; clerks, see Pol. Code, §§ 4204, 4205; and sheriffs, see Pol. Code, § 4176; Pen. Code, §§ 1216 et seq., and §§ 1601 et seq.; coroners, see Pol. Code, §§ 4285–4290, inclusive; Pen. Code, § 1510.

CHAPTER II.

SECRETARIES AND BAILIFFS OF THE SUPREME COURT.

§ 265. Appointment.
§ 266. Tenure of office, and duties.

§ 265. Appointment. The justices of the supreme court may appoint two secretaries and two bailiffs, who shall be citizens of the United States and of this state.

Legislation § 265. 1. Enacted March 11, **1872,** and then read: "The justices of the supreme court may appoint a secretary and bailiff."
2. Amended by Code Amdts. **1880,** p. 53.

§ 266. Tenure of office, and duties. The secretaries and bailiffs shall hold their offices at the pleasure of the justices, and shall perform such duties as may be required of them by the court or any justice thereof.

Legislation § 266. 1. Enacted March 11, **1872,** and as then enacted the words "secretaries and bailiffs shall hold" read "secretary and bailiff hold," and "shall perform" read "must perform."
2. Amended by Code Amdts. **1880,** p. 53.

CHAPTER III.

PHONOGRAPHIC REPORTERS.

§ 268. Phonographic reporters for supreme court, where provided for.
§ 269. Phonographic reporters for superior courts, their appointment, and duties.
§ 270. Qualifications and test of competency. Pro tempore reporters.
§ 271. Attention to duties. Reporters pro tempore.
§ 272. Oath of office.
§ 273. Reports prima facie correct statements.
§ 274. Fees.
§ 274a. Transcribing of opinions and instructions, a county charge.
§ 274b. Fees and compensation of phonographic reporter.

§ 268. Phonographic reporters for supreme court, where provided for. Phonographic reporters for the supreme court are provided for in part three of the Political Code.

Phonographic reporters of supreme court.
1. Salary. See Pol. Code, § 739.
2. Appointment. See Pol. Code, § 769.
3. Duty. See Pol. Code, § 770.

Legislation § 268. Added by Code Amdts. 1880, p. 53, in amending Part I.

§ 269. Phonographic reporters for superior courts, their appointment, and duties. The judge or judges of any superior court in the state may appoint a competent phonographic reporter, or as many such reporters as there are judges, to be known as official reporter or reporters of such court, and to hold office during the pleasure of the judge or judges appointing them. Such reporter, or any one of them, where there are two or more, must, at the request of either party, or of the court in a civil action or proceeding, and on the order of the court, the district attorney, or the attorney for defendant in a criminal action or proceeding, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, all arraignments, pleas and sentences of defendants in criminal cases, the arguments of the prosecuting attorney to the jury, and all statements and remarks made and oral instructions given by the judge; and if directed by the court, or requested by either party, must, within such reasonable time after the trial of such case as the court may designate, write out the same, or such specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing-machine, and certify to the same as being correctly reported and transcribed, and when directed by the court, file the same with the clerk of the court.

Legislation § 269. **1.** Enacted March 11, **1872** (based on Stats. 1865–66, p. 232), and then read: "The judge of each judicial district, and each county judge, may appoint a competent shorthand reporter, to hold office during the pleasure of the judge, and who must, at the request of either party, or in the discretion of the court, in a civil action or proceeding, or criminal action or proceeding, on the order of the court, the district attorney, or the counsel for the defendant, take down in shorthand all the testimony, the rulings of the court, the exceptions taken, and oral instructions given, and must, within five days, or such reasonable time after the trial of such case as the court may designate, write out the same in plain, legible, longhand writing, verify and file it, together with the original shorthand writing, with the clerk of the court in which the case was tried. The reporter of the county court of the city and county of San Francisco is ex officio reporter of the probate and municipal criminal court of such city and county."

2. Amended by Code Amdts. **1873–74**, p. 288, to read: "The judge of each court of record may appoint a competent shorthand reporter, to hold office during the pleasure of the judge. Such reporter must, at the request of either party, or of the court, in a civil action or proceeding, and on the order of the court, the district attorney, or the counsel for the defendant in a criminal action or proceeding, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, and oral instructions given, and if directed by the court, or requested by either party, must within such reasonable time after the trial of such case as the court may designate, write out the same in plain legible longhand, and verify and file it with the clerk of the court in which the case was tried."

3. Amended by Code Amdts. **1880**, p. 53, to read: "The judge or judges of any superior court in the state may appoint a competent phonographic reporter, or as many such reporters as there are judges, to be known as official reporter or reporters of such court, and to hold office during the pleasure of the judge or judges appointing them. Such reporter, or any one of them, where there are two or more, shall, at the request of either party, or of the court in a civil action or proceeding, and on the order of the court, the district attorney, or the attorney for defendant in a criminal action or proceeding, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, and oral instructions given, and if directed by the court, or requested by either party, shall, within such reasonable time after the trial of such case as the court may designate, write out the same in plain, legible longhand, and verify and file it with the clerk of the court in which the case was tried."

4. Amendment by Stats. **1901**, p. 122; unconstitutional. See note ante, § 5.

5. Amended by Stats. **1903**, p. 234.

Transcription of notes. The reporter is not required by this section to transcribe or file his notes, until his proper fees therefor have been paid or tendered (Richards v. Superior Court, 145 Cal. 38; 78 Pac. 244); but on an appeal taken under §§ 953a and 953b, post, it is his duty to make the transcript within twenty days after notice of appeal has been given, and to file such transcript with the clerk; he cannot refuse to file it because his fees are unpaid, as he has recourse against the sureties on the undertaking given to secure the payment of such fees. Gjurich v. Fieg, 160 Cal. 331; 116 Pac. 745. The official stenographer need not report the arguments of counsel. Koyer v. Willmon, 12 Cal. App. 87; 106 Pac. 599.

Stenographer for grand jury. The grand jury is authorized to appoint, as stenographic reporter, any competent stenographer; the one selected need not be the official reporter of the superior court, appointed under this section and §§ 270, 271, post. People v. Delhantie, 163 Cal. 461; 125 Pac. 1066.

CODE COMMISSIONERS' NOTE. Stats. 1866, p. 232. See Stats. 1871–72, p. 400, "An act providing for the appointment of a reporter in the first judicial district of this state," approved March 16, 1872.

§ 270. Qualifications and test of competency. Pro tempore reporters. No person shall be appointed to the position of official reporter of any court in this state, except upon satisfactory evidence of good moral character, and without being first examined as to his competency by at least three members of the bar practicing in said court, such members to be designated by the judge or judges of said court. The committee of members of the bar so designated shall, upon the request of the judge or judges of said court, examine any person as to his qualifications whom said judge or judges may wish to appoint as official reporter; and no person shall be appointed to such position upon whose qualifications such committee shall not have reported favorably. The test of competency before such committee shall be as follows: the party examined must write in the presence of said committee at the rate of at least one hundred and fifty words per minute, for five consecutive minutes, upon matter not previously written by or known to him, immediately read the same back to the committee, and transcribe the same into longhand writing, plainly and with accuracy. If he pass such test satisfactorily, the committee shall furnish him with a written certificate of that fact, signed by at least a majority of the members of the committee, which certificate shall be filed among the records of the court. No official reporter of any court or official reporter pro tempore shall be competent to act as official reporter in any court of the state who shall have failed and neglected to transcribe any notes in a criminal proceeding or action on appeal and which notes are required by law to be by him transcribed until he shall have fully completed and filed all transcription of his notes in any criminal case on appeal required by law to be by him transcribed.

Legislation § 270. 1. Added by Code Amdts. **1873–74**, p. 402, as § 272, and then read: "No person shall be appointed to, or be retained in the position of official reporter of any court in this state, without being first examined as to his competency by at least three members of the bar practicing in said court, such members to be designated by the judge of said court. The committee so selected shall, upon the request of the judge of said court, examine any person as to his qualifications whom said judge may wish to appoint or retain as official reporter, and no person shall be appointed to, or retained in such position, whose qualifications said committee shall not have reported favorably. The test of competency before such committee shall be as follows: The party examined must write, in the presence of said committee, at the rate of at least one hundred and forty words per minute for five consecutive minutes, upon matter not previously written by him, and transcribe the same into longhand writing with accuracy. If he pass said test satisfactorily, the committee shall furnish him with a written certificate of that fact, signed by at least a majority of the members of the committee, which certificate shall be filed in the records of the court."

2. Amended by Code Amdts. **1880**, p. 53, and renumbered § 270, and then read as amendment of 1909, except for the addition made in that year.

3. Amended by Stats. **1909**, c. 708, adding the final sentence, beginning "No official reporter."

The original § 270 (now § 273, post) made the transcript of the evidence by the reporter prima facie evidence of its correctness.

Qualifications of reporter. This section relates exclusively to the official reporter of superior courts, and has no application to reporters appointed by magistrates at preliminary examination; in that case the only provision is, that he be competent. People v. McIntyre, 127 Cal. 423; 59 Pac. 779; People v. Nunley, 142 Cal. 441; 76 Pac. 45.

Stenographer for grand jury. See note ante, § 269.

§ 271. Attention to duties. Reporters pro tempore. The official reporter of any superior court shall attend to the duties of his office in person, except when excused for good and sufficient reason by order of the court, which order shall be entered upon the minutes of the court. Employment in his professional capacity elsewhere shall not be deemed a good and sufficient reason for such excuse. When the official reporter of any court has been excused in the manner provided in this section, the court may appoint an official reporter pro tempore, who shall perform the same duties and receive the same compensation during the term of his employment as the official reporter.

Legislation § 271. 1. Added by Code Amdts. 1873–74, p. 401, as § 273.

2. Amended by Code Amdts. 1880, p. 54, and (1) renumbered § 271; (2) in the first line, the words "superior court shall" changed from "district court must"; (3) the article "a" omitted before "good and"; (4) the words "judge of said" omitted before "court may appoint"; and (5) the phraseology after the word "compensation" changed from "as the official reporter, and whose report shall have the same legal effect as the report of the official reporter."

The original § 271 (now § 274, post) was based on Stats. 1868, p. 45, and provided for compensation of reporters, and was repealed by Code Amdts. 1880, p. 21, in amending Part I.

Duties of reporter. The only duties devolving upon an official reporter are prescribed by this section. People v. Lon Me, 49 Cal. 353; Charnock v. Rose, 70 Cal. 189; 11 Pac. 625.

Application of section. See note ante, § 270.

§ 272. **Oath of office.** The official reporter of any court, or official reporter pro tempore, shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office.

Legislation § 272. 1. Added by Code Amdts. 1873–74, p. 403, as § 274, and then read: "The official reporter of any court, or official reporter pro tem., must, before entering on the duties of his office, take and subscribe the following oath: 'I do swear (or affirm) that I will support the constitution of the United States and the constitution of the state of California, and that I will faithfully discharge the duties of the office of official reporter (or official reporter pro tem.) of the —— court, according to the best of my ability.'"

2. Amended by Code Amdts. 1880, p. 54, and renumbered § 272.

The original § 272 (now § 270, ante) provided for examination of official reporters.

Application of section. This section has no application to a reporter appointed by a magistrate at a preliminary examination. People v. Nunley, 142 Cal. 441; 76 Pac. 45.

Oath of office. The official reporter is an officer of the court, and is required to take the oath of office (Ex parte Reis, 64 Cal. 233; 30 Pac. 806); which oath is for all cases, and not for a particular case, in which he may take, transcribe, and certify the testimony and proceedings. Reid v. Reid, 73 Cal. 206; 14 Pac. 781.

§ 273. **Reports prima facie correct statements.** The report of the official reporter, or official reporter pro tempore, of any court, duly appointed and sworn, when transcribed and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie evidence of such testimony and proceedings.

Legislation § 273. 1. Enacted March 11, 1872, as § 270 (based on Stats. 1865–66, p. 232), and read: "His report, written out in longhand writing, is prima facie a correct statement of the evidence and proceedings."

2. Amended by Code Amdts. 1873–74, p. 400, to read: "The report of the official reporter, when appointed and acting in accordance with the provisions of sections two hundred and seventy-two and two hundred and seventy-three of this code, and not otherwise, written out in longhand writing, and certified as being a correct transcript of the testimony and proceedings in the case, shall be prima facie a correct statement of such testimony and proceedings."

3. Amended by Code Amdts. 1880, p. 54, renumbered § 273, and then read: "The report of the official reporter, or official reporter pro tempore, of any court, duly appointed and sworn, when written out in longhand writing and certified as being a correct transcript of the testimony and proceedings in the case, shall be prima facie a correct statement of such testimony and proceedings."

4. Amendment by Stats. 1901, p. 123; unconstitutional. See note ante, § 5.

5. Amended by Stats. 1903, p. 234.

Transcription is evidence. Prior to the amendment of this section, the reporter's notes were not prima facie evidence of the testimony, but only "prima facie a correct statement" of the evidence. Reid v. Reid, 73 Cal. 206; 14 Pac. 781; Estate of Benton, 131 Cal. 472; 63 Pac. 775. Before the enactment of the code, by Stats. 1867–68, p. 425, the reporter's notes were made prima facie evidence in felony cases, in certain counties; it was, however, held that such notes were only prima facie evidence in the court where taken, and could not be considered in the supreme court. People v. Woods, 43 Cal. 176; People v. Armstrong, 44 Cal. 326. In criminal actions, a transcript of the reporter's notes, certified and filed as provided by law for the authentication of the testimony of witnesses at preliminary examinations, is placed upon the same footing as depositions, and is admissible in like cases. People v. Grundell, 75 Cal. 301; 17 Pac. 214; Mattingly v. Nichols, 133 Cal. 332; 65 Pac. 748. In the settlement of a bill of exceptions, the judge may insert therein the instructions to the jury as actually given by him, if the reporter's transcription thereof is incorrect, as such transcription is only prima facie evidence. People v. Cox, 76 Cal. 281; 18 Pac. 332; People v. Leary, 105 Cal. 486; 39 Pac. 24. No further identification is required, where it is admitted that the transcript contains a correct statement of the testimony. Carpenter v. Ashley, 15 Cal. App. 461; 115 Pac. 268.

CODE COMMISSIONERS' NOTE. Stats. 1866, p. 232.

§ 274. **Fees.** For his services, the official reporter shall receive the following fees, except in counties where a statute provides otherwise:

For reporting testimony and proceedings, ten dollars per day, which amount, when more than one case is reported in one day, must be apportioned by the court between the several cases;

For transcription, for one copy, twenty cents per hundred words; for two copies made at one time, fifteen cents each per hundred words; for three copies made at one time, eleven cents each per hundred words; for four copies made at one time, nine cents each per hundred words; and for five or more copies made at one time, eight cents each per hundred words.

In criminal cases, the fees for reporting and for transcripts ordered by the court to be made must be paid out of the county treasury upon the order of the court; provided, that when there is no official reporter in attendance, and a reporter pro tempore is appointed, his reasonable expenses for traveling and detention must be fixed and allowed by the court and paid in like manner.

In civil cases, the fees for reporting and for transcripts ordered by the court to be made must be paid by the parties in equal proportions, and either party may, at his option, pay the whole thereof; and, in either case, all amounts so paid by the party to whom costs are awarded must be taxed as costs in the case. The fees for transcripts and copies ordered by the parties must be paid by the party ordering the same. No reporter must be required to perform any service in a civil case until his fees therefor have been paid to him or deposited with the clerk of the court.

Legislation § 274. 1. Enacted March 11, **1872**, as § 271 (based on Stats. 1867–68, p. 455), and then read: "He shall receive, as compensation for his services, not exceeding ten dollars per day for taking notes, and not exceeding twenty cents per folio for transcription, to be paid by the party in whose favor judgment is rendered, and be taxed up by the clerk of the court as costs against the party against whom judgment is rendered. In case of failure of a jury to agree, the plaintiff must pay the reporter's fees accrued to that time. In cases where a transcript may be required by the court, the expense thereof must be paid equally by the respective parties to the action, or either of them, in the discretion of the court; and no verdict or judgment can be entered up, except the court shall otherwise order, until the reporter's fees are paid, or a sum equivalent thereto deposited with the clerk of the court. In no case shall the transcript be paid for unless specially ordered by either plaintiff or defendant, or by the court; nor shall the reporter be required, in any civil case, to transcribe his notes until the compensation per folio therefor be tendered to him or deposited in court for that purpose. In criminal cases, when the testimony has been taken down by order of the court, the compensation of the reporter must be fixed by the court and paid out of the treasury of the county in which the case is tried, upon the order of the court."

2. Amended by Code Amdts. **1873–74**, p. 400, to read: "The official reporter shall receive as compensation for his services in civil proceedings, not exceeding ten dollars per day for taking notes, and not exceeding twenty cents per hundred words for transcription. The shorthand notes so taken shall, immediately after the cause is submitted, be filed with the clerk; but, for the purpose of writing out said notes, the reporter may withdraw the same for a reasonable time. The reporter's fees for taking notes in civil cases shall be paid by the party in whose favor judgment is rendered, and shall be taxed up by the clerk of the court as costs against the party against whom judgment is rendered. In case of the failure of a jury to agree, the plaintiff must pay the reporter's fees, for per diem, and for transcription ordered by plaintiff, which have accrued up to the time of the discharge of the jury. In cases where a transcript has been ordered by the court, the expense thereof must be paid equally by the respective parties to the action, or either of them, in the discretion of the court; and no verdict or judgment can be entered up, except the court shall otherwise order, until the reporter's fees are paid, or a sum equivalent thereto deposited with the clerk of the court. In no case shall a transcript be paid for, unless ordered by either the plaintiff or defendant, or by the court, nor shall the reporter be required, in any civil case, to transcribe his notes, until the compensation therefor be tendered him, or deposited in court for that purpose. The party ordering the reporter to transcribe any portion of the testimony or proceedings, shall pay the fees of the reporter therefor. In criminal cases, when the testimony has been taken down upon the order of the court, the compensation of the reporter must be fixed by the court, and paid out of the treasury of the county in which the case is tried, upon the order of the court."

3. Amended by Code Amdts. **1880**, p. 54, renumbered § 274, and then read: "The official reporter shall receive, as compensation for his services in civil actions and proceedings for taking notes, a sum, to be fixed by the court or a judge thereof, not exceeding ten dollars per day, and for transcription a sum to be in like manner fixed not exceeding twenty cents per hundred words; provided, that when said reporter performs services in taking notes in more than one cause on the same day, the court or judge thereof shall apportion to per diem allowed between the several actions or proceedings in which such notes are taken. The shorthand notes so taken shall immediately after the cause is submitted be filed with the clerk, but for the purpose of writing out said notes the reporter may withdraw the same for a reasonable time. The reporter's fees for taking notes in civil cases shall be paid by the party in whose favor judgment is rendered, and shall be taxed up by the clerk of the court as costs against the party against whom judgment is rendered. In case of the failure of a jury to agree, the plaintiff must pay the reporter's fees for time

employed, and for transcription ordered by plaintiff which have accrued up to the time of the discharge of the jury. In cases where a transcript has been ordered by the court, the fees for transcription must be paid by the respective parties to the action in equal proportions, or by such of them and in such proportions as the court, in its discretion, may order; and no verdict or judgment shall be entered up, except the court shall otherwise order, until the reporter's fees are paid, or a sum equivalent thereto deposited with the clerk of the court therefor. In no case shall a transcript be paid for unless ordered either by the plaintiff or defendant, or by the court; nor shall the reporter be required in any civil case to transcribe his notes until the fees therefor be tendered him, or a sufficient amount to cover the same be deposited in court for that purpose. The party ordering the reporter to transcribe any portion of the testimony or proceedings, must pay the fees of the reporter therefor. In criminal cases, when the testimony has been taken down or transcribed upon the order of the court, the fees of the reporter shall be certified by the court, and paid out of the treasury of the county, or city and county, in which the case is tried, upon the order of the court."

4. Amended by Stats. **1885**, p. 218, to read: "The official reporter shall receive as compensation for his services a monthly salary, to be fixed by the judge by an order duly entered on the minutes of the court, which salary shall be paid out of the treasury of the county in the same manner and at the same time as the salaries of county officers; provided, that said monthly salary for each superior court, or department thereof, shall not exceed the following maximum: In counties having a population of one hundred thousand and over, three hundred dollars; in counties having a population less than one hundred thousand and exceeding fifty thousand, two hundred and seventy-five dollars; in counties having a population less than fifty thousand and exceeding thirty thousand, two hundred and fifty dollars; in counties having a population less than thirty thousand and exceeding twenty thousand, two hundred and twenty-five dollars; in counties having a population less than twenty thousand and exceeding fifteen thousand, two hundred dollars; in counties having a population less than fifteen thousand and exceeding twelve thousand five hundred, one hundred and seventy-five dollars; in counties having a population less than twelve thousand five hundred and exceeding ten thousand, one hundred and fifty dollars; in counties having a population less than ten thousand and exceeding seven thousand five hundred, one hundred and twenty-five dollars; in counties having a population less than seven thousand five hundred and exceeding five thousand, one hundred dollars; and in counties having a population less than five thousand, seventy-five dollars; and, further provided, that where both parties to a civil action, or either, require the testimony therein to be written out in full as the trial progresses, the official reporter shall be allowed the extra expense occasioned, to be audited by the judge, and paid by the party or parties ordering the same; provided further, that in departments of superior courts devoted exclusively to the trial of criminal cases, the judge of the court shall, in addition, fix and allow a reasonable compensation for the transcription of testimony, to be paid out of the county, or city and county, treasury, upon the order of the judge. In civil cases in which the testimony is taken down by the official reporter, each party shall pay a per diem of two dollars and fifty cents before judgment or verdict therein is entered; and where the testimony is transcribed, the party or parties ordering it shall pay ten cents per folio for such transcription on delivery thereof; said per diem and transcription fees to be paid to the clerk of the court, and by him paid into the treasury of the county, and such portion as shall be paid by the prevailing party may be taxed as costs in the case. Where there is no regular official reporter, and one is appointed temporarily by the court, he shall receive for his services and expenses of attendance, in lieu of the salary provided in this section, such compensation as the court may deem reasonable; to be paid, if a civil case, by both parties, or either of them, as the judge shall direct; and, if a criminal case, to be paid out of the treasury of the county on the order of the court."

5. Amendment by Stats. **1901**, p. 123; unconstitutional. See note ante, § 5.

6. Amended by Stats. **1903**, p. 234.

Compensation of reporters. The amendment of 1885 provided that the compensation of a reporter should be by monthly salary, fixed by the judge; but this was declared unconstitutional, as imposing legislative functions upon the judiciary. Smith v. Strother, 68 Cal. 194; 8 Pac. 852; McAllister v. Hamlin, 83 Cal. 361; 23 Pac. 357; Dwyer v. Parker, 115 Cal. 544; 47 Pac. 372; Taylor v. McConigle, 120 Cal. 123; 52 Pac. 159; Los Angeles v. Pomeroy, 124 Cal. 597; 57 Pac. 585; Stevens v. Truman, 127 Cal. 155; 59 Pac. 397. The provision in the County Government Act, fixing the salary of official reporters, is invalid, for the reason that it is not germane to the title of the act, which was to create a "uniform system of county government." Pratt v. Browne, 135 Cal. 649; 67 Pac. 1082.

Official reporters. The term "official reporters" means, only reporters appointed by the superior court, and acting under their oath of office. Fox v. Lindley, 57 Cal. 650.

Transcription ordered by court. Where the transcript is ordered by the court, it must be paid for by the losing party, and becomes a necessary part of the disbursements of the successful party. Barkly v. Copeland, 86 Cal. 483; 25 Pac. 1, 405. Money paid to the reporter for a transcript of the evidence is not recoverable as costs, unless made under an order directing the transcription. Blair v. Brownstone Oil etc. Co., 20 Cal. App. 316; 128 Pac. 1022.

Transcription in criminal cases. The compensation for transcribing in criminal actions is to be fixed by the court, and is a charge against the county. Ex parte Reis, 64 Cal. 233; 30 Pac. 806; Boys' and Girls' Aid Society v. Reis, 71 Cal. 627; 12 Pac. 796; McAllister v. Hamlin, 83 Cal. 361; 23 Pac. 357; Ex parte Widber, 91 Cal. 367; 27 Pac. 733. The superior court has power to fix and order paid the compensation of a reporter in criminal actions (Ex parte Reis, 64 Cal. 233; 30 Pac. 806), and to compel the treasurer, by mandamus, to pay the same, wherever funds are applicable to the payment thereof (Stevens v. Truman, 127 Cal. 155; 59 Pac. 397; Ex parte Reis, 64 Cal. 233; 30 Pac. 806; Boys' and Girls' Aid Society v. Reis, 71 Cal. 627; 12 Pac. 796; Ex parte Widber, 91 Cal. 367; 27 Pac. 733); and if, in a proper case, the treasurer refuses to pay, he is guilty of contempt (Ex parte Truman, 124 Cal. 387; 57 Pac. 223); but this section does not authorize the payment of traveling expenses of the reporter.

Irrgang v. Ott, 9 Cal. App. 440; 99 Pac. 528. A statute authorizing a stenographer, in counties of the twenty-seventh class, to be appointed by the judge of the superior court to report the proceedings at preliminary examinations and coroner's inquests, at a salary of one hundred dollars per month, to be paid out of the county treasury, is unconstitutional. Payne v. Murphy, 18 Cal. App. 446; 123 Pac. 350. The power of the legislature to classify counties by population is a power to be exercised for the limited purpose of enabling the compensation of the various officers to be fixed and adjusted. Id.

Transcription ordered by district attorney. This section is not a limitation on the power of the district attorney to order a transcript of the testimony in criminal cases at the expense of the county. Yolo County v. Joyce, 156 Cal. 429; 105 Pac. 125.

Transcription ordered by party. Where the transcription is ordered by a party, and furnished at an agreed rate of compensation, it cannot be taxed as costs (Los Angeles v. Pomeroy, 124 Cal. 597; 57 Pac. 585; and see Blair v. Brownstone Oil etc. Co., 20 Cal. App. 316; 128 Pac. 1022); nor has the court power to tax, as costs, fees for the transcription of testimony, where the judgment was reversed on appeal upon the judgment roll, without such transcription having been used, and where the appeal from the order denying a motion for a new trial was not perfected. Bank of Woodland v. Hiatt, 59 Cal. 580.

Fee for transcription. See note ante, § 269.

Per diem of reporters. The court has no power, by rule, to require the per diem of reporters to be paid, one half by each of the parties, before the witnesses are examined (Meacham v. Bear Valley Irrigation Co., 145 Cal. 606; 68 L. R. A. 600; 79 Pac. 281); nor, prior to the amendment of 1903, where the reporter voluntarily took the testimony without requiring a deposit, had the judge power, after judgment entered, to refuse to settle the case until the reporter's fees were paid. James v. McCann, 93 Cal. 513; 29 Pac. 49.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 455.

§ 274a. Transcribing of opinions and instructions, a county charge. Judges of the superior court may have any opinion given or rendered by such judge in the trial of any action or proceeding, pending in such court, or any instructions to be given by such court to the jury, or any necessary order, petition, citation, commitment or judgment in any insanity proceeding, probate proceeding, proceeding concerning new or additional bonds of county officials, or juvenile court proceeding, taken down in shorthand and transcribed by the official reporter of such court; but if there be no official reporter for such court, then by any competent stenographer or typewriter, the cost thereof to be a legal charge against the county, payable out of the general fund in the county treasury in the same manner as any other claims against the county, when properly approved by the said judge so ordering the same.

Legislation § 274a. 1. Added by Stats. **1907**, p. 15.

2. Amended by Stats. **1911**, p. 499, adding in the first clause, after "given by such court to the jury," "or any necessary order, petition, citation, commitment or judgment in any insanity proceeding, probate proceeding, proceeding concerning new or additional bonds of county officials, or juvenile court proceeding."

§ 274b. Fees and compensation of phonographic reporter. The phonographic reporter shall receive for making an original and three carbon copies of the portion of his notes ordered transcribed, or transcribed in any criminal case after sentence, the sum of thirty cents per folio; provided, however, that he shall receive no compensation for transcribing any notes unless the same shall have been transcribed by him within the time provided by law.

Legislation § 274b. Added by Stats. **1909**, c. 708.

TITLE V.

PERSONS SPECIALLY INVESTED WITH MINISTERIAL POWERS RELATING TO COURTS OF JUSTICE.

Chapter I. Attorneys and Counselors at Law. §§ 275–299.
II. Other Persons Invested with Such Powers. § 304.

CHAPTER I.

ATTORNEYS AND COUNSELORS AT LAW.

§ 275. Who may be admitted as attorneys.
§ 276. Qualifications.
§ 277. Certificate of admission and license.
§ 278. Oath.
§ 279. Attorneys of other states.
§ 280. Roll of attorneys.
§ 280a. Effect of diploma granted by Hastings College of the Law.
§ 280b. Admission to practice law on diplomas from certain universities.
§ 281. Penalty for practicing without license.
§ 282. Duties.
§ 283. Authority.
§ 284. Change of attorney.
§ 285. Notice of change.
§ 286. Death or removal of attorney.
§ 287. Causes for which court may remove attorney.
§ 288. Conviction of felony.
§ 289. Proceedings for removal or suspension.
§ 290. Accusation.
§ 291. Verification.
§ 292. Citation of accused by publication.
§ 293. Appearance.
§ 294. Objections to accusation.
§ 295. Demurrer.
§ 296. Answer.
§ 297. Trial.
§ 298. Reference to take depositions.
§ 299. Judgment.

§ 275. Who may be admitted as attorneys. Any citizen or person resident of this state, who has bona fide declared his or her intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all the courts of this state. All persons are attorneys of the supreme court who were on the first day of January, eighteen hundred and eighty, entitled to practice in the court superseded thereby.

Attorneys.
1. **Admission of.** See sections immediately following.
2. **Judges must have been admitted to practice.** See ante, §§ 156, 157.
3. **Removal of.** See post, § 287.

Judicial and ministerial officers.
1. Not to practice. See Pol. Code, § 4121; ante, § 171.
2. Nor to have a partner. Ante, § 172.

Legislation § 275. 1. Enacted March 11, **1872** (based on Stats. 1851, p. 48), and then read: "Any white male citizen, or white male person, resident of this state, who has bona fide declared his intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all courts of this state."

2. Amended by Code Amdts. **1877–78**, p. 99, to read as at present, except that the last sentence was not then added.

3. Amended by Code Amdts. **1880**, p. 55, adding the last sentence.

Citizenship. An alien, by filing his declaration of intention, does not thereby become a citizen (Orosco v. Gagliardó, 22 Cal. 83); but a bona fide declaration of intention entitles a person to be admitted to practice law (Alpers v. Hunt, 86 Cal. 78; 21 Am. St. Rep. 17; 9 L. R. A. 483; 24 Pac. 846), provided such person is eligible to citizenship. In re Hong Yen Chang, 84 Cal. 163; 24 Pac. 156. Females are now entitled to be admitted as attorneys, upon the same terms as males. Foltz v. Hoge, 54 Cal. 28.

Right to practice law. The right to practice law is not a natural or a constitutional right, but a statutory privilege, subject to legislative control (Application of Guerrero, 69 Cal. 88; 10 Pac. 261; Ex parte Fraser, 54 Cal. 94; Ex parte Johnson, 62 Cal. 263); neither is it a contract, nor a property right, within the meaning of the constitution. Cohen v. Wright, 22 Cal. 293; Ex parte Yale, 24 Cal. 241; 85 Am. Dec. 62.

Admission to the bar. The authority to admit to practice in all courts of the state is placed wholly within the jurisdiction of the district courts of appeal, and the supreme court has no authority to admit attorneys to practice. Application of Mock, 146 Cal. 378; 80 Pac. 64. The terms "attorney," "counselor," "attorney at law," are synonymous. Pittman v. Carstenbrook, 11 Cal. App. 224; 104 Pac. 699. Licenses granted to attorneys, under this section and § 276, post, are not affected by the failure of the legislature to define the qualifications that they must possess. (Obiter.) Ex parte McManus, 151 Cal. 331; 90 Pac. 702.

Residence as affecting right to admission to bar. See note 17 Ann. Cas. 878.

CODE COMMISSIONERS' NOTE. Stats. 1851, p. 48. An attorney at law is not a person holding an office of public trust, within the prohibitory clause of § 3, art. ii, of the constitution. The right to practice law is a statutory privilege, subject to the control of the legislature. The right to practice law is not "property" nor a "contract," within the meaning of the constitution. The state may exclude from its courts those who are disloyal to the Federal as well as to the state government. An oath may be required by the legislature of the state from an attorney purging himself of certain imputed crimes. See Cohen v. Wright, 22 Cal. 293; Ex parte Yale, 24 Cal. 241; 85 Am. Dec. 62.

§ 276. Qualifications. Every applicant for admission as an attorney and counselor must produce satisfactory testimonials of a good moral character and undergo a strict examination in open court as to his qualifications by the justices of one of the district courts of appeal.

Examination of candidates. See supreme court rule 1.

Legislation § 276. 1. Enacted March 11, **1872,** and then read: "Every applicant for admission as attorney and counselor must produce satisfactory testimonials of good moral character, and undergo a strict examination, in open court, as to his qualifications, by the justices of the supreme court."

2. Amended by Code Amdts. **1873–74,** (1) p. 404 (March 18, 1874), (a) adding the article "an" before "attorney," in the first line, (b) omitting the commas before and after the words "in open court," and (c) adding "provided, that the several county and district courts of this state may admit applicants to practice as attorneys and counselors in their respective courts"; (2) again amended, p. 289 (March 24, 1874), (a) omitting the article "an" before "attorney," (b) adding the words "except as provided in section two hundred and seventy-nine" before the word "undergo," and (c) striking out the proviso; (3) again amended, p. 404 (March 30, 1874), making the section read exactly as amended March 18, 1874.

3. Amended by Code Amdts. **1880,** p. 55, (a) omitting the commas before and after the words "in open court," (b) adding, after "supreme court," the words "or by the justices sitting and holding one of the departments thereof," and (c) making the proviso read, "provided, that the several superior courts of this state may admit applicants to practice as attorneys and counselors in their respective courts, but not elsewhere, upon strict examination in open court, and not otherwise, and upon satisfactory testimonials of good moral character."

4. Amended by Stats. **1895,** p. 56, (1) adding "a" before "good moral"; (2) striking out the proviso added in 1880, and substituting therefor, "or by not less than three of the supreme court commissioners, to be designated and appointed by the chief justice of the supreme court to conduct publicly the examination; such commissioners to report the results of the examination to the supreme court for final action."

5. Amended by Stats. **1905,** p. 5.

Application of section. See note ante, § 275.

Legislative or judicial power to determine qualifications for admission to bar. See note 10 Ann. Cas. 198.

CODE COMMISSIONERS' NOTE. See note to preceding section.

§ 277. Certificate of admission and license. If, upon examination, he is found qualified, the district court of appeal, before which he is examined, shall admit him as an attorney and counselor in all the courts of this state, and shall direct an order to be entered to that effect upon its records, and that a certificate of such record be given to him by the clerk of the court, which certificate shall be his license. Every person admitted to practice by a district court of appeal, either upon examination, or upon the production of a license from another state, as provided in section two hundred and seventy-nine of this code, may practice as an attorney in all of the courts of this state, including the supreme court; and every person now entitled to practice in the supreme court of this state may practice as an attorney in any district court of appeal.

Disbarment. See post, §§ 287 et seq.

Legislation § 277. 1. Enacted March 11, **1872,** and then read: "If, upon examination, he is found qualified, the court must admit him as attorney and counselor in all the courts of this state, and shall direct an order to be entered to that effect upon its records, and that a certificate of such record be given to him by the clerk of the court, which certificate is his license."

2. Amended by Code Amdts. **1880,** p. 56, (1) changing the words between "qualified" and "and counselor" to read, "the supreme court, or department thereof before which he is examined, shall admit him as an attorney," and (2) changing the word "is," in last line, to "shall be."

3. Amended by Stats. **1905,** p. 5.

Admission and license. The district courts of appeal have exclusive power to admit attorneys of other states and countries to practice in all the courts of this state. Application of Mock, 146 Cal. 378; 80 Pac. 64.

CODE COMMISSIONERS' NOTE. Section 4 of the Statute of 1861, p. 40, was as follows:

"Sec. 4. The district court and county courts of this state are authorized to admit, as attorney and counselor in their respective courts, any white male citizen, or white male person, who has bona fide declared his intention to become a citizen, of the age of twenty-one years, and of good moral character, who possesses the requisite qualifications, on similar testimonials and like examinations as are required by the preceding section for admission by the supreme court, and may direct their clerks to give a certificate of such admission, which certificate shall be a license to practice in such courts."

The intended effect of the omission of this section from the code was to prevent district and county courts from admitting persons as attorneys and counselors in those courts. The supreme court is alone vested with power to admit attorneys and counselors to practice in any court of this state.

§ 278. Oath. Every person on his admission must take an oath to support the constitution of the United States and the constitution of the state of California, and to faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability. A certificate of such oath must be indorsed upon the license.

Duties. See post, § 282.

Legislation § 278. 1. Enacted March 11, **1872,** and then read: "Every person, on his admission, must take an oath to support the constitution of the United States and of this state, and to discharge the duties of attorney and counselor to the best of his knowledge and ability. A certificate of such oath must be indorsed on the license."

2. Amended by Code Amdts. **1880,** p. 56.

Oath of attorney. The taking of an oath is a prerequisite for admission to practice as an attorney and counselor at law, and a violation of such oath is cause for disbarment (Disbarment of Cowdery, 69 Cal. 32; 58 Am. Rep. 545; 10 Pac. 47); and by this section it is incumbent upon an attorney to take an oath to support the constitution of the United States and of this state. Alpers v. Hunt, 86 Cal. 78; 21 Am. St. Rep. 17; 9 L. R. A. 483; 24 Pac. 846; Sears v. Starbird, 75 Cal. 91; 7 Am. St. Rep. 123; 16 Pac. 531. The payment of the Federal license tax does not entitle an attorney to practice without the oath prescribed by statute. Cohen v. Wright, 22 Cal. 293.

CODE COMMISSIONERS' NOTE. Cohen v. Wright, 22 Cal. 293; Ex parte Yale, 24 Cal. 241; 85 Am. Dec. 62.

§ 279. Attorneys of other states. Every citizen of the United States, or person resident of this state, who has, bona fide, declared his intention to become a citizen in the manner required by law, who has been admitted to practice law in the highest court of a sister state, or of a foreign country, where the common law of England constitutes the basis of jurisprudence, may be admitted to practice in all the courts of this state, by any district court of appeal, upon the production of his or her license, and satisfactory evidence of good moral character; but the court may examine the applicant as to his or her qualifications.

"State" and "United States," defined. Ante, § 17, subd. 7.

Legislation § 279. 1. Enacted March 11, **1872,** and then read: "Every white male citizen of the United States, who has been admitted to practice law in the highest court of a sister state, may be admitted to practice in the courts of this state, upon the production of his license and satisfactory evidence of good moral character; but the court may examine the applicant as to his qualifications."

2. Amended by Code Amdts. **1877–78,** p. 99, to read: "Every citizen of the United States who has been admitted to practice law in the highest court of a sister state, may be admitted to practice in the courts of this state, upon the production of their license, and satisfactory evidence of good moral character, but the court may examine the applicant as to their qualifications."

3. Amended by Code Amdts. **1880,** p. 56, to read as at present, except that (1) commas were not used before and after the words "bona fide," nor (2) the word "all," before "the courts," nor (3) the words "by any district court of appeal."

4. Amended by Stats. **1905,** p. 6.

Admission of attorneys from other jurisdictions. The admission of an attorney, duly admitted to practice in another state, may be made on motion (Case of Lowenthal, 61 Cal. 122); but his personal presence is necessary in court. Ex parte Snelling, 44 Cal. 553. A Mongolian, not being entitled to become a naturalized citizen under the laws of the United States, cannot be admitted to practice in this state, although holding a certificate of admission from another state. In re Hong Yen Chang, 84 Cal. 163; 24 Pac. 156. A practitioner from another state may be examined as to his qualifications, although he has been admitted to practice in the supreme court of the United States, or in the courts of a sister state. Ex parte Snelling, 44 Cal. 553. As a matter of comity, an attorney admitted to practice in another state may be, by the supreme court, permitted to present arguments to it in a particular case, although it has no power to admit him to practice (Application of Mock, 146 Cal. 378; 80 Pac. 64); and a lawyer, duly admitted to practice in another state, who has been accustomed to practice here as a member of the bar, is a de facto officer of the court, and the validity of his acts as such cannot be collaterally attacked. Garrison v. McGowan, 48 Cal. 592.

Evidence of good moral character. Although an attorney was admitted to practice in another state, yet he must furnish to the court, upon his application for admission to practice in this state, satisfactory evidence of his good moral character. Case of Lowenthal, 61 Cal. 122.

CODE COMMISSIONERS' NOTE. [The entire opinion in the case of Ex parte Snelling, 44 Cal. 553.]

§ 280. Roll of attorneys. Every clerk of a district court of appeal shall keep a roll of attorneys and counselors admitted to practice by the court of which he is clerk, which roll must be signed by the person admitted before he receives his license. Every clerk shall, each month, certify to the clerk of the supreme court a list of the persons so admitted during the preceding month, with such other information as appears in regard thereto on his roll, and the clerk of the supreme court shall keep a general roll of all the attorneys admitted to practice.

Attorneys of supreme court. Ante, § 275.

Legislation § 280. 1. Enacted March 11, **1872**, and then read: "Each clerk must keep a roll of attorneys and counselors admitted to practice by the court of which he is clerk, which roll must be signed by the person admitted before he receives his license."

2. Amended by Code Amdts. **1880**, p. 56, changing "Each clerk must" to "Each clerk shall."

3. Amendment by Stats. **1901**, p. 123; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1905**, p. 6.

§ 280a. Effect of diploma granted by Hastings College of the Law. Nothing in this chapter contained shall be construed as a repeal or modification of any existing provision of law relative to the effect of a diploma granted by the Hastings College of the Law.

Legislation § 280a. Added by Stats. **1905**, p. 6.

§ 280b. Admission to practice law on diplomas from certain universities. Any person producing a diploma of graduation from the college of law of the University of Southern California, the Young Men's Christian Association Law College of San Francisco, or the San Francisco Law School, or evidence of having satisfactorily completed the three years' course of study prescribed by the department of law of Leland Stanford Junior University, or the department of jurisprudence of the University of California, or the institute of law of the University of Santa Clara, or the college of law of Saint Ignatius University shall be entitled to a license to practice law in all the courts of this state, subject to the right of the chief justice of the supreme court of the state to order an examination, as in ordinary cases of applicants without such diploma or other evidence.

Legislation § 280b. 1. Added by Stats. **1907**, p. 804, and then read: "The diploma of the students of the University of Southern California College of Law shall entitle the students to whom it is issued to a license to practice in all the courts of this state, without undergoing the examination required by section two hundred and seventy-six of this code."

2. Amended by Stats. **1909**, p. 541, recasting the section.

3. Amended by Stats. **1913**, p. 88, inserting "or the institute of law of the University of Santa Clara."

4. Amended by Stats. **1915**, p. 660, (1) inserting "the Young Men's Christian Association Law College of San Francisco, or the San Francisco Law School"; (2) striking out "law" from the phrase "course of law study prescribed"; (3) inserting "or the college of law of Saint Ignatius University."

§ 281. Penalty for practicing without license. If any person shall practice law in any court, except a justices' court or police court, without having received a license as attorney and counselor, he shall be guilty of a contempt of court.

Contempt. Post, §§ 1209 et seq.
Justice's court practitioners. Ante, § 96.

Legislation § 281. 1. Enacted March 11, **1872**.

2. Amended by Code Amdts. **1880**, p. 56, (1) adding the word "court" after "justice's," and (2) changing "is" to "shall be" before "guilty."

3. Amendment by Stats. **1901**, p. 123; unconstitutional. See note ante, § 5.

CODE COMMISSIONERS' NOTE. Any person may engage in the profession of law. The profession is open to all, and it is simply the right to practice in court which is not permitted, except to those duly qualified. Woods' Case, 1 Hopk. Ch. 7; Cohen v. Wright, 22 Cal. 313.

§ 282. Duties. It is the duty of an attorney and counselor:

1. To support the constitution and laws of the United States and of this state;

2. To maintain the respect due to the courts of justice and judicial officers;

3. To counsel or maintain such actions, proceedings, or defenses only as

appear to him legal or just, except the defense of a person charged with a public offense;

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law;

5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client;

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;

7. Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest;

8. Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed.

Subd. 1. Oath. Ante, § 278.
Subd. 3. Offender, public, defense of. See Pen. Code, § 987.
Subd. 5. Privileged communications. See post, § 1881.

Legislation § 282. 1. Enacted March 11, 1872. 2. Amended by Code Amdts. 1880, p. 56, (1) in subd. 4 omitting "to" before "seek," and substituting for "judges" the words "judge or any judicial officer," and (2) in subd. 7 adding the word "corrupt" before "motive."

To maintain respect due courts. It is made the duty of an attorney to maintain the respect due to courts and judicial officers. Alpers v. Hunt, 86 Cal. 78; 21 Am. St. Rep. 17; 9 L. R. A. 483; 24 Pac. 846; Sears v. Starbird, 75 Cal. 91; 7 Am. St. Rep. 123; 16 Pac. 531. To impugn the motive or purity of a trial judge, in a brief filed in the supreme court on an appeal, is a grave breach of professional propriety, and will be treated by the supreme court as a contempt of the latter court. Sears v. Starbird, 75 Cal. 91; 7 Am. St. Rep. 123; 16 Pac. 531; Disbarment of Philbrook, 105 Cal. 471; 45 Am. St. Rep. 59; 38 Pac. 511, 884; First Nat. Bank v. Superior Court, 12 Cal. App. 335, 349; 107 Pac. 322. To say that the action of the court was "a most covetous and wholly unwarranted usurpation of power," and to characterize it also as "opera bouffe," is highly disrespectful to the court and the judge. First Nat. Bank v. Superior Court, 12 Cal. App. 335; 107 Pac. 322; In re Shay, 160 Cal. 399; 117 Pac. 442. An attorney who contumaciously insists upon maintaining a pleading asserting a claim after he has knowledge that his client has been restrained from so doing, is guilty of a contempt of court. Lake v. Superior Court, 165 Cal. 182; 131 Pac. 371. It is a violation of the oath of counsel, maliciously to invite and procure the publication of false charges against the judge, for the purpose of improperly influencing him or unjustly discrediting his action in a case, and it is a cause for disbarment (In re Collins, 147 Cal. 8; 81 Pac. 220); and it is a violation of his duty, and a contempt of court, to answer as a guardian ad litem in an action, without an order appointing him as such. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. It is also a contempt of court to send accusatory, threatening, or insulting letters to a grand jury, relating to matters which are the subject of their investigations. In re Tyler, 64 Cal. 434; 1 Pac. 884.

Misconduct of attorney as contempt of court. See note post, § 1209.

To maintain only just and legal actions. It is a violation of the duties of an attorney to counsel or maintain such actions or proceedings as do not appear to him to be just and legal. Disbarment of Stephens, 84 Cal. 77; 24 Pac. 46.

To employ only such means as are consistent with the truth. An attorney is bound to employ, for the purpose of maintaining such causes as are confided to him, only such means as are consistent with the truth, and never to seek to mislead the judge, or any other judicial officer, by artifice or false statements of fact or of law. In re Tyler, 64 Cal. 434; 1 Pac. 884; Guardianship of Danneker, 67 Cal. 643; 8 Pac. 514. He is therefore bound to admit the fault of the record, where it is due to a clerical error. Grand Grove v. Garibaldi Grove, 130 Cal. 116; 80 Am. St. Rep. 80; 62 Pac. 486.

To maintain confidence of client. The confidence reposed in an attorney is to be maintained inviolate; this obligation is a very high and stringent one, never to be relaxed, except under very exceptional circumstances; fidelity to his client, under all circumstances, is one of the principal obligations of an attorney. Disbarment of Cowdery, 69 Cal. 32; 58 Am. Rep. 545; 10 Pac. 47. An attorney, in dealing with his client, is bound to the utmost good faith, and the burden of showing that the transaction was fair and reasonable is upon him. Valentine v. Stewart, 15 Cal. 387; Kisling v. Shaw, 33 Cal. 425; 91 Am. Dec. 644; Felton v. Le Breton, 92 Cal. 457; 28 Pac. 490; Cox v. Delmas, 99 Cal. 104; 33 Pac. 836; Disbarment of Danford, 157 Cal. 425, 429; 108 Pac. 322; Cooley v. Miller & Lux, 156 Cal. 510, 523; 105 Pac. 981. An attorney dealing with a client for his own benefit, in regard to property the subject of his employment, is in a hostile attitude to

his client; but he is still bound to the exercise of the utmost good faith, and the burden is upon him to rebut the presumption of undue influence. Beach v. Riley, 20 Cal. App. 199; 128 Pac. 764. The mere fact that the relation of attorney and client existed, and that a claim by the attorney ought to be looked upon with suspicion, will not warrant the appellate court in saying that a verdict sustaining the claim was not justified, where there is strong evidence that there was a consideration therefor. Cousins v. Partridge, 79 Cal. 224; 21 Pac. 745. It is the duty of an attorney, employed to prosecute or defend an action, to communicate to his client any and all information he may acquire in relation to the subject-matter of the suit; he will be presumed to have performed this duty, and any knowledge or notice which comes to him regarding such subject-matter, while acting in such capacity, will be regarded as constructive notice to his client. Bierce v. Red Bluff Hotel Co., 31 Cal. 160; Wittenbrock v. Parker, 102 Cal. 93; 41 Am. St. Rep. 172; 24 L. R. A. 197; 36 Pac. 374; Donald v. Beals, 57 Cal. 399. An attorney, having acted as such for one party to a suit, and having had opportunities to know the facts of his client's cause, cannot go over to the adverse side and render assistance (Valentine v. Stewart, 15 Cal. 387; Disbarment of Cowdery, 69 Cal. 32; 58 Am. Rep. 545; 10 Pac. 47; De Celis v. Brunson, 53 Cal. 372); and having acted as attorney for one side on a former trial, the court will not permit him to act on the other side, on a subsequent trial of the same cause. Weidekind v. Tuolumne County Water Co., 74 Cal. 386; 5 Am. St. Rep. 445; 19 Pac. 173. Where an attorney has merely been consulted, without any retainer, as to his charges for the commencement and prosecution of an action, and his terms have not been accepted by the party, the relation of attorney and client does not exist, and the attorney is at liberty to accept a retainer from the other side (Hicks v. Drew, 117 Cal. 305; 49 Pac. 189); nor does the relation of attorney and client exist, where one, acting as an agent, employs an attorney for another. Porter v. Peckham, 44 Cal. 204.

To preserve secrets. The secrets of the client are to be preserved inviolate by an attorney, where communicated to him in his professional capacity. Valentine v. Stewart, 15 Cal. 387; Gallagher v. Williamson, 23 Cal. 331; 83 Am. Dec. 114; Kisling v. Shaw, 33 Cal. 425; 91 Am. Dec. 644; People v. Atkinson, 40 Cal. 284.

To abstain from offensive personalities. It is the duty of an attorney to abstain from offensive personalities (In re Tyler, 64 Cal. 434; 1 Pac. 884), and to be a paragon of candor, fairness, honor, and fidelity in all his dealings with those who place their trust in his ability and integrity; and he will be held to the full measure of what he ought to be. Sanguinetti v. Rossen, 12 Cal. App. 623, 630; 107 Pac. 560.

To maintain honor or reputation of party or witness. It is the duty of an attorney to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of his cause. In re Tyler, 64 Cal. 434; 1 Pac. 884.

To observe good faith in commencement of actions. An attorney should not encourage the commencement of an action from any corrupt motive, or from passion or interest. Disbarment of Stephens, 84 Cal. 77; 24 Pac. 46.

Defend the cause of the oppressed. An attorney is an officer of the court, and takes his office with all its burdens, as well as with all its rights and privileges; and among the burdens thus assumed is the duty to render professional services, without compensation, to persons accused of crime, who are destitute of means, upon the appointment of the court; and as such services are no charge against a county, the attorney must look to the possible future ability of the parties to compensate him. Rowe v. Yuba County, 17 Cal. 61.

May have interest in result when. A contract for a contingent fee is not contrary to good morals, and is valid (Hoffman v. Vallejo, 45 Cal. 564; Ballard v. Carr, 48 Cal. 74; Howard v. Throckmorton, 48 Cal. 482; Gage v. Downey, 79 Cal. 140; 21 Pac. 527, 855; King v. Gildersleeve, 79 Cal. 504; 21 Pac. 961; Calanchini v. Branstetter, 84 Cal. 249; 24 Pac. 149; Thurber v. Meves, 119 Cal. 35; 50 Pac. 1063; 51 Pac. 536); but it is otherwise where a third party, not an attorney, contracts with an attorney that he shall be employed as counsel in a case, in consideration that the third party shall be paid part of the compensation received by such attorney for his services. Alpers v. Hunt, 86 Cal. 78; 21 Am. St. Rep. 17; 9 L. R. A. 483; 24 Pac. 846.

Contracts for services. Inducing a client to pay him a fee for services which he knows he is not in a position to perform, is a breach of the obligation of fidelity by an attorney. Disbarment of Danford, 157 Cal. 425. The confidential relation does not exist, however, until the contract for services is made. Cooley v. Miller & Lux, 156 Cal. 510, 524; 105 Pac. 981.

Outlays and expenses. In the absence of a special agreement, a client is bound to repay his attorney for all outlays made by him in the payment of the expenses of carrying on the litigation, and an attorney is bound to bear his own personal and traveling expenses. Cooley v. Miller & Lux, 156 Cal. 510; 105 Pac. 981.

Action for services. An attorney may, in proving the value of legal services, include therein the amount of a reasonable

retaining fee, though not mentioned in his complaint. Aydelotte v. Bloom, 13 Cal. App. 56; 108 Pac. 877.

CODE COMMISSIONERS' NOTE. 1. Duties of attorneys and counselors. The provisions of this section are taken substantially from the oath prescribed to advocates by the laws of Geneva. The oath is as follows:

"I swear before God,

"To be faithful to the republic and the canton of Geneva;

"Never to depart from the respect due to the tribunals and authorities;

"Never to counsel or maintain a cause which does not appear to be just or equitable, unless it be the defense of an accused person;

"Never to employ knowingly, for the purpose of maintaining the causes confided to me, any means contrary to truth, and never to seek to mislead the judges by any artifice or false statement of fact or law;

"To abstain from all offensive personality, and to advance no fact contrary to the honor or reputation of the parties, if it be not indispensable to the cause with which I may be charged;

"Not to encourage either the commencement or the continuance of a suit from any motive of passion or interest;

"Not to reject, for any considerations personal to myself, the cause of the weak, the stranger, or the oppressed."

[The remainder of this portion of the note, being the report of the New York code commissioners, is omitted, and in place thereof is substituted the Canons of Ethics of the American Bar Association. This code of professional ethics was adopted by the American Bar Association at Seattle, Washington, August, 1908.]

"I. Preamble. In America, where the stability of courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency, and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the republic, to a great extent, depends upon our maintenance of justice, pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

"II. The canon of ethics. No code or set of rules can be framed which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

"1. The duty of the lawyer to the courts. It is the duty of the lawyer to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

"2. The selection of judges. It is the duty of the bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political, or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office, and not by a desire for the distinction the position may bring to themselves.

"3. Attempts to exert personal influence on the court. Marked attention and unusual hospitality on the part of a lawyer to a judge, uncalled for by the personal relations of the parties, subject both the judge and the lawyer to misconstructions of motive, and should be avoided. A lawyer should not communicate or argue privately with the judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the judge's station, is the only proper foundation for cordial, personal, and official relations between bench and bar.

"4. When counsel for an indigent prisoner. A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

"5. The defense or prosecution of those accused of crime. It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law. The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

"6. Adverse influences and conflicting interests. It is the duty of a lawyer, at the time of retainer, to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel. It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose. The obligation to represent the client with undivided fidelity, and not to divulge his secrets or confidences, forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

"7. Professional colleagues, and conflicts of opinion. A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case. When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted, unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. In this event it is his duty to ask the client to relieve him. Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

"8. Advising upon the merits of a client's cause. A lawyer should endeavor to obtain full knowledge of his client's cause before advising

thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

"9. **Negotiations with opposite party.** A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

"10. **Acquiring interest in litigation.** The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting.

"11. **Dealing with trust property.** Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him.

"12. **Fixing the amount of the fee.** In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable request of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration. In determining the amount of the fee, it is proper to consider: 1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite properly to conduct the cause; 2. Whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; 3. The customary charges of the bar for similar services; 4. The amount involved in the controversy, and the benefits resulting to the client from the services; 5. The contingency, or the certainty of the compensation; and 6. The character of the employment, whether casual or for an established and constant client. No one of these considerations, in itself, is controlling. They are mere guides in ascertaining the real value of the service. In fixing fees it should never be forgotten that the profession is a branch of the administration of justice, and not of mere money-getting trade.

"13. **Contingent fees.** Contingent fees lead to many abuses, and where sanctioned by law should be under the supervision of the court.

"14. **Suing a client for a fee.** Controversies with clients concerning compensation are to be avoided by the lawyer, so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition, or fraud.

"15. **How far a lawyer may go in supporting a client's cause.** Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of the full measure of public esteem and confidence which belongs to the proper discharge of its duties, than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause. It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause. The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within, and not without, the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience, and not that of his client.

"16. **Restraining clients from improprieties.** A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards courts, judicial officers, jurors, witnesses, and suitors. If a client persists in such wrong-doing the lawyer should terminate their relation.

"17. **Ill-feeling and personalities between advocates.** Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel, which cause delay and promote unseemly wrangling should also be carefully avoided.

"18. **Treatment of witnesses and litigants.** A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party, or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

"19. **Appearance of lawyer as witness for his client.** When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument, and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

"20. **Newspaper discussion of pending litigation.** Newspaper publications, by a lawyer, as to pending or anticipated litigation, may interfere with a fair trial in the courts, and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement.

"21. **Punctuality and expedition.** It is the duty of the lawyer not only to his client, but also to the courts and to the public, to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

"22. **Candor and fairness.** The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness. It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that

has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved; or, in those jurisdictions where a side has the opening and closing arguments, to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely. It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes. A lawyer should not offer evidence, which he knows the court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or bystanders. These and all kindred practices are unprofessional and unworthy of an officer of the law, charged, as is the lawyer, with the duty of aiding in the administration of justice.

"23. **Attitude toward jury.** All attempts to curry favor with juries by fawning, flattery, or pretended solicitude for their personal comfort, are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

"24. **Right of lawyer to control the incidents of the trial.** As to incidental matters pending the trial, not affecting the merits of the cause or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement, forcing the trial on a particular day, to the injury of the opposite lawyer, when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross-interrogatories, and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

"25. **Taking technical advantage of opposite counsel. Agreements with him.** A lawyer should not ignore known customs or practice of the bar or of a particular court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing as required by rules of court.

"26. **Professional advocacy other than before courts.** A lawyer, openly, and in his true character, may render professional services before legislative or other bodies, regarding proposed legislation, and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means, other than those addressed to the reason and understanding, to influence action.

"27. **Advertising, direct or indirect.** The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary, simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not, per se, improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection, through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills, or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business, by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

"28. **Stirring up litigation, directly or through agents.** It is unprofessional for a lawyer to volunteer advice to bring a lawsuit except in rare cases, where ties of blood, relationship, or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof, in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action, in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches, or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick, and the injured, the ignorant, or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof, to the end that the offender may be disbarred.

"29. **Upholding the honor of the profession.** Lawyers should expose without fear or favor, before the proper tribunals, corrupt or dishonest conduct in the profession, and should accept without hesitation, employment against a member of the bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the bar against the admission to the profession of candidates unfit or unqualified, because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession, and to improve not only the law, but the administration of justice.

"30. **Justifiable and unjustifiable litigations.** The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the court as to the legal merits of his client's claim. His appearance in court should be deemed equivalent to an assertion on his honor that, in his opinion, his client's case is one proper for judicial determination.

"31. **Responsibility for litigation.** No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer, upon his own responsibility, must decide what business he will accept as counsel, what causes he will bring into court for plaintiffs, what causes he will contest in court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

"32. **The lawyer's duty in its last analysis.** No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law, whose ministers we are,

or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free, and is entitled to advise as to its validity, and as to what he conscientiously believes to be its just meaning and extent. But, above all, a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."

2. **General rights of attorney and client. Counsel fees, etc.** An attorney has a lien for his costs upon a judgment recovered by him, which may be enforced, upon giving notice to the adverse party not to pay the judgment until the amount of the costs be paid; and in some cases, where there has been collusion between the parties to cheat the attorney, the court has required the client to satisfy them. But this practice is confined to some certain and fixed amount allowed to an attorney by statute, and is not extended to cases where an attorney or counselor claims a quantum meruit compensation for his services. In this state we have no statute giving costs to attorneys, and they must consequently recover for their services in the ordinary mode. Ex parte Kyle, 1 Cal. 331. And as to compensation of attorneys, see further, Mansfield v. Dorland, 2 Cal. 507; Carriere v. Minturn, 5 Cal. 435.

3. **Retaining fee in advance.** An attorney is entitled to his retaining fee in advance, unless he stipulates to the contrary. Cavillaud v. Yale, 3 Cal. 108; 59 Am. Dec. 388. In a suit for compensation, as attorney in a certain proceeding, it is not competent to prove the value of the attorney's services in another proceeding. A person who is not a lawyer is an incompetent witness to prove the value of legal services. Hart v. Vidal, 6 Cal. 56. How receivers, authorized to appoint and retain counsel, and to stipulate that the compensation of such counsel shall be left to the discretion of the court, shall provide for the payment of such compensation. See Adams v. Wood, 8 Cal. 306. In suits by attorneys to recover compensation for legal services, unskillful or negligent conduct or the skill employed in the case is an important inquiry. A suit may be won, and yet the attorney be guilty of great negligence, etc. Bridges v. Paige, 13 Cal. 642.

[3a.] **Negligence of or mismanagement by attorney.** What must be shown to establish negligence on part of attorney. Hastings v. Halleck, 13 Cal. 203. Where, through the fault of an attorney, judgment is rendered against the client, the latter has a remedy against the attorney, but the judgment remains undisturbed, unless some fraud or collusion, etc., on the part of the attorney is shown. Sampson v. Ohleyer, 22 Cal. 210, and cases therein cited. As to bargains by an attorney with a client, of advantage to the former, protection of the client in such matters, see Kisling v. Shaw, 33 Cal. 425; 91 Am. Dec. 644. For instances of gross mismanagement by an attorney, see Drais v. Hogan, 50 Cal. 121.

4. **Employing only truthful means. Seeking to mislead judges.** See case of Fletcher v. Daingerfield, 20 Cal. 427.

5. **Must preserve the secrets of his client.** Valentine v. Stewart, 15 Cal. 387; Gallagher v. Williamson, 23 Cal. 331; 83 Am. Dec. 114; Kisling v. Shaw, 33 Cal. 425; 91 Am. Dec. 644; People v. Atkinson, 40 Cal. 284. What are not privileged communications. Hager v. Shindler, 29 Cal. 47; Satterlee v. Bliss, 36 Cal. 489.

6. **Espouse the cause of the defenseless. Defend persons accused of crime.** It is part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means, upon the appointment of the court, when not inconsistent with their obligations to others; and for compensation they must trust to the possible future ability of the parties. Counsel are not considered at liberty to reject, under circumstances of such character, the cause of the defenseless because no provision for their compensation is made by law. Rowe v. Yuba County, 17 Cal. 61.

§ 283. Authority. An attorney and counselor shall have authority:

1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise;

2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

Legislation § 283. 1. Enacted March 11, **1872.** **2.** Amended by Code Amdts. **1880,** p. 57, changing "counselor shall have" from "counselor has."

General authority. The nature of the relation of attorney and client is that of principal and agent; the attorney is the agent of his client for all purposes of conducting the particular litigation (Carter v. Green Mountain Gold Mining Co., 83 Cal. 222; 23 Pac. 317); but his authority is broader than that of an ordinary agent; and because of the particular nature of his duties, he is vested with discretionary power of decision in the management and conduct of the litigation, and may bind his client by consenting to a judgment against him, in the absence of fraud or collusion or insolvency on his own part (Holmes v. Rogers, 13 Cal. 191; Sampson v. Ohleyer, 22 Cal. 200); but the attorney cannot compromise an action, in defiance of the protest of his client in open court. Preston v. Hill, 50 Cal. 43; 19 Am. Rep. 647. An authority peculiar to his character as attorney, in the discharge of his duties and functions, is conferred by this section. Alpers v. Hunt, 86 Cal. 78; 21 Am. St. Rep. 17; 9 L. R. A. 483; 24 Pac. 846. This section refers only to the "steps of an action" after it has been instituted, and pertaining to its conduct; it has no application to a contract made before the commencement of the action. Ephraim v. Pacific Bank, 149 Cal. 222; 86 Pac. 507. So long as the attorney remains of record, his right to manage and control the action cannot be

questioned by the client (Wylie v. Sierra Gold Co., 120 Cal. 485; 52 Pac. 809), and of course the opposite party cannot question it. Board of Commissioners v. Younger, 29 Cal. 147; 87 Am. Dec. 164. An attorney appears in a cause and participates in the proceedings therein by the license of the court, of which he is an officer. Clark v. Willett, 35 Cal. 534. An attorney in fact, who is also an attorney at law, however, has no right to sign a complaint as plaintiff's attorney. Dixey v. Pollock, 8 Cal. 570. A person's authority to enter into a stipulation does not follow from his general retainer as an attorney. Teich v. San José Safe Deposit Bank, 8 Cal. App. 397; 97 Pac. 167. An attorney employed by a person whose property has been stolen, to assist the district attorney in the prosecution of several cases against the alleged thieves, with authority to take such measures as he deems expedient, has power to bind his client by the employment of a detective to seek and obtain evidence in furtherance of the prosecution. Kast v. Miller & Lux, 159 Cal. 723; 115 Pac. 932. In this title and chapter, the term "attorney," "counselor," "attorney at law," are used synonymously. Pittman v. Carstenbrook, 11 Cal. App. 224; 104 Pac. 699.

Manner of exercising authority. The object of this section is, that, whenever an attorney shall enter into an agreement for the purpose of binding his client, there shall be such a record thereof as will preclude any question concerning its character or effect, and that the extent of the agreement may be ascertained by the record; if oral, that it shall be entered in the minutes, and if written, that it shall be filed with the clerk; it is not intended to enlarge or abridge the authority of the attorney, but only to prescribe the manner of its exercise (Smith v. Whittier, 95 Cal. 279; 30 Pac. 529; Preston v. Hill, 50 Cal. 43; 19 Am. Rep. 647; Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074); but it is not intended that every admission or agreement made during the course of the trial shall either be in writing or entered in the minutes; such a literal construction might lead to absurd consequences. Continental Building etc. Ass'n v. Woolf, 12 Cal. App. 725; 108 Pac. 729.

Verbal stipulations. A verbal stipulation by an attorney, made during the progress of a trial, and not entered in the minutes, does not bind the client (Merritt v. Wilcox, 52 Cal. 238); but when entered in the minutes it is binding, and is a part of the judgment roll. Kent v. San Francisco Sav. Union, 130 Cal. 401; 62 Pac. 620. A verbal stipulation, not entered in the minutes nor filed with the clerk, cannot be regarded, except so far as it is admitted by the parties against whom it is sought to be enforced, or has been wholly or in part executed (McLaughlin v. Clausen, 116 Cal. 487; 48 Pac. 487); but a verbal stipulation may be taken into consideration by the court, in the exercise of its discretion, upon a motion to set aside a default, even though it is not entered in the minutes. McGowan v. Kreling, 117 Cal. 31; 48 Pac. 980. "This section does not require the construction, that in no instance shall an agreement, which the attorney may make in behalf of his client, be binding, unless entered in the minutes of the court or filed with the clerk; its provisions have reference to executory agreements, and not to those which have been wholly or in part executed; and it was with reference to oral agreements of an executory character that the court said, in its opinion in Borkheim v. North British etc. Ins. Co., 38 Cal. 623, 'of such agreements, therefore, there can be no specific performance'; if, under the terms of a mutual stipulation which was only verbal, one party has received the advantage for which he entered into it, or the other party has, at his instance, given up some right or lost some advantage, so that it would be inequitable for him to insist that the stipulation was invalid, he will not be permitted to repudiate the obligation of his own agreement upon the ground that it had not been entered in the minutes of the court (Himmelmann v. Sullivan, 40 Cal. 125; Hawes v. Clark, 84 Cal. 272; 24 Pac. 116); if the party admits that he made such verbal stipulation, it will be as binding upon him as if it had been entered in the minutes of the court." Smith v. Whittier, 95 Cal. 279; 30 Pac. 529; Patterson v. Ely, 19 Cal. 28; Reese v. Mahoney, 21 Cal. 305; Johnson v. Sweeney, 95 Cal. 304; 30 Pac. 540; Hearne v. De Young, 111 Cal. 373; 43 Pac. 1108; Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074; McLaughlin v. Clausen, 116 Cal. 487; 48 Pac. 487; Crane v. Crane, 121 Cal. 99; 53 Pac. 433; Coonan v. Loewenthal, 129 Cal. 197; 61 Pac. 940; Daneri v. Gazzola, 139 Cal. 416; 73 Pac. 179. An unauthorized stipulation may be enforced, even if it does not comply with the terms of this section, if it is not forbidden by some other statute or by some principle of law. Wall v. Mines, 130 Cal. 27; 62 Pac. 386. Courts refuse to settle disputes in regard to verbal agreements, or to try collateral issues for the purpose of determining whether any agreement has been made. Johnson v. Sweeney, 95 Cal. 304; 30 Pac. 540; Smith v. Whittier, 95 Cal. 279; 30 Pac. 529; Hearne v. De Young, 111 Cal. 373; 43 Pac. 1108; McLaughlin v. Clausen, 116 Cal. 487; 48 Pac. 487; McGowan v. Kreling, 117 Cal. 31; 48 Pac. 980. Where admissions or stipulations of an attorney in behalf of his client, being yet executory, are denied, the only proof of their validity rests upon a compliance with the code provision, and no other proof can be received (Hearne v. De Young, 11 Cal. 373; 43 Pac. 1108); but if

the record shows the admission of a fact which makes the stipulation unnecessary, and that the court acted upon such admission, and embodied it in the bill of exceptions, the fact cannot be traversed upon appeal. Hearne v. De Young, 111 Cal. 373; 43 Pac. 1108; Patterson v. Ely, 19 Cal. 28; Reese v. Mahoney, 21 Cal. 305; Himmelmann v. Sullivan, 40 Cal. 125; Hawes v. Clark, 84 Cal. 272; 24 Pac. 116; Smith v. Whittier, 95 Cal. 279; 30 Pac. 529. An admission of counsel, in open court, as to immoral conduct of his client, even though in excess of his authority under the above section, is not a ground of reversal, where it clearly appears that the defendant was not injured thereby. Queirolo v. Queirolo, 129 Cal. 686; 62 Pac. 315.

Written agreement not filed. The same principles are applicable to the enforcement of a written agreement not filed, as govern a verbal agreement not entered in the minutes of the court. Smith v. Whittier, 95 Cal. 279; 30 Pac. 529.

Authority to appear for party. An attorney's license is prima facie evidence of his authority to appear for the person he professes to represent (Clark v. Willett, 35 Cal. 534; People v. Mariposa County, 39 Cal. 683); and it will be presumed, where an attorney signs a paper, that he was authorized so to do. Ricketson v. Torres, 23 Cal. 636. The unauthorized appearance of an attorney, where there is no fraud and no allegation of insolvency on the part of the attorney, does not give the party a right to assail the judgment on that ground. Holmes v. Rogers, 13 Cal. 191. The unauthorized appearance of an attorney may be set aside (Garrison v. McGowan, 48 Cal. 592); but a default judgment entered against a defendant will not be vacated, where he was informed of the fact of the unauthorized appearance, but took no steps to set it aside. Seale v. McLaughlin, 28 Cal. 668. A party cannot repudiate an unauthorized appearance after three years, for the purpose of obtaining a dismissal on the ground that the summons was not returned within the time prescribed by law. Pacific Paving Co. v. Vizelich, 141 Cal. 410; 74 Pac. 352; and see also Baker v. O'Riordan, 65 Cal. 368; 4 Pac. 232; Hill v. City Cab etc. Co., 79 Cal. 188; 21 Pac. 728; Hunter v. Bryant, 98 Cal. 247; 33 Pac. 51. A parol agreement of employment is sufficient; it is not necessary for an attorney to show his authority, unless questioned by a proper plea. Holmes v. Rogers, 13 Cal. 191; Turner v. Caruthers, 17 Cal. 431; Hayes v. Shattuck, 21 Cal. 51; Ricketson v. Torres, 23 Cal. 636; Willson v. Cleaveland, 30 Cal. 192; Garrison v. McGowan, 48 Cal. 592; Boston Tunnel Co. v. McKenzie, 67 Cal. 485; 8 Pac. 22. The adverse party or his attorney, upon a mere suggestion at the bar, cannot deny the right of a party to appear by the attorney of record, nor deny that the attorney so appearing has full authority to prosecute the suit; the proper procedure is a motion to dismiss, founded upon affidavit of want of authority, made by the party whom the attorney assumes to represent. Turner v. Caruthers, 17 Cal. 431; Clark v. Willett, 35 Cal. 534; People v. Mariposa County, 39 Cal. 683. Where there are several parties, each having separate attorneys, one of the attorneys cannot act for a party he does not represent (Hobbs v. Duff, 43 Cal. 485); but where he does so act for another defendant, it will be presumed that he has done so with the authority of the attorney for such party. McCreery v. Everding, 44 Cal. 284. Where an attorney appears for two or more persons, and signs as "attorney for defendants," such appearance will be limited to the defendants for whom he expressly appears. Spangel v. Dellinger, 42 Cal. 148.

Extent of authority to bind client. An attorney may acknowledge the service of papers; but such an acknowledgment does not carry an admission of the things recited therein (Estate of More, 143 Cal. 493; 77 Pac. 407); nor is it a waiver of the objection that the service was too late. Towdy v. Ellis, 22 Cal. 650. The right of an attorney to sign pleadings binding his client will be presumed. Coward v. Clanton, 79 Cal. 23; 21 Pac. 359; Duff v. Duff, 71 Cal. 513; 12 Pac. 570; Kamm v. Bank of California, 74 Cal. 191; 15 Pac. 765. He may stipulate that one action shall abide and be determined by the result of another action, and that final judgment may be entered upon such determination (Gilmore v. American Central Ins. Co., 67 Cal. 366; 7 Pac. 781; Hills v. Sherwood, 33 Cal. 474); and he may enter a judgment of retraxit against his client (Merritt v. Campbell, 47 Cal. 542; Board of Commissioners v. Younger, 29 Cal. 147; 87 Am. Dec. 164); and he may agree that the court may find additional facts to cover all the questions raised by the pleadings (Marius v. Bicknell, 10 Cal. 217); that damages may be assessed in currency (Dreyfous v. Adams, 48 Cal. 131); that a deposition may be read in evidence (Robinson v. Placerville etc. R. R. Co., 65 Cal. 263; 3 Pac. 878), and with the same force and effect, and subject to the same exceptions, as if taken in the case on trial (Brooks v. Crosby, 22 Cal. 42; King v. Haney, 46 Cal. 560; 13 Am. Rep. 217); and he has power to extend the time for giving notice of appeal (Simpson v. Budd, 91 Cal. 488; 27 Pac. 758), and of a motion for a new trial (Simpson v. Budd, 91 Cal. 488; 27 Pac. 758; Hobbs v. Duff, 43 Cal. 485; Gray v. Nunan, 63 Cal. 220; Patrick v. Morse, 64 Cal. 462; 2 Pac. 49; Brichman v. Ross, 67 Cal. 601; 8 Pac. 316); and to agree to the facts upon which the cause shall be determined (Hess v. Bolinger, 48 Cal. 349), such an agreement being like an admission

in the pleadings as to the facts thus stipulated (Muller v. Rowell, 110 Cal. 318; 42 Pac. 804); and he has power to agree that a motion for a new trial may be denied (Meerholz v. Sessions, 9 Cal. 277; Brotherton v. Hart, 11 Cal. 405; Mecham v. McKay, 37 Cal. 154; San Francisco v. Certain Real Estate, 42 Cal. 513; Erlanger v. Southern Pacific R. R. Co., 109 Cal. 395; 42 Pac. 31; Reay v. Butler, 118 Cal. 113; 50 Pac. 375); but where the agreement for the denial of a motion for a new trial is merely for the purpose of facilitating the appeal, the court will review the question upon appeal. Mecham v. McKay, 37 Cal. 154. He has power to agree to the time of service of statement on motion for a new trial (Mills v. Dearborn, 82 Cal. 51; 22 Pac. 1114); and to stipulate as to a transcript on appeal (McCreery v. Everding, 44 Cal. 246), and that the same is true and correct (Weil v. Paul, 22 Cal. 492; Godchaux v. Mulford, 26 Cal. 316; 85 Am. Dec. 178); but such a stipulation merely obviates the necessity of a certificate by the clerk (Todd v. Winants, 36 Cal. 129; Leonard v. Shaw, 114 Cal. 69; 45 Pac. 1012), and is a substitute for the clerk's certificate to the correctness of the transcript (Wetherbee v. Carroll, 33 Cal. 549); it does not waive the record required by law (Siebe v. Joshua Hendy Machine Works, 86 Cal. 390; 25 Pac. 14; Leonard v. Shaw, 114 Cal. 69; 45 Pac. 1102). He also has power to waive findings of fact (Dougherty v. Friermuth, 68 Cal. 240; 9 Pac. 98; Smith v. Whittier, 95 Cal. 279; 30 Pac. 529); to waive all errors in the record, after service of notice of appeal (Glotzback v. Foster, 11 Cal. 37), and to waive the signature of the judge to the bill of exceptions. Sarver v. Garcia, 49 Cal. 218; and see Meredith v. Santa Clara Mining Ass'n, 60 Cal. 617. But an attorney has no authority to instruct a sheriff to conduct a business attached, and thereby bind his client for expenses incurred (Alexander v. Denaveaux, 53 Cal. 663; affirmed, 59 Cal. 476), or to compromise an action he is employed to prosecute or defend (Ambrose v. McDonald, 53 Cal. 28; Commercial Union Assur. Co. v. American Central Ins. Co., 68 Cal. 430; 9 Pac. 712; Trope v. Kerns, 83 Cal. 553; 23 Pac. 691; Smith v. Whittier, 95 Cal. 279; 30 Pac. 529; Knowlton v. Mackenzie, 110 Cal. 183; 42 Pac. 580; Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074), or, under his general employment, to submit a client's cause to arbitration (Bates v. Visher, 2 Cal. 355), or to stipulate for the dismissal of an action, where the party he represents has parted with his interest to another, who prosecutes in his name (Walker v. Felt, 54 Cal. 386; Mastick v. Thorp, 29 Cal. 444; Dutton v. Warschauer, 21 Cal. 609; 82 Am. Dec. 765); nor can he, against the objection of his client, compromise an action, and consent to judgment against him (Preston v. Hill, 50 Cal. 43; 19 Am. Rep. 647); nor has he authority to convey the title to his client's land. Ryan v. Tomlinson, 31 Cal. 11.

Termination of authority. Under a general retainer, the authority of an attorney terminates with the entry of final judgment, except for the purpose of enforcing it. Knowlton v. Mackenzie, 110 Cal. 183; 42 Pac. 580. He has authority to take out execution, and procure a levy thereof, and receive and collect money thereunder. Jones v. Spear, 56 Cal. 163. The death of the client also terminates the employment and authority of the attorney, and no subsequent steps can be taken in the case under the employment. Judson v. Love, 35 Cal. 463; Moyle v. Landers, 78 Cal. 99; 12 Am. St. Rep. 22; 20 Pac. 241. But where, upon the death of the party, pending an appeal, the attorney becomes the attorney for his executors, he may move to dismiss the appeal without a formal substitution, if no substitution be made before the hearing of the motion. Whartenby v. Reay, 92 Cal. 74; 28 Pac. 56. Upon the death of one member of a firm of attorneys, the client has the right to terminate the employment. Little v. Caldwell, 101 Cal. 553; 40 Am. St. Rep. 89; 36 Pac. 107.

Presumption in favor of authority of attorney. See note 16 Am. Dec. 98.

Power of client over attorney. See note 87 Am. Dec. 166.

Authority of attorney to accept as payment a sum less than due. See notes 41 Am. Rep. 847; 31 L. R. A. (N. S.) 523.

Extent of client's control of cause. See note 93 Am. St. Rep. 170.

Implied authority of attorney. See note 132 Am. St. Rep. 149.

Implied authority of attorney to prosecute proceedings for review. See note 16 Ann. Cas. 928.

Right of attorney to employ associate counsel or assistants at expense of client. See note 15 Ann. Cas. 1180.

Authority of attorney to incur expenses incident to suit for client. See notes Ann. Cas. 1912D, 313; 23 L. R. A. (N. S.) 702.

Power of attorney to withdraw answer or appearance and permit a default judgment. See note 33 L. R. A. 515.

Authority of attorney to discontinue suit. See note 4 L. R. A. (N. S.) 244.

Authority of attorney to enter retraxit. See note 25 L. R. A. (N. S.) 1313.

CODE COMMISSIONERS' NOTE. 1. Extent of attorney's authority. As to the extent of an attorney's authority, and when it is presumed, see Turner v. Caruthers, 17 Cal. 431; Hayes v. Shattuck, 21 Cal. 51; Ricketson v. Torres, 23 Cal. 636; Holmes v. Rogers, 13 Cal. 191; Willson v. Cleaveland, 30 Cal. 192; People v. Mariposa County, 39 Cal. 683.

2. Attorney in fact, but not attorney at law. An attorney in fact, who is not an attorney at law, is not authorized to sign for his principal a complaint as "plaintiff's attorney." An action so instituted is void, as if commenced by an entire stranger without authority. Dixey v. Pollock, 8 Cal. 570.

3. Power to bind client. Hart v. Spalding, 1 Cal. 213; Holmes v. Rogers, 13 Cal. 191. The agreement of an attorney to bind a client in proceedings at law must be in writing, and filed with the clerk, or entered on the minutes. Smith v. Pollock, 2 Cal. 92. An agreement of counsel for a continuance, not reduced to writing, will be disregarded by the court. Peralta v. Mariea. 3

Cal. 185. An attorney for a party in a proceeding to determine conflicting claims to town lots cannot, after the board of trustees of the town have awarded the lot to his client, pass the client's right by a stipulation in the case for the entry of a void judgment. Ryan v. Tomlinson, 31 Cal. 11. A client cannot dismiss a suit if his attorney of record oppose it. Board of Commissioners v. Younger, 29 Cal. 147; 87 Am. Dec. 164. If a party to a suit dies after judgment, his attorney has no power to further act for him, and could not even give notice of a new trial. Judson v. Love, 35 Cal. 463.

4. **Notice to attorney is notice to client.** A client charged with notice of all errors of misconduct in the course of the trial, etc., which were known to his attorney. Hoogs v. Morse, 31 Cal. 129. Notice to an attorney is notice to the client, and he is bound thereby. Bierce v. Red Bluff Hotel Co., 31 Cal. 160.

§ 284. Change of attorney. The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

1. Upon consent of both client and attorney, filed with the clerk, or entered upon the minutes;

2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other.

Notice of substitution. See infra, § 285.

Legislation § 284. 1. Enacted March 11, **1872**, and then read: "The attorney in an action or special proceeding may be changed at any time before judgment or final determination, as follows: 1. Upon his own consent, filed with the clerk or entered upon the minutes; 2. Upon the order of the court or judge thereof, upon the application of the client."

2. Amended by Code Amdts. **1873–74**, p. 289, adding at the end of subd. 2 the words "after notice to the attorney."

3. Amended by Code Amdts. **1880**, p. 57.

Change of attorney. The change or substitution of attorneys is regulated by this section (Withers v. Little, 56 Cal. 370); but it has no application to criminal cases. Ex parte Clarke, 62 Cal. 490; People v. Garnett, 9 Cal. App. 194; 98 Pac. 247. An order associating a new attorney with the attorney of record, is not authorized by the practice prescribed by this section. Prescott v. Salthouse, 53 Cal. 221. The substitution of attorneys does not relieve a party from an obligation created by his attorney while of record. Smith v. Whittier, 95 Cal. 279; 30 Pac. 529. Service on an attorney who has not been formally substituted, but who has repeatedly appeared in the proceedings, is sufficient to bind the client. Golden Gate Cons. etc. Mining Co. v. Superior Court, 65 Cal. 187; 3 Pac. 628. A notice of motion for a new trial cannot be signed by one who is not the attorney of record (McMahon v. Thomas, 114 Cal. 588; 46 Pac. 732; Hobbs v. Duff, 43 Cal. 485; Prescott v. Salthouse, 53 Cal. 221; Whittle v. Renner, 55 Cal. 395), but a notice of appeal may. McDonald v. McConkey, 54 Cal. 143.

By consent. The consent of the attorney and the client makes the change complete (Withers v. Little, 56 Cal. 370); and the authority of the substituted attorney cannot be inquired into by the attorney for the adverse party. Withers v. Little, 56 Cal. 370. Such adverse attorney waives objection to the service of papers from the substituted attorney by accepting service thereof. McDonald v. McConkey, 54 Cal. 143. If he intends to rely upon a want of proper substitution, it is his duty to refuse to receive papers from the substituted attorney, and abstain from joining in stipulations with him. Livermore v. Webb, 56 Cal. 489.

By order of court. Absent heirs and legatees have the absolute right to have an attorney selected by themselves substituted for one appointed by the court (Lee v. Superior Court, 112 Cal. 354; 44 Pac. 666); but an order of the court substituting a new attorney does not authorize a guardian to make a contract with the new attorney, affecting the property of the minor. McKee v. Hunt, 142 Cal. 526; 77 Pac. 1103. The notice of application to substitute must be in writing (Rundberg v. Belcher, 118 Cal. 589; 50 Pac. 670); and mandamus will lie to compel the court to make an order substituting an attorney of record for another, upon application of the client. People v. Norton, 16 Cal. 436; Lee v. Superior Court, 112 Cal. 354; Rundberg v. Belcher, 118 Cal. 589; 50 Pac. 670. The interest of the client is superior to that of the attorney, and he has a right to employ such attorney as he will (Gage v. Atwater, 136 Cal. 170; 68 Pac. 581; People v. Norton, 16 Cal. 436; Theilman v. Superior Court, 95 Cal. 224; 30 Pac. 193; Faulkner v. Hendy, 99 Cal. 172; 33 Pac. 899; People's Home Sav. Bank v. Superior Court, 104 Cal. 649; 43 Am. St. Rep. 147; 29 L. R. A. 844; 38 Pac. 452; Lee v. Superior Court, 112 Cal. 354; 44 Pac. 666); and the fact that the client is indebted to the attorney, who has rendered him valuable services, does not deprive the client of this right. Gage v. Atwater, 136 Cal. 170; 68 Pac. 581. A new board of directors of a corporation may likewise, on proper application, substitute an attorney for one employed by the former board. People's Home Sav. Bank v. Superior Court, 104 Cal. 649; 43 Am. St. Rep. 147; 29 L. R. A. 844; 38 Pac. 452. It is only necessary for the party to prefer a request therefor, to justify the court in making such change. Woodbury v. Nevada Southern Ry. Co., 121 Cal. 165; 53 Pac. 450; People v. Norton, 16 Cal. 436; Board of Commissioners

v. Younger, 29 Cal. 147; 87 Am. Dec. 164; Lee v. Superior Court, 112 Cal. 354; 44 Pac. 666.

CODE COMMISSIONERS' NOTE. Authority of attorney to act. Power of court to pass upon their authority. In the case of Board of Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164, the commissioners had retained counsel to bring the action. A trial had been had, resulting in favor of the commissioners, and a new trial granted. At that stage of the case, the commissioners, without substituting another attorney of record, and without the knowledge of their attorney of record, compromised the action, and authorized the attorney of defendant, in writing, to appear for them and dismiss the action, which he did; but the motion was resisted by the commissioners' attorney of record, upon the ground, among others, that he was still the attorney of record of the commissioners, and, as such, entitled to manage and control the case until displaced and another substituted of record. The court, nevertheless, dismissed the action, and the supreme court reversed the judgment, holding, in effect, that where a party retains an attorney to bring or defend an action, the attorney has the right to control and manage the case until he has been superseded by another in the manner dictated by the tenth section of the statute in relation to attorneys and counselors, which provides that an attorney in an action or special proceedings may be changed at any time before final judgment: First, upon his consent, filed with the clerk or entered upon the minutes; second, upon the order of the court, or judge thereof, on the application of the client. The question there was, whether the court was bound to recognize the attorney of record as possessing the right to manage the case, or could, at pleasure, ignore him altogether, and recognize another as having that right. But the question here is, whether the court has the power to inquire as to the retainer of the attorney, upon the suggestion of the client that he has abused the license of the court, and brought the action without any authority. Upon such a question we have no doubt as to the power. Attorneys are the officers of the court, and answerable to it for the proper performance of their professional duties. They appear and participate in its proceedings, only by the license of the court, and if they undertake to appear without authority from the party whom they profess to represent, the act is an abuse of the license of the court, which, upon the application of the supposed client, the court has the power to inquire into and correct summarily. Otherwise the very fountain of justice might become polluted, and a license to stir its waters become a license to defile them. An attorney's license is prima facie evidence of his authority to appear for any person whom he professes to represent, but if the supposed client denies his authority, the court may require him to produce the evidence of his retainer under the supervisory power which it has over its process and the acts of its officers, and that, too, in the mode which was adopted in this case, as was suggested in Turner v. Caruthers, 17 Cal. 431. It has also been held that the court may require an attorney to show special authority upon the application of the opposite party, when justice requires it. McKiernan v. Patrick, was an action by McKiernan and Anderson as the indorsees of two promissory notes. The defendants held a set-off against McKiernan, and made a motion for an order upon the plaintiffs' attorneys to produce their authority for using the name of Anderson, which motion was supported by an affidavit to the effect that the notes in suit were the exclusive property of McKiernan, against whom they held a set-off, that Anderson was a myth, or if not, his name had been fraudulently used, without authority, for the purpose of avoiding the defendants' set-off as a defense to the action. The plaintiffs' attorneys showed cause, and informed the court that they received the notes from McKiernan, with instructions to sue as had been done; that they had no communication with Anderson, and had no personal knowledge of him, but they understood that he was a friend and near neighbor of McKiernan in Alabama; that, since the motion was made, they had written to both the plaintiffs for information, but had received no answers. The court denied the defendants' motion. Subsequently, judgment passed for the plaintiffs, and the defendants appealed, and specified as error the overruling of their motion for a rule upon the plaintiffs' attorneys to show by what authority they prosecuted the suit in the name of Anderson; and the appellate court reversed the judgment, with instructions to retry the rule, and if the plaintiffs' attorneys failed to produce satisfactory authority for bringing the action in the name of Anderson, to dismiss it. McKiernan v. Patrick, 4 How. (Miss.) 333: Clark v. Willett, 35 Cal. 538.

Subd. 2. See People v. Norton, 16 Cal. 436.

§ 285. Notice of change. When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney.

Legislation § 285. 1. Enacted March 11, **1872. 2.** Amended by Code Amdts. **1880,** p. 57, (1) changing the period after "adverse party" from a semicolon, and (2) omitting a comma after "Until then."

Construction of section. This section does not apply to criminal cases; no formal substitution of attorneys is required therein. People v. Garnett, 9 Cal. App. 194; 98 Pac. 247.

Notice of change. Where attorneys are changed, written notice must be served on the adverse party (Withers v. Little, 56 Cal. 370; Grant v. White, 6 Cal. 55; Prescott v. Salthouse, 53 Cal. 221); and until such written notice is served, the original attorney must be recognized, and all papers served upon him (Grant v. White, 6 Cal. 55; Abrahms v. Stokes, 39 Cal. 150; Prescott v. Salthouse, 53 Cal. 221; Withers v. Little, 56 Cal. 370; Livermore v. Webb, 56 Cal. 489; Young v. Fink, 119 Cal. 107; 50 Pac. 1060); but, after a proper notice of substitution has been duly served, the adverse party has no right to recognize any other attorney than the substituted one. Preston v. Eureka Artificial Stone Co., 54 Cal. 198. The requirement of written notice is for the protection of the adverse party. Livermore v. Webb, 56 Cal. 489.

Construction of section. See note ante, § 284.

CODE COMMISSIONERS' NOTE. 1. Attorneys of record. If attorneys are changed in action, and there is no regular substitution of attorneys, according to the provisions of the statute, notices may be served on the attorney of record. Grant v. White, 6 Cal. 55.

2. Notice of substitution of attorneys. Where, at different stages of the suit, different attorneys have acted for one of the parties, and no notice of substitution appears, service of notice upon the attorney last acting and recognized by the court, is sufficient to bind client. **Roussin v.** Stewart, 33 Cal. 208.

§ 286. Death or removal of attorney. When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person.

Legislation § 286. **1.** Enacted March 11, **1872.**
2. Amended by Code Amdts. **1880,** p. 57, (1) adding a comma after "action," after "as attorney," and after "another attorney."

Notice to appoint another attorney. The written notice to appoint another attorney in place of one deceased is not necessary, where an attorney is appointed without such notice. Nicol v. San Francisco, 130 Cal. 288; 62 Pac. 513; Troy Laundry etc. Co. v. Drivers' Ind. Laundry Co., 13 Cal. App. 115; 109 Pac. 36. All proceedings are suspended from the date of the death of the attorney until the appearance or appointment of another. Troy Laundry etc. Co. v. Drivers' Ind. Laundry Co., 13 Cal. App. 115; 109 Pac. 36.

§ 287. Causes for which court may remove attorney. An attorney and counselor may be removed or suspended by the supreme court, or any department thereof, or by any district court of appeal, or by any superior court of the state, for either of the following causes, arising after his admission to practice:

1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence;

2. Willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with, or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney and counselor;

3. Corruptly or willfully and without authority appearing as attorney for a party to an action or proceeding;

4. Lending his name to be used as attorney and counselor by another person who is not an attorney and counselor;

5. For the commission of any act involving moral turpitude, dishonesty or corruption, whether the same be committed in the course of his relations as an attorney or counselor at law, or otherwise, and whether the same shall constitute a felony or misdemeanor or not; and in the event that such act shall constitute a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disbarment or suspension from practice therefor.

In all cases where an attorney is removed or suspended by a superior court, the judgment or order of removal or suspension may be reviewed on appeal by the supreme court.

Attorney has right to make a defense. See post, §§ 292 et seq.

Attorney defending prosecution instituted by himself or partner forfeits license. See Pen. Code, § 162.

Legislation § 287. **1.** Enacted March 11, **1872.**
2. Amended by Code Amdts. **1873–74,** p. 289, (1) adding subd. 4; (2) changing the last paragraph, after "suspended by a," from "district court he may appeal to the supreme court, and the judgment or order of the district court is subject, on such appeal, to review, as in civil actions," to read as at present, except the word "district."
3. Amended by Code Amdts. **1880,** p. 57, (1) changing the words in the introductory paragraph, after "supreme court," from "and by the district courts of the state," to read as at present; (2) in subd. 1, substituting "shall be" for "is"; (3) in subd. 2, after "profession," adding "which he ought in good faith to do or forbear"; (4) in subd. 3, adding "or willfully," after "corruptly"; (5) in last paragraph, substituting "superior" for "district."
4. Amendment by Stats. **1901,** p. 124; unconstitutional. See note ante, § 5.
5. Amended by Stats. **1911,** p. 848, (1) in introductory paragraph, adding "or by any district court of appeal"; (2) in subdivision 4, substituting a semicolon for a period; (3) adding subdivision 5.

Power to remove or suspend. Every court having power to admit attorneys to practice has inherent power to disbar or suspend them, whenever their conduct shows them to be unfitted for the practice of their profession (People v. Turner, 1 Cal. 143; 52 Am. Dec. 295); but a justice's court has no such power. Baird v. Justice's Court, 11 Cal. App. 439; 105 Pac.

259. Attorneys are subject to the authority of courts, and may, for causes shown, be suspended or removed, and deprived of the right to pursue their profession, by the supreme court (Alpers v. Hunt, 86 Cal. 78; 21 Am. St. Rep. 17; 9 L. R. A. 483; 24 Pac. 846); and the supreme court may, of its own motion, set aside, for fraud or concealment, an order admitting an attorney to practice. Case of Lowenthal, 61 Cal. 122. While the supreme court has both original and appellate jurisdiction in proceedings to disbar attorneys, it will not exercise original jurisdiction, except where the prosecution has been instituted by a bar association, or other public body, in the public interest. Disbarment of Ashley, 146 Cal 600; 80 Pac. 1030.

Causes of disbarment. The causes are enumerated in this section, and an attorney cannot be disbarred for others than those enumerated. In re Collins, 147 Cal. 8; 81 Pac. 220. Before the adoption of the codes, however, it was held that attorneys might be disbarred for disloyalty to the national government, and for refusal to take the oath of loyalty prescribed by the legislature. Cohen v. Wright, 22 Cal. 293; Ex parte Yale, 24 Cal. 241; 85 Am. Dec. 62. A court has no power to adjudge any man, whether lawyer or layman, "infamous"; and to incorporate into an order pronouncing an attorney guilty of contempt an adjudication that he is infamous, is without precedent, and wholly illegal. Fletcher v. Daingerfield, 20 Cal. 427. Where an attorney is charged, in disbarment proceedings, with a crime, which charge is denied, the court has no jurisdiction to prosecute, until he has been convicted of such crime (In re Tilden, 3 Cal. Unrep. 383; 25 Pac. 687); but an attorney may be disbarred for a violation of his professional duties, although the charge against him might be made the basis of an indictment or information. Disbarment of Danford, 157 Cal. 425; 108 Pac. 322. If an attorney is found guilty of acts indicating professional moral depravity, the court cannot, without a previous conviction of a criminal offense, take away his license as such attorney. In re Treadwell, 67 Cal. 353; 7 Pac. 724. It is only when disbarment is sought upon the mere ground that the accused has been guilty of a public offense involving moral turpitude, that a case for disbarment cannot be made until there has been a conviction for the offense. Disbarment of Danford, 157 Cal. 425; 108 Pac. 322. Conviction of an attempt to commit the crime of extortion is a conviction of a crime involving moral turpitude, within the meaning of the first subdivision of this section. Disbarment of Coffey, 123 Cal. 522; 56 Pac. 448. A conviction for felony or misdemeanor involving moral turpitude, is a ground for disbarment, whether the offense was committed in a private or professional relation. Ex parte Tyler, 107 Cal. 78; 40 Pac. 33. The proceedings of the court are to determine whether the attorney is entitled to continue to practice as such, and not whether he is guilty of the commission of a crime. In re Treadwell, 67 Cal. 353; 7 Pac. 724; Ex parte Tyler, 107 Cal. 78; 40 Pac. 33; Disbarment of Wharton, 114 Cal. 367; 55 Am. St. Rep. 72; 46 Pac. 172. But in those cases where it is charged in the accusation that the attorney has violated a law of the state in a matter distinct from his professional conduct and obligations, and not by virtue of his office as an attorney, proceedings for his suspension or disbarment will not be entertained by the court until after he has been tried and convicted of the offense charged. Ex parte Tyler, 107 Cal. 78; 40 Pac. 33; Disbarment of Danford, 157 Cal. 425, 428; 108 Pac. 322.

Disobedience of order of court. There is no limit to the power of the court to suspend or disbar an attorney, under the second subdivision, and it is not required to defer its action until after the conviction of the attorney on a criminal charge. Ex parte Tyler, 107 Cal. 78; 40 Pac. 33.

Violation of oath. There is no ground for disbarment, where an attorney accepts payment for a just claim, in good faith, from an insolvent client, in goods at their fair valuation; and he is not acting in fraud of his client, a creditor of the insolvent, where he, having a claim against the insolvent, who has paid him no retainer, inadvertently as to such client, accepts a retainer from the insolvent, and becomes his attorney. Disbarment of Luce, 83 Cal. 303; 23 Pac. 350. It is ground for disbarment, where he fraudulently induces his client to verify a false complaint (People v. Pearson, 55 Cal. 472); and also where he betrays the confidences of his client, by the conversion of her property (Disbarment of Burris, 101 Cal. 624; 36 Pac. 101); and also where he falsely represents himself as admitted to practice in a certain court, and accepts money to appear and contest an action therein (Disbarment of Danford, 157 Cal. 425, 429; 108 Pac. 322); and also where he appears for the prosecution in a criminal action, and afterwards appears for the defense in the same action (Disbarment of Stephens, 77 Cal. 357; 19 Pac. 646); and also where, after having acted on one side of a cause, he takes the other side. Disbarment of Cowdery, 69 Cal. 32; 58 Am. Rep. 545; 10 Pac. 47. The encouragement of unjust litigation, from motives of passion or interest, and for the mere purpose of gain, is also cause for disbarment (Disbarment of Stephens, 77 Cal. 357; 19 Pac. 646); as is also the failure and refusal to pay moneys collected for his client (Ex parte Tyler, 107 Cal. 78; 40 Pac. 33; Disbarment of Burris, 101 Cal. 624; 36 Pac. 101); and the procurement of a false and fraudulent affidavit of service of summons, and inducing the court to accept such as genuine (Disbarment of Wharton, 114 Cal. 367; 55 Am. St. Rep. 72; 46 Pac.

172); and the procurement and presentation to the court of a straw bond. Disbarment of Tyler, 71 Cal. 353; 12 Pac. 289; 13 Pac. 169.

Appearing without authority. Where an attorney appears as guardian ad litem and answers without an order of appointment, he is guilty of contempt for misbehavior, and subject to a proceeding for removal or suspension. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418.

Lending name as attorney. The lending of his name, to be used as attorney or counselor, to another person, who is not an attorney and counselor, is cause for disbarment. Alpers v. Hunt, 86 Cal. 78; 21 Am. St. Rep. 17; 9 L. R. A. 483; 24 Pac. 846.

Judicial officer practicing law. The practicing of law by an attorney holding a judicial position is not ground for disbarment. Baird v. Justice's Court, 11 Cal. App. 439; 105 Pac. 259.

Fraud upon court. An attorney commits a fraud upon the court, and will be disbarred, where he applies to the court for admission in this state, when his application is based upon a certificate from a sister state, which had been canceled and set aside before the application was made in this state. In re Maxey (unreported case No. 1252 Civ., decided by District Court of Appeals, First District, December 3, 1912).

Notice of hearing. The attorney proceeded against must be given notice of the charges against him, and an opportunity to be heard (People v. Turner, 1 Cal. 143; 52 Am. Dec. 295); and the court has no power to strike an attorney's name from the rolls without affording him an opportunity to be heard. Fletcher v. Daingerfield, 20 Cal. 427.

Summary jurisdiction over attorneys. See note 2 Am. St. Rep. 847.

General powers of court to disbar. See note 114 Am. St. Rep. 839.

Power of courts to disbar attorneys. See notes 5 Ann. Cas. 990; 15 Ann. Cas. 419.

Causes and proceedings for disbarment. See note 95 Am. Dec. 333.

Grounds for disbarment. See note 45 Am. St. Rep. 71.

Right of attorney to review of disbarment proceedings. See note 10 Ann. Cas. 544.

Conviction of attorney for crime as condition precedent to disbarment therefor. See note 8 Ann. Cas. 847.

Acquittal of criminal charge against attorney as defense to disbarment proceedings for same offense. See note 10 Ann. Cas. 887.

Effect of pardon on right to disbar attorney convicted of felony. See note 16 L. R. A. (N. S.) 272.

Acts not done in practice of profession when cause for disbarment. See note 42 Am. Rep. 557.

Disbarment of attorney for act committed in another jurisdiction. See note 17 Ann. Cas. 599.

Wrongful retention of money by attorney as ground for disbarment. See notes 17 Ann. Cas. 692; 19 L. R. A. (N. S.) 414.

Disbarment of attorney for fraud in procuring license to practice. See note 20 Ann. Cas. 212.

Want of due respect toward court in legal papers as ground for disbarment. See note 15 L. R. A. (N. S.) 525.

Disbarment in one state or concealment of that fact as ground for disbarment in another state. See notes 19 L. R. A. (N. S.) 892; 24 L. R. A. (N. S.) 531.

Criticism of decision of court as ground for disbarment. See notes 15 Ann. Cas. 205; 17 L. R. A. (N. S.) 572.

Necessity for bad faith or fraudulent motive to justify disbarment. See note 18 L. R. A. 401.

CODE COMMISSIONERS' NOTE. 1. Attorney entitled to trial before his name is stricken from the roll. The name of an attorney may be stricken from the roll of attorneys, but such act is not to be regarded in the light of a punishment for contempt, and the attorney is entitled to notice of the charges preferred against him, and have an opportunity afforded him for a defense. An appeal lies to the supreme court from the judgment of the district court in such matters. People v. Turner, 1 Cal. 143; 52 Am. Dec. 295; and see also, where it was held that an attorney could not be suspended by the district court if such attorney had been admitted and licensed by the supreme court, People v. Turner, 1 Cal. 190. An attorney is entitled to a trial before he can be stricken from the rolls. See Fletcher v. Daingerfield, 20 Cal. 427.

2. **Exclusion of disloyal persons from practice, etc. Power of legislature.** See also the cases of Cohen v. Wright, 22 Cal. 322, and Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62, wherein are discussed the rights of the legislature to exclude disloyal persons from the bar, and also to require from all attorneys, after their admission, certain test oaths of loyalty to the government, etc.

§ 288. Conviction of felony.

In case of the conviction of an attorney or counselor of a felony or misdemeanor, involving moral turpitude, the clerk of the court in which such conviction is had shall, within thirty days thereafter, transmit to the supreme court a certified copy of the record of conviction.

Legislation § 288. 1. Enacted March 11, **1872. 2.** Amended by Code Amdts. **1880,** p. 57, (1) omitting a comma after "felony," and adding one after "misdemeanor," (2) changing the word "such" from "a," and (3) changing the word "shall" from "must."

Conviction of felony. A proceeding under this section, to revoke a license to practice law, because of the attorney's conviction of crime, cannot be instituted until the judgment of conviction becomes final. McKannay v. Horton, 151 Cal. 711; 121 Am. St. Rep. 146; 13 L. R. A. (N. S.) 661; 91 Pac. 598; People v. Treadwell, 66 Cal. 400; 5 Pac. 686.

Appeal from judgment. An appeal from a judgment of conviction of a criminal offense suspends the judgment of the lower court for all purposes. Knowles v. Inches, 12 Cal. 212; Woodbury v. Bowman, 13 Cal. 634; People v. Frisbie, 26 Cal. 135; People v. Treadwell, 66 Cal. 400; 5 Pac. 686. It is not necessary that a certification of the transcript of conviction should be filed within thirty days. Disbarment of Coffey, 123 Cal. 522; 56 Pac. 448.

§ 289. Proceedings for removal or suspension. The proceedings to remove or suspend an attorney and counselor, under the first subdivision of section two hundred and eighty-seven, must be taken by the court on the receipt of a certified copy of the record of conviction. The proceedings under the second, third, or fourth subdivision of section two hundred and eighty-seven may be taken by the court for the matters within its knowledge, or may be taken upon the information of another.

Legislation § 289. **1.** Enacted March 11, **1872.** **2.** Amended by Code Amdts. **1880,** p. 58, (1) changing "second, third, or fourth subdivisions" from "second subdivisions," and (2) adding the word "the" before "matters."

§ 290. Accusation. If the proceedings are upon the information of another, the accusation must be in writing.

Legislation § 290. **1.** Enacted March 11, **1872.** **2.** Re-enacted by Code Amdts. **1880,** p. 58, in amending Part I.

Accusation. An accusation by another must be on knowledge, in writing, and must state the matters charged; it must also be verified by some person, to the effect that the charges stated are true. Disbarment of Hudson, 102 Cal. 467; 36 Pac. 812. It must be made by some one who has at least some knowledge on which to base his charges; an accusation upon information is clearly insufficient. In re Hotchkiss, 58 Cal. 39. The one who verifies an accusation for the disbarment of an attorney is deemed the accuser, whoever presents the charges. In re Collins, 147 Cal. 8; 81 Pac. 220.

§ 291. Verification. The accusation must state the matters charged, and be verified by the oath of some person to the effect that the charges therein contained are true.

Legislation § 291. **1.** Enacted March 11, **1872.** **2.** Re-enacted by Code Amdts. **1880,** p. 58, in amending Part I.

Verification. The verification cannot be made upon information and belief. In re Hotchkiss, 58 Cal. 39; Disbarment of Hudson, 102 Cal. 467; 36 Pac. 812. It is sufficient, however, if the accusation is verified by some person who swears to the truth of the charge set forth. In re Collins, 147 Cal. 8; 81 Pac. 220.

§ 292. Citation of accused by publication. Upon receiving the accusation, the court shall make an order requiring the accused to appear and answer it at a specified time, and shall cause a copy of the order and of the accusation to be served upon the accused at least five days before the day appointed in the order. If it shall appear by affidavit to the satisfaction of the court or judge that the accused resides out of the state; or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of the order to show cause, the court or judge may direct the service of a citation to the accused, requiring him to appear and answer the accusation, to be made by publication in a newspaper of general circulation published in the county in which the proceeding is pending for thirty days. Such citation must be directed to the accused, recite the date of the filing of the accusation, the name of the accuser, and the general nature of the charges against him, and require him to appear and answer the accusation at a specified time. On proof of the publication of the citation as herein required the court shall have jurisdiction to proceed to hear the accusation and render judgment with like effect as if an order to show cause and a copy of the accusation had been personally served on the accused.

Legislation § 292. **1.** Enacted March 11, **1872,** and then read: "After receiving the accusation the court must, if in its opinion the case require it, make an order requiring the accused to appear and answer the accusation at a specified time in the same or subsequent term, and must cause a copy of the order and of the accusation to be served upon the accused within a prescribed time before the day appointed in the order."

2. Amended by Code Amdts. **1880,** p. 58, the first sentence of the present amendment then constituting the entire section.

3. Amended by Stats. **1911,** p. 979.

§ 293. Appearance. The accused must appear at the time appointed in the order, and answer the accusation, unless, for sufficient cause, the court assign another day for that purpose. If he do not appear, the court may proceed and determine the accusation in his absence.

Legislation § 293. 1. Enacted March 11, 1872. 2. Amended by Code Amdts. 1880, p. 58, changing the period after "purpose" from a semicolon.

§ 294. Objections to accusation. The accused may answer to the accusation either by objecting to its sufficiency or denying it.

Legislation § 294. 1. Enacted March 11, 1872. 2. Re-enacted by Code Amdts. 1880, p. 58, in amending Part I.

§ 295. Demurrer. If he object to the sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection. If he deny the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

Legislation § 295. 1. Enacted March 11, 1872. 2. Re-enacted by Code Amdts. 1880, p. 58, in amending Part I.

§ 296. Answer. If an objection to the sufficiency of the accusation be not sustained, the accused must answer within such time as may be designated by the court.

Legislation § 296. 1. Enacted March 11, 1872, and then read: "If an objection to the sufficiency of the accusation is not sustained, the accused must answer forthwith." 2. Amended by Code Amdts. 1873–74, p. 290, to read as at present. 3. Re-enacted by Code Amdts. 1880, p. 58, in amending Part I.

§ 297. Trial. If the accused plead guilty, or refuse to answer the accusation, the court shall proceed to judgment of removal or suspension. If he deny the matters charged, the court shall, at such time as it may appoint, proceed to try the accusation.

Legislation § 297. 1. Enacted March 11, 1872. 2. Amended by Code Amdts. 1880, p. 58, changing "shall" from "must" in both instances.

Proceedings on disbarment. Proceedings on disbarment are peculiar to themselves, and are governed by specific code sections; hence, findings are not required, the right to trial by jury is denied, the statute of limitations has no application, and the accuser has no right to an appeal. Disbarment of Danford, 157 Cal. 425, 430; 108 Pac. 322.

No right to jury trial. This section is constitutional, and the accused attorney is not entitled to a trial by jury. Disbarment of Wharton, 114 Cal. 367; 55 Am. St. Rep. 72; 46 Pac. 172.

Right of attorney to be confronted with witnesses against him in disbarment proceedings. See note 6 Ann. Cas. 582.

Right to jury trial in disbarment proceedings. See note Ann. Cas. 1913D, 1162.

§ 298. Reference to take depositions. The court may, in its discretion, order a reference to a committee to take depositions in the matter.

Legislation § 298. 1. Enacted March 11, 1872. 2. Re-enacted by Code Amdts. 1880, p. 58, in amending Part I.

§ 299. Judgment. Upon conviction, in cases arising under the first subdivision of section two hundred and eighty-seven, the judgment of the court must be that the name of the party shall be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of this state; and upon conviction in cases under the other subdivisions of that section the judgment of the court may be according to the gravity of the offense charged; deprivation of the right to practice as attorney or counselor in the courts of this state permanently, or for a limited period.

Legislation § 299. 1. Enacted March 11, **1872.**
2. Amended by Code Amdts. **1873–74, p.** 290, (1) adding the word "that" before "he be precluded," and (2) changing from "second subdivision of section two hundred and eighty-seven" the words "other subdivisions of that section."
3. Amended by Code Amdts. **1880,** p. 58, (1) adding the word "shall" before "be stricken," and (2) substituting a semicolon for a dash after "charged."

Judgment. Unless the court is clearly satisfied of the guilt of the attorney, no judgment should be entered in the proceeding to disbar him, except a judgment of dismissal. Disbarment of Houghton, 67 Cal. 511; 8 Pac. 52. The court has power to render a judgment suspending an attorney from practice for a definite period and until the performance by him of a particular condition. Disbarment of Tyler, 78 Cal. 307; 12 Am. St. Rep. 55; 20 Pac. 674.

Statute of limitations. The bar of the statute of limitations against a civil or criminal proceeding will not be considered by the court in disbarment proceedings. Ex parte Tyler, 107 Cal. 78; 40 Pac. 33.

Appeal. An appeal may be taken from a judgment of disbarment in the superior court. Disbarment of Wharton, 114 Cal. 367; 55 Am. St. Rep. 72; 46 Pac. 172.

CHAPTER II.

OTHER PERSONS INVESTED WITH SUCH POWERS.

§ 304. Receivers, executors, administrators, and guardians.

§ 304. Receivers, executors, administrators, and guardians. The appointment, powers, and duties of receivers, executors, administrators, and guardians are provided for and prescribed in parts two and three of this code.

Receivers. See post, §§ 564–569.
Executors and administrators. See post, Part II, Title XI, §§ 1658–1703½.
Guardians. Post, §§ 1747–1809.

Legislation § 304. 1. Enacted March 11, **1872.**
2. Amended by Code Amdts. **1880,** p. 59, adding the words "executors, administrators."
3. Repeal by Stats. **1901,** p. 124; unconstitutional. See note ante, § 5.

Limitation on power to appoint. The effect of this section is to confine the power to appoint a receiver to the court, or the judge thereof: an appointment by a court commissioner is void. Quibble v. Trumbo, 56 Cal. 626.

PART II.

CIVIL ACTIONS.

TITLE I. FORM OF CIVIL ACTIONS. §§ 307–309.

II. TIME OF COMMENCING CIVIL ACTIONS. §§ 312–363.

III. PARTIES TO CIVIL ACTIONS. §§ 367–390.

IV. PLACE OF TRIAL OF CIVIL ACTIONS. §§ 392–400.

V. MANNER OF COMMENCING CIVIL ACTIONS. §§ 405–416.

VI. PLEADINGS IN CIVIL ACTIONS. §§ 420–476.

VII. PROVISIONAL REMEDIES IN CIVIL ACTIONS. §§ 478–574.

VIII. TRIAL AND JUDGMENT IN CIVIL ACTIONS. §§ 577–680½.

IX. EXECUTION OF JUDGMENT IN CIVIL ACTIONS. §§ 681–721.

X. ACTIONS IN PARTICULAR CASES. §§ 726–827.

XI. PROCEEDINGS IN JUSTICES' COURTS. §§ 832–926.

XII. PROCEEDINGS IN CIVIL ACTIONS IN POLICE COURTS. §§ 929–933.

XIII. APPEALS IN CIVIL ACTIONS. §§ 936–980.

XIV. MISCELLANEOUS PROVISIONS. §§ 989–1059.

TITLE I.

FORM OF CIVIL ACTIONS.

§ 307. One form of civil action only.
§ 308. Parties to actions, how designated.
§ 309. Special issues not made by pleadings, how tried.

§ 307. One form of civil action only. There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs.

Legislation § 307. Enacted March 11, **1872**; based on Practice Act, § 1 (New York Code, § 69), which had (1) "shall be" instead of "is," (2) "action" instead of "actions," and (3) "right" instead of "rights."

But one form of action. There is but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs (Jones v. Steamship Cortes, 17 Cal. 487; 79 Am. Dec. 142; Wiggins v. McDonald, 18 Cal. 126; Walsh v. McKeen, 75 Cal. 519; 17 Pac. 673; Hurlbutt v. Spaulding Saw Co., 93 Cal. 57; 28 Pac. 795; Rowe v. Blake, 99 Cal. 167; 37 Am. St. Rep. 45; 33 Pac. 864; Barbour v. Flick, 126 Cal. 628; 59 Pac. 122; Lux v. Higgins, 69 Cal. 255; 4 Pac. 919; 10 Pac. 674; Williams v. Southern Pacific R. R. Co., 150 Cal. 624; 99 Pac. 599); and any relief may be granted which is consistent with the facts stated in the complaint. Walsh v. McKeen, 75 Cal. 519; 17 Pac. 673. The relief asked is not to be denied because it might have been sought under a different form of action. Merriman v. Walton, 105 Cal. 407; 45 Am. St. Rep. 50; 30 L. R. A. 786; 38 Pac. 1108. The code has reduced all pleading to one common system. Bowen v. Aubrey, 22 Cal. 566; Hurlbutt v. Spaulding Saw Co., 93 Cal. 55; 28 Pac. 795; Carpentier v. Brenham, 50 Cal. 549; Merriman v. Walton, 105 Cal. 403; 45 Am. St. Rep. 50; 30 L. R. A. 786; 38 Pac. 1108; Thompson v. Laughlin, 91 Cal. 313; 27 Pac. 752; Cordier v. Schloss, 12 Cal. 143; Bostic v. Love, 16 Cal. 69; Kimball v. Lohmas, 31 Cal. 154. Legal relief and equitable relief are administered in the same forum. Grain v. Aldrich, 38 Cal. 514, 520; 99 Am. Dec. 423. The general principles, however, which govern actions are not abolished, but remain the same as before the code. Lubert v. Chauviteau, 3 Cal. 458; 58 Am. Dec. 415. The distinction between law and equity was not intended to be abolished; only the form, not the substance, of actions. De Witt v. Hays, 2 Cal. 463; 56 Am. Dec. 352; Wiggins v. McDonald, 18 Cal. 126; Lux v. Haggin, 69 Cal. 255; 4 Pac. 919; 10 Pac. 674. The principles upon which the rights of the parties are to be determined remain. Spect v. Spect, 88 Cal. 437; 22 Am. St. Rep. 314; 13 L. R. A. 137; 26 Pac. 203. The rules of pleading of the old system are applied, where not inconsistent with the spirit of the code. Rowe v. Chandler, 1 Cal. 167. Thus, an action for money had and received may be maintained against one who holds the plaintiff's money without right, and under an implied promise to repay the same. Gray v. Ellis, 164 Cal. 481; 129 Pac. 791.

Word "action," construed. See note post, § 363.

Effect of release of one joint tort-feasor. In an action ex delicto against several wrong-doers, charged with the commission of a joint tort, the release of one of the joint defendants is the release of all, notwithstanding there was an agreement to the contrary. Flynn v. Manson, 19 Cal. App. 400; 126 Pac. 181.

CODE COMMISSIONERS' NOTE. Probate proceedings are not civil actions (Estate of Scott, 15 Cal. 220), and they are, therefore, placed under the division (Part III) of this code relating to special proceedings.

§ 308. Parties to actions, how designated. In such action the party complaining is known as the plaintiff, and the adverse party as the defendant.

Legislation § 308. Enacted March 11, **1872**; based on Practice Act, § 2 (New York Code, § 70), which had the words "shall be" instead of "is."

Title of proceeding in probate. The correct title of a cause, in which an application is made for letters of administration, is, "In the Matter of the Estate of ——, Deceased." O'Brien v. Nelson, 164 Cal. 573; 129 Pac. 985.

§ 309. Special issues not made by pleadings, how tried. A question of fact not put in issue by the pleadings may be tried by a jury, upon an order for the trial, stating distinctly and plainly the question of fact to be tried; and such order is the only authority necessary for a trial.

Legislation § 309. Enacted March 11, **1872**; based on Practice Act, § 3, which read: "When a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial."

TITLE II.

TIME OF COMMENCING CIVIL ACTIONS.

Chapter I. Time of Commencing Actions in General. § 312.
II. Time of Commencing Action for Recovery of Real Property. §§ 315–328.
III. Time of Commencing Actions Other than for Recovery of Real Property. §§ 335–349.
IV. General Provisions as to Time of Commencing Actions. §§ 350–363.

CHAPTER I.

TIME OF COMMENCING ACTIONS IN GENERAL.

§ 312. Commencement of civil actions.

§ 312. Commencement of civil actions. Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute.

Legislation § 312. 1. Enacted March 11, **1872**; based on Stats. 1850, p. 343.

2. Amended by Stats. **1897**, p. 16, (1) omitting the words "without exception" after "civil actions," and (2) changing the word "unless" from "except."

Construction of section. When one is under disability, or when from any cause the right of action is not perfect, the statute does not begin to run. Feeney v. Hinckley, 134 Cal. 467; 86 Am. St. Rep. 290; 66 Pac. 580. The only statutory provision prescribing a rule different from that contained in this section seems to be § 359, post, which refers solely to actions against directors or stockholders of corporations. Pryor v. Winter, 147 Cal. 554; 109 Am. St. Rep. 162; 82 Pac. 202. Upon an action against stockholders to enforce their liability, the cause of action accrues with the creation of the debt sought to be enforced (Redington v. Cornwell, 90 Cal. 49; 27 Pac. 40; Hunt v. Ward, 99 Cal. 612; 37 Am. St. Rep. 87; 34 Pac. 335), and the reason for this seems to be, that such an obligation is a creature of statute, and not a contract. Green v. Beckman, 59 Cal. 545; Moore v. Boyd, 74 Cal. 167; 15 Pac. 670; Redington v. Cornwell, 90 Cal. 49; 27 Pac. 40; Hunt v. Ward, 99 Cal. 612; 37 Am. St. Rep. 87; 34 Pac. 335. Payment of a corporation note by the sureties creates a new and distinct debt against the corporation and its stockholders, and the statute begins to run against the sureties from the date of the payment of the debt. Ryland v. Commercial etc. Bank, 127 Cal. 525; 59 Pac. 989.

Application of title to actions against directors or stockholders of corporations. See note post, § 359.

Extension of statute. An extension of the period of limitation of an action is valid, when made before the former period of limitation has expired. Weldon v. Rogers, 151 Cal. 432; 90 Pac. 1062.

Cause of action must accrue to set statute in motion. The accrual of a cause of action sets the statute of limitations running (Swamp Land District v. Glide, 112 Cal. 85; 44 Pac. 451; Leonard v. Flynn, 89 Cal. 535; 23 Am. St. Rep. 500; 26 Pac. 1097); but this does not imply the existence of a person legally competent to enforce the action. Tynan v. Walker, 35 Cal. 634; 95 Am. Dec. 152.

When cause of action accrues. The general rule is, that the statute of limitations commences to run within the prescribed period after the cause of action has accrued (Hunt v. Ward, 99 Cal. 614; 37 Am. St. Rep. 87; 34 Pac. 335; San Diego v. Higgins, 115 Cal. 170; 46 Pac. 923); but this general rule is subject to such different rules as may be prescribed for special cases. Cook v. Ceas, 143 Cal. 222; 77 Pac. 65. Except in cases of fraud, the time of the act, and not the time of the discovery, sets the statute in motion. Lightner Mining Co. v. Lane, 161 Cal. 689; Ann. Cas. 1913C, 1093; 120 Pac. 771.

Trustee must repudiate trust. In the case of a trustee, only an unequivocal repudiation of the trust by him, with knowledge of this brought home to the beneficiaries of the trust, can set the statute in motion in favor of the trustee. Elizalde v. Murphy, 163 Cal. 681; 126 Pac. 978.

Judgment must be final. A cause of action upon a judgment does not accrue until the judgment has become final and admissible in evidence; that is, after the lapse of the period within which an appeal might be taken from the judgment, if none is taken therefrom, or after final determination following an appeal so taken. Feeney v. Hinckley, 134 Cal. 467; 86 Am. St. Rep. 290; 66 Pac. 580. Upon a judgment of a probate court for partition of real estate, the cause of action accrues

upon entry of judgment. Cortez v. Superior Court, 86 Cal. 274; 21 Am. St. Rep. 37; 24 Pac. 1011; White v. Clark, 8 Cal. 512, 513.

Action for damages. At law, a cause of action accrues whenever there is an injury for which the law has provided a remedy; but in many cases in equity, such as an action for partition by tenants in common (Love v. Watkins, 40 Cal. 547; 6 Am. Rep. 624), and an action to quiet title to real estate, this is not true. Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722. A cause of action for damages for the breach, by abandonment, of a building contract, accrues at the time of such abandonment. Bacigalupi v. Phœnix Bldg. etc. Co., 14 Cal. App. 632; 112 Pac. 892.

Obligations payable on demand. Upon an agreement to pay money on demand, the cause of action accrues on the date of the delivery of the agreement (Halleck v. Moss, 22 Cal. 266); and upon a note payable upon demand, it accrues upon the execution and delivery of the note. Ziel v. Dukes, 12 Cal. 479; Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184; Bell v. Sackett, 38 Cal. 407. The same is true of a certificate of deposit. Vrummagim v. Tallant, 29 Cal. 503; 89 Am. Dec. 61. An action to recover dividends accrues on the refusal of the corporation to pay. Bills v. Silver King Mining Co., 106 Cal. 9; 39 Pac. 43. An interest coupon, attached to a bond, is an independent obligation; and, when detached from the bond and transferred to another than the holder of the bond, the statute begins to run from the time of its maturity. California Safe Deposit etc. Co. v. Sierra Valleys Ry. Co., 158 Cal. 690; Ann. Cas. 1912A, 729; 112 Pac. 272.

Conditional contracts. The cause of action for the breach of a conditional or contingent contract does not accrue until the accomplishment of the condition or the happening of the contingency. Bartlett v. Odd Fellows' Sav. Bank, 79 Cal. 218, 12 Am. St. Rep. 139; 21 Pac. 743. The cause of action upon an agreement to give a mortgage accrues upon the failure to tender the mortgage upon the date agreed. O'Connor v. Dingley, 26 Cal. 11; Jerome v. Stebbins, 14 Cal. 457; Green v. Palmer, 15 Cal. 411; 76 Am. Dec. 492. An action for commissions for the sale of land accrues only after the sale is consummated, or tender of performance of contract to sell. Dinkelspiel v. Nason, 17 Cal. App. 591; 120 Pac. 789. A promise to pay a debt "when able" is conditional, and no cause of action accrues thereon until the debtor is able to pay; until then the statute does not commence to run. Van Buskirk v. Kuhns, 164 Cal. 472; 129 Pac. 587. Where the breach of a condition is overlooked or waived, and there is no obligation to pay money, the rights of the parties continue as before, without regard to the breach, and the statute does not commence to run. Congregational Church Bldg. Society v. Osborn, 153 Cal. 197; 94 Pac. 881.

Effect on debt of extinguishment of lien. Although the lien of a mortgage is extinguished by the barring of the debt by the statute of limitations, yet the mortgagor cannot, without paying his debt, quiet his title nor maintain ejectment against his mortgagee in possession. Puckhaber v. Henry, 152 Cal. 419; 125 Am. St. Rep. 75; 14 Ann. Cas. 844; 93 Pac. 114.

Presumption of demand. Whenever a demand is necessary to put the adverse party in default, he cannot indefinitely and unnecessarily extend the bar of the statute by deferring such demand. Thomas v. Pacific Beach Company, 115 Cal. 136, 46 Pac. 899; Meherin v. San Francisco Produce Exchange, 117 Cal. 215; 48 Pac. 1074; Wittman v. Board of Police Commissioners, 19 Cal. App. 229; 125 Pac. 265; Vickrey v. Maier, 164 Cal. 384; 129 Pac. 273. Where there is a personal liability imposed upon a devisee, by the will, for the payment of money, the beneficiary is entitled to bring an action to recover the money of the devisee, if not paid within a reasonable time after the liability accrues. Keir v. Keir, 155 Cal. 96; 99 Pac. 487.

Actions on indemnity. The cause of action on an indemnity bond against damages does not begin to run until the indemnified person has actually paid the damages against which he was indemnified (Lott v. Mitchell, 32 Cal. 23; Oaks v. Schiefferly, 74 Cal. 478; 16 Pac. 252); but on a bond against liability for damages, the cause of action accrues as soon as a judgment has been rendered for damages. McBeth v. McIntyre, 57 Cal. 49.

Specific performance. The statute does not begin to run against an action to enforce the specific performance of a contract until a breach thereof (Vickrey v. Maier, 164 Cal. 384; 129 Pac. 273); but it commences to run, in such a case, upon the violation of an implied obligation. Hopkins v. Lewis, 18 Cal. App. 107; 122 Pac. 433.

Warranty and guaranty. An action upon an implied warranty of chattels accrues when the vendee is disturbed in his possession. Gross v. Kierski, 41 Cal. 111. The liability of the guarantor of a note secured by mortgage accrues at the maturity of the note, regardless of the exhaustion of the mortgage security. Woolwine v. Storrs, 148 Cal. 7; 113 Am. St. Rep. 183; 82 Pac. 434.

Action against remainderman. If a charge is imposed upon an estate in remainder, and the liability of the remainderman does not mature until the expiration of a life estate, the statute does not commence to run in his favor until that time (Keir v. Keir, 155 Cal. 96; 99 Pac. 487); and the possession of a tenant cannot be adverse to the remainderman until the termination of the life estate. Pryor

v. Winter, 147 Cal. 554; 109 Am. St. Rep. 162; 82 Pac. 202.

Action on insurance policy. No action can be maintained upon an insurance policy until the expiration of the time after the loss fixed by the policy. Irwin v. Insurance Company, 16 Cal. App. 143; 116 Pac. 294. A condition in an insurance policy, that no recovery can be had unless suit is brought within a given time, is valid, where such time is not, in itself, unreasonable. Tebbets v. Fidelity and Casualty Co., 155 Cal. 137; 99 Pac. 501.

Statute may be waived. The statute of limitations is a statute of repose: it grants a mere personal right, which may be waived either in whole or in part. Tebbets v. Fidelity and Casualty Co., 155 Cal. 137; 99 Pac. 501; Archer v. Harvey, 164 Cal. 274; 128 Pac. 410. No distinction, upon the ground of public policy, exists between the right of a party to waive the plea of the statute of limitations as a defense to an action, and his right to waive a portion of the time granted by the statute for the commencement of an action. Tebbets v. Fidelity and Casualty Co., 155 Cal. 137; 99 Pac. 501.

Pleading the statute. If the complaint shows on its face that the statute has run, the defendant may set up the bar, either by demurrer or answer; but if it does not show on its face that the statute has run, the defendant must plead the defense of the statute by answer. California Safe Deposit etc. Co. v. Sierra Valleys Ry. Co., 158 Cal. 690; Ann. Cas. 1912A, 729; 112 Pac. 272.

Discretion of court. Ignorance of injury will not prevent the running of the statute (Lightner Mining Co. v. Lane, 161 Cal. 689; Ann. Cas. 1913C, 1093; 120 Pac. 771); but the court has discretion to permit the statute to be pleaded, and, in its discretion, may permit the plea to be amended, by designating the particular subdivision of the section relied upon. St. Paul Title etc. Co. v. Stensgaard, 162 Cal. 178; 121 Pac. 731.

Estoppel to plead statute. One may, by his conduct, estop himself from pleading the statute. Phillips v. Phillips, 163 Cal. 530; 127 Pac. 346.

Laches may bar remedy. Stale demands will not be aided, where the claimant has slept upon his rights for so long a time and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof; where such is the condition, the demand is, in a court of equity, barred by laches (Suhr v. Lauterbach, 164 Cal. 591; 130 Pac. 2); but laches for a time less than the statutory period is no bar, where the defendant is not prejudiced. Shiels v. Nathan, 12 Cal. App. 604; 108 Pac. 34.

Suit for the death of one caused by wrongful act of another. See note post, § 377.

When the statute commences to run. See note post, § 337.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

1. **Statute of limitations not retroactive.** Statutes of limitation do not act retrospectively; they do not begin to run until they are passed. Thus an act of April 2, 1855, limiting the time for the commencement of an action on a foreign judgment to two years could not be pleaded in an action brought in 1856 on a foreign judgment obtained in 1847. Nelson v. Nelson, 6 Cal. 430; see particularly Scarborough v. Dugan, 10 Cal. 305; also Billings v. Hall, 7 Cal. 1; Billings v. Harvey, 6 Cal. 381.

2. **When statute as amended begins to run.** By the state constitution the amendment of a statute operates as an absolute repeal of the section amended (Const., art. iv, § 25), notwithstanding the amendment takes nothing away from the old law, but simply re-enacts the section amended, with the addition of a proviso in certain cases. The act of April, 1855, amending § 6 of the statute of limitations of 1850, by re-enacting the section, with the addition of a proviso concerning actions under Spanish or Mexican titles, repeals the section of the law of 1850 in toto. The re-enactment creates anew the rule of action, and even if there was not the slightest difference in the phraseology of the two, the latter alone can be referred to as the law, and the former stands, to all intents, as if absolutely and expressly repealed. Thus it would follow that the act of 1855, in this case, would be the only statute of limitations, and the time fixed therein runs only from the date of that act. Billings v. Harvey, 6 Cal. 381; see also Clarke v. Huber, 25 Cal. 593.

3. **Vested rights. Obligations of contract not impaired.** An amendatory act to the statute of limitations does not divest any rights vested under the old law, for statutes of limitation affect the right, and not the remedy. See Billings v. Hall, 7 Cal. 1. But it was held that a right without a remedy is practically no right at all, and that a statute of limitations can only be construed to apply (in the case of foreign judgments) to judgments not in esse at the time of the passage of the act. Scarborough v. Dugan, 10 Cal. 305; see, however, Civ. Code, "Obligation," § 1427.

4. **Fraudulent concealment.** Statutes of limitation are passed to prevent the production of stale claims when, from the lapse of time, it has become difficult or impossible to furnish the requisite proof to defeat them. They proceed upon the theory that the delay, for a fixed period, to assert one's claim, raises a presumption of settlement, and that a party ought not to be afterwards harassed respecting it. They are not intended to protect a party who has, by fraudulent concealment, delayed the assertion of a right against him until after the expiration of the period limited by the statute. The question, whether a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, would avoid the statute of limitations, has frequently arisen, and in its decision there is much conflict of opinion. In courts of equity it is the settled doctrine that such concealment will prevent the operation of the statute, and it is only in the application of the doctrine to suits at law that the diversity of opinion exists. See cases cited and commented on, Kane v. Cook, 8 Cal. 449. "In this diversity of opinion," say the court, "we are free to adopt the rule which will best tend to advance justice and prevent the perpetration of fraud; and we therefore hold, that in all cases a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the statute of limitations. By the system of practice in this state there is no replication to the answer. The fraudulent concealment cannot, therefore, be replied to by pleading, but it may be established by proof on the trial, and will then just as effectually avoid the plea of the statute." Kane v. Cook, 8 Cal. 449.

5. When cause of action accrues. The statute provides that civil actions shall be commenced

within certain periods therein prescribed, "after the cause of action shall have accrued." The clause "after the cause of action shall have accrued" does not, in our judgment, imply, in addition, the existence of a person legally competent to enforce it by suit. If it did, why in subsequent parts of the statute provide that the statute shall not run in certain cases specified, which are excepted from the operation of the statute, because the persons in whose favor the cause of action exists are legally incompetent to sue? Obviously, if the term "right of action" implies the existence of a person competent to commence an action, there was no occasion for special provisions relieving persons not competent from the operation of the statute. Nothing further need have been said, for the courts, after having ascertained the existence of a right of action, would have next inquired whether there was any person in existence legally competent to enforce it by suit, and computed the time accordingly. Again, if it was the intention to provide that the statute should run only where there is both a right of action and a person to assert it, why not insert a provision to that effect in general terms, and not take the hazard, by going into details, of omitting cases which ought, on the score of equal equities, to be included? But, again, if we assume that the term "cause of action" contains also a general implication in relation to disabilities, what, in view of the subsequent specification of disabilities, becomes of the settled rule, that general words are limited by special words subsequently employed, or the maxim, Expressio unius est exclusio alterius? The twenty-fourth section provides an exception, where the party entitled to bring an action dies after the cause of action accrued, and before the expiration of the time allowed for commencing the action, and also where the party against whom an action may be brought dies before the expiration of the time allowed, but no provision is made excepting a case where the party who would have been entitled to sue dies before the cause of action has accrued. Nor do we perceive any substantial reason why any exception should be made. If the cause of action does not accrue until after the death of the party who would have been entitled to sue, the persons interested in his estate—his creditors, heirs, and devisees—have the full time allowed by the statute in which to move in the matter to obtain a grant of administration and commence an action. Even if we recognized the doctrine of inherent equity, or implied exception, we are unable, independent of the judicial dogma that the term "cause of action" also implies a person to sue, to perceive that this case falls within the principle. It certainly has less equity than the case where the cause of action has accrued in the lifetime of the party; yet in such a case the statute runs on, according to the cases to which we have referred, even though there may not be forty-eight hours of the limitation remaining at the time of his death. The legislature of this state seems to have considered this latter result of the English statutes as unreasonable, and has therefore provided, as we have seen, that the time allowed to sue shall be extended, if necessary, not to exceed six months from his death, thus affording time to obtain a grant of administration and sue. Tynan v. Walker, 35 Cal. 643; 95 Am. Dec. 152.

6. **When cause of action accrues, trustee and beneficiary.** Where a person holds land in trust for another, and there is an agreement that the trustee shall convey it to the beneficiary upon the payment of the purchase-money, a cause of action does not arise to compel the execution of the trust until such money is paid to the trustee, and the statute of limitations does not commence to run until that time. Millard v. Hathaway, 27 Cal. 120.

7. **Contribution, action for, when statute begins to run.** In an action for contribution between joint obligors, the statute of limitations does not begin to run until after the payment of the debt by the plaintiff. Sherwood v. Dunbar, 6 Cal. 53.

8. **When begins to run against judgment.** The statute of limitations commences to run against a judgment only from the time of the final entry thereof. Parke v. Williams, 7 Cal. 247.

9. **Action to recover a reward offered by publication, when statute begins to run.** In an action to recover a reward offered "for such information as would lead to the arrest and conviction of the offender," the statute of limitations could not begin to run until after trial and conviction. Ryer v. Stockwell, 14 Cal. 134; 73 Am. Dec. 634.

10. **Fraud. Limitation of an action to set aside deed fraudulently obtained from a non compos mentis.** The statute does not run against a grantor's right to commence an action to set aside a deed obtained by fraud from him when he was insane, until he recovers his reason and discovers what he has done. Crowther v. Rowland-son, 27 Cal. 376.

11. **Fraud.** In cases of fraud, when the statute of limitations commences to run. See Oakland v. Carpentier, 13 Cal. 540.

12. **Actions for relief on ground of fraud.** Statute does not begin to run against time for commencing action for relief on ground of fraud until the discovery of the fraud. Currey v. Allen, 34 Cal. 257.

13. **Monthly salary, where term is for one year.** An officer elected for a term of one year, with a monthly salary, the statute does not commence to run against any portion of his salary until the expiration of his yearly term. Rosborough v. Shasta River Canal Co., 22 Cal. 556.

14. **Banker's certificate of deposit.** It has been held that the statute runs against a banker's certificate of deposit, payable on demand from the date of the same, and no special demand is necessary. Brummagim v. Tallant, 29 Cal. 503; 89 Am. Dec. 61. In this respect a certificate of deposit and a promissory note are the same. Id.

15. **When cause of action accrues on promissory note.** Payment of interest on note after the note has become due does not prolong time of payment of note so as to affect the statute of limitations. A note payable six months from date, with interest monthly in advance, contained the following clause: "In case said interest, or any part thereof, should become due and remain unpaid after demand, then the mortgage given by me, of even date herewith, to secure the payment of this note, may be foreclosed." The mortgage contained a corresponding provision. The prompt payment of the interest on demand did not prolong the time for the payment of the note beyond the time specified therein; and although the interest was paid until a year before the commencement of the action to foreclose the mortgage, yet more than four years and six months have elapsed since the date of the note; held, that the note was barred by the statute of limitations. Pendleton v. Rowe, 34 Cal. 150.

16. **Promissory note. Part payments.** A part payment indorsed upon a promissory note, made before or after the expiration of the period fixed by statute of limitations, does not avoid the bar of the statute. Heinlin v. Castro, 22 Cal. 100.

17. **Promissory note payable on failure to pay interest, etc.** Upon a note payable six months after date, with interest payable monthly, and further providing that, "in case default be made in any payment of interest when the same shall have become due, then the whole amount of principal and interest to become due and payable immediately upon such default," the cause of action, within the true meaning of the statute of limitations, arises at the expiration of the credit fixed by the note, and not at the time when default is made in the payment of the interest. Belloc v. Davis, 38 Cal. 247.

18. **Promissory note, with days of grace.** In computing the time at which the statute of limitations commences to run on promissory notes, the day on which the note becomes due is excluded in all cases when days of grace are allowed. The statute runs from the last day of grace, excluding the day on which the note falls due. Bell v. Sackett, 38 Cal. 409.

19. **Agreement not to sue on a demand.** If a party enters into a valid agreement, in writing, with the defendant, not to sue upon a particular demand, which he holds, until the happening of a particular event, the running of the statute is suspended until the event occurs. Smith v. Lawrence, 38 Cal. 24; 99 Am. Dec. 344.

20. **Covenant of warranty for quiet enjoyment. Eviction.** Where a tenant in possession is evicted,

the statute begins to run at the time of the eviction, whether such eviction be actual or constructive. McGary v. Hastings, 39 Cal. 360; 2 Am. Rep. 456.

21. No presumption of payment raised by statute. It was formerly held that statutes of limitation proceeded upon a presumption of previous payment, and that the effect of an acknowledgment was to rebut this presumption and place the debt upon its original footing. This view is not exploded, and the statute is universally regarded as one of repose, the benefit of which may be relinquished by the party interested, but cannot be taken from him without his consent. If two or more persons are bound, the same protection is afforded to each, and an acknowledgment by one is not available against the other, unless he had authority to make it. McCarthy v. White, 21 Cal. 502; 82 Am. Dec. 754.

22. Action to enforce or establish a trust. Where a trust attached to a legal title acquired through a sheriff's deed, the statute does not begin to run until the execution of the deed. Currey v. Allen, 34 Cal. 257.

23. Trusts. Trustee and beneficiary. The statute of limitations does not run against an express continuing trust until the trustee places himself in hostility to the trust. Schroeder v. Jahns, 27 Cal. 274; Miles v. Thorne, 38 Cal. 335; 99 Am. Dec. 384. As between trustees and cestui que trust, in the case of an express trust, the statute of limitations does not begin to run until the trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the knowledge of the cestui que trust. Hearst v. Pujol, 44 Cal. 230; Baker v. Joseph, 16 Cal. 173. See also Ord v. De La Guerra, 18 Cal. 67.

24. Trustee and beneficiary. Where a party holds the legal title of land as security for money due him by one having the equitable estate, he cannot, by reason of the statute of limitations, be compelled to accept the money and execute a conveyance of the land after four years from the time the money falls due; yet, if he voluntarily receives the money when tendered, after that time he is not discharged by the statute from executing the conveyance and giving a deed to the beneficiary. Millard v. Hathaway, 27 Cal. 120.

25. Trustee and beneficiary. The statute does not run in favor of a trustee as against the beneficiary while the beneficiary is in possession of the estate, and there is no adverse claim made by the trustee. Love v. Watkins, 40 Cal. 548; 6 Am. Rep. 624.

26. Vendor and vendee. The statute does not run against a vendee's right to enforce a specific performance (execution of a deed, etc.), so long as he remains in possession with the acquiescence of the vendor. Love v. Watkins, 40 Cal. 548; 6 Am. Rep. 624.

27. Equitable and legal actions alike barred. The statute of limitations is applicable alike to all causes of actions, whether in equity or at law. Boyd v. Blankman, 29 Cal. 19; 87 Am. Dec. 146.

28. Cases excepted from statute of limitations. It was held "that statutes of limitation are to be strictly construed." In Demarest v. Wynkoop, 3 Johns. Ch. 146, 8 Am. Dec. 467, it was held that the court could make no exception in favor of infants, where the statute had made none. Said Mr. Chancellor Kent (p. 142): "The doctrine of inherent equity creating an exception as to any disability, where the statute of limitations creates none, has been long and uniformly exploded. General words in the statute must receive a general construction; and if there be no express exception, the court can create none." It was agreed, without contradiction, in Stowell v. Zouch, Plowd. 369b, 371c, that the general provision in statute of fines would have barred infants, feme coverts, and the other persons named in the proviso, equally with persons under no disability if they had not been named in the exception or saving clause. So in Dupleix v. De Roven, 2 Vern. 540. The lord keeper thought it very reasonable that the statute of limitations should not run when the debtor was beyond the sea; but there was no saving in the case. He could not resist the plea of the statute. See also Beckford v. Wade, 17 Ves. Jr. 87; Buckinghamshire v. Drury, Wilmot's Opinions, p. 177, § 194; Hall v. Wybourn, 2 Salk. 420; Aubry v. Fortescue, 10 Mod. 206, where it was held that "though the courts of justice be shut by civil war, so that no original could be sued out, yet the statute of limitations continued to run." Tynan v. Walker, 35 Cal. 640; 95 Am. Dec. 152.

29. Mortgages. Mortgage barred when note is barred. "Where an action upon a note, secured by a mortgage, is barred by the statute of limitations, the mortgagee has no remedy upon the mortgage; and though he can follow distinct remedies upon the note or mortgage, the limitation prescribed is, in both cases, the same. The statute of limitations of this state differs essentially from the statutes of James I, and from the statutes of limitation in force in most of the other states. Those statutes apply in their terms only to particular legal remedies, and courts of equity hold themselves not bound by them, except in cases of concurrent jurisdiction, but act merely by analogy to them. Those statutes, as a general thing, also apply, so far as actions upon written contracts not of record are concerned, only to actions upon simple contracts; that is, contracts not under seal, fixing the limitation at six years, and leaving actions upon specialties to be met by the presumption established by the rule of the common law, that after the lapse of twenty years the claim has been satisfied. In those statutes where specialties are mentioned, the limitation is generally fixed at either fifteen or twenty years. The case is entirely different in this state. Here the statute applies equally to actions at law and to suits in equity. It is directed to the subject-matter, and not to the form of the action, or the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties. Where a note is secured by mortgage upon real property, and subsequently, after the remedy on the note is barred by the statute, the mortgagor executes a second mortgage to a third party, such third party can interpose the plea of the statute of limitations in a suit to foreclose the first mortgage, and thus secure priority for his subsequent mortgage; and this, even though the mortgagor had, after the execution of the second mortgage, and after the note was barred, indorsed on the first note that he renewed, revived, and agreed to pay the same. A mortgagor, after disposing of the mortgaged premises by deed of sale, loses all control over them. His personal liability thereby becomes separated from the ownership of the land, and he can, by no subsequent act, create or revive charges upon the premises. He is, as to the premises, henceforth a mere stranger. And if, instead of selling the premises, he execute a second mortgage upon them, he is equally without power to destroy or impair the efficacy of the lien thus created. As a general rule, the plea of the statute of limitations is a personal privilege of the party, and cannot be set up by a stranger. This is true with respect to personal obligations, which concern only the party himself, or with respect to property which the party possesses the power to charge or dispose of. But with respect to property placed by him beyond his control, or subjected by him to liens, he has no such personal privilege. He cannot, at his pleasure, affect the interests of other parties. Whether, where a party revives a note secured by mortgage upon real estate, after the note is barred, he thereby revives the mortgage, was a question raised, but not decided." See syllabus in Lord v. Morris, 18 Cal. 482, 483; see also McCarthy v. White, 21 Cal. 495; 82 Am. Dec. 754; Heinlin v. Castro, 22 Cal. 100; Coster v. Brown, 23 Cal. 142; Cunningham v. Hawkins, 24 Cal. 403; 85 Am. Dec. 73; Wormouth v. Hatch, 33 Cal. 121; Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722; see particularly Grattan v. Wiggins, 23 Cal. 16; Lent v. Shear, 26 Cal. 361; Le Roy v. Rogers, 30 Cal. 229; 89 Am. Dec. 88; Espinosa v. Gregory, 40 Cal. 58.

citing Hughes v. Davis, 40 Cal. 117; Siter v. Jewett, 33 Cal. 92. "Where an action upon a promissory note, secured by a mortgage of the same date, upon real property, is barred by our statute of limitations, the remedy upon the mortgage is also barred." McCarthy v. White, 21 Cal. 495, 82 Am. Dec. 754, affirming Lord v. Morris, 18 Cal. 482.

30. Mortgage. A person who purchases property from a mortgagor, subsequent to the execution of a mortgage, may plead the statute of limitations in an action to foreclose the mortgage, commenced after the statute has run against the debt secured by such mortgage. McCarthy v. White, 21 Cal. 495; 82 Am. Dec. 754.

31. Renewal of note extends lien of mortgage. A renewal of a note extends the lien of the mortgage given to secure the note, so that the statute of limitations will not run until the expiration of the new note given. See Lent v. Morrill, 25 Cal. 492. And this renewal extends the mortgage, even against innocent purchasers. Id.

32. Joint mortgage debtors. One being absent from state. Three persons executed a joint mortgage to secure their joint and several notes. One of the makers left the state. The note became outlawed as to the two makers living in the state. Held: the lien of the mortgage was barred as to the two in the state, and it can only be enforced against the interest of the one as to whom the note is not barred. Low v. Allen, 26 Cal. 141.

33. Mortgage not always barred when debt for which it is given is barred. A mortgage given to secure the payment of a debt not in writing is a contract "founded upon an instrument in writing," within the meaning of the statute of limitations, and an action for its foreclosure may be maintained at any time within four years from its breach, notwithstanding that the statute has in the mean time barred the original debt. Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620.

34. Right to redeem. Where the assignee of one note (see facts of case), having the first right to the benefit of the mortgage, forecloses, and the property is sold, such foreclosure and sale extinguish the mortgage. The holders of the other notes secured by the mortgage have a right to redeem, but when not made parties to the action, they must assert this right within four years, or be barred by the statute of limitations. The right to foreclose and the right to redeem are reciprocal, and the statute begins to run against the redemption at the time the right of action accrues on the mortgage. Grattan v. Wiggins, 23 Cal. 16; and see further, as to right to redeem, De Espinosa v. Gregory, 40 Cal. 58; Siter v. Jewett, 33 Cal. 92; Cunningham v. Hawkins, 24 Cal. 403; 85 Am. Dec. 73; Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722.

35. Pleading. Pleading of the statute of limitations. See Smith v. Richmond, 19 Cal. 476; Lick v. Diaz, 30 Cal. 75. The defense of the statute of limitations is a personal privilege of the debtor, which he may assert or waive at his option, but it must be set up in some form, either by demurrer or answer, or it will be deemed to have been waived. Grattan v. Wiggins, 23 Cal. 16. It must be pleaded in the first instance, and has no day of grace thereafter. See Cooke v. Spears, 2 Cal. 409; 56 Am. Dec. 348.

36. Statute, how pleaded by demurrer. A defense under the statute of limitations cannot be made by a demurrer which states in general terms that the complaint does not state facts sufficient to constitute a cause of action. The statute, in order to be available as a defense, must be distinctly stated in the demurrer. Brown v. Martin, 25 Cal. 82; affirmed in Farwell v. Jackson, 28 Cal. 106; Smith v. Richmond, 19 Cal. 476.

37. Right to use water by adverse use. See American Company v. Bradford, 27 Cal. 360.

38. Averment that cause of action accrued more than two years prior, etc. In an action for the value of services rendered, a plea which does not aver that the cause of action accrued more than two years before the commencement of the action, but only that the services contracted to be rendered by the plaintiff were rendered more than two years before action brought, is insufficient as a plea of the statute of limitations. Hartson v. Hardin, 40 Cal. 264.

39. Pleading adverse possession. A plea of the statute of limitations, which states that the plaintiff was not seised of the land within five years before the commencement of the action, is fatally defective in not averring that neither the plaintiff's predecessor or grantor was possessed within that time, and also because no adverse possession by the defendant is alleged for any time anterior to the action. Sharp v. Daughney, 33 Cal. 505.

40. Allegation of adverse possession, etc. The statute is not well pleaded in an answer which states that "if plaintiffs ever had any right or title to their claims, or to any portion thereof, they are barred by the statute of limitations, as the defendants have been in the quiet and peaceable possession of the same, adversely to the plaintiffs, for a period of over five years." The averment that the plaintiff is "barred by the statute of limitations" is merely a conclusion of law. It does not present any issuable fact. Schroeder v. Jahns, 27 Cal. 274; Caulfield v. Sanders, 17 Cal. 569. The "period of over five years," during which it is alleged that defendants were in adverse possession, is not charged as having preceded the commencement of the action. Table Mountain Tunnel Co. v. Stranahan, 31 Cal. 387.

41. Adverse possession by tenant in common, allegation of. A person depending upon an adverse possession, of a sufficient time, of land, owned by himself and the adverse party as tenants in common, must plead facts from which it will affirmatively appear that his possession was of an adverse and hostile character; otherwise his possession of land will be deemed to be according to his right, and in support of the title in common. Lick v. Diaz, 30 Cal. 65. See further, as to adverse possession, Le Roy v. Rogers, 30 Cal. 229; 89 Am. Dec. 88.

42. Allegations of facts, not of law, required. A party relying on the statute of limitations should not allege matter of law, but the facts which bring it within the statute. Boyd v. Blankman, 29 Cal. 44; 87 Am. Dec. 146.

43. Averment of five years covers any less term. An answer averring that the cause of action had not accrued within five years is sufficient for five years, and for any period of limitation less than five years. Boyd v. Blankman, 29 Cal. 44; 87 Am. Dec. 146.

44. Items of account. Where the complaint states a cause of action for goods sold and delivered, and a bill of items is annexed to the same as an exhibit, with the date of each item, an answer which refers to the exhibit, and avers that the last item, only, is within two years previous to the commencement of the action, and that, except as to the last item, "no right has accrued to said plaintiff by reason of the matter mentioned and set forth in said complaint at any time within two years next preceding this action," is a good answer of the statute of limitations to all the items, except the last. The words "preceding the commencement of this action," in such answer, are equivalent to the words "preceding the filing of the complaint." Adams v. Patterson, 35 Cal. 122.

45. Assumpsit. A count in a complaint in the old form of assumpsit, for money had and received, in which the promise is laid of a day more than two years prior to the commencement of the action, is demurrable, on the ground that it shows the demand to be barred by the statute of limitations. Keller v. Hicks, 22 Cal. 457; 83 Am. Dec. 78.

46. Pleading by demurrer. On demurrer to a complaint founded upon the statute of limitations, if the complaint fails to show whether the contract in suit was verbal or in writing, it will be presumed to have been in writing, for all the purposes of the demurrer. Miles v. Thorne, 38 Cal. 335; 99 Am. Dec. 384.

47. Pleading by demurrer. The defense of the statute of limitations may be presented by demurrer when it appears from the complaint that the period of limitation has elapsed since the cause of action accrued to the plaintiff, and no facts are alleged taking the demand out of the

operation of the statute. Mason v. Cronise, 20 Cal. 211, affirming Smith v. Richmond, 19 Cal. 476, and Barringer v. Warden, 12 Cal. 311. But the bar of the statute must clearly appear on the face of complaint. Ord v. De La Guerra, 18 Cal. 68.

48. **By answer.** But where the demand is in truth barred, but the fact does not appear upon the face of the complaint, the defense of the statute must be made by answer. Smith v. Richmond, 19 Cal. 476.

49. **New promise.** A complaint upon a note barred by the statute is sufficient, if it alleges that the defendant has within four years of the day when the suit was commenced, "in writing, acknowledged and promised to pay the note." Such allegation imports that the defendant signed the writing. Porter v. Elam, 25 Cal. 291; 85 Am. Dec. 132. The defendant's signature to the new promise was necessary, and the new promise must be in writing. Peña v. Vance, 21 Cal. 142. See also, on this point, Barringer v. Warden, 12 Cal. 311.

50. **New promise.** It is sufficient, where the complaint alleged an express promise to pay a debt which was barred by the statute, to prove an acknowledgment of the debt from which a promise to pay is implied. See further facts concerning burden of proof, etc., Farrell v. Palmer, 36 Cal. 187.

51. **New promise.** Where a creditor sues after the statute has run upon the original contract, his cause of action is not the original contract, for his action thereupon is barred, but it is the new promise, the moral obligation arising from the original contract binding in foro conscientiæ, notwithstanding the bar of the statute being the consideration for the new promise. For authorities upon new promise, see Angell on Limitations, pp. 218 et seq. And the action must be brought on the new promise within four years. See McCormick v. Brown, 36 Cal. 184; 95 Am. Dec. 170, and authorities therein cited. See further, as to new promise, Smith v. Richmond, 19 Cal. 476.

52. **Pleading new promise. For payment of debt outlawed, etc.** See Smith v. Richmond, 19 Cal. 476.

53. **Ejectment.** In ejectment, a plea of the statute of limitations of two years, under the settler's act is no defense. Anderson v. Fisk, 36 Cal. 625.

CHAPTER II.

TIME OF COMMENCING ACTIONS FOR RECOVERY OF REAL PROPERTY.

§ 315. When the people will not sue.
§ 316. When action cannot be brought by grantee from the state.
§ 317. When actions by the people or their grantees are to be brought within five years.
§ 318. Seisin within five years, when necessary in action for real property.
§ 319. Such seisin, when necessary in action or defense arising out of title to or rents of real property.
§ 320. Entry on real estate.
§ 321. Possession, when presumed. Occupation deemed under legal title, unless adverse.
§ 322. Occupation under written instrument or judgment, when deemed adverse.
§ 323. What constitutes adverse possession under written instrument or judgment.
§ 324. Premises actually occupied under claim of title deemed to be held adversely.
§ 325. What constitutes adverse possession under claim of title not written.
§ 326. Relation of landlord and tenant as affecting adverse possession.
§ 327. Right of possession not affected by descent cast.
§ 328. Certain disabilities excluded from time to commence actions.

§ 315. When the people will not sue. The people of this state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless—

1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or,

2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years.

Title by occupancy. Civ. Code, § 1007.

Legislation § 315. Enacted March 11, 1872; based on Stats. 1850, p. 343.

Statute of limitations not applicable as against the state. The state is not bound by its statute of limitations, except by express words or by necessary implication (Wilhoit v. Tubbs, 83 Cal. 279; 23 Pac. 386; Russ v. Crichton, 117 Cal. 695; 49 Pac. 1043); nor is the statute applicable to property held in trust by a state institution or a public agency for a public use (Sixth District Agricultural Ass'n v. Wright, 154 Cal. 119; 97 Pac. 144); neither is the Federal government bound by the state statute of limitations. Mathews v. Ferrea, 45 Cal. 51; Doran v. Central Pacific R. R. Co., 24 Cal. 245; Gardiner v. Miller, 47 Cal. 570; Jatunn v. Smith, 95 Cal. 154; 30 Pac. 200.

Accrual of title within ten years. This section is construed to mean, that the people of the state will not sue "for or in respect to real property," except where the cause of action has accrued within ten years. People v. Center, 66 Cal. 551; 5 Pac. 263; 6 Pac. 481.

With respect to real property. The state may maintain an action with respect to real property at any time within ten years; but no cause of action can be brought to recover possession until the state has been deprived of possession. People v. Center, 66 Cal. 551; 5 Pac. 263; 6 Pac. 481. The state can never be disseised of its lands by the adverse occupancy of another (Wilhoit v. Tubbs, 83 Cal. 279; 23 Pac. 386); and no title by adverse possession can be acquired, as against the state, to lands held

in trust by it for the people, unless there has been an abandonment of such public use by competent authority. People v. Kerber, 152 Cal. 731; 125 Am. St. Rep. 93; 93 Pac. 878. As against the public, no one can acquire, by adverse occupancy, the right to obstruct a street dedicated to public use, and thus prevent its use as a highway. Hoadley v. San Francisco, 50 Cal. 265; People v. Pope, 53 Cal. 437. The title to tide-lands cannot properly be said to have "accrued" to the state, in the sense in which that term is employed in this section (Farish v. Coon, 40 Cal. 33); and it is doubtful whether this section is applicable at all to suits to recover possession of such tide-lands. People v. Kerber, 152 Cal. 731, 738; 125 Am. St. Rep. 93; 93 Pac. 878. A suit by the attorney-general, in behalf of the people, for the recovery of state lands, may be maintained without express statutory authority. People v. Stratton, 25 Cal. 242; People v. Center, 66 Cal. 551; 5 Pac. 263; 6 Pac. 481. This section has no application to an action by an individual holding under a state patent. Wilhoit v. Tubbs, 83 Cal. 279; 23 Pac. 286.

Statute must be pleaded. The bar of the statute must be specifically pleaded, to be availed of. Osment v. McElrath, 68 Cal. 466; 58 Am. Rep. 17; 9 Pac. 731; Wilhoit v. Tubbs, 83 Cal. 279; 23 Pac. 386; Dougall v. Schulenberg, 101 Cal. 154; 35 Pac. 635.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343. See Farish v. Coon, 40 Cal. 33; Hall v. Dowling, 18 Cal. 619.

§ 316. When action cannot be brought by grantee from the state. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this state, unless the same might have been commenced by the people as herein specified, in case such patent had not been issued or grant made.

Legislation § 316. Enacted March 11, **1872**; based on Stats. 1850, p. 343.

Persons claiming from state. An individual, claiming under a patent from the state, can maintain his action to recover the property, or the mesne profits thereof, at any time within the five years prescribed by the statute. Wilhoit v. Tubbs, 83 Cal. 279; 23 Pac. 386. In an action involving the use of water, the statute runs from the date of the grant if the water was appropriated before the grant, or from the date of the appropriation if it was made after the grant, and not from the date of the issuance of the patent to the land. Jatunn v. Smith, 95 Cal. 154; 30 Pac. 200; and see Fremont v. Seals, 18 Cal. 433; Gardiner v. Miller, 47 Cal. 570; Nessler v. Bigelow, 60 Cal. 98.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

§ 317. When actions by the people or their grantees are to be brought within five years. When letters patent or grants of real property issued or made by the people of this state, are declared void by the determination of a competent court, an action for the recovery of the property so conveyed may be brought, either by the people of the state, or by any subsequent patentee or grantee of the property, his heirs or assigns, within five years after such determination, but not after that period.

Legislation § 317. 1. Enacted March 11, **1872**; based on Stats. 1850, p. 343.

2. Amended by Code Amdts. **1873–74**, p. 291, (1) omitting, after "competent court," the clause, "rendered upon an allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, in such case"; (2) changing the word "the" from "this," in the words "people of the state"; and (3) omitting the word "same" before "property," in the words "grantee of the property."

Acquisition of title by prescription against public. See note 26 L. R. A. 451.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

§ 318. Seisin within five years, when necessary in action for real property. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action.

Adverse possession. Post, §§ 321 et seq.

Trespass upon real property, action for, must be brought within three years. Post, § 338.

Possession, presumptive evidence of ownership. See post, § 1963, subd. 11.

Action includes special proceeding of civil nature. Post, § 363.

Legislation § 318. Enacted March 11, **1872**; based on Stats. 1863, p. 325.

Application of section. This section applies to an action to set aside a conveyance as obtained by fraud and undue influence, and to recover an interest in the

property (Murphy v. Crowley, 140 Cal. 141; 73 Pac. 820, reversing Murphy v. Crowley, 7 Cal. Unrep. 49; 70 Pac. 1024; Page v. Garver, 146 Cal. 577; 80 Pac. 860); and is to be construed with § 338, post; and must govern, where, though the principal ground for relief is on account of fraud, still, in the action, the party seeks the recovery of real property on the ground of such fraud. Unkel v. Robinson, 163 Cal. 648; 126 Pac. 485. An action to establish involuntary and resulting trusts in land, to enforce a conveyance of the legal title, and to recover the possession thereof, is subject wholly to this section, and not to § 343, post. Bradley v. Bradley, 20 Cal. App. 1; 127 Pac. 1044.

Recovery of real property, or possession. An action to acquire title to a right of way is within this section (Schmidt v. Klotz, 130 Cal. 223; 62 Pac. 470); as is also an action to compel a conveyance of land and correct a mistake in the deeds (Goodnow v. Parker, 112 Cal. 437; 44 Pac. 738; Union Ice Co. v. Doyle, 6 Cal. App. 284; 92 Pac. 112); and an action to recover real property and cancel a deed (Daniels v. Dean, 2 Cal. App. 421; 84 Pac. 332), and an action to cancel a patent by the United States (Curtner v. United States, 149 U. S. 662; 37 L. Ed. 890; 13 Sup. Ct. Rep. 985); and an action to determine title to water, even where the defense pleaded is fraud and mistake, whereby the legal title was obtained, is also within this section (South Tule etc. Ditch Co. v. King, 144 Cal. 455; 77 Pac. 1032); as is also an action to be let into possession as tenant in common to land, possession of which was obtained from an ancestor by undue influence (Murphy v. Crowley, 140 Cal. 141; 73 Pac. 820); but not an action which does not seek to recover real property, but merely to reform a deed upon the ground of mutual mistake. Hart v. Walton, 9 Cal. App. 502; 99 Pac. 719. In an action to quiet title under the so-called McEnerney Act, proof of the actual possession by the plaintiff of the land in question at the time the action was commenced and when the affidavit accompanying it was made, is necessary to the rendition of a judgment for the plaintiff. Vanderbilt v. All Persons, 163 Cal. 507; 126 Pac. 158.

Possession required of one who invokes McEnerney Act. See note post, § 323.

Possession by one tenant in common. As between tenants in common, the possession of one is the possession of all; in order to set the statute running in favor of one tenant against his co-tenant, it is necessary that there shall be an adverse possession (Watson v. Sutro, 86 Cal. 500; 24 Pac. 172; 25 Pac. 64; and see Love v. Watkins, 40 Cal. 547; 6 Am. Rep. 624; Unger v. Mooney, 63 Cal. 586; 49 Am. Rep. 100); and where such possession is adverse for the required time, it will operate in favor of a tenant in common against his co-tenant (Tully v. Tully, 71 Cal. 338; 12 Pac. 246); as where they hold in hostility to each other and in severalty. Casserly v. Alameda County, 153 Cal. 170; 94 Pac. 765; Gregory v. Gregory, 102 Cal. 50; 36 Pac. 364. The exercise of unequivocal, overt, and notorious acts of ownership, by a tenant in common in possession, imparts notice that disseisin is intended (Feliz v. Feliz, 105 Cal. 1; 38 Pac. 521); and an open and notorious possession, and claim of ownership, continued for more than five years, constitutes an ouster of co-tenants, and the bar of the statute intervenes (Unger v. Mooney, 63 Cal. 586; 49 Am. Rep. 100; Bath v. Valdez, 70 Cal. 350; 11 Pac. 724; Winterburn v. Chambers, 91 Cal. 170; 27 Pac. 658); but where the possession of one tenant in common has not been disturbed by his co-tenants, and there have been no acts of exclusion equivalent to an ouster, the statute does not run as against his right or title (McCauley v. Harvey, 49 Cal. 497); in other words, there must be a repudiation of the trust, and a notice thereof brought home to the co-tenant, before any adverse possession can arise. Watson v. Sutro, 86 Cal. 500; 24 Pac. 172; 25 Pac. 64. The question of whether a person entered into possession claiming ownership of the whole, or whether he acknowledged a co-tenancy, is one of fact. Alvarado v. Nordholt, 95 Cal. 116; 30 Pac. 211. A valid decree in partition severs the unity of possession, and is conclusive as to all rights in other parts of the land, irrespective of the adverse possession by those to whom they were allotted. Richardson v. Loupe, 80 Cal. 490; 22 Pac. 227.

Adverse possession. Adverse possession is merely possession hostile as against a particular claim, to which it is opposed in proof (McManus v. O'Sullivan, 48 Cal. 7); but it is of the very essence of adverse possession, that the holder claim the right to his possession, not under, but in opposition to, the title to which his possession is alleged to be adverse. Farish v. Coon, 40 Cal. 33. The statute does not begin to run against a remainderman until the termination of the life estate, when he becomes entitled to the possession. Pryor v. Winter, 147 Cal. 554; 109 Am. St. Rep. 162; 82 Pac. 202. And, although complete and exclusive, it must also continue for the full period. Baum v. Reay, 96 Cal. 462; 29 Pac. 117; 31 Pac. 561; Watts v. Gallagher, 97 Cal. 47; 31 Pac. 626. Adverse possession does not ripen into title, unless it is continued uninterruptedly for five years (Hayes v. Martin, 45 Cal. 559); and, to effect a bar, the possession must be continuous and exclusive for the full period. Hagar v. Spect, 48 Cal. 406. It must also be actual and complete, as well as continuous. Kimball v. Stormer, 65 Cal. 116; 3 Pac. 408; Kockemann v. Bickel, 92 Cal. 665; 28 Pac. 686; Miller v. Bensinger, 3

Cal. Unrep. 704; 31 Pac. 578. The possession of a part, only, will not prevent the bar of the statute as to that not in possession. Weed v. Snook, 144 Cal. 439; 77 Pac. 1023. Title by adverse possession may be acquired, though commenced under a mistake. Steckter v. Ewing, 6 Cal. App. 761; 93 Pac. 286.

Adverse possession must continue for five years. The occupation of land adversely for five years continuously, without interruption, and in compliance with all the requirements of the law, vests absolute title in the occupant, as much as any written conveyance, which is known as title by prescription (Simson v. Eckstein, 22 Cal. 580; Grattan v. Wiggins, 23 Cal. 16; Le Roy v. Rogers, 30 Cal. 229; 89 Am. Dec. 88; Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722; Cannon v. Stockmon, 36 Cal. 535; 95 Am. Dec. 205; San Francisco v. Fulde, 37 Cal. 349; 99 Am. Dec. 278; McManus v. O'Sullivan, 48 Cal. 7; Morris v. De Celis, 51 Cal. 55; Langford v. Poppe, 56 Cal. 73; Pacific Mut. Life Ins. Co. v. Stroup, 63 Cal. 150; Johnson v. Brown, 63 Cal. 391; Thomas v. England, 71 Cal. 456; 12 Pac. 491); and is sufficient not only to bar a claimant under a legal title, but also to create a title. Owsley v. Matson, 156 Cal. 401, 104 Pac. 983.

When possession is not adverse. The possession of an administrator is the possession of the heir. Spotts v. Hanley, 85 Cal. 155; 24 Pac. 738; Brenham v. Storey, 39 Cal. 179. In case of a trustee, there must be an open and unequivocal repudiation of the trust by the trustee, and actual knowledge thereof by the cestui que trust, to set the statute running against an action to enforce the trust (Luco v. De Toro, 91 Cal. 405; 27 Pac. 1082; Miles v. Thorne, 38 Cal. 335; 99 Am. Dec. 384; Love v. Watkins, 40 Cal. 547; 6 Am. Rep. 624; Hearst v. Pujol, 44 Cal. 230; Hoffman v. Vallejo, 45 Cal. 564; Janes v. Throckmorton, 57 Cal. 368), as the possession of a trustee is the possession of the cestui que trust. Love v. Watkins, 40 Cal. 547; 6 Pac. 624. The possession of one, gained by a partial distribution, while the estate remains unclosed, is the possession of all the distributees. Estate of Grider, 81 Cal. 571; 22 Pac. 908. A party holding in one capacity cannot claim adversely in another. Roman Catholic Archbishop v. Shipman, 79 Cal. 288; 21 Pac. 830. The conveyance of title by the party in possession makes him the tenant of the grantee (Brooks v. Hyde, 37 Cal. 366); but where he remains in adverse possession for a period of five years, he acquires a title as against his grantee. Dorland v. Magilton, 47 Cal. 485. An adverse possession, taken after a deed, and held the time required by statute, is good as against the grantee. Franklin v. Dorland, 28 Cal. 175; 87 Am. Dec. 111. As between a landlord and a tenant in possession, the statute does not run against the landlord in favor of the tenant (Doolan v. McCauley, 66 Cal. 476; 6 Pac. 130; Ouoto v. Restano, 89 Cal. 63; 26 Pac. 788); and the same rule applies to a subtenant. Standley v. Stephens, 66 Cal. 541; 6 Pac. 420; Millett v. Lagomarsino, 107 Cal. 102; 40 Pac. 25. This is under the general rule, that a tenant cannot dispute his landlord's title. Tewksbury v. Magraff, 33 Cal. 237; Willson v. Cleaveland, 30 Cal. 192. As between a mortgagee in possession and the mortgagor, unless there has been some breach of condition of the mortgage, the possession of the mortgagee is not adverse to the mortgagor. Husheon v. Husheon, 71 Cal. 407; 12 Pac. 410; Warder v. Enslen, 73 Cal. 291; 14 Pac. 874. The same rule applies as between a pledgee and the pledgor (Cross v. Eureka Lake etc. Canal Co., 73 Cal. 302; 2 Am. St. Rep. 808; 14 Pac. 885); and also as between a vendee and the vendor, under a contract of purchase, unless there is some hostility, manifested by some unequivocal acts brought to the knowledge of the vendor (Kerns v. Dean, 77 Cal. 555; 19 Pac. 817); but a grantee's entry under purchase is adverse to the grantor, and he may set up an adverse title from an independent source. Robinson v. Thornton, 102 Cal. 675; 34 Pac. 120. When the grantor remains in possession after a sale, or subsequently takes repossession, and holds adversely to the grantee, he may acquire adverse title. Franklin v. Dorland, 28 Cal. 175; 87 Am. Dec. 111; Dorland v. Magilton, 47 Cal. 485; Lord v. Sawyer, 57 Cal. 65; Garabaldi v. Shattuck, 70 Cal. 511; 11 Pac. 778. The statute does not commence to run against a remainderman until the death of the tenant, as he is not entitled to possession during the life of the tenant (Pryor v. Winter, 147 Cal. 554; 109 Am. St. Rep. 162; 82 Pac. 202); nor against an infant until he attains his majority (Burton v. Robinson, 51 Cal. 186); nor does it run as against the certificate of purchase of swamp or overflowed lands, but commences to run on the date of the issuance of the patent thereon. Manly v. Howlett, 55 Cal. 94; Easton v. O'Reilly, 63 Cal. 305; Wilhoit v. Tubbs, 83 Cal. 279; 23 Pac. 386; Riverside Land etc. Co. v. Jansen, 66 Cal. 300; 5 Pac. 486; O'Connor v. Fogle, 63 Cal. 9; Reed v. Ybarra, 50 Cal. 465. The statute commences to run against a purchaser at a sheriff's sale on the date of the delivery of the sheriff's deed. Leonard v. Flynn, 89 Cal. 535; 23 Am. St. Rep. 500; 26 Pac. 1097. An action to compel the conveyance of property is not barred, so long as the purchaser is in possession of the property agreed to be conveyed (Scadden Flat Gold Mining Co. v. Scadden, 121 Cal. 33; 53 Pac. 440); and where the vendee has performed his part of the contract, the statute does not commence to run against his right to

specific performance, so long as he remains in possession (Fleishman v. Woods, 135 Cal. 256; 67 Pac. 276); and where the distributee of an estate has held the same adversely for more than five years, and has paid all taxes, an action to recover the estate is barred. Gavin v. Phillips, 12 Cal. App. 34; 106 Pac. 424.

Possession by predecessor. Under this section, the grantee may tack to his own possession the possession of his grantor, for the purpose of working out a bar against the holder of the legal title (Franklin v. Dorland, 28 Cal. 175; 87 Am. Dec. 111); but where the predecessor is barred by the statute, one claiming under him is barred also. Le Roy v. Rogers, 30 Cal. 229; 89 Am. Dec. 88. An heir has only such right as the ancestor might have. Page v. Page, 143 Cal. 602; 77 Pac. 452.

Legal title not aided by adverse possession. Possession held under legal title cannot gain anything from adverse possession. Howell v. Slausen, 83 Cal. 539; 23 Pac. 692.

Possession under permission. No prescriptive title can be acquired, where occupancy of the land is under permission of the owner of the title. Feliz v. Los Angeles, 58 Cal. 73; Ball v. Kehl, 95 Cal. 606; 30 Pac. 780; Allen v. McKay, 139 Cal. 94; 72 Pac. 713.

No adverse possession against public. There can be no adverse user, against the public (Hoadley v. San Francisco, 50 Cal. 265; People v. Pope, 53 Cal. 437; Visalia v. Jacob, 65 Cal. 434; 52 Am. Rep. 303; 4 Pac. 433; San Leandro v. Le Breton, 72 Cal. 170; 13 Pac. 405; Hargro v. Hodgdon, 89 Cal. 623; 26 Pac. 1106; Oreña v. Santa Barbara, 91 Cal. 621; 28 Pac. 268), of land dedicated to a public use (San Francisco v. Bradbury, 92 Cal. 414; 28 Pac. 803; Yolo County v. Barney, 79 Cal. 375; 12 Am. St. Rep. 152; 21 Pac. 833; Board of Education v. Martin, 92 Cal. 209; 28 Pac. 799); nor can title to a public street be acquired by adverse user, except where the land has ceased to be a public street, and is held by the city merely as a proprietary interest. Red Bluff v. Walbridge, 15 Cal. App. 770; 116 Pac. 77. This section applies to adverse possession of squares by a town, city, and county. Casserly v. Alameda County, 153 Cal. 170; 94 Pac. 765.

Payment of taxes. Where it is necessary to pay taxes to secure a good title by adverse possession, such title is defeated by a failure to pay the taxes for a single year. Allen v. McKay, 139 Cal. 94; 72 Pac. 713. There is no adverse possession, under the occupation of land, where the occupier fails to pay the taxes. O'Connor v. Fogle, 63 Cal. 9; Berniaud v. Beecher, 71 Cal. 38; 11 Pac. 802; Gavin v. Phillips, 12 Cal. App. 34; 106 Pac. 424. The payment of taxes by a third person, merely as the result of an erroneous assessment, does not affect the title to land occupied by the owner, nor debar him of his right to have it quieted. Vanderbilt v. All Persons, 163 Cal. 507; 126 Pac. 158. The proof of the payment of taxes is admissible to show claim of title, and that it had not been abandoned. Baum v. Reay, 96 Cal. 462; 29 Pac. 117; 31 Pac. 561; Southern Pacific R. R. Co. v. Whittaker, 109 Cal. 268; 41 Pac. 1083.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 325.

1. **Real property.** Oakland v. Carpentier, 13 Cal. 540; Morton v. Folger, 15 Cal. 275; Fremont v. Seals, 18 Cal. 433; Clarke v. Huber, 25 Cal. 596; Billings v. Harvey, 6 Cal. 383; Billings v. Hall, 7 Cal. 3. For a digest of the above-cited decisions on the several points involved, see note to § 312, ante, where these cases are discussed.

2. **Division lines. Fences.** As to division lines between adjacent lands, acquiescence for the time prescribed by the statute of limitations concerning real property may fix the division line as to the owners, etc. Sneed v. Osborn, 25 Cal. 626, and authorities cited.

3. **Right to use running water. Adverse enjoyment.** To acquire a right to the use of a running stream by adverse enjoyment or prescription, it is necessary that such adverse enjoyment or prescription should have continued for a period corresponding to the time fixed by the statute of limitations as a bar to an entry on land, viz., five years. Crandall v. Woods, 8 Cal. 144; Davis v. Gale, 32 Cal. 26; 91 Am. Dec. 554.

4. **Adverse possessor allowing others below to use water.** If one taking adverse possession of water, as against a prior appropriator, suffers a portion of the same to flow down to accommodate miners working below, this does not prejudice his adverse possession so as to prevent the running of the statute of limitations. Davis v. Gale, 32 Cal. 26; 91 Am. Dec. 554.

5. **Water rights acquired by adverse possession.** The right to the use of a watercourse in the public mineral lands, and the right to divert and use the water taken therefrom, is acquired by appropriation and use, the person first appropriating it being deemed to have the title, as against all the world, except the United States and persons claiming under them, to the extent that he thus appropriated it before the rights of others attached. The rights thus acquired may be held, granted, abandoned, or lost by the same means as a right of the same character issuing out of lands to which a private title exists. The right of the first appropriator may be lost, in whole or in some limited portions, by the adverse possession of another. And when such person has had the continued, uninterrupted, and adverse enjoyment of the watercourse, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him. Bealey v. Shaw, 6 East, 208; Balston v. Buested, 1 Camp. 463; Ricard v. Williams, 7 Wheat. 59, 5 L. Ed. 398; Williams v. Nelson, 23 Pick. 141, 34 Am. Dec. 45; Colvin v. Burnet, 17 Wend. 564; Hammond v. Zehner, 23 Barb. 473; Yankee Jim's Union Water Co. v. Crary, 25 Cal. 509; 85 Am. Dec. 145.

6. **Right to water by adverse use, by prescription. Burden of proof, etc.** The general and established doctrine is, that an exclusive and uninterrupted enjoyment of water, in any particular way, for a period corresponding to the time limited by statute within which an action must be commenced for the recovery of the property or of the assumed right held and enjoyed adversely, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person which might have been but was not asserted. 3 Kent's Com., pp. 441–446; Bealey v. Shaw, 6 East, 214; Shaw v. Crawford, 10 Johns. 236; Johns v. Stevens, 3 Vt. 316; Yankee Jim's Union Water Co. v. Crary, 25 Cal. 504; 85 Am.

Dec. 145. The right which the defendants claim under the grant, which they assumed to exist, as evidenced by their adverse use and enjoyment of the water for five years, they denominate an easement. An easement or servitude may be created by grant or prescription, and when created it will pass by conveyance with the dominant estate (that is, with the estate to which it is appurtenant, as an incorporeal hereditament) attached to the servient estate, subjecting the latter to the benefit of the former. But the owner of the easement or servitude has no general property in nor seisin of the servient estate, though he may, by holding a fee in the dominant estate, have an estate of inheritance in the easement or servitude. Washburn on Easements, ch. i, § 1; Ersk. Inst., p. 352; Wolfe v. Frost, 4 Sandf. Ch. 89. A grant of an estate in lands, whether corporeal or incorporeal, may be presumed from an adverse enjoyment for the period corresponding to the statute of limitations within which an action might have been maintained against the person holding and enjoying adversely. But what must be the circumstances under which such presumption may arise? In order that the enjoyment of an easement in another's land may be conclusive of the right claimed, it must have been adverse in the legal sense of the term; that is, the right must have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted. The burden of proving this is on the party claiming the easement. If he leaves it doubtful whether the enjoyment was adverse, known to the owner and uninterrupted, it is not conclusive in his favor. 2 Greenleaf on Evidence, § 539; Greenleaf's Cruise, tit. 31, ch. i, note 1 to § 21, and cases therein cited. According to the common-law system of pleading, a defendant could not give in evidence under the general issue, in excuse or justification of an alleged trespass, a right of common, or a public or private right of way, or a right to an easement, nor any interest in land short of property or right of possession. Saunders v. Wilson, 15 Wend. 338; Babcock v. Lamb, 1 Cow. 239; Rouse v. Bardin, 1 H. Bl. 352; 2 Saund. Pl. & Ev., p. 856; 1 Chitty's Pleading, p. 505. A defense of the kind mentioned had to be pleaded specially. The reason of the rule was to prevent surprise. Demick v. Chapman, 11 Johns. 132. The rule of the common law here referred to has not been changed so as to obviate the necessity of pleading specially such defense. By the law of this state the defendants are bound to interpose their alleged right by answer as well as by evidence, provided it be conceded that plaintiff had the prior right and title to the waters of the creek. American Company v. Bradford, 27 Cal. 366, 367.

7. Generally. See note to § 320, post.

§ 319. Such seisin, when necessary in action or defense arising out of title to or rents of real property. No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seised or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made.

Action includes special proceeding of civil nature. Post, § 363.

Legislation § 319. Enacted March 11, 1872; based on Stats. 1863, p. 325.

Defense of actions concerning real estate. The preceding section relates to actions for the recovery of real property, while this relates to the defense thereof (Richardson v. Williamson, 24 Cal. 289); but it does not apply to actions involving mere easements in land (Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. 753; 9 Sawy. 441), nor to actions to quiet title (Brusie v. Gates, 80 Cal. 462; 22 Pac. 284), nor to cases where the defendant was never in the actual possession, and never paid any taxes assessed against the property (Bernaud v. Beecher, 71 Cal. 38; 11 Pac. 802): it applies to personal actions, founded upon title to real property, such as actions to recover damages to real property, rents, etc. Hagely v. Hagely, 68 Cal. 348; 9 Pac. 305; Richardson v. Williamson, 24 Cal. 289. It does not bar the right of a mortgagor to redeem, as against the mortgagee in possession, unless the mortgagee has had continuous adverse possession for five years after the breach of condition in the mortgage. Warder v. Enslen, 73 Cal. 291; 14 Pac. 874; Cohen v. Mitchell, 2 Cal. Unrep. 629; 9 Pac. 649.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 325.

1. Rents or profits. See Kimball v. Lohmas, 31 Cal. 159, affirming Halleck v. Mixer, 16 Cal. 574.

2. In an action to recover lands, the plaintiff can recover the rents and profits for three years only, prior to the commencement of the action, if the defendant pleads the statute of limitations as to them. Carpentier v. Mitchell, 29 Cal. 330, and authorities cited therein; affirming, also, Richardson v. Williamson, 24 Cal. 289; see also § 312, ante; see note to next section.

§ 320. Entry on real estate. No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended or accrued.

Legislation § 320. Enacted March 11, 1872; based on Stats. 1863, p. 325.

Effect of amendment of statute. Where the statute of limitations is amended, the time fixed therein runs only from the date of the passage of the amendatory act. Billings v. Harvey, 6 Cal. 381; Billings v. Hall, 7 Cal. 1; Morton v. Folger, 15 Cal. 275; Clarke v. Huber, 25 Cal. 593.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 325.

1. **Mexican grants.** This chapter embodies the provisions of statutes existing prior to the adoption of the code relative to the time of commencing actions for the recovery of real property. They have been carefully revised and placed in logical order, but no substantial changes have been made. Section 6 of the act of 1863 (Stats. 1863, p. 325) provides, among other things, that "any person claiming real property, or the possession thereof, or any right or interest therein, under the title derived from the Spanish or Mexican governments, or the authorities thereof, which shall not have been fully confirmed by the government of the United States, or its legally constituted authorities, more than five years before the passage of this act, may have five years after the passage of this act in which to commence his action for the recovery of such real property, or the possession thereof, or any right or interest therein, or for rents or profits out of the same, or to make his defense to an action founded upon the title thereto; and provided further, that nothing in this act shall be so construed as to extend or enlarge the time for commencing actions for the recovery of real estate or the possession thereof, under title derived from Spanish or Mexican governments, in a case where final confirmation has already been had, other than is now allowed under the act to which this act is amendatory." As the time fixed in this statute has expired, and all rights that have accrued under it are preserved by the saving clause in the preliminary part of this code (see § 8, ante; and see Billings v. Harvey, 6 Cal. 381), it was thought unnecessary to insert any provisions excepting lands within those grants from the operation of the general rule relating to real actions. For decisions respecting these grants, see Billings v. Harvey, 6 Cal. 381; Billings v. Hall, 7 Cal. 1; Dominguez v. Dominguez, 7 Cal. 424. Statute does not begin to run until after issuance of patent. Reed v. Spicer, 27 Cal. 58; Figg v. Mayo, 39 Cal. 262; Soto v. Kroder, 19 Cal. 87; Judson v. Malloy, 40 Cal. 300; Johnson v. Van Dyke, 20 Cal. 225; Downer v. Smith, 24 Cal. 114. But see the elaborate opinion of Justice Field in Montgomery v. Bevans, 1 Sawy. 653; Fed. Cas. No. 9735; also Palmer v. Low, opinion by Sawyer, J., 2 Sawy. 248; Fed. Cas. No. 10693; 4 Pac. Law Rep. No. 20.

2. **Pleadings.** Anderson v. Fisk 36 Cal. 625; Ord v. De La Guerra, 18 Cal. 67; Richardson v. Williamson, 24 Cal. 289; Vassault v. Seitz, 31 Cal. 228; Beach v. Gabriel, 29 Cal. 584; Davis v. Davis, 26 Cal. 23; 85 Am. Dec. 157; Mahoney v. Van Winkle, 33 Cal. 448. See note to § 312, ante.

§ 321. Possession, when presumed. Occupation deemed under legal title, unless adverse. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action.

Adverse possession. Post, §§ 322–325.
Forcible entry, one year. Post, § 1172.
Payment of taxes. See post, § 325.

Legislation § 321. Enacted March 11; **1872;** based on Stats. 1850, p. 343.

Kinds of adverse possession. Adverse possession is of different kinds: 1. Where the possession is taken by bow and spear, without color of title, but with the intent to claim the fee, exclusive of any other right, and to hold it against all comers; and 2. Where the possession is taken under a claim of title, founded upon a written instrument, as a conveyance, or upon the decree or judgment of a court of competent jurisdiction. The first is sufficient to put the statute of limitations in motion, and, at the expiration of five years, vests in the usurper a right, under the statute, which is equivalent to title; but, until the statute has run, he is, as to the true owner, a mere intruder without right. It cannot be said, in any just sense, that, as between him and the true owner, a case of conflicting title is presented until the statute has run; or that, until then, there can be, as between them, any substantial contest as to the title; but as to the other or second kind of adverse possession, the case is otherwise: there, the possession is accompanied by at least a colorable title, and an actual and substantial contest as to the title must arise whenever the party out of possession undertakes to assert his rights in any kind of action, for they occupy the position of conflicting claimants as to the true title, and not as to possession only. Where the defendant is in possession as a naked trespasser, and his right rests only upon a bald assertion, which merely suffices to put the statute of limitations in motion, he is not in a position to contest the title of the plaintiff, in such a sense as to defeat a personal action; for notwithstanding he may have alleged title in himself, it turns out to be false, and at the outcome it is made clear that title, although apparently a fact in issue, is so in no just sense, but only in seeming, and is in fact only exhibited by the plaintiff collaterally for the purpose of proving his right to the property in the suit. Kimball v. Lohmas, 31 Cal. 154; Halleck v. Mixer, 16 Cal. 574.

Possession, when adverse. To constitute adverse possession, and set the statute of limitations running, terminating in a bar, there must be present, and proved, five distinct elements: 1. The possession must be actual, exclusive, open, and notorious, and not clandestine; 2. It must be hostile to the plaintiff's title; 3. It must be under a claim of title, exclusive of any other right, as one's own; 4. It must be continuous and uninterrupted for five years prior to the commencement of the action, not necessarily next preceding that event; 5. The taxes must have been paid for five years by the occupant. Unger v. Mooney, 63 Cal.

586; 49 Am. Rep. 100. When so existing, it not only bars the remedy, but extinguishes the right of the holder of the title. Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722; Cannon v. Stockmon, 36 Cal. 535; 95 Am. Dec. 205; San Francisco v. Fulde, 37 Cal. 349; 99 Am. Dec. 278. By adverse enjoyment, water flowing through a natural channel may ripen into title (Crandall v. Woods, 8 Cal. 136); as also may the use of a ditch constructed for conveying water. Campbell v. West, 44 Cal. 646. It is sufficient to constitute adverse possession of public lands, that the defendant claims the right against all the world, except the United States: it is not necessary that it be under color of title. Page v. Fowler, 28 Cal. 605; Hayes v. Martin, 45 Cal. 559; McManus v. O'Sullivan, 48 Cal. 7. A parol gift of land, followed by possession by the donee, is a sufficient basis for the acquisition of title by adverse possession (Baldwin v. Temple, 101 Cal. 396; 35 Pac. 1008), and the rule operates in favor of the grantee of such parol donee (Bakersfield Town Hall Ass'n v. Chester, 55 Cal. 98); but a mere trespasser cannot invoke this rule. Page v. Fowler, 28 Cal. 605.

Open and notorious. The possession must be actual, open, exclusive, and notorious (Thompson v. Pioche, 44 Cal. 508; Unger v. Mooney, 63 Cal. 586; 49 Am. Rep. 100; American Co. v. Bradford, 27 Cal. 360; Lick v. Diaz, 30 Cal. 65; Garwood v. Hastings, 38 Cal. 216; Ball v. Kehl, 95 Cal. 606; 30 Pac. 780); and the claim must be absolute, that is, not dependable on any contingency, and must continue without interruption for the statutory period. McCracken v. San Francisco, 16 Cal. 591; Gernon v. Sissons, 21 Cal. App. 123; 131 Pac. 85. The possession must be of such a character as to operate as notice to the holder of the legal title that possession is held under right (Mauldin v. Cox, 67 Cal. 387; 7 Pac. 804); that is, it must be sufficiently open and notorious to notify a prudent and ordinary owner of its existence and of its hostile character (De Frieze v. Quint, 94 Cal. 653; 28 Am. St. Rep. 151; 30 Pac. 1; Smith v. Yule, 31 Cal. 180; 89 Am. Dec. 167; Thompson v. Pioche, 44 Cal. 508; Thompson v. Felton, 54 Cal. 547; Unger v. Mooney, 63 Cal. 586; 49 Am. Rep. 100; Thomas v. England, 71 Cal. 456; 12 Pac. 491); and it must be of such a character as to give a right of action to the real owner. Hanson v. McCue, 42 Cal. 303; 10 Am. Rep. 299; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185; 30 Pac. 623; Lakeside Ditch Co. v. Crane, 80 Cal. 181; 22 Pac. 76; Alta Land etc. Co. v. Hancock, 85 Cal. 219; 20 Am. St. Rep. 217; 24 Pac. 645; Sullivan v. Zeiner, 98 Cal. 346; 20 L. R. A. 730; 33 Pac. 209. Such possession will charge another, dealing with the owner in relation thereto. Stafford v. Lick, 7 Cal. 479; Hunter v. Watson, 12 Cal. 363; 73 Am. Dec. 543; Woodson v. McCune, 17 Cal. 298; Havens v. Dale, 18 Cal. 359; Lestrade v. Barth, 19 Cal. 660; Dutton v. Warschauer, 21 Cal. 609; 82 Am. Dec. 765; Daubenspeck v. Platt, 22 Cal. 330; Landers v. Bolton, 26 Cal. 393; Fair v. Stevenot, 29 Cal. 486; Killey v. Wilson, 33 Cal. 690; Pell v. McElroy, 36 Cal. 268; O'Rourke v. O'Connor, 39 Cal. 442; Moss v. Atkinson, 44 Cal. 3; Hellman v. Levy, 55 Cal. 117; Pacific Mut. Life Ins. Co. v. Stroupe, 63 Cal. 150. Neither the cases nor the text-writers agree in their classification of notices. In most cases, all descriptions of notices, except positive,—those in which the knowledge of the deed is brought directly home to the party,—are held to be included among constructive notices; but in others, all notices that are not deduced as conclusive presumptions of law arising from a given state of facts, are considered to fall within the class of actual notices. Fair v. Stevenot, 29 Cal. 486. In this state, constructive notice of title is founded upon the recordation of the instrument. Mesick v. Sunderland, 6 Cal. 297; Stafford v. Lick, 7 Cal. 479. Actual possession of land, with the exercise of the usual acts of ownership and dominion over it, operates, in law, as constructive notice to all the world of the claim of title under which the possessor holds. Talbert v. Singleton, 42 Cal. 390; Pacific Mut. Life Ins. Co. v. Stroupe, 63 Cal. 150.

Must be hostile. The possession must also be hostile to the plaintiff's title. Unger v. Mooney, 63 Cal. 586; 49 Am. Rep. 100. The essence of adverse title is, that the holder claims the right to his possession, not under, but in opposition to, the title to which his title is alleged to be adverse (McManus v. O'Sullivan, 48 Cal. 7); and where the occupancy of land is by acquiescence or permission of the owner, it is not adverse to the title of the owner. Unger v. Mooney, 63 Cal. 586; 49 Am. Rep. 100; Ball v. Kehl, 95 Cal. 606; 30 Pac. 780. Hostility to a particular claim of another party in the action is sufficient to raise the bar of the statute between them (McManus v. O'Sullivan, 48 Cal. 7), and this does not depend on whether or not the occupant had knowledge of his interference with the rights of the other party (Grimm v. Curley, 43 Cal. 250), that being only a circumstance tending to establish more strongly the good faith and exclusiveness of the occupant's claim. Silvarer v. Hansen, 77 Cal. 579; 20 Pac. 136. Holding possession under another is not adverse (Von Glahn v. Brennan, 81 Cal. 261; 22 Pac. 596); for it is in subordination to the owner's title. Frink v. Alsip, 49 Cal. 103; Gernon v. Sisson, 21 Cal. App. 123; 131 Pac. 85. Thus, the possession of a vendee, under a contract of sale, after rescission, is not adverse to that of the

vendor (Frisbie v. Price, 27 Cal. 253; Simpson v. Applegate, 75 Cal. 342; 17 Pac. 237), unless the vendee denies the relation of landlord and tenant, existing in such case. Smith v. Shaw, 16 Cal. 88; Dodge v. Walley, 22 Cal. 224; 83 Am. Dec. 61; Bolton v. Landers, 27 Cal. 104; Campbell v. Jones, 38 Cal. 507; Simpson v. Applegate, 75 Cal. 342; 17 Pac. 237. This is so, where a vendee, through fraud and mistake, enters upon a different tract, belonging to the same vendor. Farish v. Coon, 40 Cal. 33; McManus v. O'Sullivan, 48 Cal. 7; Thompson v. Felton, 54 Cal. 547. A lease of land interrupts the running of the statute in favor of the lessee. Abbey Homestead Ass'n v. Willard, 48 Cal. 614. The general rule is, that the tenant cannot dispute his landlord's title, either during the term of the lease or during his occupancy under such entry (see Willson v. Cleaveland, 30 Cal. 192; Tewksbury v. Magraff, 33 Cal. 237; Franklin v. Merida, 35 Cal. 558; 95 Am. Dec. 129); but where the lessee is deceived or imposed upon by the lessor, the rule is otherwise. Pacific Mut. Life Ins. Co. v. Stroup, 63 Cal. 150. The acceptance, by the owner, of the possession of his land from another, does not destroy his title (Baldwin v. Temple, 101 Cal. 396; 35 Pac. 1008); and an offer, after title has been acquired by adverse possession, to purchase of the holder of the paper title whatever interest he may have, for the purpose of quieting title, does not give effect to such paper title, nor render invalid the title of the party making the offer. Furlong v. Cooney, 72 Cal. 322; 14 Pac. 12; Frick v. Simon, 75 Cal. 337; 7 Am. St. Rep. 177; 17 Pac. 439; Winterburn v. Chambers, 91 Cal. 170; 27 Pac. 658; Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722. While an offer to purchase or rent property, and not merely to purchase an outstanding or adverse claim or title to quiet possession or protect from litigation, amounts to a recognition of title (Lovell v. Frost, 44 Cal. 471; Abbey Homestead Ass'n v. Willard, 48 Cal. 614; Central Pacific R. R. Co. v. Mead, 63 Cal. 112), yet the purchase of the outstanding title, by one in actual adverse possession, does not affect the character of that adverse possession (Winterburn v. Chambers, 91 Cal. 170; 27 Pac. 658), nor estop him from setting up the statute of limitations. Schuhman v. Garratt, 16 Cal. 100; Cannon v. Stockmon, 36 Cal. 535; 95 Am. Dec. 205; Lovell v. Frost, 44 Cal. 471. In a mutual contract for the exchange of land, the time for performance not being specified, where one party performs, the statute runs from the date of the delivery of the deed. Brennan v. Ford, 46 Cal. 7; Barron v. Frink, 30 Cal. 486; Hill v. Grigsby, 35 Cal. 656; Gernon v. Sisson, 21 Cal. App. 123; 131 Pac. 85.

Under claim of title. The possession must also be under a claim of title, exclusive of any other, as one's own. McCracken v. San Francisco, 16 Cal. 591; Kile v. Tubbs, 23 Cal. 431; Kimball v. Lohmas, 31 Cal. 154; Garrison v. McGlockley, 38 Cal. 78; Lovell v. Frost, 44 Cal. 471; Thompson v. Pioche, 44 Cal. 508; Unger v. Mooney, 63 Cal. 586; 49 Am. Rep. 100. The person must not only have possession adverse to the true owner, but he must claim title as against him during the statutory period. Lovell v. Frost, 44 Cal. 471; Rix v. Horstmann, 93 Cal. 502; 29 Pac. 120; Gillespie v. Jones, 47 Cal. 259. The entry with color of title, where the occupation is of a broad nature, will be held to be coextensive with the deed. Gunn v. Bates, 6 Cal. 263; Rose v. Davis, 11 Cal. 133; Baldwin v. Simpson, 12 Cal. 560; McCracken v. San Francisco, 16 Cal. 591; English v. Johnson, 17 Cal. 107; 76 Am. Dec. 574; Attwood v. Fricot, 17 Cal. 37; 76 Am. Dec. 567; Keane v. Cannovan, 21 Cal. 291; 82 Am. Dec. 738; Kile v. Tubbs, 23 Cal. 431, 432; Hicks v. Coleman, 25 Cal. 122; 85 Am. Dec. 103; Hoag v. Pierce, 28 Cal. 187; Davis v. Perley, 30 Cal. 630; Walsh v. Hill, 38 Cal. 481. But this rule is not applicable where one conveys a large tract, with no color of title beyond the possession of a limited portion thereof, as the right of possession cannot be so extended (Kile v. Tubbs, 23 Cal. 431), so that the actual entry and occupation of a part of a tract, under a deed, by one claiming the whole, gives adverse title only to the extent of his actual, as distinguished from his constructive, possession. Davis v. Perley, 30 Cal. 630. Acquiescence in and adoption of ambiguous calls in a deed are conclusive upon the parties and their privies (Hastings v. Stark, 36 Cal. 122); but where the parties are ignorant of the true boundary line, and agree upon a boundary line until the true line can be ascertained, the possession of neither is adverse to the other. Irvine v. Adler, 44 Cal. 559; Quinn v. Windmiller, 67 Cal. 461; 8 Pac. 14; White v. Spreckels, 75 Cal. 610; 17 Pac. 715; Helm v. Wilson, 76 Cal. 476; 18 Pac. 604; Silvarer v. Hansen, 77 Cal. 579; 20 Pac. 136; Woodward v. Faris, 109 Cal. 12; 41 Pac. 781; Peters v. Gracia, 110 Cal. 89; 42 Pac. 455. There must be a recognition of and an acquiescence in the boundary line as the true line, before there is any estoppel as to either party (Sneed v. Osborn, 25 Cal. 619; Columbet v. Pacheco, 48 Cal. 395; Moyle v. Connolly, 50 Cal. 295; Biggins v. Champlin, 59 Cal. 113; Cooper v. Vierra, 59 Cal. 282; Johnson v. Brown, 63 Cal. 391; Quinn v. Windmiller, 67 Cal. 461; 8 Pac. 14); but an actual dispute as to the boundary line is not necessary as the basis for an agreed boundary. Helm v. Wilson, 76 Cal. 476; 18 Pac. 604; Silvarer v. Hansen, 77 Cal. 579; 20 Pac. 136. Where, however, one coterminous proprietor erects a division-fence, claiming it to be the true boundary line, and holds it adversely for the required time, the other party cannot afterwards question it, although he never

acquiesced in such erection, but actually protested against it. Whitman v. Steiger, 46 Cal. 256; Truett v. Adams, 66 Cal. 218; 5 Pac. 96; and see Quinn v. Windmiller, 67 Cal. 461; 8 Pac. 14. Possession of land by mistake has been said to want the essential elements of adverse possession (Sheils v. Haley, 61 Cal. 157); but this doctrine has been criticised and overruled (Woodward v. Faris, 109 Cal. 12; 41 Pac. 781; Grimm v. Curley, 43 Cal. 250; Silvarer v. Hansen, 77 Cal. 579; 20 Pac. 136; Mayor and Common Council v. Trimble, 41 Cal. 536); and a holding, by mistake, adversely, for the time required by the statute, gives a perfect title to the premises. Woodward v. Faris, 109 Cal. 12; 41 Pac. 781; Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722; Cannon v. Stockmon, 36 Cal. 535; 95 Am. Dec. 205; Williams v. Sutton, 43 Cal. 65; Langford v. Poppe, 56 Cal. 73. The court has, however, held, that where the coterminous proprietors are in possession, under mutual mistake as to the division line, such possession is not adverse. Smith v. Robarts, 2 Cal. Unrep. 604; 9 Pac. 104; Irvine v. Adler, 44 Cal. 559; Allen v. Reed, 51 Cal. 362; Sheils v. Haley, 61 Cal. 157. A user, which had its origin in a license or a permission, may ripen into a perfect title by prescription, if exercised under claim of right. Barbour v. Pierce, 42 Cal. 657. Thus, the projection of a house over the land of another may become evidence of a right to continue the same. Gillespie v. Jones, 47 Cal. 259.

Must be continuous and uninterrupted for five years. The adverse user must be under claim of title for the statutory period, with the knowledge and acquiescence of the other party. American Company v. Bradford, 27 Cal. 360; Alta Land etc. Co. v. Hancock, 85 Cal. 219; 20 Am. St. Rep. 217; 24 Pac. 645; Faulkner v. Rondini, 104 Cal. 140; 37 Pac. 883. The right to overflow lands may be acquired by adverse user; but there must be an uninterrupted enjoyment for the period of five years (Grigsby v. Clear Lake Water Works Co., 40 Cal. 396), and the possession must also be continuous (San Francisco v. Fulde, 37 Cal. 349; 99 Am. Dec. 278; Mayor and Common Council v. Trimble, 41 Cal. 536; Unger v. Mooney, 63 Cal. 586; 49 Am. Rep. 100; Nathan v. Dierssen, 146 Cal. 63; 79 Pac. 739), in the party who first became adverse, and his successors in interest. Crandall v. Woods, 8 Cal. 136; Yankee Jim's Union Water Co. v. Crary, 25 Cal. 504; 85 Am. Dec. 145; San Francisco v. Fulde, 37 Cal. 349; 99 Am. Dec. 278; Mayor and Common Council v. Trimble, 41 Cal. 536; Bakersfield Town Hall Ass'n v. Chester, 55 Cal. 98; McGrath v. Wallace, 85 Cal. 622; 24 Pac. 793. An interruption of the adverse possession, however slight, within the period, prevents the acquisition by prescription (American Company v. Bradford, 27 Cal. 360; Cave v. Crafts, 53 Cal. 135; Thomas v. England, 71 Cal. 456; 12 Pac. 491; Alta Land etc. Co. v. Hancock, 85 Cal. 219; 20 Am. St. Rep. 217; 24 Pac. 645; McGrath v. Wallace, 85 Cal. 622; 24 Pac. 793); and this is so, even where the interruption was by force or fraud (Mayor and City Council v. Trimble, 41 Cal. 536), or by the judgment of a court (McGrath v. Wallace, 85 Cal. 622; 24 Pac. 793), and even against a tenant in possession, although the landlord was not a party. Spotts v. Hanley, 85 Cal. 155; 24 Pac. 738. But the mere commencement of a suit, afterwards abandoned, does not disturb the possession (Breon v. Robrecht, 118 Cal. 469; 62 Am. St. Rep. 247; 50 Pac. 689; 51 Pac. 33), nor is the possession interrupted, where a judgment is not executed; there must be an actual entry under the judgment. Carpenter v. Natoma Water etc. Co., 63 Cal. 616. During the pendency of an action affecting the title to the property, no new right can be acquired, because during that period the right of possession is sub judice. Kirsch v. Kirsch, 113 Cal. 56; 45 Pac. 164; Breon v. Robrecht, 118 Cal. 469; 62 Am. St. Rep. 247; 50 Pac. 689; 51 Pac. 33.

Presumption as to continuance of status. The rule that status, once established, is presumed to continue until the contrary appears, applies to title; and when once shown to exist in a party, he need not show he has not parted with it. Metteer v. Smith, 156 Cal. 572; 105 Pac. 735. It must, however, be shown, where there have been several successive occupants, not only that the occupation was unbroken, but also that there was a privity of estate between such occupants (People v. Klumpke, 41 Cal. 263; San Francisco v. Fulde, 37 Cal. 349; 99 Am. Dec. 278); but it need not be for the five years next preceding the commencement of the action, for, when title is once acquired, it exists until lost by another adverse possession. Cannon v. Stockmon, 36 Cal. 535; 95 Am. Dec. 205; Webber v. Clarke, 74 Cal. 11; 15 Pac. 431. This is on the theory that adverse possession for the period prescribed in the statute operates to convey a complete title to a party, as much so as any written conveyance; and such a title is not only an interest in the land, but it is a title of the highest character, the absolute dominion over it, and the appropriate mode of conveying it is by deed. Grattan v. Wiggins, 23 Cal. 16; Le Roy v. Rogers, 30 Cal. 229; 89 Am. Dec. 88; Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722; Cannon v. Stockmon, 36 Cal. 535; 95 Am. Dec. 205; Owsley v. Matson, 156 Cal. 401; 104 Pac. 983.

Taxes must have been paid. It is also essential that the taxes assessed against the property shall have been paid by the occupant. Central Pacific R. R. Co. v. Shackelford, 63 Cal. 261; Unger v. Mooney, 63 Cal. 586; 49 Am. Rep. 100.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

Adverse possession not presumed. Possession is presumed to be in subordination to the legal title, unless it be admitted by the opposing party, or found as a fact that the possession was adverse. Sharp v. Daugney, 33 Cal. 506. See note to § 312, ante.

§ 322. Occupation under written instrument or judgment, when deemed adverse. When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

Entry not under written instrument. See post, § 325.

Legislation § 322. Enacted March 11, **1872**; based on Stats. 1850, p. 344.

Possession, defined. Actual possession means possession accompanied by real and effectual enjoyment of the property; that possession which follows subjection of the property to the will and dominion of the claimant, to the exclusion of others; and it must be evidenced by occupation or cultivation, or other appropriate use, according to the locality and character of the particular premises. Wolf v. Baldwin, 19 Cal. 306; Davis v. Perley, 30 Cal. 630; Polack v. McGrath, 32 Cal. 15. Occupancy under a claim of right must be deemed adverse. Knight v. Cohen, 7 Cal. App. 43; 93 Pac. 396.

Entry under color of title. While this section does not make a written instrument evidence of adverse possession, yet it extends the adverse possession of a part to the whole of the land embraced in the instrument (Christy v. Spring Valley Water Works, 97 Cal. 21; 31 Pac. 1110); but an entry under color of title by deed does not extend the actual possession, by construction of law, beyond the limits of the tract described in the deed. Davis v. Perley, 30 Cal. 630. Color of title is that which in appearance is title, but which in reality is not (Wilson v. Atkinson, 77 Cal. 485; 11 Am. St. Rep. 299; 20 Pac. 66; Packard v. Moss, 68 Cal. 123; 8 Pac. 818); and to give color of title, the conveyance must be good in form, must contain a description of the property and profess to convey the title, and be duly executed; containing these elements or requirements, it will give color of title, although in fact invalid and insufficient to pass title, or actually void or voidable (Wilson v. Atkinson, 77 Cal. 485; 11 Am. St. Rep. 299; 20 Pac. 66; Packard v. Moss, 68 Cal. 123; 8 Pac. 818; Reynolds v. Lincoln, 73 Cal. 191; 14 Pac. 674; Silvarer v. Hansen, 77 Cal. 579; 20 Pac. 136; Kockemann v. Bickel, 92 Cal. 665; 28 Pac. 686); but the document should not be void on its face (Webber v. Clarke, 74 Cal. 11; 15 Pac. 431; Walsh v. Hill, 38 Cal. 481; Wolfskill v. Malajowich, 39 Cal. 276); for actual knowledge that the instrument is void, under which the entry is made and possession held, will vitiate the claim. Wilson v. Atkinson, 77 Cal. 485; 11 Am. St. Rep. 299; 20 Pac. 66. Good faith in the occupant, an actual belief that he has a good right to the premises, an intent to hold the same against all the world, are necessary to constitute occupancy under color of title. McCracken v. San Francisco, 16 Cal. 591; Cannon v. Union Lumber Co., 38 Cal. 672.

Possession founded on written instrument. An executory contract, the consideration having been paid, is a sufficient basis of a claim under color of title (Spect v. Hagar, 65 Cal. 443; 4 Pac. 419); and where a person in possession is an intruder, but is permitted to remain in possession under written contract of sale, the nature of his possession is thereby changed, and he holds under claim of title. Love v. Watkins, 40 Cal. 547; 6 Am. Rep. 624. A vendee's actual possession of the land, and the exercise by him of the usual acts of ownership, are, in law, constructive notice of his claim of title, although the instrument under which he claims title is not recorded (Dutton v. Warschauer, 21 Cal. 609; 82 Am. Dec. 765; Talbert v. Singleton, 42 Cal. 390; Moss v. Atkinson, 44 Cal. 3; Pacific Mut. Life Ins. Co. v. Stroup, 63 Cal. 150); and the subsequent execution of a conveyance by deed relates back to the date of the contract, and conveys an absolute title, notwithstanding the fact that the grantor, subject to the contract, and before the conveyance, mortgaged the premises by an absolute deed to a third party. Pacific Mut. Life Ins. Co. v. Stroup, 63 Cal. 150; Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722; Cannon v. Stockmon, 36 Cal. 535; 95 Am. Dec. 205; McManus v. O'Sullivan, 48 Cal. 7; Morris v. De Celis, 51 Cal. 55. A deed, which gives color of title, is the

measure of the wrongful possession, and, when adverse possession ripens into title, it fixes the extent of the right acquired. Packard v. Moss, 68 Cal. 123; 8 Pac. 818. A deed, void for uncertainty of description, gives right of title to one occupying under it in good faith (Tryon v. Huntoon, 67 Cal. 325; 7 Pac. 741); but a deed executed in a representative capacity, without authority, does not (McNeil v. First Congregational Society, 66 Cal. 105; 4 Pac. 1096); nor does a deed by partners, to a copartner, of the copartnership lands, as such conveyance does not change the nature of the possession. Allen v. McKay, 139 Cal. 94; 72 Pac. 713. A tax deed, invalid as a conveyance of title, is sufficient to give color of title (Kockemann v. Bickel, 92 Cal. 665; 28 Pac. 686; Wilson v. Atkinson, 77 Cal. 485; 11 Am. St. Rep. 299; 20 Pac. 66), and, although void on its face, is a written instrument, within the meaning of this section. Wilson v. Atkinson, 77 Cal. 485; 11 Am. St. Rep. 299; 20 Pac. 66. A tax deed is void on its face, where it contains a recital that land was "assessed to A. B., and all owners and claimants known and unknown." Grimm v. O'Connell, 54 Cal. 522; Hearst v. Egglestone, 55 Cal. 365; Wilson v. Atkinson, 77 Cal. 485; 11 Am. St. Rep. 299; 20 Pac. 66. A swamp-land certificate, where entry is made under it in good faith, gives color of title, and entry is under color of title. Goodwin v. McCabe, 75 Cal. 584; 17 Pac. 705. The actual possession essential, under this section and § 323, post, to sustain title by adverse possession, when such title is founded upon a written instrument, is required of one invoking the benefit of the McEnerney Act. Lofstad v. Murasky, 152 Cal. 64; 91 Pac. 1008.

Possession founded on judgment of court. "The decree or judgment of a competent court," mentioned in this section, is a decree or judgment adjudging that a party, or his grantor, was the owner or seised of some estate in the lands. Packard v. Johnson, 2 Cal. Unrep. 365; 4 Pac. 632. A void judgment is not sufficient to establish a claim of title (King v. Randlett, 33 Cal. 318); but a sheriff's deed, under a void judgment, may give color of title. Packard v. Johnson, 2 Cal. Unrep. 365; 4 Pac. 632; Packard v. Moss, 68 Cal. 123; 8 Pac. 818; contra, Bernal v. Gleim, 33 Cal. 668. A sheriff's deed, under judgment regular on its face, is color of title, within this statute. Webber v. Clarke, 74 Cal. 11; 15 Pac. 431; Packard v. Moss, 68 Cal. 123; 8 Pac. 818; Russell v. Harris, 38 Cal. 426; 99 Am. Dec. 421; Jones v. Gillis, 45 Cal. 541. One who enters in good faith, under a sheriff's deed, not void upon its face, made in pursuance of a judgment of the superior court, and regular in form, does so under color of title. Gregory v. Haynes, 13 Cal. 591; Webber v. Clarke, 74 Cal. 11; 15 Pac. 431.

When adverse possession of part treated as of whole. See notes 12 Am. Dec. 357; 125 Am. St. Rep. 302.

Possession taken and held through mistake or ignorance. See notes 24 Am. St. Rep. 388; 15 Ann. Cas. 827; Ann. Cas. 1912A, 450; 21 L. R. A. 830; 33 L. R. A. (N. S.) 923.

Notoriety essential to adverse possession. See note 28 Am. St. Rep. 158.

Color of title. See notes 88 Am. St. Rep. 702; 15 L. R. A. (N. S.) 1178.

Quitclaim deed as color of title for purposes of adverse possession. See note 4 L. R. A. (N. S.) 776.

Invalid tax deed as color of title. See notes 11 L. R. A. (N. S.) 772; 27 L. R. A. (N. S.) 340.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

1. **Entering under claim of title.** The object of this section is to define accurately under what conditions a possession shall be deemed adverse when the party enters under a claim of title founded upon a written instrument, judgment, or decree. The person relying upon this section, in aid of his possession, must show that he entered not only under a claim of title, but that it was exclusive of any other right. Figg v. Mayo, 39 Cal. 262.

2. **Adverse possession of predecessor. Possession to be continuous.** An adverse possession for five years must be continuous in the party who is the first adverse possessor, or in him and his grantees, in order to acquire a perfect title. And an adverse possessor cannot add to his own possession that of the one who preceded him, when he did not enter into possession under or through the one who preceded. Adverse possession must be actual, not an assertion of possession by words or an action, and if the continuity is broken, either by fraud or by a wrongful entry, the protection afforded by the statute of limitations is destroyed. San Francisco v. Fulde, 37 Cal. 349; 99 Am. Dec. 278.

3. **Adverse possession may be at any time prior to action, not for five years next preceding action.** The purchase of an outstanding adverse claim for the purpose of quieting title to land by one in possession claiming adversely to all others, does not estop the purchaser from setting up the statute against a third party. An adverse possessor for five years acquires a fee-simple title to the land so held. Adverse possession need not be for the five years next preceding the action; an adverse continuous possession for five years at any time prior to the commencement of the action being sufficient. A title once acquired by adverse possession for five years continues perfect until conveyed by the possessor, or until lost by another adverse possession for five years. Cannon v. Stockmon, 36 Cal. 535; 95 Am. Dec. 205. See also, as to adverse possession, Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722.

4. **Effect of creation of easement on adverse possession.** The creation of an easement upon land does not prevent the statute from being set in motion and running in favor of a party entering upon and claiming the soil upon which the easement has been imposed, adversely to the grantor of the easement. San Francisco v. Calderwood, 31 Cal. 585; 91 Am. Dec. 542.

5. **Adverse possession. Case.** A was in possession of land five years, under claim of title. B and C, and their grantors, during this time, had a perfect title to the land. They sued D and others to recover possession of it, but did not make A a party to the action. B and C, and their assigns, recovered judgment, and, after five years had run, the sheriff turned A out of possession under a writ of restitution, issued on the judgment, and placed B and C in possession. The court held that the title of A, by adverse possession, was not impaired by this entry of B and C. See Le Roy v. Rogers, 30 Cal. 230; 89 Am. Dec. 88.

6. **Adverse entry upon constructive possession.** Adverse possession may be acquired to part of a tract of land while the owner of the true title is in the actual possession of the other part. Actual possession of a part, with constructive possession of the rest, will not prevent the statute

of limitations from running in favor of one who enters adversely upon the constructive possession. Davis v. Perley, 30 Cal. 630.

7. **Adverse possession of grantor against grantee.** When a grantor takes adverse possession of land granted by him, and holds continuous adverse possession for the statutory period, he may set up the statute of limitations against the grantee. Franklin v. Dorland, 28 Cal. 175; 87 Am. Dec. 111.

8. **Division lines.** As to location of division lines, adverse possession may establish a division boundary between adjacent owners, although it may not be the boundary specified in the deeds, if the owners have acquiesced therein for the length of time prescribed by the statute of limitations as a bar to the right of entry upon real property. Sneed v. Osborn, 25 Cal. 619.

9. **Purchase at irregular sale.** From lapse of time and acquiescence in the possession of the purchaser, the regularity of a sale under a power may be inferred, and a presumption indulged in, that due notice thereof, as required by the power, was given. Perfect title may be acquired by adverse possession for the statutory time. Simson v. Eckstein, 22 Cal. 580.

10. **Adverse possession under claim of title.** It was held that the statute of limitations runs only in favor of parties in possession claiming title adversely to the whole world, and not in favor of those who assert the title to be in others. If it, therefore, never runs in favor of the plaintiff, his grantees are in no better position. To render possession adverse, so as to set in motion the statute of limitations, it must be accompanied with a claim of title, and this title, when founded "upon a written instrument as being a conveyance of the premises," must be asserted by the occupant in good faith, in the belief that he has good right to the premises against all the world. The claim must be absolute, not dependent upon any contingencies, and must be "exclusive of any other right." And to render the adverse possession thus commenced effectual as a bar to a recovery by the true owner, the possession must continue uninterrupted for five years, under such claim. When parties assert, either by declaration or by conduct, the title to property to be in others, the statute, of course, cannot run in their favor. Their possession, under such circumstances, is not adverse. McCracken v. San Francisco, 16 Cal. 635.

11. **Adverse possession under a claim of title.** It was held, to constitute a prescription by Spanish law, or a foundation for adverse possession at common law, the instrument under which the occupant entered and claims the premises must purport in its terms to transfer the title,—must be such as would, in fact, pass the title had it been executed by the true owner, and in proper form, with the exception, perhaps, of a contract to convey after payment of the consideration; and the occupant must have entered under it in good faith, in the belief that he had a right to the premises, and with the intention to hold them against the world. The possession must have been adverse in its inception, and during its continuance. Nieto v. Carpenter, 21 Cal. 490.

12. **Two kinds of adverse possession.** Adverse possession is of different kinds: 1. Where the possession is taken by the bow and spear, without color of title, but with the intent to claim the fee, exclusive of any other right, and hold it against all comers. 2. Where the possession is taken under a claim of title founded upon a written instrument, as a conveyance or judgment of a court, etc. Either of these kinds of adverse possession is sufficient to set the statute in motion. See the differences between the rights acquired under them, discussed in the opinion of the court. Kimball v. Lohmas, 31 Cal. 154.

13. **Persons excepted from provisions of the statute.** Strict construction of the statute of limitations formerly required, etc. See note to § 312, ante, case of Tynan v. Walker, 35 Cal. 635; 95 Am. Dec. 152.

14. **Generally.** See note to § 312, ante.

§ 323. What constitutes adverse possession under written instrument or judgment. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;

2. Where it has been protected by a substantial inclosure;

3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing-timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant;

4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

Legislation § 323. Enacted March 11, 1872; based on Stats. 1850, p. 344.

What constitutes adverse possession under written instrument. This section defines adverse possession, but it does not, in itself, define the consequences. Hagely v. Hagely, 68 Cal. 348; 9 Pac. 305. A conveyance, by a partnership in possession, to one of the copartners, does not change the character of the possession (Allen v. McKay, 139 Cal. 94; 72 Pac. 713); and a married woman, without color of title, and not living separate and apart from her husband, cannot acquire real property as her separate estate by adverse possession. Mattes v. Hall, 21 Cal. App. 552; 132 Pac. 295. An entry under a deed from the party in possession, is strong evidence of adverse possession (Andrus v. Smith, 133 Cal. 78; 65 Pac. 320; Unger v. Mooney, 63 Cal. 586; 49 Am. Rep. 100); and an entry under a conveyance from a purchaser at a tax sale, although the tax deed has not issued, brings the party within the provisions of this section, if possession is retained for five years. Millett v. Lagomarsino, 107 Cal. 102; 40 Pac. 25. A void tax deed, while not proof of adverse title,

is admissible in evidence, under this section. Simmons v. McCarthy, 128 Cal. 455; 60 Pac. 1037. One conveying by quitclaim deed, and thereafter taking possession, which he holds adversely for five years, becomes the absolute owner of the title. Baker v. Clark, 128 Cal. 181; 60 Pac. 677. One taking possession under a deed and decree of distribution holds under color of title (Owsley v. Matson, 156 Cal. 401; 104 Pac. 983); as does also one taking under a deed from his wife, to property belonging to her, but impressed with the homestead character; and such title, by adverse possession, may extinguish the homestead. Donnelly v. Tregaskis, 154 Cal. 261; 97 Pac. 421. A mere knowledge of a defect in the title, or an offer to buy an outstanding title, after title has been acquired by adverse possession, does not break the continuity of the adverse possession. Montgomery & Mullen Lumber Co. v. Quimby, 164 Cal. 250; 128 Pac. 402. To invoke the benefit of the McEnerney Act, the actual possession required is the same as that required to sustain title by adverse possession, when such title is founded upon a written instrument. Lofstad v. Murasky, 152 Cal. 64; 91 Pac. 1008.

Possession required of plaintiff under the McEnerney Act. See note ante, § 322.

Cultivation and improvement. Residence upon the property is not necessary. Barstow v. Newman, 34 Cal. 90; Goodrich v. Van Landigham, 46 Cal. 601; Kelly v. Mack, 49 Cal. 523; Webber v. Clarke, 74 Cal. 11; 15 Pac. 431; Andrus v. Smith, 133 Cal. 78; 65 Pac. 320.

Protecting inclosures. An inclosure is not necessary, where the land is held in subjection to the will and domination of the claimant, manifested in an appropriate manner (Hicks v. Coleman, 25 Cal. 122; 85 Am. Dec. 103; McCreery v. Everding, 44 Cal. 246; Sheldon v. Mull, 67 Cal. 299; 7 Pac. 710; Webber v. Clarke, 74 Cal. 11; 15 Pac. 431; Andrus v. Smith, 133 Cal. 78; 65 Pac. 320); but, unless there is some act manifested to show the domination of the claimant, a mere claim will not constitute adverse possession. De Frieze v. Quint, 94 Cal. 653; 28 Am. St. Rep. 151; 30 Pac. 1. Where the inclosure is the only evidence of adverse possession to countervail the legal title, there must be a real and substantial inclosure and actual occupancy. Polack v. McGrath, 32 Cal. 15; Wolf v. Baldwin, 19 Cal. 306; Garrison v. Sampson, 15 Cal. 93; Jones v. Hodges, 146 Cal. 160; 79 Pac. 869; Mattes v. Hall, 21 Cal. App. 552; 132 Pac. 295. Whether natural barriers are sufficient to serve as a part of the inclosure, is a question of fact for the jury. Goodwin v. McCabe, 75 Cal. 584; 17 Pac. 705; Brumagim v. Bradshaw, 39 Cal. 24; Southmayd v. Hanley, 45 Cal. 101; Pierce v. Stuart, 45 Cal. 280. Where land is fenced in connection with other land owned by the claimant, continuous occupancy may ripen into an adverse claim (Packard v. Johnson, 2 Cal. Unrep. 365; 4 Pac. 632); and also where two adjoining owners in severalty, by mutual consent, include both tracts, with a fence around the exterior boundaries. Reay v. Butler, 95 Cal. 206; 30 Pac. 208. The protecting inclosure need not be separately confined, but the land may be contained in an inclosure with other lands. Botsford v. Eyraud, 148 Cal. 431; 83 Pac. 1008.

Use for fuel-supply. An inclosure is not required, where the land is in some way subject to the will of the occupant claiming; thus, the use of land for firewood, and the like, is, by this section, evidence of possession; but the mere cutting up of dead timber, or the cutting down of trees, and the removal thereof from the land, does not, of itself, establish adverse possession. Kimball v. Stormer, 65 Cal. 116; 3 Pac. 408.

Use for pasturage. In a grazing country, herding sheep upon the land is a use in the ordinary and appropriate way, according to the particular locality and the quality of the property (Andrus v. Smith, 133 Cal. 78; 65 Pac. 320; Webber v. Clarke, 74 Cal. 11; 15 Pac. 431); and pasturage, without inclosure, may constitute adverse possession (Webber v. Clarke, 74 Cal. 11; 15 Pac. 431), even where this use is only during the grazing season. (Coryell v. Cain, 16 Cal. 567; Brumagim v. Bradshaw, 39 Cal. 24; English v. Johnson, 17 Cal. 107; 76 Am. Dec. 574; Montgomery & Mullen Lumber Co. v. Quimby, 164 Cal. 250; 128 Pac. 402); but it must be used continuously and uninterruptedly during the pasturing season, at least substantially. Mattes v. Hall, 21 Cal. App. 552; 132 Pac. 295.

Ordinary use. A use in the ordinary and appropriate way is sufficient adverse possession. Coryell v. Cain, 16 Cal. 567; English v. Johnson, 17 Cal. 107; 76 Am. Dec. 574; Brumagim v. Bradshaw, 39 Cal. 24; Webber v. Clarke, 74 Cal. 11; 15 Pac. 431; Kockemann v. Bickel, 92 Cal. 665; 28 Pac. 686. The use of a town lot in the "ordinary way," although not fenced with a substantial inclosure, is sufficient, under the third subdivision of this section (Kockemann v. Bickel, 92 Cal. 665; 28 Pac. 686); and the cultivation of a town lot, which has been fenced in the usual manner, and shade-trees planted along the fence, is not necessary to create title by adverse possession. Gray v. Collins, 42 Cal. 152. The cutting of grass upon lands theretofore inclosed, and in the possession of another, is not, of itself, evidence of possession of the land on which it grows. Page v. Fowler, 37 Cal. 100.

Occupancy of part of tract. The actual possession of part of a tract of land, by a party who entered under color of title, in good faith, claiming the whole under a deed or written instrument, or a decree or judgment of a court of competent jurisdiction, describing the land by metes and

bounds, or other certain and definite description, is not limited to that portion in his actual possession, but his possession is extended by construction to the entire tract, where the unoccupied portion is not in the actual possession of another party at the time of entry (Hicks v. Coleman, 25 Cal. 122; 85 Am. Dec. 103; and see Plume v. Seward, 4 Cal. 94; 60 Am. Dec. 599; Attwood v. Fricot, 17 Cal. 37; 76 Am. Dec. 567; 76 Am. Dec. 567; English v. Johnson, 17 Cal. 107; 76 Am. Dec. 574; Keane v. Cannovan, 21 Cal. 291; 82 Am. Dec. 738; Russell v. Harris, 38 Cal. 426; 99 Am. Dec. 421); but where a party enters under a deed from one in the actual possession of only a small portion of the land, and he knows that his grantor has no title or claim of title to the remainder, he does not thereby acquire constructive possession of anything but that which was in the possession of his grantor. Walsh v. Hill, 38 Cal. 481; Cannon v. Union Lumber Co., 38 Cal. 672. Where, however, the entry is made in good faith by the grantee, who believes that he has acquired a valid title to the whole tract, he establishes a possession co-extensive with the boundaries of the deed, except as to others in actual possession. Wolfskill v. Malajowich, 39 Cal. 276.

Constructive possession. Good faith is a necessary element to obtain constructive possession and entry under color of title (Kile v. Tubbs, 23 Cal. 431; Walsh v. Hill, 38 Cal. 481; Cannon v. Union Lumber Co., 38 Cal. 672; Wolfskill v. Malajowich, 39 Cal. 276; Wilson v. Atkinson, 77 Cal. 485; 11 Am. St. Rep. 299; 20 Pac. 66); so that where a party knows the instrument to be absolutely void, he cannot found a claim under color of title upon it, and claim constructive possession. Wilson v. Atkinson, 77 Cal. 485; 11 Am. St. Rep. 299; 20 Pac. 66. The statute distinguishes between an entry made without any right, and one made under color or claim of title. Walsh v. Hill, 38 Cal. 481. There can be no constructive possession without color of title. Mattes v. Hall, 21 Cal. App. 552; 132 Pac. 295. As between a mere naked trespasser and the actual owner of the title, who afterwards enters on a tract, claiming the whole thereof, the constructive possession acquired by the trespasser is overcome by that of the true owner. Semple v. Cook, 50 Cal. 26. The actual ouster of the true owner from some part of the land is necessary, in order that an intruder may obtain actual possession. Kimball v. Stormer, 65 Cal. 116; 3 Pac. 408; Labory v. Los Angeles Orphan Asylum, 97 Cal. 270; 32 Pac. 231. An entry under a sheriff's deed which is regular on its face, and possession thereunder, with actual occupancy of a part of the land, extends the possession of the grantee to the bounds of his deeds (Russell v. Harris, 38 Cal. 426; 99 Am. Dec. 421); and the actual possession by an heir, of the estate of his ancestor, claiming the whole estate, extends his possession, by construction, to the boundaries of the estate (Dougherty v. Miles, 97 Cal. 568; 32 Pac. 597); but a party claiming, under title, two tracts of land, cannot establish constructive possession of both by proving possession of a portion of one. Kimball v. Stormer, 65 Cal. 116; 3 Pac. 408.

What is a sufficient plea. This section need not be pleaded; it is only necessary to plead the section which establishes the limitation, and the facts which show adverse holding may be given in evidence under the plea. Hagely v. Hagely, 68 Cal. 348; 9 Pac. 305; Webber v. Clarke, 74 Cal. 11; 15 Pac. 431.

Evidence of possession. In an action to quiet title, evidence of plaintiff's actual possession for any period, under claim of ownership, is sufficient evidence of his title as against a trespasser. Morris v. Clarkin, 156 Cal. 16; 103 Pac. 180.

Adverse possession by tenant in common. See note 109 Am. St. Rep. 609.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343. A pretended possession of land by an inclosure which is not substantial, without actual occupancy of any portion of it, cannot constitute an adverse possession. Borel v. Rollins, 30 Cal. 408. See, for adverse possession, Vassault v. Seitz, 31 Cal. 225, and notes to §§ 312, 322, ante.

§ 324. Premises actually occupied under claim of title deemed to be held adversely. Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

Prescription, title by. Civ. Code, § 1007.

Legislation § 324. Enacted March 11, 1872; based on Stats. 1850, p. 344.

Continual occupation, not under claim of title. The assertion of the right of possession, whether by words or by an action, is not the equivalent of possession in fact, for the purpose of the statute of limitations; it makes no difference, in respect to the operation of the statute, whether the adverse possession commenced or terminated either peaceably or forcibly; and as the adverse possession, when continued during the whole period of the statute, ripens into a title or constitutes a perfect defense, though it was initiated by force or fraud, so such possession may be interrupted by the same means as those by which it was acquired. San Francisco v. Fulde, 37 Cal. 349; 99 Am. Dec. 278. No

claim of title, without actual and exclusive possession for the period prescribed by statute, creates title by prescription. Howell v. Slauson, 83 Cal. 539; 23 Pac. 692; People v. Center, 66 Cal. 551; 5 Pac. 263; 6 Pac. 481; Berniaud v. Beecher, 71 Cal. 38; 11 Pac. 802. While residence is not indispensable to possession, yet the mere sowing of an abandoned road with grain and grass, and the grazing of cattle thereon, does not give adverse possession of the roadway. Watkins v. Lynch, 71 Cal. 21; 11 Pac. 808. The adverse possession under this and the succeeding section is different from that required of one who claims under a written instrument. Cassin v. Nicholson, 154 Cal. 497; 98 Pac. 190. It is not necessary that the prescriptive right should have its origin in a grant from the owners of the land, or by agreement with them. Bashore v. Mooney, 4 Cal. App. 276; 87 Pac. 553. Under the McEnerney Act, to prove actual and peaceable possession it is not necessary to show the acquisition of title by adverse possession, under § 323, ante. Larsen v. All Persons, 165 Cal. 407; 132 Pac. 751.

Occupancy under claim of title. Actual occupancy, adversely, under claim of title, for the period prescribed by this section, gives absolute authority, and bars the right of recovery (Baker v. Clark, 128 Cal. 181; 60 Pac. 677; Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722; Cannon v. Stockmon, 36 Cal. 535; 95 Am. Dec. 205; McCormack v. Silsby, 82 Cal. 72; 22 Pac. 874; McGovern v. Mowry, 91 Cal. 383; 27 Pac. 746), of such portion as is actually occupied (Mattes v. Hall, 21 Cal. App. 552; 132 Pac. 295), and the title vests in the party who first becomes the adverse possessor, or his grantees and successors in interest. San Francisco v. Fulde, 37 Cal. 349; 99 Am. Dec. 278.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 344. See notes to §§ 312, 322, 323, ante.

§ 325. What constitutes adverse possession under claim of title not written. For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure.
2. Where it has been usually cultivated or improved.

Provided, however, that in no case shall adverse possession be considered established under the provisions of any section or sections of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land.

Adverse possession. See ante, § 321.

Legislation § 325. 1. Enacted March 11, **1872**; based on Stats. 1850, p. 345.

2. Amended by Code Amdts. **1877–78**, p. 99, adding the proviso after subd. 2.

3. Amendment by Stats. **1901**, p. 124; unconstitutional. See note ante, § 5.

Adverse possession under claim of title not written. The adverse possession required under this and the preceding section is different from that required of one who claims under a written instrument. Cassin v. Nicholson, 154 Cal. 497; 98 Pac. 190. This section applies only in cases where there is a contest between the holder of the legal title and a party claiming to have been in possession for five years adversely to such legal title; it does not apply where the claimant is merely protecting his possession against one who entered thereon without right of title. Shanahan v. Tomlinson, 103 Cal. 89; 36 Pac. 1009. Under this section, the land must have been protected by a substantial inclosure, or usually cultivated or improved. Los Angeles Interurban Ry. Co. v. Montijo, 153 Cal. 15; 94 Pac. 97. There are no equities in favor of a person seeking by adverse possession to acquire title to the property of another. Glowner v. De Alvarez, 10 Cal. App. 194; 101 Pac. 432. The right to take water from a stream, as against riparian owners, may be acquired by prescription. Arroyo Ditch etc. Co. v. Baldwin, 155 Cal. 280; 100 Pac. 874. The actual possession of property required to be had to give the court jurisdiction under the McEnerney Act, must be such as is necessary to sustain title by adverse possession, if maintained and continued for the period required. Lofstad v. Murasky, 152 Cal. 64; 91 Pac. 1008. See also Larsen v. All Persons, 165 Cal. 407; 132 Pac. 751. If a claim is made to land by virtue of an adverse possession under a claim of title not written, no other land than that actually occupied is deemed to have been held adversely. Los Angeles Interurban Ry. Co. v. Montijo, 153 Cal. 15; 94 Pac. 97. To constitute actual possession of land, it is not necessary that actual physical occupancy by the owner or by a tenant be shown in all cases. Vanderbilt v. All Persons, 163 Cal. 507; 126 Pac. 158. The

tacking of possessions is not permitted in proving title by adverse possession. Messer v. Hibernia Sav. & L. Soc., 149 Cal. 122; 84 Pac. 835. The possession for the requisite time must have been peaceable and undisputed; and such is not its nature where the title and the right of possession are then being actually litigated; the period of such litigation cannot be included in adverse possession. Estate of Richards, 154 Cal. 478; 98 Pac. 528. The adverse possession of community property by a divorced wife does not begin to become prescriptive, as to the divorced husband or his heirs, in the absence of a notice, either actual or constructive, imparting knowledge of the hostility of her possession. Tabler v. Peverill, 4 Cal. App. 671; 88 Pac. 994. A title acquired by prescription is good until extinguished, conveyed, or lost. Strong v. Baldwin, 154 Cal. 150; 129 Am. St. Rep. 149; 97 Pac. 178.

Protection by substantial inclosures. Protection by a substantial inclosure, either by itself or with other lands, for the period of five years, is necessary to give a title by adverse possession (Sanchez v. Grace M. E. Church, 114 Cal. 295; 46 Pac. 2); for, where there is neither title nor color of title, there is no presumption of possession (Mattes v. Hall, 21 Cal. App. 552; 132 Pac. 295); but where land thus inclosed is rented by the claimant, to a tenant who subsequently attorns, without the knowledge of the claimant, to a party to whom patent has issued, and the patentee has no knowledge of the pretensions or possession of the latter, although making due inquiry, the subsequent possession by such tenant is not adverse to the patentee. Thompson v. Felton, 54 Cal. 547. There can be no adverse possession, where land has not been protected by a substantial inclosure, and not cultivated exclusively by the claimant, and taxes not paid by him, although he erected improvements thereon. O'Connor v. Fogle, 63 Cal. 9. That property is protected by a substantial inclosure, and that one claims to be the owner, is sufficient to support a conclusion of actual possession. Davis v. Crump, 162 Cal. 513; 123 Pac. 294.

Usually cultivated or improved. The lands claimed must have been usually cultivated or improved for the period of five years, in order to give title by adverse possession. Sanchez v. Grace M. E. Church, 114 Cal. 295; 46 Pac. 2; O'Connor v. Fogle, 63 Cal. 9. The lands may be said to be usually improved, where they are improved as similar property is improved. Allen v. McKay, 120 Cal. 332; 52 Pac. 828; Gray v. Walker, 157 Cal. 381; 108 Pac. 278. If land has been improved as contemplated by this section, it is not necessary that it be either cultivated or inclosed. Gray v. Walker, 157 Cal. 381; 108 Pac. 278.

Payment of taxes. The payment, by the claimant, of the taxes assessed, if any, against the land, must be shown, since the passage of the amendment of 1878. O'Connor v. Fogle, 63 Cal. 9; Central Pacific R. R. Co. v. Shackelford, 63 Cal. 261; Unger v. Mooney, 63 Cal. 586; 49 Am. Rep. 100; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115; 64 Pac. 113; Allen v. McKay, 139 Cal. 94; 72 Pac. 713. The provision for the payment of taxes is not retroactive, and did not affect the holdings prior to that amendment (Sharp v. Blankenship, 59 Cal. 288; Johnson v. Brown, 63 Cal. 391; Central Pacific R. R. Co. v. Shackelford, 63 Cal. 261; Heilbron v. Heinlen, 72 Cal. 376; 14 Pac. 24; Webber v. Clarke, 74 Cal. 11; 15 Pac. 431; Cook v. Cockins, 117 Cal. 140; 48 Pac. 1025; Lucas v. Provines, 130 Cal. 270; 62 Pac. 509; Strong v. Baldwin, 154 Cal. 150; 129 Am. St. Rep. 149; 97 Pac. 178), which introduced a new element in the holding of land, in order to create adverse possession (Cook v. Cockins, 117 Cal. 140; 48 Pac. 1025); but this element did not affect a title which had ripened under a former law (Sharp v. Blankenship, 59 Cal. 288; Webber v. Clarke, 74 Cal. 11; 15 Pac. 431; Woodward v. Faris, 109 Cal. 12; 41 Pac. 781; Lucas v. Provines, 130 Cal. 270; 62 Pac. 509), as the legislature could not take away such title. Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722; Cannon v. Stockmon, 36 Cal. 535; 95 Am. Dec. 205; Langford v. Poppe, 56 Cal. 73; Cook v. Cockins, 117 Cal. 140; 48 Pac. 1025. Payment of taxes for five years continuously is essential to title by adverse possession; title by prescription cannot be established, if the owner pays the taxes for the fifth year. Glowner v. De Alvarez, 10 Cal. App. 194; 101 Pac. 432; People's Water Co. v. Lewis, 19 Cal. App. 622; 127 Pac. 506; Stanton v. Freeman, 19 Cal. App. 464; 126 Pac. 377. Title by prescription, turning upon the payment of taxes, is not made out, where there has been an interruption in the payment of taxes for the prescribed time. Commercial Nat. Bank v. Schlitz, 6 Cal. App. 174; 91 Pac. 750. When there is no tax on the land, by reason of the fact that it is mortgaged for more than its value, and no tax was paid by any one, there is no interruption of the adverse possession. Frederick v. Dickey, 91 Cal. 358; 27 Pac. 742. This section requires only the payment of taxes which have been levied and assessed, and, nothing to the contrary appearing, it will be presumed that the value of an easement on or over land was included in the taxes assessed against the land. Smith v. Smith, 21 Cal. App. 378; 131 Pac. 890. It is not enough for the claimant to prove that he paid all the taxes on land owned by him, for the defense of the statute of limitations, by adverse possession, admits that he does not own the land (Ross v. Evans, 65 Cal. 439; 4 Pac. 443); nor is it sufficient that the party thought or supposed that he was paying taxes upon the claimed land. Rey-

nolds v. Willard, 80 Cal. 605; 22 Pac. 262; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115; 64 Pac. 113. Reliance upon another, who agreed to pay the taxes, but failed to do so, will not relieve the claimant of his obligation. Tuffree v. Polhemus, 108 Cal. 670; 41 Pac. 806. It may be, if such taxes were paid by someone else, that the adverse claimant would only be called on to prove that fact. Ross v. Evans, 65 Cal. 439; 4 Pac. 443. Payment by the mortgagee of the claimant in possession, is payment by the claimant. Brown v. Clark, 89 Cal. 196; 26 Pac. 801. It is not intended, however, that the taxes for any one year should be paid more than once; where the land claimed is assessed both to the claimant and to the owner, payment by the claimant protects his title. Cavanaugh v. Jackson, 99 Cal. 672; 34 Pac. 509. If they are paid by the legal owner, the subsequent repayment by the claimant occupying the land cannot serve to ground or maintain adverse possession. Carpenter v. Lewis, 119 Cal. 18; 50 Pac. 925; and see Cavanaugh v. Jackson, 99 Cal. 672; 34 Pac. 509. Where the adverse claimant pays all the taxes, it is immaterial that the possessor of the legal title also paid them. Owsley v. Matson, 156 Cal. 401; 104 Pac. 983. The payment of taxes by the owner, who has procured the property to be assessed to himself also, does not stop the running of the statute in favor of the claimant. Cavanaugh v. Jackson, 99 Cal. 672; 34 Pac. 509. The failure to pay the taxes is conclusive against the claimant (Martin v. Ward, 69 Cal. 129; 10 Pac. 276); but, after possession and the payment of the taxes for the time required by statute, non-payment of the taxes thereafter will not defeat the title so acquired. Webber v. Clarke, 74 Cal. 11; 15 Pac. 431. When the fee has been once acquired by five years' adverse possession, the failure of the adverse possessor to pay subsequent taxes assessed on the land does not divest nor in any way affect his title. Southern Pacific R. R. Co. v. Whitaker, 109 Cal. 268; 41 Pac. 1083. The payment of taxes on a designated tract is not effectual to complete a prescriptive right to land not included within that designation. Eberhardt v. Coyne, 114 Cal. 283; 46 Pac. 84; McDonald v. Drew, 97 Cal. 266; 32 Pac. 173; Baldwin v. Temple, 101 Cal. 396; 35 Pac. 1008; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115; 64 Pac. 113.

Levied and assessed. The word "levy" refers to the act of the supervisors in making the levy, and the word "assessed" refers to the act of the assessor in making the assessment. Allen v. McKay, 120 Cal. 332; 52 Pac. 828. It is immaterial to whom the lands are assessed, whether to the claimant or another, but the claimant must show that he or his grantors have paid the taxes (Ross v. Evans, 65 Cal. 439; 4 Pac. 443); and he is not relieved from the obligation to pay, by the fact that the land was not assessed separately, and he was obliged to pay taxes assessed against other lands. McNoble v. Justiniano, 70 Cal. 395; 11 Pac. 742. Payment by the owner adds nothing to his title, but it excludes any presumption that any taxes were assessed or paid by the adverse claimant. Standard Quicksilver Co. v. Habishaw, 132 Cal. 115; 64 Pac. 113. The redemption from a tax sale, by the claimant, cannot take the place of the payment of taxes levied and assessed (McDonald v. McCoy, 121 Cal. 55; 53 Pac. 421); but the fact that a portion of the property was jointly assessed to the claimant and another, to whom the claimant gave the money to pay such tax, but which was not paid, and the claimant subsequently redeemed the land from the tax sale, does not show a failure to pay. Gray v. Walker, 157 Cal. 381; 108 Pac. 278. The burden of showing payment of taxes is on the claimant, where he relies upon adverse possession under the statute of limitations, and he must either prove that no taxes were levied upon the land claimed, or that he paid all the taxes levied and assessed thereon. Ball v. Nichols, 73 Cal. 193; 14 Pac. 831; Reynolds v. Willard, 80 Cal. 605; 22 Pac. 262; Oneto v. Restano, 78 Cal. 374, 375; 20 Pac. 743; McGrath v. Wallace, 85 Cal. 622; 24 Pac. 793; Baldwin v. Temple, 101 Cal. 396; 35 Pac. 1008; Goodwin v. Scheerer, 106 Cal. 690; 40 Pac. 18; Eberhardt v. Coyne, 114 Cal. 283; 46 Pac. 84; Allen v. McKay, 120 Cal. 332; 52 Pac. 828; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 123; 64 Pac. 113; Glowner v. De Alvarez, 10 Cal. App. 194; 101 Pac. 432; Allen v. Allen, 159 Cal. 197; 113 Pac. 160. If it does not appear that any taxes were assessed against the property, a failure to find that claimant paid all the taxes is immaterial (Heilbron v. Last Chance Water Ditch Co., 75 Cal. 117; 17 Pac. 65; Oneto v. Restano, 78 Cal. 374; 20 Pac. 743; Spargur v. Heard, 90 Cal. 221; 27 Pac. 198), as the party is not excluded from the benefit of the statute of limitations, unless the property which he claims to hold adversely was actually assessed; it is the duty of the occupant to pay all the taxes levied and assessed. Brown v. Clark, 89 Cal. 196; 26 Pac. 801; Allen v. McKay, 120 Cal. 332; 52 Pac. 828; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115; 64 Pac. 113. There may be adverse possession of public property that has never been assessed for the payment of taxes. Casserly v. Alameda County, 153 Cal. 170; 94 Pac. 765.

"Upon such land." It is doubtful if the word "land," as used in this section, was intended to have any other than its real meaning; in some legal connections, it is, no doubt, used co-extensively with "real property," but, primarily, it means the soil or the earth's crust; it is not at all clear, therefore, that the section was intended to

apply to mere easements or appurtenant rights; a private ditch and water right, used for domestic purposes, to water livestock, and to irrigate a definite tract of land, appurtenant to and passing with a conveyance of the land, is not required to be separately listed and taxed, but should be considered as included in the assessment of the land (Coonradt v. Hill, 79 Cal. 587; 21 Pac. 1099; Frederick v. Dickey, 91 Cal. 358; 27 Pac. 742), and, nothing to the contrary appearing, it will be presumed that it was so included in the assessment of the land. Smith v. Smith, 21 Cal. App. 378; 131 Cal. 890.

Occupied and claimed. See notes ante, §§ 321, 322, 323.

Support of findings by the evidence. See note post, § 633.

Inclosure of land as essential to adverse possession. See note Ann. Cas. 1913A, 750.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 344.

Subd. 1. See note to § 323, ante. It is only necessary to show that the land was held in adverse possession by a substantial inclosure, and the occupation, cultivation, or use of the land need not be proved. Polack v. McGrath, 32 Cal. 15; see also notes to §§ 312, 322, ante.

§ 326. Relation of landlord and tenant as affecting adverse possession. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or, where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods herein limited.

Tenant denying landlord's title. Post, § 1962, subd. 4.

Legislation § 326. Enacted March 11, 1872; based on Stats. 1850, p. 344.

Possession of tenant deemed possession of landlord. The possession of a mere tenant could not, under any circumstances, be held to be adverse, until the expiration of five years from the last payment of the rent. Raynor v. Drew, 72 Cal. 307; 13 Pac. 866. A tenant in possession under a parol lease for more than one year, the conditions of which are fully performed, is presumed to hold in subordination to the title of his landlord. Doolan v. McCauley, 66 Cal. 476; 6 Pac. 130. A party is presumed to know that the possession of the tenant is deemed the possession of the landlord (Mauldin v. Cox, 67 Cal. 387; 7 Pac. 804); but the presumption that the tenant holds in subordination of his landlord ceases upon the expiration of the term of five years after the expiration of the lease. Millett v. Lagomarsino, 4 Cal. Unrep. 883; 38 Pac. 308. Possession under an agreement to purchase is not adverse. Dresser v. Allen, 17 Cal. App. 508, 510; 120 Pac. 65. An estoppel against the tenant, in favor of the landlord's title, does not endure longer than the tenant's possession under the lease; and after possession has been restored to the landlord, the tenant is released from the estoppel, and if he has paramount title, he may bring it forward (Willson v. Cleaveland, 30 Cal. 192); and where the relation of landlord and tenant never existed, of course this section does not apply. Millett v. Lagomarsino, 107 Cal. 102; 40 Pac. 25.

Estoppel of tenant to deny title of landlord. See note 13 Am. Dec. 68.

Adverse possession by tenant. See note 53 L. R. A. 941.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 344. A tenant cannot set up title against his landlord, without first surrendering possession. Tewksbury v. Magraff, 33 Cal. 237, and cases cited therein. A tenant may not be estopped, where, in taking the lease, he was imposed upon by the lessor. Gleim v. Rise, 6 Watts (Pa.), 44. So if the tenant has been ousted by title paramount, he may plead it (Haynes v. Maltby, 3 Term Rep. 441); also, that the landlord's title has ceased, or has become extinguished (Jackson v. Rowland, 6 Wend. 666, 22 Am. Dec. 557); or that he has acquired his landlord's title by purchase from him, or at a judicial sale, or by a redemption. And if the action is brought by a vendee of the landlord, the tenant may dispute the derivative title. Phillips v. Pierce, 5 B. & C. 433; Reay v. Cotter, 29 Cal. 168. So if tenant did not take possession under the lease, but was in possession at the time he took the lease, he may dispute the landlord's title without first surrendering the possession; for, not having received the possession from him, he is under no moral or legal obligation to restore it before adopting a hostile attitude, and he may have attorned by mistake to one who had no title. Cornish v. Searell, 8 B. & C. 471. To these exceptions may be added, possibly, the case where it appears affirmatively that both parties have acted under a mutual mistake as to the law in regard to the title of the lessor. Glen v. Gibson, 9 Barb. (N. Y.) 638; Tewksbury v. Magraff, 33 Cal. 245.

§ 327. Right of possession not affected by descent cast. The right of a person to the possession of real property is not impaired or affected by a descent cast in consequence of the death of a person in possession of such property.

Legislation § 327. Enacted March 11, **1872**; based on Stats. 1850, p. 345.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 344.

§ 328. Certain disabilities excluded from time to commence actions. If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, is, at the time such title first descends or accrues, either:

1. Under the age of majority;

2. Insane;

3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than life;

The time, not exceeding twenty years, during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of five years after such disability shall cease, or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period.

War. Post, § 354.
Absence from state. See post, § 351.
Disabilities.
1. **Successive.** See post, § 358.
2. **Effect of, in action to recover escheated property.** See post, § 1272.

Legislation § 328. 1. Enacted March 11, **1872**; based on Stats. 1863, p. 325.

2. Amendment by Stats. **1901**, p. 124; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1903**, p. 177, (1) changing, in the first paragraph, the word "is" from "be"; (2) changing subd. 1 from "1. Within the age of majority; or"; (3) in subd. 2, omitting "or" after "Insane"; (4) in subd. 3, omitting (a) "for" before "life" and (b) "or" at end of subdivision; (5) omitting subd. 4, which read: "4. A married woman, and her husband be a necessary party with her in commencing such action or making such entry or defense"; and (6) in first line of last paragraph, adding the words "not exceeding twenty years."

Effect of disabilities. The provisions of this section are an exception to the general rule, that actions for the recovery of real property must be brought within five years after the cause of action has arisen (Southern Pacific R. R. Co. v. Whitaker, 109 Cal. 268; 41 Pac. 1083); but where the statute of limitations has commenced to run, no subsequent disability will stop it. Crosby v. Dowd, 61 Cal. 557. This section will not protect an heir not under disability, where the disability exists as to a coheir. Burton v. Robinson, 51 Cal. 186.

Infancy. Where a cause of action accrues during infancy, the action must be commenced at any time within five years after attaining majority. Burton v. Robinson, 51 Cal. 186; Crosby v. Dowd, 61 Cal. 557; Gates v. Lindley, 104 Cal. 451; 38 Pac. 311. When an infant's property is in the hands of an executor, trustee, or guardian, and they are barred, the infant is also barred, notwithstanding his minority. Patchett v. Pacific Coast Ry. Co., 100 Cal. 505; 35 Pac. 73; Halleck v. Mixer, 16 Cal. 574; Cunningham v. Ashley, 45 Cal. 485; McLeran v. Benton, 75 Cal. 329; 2 Am. St. Rep. 814; 14 Pac. 879; but see contra, Crosby v. Dowd, 61 Cal. 557; Winterburn v. Chambers, 91 Cal. 170; 27 Pac. 658. The statute is not suspended in favor of a minor claiming under an ancestor who died after his possession had been invaded and the statute of limitations set in motion (Crosby v. Dowd, 61 Cal. 557; McLeran v. Benton, 73 Cal. 329; 2 Am. St. Rep. 814; 14 Pac. 879; Alvarado v. Nordholt, 95 Cal. 116; 30 Pac. 211; Castro v. Geil, 110 Cal. 292; 52 Am. St. Rep. 84; 42 Pac. 804); but where the ancestor died before his rights were invaded, the minor may commence his action five years after attaining majority. Crosby v. Dowd, 61 Cal. 557; McNeil v. First Congregational Society, 66 Cal. 105; 4 Pac. 1096. An ouster, and notice thereof, are not suspended by the infancy of the disseised, but the effect of his knowledge thereof is suspended until his majority, and he has five years after that date within which to bring the action to recover the land. Winterburn v. Chambers, 91 Cal. 170; 27 Pac. 658. Prior to the statute of 1863, there was no saving clause in favor of infants. McLeran v. Benton, 73 Cal. 329; 2 Am. St. Rep. 814; 14 Pac. 879.

Disabilities which interrupt operation of statute of limitations. See note 36 Am. Dec. 68.

CODE COMMISSIONERS' NOTE. Stats. **1863**, p. 325.

CHAPTER III.

TIME OF COMMENCING ACTIONS OTHER THAN FOR RECOVERY OF REAL PROPERTY.

§ 335. Periods of limitation prescribed.
§ 336. Within five years.
§ 337. Within four years.
§ 338. Within three years.
§ 339. Within two years.
§ 340. Within one year.
§ 341. Within six months.
§ 342. Same.
§ 343. Actions for relief not hereinbefore provided for.
§ 344. Where cause of action accrues on mutual account.
§ 345. Actions by the people subject to the limitations of this chapter.
§ 346. Action to redeem mortgage.
§ 347. Same, when some of mortgagors are not entitled to redeem.
§ 348. No limitations where money deposited in bank.
§ 349. Time for commencing actions under "local improvement act of 1901."

§ 335. Periods of limitation prescribed. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

Legislation § 335. Enacted March 11, **1872.**

Limitations prescribed. This section, as well as the title of this chapter, clearly shows that the limitations therein fixed do not apply to actions, where the effect would be to cut off any portion of the limitation of five years. Goodnow v. Parker, 112 Cal. 437; 44 Pac. 738. The nature of the right sued upon, and not the form of the action or the relief demanded, determines the applicability of the statute of limitations. Bell v. Bank of California, 153 Cal. 234; 94 Pac. 889. As the statute of limitations is applicable both to actions at law and to suits in equity, there can be no laches in the delay to bring an action, where brought within the period of limitation, unless there are some facts or circumstances attending the delay that have operated to defendant's injury. Meigs v. Pinkham, 159 Cal. 104; 112 Pac. 883. This section has no relation to an equitable proceeding to set aside a fraudulent deed to real estate, where the effect of it would be to restore the possession of the premises to the defrauded party; such proceeding is substantially one for the recovery of real property. Oakland v. Carpentier, 13 Cal. 540. Where a party is entitled to a performance upon the part of another, only a tender or offer to perform can work a breach, and put the statute in motion. Vickrey v. Maier, 164 Cal. 384; 129 Pac. 273. In the absence of any provision to the contrary, interest coupons of bonds are independent obligations, and the statute begins to run from the date of their maturity, where they have been detached from the bonds and transferred to another. California Safe Deposit etc. Co. v. Sierra Valleys etc. Ry. Co., 158 Cal. 690; 112 Pac. 274. Neither the creditor's ignorance of nor his inability to discover the presence of the judgment debtor will prevent the running of the statute in the latter's favor. St. Paul Title etc. Co. v. Stensgaard, 162 Cal. 178; 121 Pac. 731. The burden of proof is on the defendant; he must show the date on which the statute began to run. Whitcomb v. McClintock, 1 West Coast Rep. 876; Norton v. Zellerbach, 2 Cal. Unrep. 181; 11 Pac. Coast L. J. 356. Where the bar of the statute is raised, the court should expressly find whether the action is barred by the statute, and not merely facts from which it may be inferred that the bar has or has not risen. Duff v. Duff, 71 Cal. 513; 12 Pac. 570; Spaulding v. Howard, 121 Cal. 194; 53 Pac. 563.

Pleading the statute of limitations. See note post, § 458.

§ 336. Within five years. Within five years:

1. An action upon a judgment or decree of any court of the United States or of any state within the United States.

2. An action for mesne profits of real property.

Foreign statute of limitations, effect of. Post, § 361.

Legislation § 336. 1. Enacted March 11, **1872;** based on Stats. 1850, p. 343.

2. Amended by Code Amdts. **1873–74,** p. 291, (1) numbering the second paragraph as subd. 1, and (2) adding subd. 2.

Actions upon judgments. This section is not applicable to the procedure contemplated by § 685, post (Doehla v. Phillips, 151 Cal. 488; 91 Pac. 330); nor does it control or affect the operation of § 708, post, nor the remedy given by it. Merguire v. O'Donnell, 139 Cal. 6; 96 Am. St. Rep. 91; 72 Pac. 337. All domestic judgments are embraced within its terms (Mason v. Cronise, 20 Cal. 211; Rowe v. Blake, 99 Cal. 167; 37 Am. St. Rep. 45; 33 Pac. 864; John Heinlen Co. v. Cadwell, 3 Cal. App. 80; 84 Pac. 443; Hobbs v. Duff, 23 Cal. 596); and also judgments of a sister state (St. Paul Title etc. v. Stensgaard, 162 Cal. 178; 121 Pac. 731); but foreign judgments are not, being provided for by § 343, post. Dore v. Thornburgh, 90 Cal.

64; 25 Am. St. Rep. 100; 27 Pac. 30. Under § 351, post, the statute does not commence to run against an action on a judgment of a sister state, against a nonresident, until the judgment debtor comes into this state, and the period of his absence subsequent to his coming here is deducted from the statutory period. Chappel v. Thompson, 21 Cal. App. 136; 131 Pac. 82. A decree for alimony is embraced within this section (De Uprey v. De Uprey, 23 Cal. 352); and for maintenance (Simpson v. Simpson, 21 Cal. App. 150; 131 Pac. 99); so also are foreclosure decrees and deficiency judgments. Stout v. Macy, 22 Cal. 647; Bowers v. Crary, 30 Cal. 621. The docketing of a deficiency judgment is not a new and independent judgment; it is governed by the decree. Bowers v. Crary, 30 Cal. 621. The statute is set in motion only by a final judgment (Condee v. Barton, 62 Cal. 1); and the time is to be computed from the date on which the judgment is entered of record, not from the date on which the court finds the party is entitled to judgment. Parke v. Williams, 7 Cal. 247; Franklin v. Merida, 50 Cal. 289; Trenouth v. Farrington, 54 Cal. 273; Condee v. Barton, 62 Cal. 1; Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074; Rowe v. Blake, 99 Cal. 167; 37 Am. St. Rep. 45; 33 Pac. 864; Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218; Herrlich v. McDonald, 104 Cal. 551; 38 Pac. 360. A final judgment does not exist until the time for the appeal therefrom has elapsed. Feeney v. Hinckley, 134 Cal. 467; 86 Am. St. Rep. 290; 66 Pac. 580; Estate of Wood, 137 Cal. 129; 69 Pac. 900. The clerk's entry in the minutes, at the end of the trial, of the decision of the judge, does not constitute a judgment. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074. A defendant against whom a judgment is rendered, if he wishes to set the statute running, may cause the judgment to be entered at any time. Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218. The statute runs from the date of the making of a decree of distribution. Wheeler v. Bolton, 54 Cal. 302. Where a judgment is made payable in installments, the statute begins to run on each installment from the day it becomes payable under the judgment. De Uprey v. De Uprey, 23 Cal. 352. A judgment for costs on appeal is barred within five years after the judgment is entered. Reay v. Heazelton, 128 Cal. 335; 60 Pac. 977. In an action against a garnishee to recover the debt due the judgment debtor, the plea of the statute can be made whenever it would be good as against the judgment debtor, but the liability created by the garnishment is never barred. Nordstrom v. Corona City Water Co., 155 Cal. 206; 132 Am. St. Rep. 81; 100 Pac. 242. A failure to sue within five years does not satisfy the judgment; it only bars the right to enforce its satisfaction. San Diego v. Higgins, 115 Cal. 170; 46 Pac. 923. In an action against the administrator of a judgment creditor, the personal privilege of the statute is not waived by its not being pleaded. Reay v. Heazelton, 128 Cal. 335; 60 Pac. 977. A defendant sued on a judgment recovered in another state may plead the bar of the statute, although living in this state under an assumed name. St. Paul Title etc. Co. v. Stensgaard, 162 Cal. 178; 121 Pac. 731.

Action to recover mesne profits. In an action for trespass, rents and profits are not governed by this section. Carpentier v. Mitchell, 29 Cal. 330. A patentee of land may bring an action for the recovery of rents at any time within five years (Wilhoit v. Tubbs, 83 Cal. 279; 23 Pac. 386); and an amended complaint filed within that time authorizes the recovery of all rents received within the same period. Pottkamp v. Buss, 5 Cal. Unrep. 462; 46 Pac. 169.

Time limit on enforcement of judgments. See note 133 Am. St. Rep. 61.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

1. **Domestic judgments.** The statute runs as well against judgments rendered in this state as against foreign judgments. Mason v. Cronise, 20 Cal. 218.

2. **Foreign judgment.** A foreign judgment is not "a contract, obligation, or liability founded upon an instrument in writing," within the meaning of § 337, post. Patten v. Ray, 4 Cal. 287.

3. **A judgment payable in installments.** The statute begins to run on a judgment payable in installments from the period fixed for the payment of each installment, as it becomes due. De Uprey v. De Uprey, 23 Cal. 352.

4. **Judgment against intestate, obtained during his life.** By common law, when the limitation began to run, a subsequent disability, as death of the party bound, etc., did not stop it. But this doctrine does not apply where a judgment is obtained against an intestate in his lifetime, and no execution levied. In such case, the judgment creditor being prevented by law from suing after the death of the debtor, the statute of limitations ceases to run until presentation of the claim to the administrator. Quivey v. Hall, 19 Cal. 98.

5. **Five-year limit on foreign judgment.** Cavender v. Guild, 4 Cal. 250. Statute begins to run, only from the time of final entry of judgment. Parke v. Williams, 7 Cal. 247.

§ 337. Within four years. Within four years:

1. An action upon any contract, obligation or liability founded upon an instrument in writing executed within this state; provided, that wherever the time within which any such action must be so commenced would in any case expire by the terms of this section after the first day of June, one thousand nine hundred and six and before the first day of January, one thousand nine hundred and seven, such action may be commenced at any time before

the first day of January, one thousand nine hundred and seven, with the same force and effect as if commenced within four years as in this section provided.

2. An action to recover a balance due upon a mutual, open and current account or upon an open book-account.

Four-years limitation, where no other provision. Post, § 343.

Legislation § 337. 1. Enacted March 11, **1872** (based on Stats. 1850, p. 345), and then read: "Within four years: An action upon any contract, obligation, or liability founded upon an instrument in writing."

2. Amended by Code Amdts. **1873–74**, p. 291, adding the words "executed in this state" at end of section.

3. Amended by Stats. **1906**, p. 5, (1) changing the word "in" to "within," in the second line, and (2) adding the proviso.

4. Amended by Stats. **1907**, p. 599, (1) numbering the second paragraph as subd. 1, and (2) adding subd. 2.

General rule. The statute states the general rule, that actions founded upon an instrument in writing are barred after four years. Priet v. De la Montanya, 3 Cal. Unrep. 122; 22 Pac. 171; Southern Pacific Co. v. Prosser, 122 Cal. 413; 52 Pac. 836; 55 Pac. 145; People v. Weineke, 122 Cal. 535; 55 Pac. 579; Coyle v. Lamb, 123 Cal. 264; 55 Pac. 901; Newhall v. Sherman, 124 Cal. 509; 57 Pac. 387; Harrigan v. Home Life Ins. Co., 128 Cal. 531; 58 Pac. 180; 61 Pac. 99; Vandall v. Teague, 142 Cal. 471; 76 Pac. 35. A finding that the action was barred by the statute, and that the security was over forty years past due before the action was commenced, is sufficient to show that the action was barred. Marshutz v. Seltzor, 5 Cal. App. 140; 89 Pac. 877.

Actions founded upon instruments in writing. Actions on bills and notes are governed by this section (Rogers v. Byers, 1 Cal. App. 284; 81 Pac. 1123; Hewel v. Hogin, 3 Cal. App. 248; 84 Pac. 1002; Du Brutz v. Bank of Visalia, 4 Cal. App. 201, 87 Pac. 467, 469; Marshutz v. Seltzor, 5 Cal. App. 140; 89 Pac. 877; Ball v. Lowe, 1 Cal. App. 228; 81 Pac. 1113; Palmtag v. Roadhouse, 4 Cal. Unrep. 205; 34 Pac. 111); but the obligation of the principal to repay the surety is not "founded upon a written instrument" (Chipman v. Morrill, 20 Cal. 130; approved in McCarthy v. Mount Tecarte Land etc. Co., 111 Cal. 328, 43 Pac. 956, holding that a resolution of a corporation appointing a director as manager does not give the manager a right of action for salary based upon an obligation in writing); but an action to enforce contribution on a bond is within this section. Hewlett v. Beede, 2 Cal. App. 561; 83 Pac. 1086. A resolution of a board of directors, fixing the salary of an officer, is a contract in writing (Rosborough v. Shasta River Canal Co., 22 Cal. 556); but a resolution adopting plans and specifications is not. Todd v. Board of Education, 122 Cal. 106; 54 Pac. 527; Foorman v. Wallace, 75 Cal. 552; 17 Pac. 680; McCarthy v. Mount Tecarte Land etc. Co., 111 Cal. 328; 43 Pac. 956; Thomas v. Pacific Beach Co., 115 Cal. 136; 46 Pac. 899. An action against a county auditor for receiving moneys collected for license taxes, is not within this section. San Luis Obispo County v. Farnum, 108 Cal. 567; 41 Pac. 447; Best v. Johnson, 78 Cal. 217; 12 Am. St. Rep. 41; 3 L. R. A. 168; 20 Pac. 415. An action upon a note, praying subrogation, is barred in four years after the maturity of the note. Campbell v. Campbell, 133 Cal. 33; 65 Pac. 134; Clausen v. Meister, 93 Cal. 555; 29 Pac. 232. The section applies to an action to enforce a mortgage executed by a guardian (Banks v. Stockton, 149 Cal. 599; 87 Pac. 83), to an action to quiet title (Burns v. Hiatt, 149 Cal. 617; 117 Am. St. Rep. 157; 87 Pac. 196), to an action between a beneficiary and his trustee (Marston v. Kuhland, 151 Cal. 102; 90 Pac. 188), to an action to recover the price of a levee built on the defendant's land (Fabian v. Lammers, 3 Cal. App. 109; 84 Pac. 432), and to an action for goods sold under a contract in writing. Brackett v. Martens, 4 Cal. App. 249; 87 Pac. 410. An action on an implied warranty of an article, manufactured, on a written order, for a specific purpose, is founded on an instrument in writing, and is also within this section (Bancroft v. San Francisco Tool Co., 120 Cal. 228; 52 Pac. 496); as is also an action to recover rents due under a lease (Coyle v. Lamb, 123 Cal. 264; 55 Pac. 901), and an action to foreclose a mortgage. Newhall v. Sherman, 124 Cal. 509; 57 Pac. 387; Moore v. Gould, 151 Cal. 723; 91 Pac. 616; California Title Ins. etc. Co. v. Miller, 3 Cal. App. 54; 84 Pac. 453. An action against a city and county treasurer and his sureties, for misappropriation of funds, is within this section (Priet v. De la Montanya, 85 Cal. 148; 24 Pac. 612); but where the primary obligation of the officer is barred, the sureties are relieved. Sonoma County v. Hall, 132 Cal. 589; 62 Pac. 257, 312; 65 Pac. 12, 459. A promise, merely implied by law, and not supported by any express terms in the written instrument, does not come within the statute. Thomas v. Pacific Beach Co., 115 Cal. 136; 46 Pac. 899. An action to recover on a contract for street improvements in front of a government reservation in a city, is based either on a contract founded on an instrument in writing, or on an obligation or liability arising out of an assessment made in writing, and is within this section. Onderdonk v. San Francisco, 75

Cal. 534; 17 Pac. 678. A naked receipt for money, not being a contract, does not import a promise or obligation (Ashley v. Vischer, 24 Cal. 322; 85 Am. Dec. 65; Scrivner v. Woodward, 139 Cal. 314; 73 Pac. 863), unless it expresses a promise. Ashley v. Vischer, 24 Cal. 322; 85 Am. Dec. 65. Where lands, upon the death of a person, are impressed with the qualities of a resulting trust, such trust may be enforced at any time within four years after such death. Keefe v. Keefe, 19 Cal. App. 310; 125 Pac. 929. The four-years limitation prescribed in this section is applicable to an action to recover a proportionate part of the expense of reclaiming land under a written agreement (Fabian v. Lammers, 3 Cal. App. 109; 84 Pac. 432), and to actions on interest coupons attached to bonds. California Safe Deposit etc. Co. v. Sierra Valleys Ry. Co., 158 Cal. 690; Ann. Cas. 1912A, 729; 112 Pac. 274. This section applies to an action to recover damages for the breach of a written contract: such action is founded upon a written instrument. Ahlers v. Smiley, 163 Cal. 200; 124 Pac. 827.

Action upon account. Action on an account stated is barred, unless brought within four years. Visher v. Wilbur, 5 Cal. App. 562; 90 Pac. 1065; 91 Pac. 412.

Commencement of running of statute. A surety's liability is not discharged until four years after his liability has become fixed (Dussol v. Bruguiere, 50 Cal. 456); and the statute commences to run from the date of the affirmance of the judgment against him. Clark v. Smith, 66 Cal. 645; 4 Pac. 689; 6 Pac. 732. The statutory bar intervenes in four years from the date when the cause of action accrues. Banks v. Marshall, 23 Cal. 223; Pendleton v. Rowe, 34 Cal. 149; Hathaway v. Patterson, 45 Cal. 294; Hibernia Sav. & L. Soc. v. O'Grady, 47 Cal. 479. A demand note is due immediately upon delivery, and the statute commences to run from the date thereof, without demand. Jones v. Nicholl, 82 Cal. 32; 22 Pac. 878; Brummagim v. Tallant, 29 Cal. 503; 89 Am. Dec. 61; Bell v. Sackett, 38 Cal. 407; Collins v. Driscoll, 69 Cal. 550; 11 Pac. 244; O'Neil v. Magner, 81 Cal. 631; 15 Am. St. Rep. 88; 22 Pac. 876. The date of the delivery, and not the date of the note, fixes the period from which the statute runs against the action on the note. Collins v. Driscoll, 69 Cal. 550; 11 Pac. 244. An absolute and unconditional guaranty of the payment of a note is broken when the note matures and remains unpaid; the statute runs from that date. Pierce v. Merrill, 128 Cal. 464; 79 Am. St. Rep. 56; 61 Pac. 64; Coburn v. Brooks, 78 Cal. 443; 21 Pac. 2; First Nat. Bank v. Babcock, 94 Cal. 96; 28 Am. St. Rep. 94; 29 Pac. 415; London etc. Bank v. Smith, 101 Cal. 415; 35 Pac. 1027; Adams v. Wallace, 119 Cal. 67; 51 Pac. 14. The action against a surety on the bond of a public officer does not accrue until the expiration of the term of office (People v. Van Ness, 76 Cal. 121; 18 Pac. 139; People v. Burkhart, 76 Cal. 606; 18 Pac. 776), and the statute commences to run on the expiration of his term of office. San Francisco v. Heynemann, 71 Cal. 153; 11 Pac. 870; People v. Weineke, 122 Cal. 535; 55 Pac. 579 (holding that the statute begins to run from the date of the delinquency). A devise to one for life, to go, upon the death of the devisee, to others, charged with the payment of a certain sum, does not cause the obligation of payment to mature until the death of the devisee. Keir v. Keir, 155 Cal. 96; 99 Pac. 487. The statute does not commence to run against a cause of action to enforce specifically, against the distributee of the estate of a deceased person, a written agreement of the deceased to convey to an attorney an interest in a water right, in consideration of his services, to be performed in appealing a case, involving such right, to the supreme court, until the final judgment of that court on the appeal. Archer v. Harvey, 164 Cal. 274; 128 Pac. 410. It is a general rule, that the statute does not begin to run, when no administration exists on the decedent's estate at the time the cause of action accrues. Estate of Bullard, 116 Cal. 355; 48 Pac. 219; Hibernia Sav. & L. Soc. v. Boland, 145 Cal. 626; 79 Pac. 365; Heeser v. Taylor, 1 Cal. App. 619; 82 Pac. 977. Where a mortgagor dies after the statute has commenced to run, an action, brought more than four years after the maturity of a note, and more than one year after administration is awarded, is barred (McMillan v. Hayward, 94 Cal. 357; 29 Pac. 774); it may not be barred as against the estate, yet barred as to subsequent grantees made parties as claiming an interest in the premises. Hibernia Sav. & L. Soc. v. Farnham, 153 Cal. 578, 583; 126 Am. St. Rep. 129; 96 Pac. 9. Where a note and mortgage are not mature at the date of the death of the mortgagor, the statute does not commence to run until letters of administration are issued on the decedent's estate, regardless of the lapse of time prior thereto. Hibernia Sav. & L. Soc. v. Farnham, 153 Cal. 578; 126 Am. St. Rep. 129; 96 Pac. 9; Estate of Bullard, 116 Cal. 355; 48 Pac. 219; Hibernia Sav. & L. Soc. v. Herbert, 53 Cal. 375; Hibernia Sav. & L. Soc. v. Conlin, 67 Cal. 178; 7 Pac. 477; Danglada v. De la Guerra, 10 Cal. 386; Smith v. Hall, 19 Cal. 85. A mortgage by a third person, to secure the note of another, may be foreclosed within the statutory period, although the mortgagee has lost his right to enforce the note, by failure to present it to the administrator of the deceased maker. Sichel v. De Carrillo, 42 Cal. 493. The death of one mortgagor

before the note is barred does not affect the bar of the statute as to his co-mortgagor. Hibernia Sav. & L. Soc. v. Wackenreuder, 99 Cal. 503; 34 Pac. 219. The statute does not run on a promissory note from the date of its presentation to the executor or administrator, but from the date of its rejection by the judge. Nally v. McDonald, 66 Cal. 530; 6 Pac. 390. The cause of action to foreclose a mortgage accrues on the maturity of the note secured thereby (Belloc v. Davis, 38 Cal. 242; Mason v. Luce, 116 Cal. 232; 48 Pac. 72; Richards v. Daley, 116 Cal. 336; 48 Pac. 220), notwithstanding a stipulation that, on default of the payment of interest, the same should become due and payable. Mason v. Luce, 116 Cal. 232; 48 Pac. 72; Belloc v. Davis, 38 Cal. 242. Where an action on a note secured by mortgage is barred, an action to foreclose the mortgage is also barred (Lord v. Morris, 18 Cal. 482; McCarthy v. White, 21 Cal. 495; 82 Am. Dec. 754; Heinlin v. Castro, 22 Cal. 100; Booth v. Hoskins, 75 Cal. 271; 17 Pac. 225); and an assignee of the mortgagor may plead the statute. McCarthy v. White, 21 Cal. 495; 82 Am. Dec. 754; Grattan v. Wiggins, 23 Cal. 16. No time being specified for payment in a mortgage or deed, the presumption is, that it is due immediately, and an action is barred in four years from the delivery thereof. Holmes v. West, 17 Cal. 623; Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620; Espinosa v. Gregory, 40 Cal. 58; Estate of Galvin, 51 Cal. 215; Dorland v. Dorland, 66 Cal. 189; 5 Pac. 77; Newhall v. Sherman, 124 Cal. 509; 57 Pac. 387. A mortgage to secure a debt, not evidenced by a written instrument, is also within the statute. Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620; Sargent v. Wilson, 5 Cal. 504; Moss v. Warner, 10 Cal. 296; Mabury v. Ruiz, 58 Cal. 11. Where several notes, secured by the same mortgage, fall due on different dates, the statute begins to run from the date of maturity of each note. Hibernia Sav. & L. Soc. v. Herbert, 53 Cal. 375. Coupons on municipal bonds are not barred until the bonds to which they belong are barred (Meyer v. Porter, 65 Cal. 67; 2 Pac. 884); but, in the absence of any promise to the contrary, the rule is, that the coupons are independent obligations, at least when detached and transferred; and the statute runs from the maturity of each (California Safe Deposit etc. Co. v. Sierra Valleys Ry. Co., 158 Cal. 690; Ann. Cas. 1912A, 729; 112 Pac. 274); and where the interest on a note is payable periodically, and on default the whole becomes due and payable, the statute commences to run on the maturity of the note. Belloc v. Davis, 38 Cal. 242. An action for money, lost by depositing it in a bank that failed, is within the statute, which begins to run from the date of the failure. San Diego County v. Dauer, 131 Cal. 199; 63 Pac. 338; and see People v. Van Ness, 79 Cal. 84; 12 Am. St. Rep. 134; 21 Pac. 554; Mason v. Luce, 116 Cal. 232; 48 Pac. 72; People v. Weineke, 122 Cal. 535; 55 Pac. 579. On a certificate of deposit issued by a bank, payable on demand, the statute begins to run from the date of issuance. Brummagim v. Tallant, 29 Cal. 503; 89 Am. Dec. 61. The statute does not begin to run, in the case of an express trust, until there is brought home to the plaintiff a knowledge of the repudiation of the trust, or violation of its terms by defendant. Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 228; 90 Pac. 39. In an action on a conditional or contingent contract, the cause of action accrues when the condition occurs. Wolf v. Marsh, 54 Cal. 228. An action on an independent covenant to pay the purchase-money for land, without any date fixed for the delivery of the deed, is barred in four years from the date on which payment was to be made. Donovan v. Judson, 81 Cal. 334; 6 L. R. A. 591; 22 Pac. 682. Where a contract for the delivery of water fixes no time for delivery, but there is an admission that it was to be made on a certain date, the statute begins to run on the day thus fixed, where there is a failure to perform. Richter v. Union Land etc. Co., 129 Cal. 367; 62 Pac. 39. The cause of action on an indemnity bond against damages accrues when the one indemnified has paid. Oaks v. Scheifferly, 74 Cal. 478; 16 Pac. 252. If an action, as shown by the record, is not for an accounting, but for the breach of a contract to pay a sum when a sale was made, and the record is silent as to the date when the sale was made and the purchase-money paid, it shows no statutory bar of the cause of action. Parker v. Herndon, 19 Cal. App. 451; 126 Pac. 183.

Interruption of running of statute. A distinction must be made between a new promise made before an action upon an original contract is barred, and one made thereafter; when it is made before, the debtor merely continues his liability for a longer term, and the action is based upon the original promise; in other words, he merely waives so much of the period of limitation as has run in his favor. Concannon v. Smith, 143 Cal. 14; 66 Pac. 40; Southern Pacific Co. v. Presser, 122 Cal. 413; 52 Pac. 836; 55 Pac. 145. An amended complaint setting up a new cause of action, where the bar has intervened after the commencement of the action, and before the filing of the amended complaint, is barred (Campbell v. Campbell, 133 Cal. 33; 65 Pac. 134; Anderson v. Mayers, 50 Cal. 525; Meeks v. Southern Pacific R. R. Co., 56 Cal. 513; 38 Am. Rep. 67; Spaulding v. Howard, 121 Cal. 194; 53 Pac. 563; Storer v. Austin, 136 Cal. 588; 69 Pac. 297;

Jeffers v. Cook, 58 Cal. 147); but where the amendment does not set up a new cause of action, it is not. Rauer's Law etc. Co. v. Leffingwell, 11 Cal. App. 494; 105 Pac. 427. The filing of the complaint suspends the running of the statute as to matters arising out of the transaction set forth therein. McDougald v. Hulet, 132 Cal. 154; 64 Pac. 278; Perkins v. West Coast Lumber Co., 120 Cal. 27; 52 Pac. 118. In the case of a note secured by a mortgage, the mortgagor cannot, as against subsequent lienholders, or the holder of the equity of redemption, prolong the period of the statute as to an action to foreclose on the security. Lord v. Morris, 18 Cal. 482; McCarthy v. White, 21 Cal. 495; 82 Am. Dec. 754; Lent v. Morrill, 25 Cal. 492; Low v. Allen, 26 Cal. 141; Lent v. Shear, 26 Cal. 361. The prompt payment of the interest on a note, on demand, when it falls due, does not extend the period within which an action may be brought to foreclose a mortgage given to secure the note (Pendleton v. Rowe, 34 Cal. 149); and where an action was commenced before the death of the maker, the filing of a supplemental complaint is not the commencement of a new action. Hibernia Sav. & L. Soc. v. Wackenreuder, 99 Cal. 503; 34 Pac. 219. An amendment to a complaint seeking a foreclosure relates back to the filing of the action, as against the original parties (Frost v. Witter, 132 Cal. 421; 48 Am. St. Rep. 53; 64 Pac. 705); and the filing of the complaint suspends the statute as to matters pleaded. Perkins v. West Coast Lumber Co., 120 Cal. 27; 52 Pac. 118; McDougald v. Hulet, 132 Cal. 154; 64 Pac. 278. An agreement to pay, made by a third person, in writing and for a valuable consideration, interrupts the running of the statute, and fixes a new date, from which the statute runs as to such third person. Hawk v. Barton, 130 Cal. 654; 63 Pac. 64. A new promise, made before the bar of the statute, removes the bar, and fixes a new period, from which the statute begins to run. Daniels v. Johnson, 129 Cal. 415; 79 Am. St. Rep. 123; 61 Pac. 1107. When an action is commenced within the period of the statute, the substitution of the pledge securing the note is not the substitution of a new cause of action so as to raise the bar of the statute. Merced Bank v. Price, 9 Cal. App. 177; 98 Pac. 383. The renewal of a note secured by mortgage carries with it an extension of the lien of the mortgage. Lent v. Morrill, 25 Cal. 492. The lien is not extinguished by lapse of time, so long as the principal obligation is not barred. Worth v. Worth, 155 Cal. 599; 102 Pac. 663. Where, in an action to quiet title, a mortgage barred by the statute is set up, to which the statute is pleaded, a decree of foreclosure cannot be entered. Marshutz v. Seltzor, 5 Cal. App. 140; 89 Pac. 877. Where the real cause of action is for the recovery of money on a promissory note, a prayer for relief incidental thereto does not remove the bar of the statute. Clausen v. Meister, 93 Cal. 555; 29 Pac. 232. If a note secured by mortgage is presented as a claim against the estate of a deceased mortgagor, but the mortgage is not presented, the statute is not suspended as to the mortgage; and if not presented within the time prescribed, it is barred. Regents of University v. Turner, 159 Cal. 541; Ann. Cas. 1912C, 1162; 114 Pac. 842. The grantee of a mortgagor may avail himself of the bar of the statute, although the running thereof against the mortgagor has been interrupted by his death or by his absence from the state. California Title Ins. etc. Co. v. Miller, 3 Cal. App. 54; 84 Pac. 453. A sufficient acknowledgment, in writing, of the indebtedness takes it out of the operation of the statute. Worth v. Worth, 155 Cal. 599; 102 Pac. 663. An acknowledgment or promise, made while the original obligation is in force, is an original obligation, and lifts the bar of the statute. McCormack v. Brown, 36 Cal. 180, 95 Am. Dec. 170; Chaffee v. Browne, 109 Cal. 211; 41 Pac. 1028; London etc. Bank v. Bandemann, 120 Cal. 220; 65 Am. St. Rep. 179; 52 Pac. 583; Southern Pacific Co. v. Prosser, 122 Cal. 413; 52 Pac. 836; 55 Pac. 145; Rodgers v. Byers, 127 Cal. 528; 60 Pac. 42; Pierce v. Merrill, 128 Cal. 473; 79 Am. St. Rep. 63; 61 Pac. 67; Daniels v. Johnson, 129 Cal. 415; 79 Am. St. Rep. 123; 61 Pac. 1107; Concannon v. Smith, 134 Cal. 14; 66 Pac. 40; Newhall v. Hatch, 134 Cal. 269; 55 L. R. A. 673; 66 Pac. 266. If an unconditional acknowledgment or promise is made after the original obligation is barred, the action is upon the implied promise raised by law from the new acknowledgment, or on the new express promise. McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170; Chabot v. Tucker, 39 Cal. 434; Biddel v. Brizzolara, 56 Cal. 374; Lambert v. Schmalz, 118 Cal. 33; 50 Pac. 13; Southern Pacific Co. v. Prosser, 122 Cal. 413; 52 Pac. 836; 55 Pac. 145; Rodgers v. Byers, 127 Cal. 528; 60 Pac. 42; Concannon v. Smith, 134 Cal. 14; 66 Pac. 40; Dearborn v. Grand Lodge, 138 Cal. 658; 72 Pac. 154. The death of a mortgagor, pending an action to foreclose, does not abate the action, but it may be prosecuted against his representatives. Union Sav. Bank v. Barrett, 132 Cal. 453; 64 Pac. 713, 1071.

Pleading. A party who assumes the payment of a mortgage debt cannot plead the statute: all defenses against the mortgage, other than payment, are expressly waived. Davis v. Davis, 19 Cal. App. 797; 127 Pac. 1051. A party sued under a fictitious name cannot set up the intervention of the statute, subsequently to the commencement of the action, by a disclosure of his true name. Hoffman v. Keeton, 132 Cal. 195; 64 Pac. 264; Farris v. Merritt, 63 Cal. 118;

Frost v. Witter, 132 Cal. 421; 84 Am. St. Rep. 53; 64 Pac. 705. The bar of the statute cannot be raised by demurrer, unless it clearly appears on the face of the complaint. Lloyd v. Davis, 123 Cal. 348; 55 Pac. 1003. Where the new promise made is coupled with a condition, the substituted conditional promise must be pleaded on an action brought after the bar has intervened on the original obligation. Curtis v. Sacramento, 70 Cal. 412; 11 Pac. 748; Rodgers v. Byers, 127 Cal. 528; 60 Pac. 42.

Actions that must be brought within four years. See note post, § 343.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

1. Construction of section. This section has been held to refer to contracts, obligations, and liabilities resting in or growing out of written instruments, not remotely or ultimately, but immediately. Thus, where two persons executed a note, one as principal, and the other as surety, and a judgment obtained upon the note is paid by the surety, the obligation of the principal to pay the surety is not "founded upon a written instrument" within the meaning of this section. Chipman v. Morrill, 20 Cal. 131.

2. What is a contract in writing. An order entered on the books of a corporation. A person acted for two years as president of a corporation, with an understanding that he should be paid, but with no agreement to that effect, or as to compensation. Having been re-elected for the third year, the trustees made an order as follows: "Ordered that the compensation of the president be established at fifty dollars per month." And the person continued to serve for two years longer. Held: that such order was a contract to pay past as well as future services at the rate of fifty dollars per month and that the order was a contract in writing, within the meaning of the statute of limitations, both for past as well as present pay, and that the statute ran only from the date of the order. Rosborough v. Shasta River Canal Co., 22 Cal. 556.

3. Audited accounts. Accounts with the words "audited and approved" and "certified to be correct," written on their face, are instruments in writing, within the meaning of this section. Sannickson v. Brown, 5 Cal. 57. Statute runs from maturity of contract. The right of action upon a contract in writing is not barred until the lapse of four years after maturity. Bagley v. Eaton, 10 Cal. 126.

4. Lost contract. The fact that the contract was in writing, and not the present existence of the writing itself, determines the time within which the action must be brought. Bagley v. Eaton, 10 Cal. 126.

5. Published offer of reward held to be a contract in writing, etc. Ryer v. Stockwell, 14 Cal. 134; 73 Am. Dec. 634.

6. City bonds, and bonds of municipal corporations, to provide for payment of indebtedness, when not barred by statute of limitations. Underhill v. Trustees of City of Sonora, 17 Cal. 173.

7. Actions on promissory notes. Banks v. Marshall, 23 Cal. 223.

8. Certificates of deposit. And of the same nature as promissory notes are certificates of deposit. The statute runs from the date, and no demand is required to set the statute in motion. Brumagim v. Tallant, 29 Cal. 503; 89 Am. Dec. 61.

9. Note and mortgage. A note payable six months after date, with interest monthly, in advance, and "in case the said interest or any portion thereof, should become due, and remain unpaid after demand, then the mortgage given by me, of even date herewith, which is given to secure the payment of this note, may be foreclosed," etc.; and the mortgage contained a provision by which the mortgagee was "empowered to foreclose said mortgage, according to the provisions in said note contained." The court held that the prompt payment of the interest on demand, when it fell due, did not, under these clauses in the note and mortgage, prolong the time of payment beyond the time specified in the note, and that a cause of action accrued upon the note, and to foreclose the mortgage, immediately upon the expiration of the six months, although there had been no default in the payment of interest. An action not commenced within four years after the expiration of six months from date of the note, is barred by the statute of limitations. Pendleton v. Rowe, 34 Cal. 149.

10. Mortgage. A mortgage given to secure a payment of a debt, of which there is no written agreement, is yet a contract, "founded upon an instrument in writing"; and an action may be had at any time within four years of the breach of the mortgage, although the original debt has become barred. Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620.

11. For actions of foreclosure and redemption, etc. See Grattan v. Wiggins, 23 Cal. 16; Cunningham v. Hawkins, 24 Cal. 403; 85 Am. Dec. 73.

12. Generally. See note to § 312, ante, commenting on McCarthy v. White, 21 Cal. 495; 82 Am. Dec. 754; see Grattan v. Wiggins, 23 Cal. 16; see also Pearis v. Covillaud, 6 Cal. 617; 65 Am. Dec. 543; Lord v. Morris, 18 Cal. 482, commented on in note to § 312, ante.

§ 338. Within three years. Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture;

2. An action for trespass upon real property;

3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property;

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

Statutory penalty. See post, § 340, subd. 1.
Executor or administrator. Limitation of actions to set aside sale, three years. Post, § 1573.
Corporations and stockholders, limitation as to. See post, § 359.

Legislation § 338. Enacted March 11, **1872**; based on Stats. 1850, p. 343.

Construction of section. This section must be construed with § 318, ante. Unkel v. Robinson, 163 Cal. 648; 126 Pac. 485. Similar statutes of limitation should receive the same construction. Lightner Mining Co. v. Lane, 161 Cal. 689; Ann. Cas. 1913C, 1093; 120 Pac. 771.

When section inapplicable. This section does not apply to an action to recover the amount of an assessment levied on the

capital stock of a corporation (Glenn v. Saxton, 68 Cal. 353; 9 Pac. 420); nor to an action against an innkeeper as the insurer of the goods and property of his guests (Churchill v. Pacific Improvement Co., 96 Cal. 490; 31 Pac. 460); nor to an action to recover a fund based upon a contract between the state and the purchaser of swamp-lands (Miller & Lux v. Batz, 131 Cal. 402; 63 Pac. 680); nor to an action for the actual damages presupposed in the treble damages provided for in § 3344 of the Political Code, for negligently causing loss by fire (Phoenix Ins. Co. v. Pacific Lumber Co., 1 Cal. App. 156; 81 Pac. 976); nor to an action for breach of warranty (Brackett v. Martens, 4 Cal. App. 249; 87 Pac. 410; Murphy v. Stelling, 8 Cal. App. 702; 97 Pac. 672); nor to an action against a bank, by one of its depositors, for damages resulting from its refusal to pay checks drawn upon it by the plaintiff. Smith's Cash Store v. First Nat. Bank, 149 Cal. 32; 5 L. R. A. (N. S.) 870; 84 Pac. 663.

Liability created by statute. Where the liability of a defendant depends upon the provisions of a statute, and the relief demanded by the plaintiff is derived from the statute, and, but for the statute, would have no existence, the action is upon a liability created by statute, and is therefore barred in three years. Harby v. Board of Education, 2 Cal. App. 418; 83 Pac. 1081; and see Miller & Lux v. Batz, 142 Cal. 447; 76 Pac. 42. The nature, and not the form, of the cause of action, determines the applicability of the statute of limitations. Miller & Lux v. Batz, 131 Cal. 402; 63 Pac. 680. A proceeding in mandamus, to compel the issuance of a warrant for a claim duly audited, is within this section (Barber v. Mulford, 117 Cal. 356; 49 Pac. 206), as is also an action by the secretary of a county board of education to recover for services (Banks v. Yolo County, 104 Cal. 258; 37 Pac. 900); and an action against a recorder for the non-payment of fees (Sonoma County v. Hall, 132 Cal. 589; 62 Pac. 257, 312; 65 Pac. 12, 459; Higby v. Calaveras County, 18 Cal. 176; People v. Van Ness, 76 Cal. 121; 18 Pac. 139); and an action by a district attorney for commissions on moneys collected and debts recovered by him for the county (Higby v. Calaveras County, 18 Cal. 176); and an action to recover municipal taxes (Perry v. Washburn, 20 Cal. 318; People v. McCreery, 34 Cal. 432; People v. Hulbert, 71 Cal. 72; 12 Pac. 43; San Francisco v. Luning, 73 Cal. 610; 15 Pac. 311; Lewis v. Rothchild, 92 Cal. 625; 28 Pac. 805; Los Angeles County v. Ballerino, 99 Cal. 593; 32 Pac. 581; 34 Pac. 329; San Diego v. Higgins, 115 Cal. 170; 46 Pac. 923; Dranga v. Rowe, 127 Cal. 506; 49 Pac. 944); and an action against a city to recover for street improvements (Connolly v. San Francisco, 4 Cal. Unrep. 134; 33 Pac. 1109); and an action against the principal on an official surety bond (Sonoma County v. Hall, 132 Cal. 589; 62 Pac. 257, 312; 65 Pac. 459; Paige v. Carroll, 61 Cal. 211), but the cause of action is on the misfeasance of the officer, not on the bond. Sonoma County v. Hall, 132 Cal. 589; 62 Pac. 257, 312; 65 Pac. 12, 459; Ventura County v. Clay, 114 Cal. 242; 46 Pac. 9. The stating of an account by the controller does not create a new cause of action nor toll the statute. People v. Melone, 73 Cal. 574; 15 Pac. 294; People v. Van Ness, 76 Cal. 121; 18 Pac. 139. An action against a state commissioner to recover for fees unlawfully retained, is barred in three years after the expiration of his term of office. People v. Van Ness, 76 Cal. 121; 18 Pac. 139; San Francisco v. Heynemann, 71 Cal. 153; 11 Pac. 870. In an action on the bond of a county treasurer, the statute begins to run when the loss becomes known to the county, and a failure to pay at the end of his term of office does not create a new cause of action. San Diego County v. Dauer, 131 Cal. 199; 63 Pac. 338. An action on a stockholder's liability for the debts of a corporation is barred in three years from the date when the debt was contracted (Green v. Beckman, 59 Cal. 545; Moore v. Boyd, 74 Cal. 167; 15 Pac. 670; Hyman v. Coleman, 82 Cal. 650; 16 Am. St. Rep. 178; 23 Pac. 62; Redington v. Cornwell, 90 Cal. 49; 27 Pac. 40; Hunt v. Ward, 99 Cal. 612; 37 Am. St. Rep. 87; 34 Pac. 335; Bank of San Luis Obispo v. Pacific Coast S. S. Co., 103 Cal. 594; 37 Pac. 499; Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407; 58 Pac. 85; Nellis v. Pacific Bank, 127 Cal. 166; 59 Pac. 830; Jones v. Goldtree Bros Co., 142 Cal. 383; 77 Pac. 939), and contributions among stockholders is regulated by the same limitation (Redington v. Cornwell, 90 Cal. 49; 27 Pac. 40); and the giving of a note by stockholders will not toll the liability. Hunt v. Ward, 99 Cal. 612; 37 Am. St. Rep. 87; 34 Pac. 335; Bank of San Luis Obispo v. Pacific Coast S. S. Co., 103 Cal. 594; 37 Pac. 499; Winona Wagon Co. v. Bull, 108 Cal. 1; 40 Pac. 1077; Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407; 58 Pac. 85; Goodall v. Jack, 127 Cal. 258; 59 Pac. 575. An action to enforce the statutory liability imposed by the laws of a sister state upon the stockholders in a banking corporation, for its corporate debts, is barred in three years from the time the cause of action arose. Miller v. Lane, 160 Cal. 90; 116 Pac. 58. An action against a stockholder of a bank, to recover for a deposit made with the bank, is limited to three years from the date of the deposit. Wells v. Black, 117 Cal. 157; 59 Am. St. Rep. 162; 37 L. R. A. 619; 48 Pac. 1090; Nellis v. Pacific Bank, 127 Cal. 166; 59 Pac. 830. The liability of the stockholders of a corporation for an overdraft is limited to three years after the overdraft, and the

subsequent giving of a promissory note for such overdraft cannot toll the statute as to the stockholders' liability. Santa Rosa Bank v. Barnett, 125 Cal. 407; 58 Pac. 85. An installment paid on an assessment of a reclamation district, without suit, after default, estops the defendant from contending that the statute commenced to run on the date fixed by statute. Reclamation District v. Hall, 131 Cal. 662; 63 Pac. 1000. An action to enforce the assessment of a swamp-land district is barred in three years after the cause of action accrued (People v. Hulbert, 71 Cal. 72; 12 Pac. 43), and mandamus to compel the levy of a tax on the swamp-lands is also barred (Barnes v. Glide, 117 Cal. 1; 59 Am. St. Rep. 153; 48 Pac. 804), as is also an action in mandamus, by a teacher, to secure reinstatement. Harby v. Board of Education, 2 Cal. App. 418; 83 Pac. 1081. An action in quo warranto for the usurpation of a franchise is not subject to the bar of the statute, because a continued use of the franchise without right is renewed usurpation, on which a new cause of action arises each day. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693. One claiming fraud in the execution of a deed has actual notice of the contents thereof when the deed is signed, and constructive notice from its recordation. Loeffler v. Wright, 13 Cal. App. 224; 109 Pac. 269. In the case of a trustee of an involuntary or constructive trust, no disaffirmance of the trust is necessary to set the statute of limitations in motion; but the rule is otherwise in voluntary trusts. Earle v. Bryant, 12 Cal. App. 553; 107 Pac. 1018. The first subdivision of this section is not applicable to a proceeding by a ward, after attaining majority, to compel a settlement of accounts by the guardian. Cook v. Ceas, 147 Cal. 614; 82 Pac. 370.

Trespass on real property. This section governs actions to recover damages for depasturing lands (Triscony v. Brandenstein, 66 Cal. 514; 6 Pac. 384; Zumwalt v. Dickey, 92 Cal. 156; 28 Pac. 212), and a statute which gives a remedy, by process in rem, against the cattle themselves, does not take away the remedy to recover damages, where they have not been distrained; but the failure of the proprietor to do, in connection with the land, what the law requires, may be availed of as a defense. Triscony v. Brandenstein, 66 Cal. 514; 6 Pac. 384. This section is not applicable to an action to quiet title, against a deed given by the plaintiff. De Leonis v. Hammel, 1 Cal. App. 390; 82 Pac. 349. The entire cause of action, for an injury to land or a trespass upon real property, accrues when the injury is inflicted or the trespass committed, and is barred, unless suit is brought within three years. Williams v. Southern Pacific R. R. Co., 150 Cal. 624; 89 Pac. 599. An action to recover the possession of real property, within the meaning of the five-year statute prescribed by § 318, ante, is not subject to the three-year limitation after discovery of the fraud established by the fourth subdivision of this section. Murphy v. Crowley, 140 Cal. 141; 73 Pac. 820. An action to recover damages for injury to adjoining lands, caused by a bulkhead, is not within this section (Hicks v. Drew, 117 Cal. 305; 49 Pac. 189; Zumwalt v. Dickey, 92 Cal. 156; 28 Pac. 212; Conniff v. San Francisco, 67 Cal. 45; 7 Pac. 41); neither is an action to recover damages for the erection of a levee which deflects a river (Daneri v. Southern California Ry. Co., 122 Cal. 507; 55 Pac. 243; De Baker v. Southern California Ry. Co., 106 Cal. 257; 46 Am. St. Rep. 237; 39 Pac. 610); but an action to recover damages for the construction of a railroad, without condemnation, is within this section (Robinson v. Southern California Ry. Co., 129 Cal. 8; 61 Pac. 947), as is also an injunction to prevent an entry upon land (Smithers v. Fitch, 82 Cal. 153; 22 Pac. 935), and an action for damages quare clausum fregit. Potter v. Ames, 43 Cal. 75. The erection of an embankment across a natural watercourse, in such manner as to obstruct the natural flow, and thereby cause the flooding of lands adjoining, is a continuing trespass (Conniff v. San Francisco, 67 Cal. 45; 7 Pac. 41); but this doctrine applies only where permanent flooding amounts to a taking. Hicks v. Drew, 117 Cal. 305; 49 Pac. 189. The statute does not commence to run against the right to maintain an action for flooding lands until actual injury is sustained. Galbreath v. Hopkins, 159 Cal. 297; 113 Pac. 174. Where, in an action of trespass, the complaint is amended to include a parcel of land inadvertently omitted, the filing of the original complaint does not stop the running of the statute against the trespass upon the omitted parcel (Atkinson v. Amador etc. Canal Co., 53 Cal. 102); but subsequent damages, pending the trial of the action, may be recovered without an amended complaint. McLennan v. Ohmen, 75 Cal. 558; 17 Pac. 687; Hicks v. Drew, 117 Cal. 305; 49 Pac. 189.

Claim and delivery. An action of claim and delivery must be brought within three years after the conversion by the bailee. Latta v. Tutton, 122 Cal. 279; 68 Am. St. Rep. 30; 54 Pac. 844. An action for unlawful taking and detaining can be taken at any time within three years. McCusker v. Walker, 77 Cal. 208; 19 Pac. 382. The third subdivision of this section is applicable to all cases "of unlawful taking or detaining of personal property," whatever the form of action. Bell v. Bank of California, 153 Cal. 234; 94 Pac. 889.

Conversion of property. Conversion is any distinct act of dominion wrongfully exercised over the property of another (Horton v. Jack, 4 Cal. Unrep. 758; 37 Pac.

652); and a refusal to surrender property on tender and demand is a wrongful conversion (Latta v. Tutton, 122 Cal. 279; 68 Am. St. Rep. 30; 54 Pac. 844), an action for which is within this section. Lowe v. Ozmun, 137 Cal. 257; 70 Pac. 87; Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 228; 90 Pac. 39. Property deposited for safe-keeping is converted, where there is a demand and a refusal to surrender; the statute commences to run from that time (Doyle v. Callaghan, 67 Cal. 154; 7 Pac. 418); but where property is deposited with another for safekeeping, and he tortiously converts it to his own use, and conveys it to another, the statute commences to run, as against such other person, at the time he acquires possession. Harpending v. Meyer, 55 Cal. 555. An action for collaterals may be maintained at any time within three years after the refusal of demand for their return. Scrivner v. Woodward, 139 Cal. 314; 73 Pac. 863. Money deposited to be kept until demanded constitutes an express trust, and the statute does not commence to run until demand is made. Zuck v. Culp, 59 Cal. 142. An action on the bond of a sheriff, for the conversion of property levied upon and sold under attachment, is within this section (Paige v. Carroll, 61 Cal. 211); as is also any action for trover and conversion. Bell v. Bank of California, 153 Cal. 234; 94 Pac. 889.

Relief from fraud. Actions for relief on the ground of fraud must be commenced within three years from the time the cause of action accrued (People v. Blankenship, 52 Cal. 619; Doyle v. Callaghan, 67 Cal. 154; 7 Pac. 418; Croghan v. Spence, 71 Cal. 124; 12 Pac. 719; Gregory v. Spieker, 110 Cal. 150; 52 Am. St. Rep. 70; 42 Pac. 576; Hunter v. Milam, 133 Cal. 601; 65 Pac. 1079); but where fraud is relied upon as a defense, and no affirmative relief is asked, the three-year limitation does not apply. McColgan v. Muirland, 2 Cal. App. 6; 82 Pac. 1113. Where fraud is only an incident to the real cause of action, this section does not apply (Clausen v. Meister, 93 Cal. 555; 29 Pac. 232; Murphy v. Crowley, 140 Cal. 141; 73 Pac. 820; Oakland v. Carpentier, 13 Cal. 540; Stewart v. Thompson, 32 Cal. 260; Goodnow v. Parker, 112 Cal. 437; 44 Pac. 738; Campbell v. Campbell, 133 Cal. 33; 65 Pac. 134; McColgan v. Muirland, 2 Cal. App. 6; 82 Pac. 1113); but the action is controlled by the statute of limitations prescribed in § 318, ante. Murphy v. Crowley, 140 Cal. 141; 73 Pac. 820 (reversing Murphy v. Crowley, 70 Pac. 820); Page v. Garver, 146 Cal. 577; 80 Pac. 860. An action to cancel a patent for land, procured by fraud, must be brought within three years from the time the cause of action accrued (People v. Blankenship, 52 Cal. 619); as also must any other action affecting real property for relief on the ground of fraud (Duff v. Duff, 71 Cal. 513; 12 Pac. 570; Gregory v. Spieker, 110 Cal. 150; 52 Am. St. Rep. 70; 42 Pac. 576; Murphy v. Crowley, 140 Cal. 141; 73 Pac. 820; Boyd v. Blankman, 29 Cal. 19; 87 Am. Dec. 146; Richards v. Farmers' etc. Bank, 7 Cal. App. 387; 94 Pac. 393; People v. Blankenship, 52 Cal. 619); such as actions for the reformation of a deed (Breen v. Donnelly, 74 Cal. 301; 15 Pac. 845), and to quiet title on the ground of fraud. Croghan v. Spence, 71 Cal. 124; 12 Pac. 719. Where the statutory period, from the date of the fraud, has not expired, the right to maintain the action is governed, not by the doctrine of laches, but by the statute of limitations. Estudillo v. Security Loan etc. Co., 149 Cal. 556; 87 Pac. 19. Where leave to file an amended complaint is denied, and, pending an appeal from such order, the statute has run, upon reversal of the order an amended complaint may be filed as of the date leave was asked. Hutchinson v. Ainsworth, 73 Cal. 452; 2 Am. St. Rep. 823; 15 Pac. 82. An action to enforce a liability against directors, on the ground of fraud, is governed by this section (Fox v. Hale & Norcross etc. Min. Co., 108 Cal. 369; 41 Pac. 308); as is also an action against a board of directors for the fraudulent issuance of stock (Smith v. Martin, 135 Cal. 247; 67 Pac. 779), and an action for the fraudulent sale thereof (Marks v. Evans, 6 Cal. Unrep. 505; 62 Pac. 76), and an action to set aside a deed, on the ground of fraud (Watkins v. Bryant, 91 Cal. 492; 27 Pac. 775; Castro v. Geil, 110 Cal. 292; 52 Am. St. Rep. 84; 42 Pac. 804); and a decree of divorce (Prewett v. Dyer, 107 Cal. 154; 40 Pac. 105); but this section does not apply to actions to quiet title against a deed, where the grantee is charged with a constructive trust in favor of the grantor, or where the deed is procured as a mortgage to pay past and future advances. De Leonis v. Hammel, 1 Cal. App. 390; 82 Pac. 349. The mere right to commence an action for fraud is not assignable (Archer v. Freeman, 124 Cal. 528; 57 Pac. 474; Sanborn v. Doe, 92 Cal. 152; 27 Am. St. Rep. 101; 28 Pac. 105; Whitney v. Kelley, 94 Cal. 146; 28 Am. St. Rep. 106; 15 L. R. A. 813; 29 Pac. 624; Emmons v. Barton, 109 Cal. 662; 42 Pac. 303); so that the cause of action of a creditor, seeking to have a fraudulent conveyance set aside, accrues, and the statute begins to run, not on the date of the fraudulent conveyance, but on the date on which he recovers judgment against the creditor (Brown v. Campbell, 100 Cal. 635; 38 Am. St. Rep. 314; 35 Pac. 433; Forde v. Exempt Fire Co., 50 Cal. 299; Ohm v. Superior Court, 85 Cal. 545; 20 Am. St. Rep. 245; 26 Pac. 244); and the cause of action does not accrue on the recovery of the judgment, if the judgment creditor has not discovered the fraud (Brown v. Campbell, 100 Cal. 635; 38 Am St. Rep. 314; 35 Pac. 433; Shiels v. Nathan,

12 Cal. App. 604; 108 Pac. 34; Vance v. Supreme Lodge, 15 Cal. App. 178; 114 Pac. 83); but the allegations must show that the acts of fraud were committed under such circumstances that the injured party could not be presumed to have any knowledge of them. Denike v. Santa Clara Valley Society, 9 Cal. App. 228; 98 Pac. 687. The statute commences to run against an action to cancel a fraudulent deed by a judgment creditor, who has received a sheriff's deed to the debtor's land, from the date of the sheriff's deed. Chalmers v. Sheehy, 132 Cal. 459; 84 Am. St. Rep. 62; 64 Pac. 709.

Action on the ground of mistake. An action to correct a mutual mistake is barred in three years from the discovery of the mistake. Eureka v. Gates, 137 Cal. 89; 69 Pac. 850. The limitation of the action is three years from the date of the mistake; after the lapse of three years, the complaint must contain allegations showing that the mistake was discovered within the three years. Smith v. Irving, 3 Cal. Unrep. 121; 22 Pac. 170. Knowledge, by the defendant, of the mistake is immaterial: he still has the right to rely upon the mistake, where action is not brought within three years. Shain v. Sresovich, 104 Cal. 402; 38 Pac. 51. An action to recover an excess payment in redemption of land, sold for taxes, cannot, by a mistake of the auditor, discovered within three years, be presented to a board of supervisors and an allowance made a year after the statute has run. Perrin v. Honeycutt, 144 Cal. 87; 77 Pac. 776. This section is not applicable in an action to compel a conveyance to a corrected division line, agreed upon by adjoining proprietors, the correction of the mistake in the partition deed being merely incidental to the action (Goodnow v. Parker, 112 Cal. 437; 44 Pac. 738); neither does it apply in an action for the breach of an oral contract to cancel a note and to return the collateral (Scrivner v. Woodward, 139 Cal. 314; 73 Pac. 863); nor in an action for the reformation of a trust claim, where the mistake was discovered within three years. Ward v. Waterman, 85 Cal. 488; 24 Pac. 930. The fourth subdivision does not apply in an action to enforce rights under a decree of distribution, as distinguished from an action to obtain relief on the ground of mistake in such decree. Taylor v. McCowen, 154 Cal. 798; 99 Pac. 351. When the bar of the statute has once attached to the enforcement of a claim, incidental equitable rights founded on mistake are lost. Banks v. Stockton, 149 Cal. 599; 87 Pac. 83.

Discovery of fraud or mistake. The discovery of fraud or mistake sets the statute in motion, and it does not begin to run until such discovery. People v. Perris Irrigation Dist., 142 Cal. 601; 76 Pac. 381; Eureka v. Gates, 137 Cal. 89; 69 Pac. 850; Lightner Mining Co. v. Lane, 161 Cal. 689; Ann. Cas. 1913C, 1093; 120 Pac. 771. The complaint must contain averments, however, showing that the fraud was discovered within three years before the commencement of the action. Le Roy v. Mulliken, 59 Cal. 281; Boyd v. Blankman, 29 Cal. 19; 87 Am. Dec. 146; People v. Noyo Lumber Co., 99 Cal. 456; 34 Pac. 96; Castro v. Geil, 110 Cal. 292; 52 Am. St. Rep. 84; 42 Pac. 804. In an action to recover for a trespass in a mine, the plaintiff, to avoid the plea of the statute, may prove the fraudulent concealment of the trespass without pleading it. Lightner Mining Co. v. Lane, 161 Cal. 689; Ann. Cas. 1913C, 1093; 120 Pac. 771. An action for relief on the ground of fraud is barred in three years after the discovery thereof. Sublette v. Tinney, 9 Cal. 423; People v. Blankenship, 52 Cal. 619; Watkins v. Bryant, 91 Cal. 492; 27 Pac. 775. No lapse of time or delay in bringing suit, however long, will defeat the remedy, if the injured party was, during all of the interval, ignorant of concealed fraud; the statute begins to run upon the discovery of the fraud. McMurray v. Bodwell, 16 Cal. App. 574; 117 Pac. 627. An action to charge the defendant with a constructive trust as to certain real property, on the ground that the purchase price thereof was fraudulently procured by the defendant from the plaintiff, is based on fraud as the substantive cause of action, and is barred in three years after the discovery, by the aggrieved party, of the facts constituting the fraud. Unkel v. Robinson, 163 Cal. 648; 126 Pac. 485. Only an unequivocal repudiation of the trust by a trustee, with knowledge of this brought home to the beneficiaries, can set the statute in motion in favor of the trustee. Elizalde v. Murphy, 163 Cal. 681; 126 Pac. 978. The policy of the law is, that actions on the ground of fraud should be commenced within three years; but, that innocent parties may not suffer while in ignorance of their rights, the statute excepts them from the limitation until the discovery of the fraud; the last clause of the section must therefore be construed as an exception, merely, to the general provision, and be pleaded as such. Sublette v. Tinney, 9 Cal. 423; Smith v. Irving, 3 Cal. Unrep. 121; 22 Pac. 170. It is not enough to assert, merely, that the discovery was not sooner made; it must appear that it could not have been made by the exercise of reasonable diligence; and all that reasonable diligence would have disclosed, the plaintiff is presumed to have known, the means of knowledge in such a case being the equivalent of the knowledge which would have been procured. Truett v. Onderdonk, 120 Cal. 581; 53 Pac. 26; Robertson v. Burrell, 110 Cal. 568; 42 Pac.

1086; Lady Washington Consolidated Co. v. Wood, 113 Cal. 482; 45 Pac. 809. "Discovery" and "knowledge' are not convertible terms; and it is not sufficient to make a mere averment of non-discovery or ignorance, but the facts from which the conclusion follows must be pleaded. Lady Washington Consolidated Co. v. Wood, 113 Cal. 482; 45 Pac. 809; Hecht v. Slaney, 72 Cal. 363; 14 Pac. 88; Moore v. Boyd, 74 Cal. 167; 15 Pac. 670; Lataillade v. Oreña, 91 Cal. 565; 25 Am. St. Rep. 219; 27 Pac. 924; Archer v. Freeman, 124 Cal. 528; 57 Pac. 474; Lillis v. Silver Creek etc. Water Co., 21 Cal. App. 234; 131 Pac. 344; Davis v. Hibernia Sav. & Loan Soc., 21 Cal. App. 444, 132 Pac. 462. The party must show diligence to detect the fraud; and also, if he made any discovery, when and how it was made, and why it was not made sooner. Lataillade v. Oreña, 91 Cal. 565; 25 Am. St. Rep. 219; 27 Pac. 924; Bills v. Silver King Mining Co., 106 Cal. 9; 39 Pac. 43; Tarke v. Bingham, 123 Cal. 163; 55 Pac. 759; Hecht v. Slaney, 72 Cal. 363; 14 Pac. 88; Prewett v. Dyer, 107 Cal. 154; 40 Pac. 105; Archer v. Freeman, 124 Cal. 528; 57 Pac. 474. The means of knowledge are equivalent to knowledge. Lady Washington Consolidated Co. v. Wood, 113 Cal. 482; 45 Pac. 809; Moore v. Boyd, 74 Cal. 167; 15 Pac. 670; Bills v. Silver King Mining Co., 106 Cal. 9; 39 Pac. 43; Robertson v. Burrell, 110 Cal. 568; 42 Pac. 1086; Lee v. McClelland, 120 Cal. 147; 52 Pac. 300; Archer v. Freeman, 124 Cal. 528; 57 Pac. 474; Simpson v. Dalziel, 135 Cal. 599; 67 Pac. 1080; McMurray v. Bodwell, 16 Cal. App. 574; 117 Pac. 627. The maxim, Vigilantibus non dormientibus, jura subveniunt, applies with aptness (Hecht v. Slaney, 72 Cal. 363; 14 Pac. 88); but where, under the circumstances, a prudent man would not be put upon inquiry, the mere fact that means of knowledge were open to plaintiff, of which he did not avail himself, does not debar him from relief; the circumstances must be such that inquiry becomes a duty, and failure to make it, a negligent omission. Tarke v. Bingham, 123 Cal. 163; 55 Pac. 759; Bank of Mendocia v. Baker, 82 Cal. 114; 6 L. R. A. 833; 22 Pac. 1037; Prouty v. Devlin, 118 Cal. 258; 50 Pac. 380. When a party, against whom a cause of action exists in favor of another, by fraud or concealment prevents such other party from obtaining knowledge thereof, the statute commences to run, only from the time the cause of action is discovered, or might have been discovered by the exercise of diligence. Vance v. Supreme Lodge, 15 Cal. App. 178; 114 Pac. 83. If an administrator seeks to administer upon the estate of a living person, and takes into his possession money belonging to such person, the latter's right of action to recover the money is barred, where more than four years have elapsed since the receipt of the money, and more than three years have elapsed since he had knowledge of the facts. Fay v. Costa, 2 Cal. App. 241; 83 Pac. 275. There must be a discovery of fraud, accomplished secretly, in order to set the statute in motion. Gregory v. Spieker, 110 Cal. 150; 52 Am. St. Rep. 70; 42 Pac. 576. Where an action for relief on the ground of fraud has been commenced in time, and the judgment therein reversed, the party seeking relief has, under § 355, post, one year thereafter in which to commence a new action. Kenney v. Parks, 137 Cal. 527; 70 Pac. 556. An action to recover money, fraudulently obtained, may be commenced within three years from the date of the discovery of the fraud. City Savings Bank v. Enos, 135 Cal. 167; 67 Pac. 52. This section governs actions at law, as well as suits in equity, for relief on the ground of fraud. Christensen v. Jessen, 5 Cal. Unrep. 45; 40 Pac. 747.

Aggrieved party. A relator suing, in the name of the state, to cancel a patent to state lands, is not an aggrieved party, within the meaning of this section. People v. Novo Lumber Co., 99 Cal. 456; 34 Pac. 96.

Limitation of actions for vacating probate sales. See note post, § 1573.

Limitations against directors of corporations. See note post, § 359.

Bar of action against administrator to account. See note post, § 343.

Fraud as preventing operation of statute of limitations. See note 60 Am. Dec. 509.

As to whether action based on fraud is governed by statute applicable to injury to property or injury to person. See note 28 L. R. A. (N. S.) 353.

When limitations commences to run against action to recover money paid by mistake. See note 11 L. R. A. (N. S.) 1191.

Failure to notify other party of mistake made by him as fraud which will toll statute of limitations. See note 21 L. R. A. (N. S.) 950.

Effect of public records as notice or evidence of notice which will set statute of limitations running against action based on fraud. See note 22 L. R. A. (N. S.) 208.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

1. **Liability created by statute.** The claim of a district attorney, for his commission on debts recovered for the county, comes within subdivision 1 of this section. Higby v. Calaveras County, 18 Cal. 176.

2. **Rents and profits.** In an action to recover lands, the plaintiff can recover the rents and profits for three years only, prior to the commencement of the action, if this section is pleaded. Carpentier v. Mitchell, 29 Cal. 330; see also Love v. Shartzer, 31 Cal. 487.

3. **Fraudulent concealment.** The statute of limitations is not intended to protect a person who, by fraudulent concealment, has delayed the assertion of a right. See Kane v. Cook, 8 Cal. 449.

4. **Allegation of discovery.** The fact of the discovery of the fraud must be alleged to have been made within three years. Sublette v. Tinney, 9 Cal. 423.

5. **Constructive, as well as actual, fraud.** This section is applicable to constructive as well as actual fraud, and an action grounded upon either may be commenced within three years after dis-

covery. Boyd v. Blankman, 29 Cal. 20; 87 Am. Dec. 146.

6. **When concealment is not fraudulent.** Where three persons entered into a partnership agreement, by the terms of which the partnership was to be kept secret, and plaintiff, ignorant of the existence of the partnership, sold goods to one of the firm, individually, in 1854, and afterwards, in 1860, discovering that the partnership existed in 1854, and that the goods went to the uses of the concern, brought suit against the three. Held: that this agreement to keep the partnership secret, and its mere concealment from plaintiff, do not amount to such a fraud as to avoid the statute of limitations. Soule v. Atkinson, 18 Cal. 225; 79 Am. Dec. 174.

7. **To what frauds section does not apply.** Subdivision 4, it has been held, does not apply to an action to set aside and cancel a conveyance, upon the ground that it is a cloud upon the title of the plaintiff, even if the court is asked to set aside the conveyance because it was made to defraud a creditor. See Hager v. Shindler, 29 Cal. 60; Stewart v. Thompson, 32 Cal. 260.

8. **Generally.** See Currey v. Allen, 34 Cal. 254.

§ 339. **Within two years.** Within two years:

1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision two of section three hundred thirty-seven of this code; or an action founded upon an instrument or writing executed out of the state; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guarantee of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guarantee of title of real property, or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder.

2. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this subdivision does not apply to an action for an escape.

Mutual account. See post, § 344.

Actions for escape. See post, § 340, subd. 4.

Legislation § 339. 1. Enacted March 11, **1872** (subd. 1 based on Stats. 1850, p. 345, and subd. 2 based on Stats. 1859, p. 306), and then read: "Within two years: 1. An action upon a contract, obligation, or liability, not founded upon an instrument of writing; 2. An action against a sheriff, coroner, or constable, upon the liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this subdivision does not apply to an action for an escape; 3. An action upon a judgment, or upon a contract, obligation, or liability for the payment of money or damages, founded upon an instrument in writing, executed out of this state; 4. An action to recover damages for the death of one caused by the wrongful act of another."

2. Amended by Code Amdts. **1873–74**, p. 291, (1) at end of subd. 1, adding "or founded upon an instrument of writing executed out of the state"; (2) in subd. 2, changing "the" to "a," before "liability"; (3) striking out subd. 3; (4) renumbering subd. 4 as subd. 3, and adding thereto the words "or neglect," after "act."

3. Amended by Stats. **1905**, p. 231, striking out subd. 3.

4. Amended by Stats. **1906**, p. 5, after subd. 2, adding the paragraph, "Provided, that wherever the time within which any action mentioned in this section must be so commenced would in any case expire by the terms of this section after the first day of June, one thousand nine hundred and six, and before the first day of January, one thousand nine hundred and seven, such action may be commenced at any time before the first day of January, one thousand nine hundred and seven, with the same force and effect as if commenced within two years as in this section provided."

5. Amended by Stats. **1907**, p. 599; this amendment differing from the present (1913) as noted infra.

6. Amended by Stats. **1913**, p. 332, (1) in subd. 1, (a) substituting "instrument or writing" for "instrument of writing," in the second instance (probably a typographical error), (b) adding all the matter in the subdivision from and including the words, "or an action founded upon a contract," to the end thereof.

Obligations other than upon contracts. "Liability" has been defined as "responsibility"; the state of one who is bound, in law and justice, to do something which may be enforced by action; and this liability may arise from contracts express or implied, or in consequence of torts committed. Piller v. Southern Pacific R. R. Co., 52 Cal. 42; Wood v. Currey, 57 Cal. 208. The word "liability" is the most comprehensive of the several terms used in this section, and includes both of the others, inasmuch as it is the condition in which an individual is placed after a breach of his contract, or a violation of any obligation resting upon him (Lattin v. Gillette, 95 Cal. 317; 29 Am. St. Rep. 115; 30 Pac. 545); it also includes responsibility for torts, and is applicable to all actions at law, not specially mentioned in other portions of the statute. Lowe v. Ozmun, 137 Cal. 257; 70 Pac. 87; Piller v. Southern Pacific R. R. Co., 52 Cal. 42; Raynor v. Mintzer, 72 Cal. 585; 18 Pac. 82; McCusker v. Walker, 77 Cal. 208; 19 Pac. 382; Lattin v. Gillette, 95 Cal. 317; 29 Am. St. Rep. 115; 30 Pac. 545. Liability for surgical and medical attention is limited to two years from the date on which

the cause of action accrued (Meeks v. Southern Pacific R. R. Co., 61 Cal. 149); as is also the liability for an injury to passengers, occasioned by a railroad company; and the lingering illness of the injured person does not toll the statute. Piller v. Southern Pacific R. R. Co., 52 Cal. 42. An action to recover a proportionate part of the expense of reclaiming land, under a written agreement, is not subject to the two-year limitation prescribed in this section: the four-year limitation prescribed in § 337, ante, applies. Fabian v. Lammers, 3 Cal. App. 109; 84 Pac. 432. This section applies in an action upon a parol warranty of merchantability of goods sold, and the statute begins to run on the date of the breach (Brackett v. Martens, 4 Cal. App. 249; 87 Pac. 410), and it applies in an action against a bank, by one of its depositors, for damages resulting from the refusal of the bank to pay checks drawn upon it by the plaintiff. Smiths' Cash Store v. First Nat. Bank, 149 Cal. 32; 5 L. R. A. (N. S.) 870; 84 Pac. 663; and in an action brought after a verbal statement of accounts (Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371), and in an action in favor of a fire-insurance company, for the negligent destruction of insured property by fire. Phœnix Ins. Co. v. Pacific Lumber Co., 1 Cal. App. 156; 81 Pac. 976. Under a general retainer, contemplating services in possible distinct matters to be attended to separately, the attorney's right of action, in the absence of any understanding as to time or amount of payment, accrues upon the performance and completion of the service in each matter. Osborn v. Hopkins, 160 Cal. 501; Ann. Cas. 1913A, 413; 117 Pac. 519.

Contracts not founded upon written instrument. The following are actions on contract, within the meaning of this section: An action on an account current (Adams v. Patterson, 35 Cal. 122); for services as secretary of a corporation, by a stockholder (Fraylor v. Sonora Mining Co., 17 Cal. 594); to recover deposit or purchase-money paid on abandonment, breach, or rescission of contract of sale (Chipman v. Morrill, 20 Cal. 130; Lattin v. Gillette, 95 Cal. 317; 29 Am. St. Rep. 115; 30 Pac. 545; Todd v. Board of Education, 122 Cal. 106; 54 Pac. 527; Patterson v. Doe, 130 Cal. 333; 62 Pac. 569); to recover the reasonable value of plans for a building (Todd v. Board of Education, 122 Cal. 106; 54 Pac. 527); in assumpsit, to enforce contribution among co-obligors (Chipman v. Morrill, 20 Cal. 130), and by a surety, who has paid the debt of his principal. Bray v. Cohn, 7 Cal. App. 124; 93 Pac. 893. An action to cancel a note cannot be maintained, where the holder of the note has furnished goods or performed services, in value equal to the amount of the note, after the statutory period, during which an action may be brought for goods or services. Gates v. Lane, 49 Cal. 266. There is no breach of a covenant for quiet and peaceable enjoyment, until an eviction by the true owner, or an assertion by him of paramount title, in such manner that the holder of the land is compelled to yield possession or purchase the superior title. McCormick v. Marcy, 165 Cal. 386; 132 Pac. 449.

Action upon instrument executed out of state. A note dated in this state, and signed by two of the makers here, and by another outside of the state, and sent to the payee here, is executed and delivered out of the state (Loud v. Collins, 12 Cal. App. 786; 108 Pac. 880); and where a note is executed in another state, and secured by a mortgage on property here, it is likewise an obligation executed out of the state. Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192; 21 Ann. Cas. 1279; 106 Pac. 715. An action to foreclose a mortgage given for a pre-existing debt, contracted orally within this state, is barred in two years from the maturity of the debt. Sanford v. Bergin, 156 Cal. 43; 103 Pac. 333. The place of delivery is generally the place of execution: the place of date, signature, and writing does not necessarily fix the place of execution. Loud v. Collins, 12 Cal. App. 786; 108 Pac. 880.

Action against officer. An action to recover fees illegally exacted is within this section. Trower v. San Francisco, 157 Cal. 762; 109 Pac. 617.

Pleading statute. A plea of the statute of limitations, alleging that a cause of action is barred by this section is insufficient, unless it gives the particular subdivision thereof. Wolters v. Thomas, 3 Cal. Unrep. 843; 32 Pac. 565; contra, Mullenary v. Burton, 3 Cal. App. 263; 84 Pac. 159. An objection, however, to the manner of pleading the statute in such cases is waived, unless it is urged in the trial court. Churchill v. Woodworth, 148 Cal. 669; 113 Am. St. Rep. 324; 84 Pac. 155; Mullenary v. Burton, 3 Cal. App. 263; 84 Pac. 159. Upon an appeal from a judgment, on the judgment roll, without a bill of exceptions presenting the evidence, a finding against a plea that the action is barred by the statute is conclusive. Murphy v. Stelling, 8 Cal. App. 702; 97 Pac. 672. The statute is not let in by amended pleadings, where the nature of the action is not changed. Atlantic etc. Ry. Co. v. Laird, 164 U. S. 393; 41 L. Ed. 485; 17 Sup. Ct. Rep. 120. A non-resident mortgagor cannot plead the two-year limitation of this section, if he has not been in the state, but a successor to the interest of the mortgagor stands in a different position. Foster v. Butler, 164 Cal. 623; 130 Pac. 6.

As to when limitations commences to run against action to recover money collected by agent or attorney. See note 17 L. R. A. (N. S.) 660.

Running of limitations against cause of action arising in foreign jurisdiction. See note 5 Ann. Cas. 546.

When statute runs as to liability of title abstractor. See note 12 L. R. A. (N. S.) 454.

CODE COMMISSIONERS' NOTE. The first and second subdivisions are based upon acts of 1850 and 1859 (Stats. 1850, p. 343; Stats. 1859, p. 306). The third subdivision is a substitute for the numerous provisions relative to the time in which actions may be commenced upon liabilities incurred without the state, and founded upon judgments or written instruments. The fourth subdivision is based upon act of 1862 (Stats. 1862, p. 447).

1. **Assumpsit, for money had and received.** See Keller v. Hicks, 22 Cal. 457; 83 Am. Dec. 78.

2. **Account. Items of, barred.** Where an account is not a mutual one, the statute bars each item two years after its delivery. Adams v. Patterson, 35 Cal. 122. Where a party is selling goods from time to time and charging them, and the other pays him money which he credits on the account as a payment, this credit does not make the account a mutual one, within the meaning of the statute of limitations. Id. See also Fraylor v. Sonora Mining Co., 17 Cal. 595; see § 344, post, and note.

3. **Claims for recovery of purchase-money at sale made by city.** Claims against the city of San Francisco by the bidders at the attempted sale in December, 1853, for the purchase-money paid on such sale, are within the fourth subdivision of the seventeenth section of the limitation act, and are barred by a failure to sue within two years from the date of the receipt of the money by the city. Pimental v. San Francisco, 21 Cal. 351.

4. **Receipt for money.** A mere naked receipt in writing, acknowledging the delivery of money, is not a contract, and does not import a promise, obligation, or liability, and an action upon it is therefore barred by the statute of limitations in two years. But a receipt or acknowledgment, in writing, for money, which also contains a clause stating that the money received is to be applied to the account of the person from whom received, partakes of the double nature of a receipt and contract, and shows upon its face a liability to account, and an action upon it is not barred by the statute of limitations until four years have expired. Ashley v. Vischer, 24 Cal. 322; 85 Am. Dec. 65.

5. **Generally.** Note to § 337, ante, referring to Chipman v. Morrill, 20 Cal. 130.

§ 340. Within one year. Within one year.

1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the people of this state.

3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check.

4. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process.

5. An action against a municipal corporation for damages or injuries to property caused by a mob or riot.

One year.

1. **Against decedent's representatives.** Post, § 353.

2. **After reversal on appeal.** Post, § 355.

3. **Entry upon real property.** Ante, § 320.

Action against city for injury from riot. See Pol. Code, § 4454.

Legislation § 340. 1. Enacted March 11, **1872** (first four subdivisions based on Stats. 1850, p. 343), (1) subd. 3 then ending with the words, after "battery" "or false imprisonment," and (2) subd. 5 reading, "5. Upon a contract, obligation, or liability for the payment of money incurred out of this state and not founded upon a written contract."

2. Amended by Code Amdts. **1873–74**, p. 292, (1) changing the words after "battery" to "false imprisonment or seduction," and (2) changing subd. 5 to read as at present, except that the word "or," before "injuries," was then printed "for."

3. Amended by Code Amdts. **1875–76**, p. 89, (1) adding in subd. 2 the words, after "statute," "or upon an undertaking in a criminal action," and (2) changing the word "or" from "for," before "injuries," in subd. 5.

4. Amended by Stats. **1905**, p. 232, omitting the word "or" before "seduction," and adding after that word the rest of the subdivision.

Action upon a statute for a penalty or forfeiture. A penalty is in the nature of a punishment for the non-performance of an act, or for the performance of an unlawful act, and in the former case it stands in lieu of the act to be performed; a license tax for the sale of liquors is a debt, not a penalty, and an action to recover the tax is not barred, under this section (San Luis Obispo County v. Hendricks, 71 Cal. 242; 11 Pac. 682); neither is an action to enforce a penalty for delinquent taxes. Los Angeles County v. Ballerino, 99 Cal. 593; 32 Pac. 581; 34 Pac. 329. An action to recover money paid under an unlawful sale of stock, on a margin, is not within this section. Parker v. Otis, 130 Cal. 322; 92 Am. St. Rep. 56; 62 Pac. 571, 927. The first and second subdivisions of this section relate exclusively to actions for a penalty arising under a statute. San Luis Obispo County v. Hendricks, 71 Cal. 242; 11 Pac. 682.

Action upon undertaking in criminal action. The second subdivision of this section relates to a cause arising in a criminal action. San Luis Obispo County v. Hendricks, 71 Cal. 242; 11 Pac. 682.

Action for libel. The limitation of actions for libel is one year. Graybill v. De Young, 140 Cal. 323; 73 Pac. 1067.

Action for slander. The limitation of actions for slander is one year. Smullen v. Phillips, 92 Cal. 408; 28 Pac. 442.

Action for false imprisonment. The limitation of actions for false imprisonment is one year, and the statute commences to run against the action on the date of release. Krause v. Spiegel, 94 Cal. 370; 28 Am. St. Rep. 137; 15 L. R. A. 707; 29 Pac. 707.

Action for seduction. The limitation of actions for seduction is one year, and the statute does not commence to run, in the case of a minor, until the seduced minor attains majority. Morrell v. Morgan, 65 Cal. 575; 4 Pac. 580.

Action for injuries to person and character. The fact that counsel failed to note that this section was amended so as to include injuries caused by wrongful act or neglect, is not good ground to allow an amendment setting up the bar of the statute. Rudd v. Byrnes, 156 Cal. 636; 20 Ann. Cas. 124; 26 L. R. A. (N. S.) 134; 105 Pac. 957.

Commencement of running of statute of limitations against action for death by wrongful act. See note 17 Ann. Cas. 519.

CODE COMMISSIONERS' NOTE. The first four subdivisions are based upon Stats. 1850, p. 343. The fifth subdivision is new.

§ 341. Within six months. Within six months:

An action against an officer, or officer de facto:

1. To recover any goods, wares, merchandise, or other property, seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure.

2. To recover stock sold for a delinquent assessment, as provided in section three hundred and forty-seven of the Civil Code.

Six months.

1. **Stock sold for assessment.** Civ. Code, § 347.
2. **Action for taxes paid under protest.** See Pol. Code, § 3819.
3. **Against county.** Post, § 342; Pol. Code, § 4075.
4. **By decedent's representatives.** Post, § 353.
5. **Suits for penalties for violating highway laws.** See Pol. Code, § 2935.

Legislation § 341. 1. Enacted March 11, **1872** (based on Stats. 1859, p. 306), and then read: "Within six months: An action against an officer, or officer de facto, engaged in the collection of taxes: 1. For money paid to any such officer under protest, or seized by such officer in his official capacity as a collector of taxes, and which, it is claimed, ought to be refunded; 2. To recover any goods, wares, merchandise, or other property seized by any such officer in his official capacity as tax-collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure."

2. Amended by Code Amdts. **1873–74, p. 292.**

Action against an officer to recover property. An action to recover money paid to a tax-collector, under protest, must be commenced within six months. Cameron v. Smith, 50 Cal. 303; Woodham v. Cline, 130 Cal. 497; 62 Pac. 822. In an action for the wrongful conversion of personal property, the statute will not run, after the commencement of the action, to the date of filing an amended complaint, though it superadded immaterial allegations. Woodham v. Cline, 130 Cal. 497; 62 Pac. 822.

Action to recover stock sold for delinquent assessment. The second subdivision of this section has no application in action relating to stock sold under a void assessment (Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64; 65 Pac. 143), and applies only where there has been some irregularity in the assessment, or defect in the sale or notice. Cheney v. Canfield, 158 Cal. 342; 111 Pac. 92.

CODE COMMISSIONERS' NOTE. Stats. 1859, p. 306. See § 345, post.

§ 342. Same. Actions on claims against a county, which have been rejected by the board of supervisors, must be commenced within six months after the first rejection thereof by such board.

Action.

1. **For riot.** Ante, § 340, subd. 5.
2. **Against county on rejected claim.** See Pol. Code, § 4078.

Legislation § 342. Enacted March 11, **1872.**

§ 343. Actions for relief not hereinbefore provided for. An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.

Bank deposits, no limitation. Ante, § 348.

Legislation § 343. Enacted March 11, **1872**; based on Stats. 1850, p. 343.

Application of section. This section governs the limitations of actions for partnership accounts (West v. Russell, 74 Cal. 544; 16 Pac. 392; Rowe v. Simmons, 113 Cal. 688; 45 Pac. 983); and actions for an accounting generally (Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 228; 90 Pac. 39); and all suits in equity, not strictly of concurrent cognizance at law and in equity (Piller v. Southern Pacific R. R. Co., 52 Cal. 42; Dore v. Thornburgh, 90 Cal. 64; 25 Am. St. Rep. 100; 27 Pac. 30); and proceedings for the sale of real property to pay the debts of a decedent's estate (Estate of Crosby, 55 Cal. 574); but where the order of sale is made more than four years before that event, the sale may be based upon such order, and regarded as a continuation of such proceeding (Estate of Montgomery, 60 Cal. 645); and the revival of a judgment in favor of the purchaser at an execution sale, though void for irregularity, is governed by this section (Merguire v. O'Donnell, 139 Cal. 6; 96 Am. St. Rep. 91; 72 Pac. 337); as is also an action upon a foreign judgment (Patten v. Ray, 4 Cal. 287; Dore v. Thornburgh, 90 Cal. 64; 25 Am. St. Rep. 100; 27 Pac. 30), and mandamus to compel restoration to office. Farrell v. Board of Police Commissioners, 1 Cal. App. 5; 81 Pac. 674. An action to set aside a deed, on the ground of undue influence, comes within this section (Trubody v. Trubody, 137 Cal. 172; 69 Pac. 968), as does also an action to enforce a vendor's lien (California Savings Bank v. Parrish, 116 Cal. 254; 48 Pac. 73), and a refusal to convey according to the terms of the trust (Hearst v. Pujol, 44 Cal. 230); and this section applies to suits for equitable relief (Teall v. Schroder, 158 U. S. 172; 39 L. Ed. 938; 15 Sup. Ct. Rep. 768); but it has no application to the procedure contemplated by § 685, post (Doehla v. Phillips, 151 Cal. 488; 91 Pac. 330); nor does it negative the limitations expressly applicable to actions to annul a void marriage. Stierlen v. Stierlen, 6 Cal. App. 420; 92 Pac. 329. Nor does it govern an action to redeem from a deed absolute in form, given as a mortgage. Warder v. Enslen, 73 Cal. 291; 14 Pac. 874. An action to recover a personal judgment for delinquent taxes is distinguished from a tax lien, although the bar is not removed. San Francisco v. Luning, 73 Cal. 610; 15 Pac. 311. When a secured debt is barred by the statute, the right of redemption is also barred (Green v. Thornton, 8 Cal. App. 160, 96 Pac. 382); but an action upon the assumption of a mortgage and an agreement to pay is not barred (Roberts v. Fitzallen, 120 Cal. 482; 52 Pac. 818), although an oral contract to convey land is (Dodge v. Clark, 17 Cal. 586; Lowell v. Kier, 50 Cal. 646; Henderson v. Hicks, 58 Cal. 364), especially in those cases where the vendee has been put in possession and holds under a contract of sale and purchase. Calanchini v. Branstetter, 84 Cal. 249; 24 Pac. 149. Mandamus to compel the levy of a tax must be brought within four years (Barnes v. Glide, 117 Cal. 1; 59 Am. St. Rep. 153; 48 Pac. 804); but a lien tax is not extinguished by the statute of limitations; it exists until there is a payment, or a sale of the property for the taxes. Lewis v. Rothchild, 92 Cal. 625; 28 Pac. 805. The duty of an administrator to account is a continuing duty, and does not become barred. Elizalde v. Murphy, 163 Cal. 681; 126 Pac. 978. This section, if any, applies to a proceeding by a ward, after attaining majority, to compel a settlement of accounts by the guardian. Cook v. Ceas, 147 Cal. 614, 619; 82 Pac. 370. It is a residuary clause, which applies only when no other section is applicable. Unkel v. Robinson, 163 Cal. 648; 126 Pac. 485.

Actions for relief not otherwise provided for. The word "hereinbefore" has never been held to limit the operation of the statute to actions at law (Lux v. Haggin, 69 Cal. 255; 4 Pac. 919; 10 Pac. 674), but it is intended to include all actions at law and suits in equity. Dore v. Thornburgh, 90 Cal. 64; 25 Am. St. Rep. 100; 27 Pac. 30. In an action upon an independent covenant to pay the purchase-money, the statute commences to run on the date the payment was to have been made, and is barred in four years, irrespective of the time of execution, or tender, of conveyance: a covenant to pay is independent, where there is a day fixed for the payment and none for the conveyance, or where the day of payment is to happen or may happen before the date on which the conveyance is fixed to be made. Donovan v. Judson, 81 Cal. 334; 6 L. R. A. 591; 22 Pac. 682. In a quo warranto proceeding to determine the legal existence of a corporation, there is no statute of limitations, because, the usurpation being without right, and continuous, a new cause of action arises each day. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693. An action for specific performance of a contract to pay is governed by this section, where there is no trust. Henderson v. Hicks, 58 Cal. 364; Luco v. De Toro, 91 Cal. 405; 27 Pac. 1082.

Actions involving trusts. Where there is a trust created in land, the statute commences to run only on the date on or from which the trust is openly disavowed, and that fact is clearly and unequivocally made known to the cestui que trust. Luco v. De Toro, 91 Cal. 405; 27 Pac. 1082. The repudiation of the trust must be brought home to the knowledge of the cestui que trust. Hovey v. Bradbury, 112 Cal. 620; 44 Pac. 1077; Norton v. Bassett, 154 Cal.

411; 129 Am. St. Rep. 162; 97 Pac. 894. Where there is a written contract, showing a trust relationship between parties, an action for an accounting based thereon, commenced within four years from the date of the contract, is not barred by the statute. McArthur v. Blaisdell, 159 Cal. 604; 115 Pac. 52. The statute does not commence to run in favor of a trustee holding the legal title to land under a positive voluntary trust resting in parol, until a repudiation of the trust by the trustee, with knowledge of the repudiation brought home to the beneficiaries. Taylor v. Morris, 163 Cal. 717; 127 Pac. 66; MacMullan v. Kelly, 19 Cal. App. 700; 127 Pac. 819. The fund arising in a county treasury, from an accumulation of excessive personal property taxes, constitutes an express continuing trust, against which the statute does not begin to run until such trust, with the knowledge or on the demand of the taxpayer, has been repudiated. MacMullan v. Kelly, 19 Cal. App. 700; 127 Pac. 819. A resulting trust differs from a constructive trust, in that the latter is forced upon the conscience of the trustee against his will, and generally to prevent fraud; while an express trust differs from a resulting trust, only in the manner in which it is proven; but, when proven, the resulting trust is enforced in the same manner as an express trust. Scadden Flat Gold Mining Co. v. Scadden, 121 Cal. 33; 53 Pac. 440; Love v. Watkins, 40 Cal. 547; 6 Am. Rep. 624. An action to enforce a constructive trust is barred in four years (Hecht v. Slaney, 72 Cal. 363; 14 Pac. 88); but a cause of action on an express trust does not accrue until there has been a repudiation of the same. Broder v. Conklin, 77 Cal. 330; 19 Pac. 513; Sandfoss v. Jones, 35 Cal. 481. The limitation of an action on an implied trust is governed by this section (Piller v. Southern Pacific R. R. Co., 52 Cal. 42; Hecht v. Slaney, 72 Cal. 363; 14 Pac. 88; Chapman v. Bank of California, 97 Cal. 155; 31 Pac. 896; Nougues v. Newlands, 118 Cal. 102; 50 Pac. 386; Kenney v. Parks, 137 Cal. 527; 70 Pac. 556), and a denial or a repudiation of such a trust is not necessary to set the statute running. Hecht v. Slaney, 72 Cal. 363; 14 Pac. 88; Currey v. Allen, 34 Cal. 254. An action to establish involuntary and resulting trusts in certain parcels of land is not subject to the four-year statute provided in this section (Bradley Bros. v. Bradley, 20 Cal. App. 1; 127 Pac. 1044); nor is an action based on fraud as the substantive cause of action. Unkel v. Robinson, 163 Cal. 648; 126 Pac. 485. A grantee who takes a deed from a trustee, with full knowledge that it is executed in violation of the trust, becomes an involuntary trustee of the trust, cast upon him by operation of law. Nougues v. Newlands, 118 Cal. 102; 50 Pac. 386; Lathrop v. Bampton, 31 Cal. 17; 89 Am. Dec. 141. The solution of questions arising under a plea of the statute, or of laches, in cases where a long period of time has intervened between the origin of the cause and the commencement of an action thereon, depends upon the circumstances peculiar to each particular case. Miller v. Ash, 156 Cal. 544; 105 Pac. 600.

Actions that must be brought within four years. See note ante, § 337.

Limitation of actions for vacating probate sales. See note post, § 1573.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343. In a suit to compel the execution of a deed, plaintiff alleged the property was purchased by him of C., and by an agreement with defendant was conveyed directly to him (defendant) as security for a debt, he to make a deed to the plaintiff upon payment of the debt. The debt was paid, and the deed demanded, but refused. (See facts of case, as to the time the statute was in motion.) It was held that this character of case did not fall under subdivision 1 of § 399, ante, but fell within the terms of this section. Dodge v. Clark, 17 Cal. 586.

§ 344. Where cause of action accrues on mutual account. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

Legislation § 344. Enacted March 11, 1872; based on Stats. 1850, p. 343.

Account stated, defined. An account stated is a document, a writing, which exhibits the state of accounts between the parties, and the balance owing from one to the other. Coffee v. Williams, 103 Cal. 550; 37 Pac. 504. The term, "a balance due upon an account," implies an account between the two parties, in which the amount of the items upon one side of the account is deducted from the other side, and the balance thus ascertained; and the term "account" involves the idea of debt and credit, and the balance of an account is the result of the debit and credit sides of the account, which constitutes a debt or claim, for which the party in whose favor it exists has the right of recovery. Millet v. Bradbury, 109 Cal. 170; 41 Pac. 865.

Mutual open and current accounts. Mutual accounts are made up of matters of set-off, where there is an existing debt on the one side, which constitutes a credit on the other, or where there is an express or implied understanding that mutual debts shall be satisfied or set off pro tanto between the parties. Norton v. Larco, 30 Cal. 126; 89 Am. Dec. 70; Millet v. Bradbury, 109 Cal. 170; 41 Pac. 865. To constitute a mutual open and current account, there must be reciprocal demands between

the parties. Fraylor v. Sonora Mining Co., 17 Cal. 594; Flynn v. Seale, 2 Cal. App. 665; 84 Pac. 263. The term "reciprocal demand," in this section, is only a synonym or the equivalent of the term "mutual accounts." Millet v. Bradbury, 109 Cal. 170; 41 Pac. 865. The right to demand an article of property that has been deposited with another, and the right to demand a debt due from the depositor, are not reciprocal; if the depositor has the right to demand the property itself, the other is merely a bailee or depositary, and the foundation of an account is wanting. Millet v. Bradbury, 109 Cal. 170; 41 Pac. 865. General deposits made by a corporation in a bank, to which it is indebted for overdrafts, of sums not greater than the balance of the indebtedness, are presumed to be made as payments thereupon, and do not make the account a mutual open and current one. Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407; 58 Pac. 85. A payment, whether of money, or of personal property of a stipulated value, made on an account, and intended as a payment, and not as a set-off pro tanto, does not make the account mutual (Rocca v. Klein, 74 Cal. 526; 16 Pac. 323); nor is the account mutual, where payments were made on an open account for goods sold and delivered, due for more than a year; nor is the case altered by the fact that the party once deposited a lump of gold amalgam to be sold, the proceeds to be applied to payment of the account (Weatherwax v. Cosumnes Valley Mill Co., 17 Cal. 344); nor is the account mutual, unless the parties have dealt with each other in the same relation, and the items upon the different sides of the account are capable of being set off against each other (Millet v. Bradbury, 109 Cal. 170; 41 Pac. 865); nor is there a mutual account where one party is selling the other goods from time to time and charging the same, and the other gives him money which he credits on the account as a payment (Adams v. Patterson, 35 Cal. 122); nor is there a mutual account, where the defendant's testator was indebted to the plaintiff for services, and the testator had intrusted to the plaintiff moneys to be expended for the use and benefit of the testator, and at his direction, and the testator died during the continuance of the trust (Millet v. Bradbury, 109 Cal. 170; 41 Pac. 865); nor is the account mutual, where the items of the account are all on one side (Fraylor v. Sonora Mining Co., 17 Cal. 594); and it is immaterial whether the account of these transactions is kept by one or by both of the parties, and the form in which the account is kept is also immaterial. Millet v. Bradbury, 109 Cal. 170; 41 Pac. 865.

Nature and theory of an account stated. The theory upon which a mutual account is taken out of the statute is, that the obligations on the one side are, in law, applied as payments, or offsets, on the other; but if the transaction between the parties does not create a debt, or claim, which may be so applied, such transaction cannot be regarded as a payment, or offset, on the debt, nor be the foundation of a mutual account or reciprocal demand. Millet v. Bradbury, 109 Cal. 170; 41 Pac. 865. An account stated alters the nature of the original indebtedness, and constitutes a new promise or undertaking. Carey v. Philadelphia etc. Petroleum Co., 33 Cal. 694; Hendy v. March, 75 Cal. 566; 17 Pac. 702; and see Griswold v. Pieratt, 110 Cal. 259; 42 Pac. 820. The word "settle" has a double meaning, and is used alike to denote an adjustment of a demand and a payment; and evidence is admissible to explain in which sense the word is used, where there is any ambiguity. Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371. In an action on an account stated, it is not necessary to prove the account, or any of its items: the proof, in such a case, is directed to the fact that the parties have accounted together and have agreed upon the balance due (insimul computassent). Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371. Where, after an account stated, a sum is due to either of the parties, which is not paid, but is afterward thrown into a new account, it is again outside of the statute. Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371. Where there are demands on each side, the striking of a balance converts the set-off into a payment, and from that time the statute of limitations commences running. Norton v. Larco, 30 Cal. 126; 89 Am. Dec. 70. The statute begins to run when the adjustment is made. Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371. Where the complaint states a cause of action for goods sold and delivered, and a bill of items is annexed to the same as an exhibit, with the date of each item, an answer referring to the exhibit, and averring that only the last item is within two years previous to the commencement of the action, and that, except as to the last item, "no action has accrued to said plaintiff by reason of the matter mentioned and set forth in said complaint, at any time within two years next preceding the commencement of this action," is a good plea of the statute to all the items, except the last. Adams v. Patterson, 35 Cal. 122. The statute, as to an accounting, begins to run from the last item charged on either side. Moss v. Odell, 141 Cal. 335; 74 Pac. 999. Where the account is not mutual, the statute bars each item two years after its delivery. Adams v. Patterson, 35 Cal. 122. The balance of a mutual open and current account is assignable. Culver v. Newhart, 18 Cal. App. 614; 123 Pac. 975.

Account stated may be oral or implied. Where an open account is orally stated

before the items comprising it are barred, the statute begins to run against the stated account from the date of the statement, and an action may be brought thereon at any time within two years after the statement (Kahn v. Edwards, 75 Cal. 192; 7 Am. St. Rep. 141; 16 Pac. 779; Baird v. Crank, 98 Cal. 293; 33 Pac. 63; and see Griswold v. Pieratt, 110 Cal. 259; 42 Pac. 820); but an open account already barred cannot be relieved from the bar of the statute by an oral settlement of such account. Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371. The agreement between the parties to an account stated, that all the items therein are true, need not be express, but may be implied from circumstances, such as the sending of the account from one to the other, who makes no objection thereto within a reasonable time. Mayberry v. Cook, 121 Cal. 588; 54 Pac. 95; and see Terry v. Sickles, 13 Cal. 427; Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371; Hendy v. March, 75 Cal. 566; 17 Pac. 702; Coffee v. Williams, 103 Cal. 550; 37 Pac. 504. Where an account stated is assented to, either expressly or impliedly, it becomes a new contract, and an action upon it is not founded upon the original items, but upon the balance agreed to by the parties. Coffee v. Williams, 103 Cal. 550; 37 Pac. 504; Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371.

Correcting error in account stated. In an action on a stated account, it is not necessary to prove the items of the original account, nor can they be inquired into or surcharged, except for some fraud, error, or mistake, which must be set forth in the pleadings. Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371; Coffee v. Williams, 103 Cal. 550; 37 Pac. 504; Mayberry v. Cook, 121 Cal. 588; 54 Pac. 95. An account stated may be attacked for mistake, but, as in other contracts, the mistake must be put in issue by the pleadings. Hendy v. March, 75 Cal. 566; 17 Pac. 702. Where the account sued upon is a defective memorandum of account, without dates, or any balance struck or stated, and the answer denies that any account was stated, great latitude is allowed in introducing evidence to disprove it. Coffee v. Williams, 103 Cal. 550; 37 Pac. 504. An action to recover money paid upon a mistake of fact, where the payment was upon a mutual open and current account, with reciprocal demands between the parties up to within two years of the time when the action was brought, and where the mistake upon which the action was predicated was discovered within one year next before the action was brought, is not barred by the statute. Olmstead v. Dauphiny, 104 Cal. 635; 38 Pac. 505.

What are mutual accounts and the applicability of statutes of limitations thereto. See note 89 Am. Dec. 75.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

1. **Mutual accounts.** Where there have been reciprocal demands between the parties, upon a mutual open and current account, the statute of limitations commences running at the time of the last item of the account proved on either side. Norton v. Larco, 30 Cal. 126; 89 Am. Dec. 70.

2. **Mutual accounts.** Mutual accounts are made up of matters of set-off, where there is an existing debt on the one side which constitutes a credit on the other, or where there is an express or implied understanding that mutual debts shall be set off pro tanto between the parties. Id.

3. **When property received and credited makes account mutual.** The defendants, being indebted to the plaintiffs on account, delivered to them an article of personal property, for which the latter gave the former credit at a specified valuation. Held: that thereby the account between the parties became a mutual open and current account, consisting of reciprocal demands between them. Id.

4. **Striking of a balance on accounts.** Where there are demands on each side, the striking of a balance converts the set-off into a payment, and from that time the statute of limitations commences running. Id.

5. **Mutual accounts.** Until a balance is struck, a mutual account is open and current. Id.

6. **A payment does not make an account mutual.** A payment, whether it be made in money or of an article of personal property of a stipulated value, made on an account and intended as a payment, and not as a set-off pro tanto, does not make an account mutual. Id.

7. **Payment on an account.** Where money is delivered by one party to the other, and credited on account by him who received it, it will be treated as intended as a payment, unless it is shown to have been delivered as a loan; but not so with personal property, even though a value be affixed thereto. Norton v. Larco, 30 Cal. 127; 89 Am. Dec. 70; see also Weatherwax v. Cosumnes Valley Mill Co., 17 Cal. 344.

8. **Generally.** See note to § 339, ante. Adams v. Patterson, 35 Cal. 122.

§ 345. Actions by the people subject to the limitations of this chapter. The limitations prescribed in this chapter apply to actions brought in the name of the state or for the benefit of the state, in the same manner as to actions by private parties, except that actions for the recovery of money due on account of the presence of patients at the state hospitals may be commenced at any time within three years after the accrual of the same.

Action by people. Ante, § 315.

Legislation § 345. 1. Enacted March 11, **1872** (based on Stats. 1850, p. 343), and then read: "The limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties."

2. Amended by Stats. **1905**, p. 487.

Application of section. The rule that the statute of limitations does not apply to the state, according to the maxim, Nullum tempus occurrit regi, has no force, in the face of this section. San Francisco v. Luning, 73 Cal. 610; 15 Pac. 311. The statute of limitations for breach of an official bond does not commence running until the expiration of the official term, and the period thereafter required to effect a bar is four years. People v. Van Ness, 79 Cal. 84; 12

Am. St. Rep. 134; 21 Pac. 554. This section relates to the actions mentioned in this chapter (People v. Center, 66 Cal. 551; 5 Pac. 263; 6 Pac. 481); and it is applicable in an action to enforce the forfeiture of a corporate franchise on account of nonuser or misuser. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693. An action brought by the people, on the relation of the controller, against a former secretary of state, on an account stated by the controller under § 437 of the Political Code, for money alleged to have been received by the defendant in his official capacity, but for which he had failed to account or make any settlement with the controller, is affected by the statute of limitations in the same manner as it would be were the action brought by a private person. People v. Melone, 73 Cal. 574; 15 Pac. 294.

Maxim that "time does not run against the crown." See note 101 Am. St. Rep. 146.

Running of statute of limitations against as dependent upon state being real party in interest. See note 8 Ann. Cas. 702.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

§ 346. Action to redeem mortgage. An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage.

"Action" includes special proceeding of civil nature. Post, § 363.

Legislation § 346. Enacted April 1, 1872.

Action to redeem mortgage of real property. This section expressly relates to suits in equity. Lux v. Haggin, 69 Cal. 255; 4 Pac. 919; 10 Pac. 674. It also applies to cases in which there has been no foreclosure of the mortgage and equity of redemption; but such right is lost after the expiration of six months from the sale under foreclosure proceedings, except in those cases in which fraud has intervened, rendering the decree and the sale thereunder voidable. Collins v. Scott, 100 Cal. 446; 34 Pac. 1085. It does not apply where the contract was entered into before the passage of the code (Allen v. Allen, 95 Cal. 184; 16 L. R. A. 646; 30 Pac. 213), nor to a conveyance executed prior thereto (Green v. Thornton, 8 Cal. App. 160; 96 Pac. 382); nor does it apply to a case where it would effect a material change in the rights and obligations of the parties. Allen v. Allen, 27 Pac. 30. In actions to redeem a mortgage, the limitations in this section alone control. Warder v. Enslen, 73 Cal. 291; 14 Pac. 874; De Cazara v. Oreña, 80 Cal. 132; 22 Pac. 74; Collins v. Scott, 100 Cal. 446; 34 Pac. 1085. The right to foreclose a mortgage, and the right to redeem therefrom, before the code, were reciprocal, and when one was barred, the other was also barred. Cunningham v. Hawkins, 24 Cal. 403; 85 Am. Dec. 73; Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722; Espinosa v. Gregory, 40 Cal. 58. Whenever a debt secured by a deed is barred, the right to redeem is also barred. Hughes v. Davis, 40 Cal. 117; Espinosa v. Gregory, 40 Cal. 58. The right to redeem and the right of the creditor to sue are reciprocal; when one is lost, the other cannot be enforced. Cunningham v. Hawkins, 24 Cal. 403; 85 Am. Dec. 73. He who seeks equity must do equity; and a mortgagor who seeks to quiet title against the mortgagee in possession, must pay the mortgage as a condition of success in his suit. Brandt v. Thompson, 91 Cal. 458; 27 Pac. 763; Peshine v. Ord, 119 Cal. 311; 63 Am. St. Rep. 131; 51 Pac. 536; Booth v. Hoskins, 75 Cal. 271; 17 Pac. 225; De Cazara v. Oreña, 80 Cal. 132; 22 Pac. 74; Spect v. Spect, 88 Cal. 437; 22 Am. St. Rep. 314; 13 L. R. A. 137; 26 Pac. 203. If the mortgagee, in such case, denies that there is any equity to be done between him and the mortgagor, and asserts title in himself, and otherwise manifests adverse holding, the mortgagor, or those claiming in his right, must proceed against the mortgagee in five years, or lose all remedy, whether the debt or obligation secured by the mortgage has been paid or not. Peshine v. Ord, 119 Cal. 311; 63 Am. St. Rep. 131; 51 Pac. 536; Warder v. Enslen, 73 Cal. 291; 14 Pac. 874. Ejectment cannot be maintained against a mortgagee in possession, by the mortgagor or his assignee, where the debt has been barred by the statute. Spect v. Spect, 88 Cal. 437; 22 Am. St. Rep. 314; 13 L. R. A. 137; 26 Pac. 203; Peshine v. Ord, 119 Cal. 311; 63 Am. St. Rep. 131; 51 Pac. 536.

Adverse possession of premises. Where a party enters under a deed absolute, which is given as security for a debt, and holds thereunder, his possession is not adverse until he gives notice to the grantor that he claims to own the land in fee; and an action to redeem from such deed must be commenced within five years after an adverse claim of title has been made manifest. Frink v. Le Roy, 49 Cal. 314; Warder v. Enslen, 73 Cal. 291; 14 Pac. 874; Peshine v. Ord, 119 Cal. 311; 63 Am. St. Rep. 131; 51 Pac. 536. A deed, absolute in form, constitutes a cloud upon the title of the grantor, which may be removed at any

time upon doing equity, by redemption and payment of the amount due, regardless of the possession of the grantee. Hall v. Arnott, 80 Cal. 348; 20 Pac. 200. An action to redeem may be brought at any time, provided there has not been adverse possession for five years. Raynor v. Drew, 72 Cal. 307; 13 Pac. 866.

CODE COMMISSIONERS' NOTE. This section was added by act of April 1, 1872 [unpublished].

§ 347. **Same, when some of mortgagors are not entitled to redeem.** If there is more than one such mortgagor, or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action under the provisions of this chapter, any one of them who is entitled to maintain such an action may redeem therein a divided or undivided part of the mortgaged premises, according as his interest may appear and have an accounting, for a part of the rents and profits proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises bears to the whole of such premises.

Legislation § 347. Enacted April 1, 1872.

CODE COMMISSIONERS' NOTE. This section was added by act of April 1, 1872 [unpublished].

§ 348. **No limitations where money deposited in bank.** To actions brought to recover money or other property deposited with any bank, banker, trust company, building and loan association, or savings and loan society there is no limitation.

Legislation § 348. **1.** Added by Code Amdts. **1873–74,** p. 293.

2. Amended by Stats. **1915,** p. 684, inserting "building and loan association."

Actions to recover deposits from banks. There is no limitation to an action brought to recover money deposited in a bank. Green v. Odd Fellows' Savings etc. Bank, 65 Cal. 71; 2 Pac. 887; Mitchell v. Beckman, 64 Cal. 117; 28 Pac. 110; Wells, Fargo & Co. v. Enright, 127 Cal. 669; 49 L. R. A. 647; 60 Pac. 439. A deposit in a bank, of shares of stock, as collateral security, is not a deposit of money or other property in a bank, within this section. Bell v. Bank of California, 153 Cal. 234; 94 Pac. 889. It is uncertain whether there is any limitation to an action against a stockholder of a bank, under this section (Mitchell v. Beckman, 64 Cal. 117; 28 Pac. 110); but the right cannot accrue against the bank and a stockholder at the same time. Mitchell v. Beckman, 64 Cal. 117; 28 Pac. 110; Mokelumne Hill Canal etc. Co. v. Woodbury, 14 Cal. 265; Davidson v. Rankin, 34 Cal. 503. The applicability of the statute of limitations is determined by the nature of the right sued upon, not by the form of the action or the relief demanded. Bell v. Bank of California, 153 Cal. 234; 94 Pac. 889.

Running of statute of limitations against action to recover deposit of money. See note 4 Ann. Cas. 1146.

§ 349. **Time for commencing actions under "local improvement act of 1901."** Any action to contest an assessment levied by the legislative body of any municipality under the terms of the "local improvement act of 1901," must be commenced within thirty days after the entry upon the minutes of such legislative body of the resolution provided for in section eight of said "local improvement act of 1901."

Legislation § 349. Added by Stats. **1901,** p. 44.

CHAPTER IV.

GENERAL PROVISIONS AS TO TIME OF COMMENCING ACTIONS.

§ 350. When an action is commenced.
§ 351. Exception, where defendant is out of the state.
§ 352. Exception, as to persons under disabilities.
§ 353. Provision where person entitled dies before limitation expires.
§ 354. In suits by aliens, time of war to be deducted.
§ 355. Provision where judgment has been reversed.
§ 356. Provision where action is stayed by injunction.
§ 357. Disability must exist when right of action accrued.
§ 358. When two or more disabilities exist, etc.
§ 359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed.
§ 360. Acknowledgment or new promise must be in writing.
§ 361. Limitation laws of other states, effect of.
§ 362. Existing causes of action not affected.
§ 363. "Action" includes a special proceeding.

§ 350. When an action is commenced. An action is commenced, within the meaning of this title, when the complaint is filed.

Legislation § 350. Enacted March 11, 1872; based on Stats. 1850, p. 343.

When an action is commenced. An action is commenced, as to the parties named, when the complaint is filed in the proper court, so far as the statute of limitations is concerned, and, to prevent the bar, no other proceedings are necessary. Sharp v. Maguire, 19 Cal. 577; Pimental v. San Francisco, 21 Cal. 351; Allen v. Marshall, 34 Cal. 165; Jeffers v. Cook, 58 Cal. 147. The issuance of a summons is not necessary to the commencement of an action (Sharp v. Maguire, 19 Cal. 577; Pimental v. San Francisco, 21 Cal. 351; Allen v. Marshall, 34 Cal. 165); but this section applies only to the statute of limitations, and not to actions which must be commenced by filing a complaint and issuing a summons. Flandreau v. White, 18 Cal. 639; Sharp v. Maguire, 19 Cal. 577. A new cause of action set out, or a cause of action extended to property not embraced in the original complaint, does not relate back, for the purpose of interrupting the statute of limitations, to the date of filing the original complaint. Anderson v. Mayers, 50 Cal. 525; Meeks v. Southern Pacific R. R. Co., 61 Cal. 149. A counterclaim, which is not barred at the commencement of the action, may be set up. Perkins v. West Coast Lumber Co., 120 Cal. 27; 52 Pac. 118; Lyon v. Petty, 65 Cal. 322; 4 Pac. 103. Where a supplemental complaint is filed, bringing in new parties, as to such parties the suit is not commenced until the filing of the new pleading (Jeffers v. Cook, 58 Cal. 147; Spaulding v. Howard, 121 Cal. 194; 53 Pac. 563; Baker v. Baker, 136 Cal. 302; 68 Pac. 971; Lord v. Morris, 18 Cal. 482; McCarthy v. White, 21 Cal. 495; 82 Am. Dec. 754; Lent v. Shear, 26 Cal. 361; Lawrence v. Ballou, 50 Cal. 258; Atkinson v. Amador etc. Canal Co., 53 Cal. 102), as it would be unjust to make defendants responsible for proceedings of which they had no notice. Jeffers v. Cook, 58 Cal. 147.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343. To prevent the bar of the statute of limitations, no other proceeding is necessary, except filing the complaint, when, for all purposes of the statute, the action is commenced. The issuance of summons is not necessary to the commencement of the action. Sharp v. Maguire, 19 Cal. 577. See also Allen v. Marshall, 34 Cal. 166; Pimental v. San Francisco, 21 Cal. 351; Adams v. Patterson, 35 Cal. 122.

§ 351. Exception, where defendant is out of the state. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

Legislation § 351. Enacted March 11, 1872; based on Stats. 1850, p. 343.

Absence from the state. When the defendant is absent from the state at the time of the maturity of his obligation, the statute does not commence to run until he returns to the state (Dougall v. Schulenberg, 101 Cal. 154; 35 Pac. 635; Chappell v. Thompson, 21 Cal. App. 136; 131 Pac. 82; McCormick v. Marcy, 165 Cal. 386; 132 Pac. 449), and the time of his absence is to be deducted from the whole time run (Stone v. Hammell, 83 Cal. 547; 17 Am. St. Rep. 272; 8 L. R. A. 425; 23 Pac. 703; Sanford v. Bergin, 156 Cal. 43; 103 Pac. 333; King v. Armstrong, 9 Cal. App. 368; 99 Pac. 527); and successive absences from the state must be deducted from the whole time run since the cause of action accrued. Rogers v. Hatch, 44 Cal. 280; Watt v. Wright, 66 Cal. 202; 5 Pac. 91. When the period of limitation has once begun to run, it cannot, except as provided by statute, be postponed, suspended, or interrupted by any subsequent condition. Congregational Church Bldg. Soc. v. Osborn, 153 Cal. 197;

94 Pac. 881. The word "return," in this section, applies to persons coming from abroad, as well as to citizens of this country going abroad, for a temporary purpose, and then returning. Palmer v. Shaw, 16 Cal. 93; Rogers v. Hatch, 44 Cal. 280. A clandestine return to the state, with intent to defraud a creditor, by setting the statute in operation, and then departing, is not such a return as the statute contemplates, and has not the effect of setting the statute in motion. Palmer v. Shaw, 16 Cal. 93; Stewart v. Stewart, 152 Cal. 162; 14 Ann. Cas. 940; 92 Pac. 87. Where a debtor departs from the state, and returns openly, the fact that the creditor did not learn of his presence here is immaterial in determining whether the statute has run. Stewart v. Stewart, 152 Cal. 162; 14 Ann. Cas. 940; 92 Pac. 87. This section does not deprive non-residents of the benefits of the statute of limitations: it merely excludes from computation the time during which any defendant, resident or non-resident, may have been out of the state. Foster v. Butler, 164 Cal. 623; 130 Pac. 6. The absence of a co-surety from the state does not extend the time within which an action may be brought against the principal (Stone v. Hammell, 83 Cal. 547; 17 Am. St. Rep. 272; 8 L. R. A. 425; 23 Pac. 703); and the absence of a mortgagor from the state does not interrupt the running of the statute as to subsequent lienholders, or holders of the equity of redemption. Watt v. Wright, 66 Cal. 202; 5 Pac. 91. The mortgagor has no power, by stipulation, to prolong the time of payment, or in any manner to increase the burdens on mortgaged premises. Wood v. Goodfellow, 43 Cal. 185; Lord v. Morris, 18 Cal. 482; Lent v. Morrill, 25 Cal. 492; Lent v. Shear, 26 Cal. 361; Barber v. Babel, 36 Cal. 11; Sichel v. Carrillo, 42 Cal. 493. A corporation, domiciled in another state, with an agent in this state in possession of land for and in behalf of the corporation, is not absent from the state, within the meaning of this section, and is entitled to set up the bar of the statute as a defense (Lawrence v. Ballou, 50 Cal. 258); but a failure to appoint such agent, and prove the fact at the trial, deprives a foreign corporation of the right to plead the statute. O'Brien v. Big Casino Gold Mining Co., 9 Cal. App. 283; 99 Pac. 209. The absence from the state of the trustee of an express trust in land does not relieve the injured party from bringing an action within the limited time (Seculovich v. Morton, 101 Cal. 673; 40 Am. St. Rep. 106; 36 Pac. 387), as absence from the state, in such a case, does not deprive the plaintiff of a remedy. Perkins v. Wakeham, 86 Cal. 580; 21 Am. St. Rep. 67; 25 Pac. 51; Seculovich v. Morton, 101 Cal. 673; 40 Am. St. Rep. 106; 36 Pac. 387. The plaintiff must allege absence from the state on the part of the defendant, where such fact is relied upon to take the case out of the statute (Bass v. Berry, 51 Cal. 264; Dougall v. Schulenberg, 101 Cal. 154; 35 Pac. 635); but this general exception does not apply to an action upon a stockholder's liability, which is governed by § 359, post. King v. Armstrong, 9 Cal. App. 368; 99 Pac. 527.

What constitutes absence from state. See note 83 Am. Dec. 644.

Return of debtor to state sufficient to start statute of limitations running. See note 14 Ann. Cas. 941.

What constitutes "residence out of the state" within meaning of statute. See note 17 L. R. A. (N. S.) 225.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343. See Palmer v. Shaw, 16 Cal. 93; Nelson v. Nelson, 6 Cal. 430.

§ 352. Exception, as to persons under disabilities. If a person entitled to bring an action, mentioned in chapter three of this title, be, at the time the cause of action accrued, either:

1. Within the age of majority; or,

2. Insane; or,

3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life; or,

4. A married woman, and her husband be a necessary party with her in commencing such action:

—The time of such disability is not a part of the time limited for the commencement of the action.

Disabilities stopping running of statute. See ante, § 328.

Legislation § 352. 1. Enacted March 11, **1872**; based on Stats. 1863, p. 326.

2. Amendment by Stats. **1901**, p. 125; unconstitutional. See note ante, § 5.

Within the age of majority. An infant may bring an action within the statutory time after attaining his majority. Morrell v. Morgan, 65 Cal. 575; 4 Pac. 580; Crosby v. Dowd, 61 Cal. 557.

Disabilities which stop the running of the statute. See ante, § 328, and note.

Disabilities which interrupt operation of statute of limitations. See note 36 Am. Dec. 68.

Interruption of running of statute of limitations on account of infancy of heir, devisee or distributee. See note 3 Ann. Cas. 837.

CODE COMMISSIONERS' NOTE. Stats. 1863, p. 325.

1. Action to set aside deed of insane man. If a person, while insane, is fraudulently induced to execute a conveyance of his property to another, the statute of limitations will not commence running against the grantor's right to commence an action to set aside the deed until he recovers his reason and discovers what he has done. Crowther v. Rowlandson, 27 Cal. 376.

2. Married women. The statute runs against a married woman in all those actions to which her husband is not a necessary party with her, in commencing the action the same as other parties. Wilson v. Wilson, 36 Cal. 447; 95 Am. Dec. 194.

3. Separate property. Actions may be brought by the wife, when they concern her separate property, or are against her husband, etc. Wilson v. Wilson, 36 Cal. 447; 95 Am. Dec. 194.

§ 353. Provision where person entitled dies before limitation expires. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within six months from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

Substitution of parties. See post, § 385.

Survival of actions. See post, §§ 385, 1582, 1584.

"Action" includes special proceeding of civil nature. See post, § 363.

Claim against decedent's estate which has been allowed, not affected by statute. See post, § 1569.

Legislation § 353. Enacted March 11, 1872; based on Stats. 1850, p. 343.

Effect of death on running of statute. This section is applicable only to causes of action against which the statute has commenced to run (Smith v. Hall, 19 Cal. 85); it is imperative, and applies to all claims arising upon a contract (Estate of Hildebrandt, 92 Cal. 433; 28 Pac. 486); and while the first clause may, under some circumstances, prolong the time originally limited, yet it cannot operate, in any case, to shorten it. Lowell v. Kier, 50 Cal. 646; Smith v. Hall, 19 Cal. 85.

Action by representative of deceased. This section does not apply to an action upon a claim against the estate of another deceased person (Morrow v. Barker, 119 Cal. 65; 51 Pac. 12), nor to an action to cancel a deed for fraud and undue influence, and to recover an interest in the real property so obtained. Page v. Garver, 146 Cal. 577; 80 Pac. 860.

Action against representatives of deceased person. The statute does not commence to run, where administration has not been granted on an estate (Danglada v. De la Guerra, 10 Cal. 386; Smith v. Hall, 19 Cal. 85; Estate of Bullard, 16 Cal. 355; 48 Pac. 219; Tynan v. Walker, 35 Cal. 634; 95 Am. Dec. 152; Hibernia Sav. & L. Soc. v. Herbert, 53 Cal. 375; Casey v. Gibbons, 136 Cal. 368; 68 Pac. 1032); nor on an action to foreclose a mortgage not due at the death of the mortgagor, while there is no administration on the mortgagor's estate (Heeser v. Taylor, 1 Cal. App. 619; 82 Pac. 977); it does not necessarily extend the time for commencing an action against the personal representatives of a deceased person; it only gives the plaintiff one year for the appointment of the representative, where he has not that much time under the statute of limitations (McMillan v. Hayward, 94 Cal. 357; 29 Pac. 774); but the statute is suspended only as to the representative of the deceased person; as to the grantee of the mortgaged premises, the statute commences to run on the death of the party, regardless of the appointment of the administrator. California Title Ins. etc. Co. v. Miller, 3 Cal. App. 54; 84 Pac. 453. A mortgage is not required to be presented to the representative of the mortgagor (Hibernia Sav. & L. Soc. v. Conlin, 67 Cal. 178; 7 Pac. 477); but other claims must be presented to the administrator. Morrow v. Barker, 119 Cal. 65; 51 Pac. 12; Tynan v. Walker, 35 Cal. 634; 95 Am. Dec. 152; Sichel v. Carrillo, 42 Cal. 493. Where a mortgage is given to secure debts payable in installments, the statute runs against such installment from its maturity. Hibernia Sav. & L. Soc. v. Herbert, 53 Cal. 375; Tynan v. Walker, 35 Cal. 634; 95 Am. Dec. 152.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

1. "If a person against whom an action may be brought die," etc. See Smith v. Hall, 19 Cal. 85.

2. Estates of deceased persons. Administration not granted. A note due shortly after the death of the maker, in 1852, letters of administration were issued in 1856, and no notice to creditors having been published, the note was presented to the administrator in 1859 and rejected. Suit was brought on the claim immediately after rejection. Held: the note was not barred by the statute of limitations. Smith v. Hall, 19 Cal. 85. The statute of limitations does not begin to run, when no administration exists on decedent's estate at the time the cause of action accrued. Danglada v. De la Guerra, 10 Cal. 386; Smith v. Hall, 19 Cal. 85; see also Soto v. Kroder, 19 Cal. 87.

§ 354. In suits by aliens, time of war to be deducted. When a person is an alien subject, or citizen of a country at war with the United States, the

time of the continuance of the war is not part of the period limited for the commencement of the action.

Legislation § 354. Enacted March 11, 1872; based on Stats. 1850, p. 343.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

§ 355. Provision where judgment has been reversed. If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal.

Legislation § 355. 1. Enacted March 11, 1872; based on Stats. 1850, p. 343.
2. Amendment by Stats. 1901, p. 125; unconstitutional. See note ante, § 5.

New actions. This section permits a new action of any kind, having for its result the same relief as was obtained in the original action. Kenney v. Parks, 137 Cal. 527; 70 Pac. 556. A reversal upon appeal does not include an annulling upon a writ of review. Fay v. Costa, 2 Cal. App. 241; 83 Pac. 275.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

§ 356. Provision where action is stayed by injunction. When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

Legislation § 356. Enacted March 11, 1872; based on Stats. 1850, p. 343.

Action stayed by injunction or statutory prohibition. Where an action is stayed by a proceeding in bankruptcy, the time of such suspension is deducted from the time prescribed by statute (Hoff v. Funkenstein, 54 Cal. 233), and the period from the time on which the claim is presented by the administrator until its rejection by the judge, is not included in computing the running of the statute against the action (Nally v. McDonald, 66 Cal. 530; 6 Pac. 390); but the insolvency of a debtor does not extend the time within which an action must be commenced to foreclose a mechanic's lien. Bradford v. Dorsey, 63 Cal. 122; Barclay v. Blackinton, 127 Cal. 189; 59 Pac. 834. The statute does not commence to run during the pendency of insolvency proceedings. Union Collection Co. v. Soule, 141 Cal. 99; 74 Pac. 549. A statutory prohibition, which is not constitutional, is not within this section, as it cannot operate to suspend the statute. Bates v. Gregory, 89 Cal. 387; 26 Pac. 891. The theory of the statute of limitations is, that the creditor has the full statutory time, whatever it may be, during which he may, of his own volition, commence an action. Hoff v. Funkenstein, 54 Cal. 233.

Suspension of statute by injunction. See notes 4 Ann. Cas. 147; 30 L. R. A. 142; 3 L. R. A. (N. S.) 1187; 23 L. R. A. (N. S.) 673.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

§ 357. Disability must exist when right of action accrued. No person can avail himself of a disability, unless it existed when his right of action accrued.

Successive disabilities. See post, § 358; ante, § 328.

Legislation § 357. Enacted March 11, 1872; based on Stats. 1850, p. 343.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

§ 358. When two or more disabilities exist, etc. When two or more disabilities coexist at the time the right of action accrues, the limitation does not attach until they are removed.

Legislation § 358. Enacted March 11, 1872; based on Stats. 1850, p. 343.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

§ 359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.

Director's personal liability. See Civ. Code, § 309.

Legislation § 359. Enacted March 11, **1872**; based on Stats. 1850, p. 343.

Actions against directors and stockholders of corporations. An action to enforce the liability of stockholders is within this section (Green v. Beckman, 59 Cal. 545; Hunt v. Ward, 99 Cal. 612; 37 Am. St. Rep. 87; 34 Pac. 335; Moore v. Boyd, 74 Cal. 167; 15 Pac. 670; O'Neill v. Quarnstrom, 6 Cal. App. 469; 92 Pac. 391; King v. Armstrong, 9 Cal. App. 368; 99 Pac. 527); and the giving of a note as evidence of the debt does not extend the time for bringing the action. O'Neill v. Quarnstrom, 6 Cal. App. 469; 92 Pac. 391. Such an action is also an obligation arising on contract. Kennedy v. California Sav. Bank, 97 Cal. 93; 33 Am. St. Rep. 163; 31 Pac. 846; London etc. Bank v. Parrott, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164. An attempt is not made by this section to relieve a stockholder from his liability (Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407; 58 Pac. 85); but it provides that the action must be commenced within three years from the date on which the debt is created, whether the cause of action has matured or not. Green v. Beckman, 59 Cal. 545; Moore v. Boyd, 74 Cal. 167; 15 Pac. 670; Hyman v. Coleman, 82 Cal. 650; 16 Am. St. Rep. 178; 23 Pac. 62; Hunt v. Ward, 99 Cal. 612; 37 Am. St. Rep. 87; 34 Pac. 335; Bank of San Luis Obispo v. Pacific Coast S. S. Co., 103 Cal. 594; 37 Pac. 499; Wells v. Black, 117 Cal. 157; 59 Am. St. Rep. 162; 37 L. R. A. 619; 48 Pac. 1090; Johnson v. Bank of Lake, 125 Cal. 6; 73 Am. St. Rep. 17; 57 Pac. 664; London etc. Bank v. Parrott, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164; Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407; 58 Pac. 85; Goodall v. Jack, 127 Cal. 258; 59 Pac. 575; Ryland v. Commercial etc. Bank, 127 Cal. 525; 59 Pac. 989; Jones v. Goldtree Bros. Co., 142 Cal. 383; 77 Pac. 939; Cook v. Ceas, 143 Cal. 221; 77 Pac. 65; O'Neill v. Quarnstrom, 6 Cal. App. 469; 92 Pac. 391. An action against a stockholder to enforce a liability created by law is barred by the lapse of three years after the liability is created, although during a part of the time he was absent from the state. King v. Armstrong, 9 Cal. App. 368; 99 Pac. 527; O'Neill v. Quarnstrom, 6 Cal. App. 469; 92 Pac. 391. An action to enforce the statutory liability imposed by the laws of a sister state upon the stockholders of a banking corporation is barred in three years after the liability is created. Miller v. Lane, 160 Cal. 90; 116 Pac. 58. A stockholder's responsibility commences with that of the corporation, and continues during the period of the existence of the indebtedness (Mokelumne Hill etc. Mining Co. v. Woodbury, 14 Cal. 265; Davidson v. Rankin, 34 Cal. 503); but the suspension of the remedy of the corporation does not stop the running of the statute (Young v. Rosenbaum, 39 Cal. 646; Hyman v. Coleman, 82 Cal. 650; 16 Am. St. Rep. 178; 23 Pac. 62; O'Neill v. Quarnstrom, 6 Cal. App. 469; 92 Pac. 391); neither does the extension of the time of payment in favor of the corporation toll the statute to enforce the stockholder's liability. Hyman v. Coleman, 82 Cal. 650; 16 Am. St. Rep. 178; 23 Pac. 62; Redington v. Cornwell, 90 Cal. 49; 27 Pac. 40. The liability of the stockholder is separate and independent, founded and depending upon the original liability of the corporation; and the statute begins to run in favor of the stockholder from the date of the execution of a note, not from its maturity. Hunt v. Ward, 99 Cal. 612; 37 Am. St. Rep. 87; 34 Pac. 335; Bank of San Luis Obispo v. Pacific Coast S. S. Co., 103 Cal. 594; 37 Pac. 499. The statute does not commence to run against an action to enforce the personal liability of the stockholder, until the accrual of a cause of action against the corporation. Johnson v. Bank of Lake, 125 Cal. 6; 73 Am. St. Rep. 17; 57 Pac. 664; State v. McCauley, 15 Cal. 429; McBean v. Fresno, 112 Cal. 159; 53 Am. St. Rep. 191; 31 L. R. A. 794; 44 Pac. 358. Thus, an action against a stockholder, to recover a deposit with a bank, must be commenced within three years after the date of the deposit (Green v. Beckman, 59 Cal. 545; Nellis v. Pacific Bank, 127 Cal. 166; 59 Pac. 830), as the debt was created and the liability incurred at the time of the acceptance of each of the deposits, and at the expiration of three years the stockholder's liability is at an end. Wells v. Black, 117 Cal. 157; 59 Am. St. Rep. 162; 37 L. R. A. 619; 48 Pac. 1090; Hunt v. Ward, 99 Cal. 612; 37 Am. St. Rep. 87; 34 Pac. 335; Bank of San Luis Obispo v. Pacific Coast S. S. Co., 103 Cal. 594; 37 Pac. 499; Nellis v. Pacific Bank, 127 Cal. 166; 59 Pac. 830. The right of action against the stockholder, on account of his individual responsibility for the debts and liabilities of the corporation, accrues at the same time as the right of action against the corporation, and is not contingent on a recovery against the corporation. Davidson v. Rankin, 34 Cal. 503; Mokelumne Hill etc. Mining Co. v. Woodbury, 14 Cal. 265; Larrabee v. Baldwin, 35 Cal. 155; Young v. Rosenbaum, 39 Cal. 646; Stilphen v. Ware, 45 Cal. 110; Hyman v. Coleman, 82 Cal. 650; 16 Am. St. Rep. 178; 23 Pac. 62. The payment of a note by the sureties of a corporation creates a new and independent liability on the part of the stockholders for the debt thus paid, which liability accrues on the date on which the note is paid by the sureties, and is barred in three years thereafter (Ryland v. Commercial etc. Bank, 127 Cal. 525; 59 Pac. 989); but a principal debtor is not a surety. Mokelumne Hill etc. Mining Co. v. Woodbury, 14 Cal. 265; Davidson v. Rankin, 34 Cal. 503; Young v. Rosenbaum, 39

Cal. 646; Neilson v. Crawford, 52 Cal. 248; Sonoma Valley Bank v. Hill, 59 Cal. 107; Morrow v. Superior Court, 64 Cal. 383; 1 Pac. 354; Hyman v. Colemau, 82 Cal. 650; 16 Am. St. Rep. 178; 23 Pac. 62. Overdrafts create a primary liability as they occur, and the statute runs in favor of the stockholder from the date thereof. Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407; 58 Pac. 85. Where a corporation guarantees the future payment of a note, liability is barred within three years from the date of guaranty. First Nat. Bank v. Consolidated Lumber Co., 16 Cal. App. 267; 116 Pac. 680. All the statutory provisions on the subject of the statute of limitations are to be considered together and construed in view of the presumption that the legislators are acquainted with well-settled principles of law, and that they legislate with reference thereto. Pryor v. Winter, 147 Cal. 554; 109 Am. St. Rep. 162; 82 Pac. 202.

Actions to enforce stockholders' liability. See note ante, § 338.

Limitation of actions against stockholders or corporate officers. See note 96 Am. St. Rep. 973.

Limitation of action to enforce stockholder's statutory liability. See note 3 Ann. Cas. 505.

Accrual of right of action to put statute of limitations into operation as to stockholder's liability for corporate debts. See note 10 L. R. A. (N. S.) 897.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

§ 360. Acknowledgment or new promise must be in writing. No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby.

Legislation § 360. Enacted March 11, **1872**; based on Stats. 1850, p. 343.

New or continuing contract. The consideration for a new promise is the original contract, or the moral obligation arising thereon, binding in foro conscientiæ, notwithstanding the bar of the statute (McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170; Chabot v. Tucker, 39 Cal. 434; Wells v. Harter, 56 Cal. 342; Curtis v. Sacramento, 70 Cal. 412; 11 Pac. 748; Concannon v. Smith, 134 Cal. 14; 66 Pac. 40), and it is this new contract that gives the right to recover. Wells v. Harter, 56 Cal. 342. There is a distinction to be observed, where the acknowledgment or new promise is made after maturity and before the bar of the statute, and where it is made after the bar has intervened; in the former case, the action is upon the original contract, the bar of the statute having been lifted and removed (McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170; Chaffee v. Browne, 109 Cal. 211; 41 Pac. 1028; Southern Pacific Co. v. Prosser, 122 Cal. 413; 52 Pac. 836; 55 Pac. 145; Rodgers v. Byers, 127 Cal. 528; 60 Pac. 42); in the latter case, the action is upon the new promise. Rodgers v. Byers, 127 Cal. 528; 60 Pac. 42; Concannon v. Smith, 134 Cal. 14; 66 Pac. 40. The action must be brought upon the original promise or contract, where the acknowledgment or new promise is made before the bar of the statute (Southern Pacific Company v. Prosser, 122 Cal. 413; 52 Pac. 836; 55 Pac. 145); but under the new promise, where made after the bar has intervened. McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170; Chaffee v. Browne, 109 Cal. 211; 41 Pac. 1028; Southern Pacific Co. v. Prosser, 122 Cal. 413; 52 Pac. 836; 55 Pac. 145; Rodgers v. Byers, 127 Cal. 528; 60 Pac. 42; Sanford v. Bergin, 156 Cal. 43; 103 Pac. 333. The new promise to pay the debt does not revive the lien of the mortgage which secures it, however (Sanford v. Bergin, 156 Cal. 43; 103 Pac. 333), unless the statute has not run before the promise. President and Board of Trustees v. Stephens, 11 Cal. App. 523; 105 Pac. 614. The action upon the new promise must be commenced within four years from the date of the new promise. McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170; Rodgers v. Byers, 127 Cal. 528; 60 Pac. 42. The new promise, to revive the cause of action, must contain an acknowledgment from which the law will imply a promise to pay, and be a direct and unqualified admission of an existing debt. Visher v. Wilbur, 5 Cal. App. 562; 90 Pac. 1065; 91 Pac. 412; President and Board of Trustees v. Stephens, 11 Cal. App. 523; 105 Pac. 614.

Acknowledgment or new promise must be in writing. To take the debt out of the bar of the statute, or to lift or remove the bar, the acknowledgment must be in writing. Peña v. Vance, 21 Cal. 142; Heinlin v. Castro, 22 Cal. 100; Porter v. Elam, 25 Cal. 291, 292; 85 Am. Dec. 132; Estate of Galvin, 51 Cal. 215; Biddel v. Brizzolara, 56 Cal. 374; Booth v. Hoskins, 75 Cal. 271; 17 Pac. 225; Pierce v. Merrill, 128 Cal. 473; 79 Am. St. Rep. 63; 61 Pac. 67; Higgins v. Graham, 143 Cal. 131; 76 Pac. 898. Oral promises are not sufficient to take the case out of the two-year limitation. Rose v. Foord, 3 Cal. Unrep. 438; 28 Pac. 229. A rehearing was denied in Rose v. Foord, 96 Cal. 152, 30 Pac. 1114, holding that no new cause of action arises to recover the purchase-money until demand made, and that the statute does not commence to run until then. To revive a claim barred by the statute, a writing is essential, and it must contain either an express or an implied promise to pay an existing debt; in the absence of an express promise, the acknowledgment must be unequivocal, and must contain a direct and unqualified admission of an existing debt

for which the party is liable, and which he is willing to pay. Visher v. Wilbur, 5 Cal. App. 562; 90 Pac. 1065; 91 Pac. 412. A mortgage barred by the statute is not renewed by a renewal of the note (Wells v. Harter, 56 Cal. 342; Southern Pacific Co. v. Prosser, 122 Cal. 413; 52 Pac. 836; 55 Pac. 145; Biddel v. Brizzolara, 56 Cal. 374); nor is the oral settlement of an account sufficient to take items out of the statute, where it is already barred. Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371; Kahn v. Edwards, 75 Cal. 192; 7 Am. St. Rep. 141; 16 Pac. 779; Baird v. Crank, 98 Cal. 293; 33 Pac. 63. An acknowledgment of a debt operates to start a new period of limitation. Moore v. Gould, 151 Cal. 723; 91 Pac. 616. There is that sort of an implied acknowledgment, that may be inferred in the case of every offer or promise, that the amount offered or promised to be paid is or will become due; but it is not the acknowledgment required by the statute, and it is of no avail to the plaintiff, because no promise arises therefrom by implication; it would be illogical to infer from any offer or promise to pay a given sum of money upon the original contract, an acknowledgment, or to infer a promise more comprehensive than that from which the acknowledgment was implied; an offer or promise to pay a certain sum, or to deliver any article of value at a specified time, in satisfaction of the original debt upon which the statute has run, cannot, by this inverse implication, be construed as evidence of a promise to pay the whole debt, without a plain perversion of the meaning and intention of the provision of the statute. McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170. An extension of time for the payment of a debt, signed by the payee, raises an estoppel to plead the statute. Quanchi v. Ben Lomond Wine Co., 17 Cal. App. 565; 120 Pac. 427.

Signed by the party to be charged. The writing must be signed by the debtor (Estate of Galvin, 51 Cal. 215; Dorland v. Dorland, 66 Cal. 189; 5 Pac. 77); and it is not sufficient, unless so signed. Baird v. Crank, 98 Cal. 293; 33 Pac. 63. A subscription by the debtor is not necessary, if it is evident, from any part of the instrument or acknowledgment, that the debtor named in it has given to it his assent; and if an attestation appears anywhere upon the face of the writing, it is sufficient, and the party thus attesting is bound as effectually as if he had subscribed his name at the foot (Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371); but the written acknowledgment or new promise must be a distinct, direct, unqualified, and unconditional admission of the existence of the debt for which the party is liable and willing to pay. McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170; Farrell v. Palmer, 36 Cal. 187; Biddel v. Brizzolara, 56 Cal. 374; Southern Pacific Co. v. Prosser, 122 Cal. 413; 52 Pac. 836; 55 Pac. 145; Pierce v. Merrill, 128 Cal. 473; 79 Am. St. Rep. 63; 61 Pac. 67; Curtis v. Sacramento, 70 Cal. 412; 11 Pac. 748. The purpose of this section is, to establish a rule, not with respect to the character of the promise or acknowledgment from which the promise may be inferred, but with respect to the kind of evidence by which the promise or acknowledgment shall be proved. Biddel v. Brizzolara, 56 Cal. 374; Tuggle v. Minor, 76 Cal. 96; 18 Pac. 131. This statute does not purport to make any changes in the effect of acknowledgments or promises, but simply to alter the mode of their proof. Barron v. Kennedy, 17 Cal. 574; Concannon v. Smith, 134 Cal. 14; 66 Pac. 40. An acknowledgment by one joint obligor is not available to take the debt out of the bar of the statute as to the others, unless made with their authority. McCarthy v. White, 21 Cal. 495; 82 Am. Dec. 754; Lord v. Morris, 18 Cal. 482. Where there is but one debt or obligation, an acknowledgment and promise, otherwise sufficient, to pay "our indebtedness," is sufficient under this section. Belloc v. Davis, 38 Cal. 242. A promise to pay is raised by implication of law from an unqualified acknowledgment (Biddel v. Brizzolara, 56 Cal. 374); but if the acknowledgment is accompanied by such qualifying expressions or circumstances as repel the idea of a contract to pay, except to the extent or upon the conditions named, no implied promise to pay absolutely is created. Biddel v. Brizzolara, 56 Cal. 374; Curtis v. Sacramento, 70 Cal. 412; 11 Pac. 748. The positive acknowledgment of a pre-existing debt is insufficient, if accompanied by a declaration which is inconsistent with an intention to pay (Curtis v. Sacramento, 70 Cal. 412; 11 Pac. 748; McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170); but a suggestion of a new mode of payment, as in work, not being made as a condition to the acknowledgment, does not have the effect of impairing the effect of the admission. Southern Pacific Co. v. Prosser, 122 Cal. 413; 52 Pac. 836; 55 Pac. 145. An agreement not to plead the statute of limitations comes equally within the statute (Wells Fargo & Co. v. Enright, 127 Cal. 669; 49 L. R. A. 647; 60 Pac. 439; State Loan etc. Co. v. Cochran, 130 Cal. 245; 62 Pac. 466, 600); and an agreement not to sue is sufficient consideration to support an agreement not to plead the statute. Smith v. Lawrence, 38 Cal. 24; 99 Am. Dec. 344; Belloc v. Davis, 38 Cal. 242; Frey v. Clifford, 44 Cal. 335; Wells Fargo & Co v. Enright, 127 Cal. 669; 49 L. R. A. 647; 60 Pac. 439; State Loan etc. Co. v. Cochran, 130 Cal. 245; 62 Pac. 466, 600. An acknowledgment of the indebtedness need not specify the amount. Curtis v. Sacramento, 70 Cal. 412; 11 Pac. 743. The report of a board of arbitration binds a corporation, the by-laws of which provide

for such a body; and it is not necessary that such report be signed by the corporation, to take the debt out of the statute. Dearborn v. Grand Lodge, 138 Cal. 658; 72 Pac. 154. Where a party relies upon an acknowledgment or new promise to take the debt out of the bar of the statute, he must plead it. Smith v. Richmond, 19 Cal. 476. An allegation that the defendant has acknowledged and has promised to pay is a sufficient allegation of the signature of the defendant. Porter v. Elam, 25 Cal. 291; 85 Am. Dec. 132.

To whom made. When the acknowledgment is made by an agent of a corporation, it does not bind him in his individual capacity (Pierce v. Merrill, 128 Cal. 473; 79 Am. St. Rep. 63; 61 Pac. 67); but an acknowledgment by an executrix, who has a personal interest in the estate of her deceased husband, and who gives her own note for an outlawed debt, is founded upon a sufficient consideration. Mull v. Van Trees, 50 Cal. 547. The acknowledgment or promise must be made to the creditor, and not to a stranger (Biddel v. Brizzolara, 56 Cal. 374; President and Board of Trustees v. Stephens, 11 Cal. App. 523; 105 Pac. 614; Rounthwaite v. Rounthwaite, 6 Cal. Unrep. 878; 68 Pac. 304); it may, however, be made to one known to be the agent or legal representative of the creditor (President and Board of Trustees v. Stephens, 11 Cal. App. 523; 105 Pac. 614); and where made to the administrator of the estate of a creditor, it is valid, and inures to the benefit of the estate (Farrell v. Palmer, 36 Cal. 187); and an indorser of a note, to whom it is afterwards transferred, is entitled to rely upon, and he has the benefit of, the acknowledgment or new promise made to the former holder. Smith v. Richmond, 19 Cal. 476.

Form of acknowledgment or promise. The statute does not prescribe any form in which an acknowledgment or promise shall be made; the imperative thing is, that it shall be "contained in some writing, signed by the party to be charged thereby;" this expression clearly indicating that it is not essential that the acknowledgment or promise shall be formal; and it is sufficient if it shows that the writer regards or treats the indebtedness as subsisting (Concannon v. Smith, 134 Cal. 14; 66 Pac. 40; Worth v. Worth, 155 Cal. 599; 102 Pac. 663); nor need it be made in express words, but it may be implied from any act or statement which necessarily and directly admits or presupposes the existence of and the obligation to pay a debt. Tuggle v. Minor, 76 Cal. 96; 18 Pac. 131.

When made. It may be made either before or after the bar of the statute has intervened; if before, the action is on the original contract; if after, it is on the new promise. President and Board of Trustees v. Stephens, 11 Cal. App. 523; 105 Pac. 614. The effect of the acknowledgment before the bar of the statute, is to continue the liability until the expiration of the statutory time thereafter. National Cycle Mfg. Co. v. San Diego Cycle Co., 9 Cal. App. 111; 98 Pac. 64.

A sufficient acknowledgment. The following have been held sufficient: Letters of a liquidating partner, acknowledging payment of partnership claim, and promising to remit (Osment v. McElrath, 68 Cal. 466; 58 Am. Rep. 17; 9 Pac. 731; Ashley v. Vischer, 24 Cal. 322; 85 Am. Dec. 65; Farrell v. Palmer, 36 Cal. 187); a letter written to a creditor by his debtor, after maturity of the debt, but before the intervening of the bar of the statute, referring specifically to the debt, and offering to pay in work (Southern Pacific Co. v. Prosser, 122 Cal. 413; 52 Pac. 836; 55 Pac. 145); the payment of interest upon the debt (Barron v. Kennedy, 17 Cal. 574); but a memorandum for the payment of the purchase price of land, signed by the creditor, but not by the debtor, although acted upon by him, is not sufficient, under the statute, not being signed by the party to be charged. Peña v. Vance, 21 Cal. 142. A release, signed by the mortgagee, of a part of the encumbered premises, which refers to the indebtedness, constitutes an acknowledgment, and stops the running of the statute. Chaffee v. Browne, 109 Cal. 211; 41 Pac. 1028. The acknowledgment, in a letter, of a mortgage indebtedness, is sufficient to take the case out of the operation of the statute. Worth v. Worth, 155 Cal. 599; 102 Pac. 663.

Effect of request not to sue. By a request for forbearance to sue, the debtor will be estopped to plead the statute. State Loan etc. Co. v. Cochran, 130 Cal. 245; 62 Pac. 466, 600.

Part payment. The payment of a part of the debt or obligation, either of the principal or interest, is an acknowledgment thereof, and takes it out of the bar of the statute (Barron v. Kennedy, 17 Cal. 574); but such part payment must be evidenced by writing, complying with the requirements of this section. Fairbanks v. Dawson, 9 Cal. 89; Lord v. Morris, 18 Cal. 482; Peña v. Vance, 21 Cal. 142; McCarthy v. White, 21 Cal. 495; 82 Am. Dec. 754; Heinlin v. Castro, 22 Cal. 100.

What is acknowledgment of existing liability. See note 40 Am. Rep. 160.

Acknowledgment of debt made to stranger. See note 57 Am. Rep. 334.

Acknowledgment sufficient to take debt out of statute. See notes 62 Am. Dec. 101; 35 Am. Rep. 317; 36 Am. Rep. 197; 58 Am. Rep. 749; 102 Am. St. Rep. 752.

Acknowledgment or new promise by one joint debtor. See notes 10 Am. Dec. 695; 17 Ann. Cas. 176.

Payment of dividend by assignee of debtor does not take debt out of statute of limitations. See note 52 Am. Rep. 401.

Indorsement of payment on promissory note by holder as sufficient proof of part payment to stop

running of statute of limitations. See note Ann. Cas. 1913A, 1223.

Part payment by joint debtor as suspending running of statute of limitations to joint obligors not authorizing or ratifying such act. See note Ann. Cas. 1912D, 1328.

Payment on barred debt as reviving lien of barred mortgage given to secure debt. See note Ann. Cas. 1912B, 508.

Written promise or acknowledgment relied on to take case out of statute of limitations as aided by other writings. See note 12 Ann. Cas. 811.

Person to whom new promise must be made to remove bar of limitations. See notes 5 Ann. Cas. 811; 19 Ann. Cas. 103; 25 L. R. A. (N. S.) 805; 33 L. R. A. (N. S.) 262.

Part payment in full satisfaction of debt as removing bar of statute of limitations as to part not paid. See note 14 Ann. Cas. 213.

Giving check, bill or note as part payment or collateral security, as starting limitations running anew. See notes 15 Ann. Cas. 332; 18 L. R. A. (N. S.) 223; 35 L. R. A. (N. S.) 97.

Removal of bar of limitations against action ex delicto by new promise. See notes 11 Ann. Cas. 180; 13 L. R. A. (N. S.) 912.

Application of undirected payment to creditor holding several barred claims as revival of any of them. See notes 14 Ann. Cas. 56; 13 L. R. A. (N. S.) 1141.

Effect of new promise or part payment to revive judgment or judgment debt. See notes 9 Ann. Cas. 254; 8 L. R. A. (N. S.) 440.

Application of proceeds of foreclosed security as part payment sufficient to revive barred note. See notes 14 Ann. Cas. 980; 14 L. R. A. (N. S.) 479.

Revival of barred debt by application of general payment. See notes 14 L. R. A. 208; 13 L. R. A. (N. S.) 1141.

New promise after bar. See note 53 L. R. A. 362.

Promise to pay as soon as one can. See note 27 L. R. A. (N. S.) 300.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 343.

1. New promise to be in writing. At an early period after the passage of the English statute of limitations (21 James I, ch. 16), an impression prevailed that the statute was not to be favored; and, accordingly, a very slight acknowledgment, proved by as slight testimony, was permitted to overcome the statute. Parsons' Mercantile Law, p. 233; Dunham v. Dodge, 10 Barb. (N. Y.) 568. But the modern cases upon this subject have established the rule, that, to take a case out of the operation of the statutes, there must have been either an express promise to pay, or an admission of the debt, in terms so distinct as that a promise might reasonably be inferred therefrom. If, however, the admission was accompanied by qualifying words, then it would not amount to a promise. Chitty on Contracts, pp. 712–714. The object of our statute was to change a rule of evidence, and now to require written where verbal testimony was formerly sufficient. The matter to be proved is the acknowledgment or promise, and the only competent evidence is a writing signed by the party to be charged. But whether the acknowledgment or promise will, when proved, be sufficient to take the case out of the operation of the act, is left to depend upon reason and authority, as it did before. 28 Eng. C. L. R. 82; Fairbanks v. Dawson, 9 Cal. 91. See also Barron v. Kennedy, 17 Cal. 574, commenting on Fairbanks v. Dawson, 9 Cal. 89; and as to effect of part payments and proof of acknowledgment of debt, see these cases commented on, and Fairbanks v. Dawson, supra, affirmed, in Peña v. Vance, 21 Cal. 142. See further, Heinlin v. Castro, 22 Cal. 100; Porter v. Elam, 25 Cal. 291; 85 Am. Dec. 132.

2. Promise must be in writing. Where a memorandum-book was kept by plaintiff and a passbook by defendant, and these books were compared, the account found to be correct, and so acknowledged orally by the defendant, yet it did not take the case out of the statute as defined by this section. Weatherwax v. Cosumnes Valley Mill Co., 17 Cal. 344. The party to be charged must sign his name to the writing. Peña v. Vance, 21 Cal. 142.

3. Effect of statute of limitations. The statute of limitations does not extinguish a debt nor raise a presumption of its payment. It only bars the remedy, and thus becomes a statute of repose. McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170.

4. New promise. Nature of action on cause that is barred by the statute. When a creditor sues after the statute has run upon the original contract, his cause of action is not founded upon the original contract, but on the new promise; the moral obligation arising upon the original contract being a sufficient consideration for a new promise. McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170.

5. Nature of the contract resulting from making the statutory acknowledgment on new promise. Under the statute of limitations, there are two ultimate facts that may be proved in the mode therein prescribed: a continuing contract and a new contract. The statutory acknowledgment or promise, if made while the original contract is a subsisting liability, establishes a continuing contract; while, if made after the bar of the statute, a new contract is created. McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170.

6. Limitation of action on new promise to pay judgment. An action on a new promise to pay a judgment, so as to avoid the bar of the statute, must be brought within four years from the making of the new promise. McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170.

7. New promise necessary to support action on cause that is barred. A creditor cannot recover after the statute has run upon the original contract or obligation, without a new promise. McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170.

8. Nature of new promise. The new promise may be either express or implied. An express promise can only be established by producing the promise itself, in the form prescribed by this section; while an implied promise can only be established by the production, in like form, of the acknowledgment prescribed in this section. McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170.

9. Nature and scope of acknowledgment. An acknowledgment, within the statute, to support an implied promise, must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay. Such acknowledgment cannot be deduced from an offer or promise to pay any part of the debt, or the whole debt in a particular manner, or at a specified time, or upon specified conditions. McCormick v. Brown, 36 Cal. 180; 95 Am Dec. 170.

10. Terms of express promise. An express promise, to be available to the creditor, must be either direct, certain, and unconditionally a specified part of the debt, or a like offer, upon specified conditions as to either time or manner, or both, to pay the whole or some part of the debt, or a direct conditional promise to pay the whole or a specified part of the debt; but in case of such offer or conditional promise, the creditor can only recover by showing an acceptance by him of the offer as made, or a performance, on his part, of the prescribed conditions of the promise. McCormick v. Brown, 36 Cal. 180; 95 Am. Dec. 170.

11. New promise generally. See Farrell v. Palmer, 36 Cal. 187; also Chabot v. Tucker, 39 Cal. 434, and authorities there cited.

§ 361. Limitation laws of other states, effect of. When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him

in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued.

Legislation § 361. Enacted March 11, **1872**; based, according to the commissioners, on Stats. 1852, p. 161, which read, "When the cause of action has arisen in another state or a territory of the United States, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this state"; but it is in the language of Practice Act, § 532, except that the words "one who has been a citizen of this state, and" are substituted for "a citizen thereof."

Effect of law of other states. This section refers to the primary and original jurisdiction in which the cause of action arose, independently of the whereabouts of the maker at the maturity thereof. McKee v. Dodd, 152 Cal. 637; 125 Am. St. Rep. 82; 14 L. R. A. (N. S.) 780; 93 Pac. 854. A citizen of this state may maintain an action on a judgment recovered in another state, of which he has held the cause of action from the time it accrued, although such an action is barred by the statute where rendered. Stewart v. Spaulding, 72 Cal. 264; 13 Pac. 661. The bar of an action, in a foreign state, on a note secured by mortgage, bars a foreclosure of the mortgage in this state. Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192; 21 Ann. Cas. 1279; 106 Pac. 715. The law of a foreign jurisdiction, with reference to the statute of limitations, is presumed to be the same as the law of this state. Van Buskirk v. Kuhns, 164 Cal. 472; 129 Pac. 587.

Pleading statute. The method of pleading this section is the same as that in pleading other sections of the statute of limitations. Allen v. Allen, 95 Cal. 184; 16 L. R. A. 646; 30 Pac. 213. Where the foreign land is a part of the statute of limitations, it is sufficiently pleaded by an allegation that the action is barred by the provisions of this section. Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192; 21 Ann. Cas. 1279; 106 Pac. 715.

Whether demands barred by law of county where they originate are barred elsewhere. See note 22 Am. Dec. 362.

CODE COMMISSIONERS' NOTE. Stats. 1852, p. 161; Nelson v. Nelson, 6 Cal. 430.

§ 362. Existing causes of action not affected. This title does not extend to actions already commenced, nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run, but the laws now in force are applicable to such actions and cases, and are repealed subject to the provisions of this section.

Repeal of limitation. See ante, §§ 9, 18.

Legislation § 362. 1. Enacted March 11, **1872**. **2.** Amendment by Stats. **1901**, p. 125; unconstitutional. See note ante, § 5.

CODE COMMISSIONERS' NOTE. See also §§ 5, 9, ante.

§ 363. "Action" includes a special proceeding. The word "action" as used in this title is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

Legislation § 363. Enacted April 1, **1872**.

Laches. The defense of laches is different from the defense of the statute of limitations which applies here. Cahill v. Superior Court, 145 Cal. 42; 78 Pac. 467.

Special proceedings. Whenever it is necessary to do so, the word "action," as used in this title, is to be construed as including a special proceeding of a civil nature: the application for a writ of mandate is a special proceeding of a civil nature (Barnes v. Glide, 117 Cal. 1; 59 Am. St. Rep. 153; 48 Pac. 804; Jones v. Board of Police Commissioners, 141 Cal. 96; 74 Pac. 696); and so is a probate proceeding. Estate of Crosby, 55 Cal. 574.

CODE COMMISSIONERS' NOTE. This section was added by act of April 1, 1872 [unpublished].

TITLE III.

PARTIES TO CIVIL ACTIONS.

§ 367. Action to be in name of party in interest.
§ 368. Assignment of thing in action not to prejudice defense.
§ 369. Executor, trustee, etc., may sue without joining the persons beneficially interested.
§ 370. Married woman as party to action.
§ 371. Wife may defend, when.
§ 372. Appearance of infant, etc., by guardian. May compromise.
§ 373. Guardian, how appointed.
§ 374. Unmarried female may sue for her own seduction.
§ 375. Father, etc., may sue for seduction of daughter, etc.
§ 376. Father, etc., may sue for injury or death of child.
§ 377. When representatives may sue for death of one caused by the wrongful act of another.
§ 378. Who may be joined as plaintiffs.
§ 379. Who may be joined as defendants.
§ 380. Parties defendant in an action to determine conflicting claims to real property.
§ 381. Parties holding title under a common source, when may join.
§ 382. Parties in interest, when to be joined. When one or more may sue or defend for the whole.
§ 383. Plaintiff may sue in one action the different parties to commercial paper or insurance policies.
§ 384. Tenants in common, etc., may sever in bringing or defending actions.
§ 385. Action, when not to abate by death, marriage, or other disability. Proceedings in such case.
§ 386. Another person may be substituted for the defendant. Conflicting claims, how made.
§ 387. Intervention, when it takes place, and how made.
§ 388. Associates may be sued by name of association.
§ 389. Court, when to decide controversy or to order other parties to be brought in.
§ 390. Actions against fire departments.

§ 367. Action to be in name of party in interest. Every action must be prosecuted in the name of the real party in interest, except as provided in section three hundred and sixty-nine of this code.

Assignees. See post, § 368.
Association, how may be sued. See post, § 388.
Right to sue on contract made for one's benefit. See Civ. Code, § 1559.
Parties plaintiff, generally.
1. All persons interested may be joined. Post, §§ 378, 382.
2. If any refuse, they may be made defendants. Post, § 382.

Legislation § 367. 1. Enacted March 11, **1872**; based on Practice Act, § 4, which read: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act."
2. Amended by Code Amdts. **1880**, p. 63.
3. Amendment by Stats. **1901**, p. 126; unconstitutional. See note ante, § 5.

In the name of the real party in interest. Actions must be prosecuted in the name of the real party in interest, except as otherwise provided by law. Wiggins v. McDonald, 18 Cal. 126; Lucas v. Pico, 55 Cal. 126; People v. Haggin, 57 Cal. 579; Walsh v. Soule, 66 Cal. 443; 6 Pac. 82; Craig v. Fry, 68 Cal. 363; 9 Pac. 550; Woodsum v. Cole, 69 Cal. 142; 10 Pac. 331; Monterey County v. Abbott, 77 Cal. 541; 18 Pac. 113; 20 Pac. 73; Giselman v. Starr, 106 Cal. 651; 40 Pac. 8. The general rule, however, is qualified by § 369, post. Tandy v. Waesch, 154 Cal. 108; 97 Pac. 69; Oliver v. Walsh, 6 Cal. 456. An action cannot be brought in the name of one other than the real party in interest, unless it is one of the exceptions to the rule provided by statute. Dubbers v. Goux, 51 Cal. 153. A stranger to a transaction has no right to sue. Chenery v. Palmer, 5 Cal. 131. A plaintiff, who is not the real party in interest, is not entitled to recover. Wheatley v. Strobe, 12 Cal. 92; 73 Am. Dec. 522. A defendant has a right to have the cause of action against him prosecuted by the real person in interest. Giselman v. Starr, 106 Cal. 651; 40 Pac. 8.

Pleading statute. This objection is properly taken by demurrer, on the ground that it does not state facts sufficient to constitute a cause of action. People v. Haggin, 57 Cal. 579. Defendant's objection, that an action is not brought in the name of the real party in interest, is without force, if he can urge any defenses that he could make against the real owner, and if a judgment satisfied by the defendant would protect him from future annoyance or loss. Giselman v. Starr, 106 Cal. 651; 40 Pac. 8; Simpson v. Miller, 7 Cal. App. 248; 94 Pac. 252. The right of a plaintiff to maintain an action cannot be questioned, unless the defendant pleads payment or offset against the person claiming to be the true party in interest. Gushee v. Leavitt, 5 Cal. 160; 63 Am. Dec. 116; Price v. Dunlap, 5 Cal. 483.

Who is real party in interest. The party entitled to the fruits of the action is the real party in interest (Summers v. Farish, 10 Cal. 347); as is also one for whom a contract is made. Western Development Co. v. Emery, 61 Cal. 611. The person for whose benefit a promise is made by a second person to a third party is the party beneficially interested, and may sue. Wormouth v. Hatch, 33 Cal. 121. Where there are distinct sums due distinct payees, each payee is a proper party plaintiff, and can maintain an action in his individual name, without the authority of his associates. Craig v. Fry, 68 Cal. 363; 9 Pac. 550. One of several parties jointly interested in a

claim may recover the whole amount due, if there is no plea of necessary parties plaintiff. Russ v. Tuttle, 158 Cal. 226; 110 Pac. 813. Where an injunction bond is given to a plaintiff and others as obligees, the plaintiff alone may sue, where the property on which the injunction operated was his sole property and the injury is to him alone. Summers v. Farish, 10 Cal. 347. An agent, in whose name a deed, absolute in form, is taken as security for the debt due the principal, is not a necessary party in an action to have the deed declared a mortgage, and foreclosed (Churchill v. Woodworth, 148 Cal. 669; 113 Am. St. Rep. 324; 84 Pac. 155); but the principal is the proper party to bring an action. Anglo-Californian Bank v. Cerf, 147 Cal. 384; 81 Pac. 1077. Whether a judgment, if satisfied, would protect the defendant from further loss or annoyance, is one of the tests, under this section, of the real party in interest. Simpson v. Miller, 7 Cal. App. 248; 94 Pac. 252.

Actions affecting public. A private person has no right to use the name of the people in suing to obtain redress for private wrongs. People v. County Judge, 40 Cal. 479. Where there is a statute requiring that it shall be done, the people, on the application of the attorney-general, may bring an action to compel a board of supervisors to issue bonds for a specific purpose (People v. Board of Supervisors, 50 Cal. 561); and a private party, applying for such relief, must have an interest, of a nature distinguishable from that of the mass of the community. Linden v. Board of Supervisors, 45 Cal. 6. The name of the people cannot be used in a writ of mandamus. People v. Pacheco, 29 Cal. 210. The attorney-general, where the people are interested, may delegate his authority to sue (People v. Board of Supervisors, 36 Cal. 595); and where he has given such authority, and the state is not interested, and the relator only is interested, the attorney-general has no power to control the suit, or to withdraw his consent to the use of the name of the people. People v. North San Francisco Homestead etc. Ass'n, 38 Cal. 564. In certiorari, the people, as an interested party, must bring the action to determine the question of the constitutionality of an act establishing a court (Fraser v. Freelon, 53 Cal. 644); but a private party may sometimes maintain an action for the determination of a question in which the public are interested. Minor v. Kidder, 43 Cal. 229; In re Marks, 45 Cal. 199. Where a board of supervisors has imposed a license tax, and provided for its collection in the name of the people, the county cannot maintain an action in its own name to recover the tax (Monterey County v. Abbott, 77 Cal. 541; 18 Pac. 113; 20 Pac. 73); but an action on a recognizance in a criminal proceeding should be in the name of the county, although the recognizance runs in the name of the people (Mendocino County v. Lamar, 30 Cal. 627); and an action may be brought in the name of the county to recover money belonging to the general fund of the county. Solano County v. Neville, 27 Cal. 465. Although a bond is made in the name of the people, yet the party for whose benefit it was given may sue and recover thereon. Baker v. Bartol, 7 Cal. 551. An action on the official bond of a county treasurer, for failure to pay over moneys, which are alleged to belong to the county, is properly brought in the name of the county. Mendocino County v. Morris, 32 Cal. 145. The people are the proper parties plaintiff in an action to recover a delinquent swamp-land assessment, although the law provides that assessments shall be collected in the same manner as are state and county taxes (People v. Hagar, 52 Cal. 171), but a reclamation district may be a party plaintiff. People v. Haggin, 57 Cal. 579; Reclamation District v. Hagar, 66 Cal. 54; 4 Pac. 945; Reclamation District v. Parvin, 67 Cal. 501; 8 Pac. 43.

Actions by and against corporations. A corporation must sue and be sued in its corporate name. Curtiss v. Murry, 26 Cal. 633. A suit to recover the amount of a subscription to stock of a corporation to be organized, is properly brought by the corporation, as the real party in interest, although the subscription was payable to a trustee or assignors. Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442; 108 Pac. 308. Any action for a recovery on a contract to the subscription stock of the corporation, must be brought in the name of the corporation, although the subscriptions are made between individuals. Western Development Co. v. Emery, 61 Cal. 611; Summers v. Farish, 10 Cal. 347; Wiggins v. McDonald, 18 Cal. 126. A cause of action to recover for misappropriation of funds by the directors, belongs to the corporation, and not to the stockholders. Cogswell v. Bull, 39 Cal. 320.

Actions by assignees. The assignee of a judgment in favor of a ward, against his guardian, may maintain an action against the sureties on the guardian's bond. Heisen v. Smith, 138 Cal. 216; 94 Am. St. Rep. 39; 71 Pac. 180; Moses v. Thorne, 6 Cal. 87; Chilstrom v. Eppinger, 127 Cal. 326; 78 Am. St. Rep. 46; 59 Pac. 696. The assignee of a written agreement to pay money may maintain an action in his own name (Quan Wye v. Chin Lin Hee, 123 Cal. 185; 55 Pac. 783); as may also the assignee of a claim against a county (First National Bank v. Tyler, 21 Cal. App. 791; 132 Pac. 1053); and so also may the assignee of a contract of guaranty to secure the payment of rent reserved in a lease (Reios v. Mardis, 18 Cal. App. 276; 122 Pac. 1091); and the assignee of a contract

may sue for a breach thereof. Moore v. Waddle, 34 Cal. 145. The assignee of a final judgment cannot maintain an action against the sureties upon the undertaking on appeal. Chilstrom v. Eppinger, 127 Cal. 326; 78 Am. St. Rep. 46; 59 Pac. 696; Moses v. Thorne, 6 Cal. 87; and see also Heisen v. Smith, 138 Cal. 216; 94 Am. St. Rep. 39; 71 Pac. 180. The verbal assignment of an account for labor does not make the assignee the proper party plaintiff in an action to foreclose a lien therefor. Ritter v. Stevenson, 7 Cal. 388. The delivery of a note and mortgage, without any indorsement or written transfer, is not such a transfer as will deprive the mortgagee of the right to sue thereon in his own name, with the consent of the transferee; at most, it is only a pledge, and, as between the pledgor and the pledgee, the legal title remains in the former: the rule is, that, where the plaintiff holds the legal title to the demand, he is the real party in interest. Consolidated Nat. Bank v. Hayes, 112 Cal. 75; 44 Pac. 469. The possession of a promissory note is prima facie evidence of ownership, and entitles the holder to sue. McCann v. Lewis, 9 Cal. 246.

Action by trustees. Where a plaintiff, before the rendition of a judgment in ejectment, conveys the premises in controversy, an action on the undertaking on appeal, given for the sale and occupation of the premises, is properly brought in his name, as he is the trustee of an express trust for the benefit of his grantee (Walsh v. Soule, 66 Cal. 443; 6 Pac. 82); but the fact that the trustee of an express trust may maintain an action does not affect the right of the real party in interest to maintain it. Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442; 108 Pac. 308.

Other actions. The widow of an intestate is the proper party to prosecute a suit to recover land. Page v. Garver, 146 Cal. 577; 80 Pac. 860. An action to recover money due an infant must be brought in the name of the infant, by his guardian. Fox v. Minor, 32 Cal. 111; 91 Am. Dec. 566. A bankrupt cannot maintain a suit in his own name in relation to his own property, not exempt, pending proceedings in bankruptcy, after the appointment of a trustee. Simpson v. Miller, 7 Cal. App. 248; 94 Pac. 252. In an action for trespass on real property, the proper party plaintiff is the person in actual possession. Lightner Min. Co. v. Lane, 161 Cal. 689; Ann. Cas. 1913C, 1093; 120 Pac. 771. The person having the possession of and the legal title to anything in an action has the right, as the real party in interest, to maintain the action (Woodsum v. Cole, 69 Cal. 142; 10 Pac. 331); and one who obtains title to a note and mortgage through a decree of distribution is entitled to sue thereon. West v. Mears, 17 Cal. App. 718; 121 Pac. 700. An action to condemn a particular riparian right is not an action to condemn absolutely all rights in and to a part of the flow of the stream, and persons having no right or interest in such riparian right, are not proper parties to the action. San Joaquin etc. Irrigation Co. v. Stevinson, 164 Cal. 221; 128 Pac. 924.

Action by wife. See note post, § 370.

Who is real party in interest within statute defining parties by whom action must be brought. See note 64 L. R. A. 581.

CODE COMMISSIONERS' NOTE. Stats. 1864, p. 29.

1. **Assignee of a judgment.** A judgment is not negotiable, like a bill of exchange by the law merchant, but is a mere chose in action, vesting an equitable right in the assignee thereof to the proceeds of it, with the right to the usual and legal means of collecting the amount due; and, between two bona fide purchasers of a judgment, the purchaser first in time is prior in right. Fore v. Manlove, 18 Cal. 436.

2. **Answer, how framed.** See 2 Abb. Forms, p. 31; Voorhees' N. Y. Code, p. 149, note. Wedderspoon v. Rogers, 32 Cal. 569.

3. **Real party in interest.** Action must be in name of real party in interest. A stranger to a transaction cannot maintain a suit. Chenery v. Palmer, 5 Cal. 133.

4. **Real party in interest.** The possession of a note, whether obtained before or after maturity, is prima facie evidence of ownership. The averment of a valuable consideration for the transfer to the plaintiff is generally immaterial. The transfer, with or without value, confers upon the holder the right of action; and a consideration need not be proved, unless a defense is interposed which would otherwise preclude a recovery. McCann v. Lewis, 9 Cal. 246; James v. Chalmers, 5 Sand. 52; 6 N. Y. 209. And in such a case the objection that the plaintiff is not the owner of the note is unavailing. His right to maintain action cannot be questioned, except the defendant pleads payment to, or offset against, the party alleged to be the true owner. Price v. Dunlap, 5 Cal. 483; Gushee v. Leavitt, 5 Cal. 160; 63 Am. Dec. 116.

5. **Real party in interest, whether the relief sought is legal or equitable.** We have but one form of action for the enforcement of private rights, and, with certain exceptions, the code requires that every action shall be prosecuted in the name of the real party in interest. Cases of assignment are not included in these exceptions (see § 369); and in the form of the remedy no distinction exists between legal and equitable rights. In this respect the two classes of rights are placed precisely upon the same footing, and must undergo the same remedial process for their enforcement. Wiggins v. McDonald, 18 Cal. 127.

6. **Several obligees in a bond.** A bond given to all the obligees by name, and using no words expressing a several obligation, yet necessarily creates a several liability, the design of it being to secure each and all of the obligees from damages or injury. In such cases, however, under the common-law practice, it has been held that the suit was properly brought in the name of the several obligees; and the question was said to be purely technical, to wit, With whom was the contract made?—the obligation being technically to both to pay whatever damage might be sustained by either, though, when recovered, the money would go to the party who sustained the injury. Whatever the rule may be under the old system, we think that, under our system, the right of action is in the party sustaining the injury; for, on a recovery, the other party, if entitled to receive the money at all, if judgment were had in the name of both, would hold it by right of, and as a trustee for, the other; and our Practice Act, for convenience, has given the right to sue to the party beneficially entitled to the fruits of the action. Summers v. Farish, 10 Cal. 347; Prader v. Puckett, 13 Cal. 591.

7. **In a joint bond, each party may sue** for his several damages, notwithstanding the bond is

made payable to the obligees jointly. Lally v. Wise, 28 Cal. 539. See also Browner v. Davis, 15 Cal. 11.

8. **Party beneficially interested in damages may sue on bond given to officer, state, or corporation.** Formerly, where a bond was given to an officer, state, or corporation, suit had to be brought in the name of the party holding the legal title, for the benefit of the persons interested; but our statute has introduced a new rule, and, by the provisions of the Practice Act, the suit must be prosecuted in the name of the real party in interest, i. e., the party beneficially interested in the damages. Baker v. Bartol, 7 Cal. 551; Lally v. Wise, 28 Cal. 540; Wormouth v. Hatch, 33 Cal. 121. A plaintiff, being the real party in interest, has a right to sue upon a bond, though made payable to the people of the state. Baker v. Bartol, 7 Cal. 551.

9. **Assignees.** Where A owes B, and B owes C, and A and B, without consulting C, agree between themselves that A shall pay C what A owes to B, it was held that an action could not be maintained by C against A, for want of privity (McLaren v. Hutchinson, 18 Cal. 80); but this was questioned and declared open for further investigation in Lewis v. Covillaud, 21 Cal. 189; and it was also held, that where A, B, and C agree among themselves that A shall be liable to C for a debt due from B to C, the assignee of C could sue in his own name for the debt due from A. McLaren v. Hutchinson, 22 Cal. 190, 83 Am. Dec. 59, and cases therein cited.

10. **Action of ejectment. Legal title to be represented.** In an action of ejectment, the plaintiff suing for possession must have or represent the legal title: an equitable title is not sufficient. The action must be in the name of the party holding the legal title. Emeric v. Penniman, 26 Cal. 123; see also Estrada v. Murphy, 19 Cal. 272; Clark v. Lockwood, 21 Cal. 222.

11. **Action by sheriff against party owing attachment debtor.** Where an attachment was issued by the court of first instance against the property of a debtor, and the sheriff had executed the same, and was ordered to make the amount due the creditor out of the goods, chattels, and property of the debtor. Held: that the sheriff could not maintain an action in his own name to recover a sum owing to the attachment debtor by a third person for goods sold and delivered. Sublette v. Melhado, 1 Cal. 104.

12. **Sheriff not responsible when goods released from attachment on sufficient undertaking.** An undertaking given to a sheriff to procure a release of goods attached is for the benefit of the plaintiff, notwithstanding it is in the name of the sheriff, and the plaintiff may sue on it; and if the sheriff takes a sufficient statutory undertaking, he has no further responsibility. Curiac v. Packard, 29 Cal. 194.

13. **Party procuring patent for land, who has no right thereto. Who may maintain action against.** If the United States confirm a grant of land, and issue a patent therefor, to a party who did not own the grant and had no right to the patent, the patentee can only hold the legal title in trust for the real parties in interest; and as to who are proper parties in an action for affirmative relief, see facts of case in Salmon v. Symonds, 30 Cal. 306, and authorities there cited. See also § 378.

14. **A party plaintiff who was agent for defendants in the transaction complained of.** The fact that the owner of a ship, lost while being towed to sea, was the agent for the owners of the steam-tug, does not relieve the latter from any of the obligations under which they contract with others. White v. Steam-tug Mary Ann, 6 Cal. 462; 65 Am. Dec. 523.

15. **Corporations as plaintiffs.** The allegation that plaintiff is a corporation under the laws of the state is sufficient to establish the legal capacity to sue. California Steam Nav. Co. v. Wright, 6 Cal. 258; 65 Am. Dec. 511.

16. **Assignable instruments.** A contract not to run boats on a certain line of travel, and on failure to comply with such contract to pay fifteen thousand dollars, is an instrument in writing for the payment of money, and assignable by our laws. California Steam Nav. Co. v. Wright, 6 Cal. 258; 65 Am. Dec. 511.

17. **What may be assigned. Assignees. Acceptance of orders.** Funds in the hands, or to come into the hands, of the third person, are assignable, and the drawees having given an order and received notice of its acceptance are liable to the payees, without any other express promise to pay. Pope v. Huth, 14 Cal. 407, and cases cited.

18. **Acceptance of orders.** Where an order is drawn for an amount due, it is a prima facie assignment of the debt due. Even if it was only for part of a debt, no one could make the objection but the defendants. McEwen v. Johnson, 7 Cal. 260; Wheatley v. Strobe, 12 Cal. 97; 73 Am. Dec. 522. It would seem that a debtor may accept orders in favor of different persons, for different portions of the debt, and those accepted orders will bind all parties. McEwen v. Johnson, 7 Cal. 260.

19. **Assignment of debt by parcels.** And so debts due a party may by him be split up and assigned in parcels, and the debtor subjected to costs of more suits than was in the first place contemplated, if such debtor consents thereto. Marzion v. Pioche, 8 Cal. 536.

20. **Agreement not to defend suit assignable.** A agrees to pay a certain sum of money to B, if B will cease to defend a certain suit. Held: such an agreement is assignable, and gives the assignee a right to suit in his own name. Gray v. Garrison, 9 Cal. 325.

21. **Assignable contract.** A contract leasing a stallion for a certain time, and with a right reserved to have nine mares covered by the stud during the continuance of the lease, may be assigned, and carries therewith all the benefits arising out of the contract. But the assignee must give notice to the lessee of the assignment. Doll v. Anderson, 27 Cal. 248.

22. **Contingent rights and interests are not ordinarily assignable at law, but they are in equity.** Assignments of such rights and interests, in being, are upheld and enforced by courts of equity, And, more than this, these courts support and give effect to assignments of things which have no present actual existence, but rest in mere possibility; not as a present positive transfer operates in præsenti, but as a present contract, to take effect and attach as soon as the thing comes in esse. Bibend v. Liverpool etc. Fire and Life Ins. Co., 30 Cal. 78; Pierce v. Robinson, 13 Cal. 121; 2 Story's Eq., § 1040; Mitchell v. Winslow, 2 Story, § 638; Fed. Cas. No. 9673.

23. **Assignment of policy of insurance to one having no interest in property insured.** See Bibend v. Liverpool etc. Fire and Life Ins. Co., 30 Cal. 89; see also Civ. Code, §§ 2546–2557.

24. **Assessment for street improvements assignable.** An assessment for street improvements against an owner of property assignable by the contractor. Cochran v. Collins, 29 Cal. 129. And a contract for improving a street may be assigned. See Taylor v. Palmer, 31 Cal. 248, and cases cited.

25. **Suits by assignees.** Where A was indebted to a company, and the company indebted to B, if all parties agreed that A should pay his debt to B it is an equitable assignment, and the assignees can sue for the amount of the assignment. Wiggins v. McDonald, 18 Cal. 126. An appropriation of the fund is all that is necessary, and any act amounting to such an appropriation was sufficient to constitute an equitable assignment of the debt. Id.

26. **Assignment of a judgment assignment of debt on which judgment was obtained.** It matters not if an assignment of a judgment is made, and the judgment is invalid for want of jurisdiction, for the assignment of a judgment so void is an assignment of the debt for which it was obtained. Brown v. Scott, 25 Cal. 196.

27. **Cause of action assignable.** Whether a cause of action is assignable depends mainly upon whether, in case of the death of the assignor, it would descend to his representatives. Zabriskie v. Smith, 13 N. Y. 322; 64 Am. Dec. 551; McKee v. Judd, 12 N. Y. 622; 64 Am. Dec. 515; Dininny v Fay, 38 Barb. 18; Fried v. New York Central R. R. Co., 25 How. Pr. 285; People v. Tioga Common Pleas, 19 Wend. 73.

28. **Suit by assignee of personal property.** Where personal property is wrongfully detained, the owner may assign his title thereto, and the assignee may maintain an action therefor. Cass v. New York etc. R. R. Co., 1 E. D. Smith, 522; McGinn v. Worden, 3 E. D. Smith, 355; Hall v. Robinson, 2 N. Y. 295; The Brig Sarah Ann, 2 Sumn. 211; Fed. Cas. No. 12342; 2 Hilliard on Torts, 275; Lazard v. Wheeler, 22 Cal. 142.

29. **A right of action for the wrongful taking and conversion of personal property is assignable,** and, under the provisions of the code, the assignee can recover upon the same in his own name. McKee v. Judd, 12 N. Y. 622; 64 Am. Dec. 515; Hoyt v. Thompson, 5 N. Y. 347; see also North v. Turner, 9 Serg. & R. 244; Lazard v. Wheeler, 22 Cal. 142.

30. **A damage caused by trespass on land may be assignable.** More v. Massini, 32 Cal. 590.

31. **Causes of action not assignable.** A judgment in an action for a non-assignable tort becomes a debt, but the recovery of judgment does not change the character of the debt so as to make it assignable. Lawrence v. Martin, 22 Cal. 173.

32. **Partner cannot assign claim against his firm. Assignee cannot maintain an action thereon.** A partner who has a claim against the firm of which he is a member, and who cannot therefore sue the firm at law, cannot confer upon his assignee a right to maintain such an action. If he could avoid the disability by assignment, it would defeat all the substantial reasons upon which the rule is founded. Bullard v. Kinney, 10 Cal. 63.

33. **Vendor's lien not assignable.** A vendor's lien cannot be assigned. Baum v. Grigsby, 21 Cal. 172; 81 Am. Dec. 153; affirmed in Lewis v. Covillaud, 21 Cal. 178; Williams v. Young, 21 Cal. 227.

34. **A cause of action arising out of a tort is not assignable.** Oliver v. Walsh, 6 Cal. 456.

35. **An assignment of an account by indorsement of the word "assigned,"** signed by the owner of the account, is sufficient. Ryan v. Maddux, 6 Cal. 247.

36. **Plaintiff designated by name of copartnership firm.** A complaint, which contains no other designation of the party plaintiff than the name of a partnership firm, is defective. Gilman v. Cosgrove, 22 Cal. 356.

37. **Set-off judgment not defeated as a set-off by assignment.** Where, in the same action, two judgments were entered, one for the plaintiff for a certain sum, and one for the defendant for a less sum: Held: that defendant has a right to set off his judgment, pro tanto, against that of the plaintiff, and that this right could not be defeated by any assignment by plaintiff of his judgment before application for the set-off. Porter v. Liscom, 22 Cal. 430; 83 Am. Dec. 76.

38. **Promise to third party.** Where the obligation with which it is sought to affect defendants personally arises out of an alleged promise given by them to W. and A. Elder, of whom they bought the land mortgaged by Pangburn to plaintiff, that they would pay a portion of the purchase-money, equal to the amount due or to grow due upon the note given by Pangburn to plaintiff, and secured by said mortgage, this is not a promise to pay the debt of another, nor to pay the Pangburn note, but an original promise by them to the Elders to pay their own debt to them, by paying a certain amount of money to plaintiff. If such promise was given, plaintiff could recover upon it as the party beneficially interested. Wormouth v. Hatch, 33 Cal. 121.

39. **In whose name writ of mandate must be applied for.** An application for the writ of mandate must be prosecuted in the name of the real party in interest, and if the name of the people is used and the people have no interest, and the relator alone is interested, the writ will be denied. People v. Pacheco, 29 Cal. 210.

40. **Who are proper parties in an action for partition.** Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139.

41. **Suit by assignee of a claim.** An absolute assignment of a demand enables the assignee to sue for and recover the whole debt, even though by the assignments he acquired only a portion of the demand. Gradwohl v. Harris, 29 Cal. 150.

42. **Intervention by part-owner of claim sued on.** If the owner of a claim assigns it absolutely, retaining, however, an interest in it, he may intervene to protect his interests in an action brought by the assignee to collect the same; and if he does not intervene, he is bound by the judgment. Gradwohl v. Hatch, 29 Cal. 150.

§ 368. Assignment of thing in action not to prejudice defense. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity.

Assignment and survival of causes of action. See post, §§ 1582 et seq.

Negotiable instruments, and rights of parties thereto. Civ. Code, §§ 3086 et seq., where the subject is discussed.

Thing in action, defined. Civ. Code, § 953.

Legislation § 368. Enacted March 11, 1872; based on Practice Act, § 5 (New York Code, § 112), which had (1) the words "shall be" instead of "is" before "without," (2) the word "shall" instead of "does" before "not apply," and (3) the word "due" instead of "maturity."

Assignment of thing in action. The rule which prevailed in equity is adopted in this section (McCabe v. Grey, 20 Cal. 509), and it embraces every kind of thing in action, except negotiable paper, which paper alone is excepted from its operation. St. Louis Nat. Bank v. Gay, 101 Cal. 286; 35 Pac. 876; McKenney v. Ellsworth, 165 Cal. 326; 132 Pac. 75. "A thing in action" is a right to recover money or other personal property by a judicial proceeding (Haskins v. Jordan, 123 Cal. 157; 55 Pac. 786); and "a thing in action not arising out of contract" means a thing in action not arising out of express contract. Oliver v. Walsh, 6 Cal. 456. The law does not require that the assignee for value of a thing in action shall take it subject to latent equities of third persons, of which he has no notice, but only that the assignment shall be subject to equities existing in favor of the debtor. First Nat. Bank v. Perris Irrigation Dist., 107 Cal. 55; 40 Pac. 45; Wright v. Levy, 12 Cal. 257. Equity will uphold assignments, not only of choses in action, but also of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility; and an agreement for such interests will take effect as such

assignment, when the subjects to which they refer have ceased to rest in possibility, and have ripened into reality. Pierce v. Robinson, 13 Cal. 116. An unsatisfied judgment is a thing in action, within this section (Haskins v. Jordan, 123 Cal. 157; 55 Pac. 786); but an assignee thereof, after the reversal of the judgment, stands in the same position as the assignor. Reynolds v. Harris, 14 Cal. 667; 76 Am. Dec. 459. The rights of the assignee of a judgment are not affected by payments voluntarily made by the judgment debtor, notwithstanding the latter had no notice of the assignment. Brown v. Ayres, 33 Cal. 525; 91 Am. Dec. 655. The assignee of a judgment is simply the holder of an equity, with the right to use the assignor's name to enforce it, and he occupies the position of the assignor as to all the defenses which existed between the original parties. Wright v. Levy, 12 Cal. 257. Equity will also uphold an assignment of the funds in the hands, or to come into the hands, of another (Pope v. Huth, 14 Cal. 403; Pierce v. Robinson, 13 Cal. 116; Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423), and also the assignment of an insurance policy, where there is no transfer of the property. Bergson v. Builders' Insurance Co., 38 Cal. 541. The lease of a stallion, with a reservation, is assignable, and the assignee is entitled to the benefit arising out of the contract. Doll v. Anderson, 27 Cal. 248. So also is an agreement to pay a certain sum of money to a defendant to sign a stipulation waiving a jury, and to withdraw a defense interposed. Gray v. Garrison, 9 Cal. 325. An order drawn for the amount due the defendant is prima facie an assignment of the debt due. McEwen v. Johnson, 7 Cal. 258; Wheatley v. Strobe, 12 Cal. 92; 73 Am. Dec. 522; Pope v. Huth, 14 Cal. 403. A part of a debt or demand cannot be assigned, without the debtor's consent, so as to give the assignee a right of action, for the creditor cannot split up his cause of action (Marziou v. Pioche, 8 Cal. 522); but such an assignment is valid in equity, without the consent of the debtor. Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423. A partnership in an unsettled account is not assignable, where there is no balance struck, and no promise on the part of the individual members to pay their ascertained proportions of the amount. Bullard v. Kinney, 10 Cal. 60. A cause of action for tort is not assignable (Lawrence v. Martin, 22 Cal. 173), unless reduced to judgment; then the judgment becomes a debt, and is undoubtedly assignable. Oliver v. Walsh, 6 Cal. 456.

Without prejudice to set-off or other defense. Set-off, as used in this section, is applicable to demands independent in their nature and origin; and counterclaim includes both recoupment and set-off, and is, strictly speaking, a pleading by which matters arising out of recoupment or set-off are averred. St. Louis Nat. Bank v. Gay, 101 Cal. 286; 35 Pac. 876. The assignee takes for a valuable consideration an assignment of a judgment subject to the right of set-off existing between the parties at the time of the purchase. Hobbs v. Duff, 23 Cal. 596; Jones v. Chalfant, 55 Cal. 505. A judgment is not available as a set-off in an action of common-law jurisdiction, where the parties, in such case, are not the same; but in a court of equity it is otherwise; the court will look beyond the nominal parties to the suit, to the real parties in interest, and adjudicate the rights between them accordingly. Hobbs v. Duff, 23 Cal. 596. The assignee of an unsatisfied judgment takes it cum onere, subject to all rights of set-off affecting it that the judgment debtor had, or might acquire, before notice to him of the assignment. Haskins v. Jordan, 123 Cal. 157; 55 Pac. 786. Under this section, and § 1459 of the Civil Code, a defendant may avail himself of any set-off or defense acquired before notice of the assignment of any non-negotiable cause of action. Helmer v. Parsons, 18 Cal. App. 450; 123 Pac. 356. It is the duty of the proposed assignee of a non-negotiable cause of action to inquire as to any defenses or set-offs against it. Helmer v. Parsons, 18 Cal. App. 450; 123 Pac. 356.

Does not apply to negotiable paper. An assignee or a transferee, bona fide, for value, before maturity, of a promissory note or other negotiable instrument, takes the same free from all equities, counterclaims, and set-offs (Payne v. Bensley, 8 Cal. 260; 68 Am. Dec. 318; Robinson v. Smith, 14 Cal. 94; Naglee v. Lyman, 14 Cal. 450); after maturity, a different rule prevails as to the first taker and all subsequent takers (Folsom v. Bartlett, 2 Cal. 163; Vinton v. Crowe, 4 Cal. 309; Fuller v. Hutchings, 10 Cal. 523; 70 Am. Dec. 746; Hayward v. Stearns, 39 Cal. 58); but where the original assignee took the instrument before maturity, bona fide, for value, discharged of all equities, counterclaims, and set-offs, all the subsequent indorsers will hold in like manner, even though they take after maturity. Bank of Sonoma County v. Gove, 63 Cal. 355; 49 Am. Rep. 92. Where a non-negotiable note is transferred by assignment after maturity, the assignee takes it subject to all equities and defenses which could have been urged against the original payee. San José Ranch Co. v. San José Land etc. Co., 132 Cal. 582; 64 Pac. 1097; St. Louis Nat. Bank v. Gay, 101 Cal. 286; 35 Pac. 876.

Before maturity. An assignee, bona fide, for value, of a negotiable instrument, before maturity, takes the same free from all equitable defenses (Hays v. Plummer, 126 Cal. 107; 77 Am. St. Rep. 153; 58 Pac. 447); and an assignee of negotiable paper,

indorsed and delivered before maturity, is presumed to be the bona fide owner thereof, and all intendments are in favor of his right. Palmer v. Goodwin, 5 Cal. 458. A negotiable promissory note, not yet due, taken bona fide, as collateral security for a pre-existing debt, is taken free from any equities, defenses, or set-offs existing between the original parties (Payne v. Bensley, 8 Cal. 260; 68 Am. Dec. 318); but where assigned after maturity, it is taken subject to equities. Graves v. Mono Lake etc. Mining Co., 81 Cal. 303; 22 Pac. 665. An assignee after maturity takes the same interest the assignor had, and the thing in action is subject to the same defenses, legal and equitable, as if it were in the hands of the assignor. Folsom v. Bartlett, 2 Cal. 163. A check, after dishonor, is taken subject to all the defenses to which it would be subject in the hands of the original holder. Fuller v. Hutchings, 10 Cal. 523; 70 Am. Dec. 746.

After maturity. A negotiable note, taken after maturity, is taken subject to all subsisting equities between the maker and the payee, but not such as subsisted between the maker and an intermediate holder. Warner v. Wilson, 4 Cal. 310.

Non-negotiable instrument. Non-negotiable paper is subject to all set-offs, equities, and defenses, legal and equitable, in the hands of the assignee, that existed in favor of the payor, against the payee, at the time of the assignment, or of notice thereof (St. Louis Nat. Bank v. Gay, 101 Cal. 286; 35 Pac. 876; Mitchell v. Hackett, 14 Cal. 661), and is also subject to all set-offs that mature after notice, and before suit brought. St. Louis Nat. Bank v. Gay, 101 Cal. 286; 35 Pac. 876. The answer must show that the counterclaim or set-off arose before the assignment, or before the defendant had notice thereof, or, on motion, judgment for plaintiff must be entered on the pleadings. Benham v. Connor, 113 Cal. 168; 45 Pac. 258; and see Hemme v. Hays, 55 Cal. 337; Loveland v. Garner, 74 Cal. 298; 15 Pac. 844; San Francisco v. Staude, 92 Cal. 560; 28 Pac. 778.

Consideration. The delivery of a chose in action, for a valuable consideration, without a writing, is a sufficient transfer. Bibend v. Liverpool etc. Fire and Life Ins. Co., 30 Cal. 78. The presumption is, that a check was given upon a valid consideration; but this presumption may be rebutted. Fuller v. Hutchings, 10 Cal. 523; 70 Am. Dec. 746. A valid consideration is necessary to the validity of an assignment; a pre-existing debt is a valuable consideration. Payne v. Bensley, 8 Cal. 260; 68 Am. Dec. 318; Robinson v. Smith, 14 Cal. 94; Naglee v. Lyman, 14 Cal. 450; Frey v. Clifford, 44 Cal. 335; Davis v. Russell, 52 Cal. 611; 28 Am. Rep. 647; Sackett v. Johnson, 54 Cal. 107. A claim may be assigned either for a valuable consideration or for collection, and may be enforced by the assignee, subject to any defense or counterclaim against the assignor. Watkins v. Glas, 5 Cal. App. 68; 89 Pac. 840.

Sufficiency of assignment. No particular form of words is necessary to constitute an assignment. Wiggins v. McDonald, 18 Cal. 126. An indorsement of an account, "Assigned to A and B," signed by the owner of the account, is sufficient. Ryan v. Maddux, 6 Cal. 247. "Please hold to the order of Messrs. A & B, of C, (£500) five hundred pounds, sterling, of insurance, effected on cargo per bark D, and oblige," is an equitable assignment of the funds in the hands or to come into the hands of the drawees, to the payees. Pope v. Huth, 14 Cal. 403. "Please pay to the bearer of these lines two hundred and thirty-six dollars, and charge the same to my account," where given for a valuable consideration, and for the whole amount of the demand against the drawee, operates as an assignment of the debt or fund against which it was drawn. Wheatley v. Strobe, 12 Cal. 92; 73 Am. Dec. 522. A non-negotiable contract, indorsed in blank, passes by delivery, the same as a negotiable one, but subject to all equities and defenses existing in favor of the maker at the time of indorsement. Lucas v. Pico, 55 Cal. 126. An order given by a creditor on his debtor is an equitable assignment of the claim, where it covers the full amount, without acceptance; and where for less than the full amount, and accepted, it is an assignment pro tanto. McEwen v. Johnson, 7 Cal. 258; Wheatley v. Strobe, 12 Cal. 92; 73 Am. Dec. 522; Pierce v. Robinson, 13 Cal. 116; Pope v. Huth, 14 Cal. 404; Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423. "Pay the within, in case of loss, to C D," is a sufficient assignment of an insurance policy, where indorsed on the policy, which was delivered to the assignee. Bergson v. Builders' Ins. Co., 38 Cal. 541. A negotiable promissory note can be transferred only by indorsement and delivery; and such indorsement can be made only by writing the indorser's name on the back of the instrument if there is room, and if not, then on a paper so attached as in effect to become a part of it (Hays v. Plummer, 126 Cal. 107; 77 Am. St. Rep. 153; 58 Pac. 447); but the assignment must be delivered, to be valid; the mere signing of an assignment is insufficient to transfer title. Ritter v. Stevenson, 7 Cal. 388. An agreement to pay the debts of another, not assented to by the creditor, as part consideration, is not an assignment, pro tanto, of the debts to the creditor. McLaren v. Hutchinson, 18 Cal. 80.

Notice of assignment. Notice of assignment of a claim, other than a negotiable instrument assigned before maturity, is necessary to protect the assignee. Doll v. Anderson, 27 Cal. 248; Bank of Stockton

v. Jones, 65 Cal. 437; 4 Pac. 418; Hogan v. Black, 66 Cal. 41; 4 Pac. 943; Renton v. Monnier, 77 Cal. 449; 19 Pac. 820. Thus, in the case of a street assessment, settlement with the assignor and cancellation of the assessment, before notice of assignment, is a good defense to an action by the assignee (Hogan v. Black, 66 Cal. 41; 4 Pac. 943); and where a promissory note is assigned after maturity, payment to the original payee, before notice of the assignment, discharges the maker. Bank of Stockton v. Jones, 65 Cal. 437; 4 Pac. 418. The assignee of a bill of goods to arrive, part of the purchase price having been paid, and the balance to be paid upon arrival, on tendering such balance within a reasonable time after arrival, is entitled to possession of the goods, without previous notice of assignment. Morgan v. Lowe, 5 Cal. 325; 63 Am. Dec. 132. The question of the giving and the sufficiency of the notice is for the jury. Renton v. Monnier, 77 Cal. 449; 19 Pac. 820. Notice to an agent, of facts arising from or connected with the subject-matter of the agency, is notice to the principal; and it is constructive notice to the principal, when the notice comes to the agent while he is concerned for the principal, and in the course of the very transaction. Bierce v. Red Bluff Hotel Co., 31 Cal. 160. But an agent has only such authority as his principal actually or ostensibly confers upon him; and notice to the agent, of facts not arising from or connected with the subject-matter of his agency, is not notice to the principal, unless actually communicated to him. Renton v. Monnier, 77 Cal. 449; 19 Pac. 820.

Action by an assignee. An assignee may commence an action in his own name, on contracts and things in action assigned (Wheatley v. Strobe, 12 Cal. 92; 73 Am. Dec. 522; Wiggins v. McDonald, 18 Cal. 126; Gradwohl v. Harris, 29 Cal. 150; Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423); and also on a non-negotiable instrument, indorsed (Gushee v. Leavitt, 5 Cal. 160; 63 Am. Dec. 116; Price v. Dunlap, 5 Cal. 483); and on a warehouse receipt, assigned in good faith and in the ordinary course of business. Davis v. Russell, 52 Cal. 611; 28 Am. Rep. 647. The assignee of a non-negotiable contract is the proper party plaintiff; for the holder of a non-negotiable contract is presumptively the owner, and, as the real party in interest, is entitled to maintain an action thereon in his own name (Lucas v. Pico, 55 Cal. 126; Wheatley v. Strobe, 12 Cal. 92; 73 Am. Dec. 522; and see Dana v. San Francisco, 19 Cal. 486; People v. Gray, 23 Cal. 125; National Bank v. Herold, 74 Cal. 603; 5 Am. St. Rep. 476; 16 Pac. 507; Woodward v. Brown, 119 Cal. 283; 63 Am. St. Rep. 108; 51 Pac. 2, 542), and he may also bring an action on an account held for collection, where he has the legal title, and interest to the extent of a fee or compensation. Curtis v. Sprague, 51 Cal. 239; Toby v. Oregon Pacific R. R. Co., 98 Cal. 490; 33 Pac. 550; Tuller v. Arnold, 98 Cal. 522; 33 Pac. 445; Greig v. Riordan, 99 Cal. 316; 33 Pac. 913. On a judgment assigned for value, or purchased at a sale under execution, the purchaser takes as assignee (Moses v. Thorne, 6 Cal. 87; Fore v. Manlove, 18 Cal. 436; Low v. Burrows, 12 Cal. 181); but it is otherwise as to an assignment after verdict, and before judgment, in an action for tort, which is unassignable. Lawrence v. Martin, 22 Cal. 173. The assignment of a claim against a city, on a written contract for street improvements, is not a mere assignment, but transfers the right to collect, demand, and receive all moneys due, even if recovered on quantum meruit. Wetmore v. San Francisco, 44 Cal. 294. A cause of action based upon the breach of a covenant in a deed, not running with the land, does not pass by a conveyance of the land. Lawrence v. Montgomery, 37 Cal. 183. The owner of personal property wrongfully detained may assign his title thereto, and the assignee may maintain an action therefor. Lazard v. Wheeler, 22 Cal. 139. A claim for damages for trespass on land is assignable, and the assignee may maintain an action to recover same (More v. Massini, 32 Cal. 590), and an agreement to pay money to a party to an action, in consideration of his withdrawal of his defense is also assignable (Gray v. Garrison, 9 Cal. 325), and a contract leasing the services of a stallion is assignable. Doll v. Anderson, 27 Cal. 248. An order upon a third person for the whole amount of a debt owing by such third person, operates as an assignment of the debt, although not accepted by the debtor. Wheatley v. Strobe, 12 Cal. 92; 73 Am. Dec. 522; Pierce v. Robinson, 13 Cal. 116; Pope v. Huth, 14 Cal. 403; Thomas v. Rock Island etc. Mining Co., 54 Cal. 578. Where an order is for less than the whole amount of the claim, but is made with the knowledge and consent of the drawee, the assignee must sue alone for his portion. McEwen v. Johnson, 7 Cal. 258; Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423; Thomas v. Rock Island etc. Mining Co., 54 Cal. 578; Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423; Marziou v. Pioche, 8 Cal. 522. An assignee, holding in trust for another, may maintain an action in his own name. Grant v. Heverin, 77 Cal. 263; 18 Pac. 647; 19 Pac. 493. An assignment by a trustee will make the assignee, with notice of the trust, a trustee, the same as his assignor, and he may maintain suit in his own name. Grant v. Heverin, 77 Cal. 263; 18 Pac. 647; 19 Pac. 493. Where the assignment of a debt is absolute, the assignee may recover the full amount thereof, notwithstanding the fact that, by the

assignment, he acquired only a portion of the demand. Ginocchio v. Amador etc. Mining Co., 67 Cal. 493; 8 Pac. 29; Gradwohl v. Harris, 29 Cal. 150; Grant v. Heverin, 77 Cal. 263; 18 Pac. 647; 19 Pac. 493. In an action against an assignee, where the consideration passing from him is not equal to the amount of the paper, the recovery is limited to the amount actually paid him. Coye v. Palmer, 16 Cal. 158. The assignee of a judgment cannot sue upon the appeal bond, without an assignment thereof. Moses v. Thorne, 6 Cal. 87.

CODE COMMISSIONERS' NOTE. 1. **Purchasers and assignees of judgments.** A purchaser of a judgment is not bound to inquire into latent equities existing in the hands of third parties, and is not affected as to third parties by frauds, of which he had neither actual nor constructive notice. Wright v. Levy, 12 Cal. 257. The rule caveat emptor applies as to the right of third parties in the purchase of a judgment, as well as in the purchase of other personal property. Mitchell v. Hockett, 25 Cal. 544; 85 Am. Dec. 151. A purchaser of a judgment takes it subject to all set-offs existing at time of purchase. Hobbs v. Duff, 23 Cal. 596; Porter v. Liscom, 22 Cal. 430; 83 Am. Dec. 76; McCabe v. Grey, 20 Cal. 509; Fore v. Manlove, 18 Cal. 436

2. **Payment by a garnishee.** If the judgment creditor assigns the judgment, and the judgment debtor, without notice of the assignment, afterwards pays the same voluntarily to the sheriff, by reason of the service of garnishee process upon him, the rights of the assignee are not affected, and he may still enforce the judgment. Brown v. Ayres, 33 Cal. 525; 91 Am. Dec. 655.

3. **Promissory notes assigned as collateral security.** A negotiable promissory note, not yet due, and taken bona fide as collateral security for a previous debt, is not subject to a defense existing at the date of the assignment between the original parties. Payne v. Bensley, 8 Cal. 260; 68 Am. Dec. 318; Naglee v. Lyman, 14 Cal. 450; Robinson v. Smith, 14 Cal. 94. Where there is any change in the legal rights of the parties in relation to the antecedent debt, the creditor taking the collateral security is considered as a holder for value, and the paper not subject to equities existing between the original parties. Naglee v. Lyman, 14 Cal. 454. But where A gave his note to B in order that B might raise money on it as collateral security, and B raised the money thereon, and then took up the note from the pledgees, it was held that B could not sue on the note, as it had answered all the purposes for which it was given; and an assignee of B, taking the note after maturity, and upon no new consideration, took it subject to the same defense. Coghlin v. May, 17 Cal. 515.

4. **Notes assigned and indorsed after maturity.** An indorsee, after maturity, takes the same interest that the indorser had, and his claim is subject to the same defense. Folsom v. Bartlett, 2 Cal. 163. If a party takes a note after its maturity, he takes it subject to all subsisting equities between the maker and the payee, but not subject to such as subsisted between the maker and any intermediate holder. Vinton v. Crowe, 4 Cal. 309.

5. **Transfer of check after dishonor.** As to all persons except a bona fide holder without notice, a check given for a gambling debt is void. If it was presented to the bank, and payment refused, and then it was transferred, after dishonor, the assignee takes it subject to all the defenses to which it was subject in the hands of the first holder. Fuller v. Hutchings, 10 Cal. 526; 70 Am. Dec. 746.

6. **Assignment of judgment.** The assignee of the judgment is only the holder of an equity, with the right to use the judgment and the name of the plaintiff to enforce it, and stands in the shoes of the assignor as to all defenses which existed against the judgment between the parties to it. It is like a note assigned after due. Wright v. Levy, 12 Cal. 257; Northam v. Gordon, 23 Cal. 255; Hobbs v. Duff, 23 Cal. 596.

7. **What assignments equity upholds.** Equity upholds assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no actual existence, but vest in possibility. See note to preceding section, and the cases there cited, of Pierce v. Robinson, 13 Cal. 123; Bibend v. Liverpool etc. Fire and Life Ins. Co., 30 Cal. 78; Pope v. Huth, 14 Cal. 403.

8. **Assigned account.** As to defense to assigned account, see Duff v. Hobbs, 19 Cal. 646.

9. **Fraudulent assignor.** A fraudulent assignor cannot sue to compel a reassignment, etc. See Gregory v. Haworth, 25 Cal. 653.

10. **Notice of assignment.** As to when notice of assignment is not necessary, see Morgan v. Lowe, 5 Cal. 325; 63 Am. Dec. 132.

11. **Assignee of judgment.** An assignee of a judgment and of the sheriff's certificate of sale thereunder, stands in the same position as his assignor when the judgment has been reversed, and the sale will be set aside, where no loss will occur to the assignee. Reynolds v. Harris, 14 Cal. 667; 76 Am. Dec. 459.

§ 369. Executor, trustee, etc., may sue without joining the persons beneficially interested. An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.

Actions by executors and administrators.

1. Jointly with heirs or devisees, for possession of real estate or quieting title. Post, § 1452.

2. Alone. Post, §§ 1581–1583.

3. To set aside fraudulent deeds made by deceased. Post, § 1589.

Legislation § 369. Enacted March 11, **1872**; based on Practice Act, § 6 (New York Code, § 113), which, as amended by Stats. 1854, Redding ed. p. 59, Kerr ed. p. 84, read: "An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person or persons for whose benefit the action is prosecuted. A trustee of an express trust within the meaning of this section, shall be construed to include a person, with whom, or in whose name, a contract is made for the benefit of another."

Action by an executor or administrator. An administrator may sue in his own name, as trustee of an express trust (Estate of Callaghan, 119 Cal. 571; 39 L. R. A. 689; 51 Pac. 860), without joining the heirs or beneficiaries. Robertson v. Burrell, 110 Cal. 568; 42 Pac. 1086. This is an exception to the general rule laid down in § 367, ante. Tandy v. Waesch, 154 Cal. 108; 97 Pac. 69. Where an insurance policy does not designate any beneficiary, the administrator may likewise sue for insurance on the life of the deceased (Winterhalter v. Workmen's etc. Ass'n, 75 Cal. 245; 17 Pac. 1); and, being entitled to the pos-

session of the real estate of the deceased, he may maintain an action in ejectment (Curtis v. Herrick, 14 Cal. 117; 73 Am. Dec. 632; Teschemacher v. Thompson, 18 Cal. 11; 79 Am. Dec. 151), and no special authority of the probate court is necessary (Halleck v. Mixer, 16 Cal. 574), and an action may be brought at any time before administration is had or decree of distribution is made. Curtis v. Sutter, 15 Cal. 259.

Trustee of an express trust. This section is permissive only, and does not exclude an action in the name of the real party in interest. Anglo-Californian Bank v. Cerf, 147 Cal. 384; 81 Pac. 1077. The fact that the trustee can maintain a suit does not preclude the beneficiary from maintaining a like suit. Horseshoe Pier etc. Co. v. Sibley, 157 Cal. 442; 108 Pac. 308. He may sue alone, but he is not bound to do so. Tyler v. Houghton, 25 Cal. 26; Cerf v. Ashley, 68 Cal. 419; 9 Pac. 658; Walker v. McCusker, 71 Cal. 594; 12 Pac. 723; Winterhalter v. Workmen's etc. Ass'n, 75 Cal. 245; 17 Pac. 1; Patchett v. Pacific Coast Ry. Co., 100 Cal. 505; 35 Pac. 73; Graham v. Franke, 4 Cal. Unrep. 899; 38 Pac. 455; Robertson v. Burrell, 110 Cal. 568; 42 Pac. 1086; Kellogg v. King, 114 Cal. 378; 55 Am. St. Rep. 74; 46 Pac. 166. Thus, a trustee, to whom a mortgage has been assigned as security for the debt of the mortgagee, may be joined with the mortgagee as a party plaintiff in an action to foreclose the mortgage; and if not originally so made, he may be brought in afterwards. Cerf v. Ashley, 68 Cal. 419; 9 Pac. 658. That the trustee would be bound to bring an action to prevent waste or trespass upon land, or ejectment to recover its possession in case of an ouster, does not admit of doubt; on the contrary, should he refuse to do so, his cestui que trust may bring an action to compel him to do so: such being the case, it is anomalous to say that he cannot apply for other relief, if necessary, in his own name. Tyler v. Houghton, 25 Cal. 26. A trustee to whom a chose in action has been transferred for collection is, in contemplation of law, so far the owner that he may sue on it in his own name. Toby v. Oregon Pacific R. R. Co., 98 Cal. 490; 33 Pac. 550. A person contracting to purchase land in his own name, although acting for another, may, without joining his principal, sue on the contract. Tandy v. Waesch, 154 Cal. 108; 97 Pac. 69. The first clause of this section has no application where a suit is brought by trustees, which involves their relations with the beneficiaries, or the relations of the beneficiaries among themselves: it applies only to suits against strangers, which affect the trust property. Mitau v. Roddan, 149 Cal. 1; 6 L. R. A. (N. S.) 275; 84 Pac. 145. A person may be a trustee in a transaction wherein he is not acting in his own interest solely, but for others associated with him, and where the agreement was made in his own name for the benefit of himself and of such other persons. McCowen v. Pew, 147 Cal. 299; 81 Pac. 958. A trustee of an express trust is a person with whom or in whose name a contract is made for the benefit of another. Walter v. McCusker, 71 Cal. 594; 12 Pac. 723; People v. Stacy, 74 Cal. 373; 16 Pac. 192; Chin Kem You v. Ah Joan, 75 Cal. 124; 16 Pac. 705. Where one party is in possession of money, which, in equity and good conscience, he is bound to pay over, an action may be maintained therefor, and no privity is required, except that which results from one person having money of another, which he conscientiously has no right to retain. Kreutz v. Livingston, 15 Cal. 344. There need be no allegation of trusteeship, or proof of it at the trial. Corcoran v. Doll, 32 Cal. 82; Walsh v. Soule, 66 Cal. 443; 6 Pac. 82; Lewis v. Adams, 70 Cal. 403; 59 Am. Rep. 423; 11 Pac. 833; Walker v. McCusker, 71 Cal. 594; 12 Pac. 723. The principal may sue on a contract executed by an agent without disclosing his principal, but he must show the agency, and the power of the agent to bind him. Ruiz v. Norton, 4 Cal. 355; 60 Am. Dec. 618; Thurn v. Alta Telegraph Co., 15 Cal. 472; Swift v. Swift, 46 Cal. 266. A contract, partly for the benefit of one, made in the name of another, makes the latter a trustee of an express trust. Graham v. Franke, 4 Cal. Unrep. 899; 38 Pac. 455. Where incorporators designate one of their number as the party to receive subscriptions to the capital stock, they constitute him a trustee of an express trust. West v. Crawford, 80 Cal. 19; 21 Pac. 1123; Winters v. Rush, 34 Cal. 136. The directors of an insane asylum may sue as trustees of an express trust (Watt v. Smith, 89 Cal. 602; 26 Pac. 1071), as may also one taking a note or a mortgage in his own name for the benefit of another (White v. Allatt, 87 Cal. 245; 25 Pac. 420), and also one coming into possession with notice of trust property. Lathrop v. Bampton, 31 Cal. 17; 89 Am. Dec. 141. A party to whom an undertaking on appeal is given, and who transfers the subject-matter of the litigation, becomes the trustee of the purchaser. Walsh v. Soule, 66 Cal. 443; 6 Pac. 82. A priest of a California Misión, occupying a position analogous to that of a sole corporation in England, may maintain an action in his own name to recover possession of Misión lands. Santillan v. Moses, 1 Cal. 92. A purchaser at an execution sale for the benefit of another, and taking possession in his own name, is trustee of an express trust (Walker v. McCusker, 71 Cal. 594; 12 Pac. 723); and the state is the trustee of an express trust, where a bond is executed in the name of the state for the benefit of

a county (People v. Stacy, 74 Cal. 373; 16 Pac. 192); but a naked agency does not make the agent the trustee of an express trust (Lineker v. Ayeshford, 1 Cal. 75; Swift v. Swift, 46 Cal. 266); nor is an attorney in fact the trustee of an express trust (Powell v. Ross, 4 Cal. 197); but an agent, contracting in his own name for the benefit of his principal, the agency being known, may sue in his own name. Salmon v. Hoffman, 2 Cal. 138; 56 Am. Dec. 322; Ord v. McKee, 5 Cal. 515; Winters v. Rush, 34 Cal. 136. Where an agent makes an assignment without authority, the assignee cannot maintain an action, even though the assignment was subsequently ratified by the principal. Wittenbrock v. Bellmer, 57 Cal. 12.

Party for whose benefit action is prosecuted. A person for whose benefit a contract is made may sue alone as the real party in interest, although not a party to it (Summers v. Farish, 10 Cal. 347; Wiggins v. McDonald, 18 Cal. 126; Lewis v. Covillaud, 21 Cal. 178; McLaren v. Hutchinson, 22 Cal. 187; 83 Am. Dec. 59; Morgan v. Overman Silver Mining Co., 37 Cal. 534; Western Development Co. v. Emery, 61 Cal. 611; Sacramento Lumber Co. v. Wagner, 67 Cal. 293; 7 Pac. 705; Malone v. Crescent City Mill etc. Co., 77 Cal. 38; 18 Pac. 858; Tyler v. Mayre, 95 Cal. 160; 27 Pac. 160; 30 Pac. 196); but a party benefited incidentally by a contract, who is not a party to it, but for whose benefit it was not expressly made, cannot maintain suit thereon in his own name. Chung Kee v. Davidson, 73 Cal. 522; 15 Pac. 100.

Person expressly authorized by statute. The first clause of this section raises a presumption against the authority of any officer to sue, unless specially authorized by statute, otherwise the officer must sue on the ground that he is a trustee of an express trust. Watt v. Smith, 89 Cal. 602; 26 Pac. 1071.

CODE COMMISSIONERS' NOTE. Stats. 1854, p. 84.

1. **An executor or administrator may sue** in his own name as executor or administrator. Curtis v. Herrick, 14 Cal. 117; 73 Am. Dec. 632; Teschemacher v. Thompson, 18 Cal. 11; 79 Am. Dec. 151; Halleck v. Mixer, 16 Cal. 579; Curtis v. Sutter, 15 Cal. 259; Corcoran v. Doll, 32 Cal. 82.

2. **Damages for death of decedent.** A suit for damages for the death of decedent can be brought only by the administrator or executor. Kramer v. San Francisco etc. R. R. Co., 25 Cal. 435.

3. **Legal title must be represented, to recover lands.** But a person having the equitable title cannot sue to recover possession of lands. Such action must be in the name of the party holding the legal title; thus, where a grant of land was made to P., which was confirmed by decree of the board of land commissioners, from which an appeal was taken to the United States district court. Pending the appeal, P. died, leaving a will. An order was made in the United States court, on petition of the heirs of P., and the executors of the estate, substituting the heirs in the proceedings in place of P., and the court then confirmed the land to the heirs, and it was surveyed, and the surveyor approved. Subsequently, E. was appointed administrator with the will annexed. It was held that the legal title was in the heirs, and that the administrator could not maintain an action to recover possession of the same. Emeric v. Penniman, 26 Cal. 122; Salmon v. Symonds, 30 Cal. 301.

4. **Foreclosure of a mortgage upon real property.** See Burton v. Lies, 21 Cal. 87.

5. **The heir must not be joined with the administrator,** in an action to recover a debt due to the decedent. The debts vest in the administrator, and not in the heir, for it is personalty, and not realty. The administrator has alone the right to maintain the action. Grattan v. Wiggins, 23 Cal. 16.

6. **Action against executors and administrators.** It was held, the general right to sue an administrator was taken away by statute, except in case of presentation and rejection of the account. Ellissen v. Halleck, 6 Cal. 386; Falkner v. Folsom's Executors, 6 Cal. 412.

7. **Administrator a proper party to all suits respecting property of decedent.** The administrator has possession of all the real and personal property of the decedent, and is therefore a proper party to any suit concerning it. Harwood v. Marye, 8 Cal. 580; Belloc v. Rogers, 9 Cal. 124.

8. **Administrator cannot be sued on a claim until the same has been presented and rejected.** The claimant must present his claim, properly verified, to the administrator, that the administrator and the probate judge may determine whether they will allow or reject the claim. If the claimant does not thus present his claim, he can maintain no action thereon against the administrator. Hentsch v. Porter, 10 Cal. 559.

9. **As to mortgages, liens, etc. Their presentation, etc.** See Belloc v. Rogers, 9 Cal. 123; Carr v. Caldwell, 10 Cal. 380; 70 Am. Dec. 740; Hentsch v. Porter, 10 Cal. 559. It was held in Fallon v. Butler, 21 Cal. 24, 81 Am. Dec. 140, that an action could be maintained against an executor or administrator to foreclose a mortgage given by the decedent, although the debt secured had been presented to and allowed by the administrator and probate judge, if the action is only to reach the mortgaged property, and subject it to sale, and have the proceeds applied to the payment of the debt secured, and no judgment is asked against the general estate of the decedent; and the cases of Ellissen v. Halleck, and Falkner v. Folsom's Executors, were overruled. It was further held, that the word "claim" did not embrace mortgage liens, etc. But this was doubted, and it was held that the word "claim" was broad enough to include a mortgage, or any other lien. Ellis v. Polhemus, 27 Cal. 353. It may be stated, therefore, that an administrator or executor cannot be sued, unless the claimant present his claims for allowance, and that the rule applies equally to mortgages and other liens as it does to any other claims. See, generally, Ellis v. Polhemus, 27 Cal. 353; Willis v. Farley, 24 Cal. 491; Fallon v. Butler, 21 Cal. 24; 81 Am. Dec. 140; Ellissen v. Halleck, 6 Cal. 386; Falkner v. Folsom's Executors, 6 Cal. 412; Hentsch v. Porter, 10 Cal. 555; Carr v. Caldwell, 10 Cal. 380; 70 Am. Dec. 740; Belloc v. Rogers, 9 Cal. 123.

10. **Administrator cannot be joined with survivor on joint obligation.** In actions upon joint and several obligations, the administrator cannot be joined with survivor. May v. Hanson, 6 Cal. 642; Humphreys v. Crane, 5 Cal. 173.

11. **Trustees of express trust.** See Kreutz v. Livingston, 15 Cal. 344, and cases cited therein. A person to whom a note is payable for the benefit of another is, under this section, a trustee of an express trust. Winters v. Rush, 34 Cal. 136.

12. **Attorney in fact is not a trustee.** One who is described in an instrument, whether parol or special, as the attorney in fact of another, does not hold the character of trustee, and is not a necessary party to represent the interest of the principal. Our statute requires every action to be prosecuted in the name of the real party in interest. Powell v. Ross, 4 Cal. 198.

13. **Guardian is not trustee of express trust.** A guardian appointed by the probate court, under

the act which provides for the appointment and prescribes the duties of guardians, is not a trustee of an express trust, within the meaning of this section. Fox v. Minor, 32 Cal. 116; 91 Am. Dec. 566.

14. Miscellaneous actions on bonds taken in name of the people. Bonds in the name of the people, for the benefit of others, should be prosecuted in the name of the party in interest, although it is made payable to the people of the state. Baker v. Bartol, 7 Cal. 551.

§ 370. Married woman as party to action. When a married woman is a party, her husband must be joined with her, except:

1. When the action concerns her separate property, including action for injury to her person, libel, slander, false imprisonment or malicious prosecution, or her right or claim to the homestead property, she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone.

3. When she is living separate and apart from her husband by reason of his desertion of her, or by agreement, in writing, entered into between them, she may sue or be sued alone.

Contracts of married women, generally. See Civ. Code, § 158.

Sole traders. Post, §§ 1811 et seq.

Legislation § 370. 1. Enacted March 11, **1872**; based, except subd. 3, on Practice Act, § 7 (New York Code, § 114), as amended by Stats. 1867–68, p. 550; subd. 3 being based on Stats. 1869–70, p. 226, and when enacted in 1872, read, "3. When she is living separate and apart from her husband, she may sue or be sued alone."

2. Amended by Code Amdts. **1873–74**, p. 293; this amendment differing from the present (1913) as noted infra.

3. Amendment by Stats. **1901**, p. 126; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1913**, p. 217, in subd. 1, adding "including action for injury to her person, libel, slander, false imprisonment or malicious prosecution."

Married woman a party, joinder of husband. The common-law rule required the husband to join the wife in all actions in which she was a party, plaintiff or defendant; but that rule is altered by this section, the provisions of which are permissive, and not compulsory, in their nature, and for that reason the husband may be joined with the wife as a party, even where she is permitted to sue or to be sued alone. Van Maren v. Johnson, 15 Cal. 308; Calderwood v. Pyser, 31 Cal. 333; Corcoran v. Doll, 32 Cal. 82; Snyder v. Webb, 3 Cal. 83; Marlow v. Barlew, 53 Cal. 456. The object of this section is to avoid the necessity of a married woman suing by prochein ami. Kashaw v. Kashaw, 3 Cal. 312. In an action concerning property belonging to a married woman as a sole trader, her husband need not be joined. Guttmann v. Scannell, 7 Cal. 455. In an action for injuries to her person, before the amendment of 1913, the wife could not sue alone (Tell v. Gibson, 66 Cal. 247; 5 Pac. 223; McFadden v. Santa Ana etc. Ry. Co., 87 Cal. 464; 11 L. R. A. 252; 25 Pac. 681); but the husband merely a formal party; the right of action was the wife's (McFadden v. Santa Ana etc. Ry. Co., 87 Cal. 464; 11 L. R. A. 252; 25 Pac. 681; Neale v. Depot Railway Co., 94 Cal. 425; 29 Pac. 954); the husband joins as party plaintiff, only because the common-law rule requiring him to do so is still in force. Matthew v. Central Pacific R. R. Co., 63 Cal. 450; Baldwin v. Second Street Cable R. R. Co., 77 Cal. 390; 19 Pac. 644. In an action for the false imprisonment of the wife, although the recovery would be community property, the wife is a necessary party (Gomez v. Scanlan, 155 Cal. 528; 102 Pac. 12); and in an action for malicious prosecution, the wife must be joined with her husband as a party plaintiff (Williams v. Casebeer, 126 Cal. 77; 58 Pac. 380; McFadden v. Santa Ana etc. Ry. Co., 87 Cal. 464; 11 L. R. A. 252; 25 Pac. 681); and in an action against the wife for personal injuries, the husband is a necessary party. Henley v. Wilson, 137 Cal. 273; 92 Am. St. Rep. 160; 58 L. R. A. 941; 70 Pac. 21. In an action sounding in tort to the wife, based on a contract, she is properly joined as plaintiff; thus, in an action against a steamer for a breach of contract to carry the wife to a certain port, the alleged breach consisting in carrying her to another port, causing her detention there, and consequent illness and other injuries, she is a proper and necessary party. Warner v. Steamship Uncle Sam, 9 Cal. 697. The wife may, without joining her husband, unless objection is raised by special demurrer, maintain an action against a person who, by fraudulent representations concerning her husband brought about her separation from her husband, to recover damages resulting therefrom. Work v. Campbell, 164 Cal. 343; 128 Pac. 943. The objection that the plaintiff is a married woman, and that her husband should be joined with her, is, in effect, a plea of defect of parties plaintiff; such objection is waived if not raised by demurrer, where the defect appears upon the face of the complaint, or by answer, where it does not. Hayt v. Bentel, 164 Cal. 680; 130 Pac. 432.

Action concerning separate property. In an action concerning her separate estate, a married woman may sue either without her husband (Snyder v. Webb, 3 Cal. 83; Van Maren v. Johnson, 15 Cal. 308; Duncan v. Duncan, 6 Cal. App. 404; 92 Pac.

310; Marlow v. Barlew, 53 Cal. 456), or jointly with him. Van Maren v. Johnson, 15 Cal. 308. In an action for money, which, when recovered, will be the wife's separate property, subject to the management and control of her husband, he may, but need not necessarily, be joined with her as plaintiff (Van Maren v. Johnson, 15 Cal. 308); and in an action for the purchase-money of her separate property, where she alleges that she had never given her consent, either in writing or orally, that the money might be paid to her husband, although his nonjoinder as a party plaintiff is not ground of demurrer, yet the fact of the payment of the money to him may constitute a defense. Kays v. Phelan, 19 Cal. 128. The wife is the proper party plaintiff in an action to foreclose a mortgage, executed by her husband, on lands claimed by her (Kohner v. Ashenauer, 17 Cal. 578); the husband is not a necessary party defendant in an action against the wife, upon an express contract made by the wife, and the judgment will bind the wife's separate property only. Terry v. Superior Court, 110 Cal. 85; 42 Pac. 464. The wife may bring an action for converted goods, her separate estate without her husband being joined. Bondy v. American Transfer Co., 15 Cal. App. 746; 115 Pac. 965. A judgment against the wife alone, in a suit brought against her in her maiden name, to quiet title to property acquired in such name, is not void. Emery v. Kipp, 154 Cal. 83; 129 Am. St. Rep. 141; 16 Ann. Cas. 792; 97 Pac. 17; 19 L. R. A. (N. S.) 983. The husband need not be joined in an action concerning property belonging to the wife as a sole trader (Guttmann v. Scannell, 7 Cal. 455); nor in an action brought by the wife to quiet title to her separate property, on which a homestead has been declared. Prey v. Stanley, 110 Cal. 423; 42 Pac. 908. The fact that the validity of the homestead is involved does not affect the right of the wife to sue alone. MacLeod v. Moran, 11 Cal. App. 622; 105 Pac. 932. A tenant, under a lease of the homestead, executed by the husband, cannot hold adversely to either the husband or the wife (Mauldin v. Cox, 67 Cal. 387; 7 Pac. 804); but the statute of limitations may be pleaded against an action by the wife, where the facts establish adverse possession. Wilson v. Wilson, 36 Cal. 447; 95 Am. Dec. 194; Kapp v. Griffith, 42 Cal. 408. The earnings of a wife for her labor belong to her husband, and he is the proper party to sue therefor, in the absence of an agreement between them making such proceeds her separate property. Moseley v. Heney, 66 Cal. 478; 6 Pac. 134. A right of action for personal injury is community property; and in an action to recover for such injury, before the amendment of 1913, the husband was a necessary party, unless his wife was living separate and apart. Lamb v. Harbaugh, 105 Cal. 680; 39 Pac. 56. The wife cannot be sued alone in an action concerning her separate property; thus, in an action to foreclose a chattel mortgage on the separate property of the wife, the husband is a necessary party defendant. McDonald v. Porsh, 136 Cal. 301; 68 Pac. 817.

Action concerning homestead property. The husband is not a necessary party in an action to quiet title to the wife's separate property, on which a homestead has been declared; the wife may sue alone. Prey v. Stanley, 110 Cal. 423; 42 Pac. 908. The phrase, "or her right or claim to the homestead property," was not in the original Practice Act section before the amendment of 1867–78, and it was held that the wife could not sue alone to recover the homestead (Poole v. Gerrard, 6 Cal. 71; 65 Am. Dec. 481; Revalk v. Kraemer, 8 Cal. 66; 68 Am. Dec. 304; Cook v. Klink, 8 Cal. 347; Marks v. Marsh, 9 Cal. 96; Moss v. Warner, 10 Cal. 296; Gee v. Moore, 14 Cal. 472; Guiod v. Guiod, 14 Cal. 506; 76 Am. Dec. 440), as the husband alone had title to the homestead (Gee v. Moore, 14 Cal. 472; Bowman v. Norton, 16 Cal. 213; Himmelmann v. Schmidt, 23 Cal. 117; Brennan v. Wallace, 25 Cal. 108; Brooks v. Hyde, 37 Cal. 366; Johnston v. Bush, 49 Cal. 198), and the homestead right could not be asserted individually, both husband and wife being required to join (Cook v. Klink, 8 Cal. 347), and the homestead right could not then be determined, unless both husband and wife were before the court. Revalk v. Kraemer, 8 Cal. 66; 68 Am. Dec. 304. But, since the amendment of 1867–68, the wife may sue or be sued alone, the husband not being a necessary party (Marlow v. Barlew, 53 Cal. 456; Hart v. Church, 126 Cal. 471; 77 Am. St. Rep. 195; 58 Pac. 910; 59 Pac. 296; Prey v. Stanley, 110 Cal. 423; 42 Pac. 908); and an action to recover the homestead may be maintained by the wife in her own name, without her husband joining as a party plaintiff. Mauldin v. Cox, 67 Cal. 387; 7 Pac. 804. The complaint in such an action must show that the land sued for is covered by a valid declaration of homestead. Tappendorff v. Moranda, 134 Cal. 419; 66 Pac. 491. Where a homestead was claimed by the husband, in an action, in which he was the sole defendant, brought to foreclose a mortgage executed by him alone, after the marriage, the rights of neither husband nor wife can be affected by the proceedings, the wife not being a party; and the proceedings, to be conclusive against either, must include both. Revalk v. Kraemer, 8 Cal. 66; 68 Am. Dec. 304; Van Reynegan v. Revalk, 8 Cal. 75; Cook v. Klink, 8 Cal. 347; Marks v. Marsh, 9 Cal. 96; Moss v. Warner, 10 Cal. 296.

Action between husband and wife. In such an action the wife may sue alone, and it is not necessary to introduce other par-

ties, and their introduction cannot affect her rights. Kashaw v. Kashaw, 3 Cal. 312. But this section does not contemplate actions in tort by one spouse against the other; it applies only to actions for the possession of property rights. Peters v. Peters, 156 Cal. 32; 23 L. R. A. (N. S.) 699; 103 Pac. 219. The wife may maintain a suit against her husband, on a promissory note executed by him to her before their marriage. Wilson v. Wilson, 36 Cal. 447; 95 Am. Dec. 194.

Wife living separate and apart from her husband. Where the wife is living separate and apart from her husband, she may sue alone for damages for injury to her person (Andrews v. Runyon, 65 Cal. 629; 4 Pac. 669; Duncan v. Duncan, 6 Cal. App. 404; 92 Pac. 310; Baldwin v. Second Street Cable R. R. Co., 77 Cal. 390; 19 Pac. 644; Muller v. Hale, 138 Cal. 163; 71 Pac. 81); but this does not mean a mere temporary absence of the wife; there must be an abandonment on the part of either the wife or the husband, or a separation which was intended to be final. Tobin v. Galvin, 49 Cal. 34; Humphrey v. Pope, 122 Cal. 253; 54 Pac. 847. Where, however, a wife, who has deserted her husband, before the period has expired entitling her to a divorce, in good faith offers to return and resume the marital relations, to which the husband does not consent, she is entitled to sue alone. Marlow v. Barlew, 53 Cal. 456; Muller v. Hale, 138 Cal. 163; 71 Pac. 81. An action may be maintained by the wife for injuries sustained by the enticing away of her husband. Humphrey v. Pope, 122 Cal. 253; 54 Pac. 847. Adverse possession by the wife, as against the husband, who has deserted her, may be acquired; and as to the property so acquired, she may sue or be sued alone. Union Oil Co. v. Stewart, 158 Cal. 149; Ann. Cas. 1912A, 567; 110 Pac. 313. If a married woman, not living separate and apart from her husband, is sued by a third person for the alleged conversion of a fund, the plaintiff cannot recover where the husband is not joined as a party defendant. Taylor v. Darling, 19 Cal. App. 232; 125 Pac. 249. A married woman, deserted by her husband, may sue alone to recover damages for her personal injuries, although such damages, when recovered, are community property. Duncan v. Duncan, 6 Cal. App. 404; 92 Pac. 310.

Action concerning community property. In a suit to recover money lent to the wife to complete the purchase of what afterwards becomes community property, though the title is taken in her name, she is not a proper party defendant (Althof v. Conheim, 38 Cal. 230; 99 Am. Dec. 363; Maclay v. Love, 25 Cal. 367; 85 Am. Dec. 133; Brown v. Orr, 29 Cal. 120; Smith v. Greer, 31 Cal. 476); and in an action to foreclose a mortgage on the community property, the husband is a necessary party. McComb v. Spangler, 71 Cal. 418; 12 Pac. 347.

Judgments against married woman. See note, 55 Am. Dec. 599.

CODE COMMISSIONERS' NOTE. Stats. 1868, p. 550. The third subdivision is taken from Stats. 1870, p. 226.

1. Construction of section. Since married women can sue or defend alone, they are responsible alone for costs, etc., of suit, if unsuccessful. This section provides in what cases a married woman may sue and be sued, without imposing any conditions or bestowing any privileges. Thus, in the cases mentioned, she is put upon a common level with all other parties to actions, no discrimination being made in her favor or against her. Thereafter the code proceeds, and, without any distinction as to persons, prescribes, in general terms, applicable to all alike, the manner in which actions shall be prosecuted, and the nature and form of the judgments which shall be rendered, and the manner in which the same shall be executed. The provisions in the code relating to judgments do not declare that judgments may be rendered in favor of, but not against, married women; on the contrary, they merely provide, in general terms, when the plaintiff or defendant shall have judgment and execution, regardless of the fact whether they are male or female, married or unmarried. The provisions of the Practice Act, allowing a married woman to sue alone, is not merely the adoption of the old chancery rule, allowing her, in certain cases, to sue by her "next friend." It is something more, for it allows her to sue alone. The office which the prochein ami performed was to be responsible for costs. The old form of suing by prochein ami is abolished, but the right of the opposite party to recover costs is unimpaired, and, as a necessary consequence, resulting from dispensing with the prochein ami, the married woman has herself been charged with the responsibility which previously attached to him; and there is no good reason why it should not be so. If she is to be regarded as a feme sole for any purpose connected with litigation, she ought to be so regarded for all. There is no justice in according to her all the advantages and benefits to be gained by an action, and at the same time exempting her from all risk and responsibility. If she is to be allowed the rights of a suitor, she must, in the absence of an express provision to the contrary, be held to take also the responsibilities of a suitor, for they ought not to be separated. A question somewhat analogous arose in Alderson v. Bell, 9 Cal. 321, where the court said: "In this state, the wife can appear in and defend an action separately from her husband. To enable her to do so, she must possess, as defendant, all the rights of a feme sole, and be able to make as binding admissions in writing, in the action, as other parties." The question has arisen in New York, from which state our system is borrowed, and has been there determined in accordance with the views entertained by us. In Moncrief v. Ward, New York common pleas (reported in note to Baldwin v. Kimmel, 16 Abb. Pr. 364), this same question was involved, and it was held that an execution for costs against a married woman could be enforced against her separate estate, whether it contains a direction to that effect or not. Mr. Justice Brady said: "Having the right to sue, the power must be employed cum onere. The statute awarding costs does not exempt a married woman, either as plaintiff or defendant, from the payment of costs when unsuccessful. There is no just reason why she should be thus exempted. Having the status of a feme sole in the courts, if she fail in her action, it would be unjust to compel her adversary to resort to extraordinary modes to collect his costs. It cannot be that the legislature intended this. It is true that, until the amendment of the code (§ 274) in 1862, the legislature did not, in express terms, provide that costs could be recovered against her, but such

was the effect of the statutes then in existence, as I interpret them. That amendment merely declared the necessary legal conclusion from the existing statutes; no class of suitors, as already suggested, having been excepted from them. The execution to compel the payment of such costs must be enforced against her separate estate, whether so directed or not. It cannot be employed against the property of another person, per se." Leonard v. Townsend, 26 Cal. 443.

2. **Wife may choose whether she will sue or defend alone, or in connection with her husband.** It has been held that this section is not obligatory upon the wife to sue or defend alone; it confers only a privilege which, in many instances, it may be important for her to assert, for the protection of her interests, and in the exercise of which the fullest liberty should be accorded to her. Van Maren v. Johnson, 15 Cal. 311; Kays v. Phelan, 19 Cal. 128.

3. **Suits concerning the homestead property.** The original statute, 1851–52, did not contain the clause "or her right or claim to the homestead property," and the phrase was added by the amendment of 1867–68, p. 550. Until after the passage of the amendment the court had held a wife could not sue alone to recover the homestead. See Poole v. Gerrard, 6 Cal. 71; 65 Am. Dec. 481; Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Cook v. Klink, 8 Cal. 347; and see Gee v. Moore, 14 Cal. 472, overruling these cases in some particulars, but not as to this point, it seems; see Guiod v. Guiod, 14 Cal. 507; 76 Am. Dec. 440; see also Moss v. Warner, 10 Cal. 296. And it was said that a wife had no right in the homestead, independent of the husband, which she could enforce against his consent, and that she could not maintain a suit for it in her own name alone. Guiod v. Guiod, 14 Cal. 506; 76 Am. Dec. 440. And in a suit against the husband for a foreclosure of a mortgage upon the homestead, it has been held that when the husband appears and defends alone, any decision the court could make in regard to the homestead could not affect the rights of the wife, she not being a party to the suit. And such is the nature of the title to the homestead, that the rights of the husband cannot be affected without affecting those of the wife also. If no binding decision can be made when one of them only is a party, then it is idle for the court to make any decision at all in such a case. Marks v. Marsh, 9 Cal. 97.

4. **Separate property.** Snyder v. Webb, 3 Cal. 83. When the action concerns the wife's separate property, it has been held she may seek the aid of the court either with or without her husband. Van Maren v. Johnson, 15 Cal. 311; Kays v. Phelan, 19 Cal. 128; Calderwood v. Pyser, 31 Cal. 333; Corcoran v. Doll, 32 Cal. 82.

5. **Foreclosure of mortgage on wife's separate property.** In an action for the foreclosure of mortgage executed by the husband, if the wife alleges the land was her separate property by virtue of a previous conveyance from the husband to her, she may be made a defendant. Kohner v. Ashenauer, 17 Cal. 578.

6. **Action between wife and husband.** Kashaw v. Kashaw, 3 Cal. 312.

7. **Foreclosure of mortgage executed by both husband and wife.** If a wife executes a mortgage with her husband, she may be made a party defendant along with her husband in an action to foreclose the same, without alleging her interest in the property mortgaged. Anthony v. Nye, 30 Cal. 401.

8. **Action for damages for injury to the person of the wife.** Husband and wife must be joined. Sheldon v. Steamship Uncle Sam, 18 Cal. 526; 79 Am. Dec. 193.

9. **Partnership obligation contracted by wife and third parties previous to marriage.** The husband of a married woman is properly joined with her as a defendant in an action upon a partnership obligation, contracted by the wife and a third person, as partners, previous to the marriage, and while she was a feme sole. Keller v. Hicks, 22 Cal. 457; 83 Am. Dec. 78.

10. **When the wife lives apart from husband.** The third subdivision is taken from the statutes of 1870, p. 226.

11. **Sole trader.** In a suit against a married woman, who is a sole trader, on a contract made by her, she must be sued alone. McKune v. McGarvey, 6 Cal. 497. And an action may be maintained by a married woman, who is a sole trader, in her own name, without joining her husband. Guttmann v. Scannell, 7 Cal. 455; see also Camden v. Mullen, 29 Cal. 564.

12. **Damages to community property.** In an action for damages to the community property, the husband must sue alone: the wife cannot be made a party. Sheldon v. Steamship Uncle Sam, 18 Cal. 526; 79 Am. Dec. 193; Barrett v. Tewksbury, 18 Cal. 334.

§ 371. Wife may defend, when. If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also.

Legislation § 371. Enacted March 11, **1872**; based on Practice Act, § 8, which read, "If a husband and wife be sued together, the wife may defend for her own right."

Defense by wife to action against herself and husband. A wife can appear in and defend an action separately from her husband (Alderson v. Bell, 9 Cal. 315); and where sued with her husband, she pleads a special defense, she may defend as if she were sued separately. Deuprez v. Deuprez, 5 Cal. 387. Where the wife is a necessary party to the full adjustment of the controversy, she should be allowed to intervene (Sargent v. Wilson, 5 Cal. 504), and to file a separate answer, where the action concerns the homestead property. Moss v. Warner, 10 Cal. 296. If a feme sole subsequently marries, her husband should be made defendant in a supplemental pleading setting up the fact of the marriage. Van Maren v. Johnson, 15 Cal. 308.

CODE COMMISSIONERS' NOTE. The words "and if the husband neglect," etc., are added to the original provision of § 8 of the Practice Act.

1. The wife can appear in and defend an action separately from her husband. To enable her to do so, she must possess, as defendant, all the rights of a feme sole, and be able to make as binding admissions in writing in the action as other parties. Alderson v. Bell, 9 Cal. 315.

2. The wife may defend for her own right, as well when sued jointly with her husband as if the trial were separate; her defense, if a separate one, could come in, in either case. See Deuprez v. Deuprez, 5 Cal. 388.

§ 372. Appearance of infant, etc., by guardian. May compromise. When an infant, or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending, in each case. A guardian ad litem may

be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane, or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him. The general guardian or guardian ad litem so appearing for any infant, or insane or incompetent person in any suit shall have power to compromise the same and to agree to the judgment to be entered therein for or against his ward, subject to the approval of the court in which such suit is pending.

Appointment of guardian ad litem. See post, § 373.

Guardian and ward, generally. See post, §§ 1747 et seq.; Civ. Code, §§ 236 et seq.

Insane or incompetent person. Civ. Code, §§ 36, 38–42. **Guardian of.** Post, §§ 1763–1766.

Minors and persons of unsound mind, their rights and liabilities. Civ. Code, §§ 33 et seq.

Legislation § 372. 1. Enacted March 11, **1872**; based on Practice Act, § 9 (New York Code, § 115), which read: "When an infant is a party he shall appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a county judge." When enacted in 1872, § 372 read: "When an infant is a party he must appear by his general guardian, if he has one; and if not, by a guardian who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a county judge."

2. Amended by Code Amdts. **1873–74**, p. 294, to read: "When an infant is a party, he must appear either by his general guardian, or by a guardian appointed by the court in which the action is prosecuted, or by a judge thereof. A guardian may be appointed in any case, when it is deemed by the court in which the action is prosecuted, or by a judge thereof, expedient to represent the infant in the action, notwithstanding he may have a general guardian, and may have appeared by him."

3. Amended by Code Amdts. **1880**, p. 63, and then contained the first two sentences of the present section.

4. Amended by Stats. **1913**, p. 350, adding the final sentence.

Where infant is a party. An infant, party to an action, must appear, prosecute, and defend by his general guardian, or guardian ad litem. Crawford v. Neal, 56 Cal. 321; Estate of Cahill, 74 Cal. 52; 15 Pac. 364; Childs v. Lanterman, 103 Cal. 387; 42 Am. St. Rep. 121; 37 Pac. 382. The reason for this is the supposed want of discretion in the infant, and his inability to bind himself, or to appoint an attorney to represent him. Estate of Cahill, 74 Cal. 52; 15 Pac. 364. But a judgment is not absolutely void, where no guardian is appointed; for the failure to appoint a guardian does not go to the jurisdiction of the court; it is merely an irregularity. Estate of Cahill, 74 Cal. 52; 15 Pac. 364; Foley v. California Horseshoe Co., 115 Cal. 184; 56 Am. St. Rep. 87; 47 Pac. 42. There is a distinction to be observed, and with good reason, between an action brought by an infant and one taken in hostility to him. Estate of Cahill, 74 Cal. 52; 15 Pac. 364. The supreme court has held, however, that, notwithstanding the provisions of this section, a judgment against an infant, in a cause in which no guardian was appointed for him, is not for that reason void. Childs v. Lanterman, 103 Cal. 387; 42 Am. St. Rep. 121; 37 Pac. 382; Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. Under this section and § 373, post, upon the application of a relative, where a plaintiff sues to annul his marriage on the ground of mental incompetency at the time of the marriage, a guardian ad litem may be appointed for him, the evidence tending to show incompetency. Dunphy v. Dunphy, 161 Cal. 380; Ann. Cas. 1913B, 1230; 38 L. R. A. (N. S.) 818; 119 Pac. 512. An allowance for minor children may be made in a probate proceeding, on the petition of any person, or by the court of its own motion; it is immaterial whether or not a guardian ad litem is appointed. Estate of Snowball, 156 Cal. 235; 104 Pac. 446.

Incompetent person a party. An action must be brought against an incompetent person, not against his guardian: there is no obligation on the part of the latter to discharge the obligation (Justice v. Ott, 87 Cal. 530; 25 Pac. 691; Fox v. Minor, 32 Cal. 111; 91 Am. Dec. 566); and the incompetent, being the aggrieved party, may appeal from an order binding the guardian. In re Moss, 120 Cal. 695; 53 Pac. 357.

General guardian. An infant may appear by his general guardian (Gronfier v. Puymirol, 19 Cal. 629; Smith v. McDonald, 42 Cal. 484; Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418; Western Lumber Co. v. Phillips, 94 Cal. 54; 29 Pac. 328); and his appearance is sufficient to give the court jurisdiction of an infant defendant. Richardson v. Loupe, 80 Cal. 490; 22 Pac. 227; Western Lumber Co. v. Phillips, 94 Cal. 54; 29 Pac. 328.

Guardian ad litem. Where the interest of the infant requires it, the court will appoint a guardian ad litem; but it cannot do so until the infant has been brought into court by summons. Gray v. Palmer, 9 Cal. 616; Johnson v. San Francisco Savings Union, 63 Cal. 554; McCloskey v. Sweeney, 66 Cal. 53; 4 Pac. 943. Service upon the general guardian of an infant under fourteen years of age is sufficient service upon the infant (Richardson v. Loupe, 80 Cal. 490; 22 Pac. 227); and the appearance of a general guardian is sufficient to give the court jurisdiction of the person of an infant defendant; the fact

that no guardian ad litem was appointed for him is immaterial. Western Lumber Co. v. Phillips, 94 Cal. 54; 29 Pac. 328; and see Gronfier v. Puymirol, 19 Cal. 629; Smith v. McDonald, 42 Cal. 484; Hill v. Den, 54 Cal. 6. Where infants become necessary parties during the pendency of partition proceedings, as the successors of a deceased defendant, they need not be served with summons: they may be brought in on motion, by order of the court. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418; Stuart v. Allen, 16 Cal. 473; 76 Am. Dec. 551. There is no provision for the time of appointment of a guardian ad litem. Stuart v. Allen, 16 Cal. 473; 76 Am. Dec. 551.

Appointment and powers of guardian ad litem. See note 97 Am. St. Rep. 995.

Right of parent or person in loco parentis to compromise child's cause of action. See note 17 Ann. Cas. 608.

Necessity for appointment of guardian ad litem when infant defendant has general guardian. See note Ann. Cas. 1912D, 363.

Guardian ad litem. See note 32 L. R. A. 683.

Control of guardian ad litem over action. See note 16 L. R. A. 507.

CODE COMMISSIONERS' NOTE. 1. Appear by general, not special, guardian. "The infant must appear by his general guardian, if he has one." Spear v. Ward, 20 Cal. 660. But it has been held, that, although the infant may have a general guardian, yet the court will appoint a guardian ad litem if the interests of the infant require it. Gronfier v. Puymirol, 19 Cal. 629. The words, "his general guardian, if he has one; and if not, then by," etc., were not in the section when the above decision was rendered.

2. Guardian appointed by will may act before letters issue. If a guardian is appointed by the will, it is not necessary that any letters of guardianship should issue to authorize the guardian to act. The order of appointment, when made by the probate court, constitutes the authority of the guardian, and the will, in cases of testamentary appointment, that of guardians in other cases. Norris v. Harris, 15 Cal. 256.

3. When married women regarded as infants, when under age. It has been held that, in some instances, the disability of infancy attaches as well to married women under age as it does to other infants. See Magee v. Welsh, 18 Cal. 159.

4. Action in name of infant for money due him. In an action to recover money due to an infant, the action must be brought by the guardian in the name of the infant, and not in the name of the guardian. Fox v. Minor, 32 Cal. 111; 91 Am. Dec. 566.

5. Guardian ad litem not appointed until infant is brought into court. The court has no right to appoint a guardian ad litem, until the infant is properly brought into court. Gray v. Palmer, 9 Cal. 638.

6. Guardian ad litem limited in authority. A guardian ad litem has only a special and limited authority, and cannot go beyond it. Where guardians ad litem were appointed to represent an infant in a suit for the partition of real property, they had no authority to give and gave no assent to a decree, nor for partition or division of a common estate, but for a foreclosure of all claim of the infants, and the quieting against them of the plaintiff's title to the particular piece of land mentioned in the decree. The court might as well have entered a decree affecting their title or declaring void their claim to any other property. The infants were not before the court for any such purpose, and the appointment of the guardian being a special power exercised by the court, and giving only special and limited authority to the guardians, it would seem that their acts, so far as transcending this authority, would be void. Waterman v. Lawrence, 19 Cal. 217; 79 Am. Dec. 212.

7. Infant's day in court after he attains his majority, etc. At common law when the heir was sued at law, upon a specialty obligation of the ancestor chargeable upon the inheritance, he might pray that "the parol demur"—that is to say, that the pleadings or proceedings be stayed until he should attain his majority. This privilege was based on feudal reasons, and was confined to heirs. It did not even extend to devisees. "Courts of equity did not, however, confine this species of protection to cases precisely similar to those in which the parol could demur at law; but by a kind of analogy they adopted a second rule, by which, in cases of foreclosure and partition, and in all such cases in which the real estate of an infant was to be sold or conveyed under a decree of the court, and, consequently, the execution of the conveyance was necessarily deferred, the infant had an opportunity, after attaining twenty-one, to show cause against the decree. For this purpose a provision was inserted in the decree." Joyce v. McAvoy, 31 Cal. 279, 89 Am. Dec. 172, and cases there cited.

§ 373. Guardian, how appointed. When a guardian ad litem is appointed by the court, he must be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons, or if under that age, or if he neglect so to apply, then upon the application of a relative or friend of the infant, or of any other party to the action.

3. When an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding.

Legislation § 373. 1. Enacted March 11, **1872**; based on Practice Act, § 10 (New York Code, § 116), which read: "The guardian shall be appointed as follows: 1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of a relative or friend of the infant; 2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant." When enacted in 1872 the introductory paragraph was changed to read, "When a guar-

dian is appointed by the court, he must be appointed as follows," this being the only change.
2. Amended by Code Amdts. **1880**, p. 63.

Appointment of guardian ad litem. The appointment of a guardian ad litem may be made ex parte. Crawford v. Neal, 56 Cal. 321; Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418; Granger v. Sherriff, 133 Cal. 416; 65 Pac. 873. No notice of the application is necessary. Granger v. Sherriff, 133 Cal. 416; 65 Pac. 873. It may be made ore tenus, in open court; but it is the better practice to file the petition, setting forth the facts necessary to confer jurisdiction. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. The court has no jurisdiction to appoint a guardian ad litem for an infant until such infant has been served with summons. McCloskey v. Sweeney, 66 Cal. 53; 4 Pac. 943; Estate of Callaghan, 119 Cal. 571; 39 L. R. A. 689; 51 Pac. 860.

Application for family allowance. A guardian ad litem may be appointed for the purpose of applying for a family allowance, in a probate proceeding. Estate of Snowball, 156 Cal. 235; 104 Pac. 446.

Guardian ad litem for insane person. Application for appointment of a guardian for an insane person may be made ex parte. Boyd v. Dodson, 66 Cal. 360; 5 Pac. 617. No notice of the application is necessary. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418.

Guardian ad litem for incompetent. See note ante, § 372.

Appointment of guardian ad litem, where infant has general guardian. Where the interest of the infant requires it, the court in which the cause of action is pending will appoint a guardian ad litem, even though the infant has a general guardian (Gronfier v. Puymirol, 19 Cal. 629); but the provisions of this section apply only to cases where there is no general guardian, or where the general guardian is interested adversely to the ward, or does not act. Gronfier v. Puymirol, 19 Cal. 629.

CODE COMMISSIONERS' NOTE. This section relates to the appointment of a guardian ad litem, where there is no general guardian. Spear v. Ward, 20 Cal. 659; Norris v. Harris, 15 Cal. 255; Gronfier v. Puymirol, 19 Cal. 629. See the cases referred to in note to the preceding section.

§ 374. Unmarried female may sue for her own seduction.

An unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor.

Exemplary damages. See Civ. Code, § 3294.
Damages for seduction. See Civ. Code, § 3339.

Legislation § 374. Enacted March 11, **1872**.

Unmarried female may sue for her own seduction. The word "seduction," as used in this section, means the use of some influence, promise, art, or means, upon the part of the male, by which he induces the female to surrender her chastity and virtue to his embraces. Marshall v. Taylor, 98 Cal. 55; 35 Am. St. Rep. 144; 32 Pac. 867; and see Morrell v. Morgan, 65 Cal. 575; 4 Pac. 580. When rape is shown, instead of seduction, it but aggravates the offense, and justifies augmented exemplary damages. Marshall v. Taylor, 98 Cal. 55; 35 Am. St. Rep. 144; 32 Pac. 867. In an action for breach of promise of marriage, the plaintiff may plead seduction, brought about by reason of the promise, in aggravation of damages. Lanigan v. Neely, 4 Cal. App. 760; 89 Pac. 441.

"Seduction," defined. Marshall v. Taylor, 98 Cal. 55; 35 Am. St. Rep. 144; 32 Pac. 867.

In whom right of action for seduction vests. See note 4 Am. Dec. 403.
Right of woman to recover damages for her own seduction. See notes 8 Ann. Cas. 1115; Ann. Cas. 1912B, 1062.
Who is real party in interest by whom action for seduction must be brought. See note 64 L. R. A. 622.

CODE COMMISSIONERS' NOTE. This, and the succeeding section, are new. Heretofore the action could only be in the name of the parent, or one who stands in that relation, and is supported by the fiction that he has suffered pecuniary injury by loss of service, etc. The object of these sections is to provide a remedy in favor of the party injured, and to make the law, in this respect, harmonious with the declaration of the code, "that all actions must be prosecuted in the name of the real party," etc.

§ 375. Father, etc., may sue for seduction of daughter, etc.

A father, or, in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service.

Guardian ad litem. Ante, § 372. **Appointment of.** Ante, § 373.

Legislation § 375. **1.** Enacted March 11, **1872**.
2. Amendment by Stats. **1901**, p. 126; unconstitutional. See note ante, § 5.

Accrual of father's right of action for daughter's seduction. See note 1 Ann. Cas. 388.
Right of person standing in loco parentis to maintain civil action for seduction. See note Ann. Cas. 1912D, 299.

§ 376. Father, etc., may sue for injury or death of child. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury, or death, or if such person be employed by another person who is responsible for his conduct, also against such other person.

Guardian and ward. Post, §§ 1768–1776; Civ. Code, §§ 236–258.

Legislation § 376. 1. Enacted March 11, **1872**, in the exact language of Practice Act, § 11, and then read: "A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward."

2. Amended by Code Amdts. **1873–74**, p. 294.

3. Amendment by Stats. **1901**, p. 126; unconstitutional. See note ante, § 5.

Action by father for injury or death of child. This section does not create a right of action, where none existed before, but merely designates the persons by whom an action, for the causes therein mentioned, which then existed, or might thereafter be created by statute, should be brought. Kramer v. San Francisco etc. R. R. Co., 25 Cal. 434. The anomalies of this section are evidence of careless legislation, and suggest caution in its construction and application. Bond v. United Railroads, 159 Cal. 270; Ann. Cas. 1912C, 50; 113 Pac. 366. The action provided for in this section is a new action, and not that which the deceased might have brought had he survived. Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139. In an action for the death of a child, the parent may recover all pecuniary loss suffered. Bond v. United Railroads, 159 Cal. 270; Ann. Cas. 1912C, 50; 113 Pac. 366. It is left to the jury, in such cases, to say what they deem "just"; and if they have not made their estimate upon a wrong basis, nor acted under the influence of passion or prejudice, their judgment is final. Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139; Skelton v. Pacific Lumber Co., 140 Cal. 507; 74 Pac. 13. There are no restrictions as to the amount of damages recoverable in an action for death caused by the defendant's negligence, except that the damages must be just, and not exceed the amount claimed. Bowen v. Sierra Lumber Co., 3 Cal. App. 312; 84 Pac. 1010.

Measure of damages. The measure of damages is that prescribed by this and the succeeding section (Bond v. United Railroads, 159 Cal. 270; Ann. Cas. 1912C, 50; 113 Pac. 366); neither of which sections give redress or compensation for mental distress consequent upon the death of a child (Morgan v. Southern Pacific Co., 95 Cal. 510; 29 Am. St. Rep. 143; 17 L. R. A. 71; 30 Pac. 603); nor for the pain or anguish suffered by the child. Bond v. United Railroads, 159 Cal. 270; Ann. Cas. 1912C, 50; 113 Pac. 366. The damages recoverable by the father are limited to such losses as he sustains; the infant can recover such further damages as are personal to himself (Durkee v. Central Pacific R. R. Co., 56 Cal. 388; 38 Am. Rep. 59; Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139); but the father is not limited, in his recovery, to the actual pecuniary injury sustained by reason of the loss of the services of his child. Nehrbas v. Central Pacific R. R. Co., 62 Cal. 320; Beeson v. Green Mountain Gold Mining Co., 57 Cal. 20; Cook v. Clay Street Hill R. R. Co., 60 Cal. 604. The proper elements to be considered by the jury in awarding damages to parents in such cases are: 1. The loss of the child's services during minority; 2. The mental anguish and suffering of the parents; 3. The expenses for medical attendance; and 4. The funeral expenses. Karr v. Parks, 44 Cal. 46; Sykes v. Lawlor, 49 Cal. 236; Cleary v. City Railroad Co., 76 Cal. 240; 18 Pac. 269; and see Bond v. United Railroads, 159 Cal. 270, 276; Ann. Cas. 1912C, 50; 113 Pac. 366. The main element of the damages for the determination of the injury is the loss of the child's services. Cleary v. City Railroad Co., 76 Cal. 240; 18 Pac. 269; Morgan v. Southern Pacific Co., 95 Cal. 510; 29 Am. St. Rep. 143; 17 L. R. A. 71; 30 Pac. 603. In the case of a mother or a wife, the jury have been allowed to consider the fact that they were deprived of the comfort, society, and protection of a son or a husband; but it has always been held that this was in strict accordance with the rule, that only the pecuniary value of the life to the relatives could be recovered, the probable comfort, society, and protection having a pecuniary value. Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139.

Recovery by infant. The infant may recover damages for such injuries as are personal to himself, such as physical and mental pain and suffering, disfigurement, etc., notwithstanding the recovery of damages by his parent for the losses the latter sustains. Durkee v. Central Pacific R. R. Co., 56 Cal. 388; 38 Am. Rep. 59. Where the infant plaintiff was a female of two years, and the evidence showed that the deceased father was twenty-seven years old, with an expectancy of thirty-seven years, and that he earned forty dollars a month and board, a verdict of five thou-

sand dollars was sustained as not excessive. Bowen v. Sierra Lumber Co., 3 Cal. App. 312; 84 Pac. 1010.

Measure of damages for injuries causing death. See note post, § 377.

Who may sue for wrongful death. See note 12 Am. St. Rep. 869.

Right of parent to recover for death of illegitimate child. See note 10 Ann. Cas. 810.

Right of parent to recover for death of adopted child. See note 15 Ann. Cas. 148.

Parent's right of action at common law for loss of services of minor child whose death is caused by negligence. See note 18 L. R. A. (N. S.) 316.

CODE COMMISSIONERS' NOTE. It was held that the eleventh section of the Practice Act (which was in the same terms as this section), which provides that the father, or, in case of his death, or desertion of his family, the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward, does not create a right of action where none existed before, but merely designates the persons by whom an action, for the causes therein mentioned, which then existed, or might thereafter be created by statute, should be brought; and at the time the Practice Act was passed, the death of a person constituted no cause of action; and the eleventh section of that act, so far as it designates the parties by whom an action for the death of a person may be brought, is repealed by the act of 1862 (see next section), which provides that "every such action shall be brought by and in the names of the personal representatives of such deceased person." Kramer v. San Francisco etc. R. R. Co., 25 Cal. 435.

§ 377. When representatives may sue for death of one caused by the wrongful act of another. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just.

Legislation § 377. 1. Enacted March 11, **1872**, and then read: "When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square, or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, pecuniary or exemplary, as, under all the circumstances of the case, may to them seem just."

2. Amended by Code Amdts. **1873-74**, p. 294.

3. Amendment by Stats. **1901**, p. 126; unconstitutional. See note ante, § 5.

Action by heirs or personal representatives. The action may be brought either by the heirs of the deceased, or by his personal representatives; and when an action is brought, and the court has obtained jurisdiction of it, that is the only action that is permitted, under this section. Munro v. Pacific Coast Dredging etc. Co., 84 Cal. 515; 18 Am. St. Rep. 248; 24 Pac. 303; Hartigan v. Southern Pacific Co., 86 Cal. 142; 24 Pac. 851. This section is general; but actions for injuries arising out of the relation of employer and employee are governed by § 1970 of the Civil Code. Pritchard v. Whitney Estate Co., 164 Cal. 564; 129 Pac. 989. The action under this section is intended for the compensation of the families of persons killed, not for the solacing of their wounded feelings. Simoneau v. Pacific Electric Ry. Co., 159 Cal. 494; 115 Pac. 320. The word "heirs," in this section, is used in the common-law sense: it includes all persons capable of inheriting from the deceased, without any reference to the distribution of his property under a statute. Redfield v. Oakland Consol. etc. Ry. Co., 110 Cal. 277; 42 Pac. 822, 1063; Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139. The action being purely statutory, and the statute contemplating but one action and one recovery, where a child is unborn, and its existence in its mother's womb is unknown to the defendant when a judgment in favor of the widow or other heirs is given, an action cannot be maintained by the child after its birth. Daubert v. Western Meat Co., 139 Cal. 480; 96 Am. St. Rep. 154; 69 Pac. 297; 73 Pac. 244. A recovery in the action is a bar to a further recovery, in a subsequent action, by another heir, of whose existence the defendant had no knowledge at the time of the first action. Salmon v. Rathjens, 152 Cal. 290; 92 Pac. 733. The action must be brought for the benefit of all the heirs, or by all the heirs for their own benefit. Salmon v. Rathjens, 152 Cal. 290; 92 Pac. 733. The bringing of the action by the personal representatives of the deceased does not make the damages any part of the estate. Jones v. Leonardt, 10 Cal. App. 284; 101 Pac. 811. The words "personal representatives" mean the administrator or executor, and not the heir or next of kin. Munro v. Pacific Coast Dredging etc. Co., 84 Cal. 515; 18 Am. St. Rep. 248; 24 Pac. 303; Burk v. Arcata etc. R. R. Co., 125 Cal. 364; 73 Am. St. Rep. 52; 57 Pac. 1065. The administrator is simply made a statutory trustee to recover damages for the benefit of the heirs. Ruiz v. Santa Barbara Gas etc. Co., 164 Cal. 188; 128 Pac. 330. Where the complaint by an administrator, in an action for death, does not show that there are heirs, it does not state a cause of action; the administrator can

bring only such an action as the statutory trustee for heirs, to recover damages which they have suffered; but where there are no heirs, there can be no recovery. Webster v. Norwegian Mining Co., 137 Cal. 399; 92 Am. St. Rep. 181; 70 Pac. 276; Jones v. Leonardt, 10 Cal. App. 284; 101 Pac. 811; Ruiz v. Santa Barbara Gas etc. Co., 164 Cal. 188; 128 Pac. 330. An amended complaint, curing the defect of the original in not alleging that there are heirs, does not state a new or different cause of action. Ruiz v. Santa Barbara Gas etc. Co., 164 Cal. 188; 128 Pac. 330. The damages recovered by the administrator, in such an action, are not assets of the estate of the decedent, but go to the heirs and persons injured by the death. Munro v. Pacific Coast Dredging etc. Co., 84 Cal. 515; 18 Am. St. Rep. 248; 24 Pac. 303; Jones v. Leonardt, 10 Cal. App. 284; 101 Pac. 811. The heirs cannot recover, where the deceased was guilty of contributory negligence. Shade v. Bay Counties Power Co., 152 Cal. 10; 92 Pac. 62. All the heirs should join as plaintiffs in the action; and where one does not consent to be joined, he may be made a defendant. Salmon v. Rathjens, 152 Cal. 290; 92 Pac. 733. The surviving widow may be the sole heir of the decedent. Knott v. McGilvray, 124 Cal. 128; 56 Pac. 789; Daubert v. Western Meat Co., 139 Cal. 480; 96 Am. St. Rep. 154; 69 Pac. 297; 73 Pac. 244. In an action by a husband for the death of his wife, caused by the malpractice of a physician, it is not necessary to allege expressly that he is her heir, where it is alleged she was his wife, at the time of her death. Groom v. Bangs, 153 Cal. 456; 96 Pac. 503. A special administrator may sue, when authorized by the order appointing him. Ruiz v. Santa Barbara Gas etc. Co., 164 Cal. 188; 128 Pac. 330.

Action for death by wrongful act or neglect. An action for damages for death by negligence or wrongful act is purely statutory: no such right existed at common law. Burk v. Arcata etc. R. R. Co., 125 Cal. 364; 73 Am. St. Rep. 52; 57 Pac. 1065; Daubert v. Western Meat Co., 139 Cal. 480; 96 Am. St. Rep. 154; 69 Pac. 297; 73 Pac. 244; Pritchard v. Whitney Estate Co., 164 Cal. 564; 129 Pac. 989. In order to entitle one to recover, two things must be shown: 1. The wrongful act or negligence of the defendant; 2. No want of ordinary care on the part of the decedent; the gravamen of the action is the negligence or wrongful act of the defendant; and there can be no recovery, where the negligence of the decedent contributed in any degree to the death, or to the injury resulting in the death. Gay v. Winter, 34 Cal. 153. Where a widow sues for damages for the death of her husband, caused by negligence, the social and domestic relations of the parties, and their kindly demeanor toward each other, are admissible to be shown, as parts of "all the circumstances of the case." Beeson v. Green Mountain Gold Mining Co., 57 Cal. 20; Cook v. Clay Street Hill R. R. Co., 60 Cal. 604; McKeever v. Market Street R. R. Co., 59 Cal. 294; Nehrbas v. Central Pacific R. R. Co., 62 Cal. 320; Wolford v. Lyon Gravel etc. Mining Co., 63 Cal. 483. The heirs may all be joined as plaintiffs; and the husband, as the heir of his deceased wife, may bring suit in his own name as an heir, and as the guardian ad litem of the minor heirs. Redfield v. Oakland Consol. etc. Ry. Co., 110 Cal. 277; 42 Pac. 822, 1063. Joint tort-feasors are liable jointly and severally, and they may be sued jointly in one action, or severally in separate actions. Grundel v. Union Iron Works, 127 Cal. 438; 78 Am. St. Rep. 75; 47 L. R. A. 467; 59 Pac. 826. If several persons are guilty in common of a tort, the injured party may, at his election, sue such tort-feasor either separately or together. Butler v. Ashworth, 110 Cal. 614; 43 Pac. 4, 386. Where work is being done with tools and materials directly over a thoroughfare, where people are constantly traveling, and have the undoubted right to travel, the law demands the exercise of great care and precaution in the performance of the work, in order that the travelers may not be injured. Dixon v. Pluns, 98 Cal. 384; 35 Am. St. Rep. 180; 20 L. R. A. 698; 33 Pac. 268; Judson v. Giant Powder Co., 107 Cal. 549; 48 Am. St. Rep. 146; 29 L. R. A. 718; 40 Pac. 1020; Knott v. McGilvray, 124 Cal. 128; 56 Pac. 789. The mere fact that a child is drowned in a public bathing-house is not conclusive proof of negligence on the part of the proprietor. Flora v. Bimini Water Co., 161 Cal. 495; 119 Pac. 661.

Damages recoverable. The damages recoverable are for the injuries inflicted upon the plaintiff, not for those upon the decedent (Redfield v. Oakland Consol. etc. Ry. Co., 110 Cal. 277; 42 Pac. 822, 1063; Bond v. United Railroads, 159 Cal. 270; Ann. Cas. 1912C, 50; 113 Pac. 366; Pierce v. United Gas etc. Co., 161 Cal. 176; 118 Pac. 700); and the jury have power to assess such damages as, under all the circumstances of the case, may be just (Beeson v. Green Mountain Gold Mining Co., 57 Cal. 20; McKeever v. Market Street R. R. Co., 59 Cal. 294; Cook v. Clay Street Hill R. R. Co., 60 Cal. 604; Munro v. Pacific Coast Dredging etc. Co., 84 Cal. 515; 18 Am. St. Rep. 248; 24 Pac. 303; Morgan v. Southern Pacific Co., 95 Cal. 510; 29 Am. St. Rep. 143; 17 L. R. A. 71; 30 Pac. 603); and if they have not made their estimate upon a wrong basis, and have not acted under the influence of passion and prejudice, their judgment is final. Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139. The rule of damages stated in the last sentence of this section is the exclu-

sive measure of damages in any action for injuries causing death (Bond v. United Railroads, 159 Cal. 270; Ann. Cas. 1912C, 50; 113 Pac. 366); and is a direct determination of the legislature that the policy adopted by other states in that regard shall not exist in this state. Redfield v. Oakland Consol. etc. Ry. Co., 110 Cal. 277; 42 Pac. 822, 1063. The general language of the last clause of this section is used with reference to the fact that the damages allowed by the statute to be recovered are usually prospective in their nature, and necessarily based upon probabilities; therefore the estimate of such damages must necessarily call for the exercise of a very large discretion upon the part of the jury, who must keep in view the fact that the measure thereof is what shall fairly seem to be the pecuniary injury or loss of the plaintiff. De Haven, J., concurring, in Morgan v. Southern Pacific Co., 95 Cal. 510; 29 Am. St. Rep. 143; 17 L. R. A. 71; 30 Pac. 603. The jury are not limited, in assessing damages, to the actual pecuniary injury sustained by the plaintiff by reason of the loss of the services of the deceased. Nehrbas v. Central Pacific R. R. Co., 62 Cal. 320; Cleary v. City Railroad Co., 76 Cal. 240; 18 Pac. 269; Skelton v. Pacific Lumber Co., 140 Cal. 507; 74 Pac. 13. If the amount of damages awarded is large, the court cannot, for that reason, say they are excessive. Aldrich v. Palmer, 24 Cal. 513; Morgan v. Southern Pacific Co., 95 Cal. 510; 29 Am. St. Rep. 143; 17 L. R. A. 71; 30 Pac. 603; Redfield v. Oakland Consol. etc. Ry. Co., 110 Cal. 277; 42 Pac. 822, 1063; Skelton v. Pacific Lumber Co., 140 Cal. 507; 74 Pac. 13. Compensatory, and not exemplary or vindictive, damages may be allowed, and these must be confined to the pecuniary loss suffered, including comfort, society, etc., of the deceased. Munro v. Pacific Coast Dredging etc. Co., 84 Cal. 515; 18 Am. St. Rep. 248; 24 Pac. 303. Exemplary damages cannot be allowed. Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139. The statute of 1862 expressly provided that the jury might give exemplary damages, and this provision was carried into the first edition of the code (Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139; Munro v. Pacific Coast Dredging etc. Co., 84 Cal. 515; 18 Am. St. Rep. 248; 24 Pac. 303; Morgan v. Southern Pacific Co., 95 Cal. 510; 29 Am. St. Rep. 143; 17 L. R. A. 71; 30 Pac. 603; but damages cannot be recovered for grief, mental suffering, or sorrow. Munro v. Pacific Coast Dredging etc. Co., 84 Cal. 515; 18 Am. St. Rep. 248; 24 Pac. 303; Beeson v. Green Mountain Gold Mining Co., 57 Cal. 20. Evidence as to necessary medical attention is proper on the question of damages: Simoneau v. Pacific Electric Ry., 159 Cal. 494; 115 Pac. 320; but in order to recover such charges for medical and hospital services rendered, they must have been paid. Salmon v. Rathjens, 152 Cal. 290; 92 Pac. 733. In order that funeral expenses may be recovered, they must be pleaded as special damages. Gay v. Winter, 34 Cal. 153. In all actions for injuries causing death, the damages are limited to the pecuniary loss suffered, by the person or persons for whose benefit the right of action is given, from the death or injury of the victim. Bond v. United Railroads, 159 Cal. 270; Ann. Cas. 1912C, 50; 113 Pac. 366. Pecuniary damages are limited to the probable value of the life of the deceased to relatives. Morgan v. Southern Pacific Co., 95 Cal. 510; 29 Am. St. Rep. 143; 17 L. R. A. 71; 30 Pac. 603; Pepper v. Southern Pacific Co., 105 Cal. 389; 38 Pac. 974; Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139. The pecuniary interest of children in the lives of their parents does not necessarily end with their attaining majority; the jury must take into consideration and allow for the probable loss of any benefit of pecuniary value which the children would probably receive from their parents at the age of majority. Redfield v. Oakland Consol. etc. Ry. Co., 110 Cal. 277; 42 Pac. 822, 1063; Valente v. Sierra Railway Co., 158 Cal. 412; 111 Pac. 95; Bond v. United Railroads, 159 Cal. 270; Ann. Cas. 1912C, 50; 113 Pac. 366. Children have a right to demand from their father a comfortable support and a reasonably good education until of sufficient age to maintain themselves; and where the father, whilst able to perform this duty, loses his life through the negligence of another, it was the intention of the statute to compel the offending party to make fair and just compensation for the loss; to accomplish that end, a larger sum would be required for a numerous family than for one of but one or two persons; in like manner, if there is a surviving widow, who, if her husband were alive, would be entitled to support from him, appropriate to his circumstances and standing in life, she would be entitled to be fairly and justly compensated for the loss, in this respect, which she suffered by his death. Taylor v. Western Pacific R. R. Co., 45 Cal. 323. In determining the amount of damages to the children, caused by the death of the parent, the jury may take into consideration the value of nurture and instruction, moral and physical and intellectual training, which a parent gives to children. Redfield v. Oakland Consol. etc. Ry. Co., 110 Cal. 277; 42 Pac. 822, 1063. The proof of the value of the deceased as a wage-earner is not the only element of damages to be considered by the jury. Skelton v. Pacific Lumber Co., 140 Cal. 507; 74 Pac. 13. Evidence of the business and education of the decedent, and of his habits of sobriety and economy, are also admissible. Taylor v. Western Pacific R. R. Co., 45 Cal. 323.

The theory of this section is, that those who are entitled to recover damages have a pecuniary interest in the life of the person killed, and hence the amount of recovery is limited to the value of that interest; but "pecuniary interest" does not mean a precise sum in money, measured and demonstrated by evidence. Ruppel v. United Railroads, 1 Cal. App. 666; 82 Pac. 1073. A life annuity in favor of the deceased is not a measure of damages. Redfield v. Oakland Consol. etc. Ry. Co., 110 Cal. 277; 42 Pac. 822, 1063. If the facts are clear and undisputed, and no other inference than that of negligence can be drawn from them, the court may draw the inference, and grant a nonsuit, where the plaintiff is guilty of contributory negligence. Shade v. Bay Counties Power Co., 152 Cal. 10; 92 Pac. 62. If liability for an injury caused by blasting depends upon negligence, the person who has an independent contract for the blasting is liable for the negligence, and not the party who let the contract. Houghton v. Loma Prieta Lumber Co., 152 Cal. 500; 14 Ann. Cas. 1159; 14 L. R. A. (N. S.) 913; 93 Pac. 82. The plaintiff, in an action, in this state, to recover for an injury causing death in a foreign state, must allege and prove the law of such foreign state, giving a right of action for the death. Ryan v. North Alaska Salmon Co., 153 Cal. 438; 95 Pac. 862. The rule of damages is discussed in Durkee v. Central Pacific R. R. Co., 56 Cal. 388; 38 Am. Rep. 59; Bowen v. Sierra Lumber Co., 3 Cal. App. 312; 84 Pac. 1010.

Elements and measure of damages for wrongful death. See note 12 Am. St. Rep. 375.

Measure of damages recoverable by parent for death of minor child by wrongful act. See note Ann. Cas. 1912C, 58.

CODE COMMISSIONERS' NOTE. This section is intended as a substitute for "An Act requiring compensation for causing death by wrongful act, neglect, or default." Stats. 1862, p. 447. The portion of that act relating to the time in which the action must be commenced is inserted in chapter III of the title relating to the time in which civil actions must be commenced. See Kramer v. San Francisco etc. R. R. Co., 25 Cal. 435.

§ 378. Who may be joined as plaintiffs. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this title.

Co-tenants. Post, § 381.

Special partners. Civ. Code, § 2492.

Other parties, bringing in. Post, § 389.

Misjoinder and non-joinder of plaintiffs. Post, § 430.

Legislation § 378. Enacted March 11, **1872**; based on Practice Act, § 12 (New York Code, § 117), the only change being to substitute the word "title" for "act."

Persons having interest, joined as plaintiffs. All persons in interest as plaintiffs should be joined as such (Whitney v. Stark, 8 Cal. 514; 68 Am. Dec. 360; Gorman v. Russell, 14 Cal. 531); but no one can be both plaintiff and defendant; a party cannot have a right of action against himself as debtor or tort-feasor: Brown v. Mann, 71 Cal. 192; 12 Pac. 51; Byrne v. Byrne, 94 Cal. 576; 29 Pac. 1115; 30 Pac. 196. A person interested both as plaintiff and defendant must be made defendant; but this rule is dispensed with, where it is impracticable or very inconvenient, as in cases of joint associations composed of numerous individuals. Gorman v. Russell, 14 Cal. 531. Generally, several persons, who have a common interest in the subject-matter of the action, and the right to ask the same remedy against the defendant, may properly be joined as plaintiffs. People v. Morrill, 26 Cal. 336; Toomey v. Knobloch, 8 Cal. App. 585; 97 Pac. 529. Several parties, having one common interest in the subject-matter of the action, may join as plaintiffs, although they claim under distinct titles and have different interests (Churchill v. Lauer, 84 Cal. 233; 24 Pac. 107); and several parties, all interested in the principal question raised, though they do not have a joint interest adverse to the defendant, may join as plaintiffs, particularly where such joinder will prevent a multiplicity of suits. People v. Morrill, 26 Cal. 336; Owen v. Frink, 24 Cal. 171. Several abutting property-owners, each with a distinct parcel of land, all watered successively by the same stream, may unite as plaintiffs in an action seeking the redress of a common grievance. Daly v. Ruddell, 137 Cal. 671; 70 Pac. 784; Los Robles Water Co. v. Stoneman, 146 Cal. 203; 79 Pac. 880; Barham v. Hostetter, 67 Cal. 272; 7 Pac. 689; Foreman v. Boyle, 88 Cal. 290; 26 Pac. 94. Tenants in common may maintain a joint action for the diversion of the waters of a ditch, such action being in the nature of an action for the abatement of a nuisance. Parke v. Kilham, 8 Cal. 77; 68 Am. Dec. 310; De Johnson v. Sepulbeda, 5 Cal. 149. In an action in trover, all parties in interest should be joined as plaintiffs, and failure so to join may be pleaded in abatement. Whitney v. Stark, 8 Cal. 514; 68 Am. Dec. 360. A trustee, to whom a mortgage has been transferred by the mortgagee to secure a debt, may be joined in an action to foreclose the mortgage. Cerf v. Ashley, 68 Cal. 419; 9 Pac. 658. Parties holding distinct water rights, regulated by a contract, jointly exercised by all, are properly united as plaintiffs in an action for the enforcement of such contractual rights (Daly v. Ruddell, 137 Cal. 671; 70 Pac. 784; Los Robles Water Co. v. Stoneman, 146 Cal. 203; 79 Pac. 880); but where several riparian owners of dis-

tinct parcels of land, which are supplied with water from the same source, join in an action to prevent the diversion of the waters, and also ask for damages severally to plaintiffs, the cause of action for damages to each of the plaintiffs, being several and individual, cannot be joined with the cause of action for an injunction, which is common to them all. Barham v. Hostetter, 67 Cal. 272; 7 Pac. 689; Foreman v. Boyle, 88 Cal. 290; 26 Pac. 94. An attorney in fact, not a trustee, is not a necessary party to a suit to represent his principal. Powell v. Ross, 4 Cal. 197. Where the plaintiff brings a suit upon a bill of lading, made to the plaintiff jointly with another, he has no separate cause of action. Mayo v. Stansbury, 3 Cal. 465. Where a purchase is made on a joint contract of two, one cannot sue for damages sustained by himself alone. McGilvery v. Moorhead, 3 Cal. 267. Under a lease made jointly by two parties, to a third party, by the terms of which each of the lessors was to receive an equal portion of the rent, both lessors are properly joined as plaintiffs, in an action to recover restitution and damages on a breach of the contract by the lessee. Treat v. Liddell, 10 Cal. 302. In an action to quiet title, brought by the vendor against his vendee, under a contract of sale, the right to purchase under which had not been forfeited at the time of the commencement of the action, a subsequent vendee, under another contract, is a necessary party to the complete determination or settlement of the question. Birch v. Cooper, 136 Cal. 636; 69 Pac. 420. Where a party agreed to pay the debt of another, a suit cannot be maintained by either the person to whom the debt was owing, or his assignee, neither having been a party to the agreement, nor assented to it, nor sought to connect themselves with it, until the commencement of the action. McLaren v. Hutchinson, 18 Cal. 80. Where the defendant is indebted to another person, and he to the plaintiff, and all parties agree that the defendant shall pay his indebtedness to the plaintiff, there is an equitable assignment of the debt, and the plaintiff may maintain an action thereon against the defendant. Wiggins v. McDonald, 18 Cal. 126. Where a business is destroyed by fire, through the negligence or wrongful act of the defendant, the owner of the building and the insuring company are properly joined as plaintiffs, although the owner alleges and seeks to recover special damages to his business by reason of such negligence or wrongful act, in which damage the insurer has no interest. Fairbanks v. San Francisco etc. Ry. Co., 115 Cal. 579; 47 Pac. 450; and see also People v. Morrill, 26 Cal. 336; Owen v. Frink, 24 Cal. 171. When a citizen has been injured through the failure of a state officer to do his duty, the state is not a proper party in an action to recover damages for such injury. Nougues v. Douglass, 7 Cal. 65. Where the nonjoinder does not appear on the face of the complaint, it may be taken advantage of, either by the answer, or by the apportionment of the damages at the trial. Whitney v. Stark, 8 Cal. 514; 68 Am. Dec. 360. Where there is no showing of the impairment of substantial rights, a judgment will not be reversed for multifariousness and misjoinder. Asevado v. Orr, 100 Cal. 293; 34 Pac. 777; Shade v. Sisson Mill etc. Co., 115 Cal. 357; 47 Pac. 135; Daly v. Ruddell, 137 Cal. 671; 70 Pac. 784. In an action to cancel liens for street-work, the owners in severalty of separate lots may be joined as plaintiffs, this section expressly authorizing the joinder of plaintiffs, in one action, to accomplish a common purpose. Toomey v. Knobloch, 8 Cal. App. 585; 97 Pac. 529. In an action for the specific performance of a contract to purchase, brought by one of two purchasers, the other having received his share, the court, in the absence of a demurrer for nonjoinder, may grant a decree in favor of the plaintiff alone. Stevens v. Los Angeles Dock etc. Co., 20 Cal. App. 743; 130 Pac. 197.

CODE COMMISSIONERS' NOTE. 1. "Having an interest in the subject of the action." See § 367, ante, and notes. In an action of trover, all parties in interest should be joined. Whitney v. Stark, 8 Cal. 514; 68 Am. Dec. 360.

2. **"Except when otherwise provided in this title."** See the following notes.

3. **"Assignees of things in action."** See § 368, ante, and notes.

4. **Executors, administrators, and trustees.** See § 369, ante, and notes.

5. **Married women.** See §§ 370, 371, ante, and notes.

6. **For infants and guardian.** See § 372, ante, and notes.

7. **Actions by parents in certain cases.** See §§ 375, 376, ante, and notes.

8. **Actions by heirs and personal representatives** for death of person by wrongful act. See preceding section.

9. **When one or more parties may sue** or defend for all the parties in interest. See § 382, post.

10. **Actions to quiet title.** See § 738, post.

11. **Parties having an interest. Who are proper parties to equity actions.** Who are the proper and necessary parties to a suit in equity, is a subject of great practical importance, and oftentimes of no inconsiderable difficulty. It is the constant aim of a court of equity to do complete justice, by deciding upon and settling the rights of all parties interested in the subject of the suit, so as to make the performance of the decree of the court perfectly safe to those compelled to obey it, and to prevent further litigation. For this purpose, all persons materially interested, either legally or beneficially, in the subject-matter of the suit, ought generally to be made parties thereto, either as plaintiffs or defendants, so that there may be a complete decree, which shall bind them all. Mitford's Pleading, 6th Am. ed., p. 189; 1 Daniell's Chancery Pl. & Pr., p. 40; Story's Eq. Pl., § 72; People v. Morrill, 26 Cal. 360, 361. The rule, as stated and illustrated in King v. Berry's Executors, 3 N. J. Eq. 52, is, that all persons legally or beneficially interested in the subject-matter and result of a suit must be parties; and to the same effect are the following cases: Mechanics' Bank v. Seton, 1 Pet. 306; 7 L. Ed. 156; Caldwell v.

Taggart, 4 Pet. 190; 7 L. Ed. 828; Marshall v. Beverley, 5 Wheat. 313; 5 L. Ed. 97; Connecticut v. Pennsylvania, 5 Wheat. 424; 5 L. Ed. 125; Williams v. Russell, 19 Pick. 165; to which many others might be added. But to this general rule there are, according to the authorities, exceptions. Mitford's Pleading p. 190; Story's Eq. Pl., §§ 76, 76a. 76b, 76c; Wiser v. Blackly, 1 Johns. Ch. 437. These it is not necessary to notice in this place, as no question is presented requiring it. There is a distinction made in some of the authorities between the subject-matter of the suit and the object of the suit; and it has been said, that it is not all persons who have an interest in the subject-matter of the suit, but, in general, those only who have an interest in the object of the suit, who are ordinarily required to be made parties. Calvert on Parties, pp. 5, 6, 10, 11. The general rule on the subject may be stated to be, that all are necessary parties who have an interest in the subject-matter, which may be affected by the decree. Smith v. Trenton Delaware Falls Company, 4 N. J. Eq. 508; Crease v. Babcock, 10 Met. (Mass.) 531. This rule is founded on the principle of preventing future litigation and avoiding a multiplicity of suits, by adjudicating upon the rights of all parties upon whom a decree may or ought to operate. But this rule requiring all in interest to be before the court, is one somewhat of convenience, and will not be rigidly enforced where its observance would be attended with great inconvenience, and answer no substantially beneficial purpose. It will be modified, or partially dispensed with, in the discretion of the court, as justice and the exigencies of the case may require. Having thus referred generally to the rule of courts of equity in relation to what persons ought to be made parties to a suit, we shall proceed directly to the consideration of the question in issue, that is to say, the objection that there is a misjoinder of parties defendants, and an improper union of causes of action, or in other words, that the complaint is fatally infected with the vice of multifariousness. A bill in equity is said to be multifarious when distinct and independent matters are joined therein; as, for example, the uniting of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants. But the case of each particular defendant must be entirely distinct and independent from that of the other defendants, or the objection cannot prevail; for, as said by Judge Story, "the case of one may be so entire as to be incapable of being prosecuted in several suits, and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case the objection of multifariousness could not be allowed to prevail. So it is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some matters in the suit, and they are connected with the others." Story's Eq. Pl., §§ 271, 271a. The same authority lays it down, that "to support the objection of multifariousness, because the bill contains different causes of suit against the same person, two things must concur: first, the different grounds of suit must be wholly distinct; secondly, each ground must be sufficient, as stated, to sustain a bill. If the grounds be not entirely distinct and unconnected, if they arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end, if one connected story can be told of the whole, the objection does not apply." Id., § 271b. When the point in issue is a matter of common interest among all the parties to the suit, though the interests of the several defendants are otherwise unconnected, still they may be joined. In Salvidge v. Hyde, 5 Madd. 138, Sir John Leach, vice-chancellor, said: "If the objects of the suit be single, but it happens that different persons have separate interests, indistinct questions which arise out of the single object, it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole subject." In Boyd v. Hoyt, 5 Paige Ch. 78, Mr. Chancellor Walworth laid down the same doctrine, in substantially the language used by Sir John Leach in Salvidge v. Hyde; and Mr. Daniell, in the first volume of his excellent work on Pleading and Practice in the High Court of Chancery, at page 386, says, in reference to the doctrine held in Salvidge v. Hyde, there is no doubt that the learned judge stated the principle correctly, though in the application of it he went, in the opinion of Lord Eldon, too far. 1 Jac. 151. In Whaley v. Dawson, 2 Sch. & Lef. 370, Lord Redesdale observed, that, in the English cases, where demurrers, because the plaintiff demanded in his bill matters of distinct natures against several defendants not connected in interest, have been overruled, there has been a general right in the plaintiff covering the whole case, although the rights of the defendants may have been distinct. In such cases the court proceeds on the ground of preventing multiplicity of suits, when one general right is claimed by the plaintiff against all the defendants; and so in Dimmock v. Bixby, 20 Pick. 368, the court held that where one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights, the bill of complaint is not multifarious. In the elaborate case of Campbell v. Mackay, 1 Myl. & C. 603, Lord Cottenham held that where the plaintiffs have a common interest against all the defendants in a suit, as to one or more of the questions raised by it, so as to make them all necessary parties for the purpose of enforcing that common interest, the circumstance of the defendants being subject to distinct liabilities, in respect to different branches of the subject-matter, will not render the bill multifarious. In the same case his lordship observed that it was utterly impossible, upon the authorities, to lay down any rule or abstract proposition as to what constitutes multifariousness which can be made universally applicable. The only way, he said, of reconciling the authorities upon the subject is by adverting to the fact, that, although the books speak generally of demurrers for multifariousness, yet, in truth, such demurrers may be divided into two kinds, one of which, properly speaking, is on account of a misjoinder of causes of action, that is to say, uniting claims of so different a character that the court will not permit them to be litigated in one record, even though the plaintiff and defendants may be parties to the whole transactions which form the subject of the suit. The other of which, as applied to a bill, is, that a party is brought as a defendant upon a record with a large portion of which, and with the case made by it, he has no connection whatever. A demurrer for such cause is an objection that the complaint sets forth matters which are multifarious, and the real cause of objection is, as illustrated by the old form of demurrer, that it puts the parties to great and useless expense; an objection which has no application in a case of mere misjoinder of parties. Upon this subject, Judge Story says: "In the former class of cases, where there is a joinder of distinct claims between the same parties, it has never been held, as a distinct proposition, that they cannot be united, and that the bill is of course demurrable for that cause alone, notwithstanding the claims are of a similar nature, involving similar principles and results, and may, therefore, without inconvenience, be heard and adjudged together. If that proposition were to be established and carried to its full extent, it would go to prevent the uniting of several instruments in one bill, although the parties were liable in respect to each, and the same parties were interested in the property which was the subject of each"; and, after giving an example in illustration of the inconvenience of an opposite doctrine, he continues: "Such a rule, if established in equity, would be very mischievous and oppressive in practice, and no possible advantage could be gained by it. It would be a multiplication of suits in cases where it could answer no assignable purpose but to have the subject-matter split into a variety of separate bills"; and further, he denies that such a rule has been established, but says, on the contrary, a different doctrine has been maintained, which is

supported by the most satisfactory authority (Story's Eq. Pl., §§ 531, 532); and he states, in conclusion, the result of the principles of the cases on the subject to be, that, where there is a common liability in the defendants, and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit; and further, that, where the interests of the plaintiffs are the same, although the defendants may not have a coextensive common interest, but their interests may be derived under different instruments, if the general object of the bill will be promoted by their being united in a single suit, the court will not hesitate to sustain the bill against all of them. Ibid., §§ 533, 534; Wilson v. Castro, 31 Cal. 426.

12. **Parties interested in annulling patent.** Persons not owning a joint interest in the real estate, yet if they have a common interest in annulling a patent therefor, they may be joined as plaintiffs. People v. Morrill, 26 Cal. 352; see also People v. Stratton, 25 Cal. 244.

13. **Action by assignee of equitable title for specific performance.** Where A contracts for the conveyance of certain lands to B, the assignees of B, who had the equitable title, may jointly maintain an action against A for a specific performance. Owen v. Frink, 24 Cal. 177.

14. **Joint action by several holders of mechanics' liens.** Several parties, holding mechanics' liens, may be joined for the enforcement of the liens, even though they have no common interest together. Barber v. Reynolds, 33 Cal. 502.

15. **Agents, action by.** Generally, agents cannot maintain action in their own name for causes arising out of the subject-matter of the agency. Lineker v. Ayeshford, 1 Cal. 75; Phillips v. Henshaw, 5 Cal. 509. But, if a note is payable to a person, as agent of another, yet he may sue in his own name at law. Ord v. McKee, 5 Cal. 515. If two agents are employed to do a certain business, each agent may, in some cases, maintain a separate action for his expenses. Conner v. Hutchinson, 12 Cal. 127.

16. **Principals, when they may sue** in their own names on contracts made by their agents. See Ruiz v. Norton, 4 Cal. 359; Brooks v. Minturn, 1 Cal. 482; Thurn v. Alta Telegraph Co., 15 Cal. 472; Lubert v. Chauviteau, 3 Cal. 462; 58 Am. Dec. 415.

17. **Assignees.** Generally an assignee may bring an action in his own name. Wheatley v. Strobe, 12 Cal. 98; 73 Am. Dec. 522. If the assignment was absolute of a whole demand, although he only acquired a portion thereof, yet the assignee may sue for the whole debt. Gradwohl v. Harris, 29 Cal. 150. But the assignment of a portion of a debt does not constitute the assignee a joint owner in the whole debt, and he need not necessarily be joined as a party in an action to recover the debt. Leese v. Sherwood, 21 Cal. 152.

18. **Assignment of contract as security for debt, etc.** "An assignment of a contract as a security for a debt, and also in consideration of a covenant not to sue upon the debt, entitles the assignee to sue on the contract in his own name." Warner v. Wilson, 4 Cal. 310 (syllabus); see also Gray v. Garrison, 9 Cal. 325. When assignee of a judgment may sue on appeal bond. See Moses v. Thorne, 6 Cal. 88.

19. **Indorsers and indorsees.** The holder of a non-negotiable note may maintain an action against the person assigning the same to him, and also against every one from whose hands the note has passed by assignment. Hamilton v. McDonald, 18 Cal. 128. If a new promise has been made to a payee, a subsequent indorsee succeeds to the rights of the payee, and may maintain an action upon it. Smith v. Richmond, 19 Cal. 476.

20. **Joint contracts, bills of lading, and leases.** As to joint contracts, both joint contractors must be joined as plaintiffs in an action thereon, notwithstanding only one of the contractors has sustained damage. See McGilvery v. Moorhead, 3 Cal. 267. A suit being brought upon a bill of lading made to the plaintiff jointly with another party. Held: the plaintiff had no separate cause of action. Mayo v. Stansbury, 3 Cal. 465. Also, as to joint leases, see Treat v. Liddell, 10 Cal. 302.

21. **Actions by or against counties.** See Pol. Code, §§ 4000, 4003, and 4452, and notes. See also People v. Myers, 15 Cal. 33; Mendocino County v. Lamar, 30 Cal. 627; Mendocino County v. Morris, 32 Cal. 145; Placer County v. Astin, 8 Cal. 305; Price v. Sacramento County, 6 Cal. 254; Board of Supervisors v. Bird, 31 Cal. 66; Solano County v. Neville, 27 Cal. 468; Sharp v. Contra Costa County, 34 Cal. 284.

22. **Ejectment suits. "All persons having an interest in the subject of the action," etc.** Actions of ejectment must be prosecuted in the name of the real party in interest. Ritchie v. Dorland, 6 Cal. 33. See also Seaward v. Malotte, 15 Cal. 304; Collier v. Corbett, 15 Cal. 183; Stark v. Barrett, 15 Cal. 361; Touchard v. Crow, 20 Cal. 162; 81 Am. Dec. 108. If the action is brought for the community property of husband and wife, the action should be by the husband alone. Mott v. Smith, 16 Cal. 533. An heir at law can maintain the action without entry upon the land. See Soto v. Kroder, 19 Cal. 87; see also Estate of Woodworth, 31 Cal. 604; Updegraff v. Trask, 18 Cal. 458.

23. **Non-resident alien.** A non-resident alien may be plaintiff in an action of ejectment. State v. Rogers, 13 Cal. 165.

24. **Party to a fraud.** A party to a fraud cannot maintain an action thereon. Depuy v. Williams, 26 Cal. 313.

25. **Partners. Actions against each other.** One partner cannot sue the other in an action at law. The remedy is by bill in equity for a dissolution and an account. Barnstead v. Empire Mining Co., 5 Cal. 299; Stone v. Fouse, 3 Cal. 292; Russell v. Ford, 2 Cal. 86; see also Buckley v. Carlisle, 2 Cal. 420.

26. **Church, who represents in an action.** Priest may have power to sue for the church. See Santillan v. Moses, 1 Cal. 94.

27. **The state may be a party.** Civil actions. See State v. Poulterer, 16 Cal. 532. A private person cannot bring a suit for private wrongs in the name of the state. See People v. Pacheco, 29 Cal. 210. The state cannot be plaintiff in certain actions, where it has no interest. See People v. Stratton, 25 Cal. 244.

28. **Who may bring action to annul patents to mines.** The state, and persons who have a right to mine on the land, under the mining laws of this state, may be joined as plaintiffs in an action to annul a patent for land sold illegally. People v. Morrill, 26 Cal. 352; Wilson v. Castro, 31 Cal. 420; see also, however, People v. Stratton, 25 Cal. 244.

29. **State cannot be sued.** Except as may be authorized by some statute. People v. Talmage, 6 Cal. 256.

30. **Administrators, when proper parties.** In an action to recover judgment on a promissory note, the suggestion of the death of the defendant, and the substitution of his administrator, and the continuance of the suit against him, subject the proceedings to such rules of the Probate Act as are applicable to proceedings for the collection of claims against an estate of a deceased person. Myers v. Mott, 29 Cal. 359; 89 Am. Dec. 49.

31. **Administrators, when parties.** Though the defendant in such an action be described in the caption of the complaint as administrator, yet the facts show that it is not sought to charge him as administrator, and no relief is sought against the estate. Held: that the objection that he is sued in his representative capacity is untenable. People v. Houghtaling, 7 Cal. 348; Lathrop v. Bampton, 31 Cal. 17; 89 Am. Dec. 141.

32. **Same person interested both as plaintiff and defendant.** Person being payee of a note and mortgage, and also payer of the same jointly with others, may sue the other joint payers. Where thirteen persons made a joint and several promissory note, payable to three of their number, and all joined in the execution of a mortgage to secure the payment of the note, the plaintiffs being

both payers and payees in the note, and the mortgagors and mortgagees in the mortgage, and, subsequently, the payees of the note brought suit against the other makers, and for a foreclosure of the mortgage. Held: That the suit was properly brought, and plaintiffs were entitled to a judgment of foreclosure. McDowell v. Jacobs, 10 Cal. 387.

33. **Actions to foreclose mortgages.** The plaintiff had the right to go into equity and foreclose the mortgage given to the principal to secure the note, if he was really interested in the subject-matter. Ord v. McKee, 5 Cal. 515.

34. **Mortgage given to secure separate debts of several persons as mortgagees.** "Where a mortgage is given to secure the separate debts of several persons as mortgagees, it is a several security, and may be enforced by each creditor, as in case of a separate mortgage. But when other parties are interested in the property, the court will require them to be brought in, before ordering a sale or foreclosure." Tyler v. Yreka Water Co., 14 Cal. 212 (syllabus).

35. **Actions by assignees to foreclose mortgage.** Where an assignment of a note and mortgage has been made to plaintiffs, to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them as such assignees, to institute suit on the note and mortgage; and a decree of foreclosure in such case, with directions to pay the money into court, to await the further decree of the court, is proper, or at least there is no error in such a decree to the prejudice of the defendants. Hunter v. Levan, 11 Cal. 11.

36. **Stranger in interest.** A mere stranger, who voluntarily pays money due on a mortgage, and fails to take an assignment thereof, but allows it to be canceled and discharged, cannot afterwards come into equity, and, in the absence of fraud, accident, or mistake of fact, have the mortgage reinstated and himself substituted in the place of the mortgagee. Guy v. Du Uprey, 16 Cal. 195; 76 Am. Dec. 518.

37. **Parties plaintiff in suit on injunction bond.** If several parties are severally in possession of and cultivating in separate parcels a tract of land, and are sued jointly in ejectment to recover possession of the whole tract, and an injunction is obtained, restraining them jointly from taking off the crops, these parties cannot maintain a joint action for damages on the injunction bond, provided their damages are not joint. They can maintain a joint action for such damages, only, as are joint, such as attorneys' fees. Fowler v. Frisbie, 37 Cal. 34.

38. **Action on injunction bond for several damages.** The fact that the plaintiff brings a joint action against several persons as trespassers, and obtains an injunction against them jointly, does not estop him, in an action brought against him on the injunction bond, from showing that the damages were several, and from claiming that they cannot maintain a joint action for several damages. Fowler v. Frisbie, 37 Cal. 34.

39. **Party plaintiff in action for deceit.** An action for deceit in the sale of land, to which the grantor had no title, should be brought by all the grantees jointly, unless there has been a conveyance of the cause of action to the plaintiff. A conveyance by one of the grantees to the others, of his interest in the land, does not assign the cause of action for deceit, so as to enable the assignees to sue for the deceit in their names. Lawrence v. Montgomery, 37 Cal. 183.

40. **Plaintiffs in suit upon covenants in a deed.** All the grantees should join as plaintiffs in an action upon either a direct or implied covenant in a deed, that the grantor has not sold or encumbered the land, or that he is seised of and has a right to convey the same. A deed of the land by one of the grantees to another, does not convey to him the cause of action upon such covenant. Lawrence v. Montgomery, 37 Cal. 183.

41. **Parties having a part-interest must be joined.** All the parties having a part-interest in the subject-matter should be joined as plaintiffs, but the defect must be taken advantage of by answer or apportionment of damages, where it does not appear on the face of the complaint. Whitney v. Stark, 8 Cal. 514; 68 Am. Dec. 360.

42. **Constructive parties in action upon bond.** In an action upon a bond or written undertaking, there can be no constructive parties jointly liable with the proper obligors. Lindsay v. Flint, 4 Cal. 88.

§ 379. Who may be joined as defendants. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant.

Joining landlord. Civ. Code, § 1949.
Parties to foreclosure. Post, § 726.
Corporation stockholders. Const., art. xii, §§ 3, 4; Civ. Code, § 322.
Associates, suing by common name. Post, § 388.
Quieting title. See post, § 738.
Executors, unqualified, need not be joined. Post, § 1587.
Fresh parties, bringing in. Post, § 389.
Service on one defendant out of several, effect of. Post, § 414.
State, suits against. Suits may be brought against state in such manner and in such courts as shall be directed by law. Const., art. xx, § 6.

Legislation § 379. Enacted March 11, **1872**; based on Practice Act, § 13 (New York Code, § 113), which read: "Any person may be made a defendant, who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

Parties having interest, joined as defendants. The former rule in equity is substantially adopted in this section, under which the parties interested not only in the cause of action, but also in the relief to be obtained, or who would be affected by the granting or withholding of such relief, were proper parties. Shakespear v. Smith, 77 Cal. 638; 11 Am. St. Rep. 327; 20 Pac. 294; Gardner v. Samuels, 116 Cal. 84; 58 Am. St. Rep. 135; 47 Pac. 935; Wilson v. Castro, 31 Cal. 420. The "controversy" referred to in this section is the claim for relief, set forth in the complaint, made by the plaintiff against the defendant. Gardner v. Samuels, 116 Cal. 84; 58 Am. St. Rep. 135; 47 Pac. 935. All persons interested in the subject-matter of the litigation, adverse to the plaintiff, should be made parties defendant. Shakespear v. Smith, 77 Cal. 638; 11 Am. St. Rep. 327; 20 Pac. 294; Randall v. Duff, 79 Cal. 115; 3 L. R. A. 754; 19 Pac. 532; 21 Pac. 610; Bireh v. Cooper, 136 Cal. 636; 69 Pac. 420. Persons who cannot be affected by

the judgment are not proper parties (Smith v. Lawrence, 38 Cal. 24; 99 Am. Dec. 344); but accommodation grantees are necessary parties defendant, and they have a right to be heard at law in their own defense, before a court of chancery can pronounce definitely on their claims. Knowles v. Inches, 12 Cal. 212. The owner of an equitable right to a part of the proceeds of a note is not a necessary party to an action on the note. Smith v. Woods, 164 Cal. 291; 128 Pac. 748. An action at law for damages cannot be maintained against several defendants jointly, where each acted independently of the others, and there was no concert or unity of design among them. Miller v. Highland Ditch Co., 87 Cal. 430; 22 Am. St. Rep. 254; 25 Pac. 550; Lang v. Lilley and Thurston Co., 20 Cal. App. 223; 128 Pac. 1028. Where a wife brings an action to quiet title to land, to remove a cloud created by her husband's deed, the grantee of the husband is the only necessary party defendant: the holders of a mortgage executed by such grantee are not. Peralta v. Simon, 5 Cal. 313. An administrator has no interest in, nor is he a proper party to, suits to determine controversies between the different heirs as to their rights of inheritance. Estate of Healy, 137 Cal. 474; 70 Pac. 455; Estate of Wright, 49 Cal. 550; Rosenberg v. Frank, 58 Cal. 387; Roach v. Coffey, 73 Cal. 281; 14 Pac. 840; Goldtree v. Thompson, 83 Cal. 420; 23 Pac. 383; Jones v. Lamont, 118 Cal. 499; 62 Am. St. Rep. 251; 50 Pac. 766; McCabe v. Healy, 138 Cal. 81; 70 Pac. 1008. The administrator of a deceased debtor or promisor may be joined with survivors jointly liable with the decedent to the plaintiff (Lawrence v. Doolan, 68 Cal. 309; 5 Pac. 484; 9 Pac. 159); and the administrator of a deceased executor may be joined with the surviving executor in an action to recover attorneys' fees for services rendered the executors jointly (Briggs v. Breen, 123 Cal. 657; 56 Pac. 633, 886); but before the adoption of the codes it was otherwise. Humphreys v. Crane, 5 Cal. 173. Adverse claimants to the rent of property are all necessary parties to an action by a tenant to obtain a decision as to who is entitled to receive the rent. McDevitt v. Sullivan, 8 Cal. 592. An attorney, charged with being a party to a fraud in obtaining judgment for his client, is properly joined with his client in a suit to set aside the judgment. Crane v. Hirshfelder, 17 Cal. 467. Contractors under an independent contract are alone responsible for injuries occurring in the progress of the work, before completion and acceptance. Boswell v. Laird, 8 Cal. 469; 68 Am. Dec. 345. In an action to foreclose a lien on lots assessed for street-work, the contractor may properly join as defendants, in one action, all the owners in common of several lots (Barber Asphalt Pav. Co. v. Crist, 21 Cal. App. 1; 130 Pac. 435); in an action to cancel a deed of trust, the beneficiaries are not necessary parties defendant: their interest is represented by the trustee. Watkins v. Bryant, 91 Cal. 492; 27 Pac. 775. Judgment must be rendered severally, not jointly: a judgment against a surviving obligor must be payable de bonis propriis, and a judgment against an administrator must be payable de bonis testatoris, in due course of administration. Bank of Stockton v. Howland, 42 Cal. 129; Briggs v. Breen, 123 Cal. 657; 56 Pac. 633, 886. Two defendants, whose liability is based upon different theories, cannot be joined. Hannon v. Nuevo Land Co., 14 Cal. App. 700; 112 Pac. 1103. One of the promisors on a bond, joint and several in form, may be sued separately thereon. Goff v. Ladd, 161 Cal. 257; 118 Pac. 792. Stockholders may be made parties, and several judgments may be entered against those served, or who appear. Turner v. Fidelity Loan Concern, 2 Cal. App. 122; 83 Pac. 62, 70. All stockholders, including a corporation stockholder, who were such when the debt of a corporation was incurred, may be joined as parties defendant. Kiefhaber Lumber Co. v. Newport Lumber Co., 15 Cal. App. 37; 113 Pac. 691. If stockholders, in behalf of the corporation and other stockholders, sue the corporation for acts complained of, that could not have been consummated otherwise than by the aid of the directors, such directors are proper parties defendant. Harvey v. Meigs, 17 Cal. App. 353; 119 Pac. 941. A temporary injunction, restraining the payment of dividends on stock in a corporation, or enjoining the stockholders from voting for the election of directors, will not be granted, unless the stockholders whose rights are affected are made parties to the action. Willis v. Lauridson, 161 Cal. 106; 118 Pac. 530.

Parties necessary to a complete determination. An executor may be joined with the administrator of a deceased executor, in an action to recover attorneys' fees for services rendered to the executors jointly. Briggs v. Breen, 123 Cal. 657; 56 Pac. 633, 886. Fictitious depositaries of title are necessary parties defendant, and they have a right to be heard at law in their own defense, before a court of chancery can pronounce definitely on their claims. Knowles v. Inches, 12 Cal. 212. An assignee in insolvency is a necessary party in an action to recover the possession of property, and to set aside a conveyance thereof, alleged to have been made by the judgment debtor in fraud of the creditors. Pfister v. Dascey, 65 Cal. 403; 4 Pac. 393. In an action for the rescission of a sale and conveyance of property to trustees for a corporation, on the ground of fraud, the joinder of an English stockholder, as a plaintiff, with the corporation defrauded,

is not a fatal misjoinder, where he holds bonds and stocks of the corporation, that may have to be canceled or transferred as a part of the relief asked. California Farm etc. Co. v. Schiappa-Pietra, 151 Cal. 732; 91 Pac. 593. The grantor is a proper but not a necessary party defendant in an action to subject to the lien of a judgment the property alleged to have been fraudulently conveyed. Blanc v. Paymaster Mining Co., 95 Cal. 524; 29 Am. St. Rep. 149; 30 Pac. 765. A guardian is not a proper party in an action affecting only the ward's interest. O'Shea v. Wilkinson, 95 Cal. 454; 30 Pac. 588. The guardian appears in the action, simply to manage and take care of the interests of the infant, and is no more a party to the action than the attorney who appears for one who has attained his majority. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418; Justice v. Ott, 87 Cal. 530; 25 Pac. 691; O'Shea v. Wilkinson, 95 Cal. 454; 30 Pac. 588. The heirs of a deceased mortgagor are not necessary parties to an action to foreclose the mortgage. Finger v. McCaughey, 119 Cal. 59; 51 Pac. 13; Cunningham v. Ashley, 45 Cal. 485; De Halpin v. Oxarart, 58 Cal. 101; Bayly v. Muehe, 65 Cal. 345; 3 Pac. 467; 4 Pac. 486; Monterey County v. Cushing, 83 Cal. 507; 23 Pac. 700; Spotts v. Hanley, 85 Cal. 155; 24 Pac. 738; Collins v. Scott, 100 Cal. 446; 34 Pac. 1085. Several tort-feasors, not acting in concert or by unity of design, are not liable to a joint action for damages, although the consequences of the several torts have united to produce an injury to the plaintiff, but a joint action may be maintained to restrain them all from continuing the wrong. Miller v. Highland Ditch Co., 87 Cal. 430; 22 Am. St. Rep. 254; 25 Pac. 550; People v. Gold Run etc. Min. Co., 66 Cal. 138; 56 Am. Rep. 80; 4 Pac. 1152. To restrain the issuance of bonds by a corporation, it is necessary that some of the persons to whom the bonds are to be issued shall be made parties. Hutchinson v. Burr, 12 Cal. 103; Patterson v. Board of Supervisors, 12 Cal. 105. To restrain the opening of a road by the road-overseer of the district, the board of supervisors are properly joined as defendants with the road-overseer, where the complaint alleges that there never has been any road or highway over or across the premises, and that one of the defendants, who is the road-overseer, and who is insolvent, instigated and abetted by the other defendants, who are the board of supervisors, had trespassed upon the plaintiff's premises, etc., for the purpose of constructing the road. Myers v. Daubenbiss, 84 Cal. 1; 23 Pac. 1027. The real owner of the equity of redemption is a necessary party, in an action to foreclose a fraudulent mortgage. Randall v. Duff, 79 Cal. 115; 3 L. R. A. 754; 19 Pac. 532; 21 Pac. 610. Where a husband is sued in an action of partition of land claimed as the homestead, the wife is a necessary party. De Uprey v. De Uprey, 27 Cal. 329; 87 Am. Dec. 81. Where H. & Co. was sued as a partnership, but there was a failure to prove that others were connected with H. in the transaction, "& Co." may be treated as surplusage, and the action proceed against H. alone. Mulliken v. Hull, 5 Cal. 245. The non-joinder of a secret partner, whose relation to the firm was not known to the plaintiff, cannot be objected to by the defendant. Tomlinson v. Spencer, 5 Cal. 291. Where producers contract to sell their product to an association, which brings an action for an accounting, and each producer is equitably interested in the fund derived from a sale of the season's product held by the plaintiff for distribution, a demurrer for misjoinder of causes and parties defendant is properly overruled. California Raisin Growers' Ass'n v. Abbott, 160 Cal. 601; 117 Pac. 767. Where a consignment of merchandise was made to two defendants as partners, and, after a dissolution of the partnership, two sales of a portion of the goods were made, one by each, and each received the purchase-money, the partnership continues for the purpose of fulfilling engagements, and the defendants are jointly liable. Johnson v. Totten, 3 Cal. 343; 58 Am. Dec. 412. In an action for a dissolution and accounting, all persons having an interest in the partnership are necessary parties (Settembre v. Putnam, 30 Cal. 490; Young v. Hoglan, 52 Cal. 466; Wright v. Ward, 65 Cal. 525; 4 Pac. 534); and the assignee of a partner is a necessary party to such action, because no complete determination of the controversy can be had without his presence. Cuyamaca Granite Co. v. Pacific Paving Co., 93 Cal. 252; 30 Pac. 525; Harrison v. McCormick, 69 Cal. 616; 11 Pac. 456. Where two persons purchased partnership property from one of two partners, who had taken forcible possession, the other partner cannot maintain a joint action against the partner selling and the purchasers. Mason v. Tipton, 4 Cal. 276. A patentee is a necessary party in an action to avoid or set aside a patent for fraud in its procurement, and his right cannot be impaired or determined in an action between third parties. Boggs v. Merced Mining Co., 14 Cal. 279. In an action against a trustee, for an accounting, the beneficiaries are necessary parties, to protect the trustee against further litigation. Alison v. Goldtree, 117 Cal. 545; 49 Pac. 571. There is a broad distinction between actions brought in opposition to trusts and those brought to enforce them; in the former, the beneficiaries are not necessary parties; in the latter, they are. Watkins v. Bryant, 91 Cal. 492; 27 Pac. 775. In an action for the rescission of a sale and conveyance of property to trustees for a

corporation, the trustees, if they hold title to the property at the beginning of the action, are properly joined as parties defendant; they do not become improper parties because, pending the action, they part with their interest. California Farm etc. Co. v. Schiappa-Pietra, 151 Cal. 732; 91 Pac. 593. Where an intestate had violated a contract, made in his lifetime, to leave a will in favor of his nephew, who had fully performed the contract on his part, and the nephew brings an action to enforce a constructive trust against the heirs, the administrator has no interest in the litigation, and is not a necessary party. McCabe v. Healy, 138 Cal. 81; 70 Pac. 1008. A subsequent vendee is a necessary party to an action by his vendor against the first vendee to quiet title to land. Birch v. Cooper, 136 Cal. 636; 69 Pac. 420. The vendee of land, purchasing after the termination of a lease thereon, is a proper party defendant in an action by the lessee against the lessor-vendor to recover for the value of improvements made, where the complaint asks to have the amount declared a lien on the land, and the land sold in satisfaction thereof. Gardner v. Samuels, 116 Cal. 84; 58 Am. St. Rep. 135; 47 Pac. 935. A promise to pay for improvements is personal, and does not run with the land (Gardner v. Samuels, 116 Cal. 84; 58 Am. St. Rep. 135; 47 Pac. 935); and such agreement does not bind the assignee of the lessor of land, where the breach of covenant took place before he took possession. Bailey v. Richardson, 66 Cal. 416; 5 Pac. 910. In the absence of an agreement in the lease to that effect, the tenant has no lien on the land for improvements placed thereon, during the term of his lease, under an agreement with his landlord to pay for the same at the expiration of the lease. Gardner v. Samuels, 116 Cal. 84; 58 Am. St. Rep. 135; 47 Pac. 935. In a judgment creditors' suit upon a stockholder's subscription, all the stockholders should be made parties, so far as practicable, unless some valid excuse is shown for not bringing them in. Turner v. Fidelity Loan Concern, 2 Cal. App. 122; 83 Pac. 62, 70. Where the complaint charged that a defendant was indebted to the plaintiffs, and had combined with another to defraud them, such defendant is a necessary party. Lucas v. Payne, 7 Cal. 92. In the absence of any provision by the legislature, the state cannot be sued (People v. Talmage, 6 Cal. 256); and it is not a necessary party to a suit by a citizen, who claims to have been injured by the alleged failure of a state officer to do his duty. Nougues v. Douglass, 7 Cal. 65.

Defendant in action to determine title or right of possession to real property. Before the adoption of this section, if the landlord was joined with his tenant, and the evidence at the trial did not show that he was in possession of any part of the premises, he was entitled to a nonsuit (Hussman v. Wilke, 50 Cal. 250); but the court had power to substitute the landlord for the tenant in possession, in an action in ejectment, after notice and motion for that purpose. Reay v. Butler, 69 Cal. 572; 11 Pac. 463. The tenant having notified the landlord, as required by the Civil Code, of the pendency of an action, and permitted him to appear and defend in the tenant's name, the latter cannot interfere with any of the subsequent proceedings to the landlord's injury. Valentine v. Mahoney, 37 Cal. 389. The landlord and a tenant in possession are proper parties defendant. Easton v. O'Reilly, 63 Cal. 305; Oakland Gas Light Co. v. Dameron, 67 Cal. 663; 8 Pac. 595.

How judgment may be. See note post, §§ 578, 579.

CODE COMMISSIONERS' NOTE. 1. **Parties united in interest.** All parties united in interest should be joined See § 382, post.

2. **Tenants in common.** One or more may be defendants. See § 384, post; also § 378, ante, note. See also § 382, post.

3. **When one party may defend for all.** See § 382, post.

4. **Married women.** See § 370, ante.

5. **Executor, administrator, etc.** See § 369, ante.

6. **Infants, guardians, etc.** See § 372, ante.

7. **Trustees of express trust.** See § 369, ante.

8. **Partners.** May be sued in firm name. § 388, post.

9. **Actions to quiet title.** See § 738, post.

10. **Personal representatives and successors in interest.** See § 385, post.

11. **Parties severally liable upon the same obligation.** See § 383, post.

12. **If a necessary party will not consent to be joined as plaintiff,** he may be made defendant. See § 382, post.

13. **Substitution of another party as defendant.** See § 386, post. See also § 389, post, party desiring to be made a defendant.

14. **Interveners.** See § 387, post.

15. **Action against state.** The state cannot be sued. People v. Talmage, 6 Cal. 256.

16. **Construction of section as to ejectment suits. Former law as to landlord and tenant, when parties to ejectment suit modified.** The last sentence, "And in an action to determine the title or right of possession to real property, which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant," was added to avoid the rule laid down in Dimick v. Deringer, 32 Cal. 488, that, "when the premises are in possession of a tenant, the tenant is, and the landlord is not, a proper party defendant." All who have given the subject any consideration will concede that the plaintiff ought to have the right to make the landlord a party to the action, and to bind him by the judgment, otherwise he would, in every such case, be driven to two actions to determine what could as well be settled in one. The additional clause changes, to a great extent, the construction heretofore given to this section (Practice Act, § 13) by our courts. The reasons for the change are apparent, and attention has long since been called to its necessity by our supreme court. In Valentine v. Mahoney, 37 Cal. 393, the court say: "It was decided at an early day in this court, that the provision of this section, that 'any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff,' was not applicable to actions of ejectment (Garner v. Marshall, 9 Cal. 270; see also Hawkins v. Rechert, 28 Cal. 534),

and that construction has prevailed to the present time. But it is readily seen that in all cases in which the defendant is holding under a lease, and the lessor's title is in issue, it is proper, if not necessary, that the latter should have an opportunity to participate in the defense, for no one is as competent to present and defend his title as he. The landlord, having been in possession, and having transferred it to the tenant, ought not to be deprived of the possession at the expiration of the term by proceedings in which he could take no part. And, on the other hand, the party holding the true title might be kept out of possession for years, should the person claiming the adverse title lease the premises to different persons for such short terms that the tenancy of any one would expire before a suit against him could be prosecuted to final judgment. But this construction of that section has been too long maintained to be departed from by the courts, and if a change in the rule is desirable or necessary, it must come from the legislature. Considerations of the character alluded to have induced the courts to give some regard to the rights and position of the landlord, and it is held that when the tenant has notified the landlord of the pendency of the action, and has permitted him to appear and defend in the tenant's name, the tenant cannot interfere with any subsequent proceedings to the prejudice of the landlord. See Dutton v. Warschauer, 21 Cal. 619; 82 Am. Dec. 765; Calderwood v. Brooks, 28 Cal. 156; Dimick v. Deringer, 32 Cal. 488. In Dutton v. Warschauer, although the opinion of Mr. Chief Justice Field was not expressly concurred in by Mr. Justice Cope and Mr. Justice Norton, it is apparent that the case is authority for the position above stated, from the fact that the tenant, who was the defendant, executed a release of errors, and that, notwithstanding this, the court, at the instance of the landlord of the defendant, reviewed the cause and reversed the judgment. If the landlord, though not nominally a party to the record, when once permitted by the tenant to appear and defend the action, can insist upon the right to conduct the defense from that point, this right cannot spring from the notice from the tenant to assume the burden of the defense, but proceeds from the fact that he will be affected by the judgment. The judgment is conclusive, both upon the landlord and tenant, in a subsequent action between them, involving the issue of eviction of the tenant by virtue of the judgment (Wheelock v. Warschauer, 21 Cal. 309; Wheelock v. Warschauer, 34 Cal. 265); and this is another instance in which the judgment binds others than the parties to the record and their privies. A possible future controversy between the landlord and tenant was not the only nor the principal purpose in view in securing to the landlord the right to defend the action in the tenant's name, but it was, that the issue between the plaintiff's and the landlord's title might be litigated and determined." Valentine v. Mahoney, 37 Cal. 393. The change made materially modifies the decisions of the supreme court as to proper parties to an ejectment suit. Among the decisions thus modified, to some extent at least, are the following: Winans v. Christy, 4 Cal. 70; 60 Am. Dec. 597; Ritchie v. Dorland, 6 Cal. 33; Garner v. Marshall, 9 Cal. 268; Waring v. Crow, 11 Cal. 366; Sampson v. Ohleyer, 22 Cal. 200; Hawkins v. Reichert, 28 Cal. 535; Dimick v. Deringer, 32 Cal. 489; Valentine v. Mahoney, 37 Cal. 393. And this modification extends also to other cases. The rule of law laid down by the supreme court heretofore has been, that ejectment was a possessory action, and must be brought against the occupant; it determines no rights but those of possession at the time, and it matters not who has, or claims to have, the title of the premises. Garner v. Marshall, 9 Cal. 268; Burke v. Table Mountain Water Co., 12 Cal. 403; Dutton v. Warschauer, 21 Cal. 609; 82 Am. Dec. 765; Fogarty v. Sparks, 22 Cal. 148; Owen v. Fowler, 24 Cal. 192; Lyle v. Rollins, 25 Cal. 440; Hawkins v. Reichert, 28 Cal. 534; Klink v. Cohen, 13 Cal. 623.

17. Parties to a foreclosure suit. It has been held, in an action for the foreclosure of a mortgage, if the creditor, the debtor, and the title to the mortgaged premises are before the court, it has jurisdiction of the case, though there may be other holders of distinct liens who might have been made parties to the suit, and were omitted. Hayward v. Stearns, 39 Cal. 58.

18. A defendant in possession, not directly interested in the question in litigation between other parties to the action, should not be affected by the results of such litigation. Welton v. Palmer, 39 Cal. 456.

19. Foreclosure of mortgages. In actions to foreclose mortgages, all persons interested should be made parties; and as to who should be joined as defendants, see Burton v. Lies, 21 Cal. 87; Boggs v. Fowler, 16 Cal. 559; 76 Am. Dec. 561; Goodenow v. Ewer, 16 Cal. 461; 76 Am. Dec. 540; Horn v. Jones, 28 Cal. 194; De Leon v. Higuera, 15 Cal. 483; Montgomery v. Tutt, 11 Cal. 307; Luning v. Brady, 10 Cal. 265; Hocker v. Reas, 18 Cal. 650; Bludworth v. Lake, 33 Cal. 255; Id., 33 Cal. 265; Carpentier v. Williamson, 25 Cal. 159; Belloc v. Rogers, 9 Cal. 123; Fallon v. Butler, 21 Cal. 24; 81 Am. Dec. 140; Skinner v. Buck, 29 Cal. 253; Eastman v. Turman, 24 Cal. 382; Heyman v. Lowell, 23 Cal. 106. All persons interested in the premises prior to a suit brought to foreclose a mortgage, or to enforce a mechanic's lien, whether purchasers, lienholders, devisees, remaindermen, reversioners, or encumbrancers, must be made parties, otherwise their rights will not be affected. Persons who acquire interests by conveyance or encumbrance after suit brought need not be made parties; and who are and who are not proper parties to a foreclosure suit, is carefully discussed in Whitney v. Higgins, 10 Cal. 547, 70 Am. Dec. 748, and authorities there cited. A tenant need not, from the mere fact of his tenancy, be made a party to the foreclosure suit. McDermott v. Burke, 16 Cal. 580.

20. Community property. Where the community property of husband and wife, or the separate property of the wife, is the subject of an action for foreclosure. See Kohner v. Ashenauer, 17 Cal. 578; Revalk v. Kraemer, 8 Cal. 66; 68 Am. Dec. 304; Marks v. Marsh, 9 Cal. 96; Powell v. Ross, 4 Cal. 197; see note to §§ 370, 371, ante.

21. Equitable actions. All persons interested legally or beneficially should be made parties. See Wilson v. Castro, 31 Cal. 420, commented on in note to § 378, ante.

22. Trustees and assignees. If a debtor assigns his property to trustees, to be by them sold, and proceeds divided pro rata among the creditors, one creditor cannot, after the property has been converted into money, maintain an action against the trustees for an accounting and for judgment for his pro rata share, without making the other creditors parties and the assignor a defendant. McPherson v. Parker, 30 Cal. 455; 89 Am. Dec. 129. Where A owed plaintiff, and conveyed his property to B, to be sold for his benefit, and drew an order, in favor of plaintiff, on B, who accepted it, and it was charged that B had subsequently conveyed a portion of the property to A without consideration, praying that B be compelled to execute the trust in favor of plaintiff. Held: that A was a proper and necessary party to the action. Lucas v. Payne, 7 Cal. 92. In an action by one of several cestuis que trust, to declare and enforce an implied trust in relation to land, all the persons who are entitled to, or claim to be entitled to, a portion of the trust estate, are proper parties defendant. Jenkins v. Frink, 30 Cal. 586; 89 Am. Dec. 134.

23. Assignees. The vendor, or the assignee of the rights and claims of the vendor, is not bound to know every assignee, though they were numerous. Truebody v. Jacobson, 2 Cal. 286.

24. Parties to action between mining partners, and to dissolve mining partnership. Where two of three partners in a mine make a contract with a person not interested in the same, by which he becomes entitled to a share of their interests, and a like share of the profits of their interests, the two are the only necessary parties defendant in an action brought by the person they contract with, to determine his right to a share in the mine

and a corresponding share of the profits on their interest. But in an action to take account of a mining partnership and dissolve the same, and sever the interests of the several partners, all those owning interests in the partnership are necessary parties. Settembre v. Putnam, 30 Cal. 490 (syllabus).

25. **Persons not made parties not affected by suit.** The rights of a third party cannot be determined or impaired in any suit between two other parties. Boggs v. Merced Mining Co., 114 Cal. 279.

26. **Parties to action to enjoin issuance of county bonds, etc.** In an action to enjoin the issuance of bonds, it may be necessary that some of the persons to whom the bonds are to be issued should be joined as defendants. See Hutchinson v. Burr, 12 Cal. 103; Patterson v. Board of Supervisors, 12 Cal. 105.

27. **Attorney joined with his client, when.** Where there has been fraud in obtaining a judgment, if the attorney is a party to the fraud he may be joined with his client as a defendant, in an action to set aside the judgment. Crane v. Hirshfelder, 17 Cal. 467.

28. **Unknown defendant.** When the name of the defendant is unknown, fictitious name may be used, etc. See § 474, post.

29. **Real estate** may be made a party in actions in rem, as for collection of taxes, etc. See People v. Rains, 23 Cal. 131.

30. **Principal and agent, or attorney.** When the principal, or when the agent, is liable. See Engels v. Heatly, 5 Cal. 136; Haskell v. Cornish, 13 Cal. 45; McDonald v. Bear River etc. Mining Co., 13 Cal. 221; Shaver v. Ocean Mining Co., 21 Cal. 45; Love v. Sierra Nevada etc. Mining Co., 32 Cal. 639; 91 Am. Dec. 602; Hall v. Crandall, 29 Cal. 568; 89 Am. Dec. 64.

31. **Actions against counties, supervisors, etc.** See § 378, ante, and note. In an action against or for a county, it must be in the name of the county, not in the name of the people. People v. Myers, 15 Cal. 33; McCann v. Sierra County, 7 Cal. 121; Price v. Sacramento County, 6 Cal. 254; see also, however, Gilman v. Contra Costa County, 8 Cal. 52; 68 Am. Dec. 290; Hastings v. San Francisco, 18 Cal. 49. The right to sue a county is not confined to actions of tort, malfeasance, etc., but extends to all accounts after their presentation to the board of supervisors. People v. Board of Supervisors, 28 Cal. 431. But the account or claim, of whatever nature, must have been first presented to the supervisors, and rejected, before any action thereon can be maintained against the county. McCann v. Sierra County, 7 Cal. 121. The agents of the county, and its officers, may be joined as defendants in certain cases. McCann v. Sierra County, 7 Cal. 121. At least a majority of the members of the board of supervisors should be made defendants in an action brought to enjoin the board from purchasing property for the use of the county. Trinity County v. McCammon, 25 Cal. 119; see further, Political Code, § 4000.

32. **Joinder of parties who have no joint interest.** It seems that the joinder of two persons as co-defendants, who have no joint interest in the subject-matter of the suit, and are under no joint liability, will, unless the mistake be corrected in the court below, be error. Sterling v. Hanson, 1 Cal. 478.

33. **Accommodation grantees and fictitious depositaries of title. When may be made parties.** It was shown that some of the parties were mere accommodation grantees and fictitious depositaries of title; but it was held that they have a right to be heard at law in their own defense, before courts of chancery can pronounce definitely on their claims, however false they may appear, inter alia. Knowles v. Inches, 12 Cal. 212.

34. **Action against one attaching creditor by a subsequent attaching creditor.** Property was seized under two attachments, and was claimed by a third party. Both attaching creditors indemnified the sheriff, who proceeded to sell it, and paid the proceeds to the first attaching creditor, the amount not equaling his judgment; and afterwards the party claiming the property obtained judgment against the sheriff for the value of the property. Held: That the recourse must be had against the first attaching creditor, for whose benefit the property was sold. In such a case the attaching creditors do not stand in the position of joint trespassers, the seizure of the second being subject to the first. Davidson v. Dallas, 8 Cal. 227.

35. **Actions against contractors by third parties for damages to property of such parties.** Where parties employed architects, reputed to be skilled in their profession, to construct, at a designated point on a creek, a dam or embankment, of certain specific dimensions, capable of resisting all floods and freshets of the stream for the period of two years, and to deliver it completely by a given time, and before the embankment was completed it was broken by a sudden freshet, and a large body of water, confined by it, rushed down the channel of the stream, carrying away and destroying in its course the store of plaintiffs, with their stock of merchandise. The employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work. Plaintiffs brought suit to recover the damage sustained by them against the employers and contractors. Held: that the latter alone were liable. The relation of the parties is that of independent contractors. The relation of master and servant, or superior and subordinate, did not exist between them, and therefore the doctrine respondeat superior does not apply to the case. Boswell v. Laird, 8 Cal. 469; 68 Am. Dec. 345.

36. **Actions on contracts.** In an action on a contract, only the contractors therein can be made parties. See Barber v. Cazalis, 30 Cal. 92.

37. **Actions against public officers.** A public officer, who stands in the relation of agent of the government, or of the public, is not personally liable upon contracts made by him as such officer, and within the scope of his legitimate duties; but this reason does not apply when neither the government nor the public in any way can be considered or held responsible for a contract made by a person, although a public officer. Dwinelle v. Henriquez, 1 Cal. 392.

38. **Action for malicious prosecution.** Dreux v. Domec, 18 Cal. 83.

§ 380. Parties defendant in an action to determine conflicting claims to real property. In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed.

Actions to quiet title. See post, § 738.
Writ of possession. See post, § 682.
Fresh parties, bringing in. See post, § 389.
Non-joinder or misjoinder of parties. See post, § 430.

Legislation § 380. 1. Enacted March 11, 1872, and then read: "In an action brought by a person ont of possession of real property to determine an adverse claim of an interest or estate therein, the person making such adverse claim

and all persons in possession must be joined as defendants."

2. Amended by Code Amdts. **1873–74**, p. 295.

Action to recover adverse claims to real property. A person out of possession may maintain an action to quiet title. People v. Center, 66 Cal. 551; 5 Pac. 263; 6 Pac. 481; Bryan v. Tormey, 3 Cal. Unrep. 85; 21 Pac. 725; Hyde v. Redding, 74 Cal. 493; 16 Pac. 380; Castro v. Barry, 79 Cal. 443; 21 Pac. 946; Brusie v. Gates, 80 Cal. 462; 22 Pac. 284; McGrath v. Wallace, 85 Cal. 622; 24 Pac. 793.

Judgment. The findings are sufficient if they follow the language of the pleadings, or if they make definite reference to the pleadings. Hihn v. Peck, 30 Cal. 280; Bryan v. Tormey, 3 Cal. Unrep. 85; 21 Pac. 725. Where it is adjudicated that the judgment defendant has no adverse claim to or interest in the property in controversy, the subject of the litigation is exhausted, and if the plaintiff is out of possession, the judgment necessarily entitles him to possession. Landregan v. Peppin, 94 Cal. 465; 29 Pac. 771; Merritt v. Campbell, 47 Cal. 542. Where the complaint alleges that the plaintiff was the owner and in possession, and the findings are that he is the owner, but that the defendant is in possession, the plaintiff cannot have judgment that his title be quieted, and that defendant be removed from possession; because the findings and the judgment, so far as the possession is concerned, are in contradiction of the complaint, and the plaintiff cannot have a judgment in direct contradiction of the complaint. Bryan v. Tormey, 3 Cal. Unrep. 85; 21 Pac. 725; Von Drachenfels v. Doolittle, 77 Cal. 295; 19 Pac. 518.

Writ for possession of the premises. Where the gravamen of an action is to determine conflicting claims to real property, brought by a person in possession at the time the action is commenced, but who, during pendency, is turned out of possession, a judgment in favor of the plaintiff may provide for a restitution of the premises; and the action remains an equitable one. Polack v. Gurnee, 66 Cal. 266; 5 Pac. 229, 610; Kitts v. Austin, 83 Cal. 167; 23 Pac. 290. And where the answer of a defendant out of possession sets up an adverse claim of title, which is found to be superior to that of the plaintiff, the court may award possession to such defendant. Kitts v. Austin, 83 Cal. 167; 23 Pac. 290.

Who may be dispossessed under writ of possession. See note 39 Am. Dec. 311.

§ 381. Parties holding title under a common source, when may join. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.

Co-tenants may sever. See post, § 384.
Ejectment. See post, § 738, and ante, § 379.
Quieting title. See post, § 738.
Joint tenants. See post, § 384.

Legislation § 381. 1. Enacted March 11, **1872** (based on Stats. 1867–68, p. 158), and then read: "Persons claiming an interest in lands under a common source of title may unite as plaintiffs in an action against any person claiming an adverse interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or for removing a cloud thereon."

2. Amended by Code Amdts. **1873–74**, p. 295.

Joinder of parties holding title under common source. The general rule is, that unconnected parties may join in bringing a bill in equity, where there is one connected interest among them all, centering in the point in issue in the case. Owen v. Frink, 24 Cal. 171. An action to recover rents and profits could not be maintained at law by one tenant in common against another, before the adoption of the code, and under the common-law rule. Pico v. Columbet, 12 Cal. 414; 73 Am. Dec. 550; Howard v. Throckmorton, 59 Cal. 79; McCord v. Oakland Quicksilver Mining Co., 64 Cal. 134; 49 Am. Rep. 686; 27 Pac. 863. It is otherwise in equity, for an accounting. Goodenow v. Ewer, 16 Cal. 461; 76 Am. Dec. 540; Abel v. Love, 17 Cal. 233. The principle enunciated in Pico v. Columbet, supra, has no application to the case of money received by one tenant in common from sales of water, or profits derived from the operation of a ditch or mine. Abel v. Love, 17 Cal. 233. Where an estate is sold in lots, to different persons, the purchasers cannot unite in an action for specific performance: each purchaser's case being distinct, and depending upon its own peculiar circumstances, there must be distinct and separate actions. Owen v. Frink, 24 Cal. 171. One of two tenants in common of personal property can maintain replevin against the other, where there is an agreement that on a sale of the property the proceeds shall be equally divided. Hewlett v. Owens, 50 Cal. 474. Persons having a common interest in the subject of an action to redeem, and in obtaining the general relief demanded, may join as plaintiffs (Wadleigh v. Phelps, 149 Cal. 627; 87 Pac. 93), as also may persons

claiming as devisees under the same will, and seeking to remove from their title the cloud of a fraudulent deed that affects the whole land. Gillespie v. Gouly, 152 Cal. 643; 93 Pac. 856. Tenants in common of an irrigation-ditch may join in an action for an injunction to prevent the stoppage of the flow of water in such ditch, notwithstanding their several ownerships of lands, and of water to irrigate the same from said ditch. Smith v. Stearns Rancho Co., 129 Cal. 58; 61 Pac. 662; Los Robles Water Co. v. Stoneman, 146 Cal. 203; 79 Pac. 880. The joinder of tenants in common in real actions was not permissible, before the code (De Johnson v. Sepulbeda, 5 Cal. 149; Throckmorton v. Burr, 5 Cal. 400; Welch v. Sullivan, 8 Cal. 165); but for injuries to their common property, as trespass quare clausum fregit, nuisance, and the like, all were required to join. De Johnson v. Sepulbeda, 5 Cal. 149. A tenant in common may recover an entire tract against all persons in possession, except his co-tenants (Stark v. Barrett, 15 Cal. 361; Touchard v. Crow, 20 Cal. 150; 81 Am. Dec. 108; Touchard v. Keyes, 21 Cal. 202; Mahoney v. Van Winkle, 21 Cal. 552; Carpentier v. Mendenhall, 28 Cal. 484; 87 Am. Dec. 135); and he may maintain an action for the recovery of land, without joining his co-tenants (Morenhaut v. Wilson, 52 Cal. 263); and, where ousted by a co-tenant, he may maintain ejectment, unless such co-tenant is acting as his bailiff, by agreement, when an action for an accounting lies. Pico v. Columbet, 12 Cal. 414; 73 Am. Dec. 550; Carpentier v. Webster, 27 Cal. 524; Carpentier v. Mendenhall, 28 Cal. 484; 87 Am. Dec. 135; Carpentier v. Gardiner, 29 Cal. 160; Carpentier v. Mitchell, 29 Cal. 330. Damages may be recovered for ouster by a co-tenant, the same as for ouster by a stranger; but the only damages the plaintiff is entitled to recover are such as grow out of and are incident to the ouster upon which the recovery rests. Carpentier v. Mitchell, 29 Cal. 330. Where there is an ouster by a stranger, who afterwards purchases the interest of the co-tenant, and becomes a tenant in common in possession, his possession then loses its hostile character, and damages are limited to those of the period from the date of the ouster to the date on which he became the tenant in common. Carpentier v. Mendenhall, 28 Cal. 484; 87 Am. Dec. 135. In an action to quiet title, the complaint should set forth that the plaintiffs deraign their title from the same source, and this allegation must be proved, and be found by the court, where that fact is in issue; but where there is no plea of misjoinder of plaintiffs, the failure of the plaintiffs so to plead and of the court so to find is immaterial. Dewey v. Parcells, 137 Cal. 305; 70 Pac. 174. The administrator of a deceased co-tenant's estate may be joined as plaintiff with the surviving co-tenants, in all cases in which the deceased co-tenant could have been joined, until the administration of the estate represented is closed, or the property distributed under decree of the probate court. Meeks v. Hahn, 20 Cal. 620; Touchard v. Keyes, 21 Cal. 202; Goller v. Fett, 30 Cal. 481; Reynolds v. Hosmer, 45 Cal. 616. Joint tenants were formerly required to join, where the land was held jointly. Dewey v. Lambier, 7 Cal. 347; Cohas v. Raisin, 3 Cal. 443. Parties making separate instruments to secure the same debt may join as plaintiffs in an action to redeem (Wadleigh v. Phelps, 149 Cal. 627; 87 Pac. 93), and devisees under a will may join in an action to remove a cloud affecting the lands of both. Gillespie v. Gouly, 152 Cal. 643; 93 Pac. 856.

CODE COMMISSIONERS' NOTE. Stats. 1867–68, p. 158.

1. **Actions respecting common property.** Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisance, and may be maintained by tenants in common in a joint action. De Johnson v. Sepulbeda, 5 Cal. 151; Parke v. Kilham, 8 Cal. 79; 68 Am. Dec. 310. Tenants in common in a mine may sue jointly to recover possession of all of their several undivided interests. Goller v. Fett, 30 Cal. 481. And the executor of a tenant in common can be united with the surviving co-tenants. Touchard v. Keyes, 21 Cal. 202. A tenant in common, employed as agent, may sue his co-tenant for the services rendered in respect to the land. Thompson v. Salmon, 18 Cal. 632. One of several tenants in common has a right to sue alone for his moiety. Covillaud v. Tanner, 7 Cal. 38.

2. **Action of ejectment, where there are several co-tenants.** In this state, two or more of several co-tenants cannot be joined as parties in an action of ejectment. The rule which determines whether tenants in common should sue jointly or severally depends upon the nature of their interest in the matter or thing which is in controversy. For injuries to their common property, as trespass quare clausum fregit, or nuisance, etc., they should all be joined; but they must sue severally in real actions, generally, as they all have separate titles. See Coke Lit., p. 197; De Johnson v. Sepulbeda, 5 Cal. 151.

§ 382. Parties in interest, when to be joined. When one or more may sue or defend for the whole. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Joinder, misjoinder, non-joinder. Post, § 430.
Executors, etc., not qualified, need not be joined. Post, § 1587.

Legislation § 382. Enacted March 11, **1872**; based on Practice Act, § 14 (New York Code, § 119), which had the word "shall" instead of "must" before "be joined."

Joinder of parties united in interest. All parties in interest must be joined, either as plaintiffs or as defendants (Williams v. Southern Pacific R. R. Co., 110 Cal. 457; 42 Pac. 974; Birch v. Cooper, 136 Cal. 636; 69 Pac. 420); and this rule is general, and applies to undertakings, obligations, and promises of all possible descriptions. Moreing v. Weber, 3 Cal. App. 14; 84 Pac. 220. The rule requiring all parties in interest to be before the court is somewhat one of convenience, and will not be rigidly enforced, where its observance would be attended with great inconvenience, and answer no substantially beneficial purpose, but will be modified or partially dispensed with, in the discretion of the court, as justice and the exigencies of the case may require. Wilson v. Castro, 31 Cal. 420. When an objection is not taken either by demurrer or answer, defect of parties is deemed waived. Dunn v. Tozer, 10 Cal. 167; Wendt v. Ross, 33 Cal. 650; Rutenberg v. Main, 47 Cal. 213; Trenor v. Central Pacific R. R. Co., 50 Cal. 222; Foley v. Bullard, 99 Cal. 516; 33 Pac. 1081. Parties plaintiff are all who are interested as plaintiffs in the subject-matter of the action. Whitney v. Stark, 8 Cal. 514; 68 Am. Dec. 360; People v. Morrill, 26 Cal. 336; Salmon v. Rathjens, 152 Cal. 290; 92 Pac. 733.

Party refusing to join may be made defendant. Where antagonism of interests exists, a person who is a necessary party plaintiff, but who cannot be joined because of such antagonistic interests, may be made a party defendant. Byrne v. Byrne, 94 Cal. 576; 29 Pac. 1115; 30 Pac. 196. A partner, interested, but who refuses to join as plaintiff, may be made a party defendant, the reason therefor being stated in the complaint (Nightingale v. Scannell, 6 Cal. 506; 65 Am. Dec. 525; O'Connor v. Irvine, 74 Cal. 435; 16 Pac. 236; Cuyamaca Granite Co. v. Pacific Paving Co., 95 Cal. 252; 30 Pac. 525); and if the consent of an heir, who should be joined, cannot be obtained, he may be made a defendant. Salmon v. Rathjens, 152 Cal. 290; 92 Pac. 733.

Effect of joinder, as defendant, of one refusing to become plaintiff. See note post, § 395.

Joinder where question is of common interest and parties are numerous. A party, who seeks to avail himself of the provisions of this section, must allege facts which bring his case within the provisions: he must show that the question is one of common or general interest, of many persons, or that parties are numerous, and that it is impracticable to bring them all before the court. Carey v. Brown, 58 Cal. 180. In an action upon the joint indebtedness of two partners, the complaint should be against both, as both are united in interest. Baker & Hamilton v. Lambert, 5 Cal. App. 708; 91 Pac. 340. If an obligation is joint, and not joint and several, the joint obligors must all be made parties. Moreing v. Weber, 3 Cal. App. 14; 84 Pac. 220. The second pledgee of a note and mortgage, though not the holder thereof, is entitled to foreclose the same, where the first pledgee, who is the holder, is made a party to the action. Patten v. Pepper Hotel Co., 153 Cal. 460; 96 Pac. 296. This section applies to an action for partition, brought for the benefit of all persons interested in the estate. Adams v. Hopkins, 69 Pac. 228. It permits the joinder, in actions of condemnation, of all defendants whose lands are affected by the action. Sacramento County v. Glann, 14 Cal. App. 780; 113 Pac. 360. This section, and § 383, post, authorize the joinder of a wife with her husband, in an action against him to recover for necessaries contracted for solely by him. Evans v. Noonan, 20 Cal. App. 288; 128 Pac. 794. A complaint, in which there is united with some defendants another, against whom no liability is alleged or recovery sought, is not necessarily defective. Asevado v. Orr, 100 Cal. 293; 34 Pac. 777. This section is a re-enactment of § 14 of the Practice Act, which was construed as intended to apply to suits in equity and not to actions at law. Andrews v. Mokelumne Hill Co., 7 Cal. 330. In equity proceedings, the rule is relaxed, requiring all persons materially interested to be before the court; it is always dispensed with, where it is inconvenient or impracticable to get them before the court, as in the case of joint associations composed of numerous individuals. Von Schmidt v. Huntington, 1 Cal. 55; Gorman v. Russell, 14 Cal. 531. All parties to joint contracts must be made parties defendant. Harrison v. McCormick, 69 Cal. 616; 11 Pac. 456; Farmers' Exchange Bank v. Morse, 129 Cal. 239; 61 Pac. 1088. Where all parties to a contract are not made parties, the plaintiff is not entitled to recover, because the allegations and the proof will not correspond (Cotes v. Campbell, 3 Cal. 191; Morrison v. Bradley etc. Corporation, 5 Cal. 503; Farmer v. Cram, 7 Cal. 135; Harrison v. McCormick, 69 Cal. 616; 11 Pac. 456); and several persons, contracting together with the same party for one and the same act, are regarded as jointly, and not individually or separately, liable, in the absence of any words to show that a distinct as well as an entire liability was intended to be fastened upon the promisors. Harrison v. McCormick, 69 Cal. 616; 11 Pac. 456. In an action to enforce a joint note,

upon which there is no several liability, all the joint makers must be united. Farmers' Exchange Bank v. Morse, 129 Cal. 239; 61 Pac. 1088. In an action for an injunction, the joinder of all tort-feasors as defendants is permissible. Miller v. Highland Ditch Co., 87 Cal. 430; 22 Am. St. Rep. 254; 25 Pac. 550. A stockholder may sue in behalf of himself and other stockholders, for a misappropriation of the funds of the corporation (Neall v. Hill, 16 Cal. 145; 76 Am. Dec. 508; Wickersham v. Crittenden, 93 Cal. 17; 28 Pac. 788); and all who participate in such fraudulent acts are properly joined as defendants (Andrews v. Pratt, 44 Cal. 309); for, each of them being alleged to have been in some way connected with the transaction, complete justice cannot be done in their absence; and it is not necessary that the plaintiff join with him other stockholders, or make them defendants, as he has a right to bring the action in his own behalf and for his individual account, as well as in behalf of other stockholders. Wickersham v. Crittenden, 93 Cal. 17; 28 Pac. 788. The corporation is not a necessary party defendant, although the suit by the plaintiff is, in reality, in behalf of the corporation. Beach v. Cooper, 72 Cal. 99; 13 Pac. 161; Neall v. Hill, 16 Cal. 145; 76 Am. Dec. 508. This section (§ 14 of the Practice Act) does not apply to an action brought by one for himself and in behalf of others, to remove a cloud from a title, and for an injunction, where the right sought to be enforced is not general and common to all. Gibbons v. Peralta, 21 Cal. 629. Where a creditor of one class sues for the benefit of all creditors similarly situated, the creditors of another class cannot claim the benefit of the action; and thus, where a judgment creditor sues, and provision is inserted in the judgment for the relief of other judgment creditors, it will include only such as were judgment creditors at the time the action was commenced, and will not include such as were creditors at large, without judgment at that time, who became judgment creditors after the entry of such judgment. Baines v. West Coast Lumber Co., 104 Cal. 1; 37 Pac. 767; Von Schmidt v. Huntington, 1 Cal. 55. A creditor may sue the stockholders of a corporation on their liability as stockholders, for the benefit of all the creditors. Baines v. Babcock, 95 Cal. 581; 29 Am. St. Rep. 158; 27 Pac. 674; 30 Pac. 776. In an action to compel a reconveyance of real property, alleged to have been secured by conspiracy and fraud, all persons who have participated in the alleged fraud, and all persons claiming an interest in the property through or by means of the alleged fraudulent transactions, may be joined as parties defendant. Raynor v. Mintzer, 67 Cal. 159; 7 Pac. 431. A suit by one person for the partition of real estate, for the benefit of all having a community of interest in the property, has the effect to stop the running of the statute of limitations as to all. Adams v. Hopkins, 144 Cal. 19; 77 Pac. 712. Where a partner sues alone, and no objection is made, either by demurrer or answer, he may recover the whole amount due the partnership (Williams v. Southern Pacific Co., 110 Cal. 457; 42 Pac. 974); the reason for this rule being, that the interest of the partner extends to the entire demand, and payment to one partner discharges the debtor's liability to the firm, and the recovery by one partner has the same effect. Williams v. Southern Pacific Co., 110 Cal. 457; 42 Pac. 974; Andrews v. Mokelumne Hill Co., 7 Cal. 330; McCord v. Seale, 56 Cal. 262; Webb v. Treseony, 76 Cal. 621; 18 Pac. 796; Weinreich v. Johnston, 78 Cal. 254; 20 Pac. 556; Baxter v. Hart, 104 Cal. 344; 37 Pac. 941. In a suit by one partner, making the other defendant because he refuses to join in the action, the recovery must be entire for the whole injury; the law will not tolerate the division of a joint right of action. Nightingale v. Scannell, 6 Cal. 506; 65 Am. Dec. 525. A member of a religious corporation may prosecute an action for the benefit of himself and all the other members of the association, to prevent a wrongful exchange of creed or denomination, or the diversion of the property. Baker v. Ducker, 79 Cal. 365; 21 Pac. 764. One member of a voluntary association may sue for all the members. Gieske v. Anderson, 77 Cal. 247; 19 Pac. 421; Baker v. Ducker, 79 Cal. 365; 21 Pac. 764; Florence v. Helms, 136 Cal. 613; 69 Pac. 429. A member of a voluntary association, elected the treasurer thereof, may maintain a suit in behalf of himself and other members of the association, except the former treasurer thereof, to compel him to pay over the funds in his hands belonging to the association, which properly belong in the custody of the treasurer, and which the former treasurer, on demand, refused to pay over. Gieske v. Anderson, 77 Cal. 247; 19 Pac. 421. An action may be maintained under this section, where the plaintiffs allege that they are members of an association, and that the action is prosecuted in behalf of the association and all the members thereof. Florence v. Helms, 136 Cal. 613; 69 Pac. 429.

CODE COMMISSIONERS' NOTE. 1. Joint associations composed of many individuals. In cases of joint associations which consist of a great many individuals, and when it would be very inconvenient or almost impossible to join them, one or more may sue or defend for all. See Von Schmidt v. Huntington, 1 Cal. 55; Gorman v. Russell, 14 Cal. 531.

2. Action by stockholder against corporation and certain trustees for negligence on part of trustees. An action was brought to compel an account and obtain a settlement of the affairs of a corporation. The plaintiff was a stockholder, and the corporation and four of the trustees were made defendants. It was alleged that these trustees were the owners of stock sufficient to enable

them to control the business of the company, and various acts of fraud and mismanagement were charged against them in the complaint. It was decided that a stockholder could maintain an action in equity for an account (Angell and Ames on Corporations, § 312; Robinson v. Smith, 3 Paige Ch. 222; 24 Am. Dec. 212); and that where no objection was interposed, that all the stockholders were not made parties, the trustees and corporation could be sued alone, and made the only parties. The trustees will be compelled to make good any loss occasioned by their negligence or improper conduct. See Neall v. Hill, 16 Cal. 151; 76 Am. Dec. 508.

3. **Decree in action brought by one for himself and on behalf of others.** Where an action is brought by one of several persons, claiming title from a common source, in his own behalf, and in behalf of all others interested in the same manner as himself, to set aside a deed executed to others by the same grantor, under whom plaintiff claims, on the ground of fraud, the parties named in the complaint, for whose benefit the action is brought, are entitled to the benefit of the decree declaring the deed fraudulent. Hurlbutt v. Butenop, 27 Cal. 50.

4. **Partner suing for injury to partnership property and making copartner a defendant.** When one partner sues for an injury to the partnership property, and makes his copartner a defendant for want of his consent to join as plaintiff, the recovery must be entire for the whole injury. The law will not tolerate a division of a joint right of action into several actions. The whole cause of action must be determined in one, and thus avoid a multiplicity of suits. In such a case, the partner recovering is liable to account to his copartner defendant, and the latter is interested immediately in the event of the suit. Nightingale v. Scannell, 6 Cal. 509; 65 Am. Dec. 525. But this case did not decide that such a nonjoinder of the plaintiffs would be permitted under the code. The question was not raised. Id.

5. **Section applies only to suits in equity.** It was held that this section was intended to apply to suits in equity, and not to actions at law. Andrews v. Mokelumne Hill Co., 7 Cal. 333.

§ 383. Plaintiff may sue in one action the different parties to commercial paper or insurance policies. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff; and all or any of them join as plaintiffs in the same action, concerning or affecting the obligation or instrument upon which they are severally liable. Where the same person is insured by two or more insurers separately in respect to the same subject and interest, such person, or the payee under the policies, or the assignee of the cause of action, or other successor in interest of such assured or payee, may join all or any of such insurers in a single action for the recovery of a loss under the several policies, and in case of judgment a several judgment must be rendered against each of such insurers according as his liability shall appear.

Judgment for or against one or more of several parties. See post, §§ 414, 578, 579.

Legislation § 383. 1. Enacted March 11, **1872,** in the exact language of Practice Act, § 15 (New York Code, § 120), and then read: "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff."

2. Amended by Stats. **1897,** p. 19, to read: "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff; and all or any of them join as plaintiffs in the same action, concerning or affecting the obligation or instrument upon which they are severally liable."

3. Amended by Stats. **1903,** p. 203.

Parties liable upon the same obligation. A plaintiff may, at his election, sue one or more, or all, of the persons severally liable upon the same obligation or instrument (Stearns v. Aguirre, 6 Cal. 176; People v. Evans, 29 Cal. 429; Hurlbutt v. N. W. Spaulding Saw Co., 93 Cal. 55; 28 Pac. 795; Kurtz v. Forquer, 94 Cal. 91; 29 Pac. 413; London etc. Bank v. Smith, 101 Cal. 415; 35 Pac. 1027; Kreling v. Kreling, 118 Cal. 413; 50 Pac. 546; Slater v. McAvoy, 123 Cal. 437; 56 Pac. 49); but where the liability is joint, all must be united, in an action upon the contract; and this rule applies to undertakings, obligations, and promises of all possible descriptions. Moreing v. Weber, 3 Cal. App. 14; 84 Pac. 220. This section is in the exact language of § 15 of the Practice Act, which latter section was said to be in derogation of the common law, which required that one or all, and not an intermediate number, should be sued. Stearns v. Aguirre, 6 Cal. 176; People v. Love, 25 Cal. 520. This section permits all or any of the persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, to be joined as defendants; but where the promise is separate and distinct, the promisors cannot be joined. Thomas v. Anderson, 58 Cal. 99. The object of this section is solely the avoidance of a multiplicity of actions. Loustalot v. Calkins, 120 Cal. 688; 53 Pac. 258. By § 15 of the Practice Act, the common-law rule that one or all, and not any intermediate number, may be sued, was changed; and, under that section, a plaintiff could, at his election, sue one or more, or all of the persons severally liable upon the same obligation or instrument. People v. Love, 25 Cal. 520. The joinder of all the defendants in a complaint does not

prevent the plaintiff from going to trial before some of them have been served. People v. Evans, 29 Cal. 429; Reed v. Calderwood, 22 Cal. 463; People v. Love, 25 Cal. 520. Where a sheriff executed two attachments upon the same property, which was claimed by a third person, and each of the attaching creditors executed to the sheriff an indemnifying bond, the liability of the attaching creditors is several, and not joint, and each bond must be sued on as an independent obligation. White v. Fratt, 13 Cal. 521. The joinder of co-defendants is at the option of the plaintiff. People v. Love, 25 Cal. 520; Powell v. Powell, 48 Cal. 234; Heppe v. Johnson, 73 Cal. 265; 14 Pac. 833; Kurtz v. Forquer, 94 Cal. 91; 29 Pac. 413; Sacramento v. Dunlap, 14 Cal. 421; People v. Hartley, 21 Cal. 585; 82 Am. Dec. 758.

Joinder of sureties. The sureties on a several obligation may be sued alone, at the election of the plaintiff. London etc. Bank v. Smith, 101 Cal. 415; 35 Pac. 1027. The joinder of an indorser and the maker of a promissory note is permissible, under this section (Loustalot v. Calkins, 120 Cal. 688; 53 Pac. 258; Hubbard v. University Bank, 125 Cal. 684; 58 Pac. 297); and each one who writes his name upon the note is a party to it; and, from its original character, each party to it is an original undertaker. Riggs v. Waldo, 2 Cal. 485; 56 Am. Dec. 356. From the earliest judicial history of this state, makers and indorsers of negotiable promissory notes have been joined as parties defendant, and no question as to the correctness of the practice has ever been suggested. Loustalot v. Calkins, 120 Cal. 688; 53 Pac. 258; Pierce v. Kennedy, 5 Cal. 138; Ford v. Hendricks, 34 Cal. 673; Jones v. Goodwin, 39 Cal. 493; 2 Am. Rep. 473; Fessenden v. Summers, 62 Cal. 484; Young v. Miller, 63 Cal. 302. The distinction at common law, and in most of the states, between guarantor and surety has been done away with by our Civil Code, and the guarantor has been practically reduced to the footing of a surety, and has less protection than the indorser; there is this distinction to be observed, however: the obligation of the surety arises out of the instrument, while that of the guarantor is separate and apart from it; the guarantor becomes liable immediately upon the failure of his principal to perform (except in case of guaranty of collectibility), but this liability grows out of such failure to perform, and not out of the instrument; the surety may be joined with his principal, under this section, but it is thought the guarantor cannot; it is barely possible, but not probable, that a case may arise where the guarantor's liability arises out of the instrument. Carman v. Plass, 23 N. Y. 286. Where an administrator gives two bonds, one on his qualification as administrator and the other upon a sale of real estate, the conditions and the sureties on each bond being the same, the sureties are properly joined as co-defendants, having assumed a common burden. Powell v. Powell, 48 Cal. 234; Heppe v. Johnson, 73 Cal. 265; 14 Pac. 833. The sureties on a bond to sell real estate, given by a deceased administrator, the estate being unadministered, are proper parties defendant in an action to recover moneys realized from the sale of such real estate (Slater v. McAvoy, 123 Cal. 437; 56 Pac. 49); and they are the proper parties to make the settlement (People v. Jenkins, 17 Cal. 500; Slater v. McAvoy, 123 Cal. 437; 56 Pac. 49); and also in an accounting against a deceased guardian. Zurfluh v. Smith, 135 Cal. 644; 67 Pac. 1089; Reither v. Murdock, 135 Cal. 197; 67 Pac. 784.

Joinder of insurers. Where two insurance companies insure a building against loss, both uniting in the policy for separate amounts, and the loss occurs within the policies, the two companies are severally liable upon the same obligation or instrument, and may be joined as co-defendants, at the option of the plaintiff. Bernero v. South British etc. Ins. Co., 65 Cal. 386; 4 Pac. 382; Blasingame v. Home Ins. Co., 75 Cal. 633; 17 Pac. 925.

What judgment must be rendered. Where a plaintiff sues, jointly, two or more defendants on a joint and several contract or obligation, one of whom defaults, and judgment is taken against him on such default, this releases the other defendants. Stearns v. Aguirre, 6 Cal. 176.

Joinder of husband and wife. See note ante, § 382.

CODE COMMISSIONERS' NOTE. 1. Plaintiff may elect which one or what number of many persons severally liable he will sue. This section changes the common-law rule, that one or all, and not any intermediate number, may be sued. Under this section, a plaintiff may, at his election, sue one or more, or all the persons severally liable, upon the same obligation or instrument. People v. Love, 25 Cal. 526; Stearns v. Aguirre, 6 Cal. 183; see also People v. Frisbie, 18 Cal. 402; Lewis v. Clarkin, 18 Cal. 399.

2. Judgment may be for or against one of several defendants, and otherwise as to the other defendants. See §§ 578, 579, post. Lewis v. Clarkin, 18 Cal. 399; People v. Frisbie, 18 Cal. 402.

3. **Indorsers. When jointly, and not severally, liable.** A note was payable to A, and, previously to its delivery to the payee, was indorsed by B and C. These parties were accommodation indorsers. An indorsement was made by two persons, upon an agreement with each other, that they would each become surety if the other would, or in other words, that they would become sureties together. It was decided that the indorsers were guarantors (see facts), and were jointly, and not severally, liable to payee, etc. Brady v. Reynolds, 13 Cal. 31.

4. There must be express words to create a several liability. See Chitty on Contracts, p. 96; 1 Chitty's Pleading, p. 41; Brady v. Reynolds, 13 Cal. 32.

5. **Judgment against one is bar to action against other parties on a joint contract.** A judgment against one on a joint contract of several is a bar to an action against the others. Smith v. Black, 9 Serg. & R. (Pa.) 142; 11 Am. Dec. 686; Ward v. Johnson, 13 Mass. 148. When the cause of action is joint, and not joint and

several, the entire cause of action is merged in the judgment. See also Pierce v. Kearney, 5 Hill (N. Y.), 86; Taylor v. Claypool, 5 Blackf. 557; Brady v. Reynolds, 13 Cal. 33.

6. **Administrator not joined with survivor on several contract.** In cases of joint and several contracts, an administrator cannot be joined with the survivor, for one is charged de bonis testatoris, and the other de bonis propriis. Humphreys v. Crane, 5 Cal. 173.

7. **Judgment in suit on joint and several bond.** In an action upon a joint and several bond, where all the persons who sign it are made defendants in the complaint, the plaintiff may go to trial, if he elects so to do, before all the defendants are served, and may dismiss as to some of the defendants, and take judgment against the others. People v. Evans, 29 Cal. 429.

8. **When a bond is joint, and not several.** A bond in this form: Know all men, That we, A, as principal, and B, C, and D, as sureties, are bound unto the people in the several sums affixed to our names, viz.: B, in the sum of ten thousand dollars; C, in the sum of five thousand dollars; D, in the sum of three thousand dollars, etc., "for the which payment well and truly to be made we severally bind ourselves, our heirs," etc., and signed and sealed by the obligors, is held to be an instrument embracing several distinct obligations, each of which is a joint obligation of the principal and one surety, and not joint and several. People v. Hartley, 21 Cal. 585; 82 Am. Dec. 758.

9. **Suit on separate indemnifying bonds for the same attached property.** A sheriff seized goods on two attachments, for different plaintiffs. The plaintiffs in the attachment suits executed to the sheriff separate indemnifying bonds. It was decided that there is no joint liability between the plaintiffs to the sheriff. Each bond must be sued on as an independent obligation. White v. Fratt, 13 Cal. 521.

10. **Action on note secured by mortgage.** The maker executes and delivers to the same person a promissory note, and a mortgage to secure the same, and this person indorses the note and assigns the mortgage to a third person, who brings an action on the note and to foreclose the mortgage. It was held that the indorser and maker of the note were properly joined as defendants. Eastman v. Turman, 24 Cal. 379.

§ 384. Tenants in common, etc., may sever in bringing or defending actions. All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.

Co-claimants, united as plaintiffs. Ante, § 381.

Legislation § 384. Enacted March 11, **1872**; based on Stats. 1867–68, p. 62.

Joinder of tenants in common. Co-tenants may sue alone or jointly touching matters affecting common property or estate. Clark v. Huber, 20 Cal. 196; Touchard v. Keyes, 21 Cal. 202; Goller v. Fett, 30 Cal. 481; Reynolds v. Hosmer, 45 Cal. 616; Morenhaut v. Wilson, 52 Cal. 263; Himes v. Johnson, 61 Cal. 259; Moulton v. McDermott, 80 Cal. 629; 22 Pac. 296; Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593; 28 Pac. 45; Kimball v. Tripp, 136 Cal. 631; 69 Pac. 428; Miller v. Kern County, 137 Cal. 516; 70 Pac. 549; Harlow v. Standard Improvement Co., 145 Cal. 477; 78 Pac. 1045. A co-tenant of the plaintiff is not a necessary party in an action for the wrongful diversion of water from a ditch and lands owned by the plaintiff and others. Himes v. Johnson, 61 Cal. 259. Co-distributees are tenants in common; and one tenant, suing alone, may recover the entire tract of land from an intruder. Moulton v. McDermott, 80 Cal. 629; 22 Pac. 296. The personal representative of a deceased co-tenant may join with the surviving co-tenants. Touchard v. Keyes, 21 Cal. 202; Goller v. Fett, 30 Cal. 481; Reynolds v. Hosmer, 45 Cal. 616. One co-tenant cannot recover all the rents and profits, even as against a trespasser (Clark v. Huber, 20 Cal. 196; Muller v. Boggs, 25 Cal. 175; Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593; 28 Pac. 45); but, under an agreement apportioning the rents and profits, whereby one co-tenant is to receive them every alternate six months, perhaps a co-tenant, in a proper action, would be entitled to recover all the rents and profits due for periods allotted to him. Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593; 28 Pac. 45. An heir, as tenant in common, may sue alone, under this section, regarding the subject-matter affecting the common estate. Kimball v. Tripp, 136 Cal. 631; 69 Pac. 428. A husband is not a necessary party in an action by his wife to quiet title to her separate property, upon which a homestead has been declared for their joint benefit. Prey v. Stanley, 110 Cal. 423; 42 Pac. 908. Husband and wife may sue jointly as tenants in common, in an action for trespass. Wagoner v. Silva, 139 Cal. 559; 73 Pac. 433. A surviving partner may sue alone regarding the subject-matter of the firm's property. Miller v. Kern County, 137 Cal. 516; 70 Pac. 549.

CODE COMMISSIONERS' NOTE. Stats. 1867, p. 62.

§ 385. Action, when not to abate by death, marriage, or other disability. Proceedings in such case. An action or proceeding does not abate by the death, or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest.

In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

If party die, judgment against his representative must be that he pay in due course of administration. Post, § 1504.

Necessity for claiming against estate of deceased. Post, §§ 1493, 1502.

Death after verdict or decision, and before judgment. See post, § 669.

Survival of actions. See post, §§ 1582 et seq.

Legislation § 385. 1. Enacted March 11, **1872**; based on Practice Act, § 16 (New York Code, § 16), which read: "An action shall not abate by the death, or other disability of a party; or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, or other disability of a party, the court, on motion, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made, to be substituted in the action." When enacted in 1872, the section read as at present, except that the words "death or any disability" then read "death, marriage, or other disability," in both instances.

2. Amended by Code Amdts. **1873–74**, p. 295.

Action does not abate, where the cause of action survives. This section is permissive, and appeals to the discretion of the court (Fay v. Steubenrauch, 138 Cal. 656; 72 Pac. 156; Emerson v. McWhirter, 128 Cal. 268; 60 Pac. 774); and should receive a liberal construction, with a view to effect its object and promote justice. Plummer v. Brown, 64 Cal. 429; 1 Pac. 703; Crescent Canal Co. v. Montgomery, 124 Cal. 134; 56 Pac. 797. If this section is applicable to the case of a corporation, it does not authorize the continuance of the action against the corporation itself, but allows the action to be continued only against the "representative or successor in interest" brought in on motion. Crossman v. Vivienda Water Co., 150 Cal. 575; 89 Pac. 335. It applies to the supreme court, except where the code otherwise provides, or where it is evidently applicable only to the trial court. Trumpler v. Trumpler, 123 Cal. 248; 55 Pac. 1008; People v. Mullan, 65 Cal. 396; 4 Pac. 348. It does not make distinctions dependent upon the stages of the action or proceeding. Ex parte Connaway, 178 U. S. 421; 44 L. Ed. 1134; 20 Sup. Ct. Rep. 951. It does not apply in a contest for the purchase of state land, which has been referred to the courts, and where the applicant dies pending the action. Polk v. Sleeper, 158 Cal. 632; 112 Pac. 179. In case a corporation, which is a party, is dissolved, the action may be continued, only as against the representative or successor in interest brought in on motion; the remedy is against the directors, as trustees, and the stockholders. Crossman v. Vivienda Water Co., 150 Cal. 575, 581; 89 Pac. 335. The substitution of the representative of a deceased person as a party, pending an appeal, should be followed by a like substitution in the trial court in order properly to determine the responsibility for the costs upon appeal. Reay v. Heazelton, 128 Cal. 335; 60 Pac. 977. The court cannot permit a person to be substituted as plaintiff, in place of the then plaintiff, on the ground that the person substituted was the real party in interest at the commencement of the action. Dubbers v. Goux, 51 Cal. 153. The right of action against a person for wrongful imprisonment ceases upon his death. Harker v. Clark, 57 Cal. 245. A former application for a writ of mandate against a city treasurer does not bar an action against the city. Madary v. Fresno, 20 Cal. App. 91; 128 Pac. 340. In an action of ejectment, brought by a lessee for the benefit of the lessor, the court may, after the expiration of the lease, allow the substitution of a plaintiff who has succeeded to the whole title (Cassin v. Nicholson, 154 Cal. 497; 98 Pac. 190); and in an action to determine an adverse claim to real property, it has power to substitute a special administrator for the general administrator as a party defendant. McNeil v. Morgan, 157 Cal. 373; 108 Pac. 69. A transfer, by the defendant, of attached real estate, pending the principal suit, is not such a transfer as entitles the transferee to be substituted as a party defendant. Anderson v. Schloesser, 153 Cal. 219; 94 Pac. 885. If a suit on assigned claims, commenced in a state court, is transferred to a Federal court, but the cause of action is transferred to the plaintiff's assignor, the action may be continued either in the name of the original party or in that of the transferee. Davis v. Rawhide Gold Mining Co., 15 Cal. App. 108; 113 Pac. 898. An action abates upon a showing of the institution and pendency of a prior action between the same parties upon the same subject-matter. Fresno Planing Mill Co. v. Manning, 20 Cal. App. 766; 130 Pac. 196. If a husband and wife were properly joined as plaintiffs in the first instance, a personal representative for the husband may be substituted upon his death, pending suit. Gomez v. Scanlan, 155 Cal. 528; 102 Pac. 12. If, pending an action to foreclose a mortgage given to secure a note, the note and mortgage are assigned, and are subsequently distributed by a decree of distribution in the estate of the assignee, the distributee, as a successor in interest, may be substituted as plaintiff in the foreclosure suit. Blinn Lumber Co. v. McArthur, 150 Cal. 610; 89 Pac. 436. Where, pending a suit commenced in this state, against a

non-resident defendant, the property involved is transferred to a resident of this state, the death of the original defendant, subsequently to such transfer, does not confer upon the transferee any right of substitution as representative of the original defendant. Anderson v. Schloesser, 153 Cal. 219; 94 Pac. 885.

Does not abate by death. On the death of a party in this state, whatever property he has vests immediately, by operation of law, in his heirs, subject to the lien of the administrator to pay the debts of the estate. Beckett v. Selover, 7 Cal. 215; 68 Am. Dec. 237; Updegraff v. Trask, 18 Cal. 458; Meeks v. Hahn, 20 Cal. 620. Whenever, by reason of the death of a defendant, the case becomes such that execution cannot be legally issued, an attachment must of necessity cease, whether judgment has been procured or not, in an action in which attachment issued and was levied. Myers v. Mott, 29 Cal. 359; 89 Am. Dec. 49; affirmed in Hensley v. Morgan, 47 Cal. 622; Ham v. Cunningham, 50 Cal. 365. The common-law rule, that a personal right of action dies with the person, is inapplicable where the plaintiff dies after a judgment in his favor, which has not been vacated. Fowden v. Pacific Coast S. S. Co., 149 Cal. 151; 86 Pac. 178. This section does not have the effect of abating an action against a corporation after its legal death, by a forfeiture of its charter for the non-payment of its license taxes, when construed with § 10a of the act of June 13, 1906 (Stats. Extra Sess. 1906, p. 22), providing that the trustees may maintain or defend any action or proceeding then pending, in behalf of or against the corporation, and § 400 of the Civil Code. Lowe v. Supreme Court, 165 Cal. 708; 134 Pac. 190. A judgment against a person, who is dead at its rendition, is valid, until reversed or set aside by some competent judicial authority, and it cannot be collaterally attacked. Tyrrell v. Baldwin, 67 Cal. 1; 6 Pac. 867. Where a party dies after verdict, but before judgment, judgment will be entered in accordance with the verdict (Judson v. Love, 35 Cal. 463), and where a party dies after judgment, but before notice of appeal is filed, the appeal will be dismissed. Judson v. Love, 35 Cal. 463; Shartzer v. Love, 40 Cal. 93. Where, pending an appeal, the defendant dies, and the court, on plaintiff's motion, substitutes his executor, notice must be served on the executor; and if notice is served, and the executor does not appear and answer, nor adopt the answer of the testator as his own, and judgment is subsequently entered in the testator's name and in his favor, this judgment is not one in favor of the executor; for, as to him, the case has never been tried, and the judgment a nullity. McCreery v. Everding, 44 Cal. 284. When a husband and wife sue to recover the homestead, and the wife dies without issue, pending suit, the husband cannot recover. Gee v. Moore, 14 Cal. 472. An assignee or grantee is the legal representative of the assignor or grantor, and, as such, is entitled to defend in his name. Plummer v. Brown, 64 Cal. 429; 1 Pac. 703; Malone v. Big Flat Gravel Mining Co., 93 Cal. 384; 28 Pac. 1063; Trumpler v. Trumpler, 123 Cal. 248; 55 Pac. 1008. An action to foreclose a mortgage does not abate on the death of the defendant, pending suit, but survives against the estate. Hibernia Sav. & L. Soc. v. Wackenreuder, 99 Cal. 503; 34 Pac. 219; Union Sav. Bank v. Barrett, 132 Cal. 453; 64 Pac. 713, 1071. Upon the appointment of a personal representative of the defendant, the plaintiff has the same right to proceed against him as he would have against the original defendant. Union Sav. Bank v. Barrett, 132 Cal. 453; 64 Pac. 713, 1071. If, pending an action on a note and mortgage, they are assigned, and the assignee dies, whereupon his estate is distributed to his widow, she may, as a successor in interest, be properly substituted as plaintiff in the foreclosure suit. Blinn Lumber Co. v. McArthur, 150 Cal. 610; 89 Pac. 436.

Effect of transfer of interest. The last clause of this section has reference to the transfer of interest before judgment; after judgment, others succeeding to interests in the property affected take the same subject to the judgment, and with all of its protection. Emerson v. McWhirter, 128 Cal. 268; 60 Pac. 774. The last clause of this section is permissive, and the discretion of the court, in making the order, is to be exercised in view of all the attending circumstances. Emerson v. McWhirter, 128 Cal. 268; 60 Pac. 774; Hentig v. Johnson, 12 Cal. App. 423; 107 Pac. 582. An assignee for the benefit of creditors may be substituted as a party, in place of the assignor (Wilson v. Baker, 64 Cal. 475; 2 Pac. 253); but the assignee need not be substituted: he may prosecute or defend in the name of his assignor. Stewart v. Spaulding, 72 Cal. 264; 13 Pac. 661. The court rendering a judgment has control of such judgment, and authority to direct the issuance and execution of process thereunder, and to determine who is entitled thereto. Rowe v. Blake, 112 Cal. 637; 44 Pac. 1084; McAuliffe v. Coughlin, 105 Cal. 268; 38 Pac. 730. Where the court, in the exercise of such jurisdiction, makes an order which involves the determination that an assignee was entitled to have process, such determination is conclusive, without any express finding that such assignee was the owner of the judgment, or that the application was upon notice to the judgment plaintiff. Rowe v. Blake, 112 Cal. 637; 44 Pac. 1084; Hibernia Sav. & L. Soc. v. Lewis, 117 Cal. 577; 47 Pac. 602; 49 Pac. 714. Against a collateral attack, it will be presumed that the application for such order was regularly made upon notice to the parties interested, and that

the court, upon competent evidence, found and determined the ownership of the judgment, and who was entitled to have process for its execution. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074; Caruthers v. Hensley, 90 Cal. 559; 27 Pac. 411. The conveyance by the plaintiff of the demanded premises, or a portion thereof, pending the action, does not necessarily defeat the suit (Moss v. Shear, 30 Cal. 467; Barstow v. Newman, 34 Cal. 90); and the transfer of the real estate under attachment in the action is not such a transfer of an interest in the action as will give the transferee the right to be substituted as a party (Anderson v. Schloesser, 153 Cal. 219; 94 Pac. 885), but the acquirement of a pledge by the pledgee, pending an action on the note secured thereby, gives the pledgee the right to be substituted. Merced Bank v. Price, 9 Cal. App. 177; 98 Pac. 383. The use of the name of a person as a nominal plaintiff is not improper, where such person has been authorized to act. Cobb v. Doggett, 142 Cal. 142; 75 Pac. 785. A purchaser pendente lite, on giving notice of such purchase, may be substituted in place of the original party, under this section, and thus conserve his rights, or he may permit the action to continue in the name of the grantor, but, in either event, he is equally bound by the judgment with his grantor (Hibernia Sav. & L. Soc. v. Lewis, 117 Cal. 577; 47 Pac. 602; 49 Pac. 714; Hohn v. Pauly, 11 Cal. App. 724; 106 Pac. 266); and he has control of the action, both in the court below and in the supreme court. Trumpler v. Trumpler, 123 Cal. 248; 55 Pac. 1008; People v. Mullan, 65 Cal. 396; 4 Pac. 348. Where the parties to an action have disposed of all their interest to a third party, and thereafter, upon appeal, by fraudulent means, procure a reversal, the supreme court will recall the remittitur, stay the proceedings of the court below, and assert its jurisdiction over the appeal, on the ground that its jurisdiction cannot be divested by such fraud and irregularity. Trumpler v. Trumpler, 123 Cal. 248; 55 Pac. 1008; Rowland v. Kreyenhagen, 24 Cal. 52; Vance v. Peña, 36 Cal. 328; Hanson v. McCue, 43 Cal. 178; Bernal v. Wade, 46 Cal. 640; Holloway v. Galliac, 49 Cal. 149; People v. McDermott, 97 Cal. 247; 32 Pac. 7; In re Levinson, 108 Cal. 450; 41 Pac. 483; 42 Pac. 479. One who has no further interest in the matter in litigation has no right to interfere with the control of the suit respecting it. Harlan Douglas Co. v. Moncur, 19 Cal. App. 177; 124 Pac. 1053. A grantee, pendente lite, unless substituted as plaintiff, acquires no right which he can enforce in an action, or under the judgment. Walsh v. Soule, 66 Cal. 443; 6 Pac. 82. Where the plaintiff, pendente lite, parts with his interest, the action may be continued in his name, unless the transferee makes an application to be substituted. Camarillo v. Fenlon, 49 Cal. 202. The court should permit the substituted party to file an amended complaint; otherwise he may be seriously embarrassed on the trial. Northern Railway Co. v. Jordan, 87 Cal. 23; 25 Pac. 273. Substitution may be had of a new corporation, in place of the old one, in a proceeding to condemn lands under the right of eminent domain. California Central Ry. Co. v. Hooper, 76 Cal. 404; 18 Pac. 599. In an action to enforce a lien, a grantee, pendente lite, of the land in controversy, claiming under the defendant, may appear and move to vacate a judgment and open a default. McKendrick v. Western Zinc Mining Co., 165 Cal. 24; 130 Pac. 865.

Substitution of parties. An assignee or transferee cannot acquire any right which can be enforced, in his own name, in an action, or under the judgment, unless substituted. Walsh v. Soule, 66 Cal. 443; 6 Pac. 82. Parties substituted take up the controversy in the condition in which they find it, and subject to the terms of stipulations theretofore entered into by the original parties. De Temple v. Alexander, 53 Cal. 3. Where the property in controversy is conveyed pendente lite, and no substitution is asked for, the action proceeds in the name of the original plaintiff, and no application to or order by the court is necessary. Malone v. Big Flat Gravel Mining Co., 93 Cal. 384; 28 Pac. 1063. The practice in this state is well settled, on the death of a party to an action, to allow the substitution of his legal representative, upon the suggestion of the death, and on an ex parte motion showing the appointment and qualification of the administrator. Taylor v. Western Pacific R. R. Co., 45 Cal. 323; Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418; Kittle v. Bellegarde, 86 Cal. 556; 25 Pac. 55; Campbell v. West, 93 Cal. 653; 29 Pac. 219, 645; De Leonis v. Walsh, 140 Cal. 175; 73 Pac. 813. Substitution of parties is not such an amendment of the pleadings as is required to be made on notice, or to be engrossed otherwise than entered in the minutes of the court. Kittle v. Bellegarde, 86 Cal. 556; 25 Pac. 55; Farrell v. Jones, 63 Cal. 194; Brock v. Martinovich, 55 Cal. 516. An allegation of the representative capacity of a substituted executor, filed by leave of the court, in connection with a showing that the action was continued in his name, is a sufficient showing of the appointment and qualification of the legal representative. Campbell v. West, 93 Cal. 653; 29 Pac. 219, 645. A different party cannot be substituted as plaintiff, on the ground that he was the real party in interest when the action was commenced. Dubbers v. Goux, 51 Cal. 153. Where it is admitted in open court, by all the parties, that, under the will of the decedent, the claim in the action has been decreed by the probate court to the legatee named in the

will, the court may make an order substituting such distributee as plaintiff. Cockrill v. Clyma, 98 Cal. 123; 32 Pac. 888. The substitution "in case of any other transfer of interest," must be made by supplemental complaint or answer. Campbell v. West, 93 Cal. 653; 29 Pac. 219, 645; Ford v. Bushard, 116 Cal. 273; 48 Pac. 119. In case of assignment, the supplemental complaint should set out such assignment, which is an issuable fact, and if denied, its proof, as in all other cases of assignment, is vital to a recovery. Ford v. Bushard, 116 Cal. 273; 48 Pac. 119; Murdock v. Brooks, 38 Cal. 596; Read v. Buffum, 79 Cal. 77; 12 Am. St. Rep. 131; 21 Pac. 555. A purchaser pendente lite need not be substituted as a party plaintiff. Stufflebeem v. Adelsbach, 135 Cal. 221; 67 Pac. 140; Sears v. Ackerman, 138 Cal. 583; 72 Pac. 171. Where an action is commenced by the general guardian of an infant, and the infant subsequently appears by a guardian ad litem, this is substitution, and not intervention; the guardian ad litem takes the case in the state in which he finds it. Temple v. Alexander, 53 Cal. 3. Where there is an action pending to enforce a lien against real property, and the defendant owner conveys his interest by a deed which is recorded, and the action is thereafter continued, in the name of the original defendant, to judgment, the grantee may move, in his own name, to set the judgment aside, and appeal from an order denying the motion. Malone v. Big Flat Gravel Mining Co., 93 Cal. 384; 28 Pac. 1063; Plummer v. Brown, 64 Cal. 429; 1 Pac. 703; People v. Mullan, 65 Cal. 396; 4 Pac. 348. The right of a grantee, as legal representative, cannot be enforced in his own name, unless he is substituted as plaintiff. Walsh v. Soule, 66 Cal. 443; 6 Pac. 82. The assignor may settle a claim, where the assignee is not substituted. Hogan v. Black, 66 Cal. 41; 4 Pac. 943. As between the assignor and the assignee, the assignment transfers the interest of the plaintiff in the subject-matter of the action, but the assignee cannot avail himself of the benefit of the same against the defendant, without notifying him of the assignment, or without having himself substituted for the plaintiff. Hogan v. Black, 66 Cal. 41; 4 Pac. 943; Doll v. Anderson, 27 Cal. 248. A part interest may be assigned, under this section; and the assignee must be joined as plaintiff with the assignor (Cerf v. Ashley, 68 Cal. 419; 9 Pac. 658; Cramer v. Tittle, 79 Cal. 332; 21 Pac. 750); and the rights of such grantee and his protection, under this section, are the same as though he acquired the entire interest (Crescent Canal Co. v. Montgomery, 124 Cal. 134; 56 Pac. 797); and he may move the court to set aside a judgment entered by stipulation of the original defendants to the action, in fraud of his rights. Cramer v. Tittle, 79 Cal. 332; 21 Pac. 750; Crescent Canal Co. v. Montgomery, 124 Cal. 134; 56 Pac. 797. Where the plaintiff transfers his interests to others, and the action is prosecuted in his name, without a substitution of parties or a change of attorneys of record, a stipulation for dismissal by the original plaintiff is a flagrant breach of good faith, and an order of dismissal, entered on such stipulation, should be promptly vacated. Walker v. Felt, 54 Cal. 386. Where, pending litigation, the defendant transfers his interest to a third person, and subsequently enters into a fraudulent stipulation with the plaintiff, allowing him to take judgment, such judgment will be set aside, on motion of the purchaser. Plummer v. Brown, 64 Cal. 429; 1 Pac. 703; People v. Mullan, 65 Cal. 396; 4 Pac. 348; Crescent Canal Co. v. Montgomery, 124 Cal. 134; 56 Pac. 797. Where the plaintiff disposes of his interest, the substitution of the transferee as plaintiff is a matter in which the defendant is not concerned, and in which he cannot move; it concerns only the original plaintiff and the transferee; as against the defendant, the former has a right to remain in court until the case is disposed of. Hestres v. Brennan, 37 Cal. 385. The defendant can take advantage, by supplemental answer, of such transfer. Moss v. Shear, 30 Cal. 467; Barstow v. Newman, 34 Cal. 90; Hestres v. Brennan, 37 Cal. 385. The joinder of a transferee in an action to foreclose a mortgage is proper, if not necessary. Cerf v. Ashley, 68 Cal. 419; 9 Pac. 658. Infant heirs succeeding are substituted, ex parte, on motion. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. The want of substitution of a representative does not render the judgment of the appellate court void. Phelan v. Tyler, 64 Cal. 80; 28 Pac. 114. The death of an interested party in no way affects an appeal, and it will proceed without a substitution of his personal representative. Davies & Henderson Lumber Co. v. Gottschalk, 81 Cal. 641; 22 Pac. 860. A representative should be substituted in all cases, under this section, where the action does not abate on the death of the party. Union Savings Bank v. Barrett, 132 Cal. 453; 64 Pac. 713, 1071; Daneri v. Gazzola, 139 Cal. 416; 73 Pac. 179; De Leonis v. Walsh, 140 Cal. 175; 73 Pac. 813. The substitution of heirs and representatives is authorized by this section (Hibernia Sav. & L. Soc. v. Wackenreuder, 99 Cal. 503; 34 Pac. 219), which may be made on an ex parte suggestion and proof of death, without any amendment of the complaint, though all subsequent proceedings should be in the name of the substituted party. Kittle v. Bellegarde, 86 Cal. 556; 25 Pac. 55. Personal representatives are not proper parties to be substituted, where the decedent had transferred his interest; the action must either be continued in decedent's name by the transferee, or the latter substituted.

Tuffree v. Stearns Ranchos Co., 124 Cal. 306; 57 Pac. 69; Daneri v. Gazzola, 139 Cal. 416; 73 Pac. 179; Blinn Lumber Co. v. McArthur, 150 Cal. 610; 89 Pac. 436. Where the defendant transfers his interest, pendente lite, to one having notice of the pendency of the action, the transferee may elect to be substituted as defendant or to defend in the name of the original defendant, who thereupon becomes merely a nominal party, and upon his death his representatives cannot be substituted. Tuffree v. Stearns Ranchos Co., 124 Cal. 306; 57 Pac. 69. Where the respondent dies pending an appeal, his personal representatives must be substituted in the supreme court; substitution in the trial court, after appeal taken, is not noticed by the supreme court. Lyons v. Roach, 72 Cal. 85; 13 Pac. 151. An action in ejectment survives the death of the defendant, pendente lite, and the representative of the deceased may be substituted. Barrett v. Birge, 50 Cal. 655. Where the personal representatives are substituted, the judgment does not bind the transferee, and does not protect the adverse party. Daneri v. Gazzola, 139 Cal. 416; 73 Pac. 179.

Effect of disability of party. An appeal may be prosecuted by a bankrupt or his assignee, under this section, though the bankruptcy was adjudicated before the taking of the appeal. O'Neil v. Dougherty, 46 Cal. 575. An assignee for the benefit of creditors may be substituted as a party, in the place of an assignor in a pending action. Wilson v. Baker, 64 Cal. 475; 2 Pac. 253. Where one of the plaintiffs in an action is adjudged an insolvent during its pendency, his assignee need not be substituted in his place. Stewart v. Spaulding, 72 Cal. 264; 13 Pac. 661. Upon the expiration of the term of a public officer, the court, upon the proper suggestion of the fact, will order the substitution of his successor as defendant. Ex parte Tinkum, 54 Cal. 201; Jordan v. Hubert, 54 Cal. 260.

Survivorship of actions. See note 53 Am. Rep. 525.

Effect of death of party. See note 29 Am. St. Rep. 816.

Substitution of personal representative. See note 50 Am. St. Rep. 742.

Effect of death of party on action for death by wrongful act. See note 70 Am. St. Rep. 685.

Survival of action for death by wrongful act after death of wrongdoer. See notes 12 Ann. Cas. 462; 11 L. R. A. (N. S.) 1157.

Survival of action for death by wrongful act after death of beneficiary. See note 17 Ann. Cas. 773.

Whether statutory action for wrongful death survives to personal representative of original beneficiary. See note 24 L. R. A. (N. S.) 844.

CODE COMMISSIONERS' NOTE. 1. Construction of section. This rule as to right of a third person, under our statute, to be made a party, where he is directly interested in the subject-matter in litigation, as it existed upon this subject, both at law and in chancery, has been altered by the Practice Act of this state, by the sixteenth and seventeenth sections of which it is provided that, in case of the transfer of any interest in the action during the pendency, the suit may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. Again, it is provided that the court shall order parties to be brought in, if there cannot be a complete determination of the action without prejudice to their interests. Brooks v. Hager, 5 Cal. 282.

2. **Judgment for or against a party deceased.** See § 669, post; see also Judson v. Love, 35 Cal. 464.

3. **Transfer of cause of action in ejectment.** The transfer, by the plaintiff in ejectment, of the demanded premises, pending the action, is a transfer of the cause of action, within the provisions of this section, and the action may be continued in the name of the original plaintiff. Moss v. Shear, 30 Cal. 468.

4. **Transfer of plaintiff's interest in cause of action.** If the plaintiff has conveyed the demanded premises, pending ejectment, the court, by the consent of both the plaintiff and vendee, may make an order continuing the action in the name of the original plaintiff. Moss v. Shear, 30 Cal. 468.

5. **Plaintiff may recover after sale of land.** If the action is continued, as above stated, in the name of the original plaintiff, notwithstanding the premises have been transferred by him, he may recover judgment for both possession and the rents and profits. Moss v. Shear, 30 Cal. 468.

6. **Death of one of several respondents.** If one of several respondents died before notice of appeal was filed, a motion to dismiss the appeal as to him must be granted. Shartzer v. Love, 40 Cal. 96; Judson v. Love, 35 Cal. 463.

7. **Husband cannot recover homestead on death of wife.** If the wife die after an action has been commenced by herself and husband for the homestead, a recovery by the husband is defeated, although his right to recover existed at the time when the action was begun. Gee v. Moore, 14 Cal. 472, overruling Taylor v. Hargous, 4 Cal. 273; 60 Am. Dec. 606; Poole v. Gerrard, 6 Cal. 71; 65 Am. Dec. 481; Revalk v. Kraemer, 8 Cal. 73; 68 Am. Dec. 304.

8. **Death of party to a divorce suit abates action. Partitioner's community property.** A supplemental decree in the divorce suit, after death of husband, under which the plaintiff claims to be the owner of the whole land sued for, was, in our judgment, null and void, as against the heirs at law. By the death of the husband, the suit abated, for all the purposes of further judicial action therein, on the subject of partitioning the common property, and the court had no jurisdiction to adjudge that the property should be sold and the proceeds divided, without a revivor as to the heirs. No such revivor was had, and the interest of the heirs was, therefore, unaffected by the supplemental decree, and the transactions under it. Ewald v. Corbett, 32 Cal. 499.

9. **Where, during action in name of husband and wife, they are divorced.** An action begun by husband and wife in their joint names, does not abate in consequence of a divorce. Calderwood v. Pyser, 31 Cal. 335.

10. **Conveyance of demanded land, pending suit.** The conveyance of demanded premises, by the plaintiff in ejectment, pending the suit, to a person not a party to the action, does not necessarily defeat the action. Moss v. Shear, 30 Cal. 468; Barstow v. Newman, 34 Cal. 90.

11. **Continuation of action in name of executor on death of party.** What is a sufficient suggestion of death of principal, and a revival of the cause in the name of the executor. See Gregory v. Haynes, 21 Cal. 443.

12. **Death of appellant after argument of his case on appeal.** The death of an appellant after argument of his case upon appeal, does not constitute any ground for delaying a decision or departing from the ordinary course of procedure, except as to the entry of the judgment which may be rendered. The entry should be of a day anterior to the appellant's death. King v. Dunn, 21 Wend. (N. Y.) 253; Campbell v. Mesier, 4 Johns. Ch. 335; 8 Am. Dec. 570; Miller v. Gunn, 7 How. Pr. 159; Black v. Shaw, 20 Cal. 69.

13. **Death of appellant previous to argument on appeal.** The rule is different from that above

stated if the death occurs previous to the argument; in that event, further proceedings can only be had upon leave given after suggestion of the death is made. Black v. Shaw, 20 Cal. 69.

14. **Defendants cannot change plaintiffs.** The substitution of one person as plaintiff in place of another, in case of a transfer of the cause of action, is a matter which the defendant cannot move. It concerns only the plaintiff, or the person to whom the transfer is made. If the plaintiff desires to take advantage of the transfer for any cause, he must do so by supplemental answer. As against a defendant, a plaintiff has a right to stay in court till his case has been tried. Hestres v. Brennan, 37 Cal. 385.

15. **Mode of showing the death of a party and substitution of his legal representatives.** The death of a party, pendente lite, should be made known by suggestion of that fact to the court, and the action continued by order of the court against the representative of the party deceased, of which he must be duly notified before he can be affected by further proceedings in the action. Judson v. Love, 35 Cal. 464.

16. **Suggestion of the death of party. When it may be made.** It is regular and proper to suggest the death of a party to an action in any court, and at any stage of the proceedings. And the death of a party occurring before the appeal taken may be shown in this court by affidavit of the fact. Judson v. Love, 35 Cal. 464.

17. **Death of the defendant during the pendency of an action.** In an action to recover judgment on a promissory note, the suggestion of the death of the defendant, and the substitution of his administrator, and the continuance of the suit against him, subject the proceedings to such rules of the Probate Act as are applicable to proceedings for the collection of claims against an estate of a deceased person. Myers v. Mott, 29 Cal. 359; 89 Am. Dec. 49.

18. **Judgment against administrators enforcing attachment lien.** If the defendant dies after the service of summons and the levy of an attachment on his property, and before judgment, and the administrator is substituted, and the action continued against him, the court cannot render a judgment enforcing the lien of the attachment by a sale of the attached property, and an application of the proceeds to the satisfaction of the demand. Myers v. Mott, 29 Cal. 359; 89 Am. Dec. 49.

19. **Purchase of property pending an action to recover possession of it.** One who buys land during the pendency of an action to recover possession of it, in which his grantor is a defendant, may thereafter continue the defense in the name of his grantor, or may cause himself to be substituted in his place. Mastick v. Thorp, 29 Cal. 444.

§ 386. Another person may be substituted for the defendant. Conflicting claims, how made. A defendant, against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order. And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.

Legislation § 386. 1. Enacted March 11, **1872**; based on Practice Act, § 658, as amended by Stats. 1854, Redding ed. p. 72, Kerr ed. p. 102, § 70, which had the word "due" before "notice to such person," and with this omission the section was enacted in 1872, ending with the words "make the order."

2. Amended by Stats. **1881**, p. 19, (1) changing the word "such" before "contract" and before "property" from the words "the same," and (2) adding the rest of the section after the words "make the order."

3. Amendment by Stats. **1901**, p. 126; unconstitutional. See note ante, § 5.

Intervention by substitution of defendant. A party sued upon a debt, contract, or claim, upon which another has or claims a demand, or right to receive the money, may, before answer, file an affidavit setting up such facts, and have an order made thereon, substituting such claimant as defendant in his place or stead; and by paying the money into the court he may be relieved of all further liability. Pfister v. Wade, 69 Cal. 133; 10 Pac. 369; Howell v. Stetefeldt Furnace Co., 69 Cal. 153; 10 Pac. 390; Cross v. Eureka Lake etc. Canal Co., 73 Cal. 302; 2 Am. St. Rep. 808; 14 Pac. 885; San Francisco Sav. Union v. Long, 123 Cal. 107; 55 Pac. 708; 137 Cal. 68; 69 Pac. 687; Orient Ins. Co. v. Reed, 81 Cal. 145; 22 Pac. 484; Woodmen of the Word v. Rutledge, 133 Cal. 640; 65 Pac. 1105; Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111. A person seeking to bring in a party to litigate his claim, must show that such person claims an interest in the property, or has made a demand therefor. McGorray v. Stockton

Sav. & L. Soc., 131 Cal. 321; 63 Pac. 479. The order should specifically state the nature and character of the claim of the defendant. Warnock v. Harlow, 96 Cal. 298; 31 Am. St. Rep. 209; 31 Pac. 166. There must be claims to be litigated, or an order for intervention cannot be made. Cahoon v. Levy, 4 Cal. 243.

Interpleader, where there are conflicting claims. The second clause of this section makes no provision for an order permitting the plaintiff in an action of interpleader to pay the money into court or to deliver the property. Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111; Fox v. Sutton, 127 Cal. 515; 59 Pac. 939. This section applies to conflicting claims of attorneys to a particular fund for their fees (Sullivan v. Lusk, 7 Cal. App. 186; 94 Pac. 91, 92), and in an action to compel defendants to litigate among themselves their claims to certain moneys in the hands of plaintiff. Water Supply Co. v. Sarnow, 6 Cal. App. 586; 92 Pac. 667. Where a case is a proper one for an interpleader, and the plaintiff's complaint is sufficient, an order will be made discharging him from liability to the conflicting claimants, and requiring them to litigate their several claims among themselves. Interlocking Stone Co. v. Scribner, 19 Cal. App. 344; 126 Pac. 178. Until an order is obtained therefor, a party cannot, of his own volition, relieve himself of responsibility by voluntarily placing the property or money in the hands of the clerk, which would not then, in any proper sense, be in the custody of the law. Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111. An interpleader will be sustained against persons who claim, legally or equitably, the same thing, debt, or duty, whenever it is necessary for the protection of one who has incurred no independent liability to any of the claimants and who does not himself claim an interest in the matter. Pfister v. Wade, 56 Cal. 43; Sullivan v. Lusk, 7 Cal. App. 186; 94 Pac. 91, 92. Where one of two claimants of the same fund litigates it and secures judgment, the other, standing by, cannot deprive him of the fruits of his labor, by compelling him to litigate again his right to the fund. Wilson v. Heslep, 4 Cal. 300. Defendants in interpleader are persons having adverse interests. McDevitt v. Sullivan, 8 Cal. 592. Notice of the claim to the debtor is necessary, in order to make him liable to the claimant. Hogan v. Black, 66 Cal. 41; 4 Pac. 943. It is an inflexible rule, that the thing to which the parties make adverse claims must be one and the same thing, or in other words, the claims must be identical; there may be cases in which all the fund (where the plaintiff sustains to it the mere relation of a stockholder or trustee) may not be claimed by each of the defendants; but the defendants must assert adverse claims to all and every part of it. Pfister v. Wade, 56 Cal. 43. An action in interpleader cannot be employed to determine disputed claims between the plaintiff and the defendants; the amounts claimed by the defendants, or any of them, must be admitted by the plaintiff, and he must be a mere uninterested stakeholder; and where one of them claims more than the plaintiff admits to be due, the interpleader is defeated: the general rule is, that an interpleader cannot be invoked, where the plaintiff denies the claim; but a denial, made in another action, does not defeat an interpleader subsequently filed. Orient Ins. Co. v. Reed, 81 Cal. 145; 22 Pac. 484. It is essential to the right of interpleader, that the person standing in the position of a stakeholder is ignorant of the rights of the different claimants of the fund, debt, duty, or property owing by him or in his possession, or that there is some doubt as to whom he shall deliver the property, pay the debt, or render the duty, so that he cannot safely do so to any one of them. Pfister v. Wade, 56 Cal. 43.

The pleadings. Defects in matter of formal allegation may be cured by amendment. Orient Ins. Co. v. Reed, 81 Cal. 145; 22 Pac. 484. A demurrer must be made or an objection must be raised to the complaint, or any objection to the plaintiff's right of action will be deemed waived. San Francisco Sav. Union v. Long, 123 Cal. 107; 55 Pac. 708; Woodmen of the World v. Rutledge, 133 Cal. 640; 65 Pac. 1105. The plaintiff may dismiss the proceeding at any time, upon the payment of costs, where no counterclaim has been filed or affirmative relief asked. Kaufman v. Superior Court, 115 Cal. 152; 46 Pac. 904.

Order of substitution. An interlocutory order, requiring the defendants to come in and litigate their conflicting claims, should not be made until it has first been determined that the plaintiff has a right to bring the action. San Francisco Sav. Union v. Long, 123 Cal. 107; 55 Pac. 708. Persons brought in in invitum, under this section, are entitled to a change of place of trial to the county in which they reside. Howell v. Stetefeldt Furnace Co., 69 Cal. 153; 10 Pac. 390.

Liability of plaintiff. Where an interlocutory order is made, bringing in the conflicting claimants, and dismissing the plaintiff, he ceases to be a party to the action, and is not responsible for costs. San Francisco Sav. Union v. Long, 137 Cal. 68; 69 Pac. 387. It is not necessary that the plaintiff in a bill for interpleader shall offer to pay the costs of a previous suit by one of the defendants against him: such costs are taxable in that action. Orient Ins. Co. v. Reed, 81 Cal. 145; 22 Pac. 484.

Conflicting claimants. A corporation paying the money into court, and complying with the provisions of this section,

may have the claimants to dividends substituted in its place as defendants, and be relieved of all responsibility. Cross v. Eureka Lake etc. Canal Co., 73 Cal. 302; 2 Am. St. Rep. 808; 14 Pac. 885. An insurance company sustaining a loss, involving conflicting claims to the money payable thereunder, may file an action in interpleader, and have an order directing it to pay the money into court, and thus be discharged from further liability. Orient Ins. Co. v. Reed, 81 Cal. 145; 22 Pac. 484. A tenant may file a complaint in interpleader, making all the adverse claimants to the rents parties defendant, and pay the same into court, to abide the ultimate decision (McDevitt v. Sullivan, 8 Cal. 592; Schluter v. Harvey, 65 Cal. 158; 3 Pac. 659); also on other claims, where there is privity of estate between the claimants and the landlord. McDevitt v. Sullivan, 8 Cal. 592; Warnock v. Harlow, 96 Cal. 298; 31 Am. St. Rep. 209; 31 Pac. 166. In such cases the court may make an order directing the tenant to pay the amount of the rents stipulated in the lease into court, and thus absolve the tenant from liability to any of the parties. Schluter v. Harvey, 65 Cal. 158; 3 Pac. 659. Interpleader by a judgment debtor is not allowable, under this section. Collins v. Angell, 72 Cal. 513; 14 Pac. 135.

CODE COMMISSIONERS' NOTE. This is § 658 of the Practice Act, taken from its place and inserted here because it relates to parties to actions.

When tenant finds there are adverse claimants to property he has rented. When there are adverse claimants to the property, a tenant should file a bill of interpleader, making them parties thereto, and offering to pay the rents into court to abide its ultimate decision. McDevitt v. Sullivan, 8 Cal. 592.

§ 387. Intervention, when it takes place, and how made. At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it within ten days from the service thereof, if served within the county wherein said action is pending, or within thirty days if served elsewhere.

Eminent domain. Intervention in. Post, § 1246.

Legislation § 387. 1. Enacted March 11, **1872;** based on Practice Act, §§ 659–661 (Stats. 1854, Redding ed. p. 73, Kerr ed. p. 102, §§ 71–73), which read: "§ 71 [§ 659]. Any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties, to the action or an interest against both. An intervention takes place, when a third person is permitted to become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant." "§ 72 [§ 660]. A third person may intervene either before or after issue has been joined in the cause." "§ 73 [§ 661]. The intervention shall be by petition or complaint, filed in the court in which the action is pending, and it must set forth the grounds on which the intervention rests; a copy of the petitions or complaint shall be served upon the party or parties to the action against whom anything is demanded, who shall answer it as if it were an original complaint in the action." When enacted in 1872, the section read the same as when amended by Code Amdts. 1873–74, p. 296, down to the words "action or proceeding," the section ending, after these words, with the clause, "who may answer it as if it were an original complaint."

2. Amended by Code Amdts. **1873–74,** p. 296, and then read: "Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint."

3. Amendment by Stats. **1901,** p. 127; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907,** p. 703; the code commissioner saying, "The amendment consists in adding the words, 'within ten days from the service thereof, if served within the county wherein said action is pending, or within thirty days if served elsewhere,' thus removing any ambiguity respecting the time within which the complaint in intervention must be answered."

Interest in the matter in litigation. Any one having an interest in the matter in litigation may be permitted to intervene before the trial of the action or the hearing of the proceedings. Leonis v. Biscailuz, 101 Cal. 330; 35 Pac. 875. "To

intervene" is to appear as a party, to protect some right, or an interest affected thereby, in a pending action, carried on by other persons, where the intervener has not the right to institute or carry on the proceeding himself. Estate of Ghio, 157 Cal. 552; 137 Am. St. Rep. 145; 37 L. R. A. (N. S.) 549; 108 Pac. 516. Where the court allows a party to intervene, the plaintiff cannot afterwards, by a dismissal of the action as to some of the defendants, deprive such party of the right to a judgment on his claim, unless the court sets aside the order allowing intervention. Townsend v. Driver, 5 Cal. App. 581; 90 Pac. 1071. The interest entitling a person to intervene must be one created by a claim to the demand in a suit, or a claim to or lien upon the property which is the subject of the litigation. Horn v. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569; Robinson v. Crescent City Mill etc. Co., 93 Cal. 316; 28 Pac. 950. The code does not attempt to state what or how great the interest shall be, in order to give the right to intervene; any interest is sufficient. Coffey v. Greenfield, 55 Cal. 382; Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111; Dennis v. Kolm, 131 Cal. 91; 63 Pac. 141. If one has any interest in the subject-matter of the litigation, or in the success of some of the parties, he has the right to intervene (Coffey v. Greenfield, 55 Cal. 382; Moran v. Bonynge, 157 Cal. 295; 107 Pac. 312); but the interest must be direct, in the subject-matter of the action (Brooks v. Hager, 5 Cal. 281; Yuba County v. Adams, 7 Cal. 35; Davis v. Eppinger, 18 Cal. 378; 79 Am. Dec. 184; Coburn v. Smart, 53 Cal. 742), either for or against one of the parties, or adversely to both (Stich v. Dickinson, 38 Cal. 608; Moran v. Bonynge, 157 Cal. 295; 107 Pac. 312); and it must be of such immediate and direct character that he will either gain or lose by the direct legal operation and effect of the judgment. Horn v. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569. In an action of accounting between partners, the firm creditors may join in an intervention to share in a fund in the hands of one of the partners, the proceeds of a fraudulent sale of firm property (Grossini v. Perazzo, 66 Cal. 545; 6 Pac. 450); but an attaching creditor of an individual partner's interest in the partnership has no such interest in proceedings to wind up the affairs of the partnership as entitle him to intervene. Isaacs v. Jones, 121 Cal. 257; 53 Pac. 793, 1101. A creditor, by garnishment, may intervene in an action and set up his rights, under this section. Dore v. Dougherty, 72 Cal. 232; 1 Am. St. Rep. 48; 13 Pac. 621. Execution and attachment creditors may intervene to defeat the lien of a prior attachment (Horn v. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569; Davis v. Eppinger, 18 Cal. 378; 79 Am. Dec. 184; Speyer v. Ihmels, 21 Cal. 280; 81 Am. Dec. 157; McComb v. Reed, 28 Cal. 281; 87 Am. Dec. 115; Coghill v. Marks, 29 Cal. 673; Coffey v. Greenfield, 55 Cal. 382); as also may one who has procured a garnishment. Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111. Where, in an action, money claimed to belong to the debtor is attached, a third person, claiming it, may intervene (Dennis v. Kolm, 131 Cal. 91; 63 Pac. 141); as also may an administrator, who claims that a note and mortgage, sued upon, belong to the estate of his decedent (Stich v. Dickinson, 38 Cal. 608); and also the assignee of an interest, pendente lite (Loughborough v. McNevin, 74 Cal. 250; 5 Am. St. Rep. 435; 14 Pac. 369; 15 Pac. 773); and also the assignee of the subject-matter, who still retains an interest therein, although the assignment is general (Gradwohl v. Harris, 29 Cal. 150); and also the assignee of a pledge. Loughborough v. McNevin, 74 Cal. 250; 5 Am. St. Rep. 435; 14 Pac. 369; 15 Pac. 773. The claimant of an interest in a fund or property held in trust, sought to be reached by creditor's bill, which is founded upon an agreement between the parties, entered into prior to the execution of the trust, and which was to have been included in the trust, but was not, may intervene, set up facts, and have the trust agreement reformed so as to protect his interests. Ward v. Waterman, 85 Cal. 488; 24 Pac. 930. The judgment creditors of a decedent may intervene to set aside, as to them, an attachment procured on a debt not yet due (Davis v. Eppinger, 18 Cal. 378; 79 Am. Dec. 184; Speyer v. Ihmels, 21 Cal. 280; 81 Am. Dec. 157), the attachment of a debt not yet due being void as to creditors whose interests are affected injuriously thereby. Davis v. Eppinger, 18 Cal. 378; 79 Am. Dec. 184. Judgment creditors having liens may intervene as subsequent debtors in a foreclosure suit against a common debtor (Horn v. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569); as also may judgment creditors of the same class with the plaintiff, in an action by creditor's bill, to reach unpaid subscriptions to the stock of a debtor corporation. Baines v. West Coast Lumber Co., 104 Cal. 1; 37 Pac. 767. An actual settler on swamp-lands may intervene in an action to determine who is entitled to purchase; and if the petition does not show the right to intervene, the court may, in its discretion, allow the intervener, as amicus curiæ, to remain in the case for the purpose of showing that neither of the parties is entitled to purchase, where he is not allowed to take anything by the judgment. McNee v. Lynch, 88 Cal. 519; 26 Pac. 508. He may intervene before judgment, but not afterwards. Smith v. Roberts, 1 Cal. App.

148; 81 Pac. 1026. An intervention may be had in an action to foreclose a mechanic's lien, and will be as much a compliance with law as the institution of an original suit (Mars v. McKay, 14 Cal. 127; Sheldon v. Gunn, 56 Cal. 582); and a mortgagee holding a prior mortgage may intervene in such an action (Walker v. Hauss-Hijo, 1 Cal. 183; Van Winkle v. Stow, 23 Cal. 457); as also may mortgagee, subsequent to a mechanic's lien for labor done, if he makes timely application (Hocker v. Kelley, 14 Cal. 164); but material-men who have not filed liens cannot intervene. Walker v. Hauss-Hijo, 1 Cal. 183. The statute must be strictly complied with, in order to give rights under the mechanic's lien law. Davis v. Livingston, 29 Cal. 283. In an action to determine the right to a mining claim, under § 3226 of the United States Revised Statutes, only such persons as have filed claims to the land in the United States land-office may intervene. Mont Blanc etc. Mining Co. v. Debour, 61 Cal. 364. Persons having an interest in property involved in an action to quiet title may intervene (Townsend v. Driver, 5 Cal. App. 581; 90 Pac. 1071); but a third party cannot intervene in an action in ejectment to quiet title (Rosecrans v. Ellsworth, 52 Cal. 509), by alleging title adversely to both parties (Porter v. Garrissino, 51 Cal. 559); nor in proceedings to condemn a particular riparian right. San Joaquin etc. Irrigation Co. v. Stevinson, 164 Cal. 221; 128 Pac. 924. An insane person may intervene, where otherwise qualified, but he can appear only by general guardian or guardian ad litem, and the court has authority to appoint a guardian ad litem in intervention, just as it has in other cases. Security Loan etc. Co. v. Kauffman, 108 Cal. 214; 41 Pac. 467; Crawford v. Neal, 56 Cal. 321. The sureties of a defendant on a replevin bond may intervene, as they will be affected by the judgment. Coburn v. Smart, 53 Cal. 742; Brooks v. Hager, 5 Cal. 281. Bondholders interested in the success of a defendant may intervene, but, like him, they cannot seek any affirmative relief. Boskowitz v. Thompson, 144 Cal. 724; 78 Pac. 290. Stockholders may intervene, where the corporation refuses to answer, or, having properly answered, does not defend in good faith. Waymire v. San Francisco etc. Ry. Co., 112 Cal. 646; 44 Pac. 1086. Where a debt secured by mortgage is barred by statute, the mortgage is also barred; and where one acquires a lien on the property subsequently to the mortgage, he may intervene and plead the statute, to the extent of his interest, in an action to foreclose the mortgage. Coster v. Brown, 23 Cal. 142; Grattan v. Wiggins, 23 Cal. 16; Lord v. Morris, 18 Cal. 482; McCarthy v. White, 21 Cal. 495; 82 Am. Dec. 754; Low v. Allen, 26 Cal. 141; Lent v. Shear, 26 Cal. 361; Wood v. Goodfellow, 43 Cal. 185. The mortgagee, when entitled to immediate possession under the recorded mortgage, may intervene in an action by a third person to recover from the mortgagor the specific property; and the fact that the plaintiff takes the property, and gives the statutory bond, does not defeat the mortgagee's right to intervene. Martin v. Thompson, 63 Cal. 3. The lien of a mortgage upon a growing crop is not lost by severance or tortious removal by a third person. Martin v. Thompson, 63 Cal. 3; Wilson v. Prouty, 70 Cal. 196; 11 Pac. 608; Chittenden v. Pratt, 89 Cal. 178; 26 Pac. 626. A mortgagee, subsequent to the one in foreclosure proceedings, may intervene to show that the mortgage sought to be foreclosed is barred by the statute. Coster v. Brown, 23 Cal. 142. A simple contract creditor of a common debtor cannot intervene in an action to foreclose a mortgage executed by such common debtor (Horn v. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569); nor can general creditors intervene, unless they have acquired some lien upon the subject-matter of the action. Davis v. Eppinger, 18 Cal. 378; 79 Am. Dec. 184; Speyer v. Ihmels, 21 Cal. 280; 81 Am. Dec. 157; Coghill v. Marks, 29 Cal. 673. A wife may intervene in an action to foreclose a mortgage on property claimed as a homestead. Sargent v. Wilson, 5 Cal. 504; Moss v. Warner, 10 Cal. 296; Mabury v. Ruiz, 58 Cal. 11; Fitzgerald v. Fernandez, 71 Cal. 504; 12 Pac. 562; Booth v. Hoskins, 75 Cal. 271; 17 Pac. 225. An administrator cannot intervene in a suit brought to determine a controversy between different heirs as to their respective rights of inheritance, in which no claim is made against the estate of the deceased or against the administrator, or against his right to retain possession of the property during the administration of the estate, or against the application of any property in his hands to the purpose of such administration. Estate of Healy, 137 Cal. 474; 70 Pac. 455; Roach v. Coffey, 73 Cal. 281; 14 Pac. 840; Estate of Jessup, 80 Cal. 625; 22 Pac. 260; Goldtree v. Thompson, 83 Cal. 420; 23 Pac. 383; Jones v. Lamont, 118 Cal. 499; 62 Am. St. Rep. 251; 50 Pac. 766. When the complaint in intervention shows the intervener to be the real party in interest, he has the right to intervene. Robinson v. Crescent City Mill etc. Co., 93 Cal. 316; 28 Pac. 950.

How intervention is made. The right to intervene is purely statutory, and the statute prescribes the mode; intervention is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action, who may answer or demur as if it were an original complaint. Chase v. Evoy, 58 Cal. 348. Application for leave to intervene may be

granted ex parte. Spanagel v. Reay, 47 Cal. 608; People v. Pfeiffer, 59 Cal. 89; Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111. Where the intervener is allowed to defend in the name of a defendant in the action, no harm results to him from an erroneous order. Muller v. Carey, 58 Cal. 538. The intervener is to be regarded as a plaintiff or as a defendant in the action, unless he seeks something adversely to both, according as is the party for whose success he seeks to intervene, and is limited to the same procedure and remedies as is such original party, either for the purpose of defeating the action or of resisting the claim of the plaintiff. Boskowitz v. Thompson, 144 Cal. 724; 78 Pac. 290. The complaint must affirmatively show the facts which entitle the petitioner to intervene. People v. Talmage, 6 Cal. 256. Where the intervener joins the defendant in resisting the plaintiff's claim, the complaint in intervention is, in effect, an answer to the complaint of the plaintiff. People v. Perris Irrigation Dist., 132 Cal. 289; 64 Pac. 399, 773; Henry v. Vineland Irrigation Dist., 140 Cal. 376; 73 Pac. 1061. The rules applicable to pleadings in general apply with equal force to pleadings in intervention. Hadsall v. Case, 15 Cal. App. 541; 115 Pac. 330. Intervention is treated as a complaint, by this section, to which either party may demur, answer, or file a cross-complaint (Wall v. Mines, 130 Cal. 27; 62 Pac. 386); and the plaintiff must meet the issues raised by the complaint, so long as he seeks relief in the action. Townsend v. Driver, 5 Cal. App. 581; 90 Pac. 1071. A complaint in intervention, to recover a share of commissions, alleging the placing of the property in the plaintiff's hands, to be sold upon specified terms as to the division of the profits, is sufficient, if it does not allege performance (Gorham v. Heiman, 90 Cal. 346; 27 Pac. 289), and its insufficiency must be objected to by demurrer, to be available on appeal (Gorham v. Heiman, 90 Cal. 346; 27 Pac. 289); and an objection because of the insufficiency of the complaint or the want of right, must be made at the time, or the right to object will be considered waived. McKenty v. Gladwin, 10 Cal. 227; Smith v. Penny, 44 Cal. 161; Bangs v. Dunn, 66 Cal. 72; 4 Pac. 963; People v. Reis, 76 Cal. 269; 18 Pac. 309. It cannot be raised for the first time in the supreme court. People v. Reis, 76 Cal. 269; 18 Pac. 309. All objection thereto is waived by entering into a stipulation with the intervener, that his claim shall be determined upon certain facts. Donner v. Palmer, 51 Cal. 629. Averments, in an answer to a complaint in intervention, must, under the statute, be considered denied by the intervener. (Pearson v. Creed, 78 Cal. 144; 20 Pac. 302); and an allegation, in a complaint in intervention, that the partnership previously existing between the plaintiff and the defendant had never been dissolved, is deemed to be denied by the answer. Strong v. Stapp, 74 Cal. 280; 15 Pac. 835. A failure to find on an immaterial issue is not error, and does not affect the judgment. Gorham v. Heiman, 90 Cal. 346; 27 Pac. 289. An averment in the complaint, not denied, need not be found (Gorham v. Heiman, 90 Cal. 346; 27 Pac. 289; Grossini v. Perazzo, 66 Cal. 545; 6 Pac. 450); and the decision thereon cannot be controlled or reviewed by mandamus. People v. Sexton, 37 Cal. 532; People v. Hubbard, 22 Cal. 34; People v. Pratt, 28 Cal. 166; 87 Am. Dec. 110; People v. Weston, 28 Cal. 639. The order dismissing an intervention should state precisely the grounds relied on. Coffey v. Greenfield, 62 Cal. 602; Kiler v. Kimbal, 10 Cal. 267; McGarrity v. Byington, 12 Cal. 426; People v. Banvard, 27 Cal. 470; Sanchez v. Neary, 41 Cal. 485, 486; Poehlmann v. Kennedy, 48 Cal. 201; Silva v. Holland, 74 Cal. 530; 16 Pac. 385; Miller v. Luco, 80 Cal. 257; 22 Pac. 195; Belcher v. Murphy, 81 Cal. 39; 22 Pac. 264; Shain v. Forbes, 82 Cal. 577; 23 Pac. 198; Bronzan v. Drobaz, 93 Cal. 647; 29 Pac. 254; People v. Sansome, 98 Cal. 235; 33 Pac. 202. The inaction of defendants in permitting their default does not preclude an intervener from his relief. Townsend v. Driver, 5 Cal. App. 581; 90 Pac. 1071. An order of the court, consolidating cases and providing for intervention, although irregular, must be excepted to. Bangs v. Dunn, 66 Cal. 72; 4 Pac. 963; People v. Reis, 76 Cal. 269; 18 Pac. 309.

Intervention must be before trial. Intervention may be made before issue is joined (Brooks v. Hager, 5 Cal. 281; Coburn v. Smart, 53 Cal. 742), or afterwards, at any time after the commencement of the action (Ah Goon v. Superior Court, 61 Cal. 555; Robinson v. Crescent City Mill etc. Co., 93 Cal. 316; 28 Pac. 950; Leonis v. Biscailuz, 101 Cal. 330; 35 Pac. 875; Hibernia Sav. & L. Soc. v. Churchill, 128 Cal. 633; 79 Am. St. Rep. 73; 61 Pac. 278), or before the trial, if the complaint therein raises no issues other than those raised by the answer on file. Coburn v. Smart, 53 Cal. 742. It may be had even after the cause is called for trial, but before it is commenced (Ah Goon v. Superior Court, 61 Cal. 555), but it cannot be allowed after trial. Johnson v. San Francisco Sav. Union, 63 Cal. 554. Judgment creditors may intervene at any time before judgment is entered. Speyer v. Ihmels, 21 Cal. 280; 81 Am. Dec. 157. A default, by which all the issues tendered by the complaint are admitted in plaintiff's favor, is equivalent to a trial, and shuts out intervention. Hibernia Sav. & L. Soc. v. Churchill, 128 Cal. 633; 79 Am. St. Rep.

73; 61 Pac. 278. After final judgment and decree, the application to intervene must be denied. Hocker v. Kelley, 14 Cal. 164; Laugenour v. Shanklin, 57 Cal. 70; Carey v. Brown, 58 Cal. 180; Cunningham v. Shanklin, 60 Cal. 118; Owens v. Colgan, 97 Cal. 454; 32 Pac. 519; Leonis v. Biscailuz, 101 Cal. 330; 35 Pac. 875; Baines v. West Coast Lumber Co., 104 Cal. 1; 37 Pac. 767. There is no authority for intervention, after judgment, and while the cause is pending on appeal; a stranger to the record cannot be heard on appeal. Leonis v. Biscailuz, 101 Cal. 330; 35 Pac. 875. The general rule is, that intervention cannot be allowed after final judgment (Owens v. Colgan, 97 Cal. 454; 32 Pac. 519; Laugenour v. Shanklin, 57 Cal. 70; Carey v. Brown, 58 Cal. 180; Baines v. West Coast Lumber Co., 104 Cal. 1; 37 Pac. 767); but where the plaintiff attempts to sue in behalf of others, and the would-be intervener is interested in the thing recovered, the rule is otherwise, and he may be permitted to intervene after judgment and before distribution, so as to receive his share (Carey v. Brown, 58 Cal. 180); and where the cause is reversed, and remanded for retrial, intervention may be had (Leonis v. Biscailuz, 101 Cal. 330; 35 Pac. 875), as it may, also, after the decision in a contest of the right to purchase public lands (Laugenour v. Hennagin, 59 Cal. 625; Cunningham v. Shanklin, 60 Cal. 118), and after an interlocutory order for an accounting, not establishing any indebtedness (Clarke v. Baird, 98 Cal. 642; 33 Pac. 756); but not after an interlocutory decree in partition, fixing the respective interests of the parties. Leonis v. Biscailuz, 101 Cal. 330; 35 Pac. 875.

What may be demanded. Intervening creditors cannot raise or litigate a question as to the validity of a note and mortgage as between the original parties: all they can demand is a judgment protecting their interests, and preventing the enforcement of the judgment to their prejudice (Horn v. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569); nor, in an action brought by an assignee to foreclose a mortgage executed by a husband, can the wife, intervening, question the validity of the assignment of the mortgage, nor demur to the complaint on this ground; the only question that can be considered is the homestead character of the property. Mabury v. Ruiz, 58 Cal. 11.

Pleadings and proceedings. Allegations in a complaint in intervention, traversing the complaint of the plaintiff, have the same effect as denials in an answer have, and require affirmative proof by the plaintiff, to entitle him to judgment. Speyer v. Ihmels, 21 Cal. 280; 81 Am. Dec. 157. A plaintiff, against whom no affirmative relief is sought, may dismiss his action at any time, both as against the defendant and the intervener (Henry v. Vineland Irrigation Dist., 140 Cal. 376; 73 Pac. 1061); and an intervener, against whom no relief is sought, may dismiss his complaint of intervention at any time, and abandon the contest (Sheldon v. Gunn, 56 Cal. 582); and the court may set aside an order, made ex parte, allowing the complaint in intervention to be filed, and dismiss the complaint. People v. Pfeiffer, 59 Cal. 89. Where the intervener claims an interest in the subject-matter of the action, adverse to both parties, and the complaint in intervention is answered by the plaintiff, and material issues are raised, the nonsuit of the plaintiff, on motion of the defendant, does not affect the intervener, and the issues raised by the complaint in intervention and the answer thereto remain. Poehlmann v. Kennedy, 48 Cal. 201. The plaintiff has a right to an appeal where intervention is granted in a justice's court, and to have the superior court pass upon the sufficiency of his demurrer to the complaint, without any statement of the case. Rossi v. Superior Court, 114 Cal. 371; 46 Pac. 177; Southern Pacific R. R. Co. v. Superior Court, 59 Cal. 471. Where the complaint in intervention is not properly set out in the record, the supreme court will presume that the demurrer thereto was properly overruled. Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111. A judgment in favor of the intervener, against the defendant, will not be reversed upon appeal of the plaintiff, where he is not aggrieved thereby. People v. Reis, 76 Cal. 269; 18 Pac. 309. Where the defendant and the intervener prosecute separate appeals from a judgment in favor of the plaintiff, and from an order denying a new trial, the affirmance of the judgment and order on the appeal of the defendant does not operate to oust the authority of the supreme court to reverse it afterwards, on the appeal by the intervener. Donner v. Palmer, 45 Cal. 180. Formerly, an order denying a motion to intervene was not appealable (Wenborn v. Boston, 23 Cal. 321); but now an appeal may be taken from an order sustaining an objection to the right to intervene. Stich v. Dickinson, 38 Cal. 608. The sureties on a replevin bond are entitled to intervene; and where their motion for leave to intervene is denied, they may immediately prosecute an appeal. Coburn v. Smart, 53 Cal. 742; People v. Grant, 45 Cal. 97. Where permission has been given to intervene, the intervener may appeal from the judgment, although no judgment was rendered against him. People v. Perris Irrigation District, 132 Cal. 289; 64 Pac. 399, 773.

Who may become interveners. See note 15 Am. Dec. 162.

Origin and nature of intervention. See note 16 Am. Dec. 177.

Intervention. See note 123 Am. St. Rep. 280.

Right of contract creditors to intervene in equity. See note 3 Ann. Cas. 1091.

Right of claimant of attached property to intervene. See notes 18 Ann. Cas. 594; 23 L. R. A. (N. S.) 536.

Right of adverse claimant to intervene in action for partition. See note 20 Ann. Cas. 82.

Right of surety to intervene in an action against principal or principal in action against surety. See note 68 L. R. A. 736.

CODE COMMISSIONERS' NOTE. 1. Intervention may take place either before or after issue joined. A party has the right to intervene in an action in case of the transfer of any interest during the pendency thereof, or when he is directly interested in the subject-matter in litigation, and this can be done either before or after issue has been joined in the case. Brooks v. Hager, 5 Cal. 281.

2. **What interest is necessary to entitle party to intervene.** Before a party may intervene in an action between third parties, he must have such an interest in the matter in litigation of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. It must be an interest created by a claim to the demand, or some part thereof, in suit or a claim to or lien upon the property, or some part thereof, which is the subject of litigation. Horn v. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569; see also Montgomery v. Tutt, 11 Cal. 307.

3. **Assignor of a claim retaining an interest therein may intervene in an action by assignee thereon.** If a party assigns a claim absolutely, retaining, however, an interest in it, he may intervene to protect his interest in an action brought by the assignee to collect the same, and if he does not intervene, he is bound by the judgment. Gradwohl v. Harris, 29 Cal. 150.

4. **Who may intervene in foreclosure suit.** A simple contract creditor cannot intervene in a foreclosure suit. But judgment creditors, being, as such, subsequent encumbrancers, may intervene; and a court may order them to be made parties by an amendment of the complaint, or on petition of intervention. Horn v. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569.

5. **When co-tenants cannot intervene in action by one of the tenants in common.** Where one tenant in common sues to recover possession of the premises, and the damages sustained by the ouster, his co-tenants cannot intervene. Donner v. Palmer, 23 Cal. 40.

6. **Subsequent mortgagee no right of intervention in action to enforce lien.** A mortgagor of a ditch, subsequent to the lien, has no absolute right to intervene in an action to enforce the mechanic's lien on the ditch. And when the suit has been pending some time, and the application to intervene was made just as plaintiff was taking judgment, the application was too late, and therefore properly refused. Hocker v. Kelley, 14 Cal. 164.

7. **Right to intervene in a suit where property is attached.** If the first attachment was fraudulently obtained, and the debtor has not sufficient property to pay both claims, a subsequent attaching creditor, who has his attachment levied on the property previously levied on by a prior attaching creditor, may intervene in the action between the first attaching creditor and the defendant. Coghill v. Marks, 29 Cal. 673.

8. **Intervention by judgment creditors in attachment suits.** Judgment creditors can intervene in an attachment suit, and have the attachment set aside, because as to them it was void. Davis v. Eppinger, 18 Cal. 378; 79 Am. Dec. 184.

9. **Intervention by subsequent attaching creditors in attachment suit.** Where an attachment has been levied upon the property of a defendant in an action to recover money, a subsequent attaching creditor may intervene, any time before judgment is entered, and dispute the validity of the first attachment. Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157, sustaining Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184, and Horn v. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569. In a case like this, before the passage of this provision of the code, and as doubtless may still be done, the proceedings would have been by a separate action, in the nature of a bill in chancery, as in the case of Heyneman v. Dannenberg, 6 Cal. 376, 65 Am. Dec. 519; or by a motion to the court, as in Dixey v. Pollock, 8 Cal. 570; Speyer v. Ihmels, 21 Cal. 280; 81 Am. Dec. 157.

10. **Owner of lien subsequent to mortgage may intervene and plead statute of limitations as to mortgage.** If an action is brought to foreclose a mortgage barred by statute of limitations, one who has purchased or acquired a lien on the property subsequent to the mortgage has a right to intervene and plead the statute of limitations. Coster v. Brown, 23 Cal. 142.

11. **Intervention by creditors in an action on a fraudulent note and mortgage.** In an action on a note and mortgage, where creditors of the defendant intervened, alleging the note and mortgage to be fraudulent as against them, the interveners cannot prevent a judgment for plaintiff against defendant. The most they can claim is protection against the enforcement of the judgment to their prejudice. Horn v. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569.

When defendant alone can object. If the proceedings between the debtor and a prior creditor are not void, but voidable, the defendant can alone object. Dixey v. Pollock, 8 Cal. 570.

12. **Wife may intervene in action to foreclose mortgage on homestead.** The wife is a proper party defendant in a suit to foreclose a mortgage executed upon premises claimed as a homestead. If not made such a party, she may intervene, or, by permission of the court, be allowed to file a separate answer. Moss v. Warner, 10 Cal. 297; Sargent v. Wilson, 5 Cal. 504. See also Dillon v. Byrne, 5 Cal. 456.

13. **Intervention by county to recover tax on property which is the subject of an action.** A had property deposited with B, which was taxed by the county, and payment demanded of both A and B, and it was held that in an action concerning the money, the county might intervene so as to recover the tax. Yuba County v. Adams, 7 Cal. 37.

14. **Intervention of same effect as commencing an original action.** In an action to foreclose a mechanic's lien, the interveners having filed their intervention and become parties to the suit within the prescribed time and during the existence of the lien, the effect of their position is precisely the same as if they had commenced an original action. Mars v. McKay, 14 Cal. 129.

15. **Petition of intervener treated as a declaration or complaint.** See People v. Talmage, 6 Cal. 258.

16. **Onus probandi as to action between plaintiff and interveners.** "Where a subsequent attaching creditor intervenes in an action for the purpose of setting aside an attachment issued therein, on the ground that there is no debt due from the defendant to the plaintiff, the allegations in the pleading on the part of the intervener, traversing the complaint, have the same effect as denials in an answer, and require affirmative proof by the plaintiff of his cause of action, in default of which the intervener will have judgment in his favor." Speyer v. Ihmels, 21 Cal. 280 (syllabus); 81 Am. Dec. 157.

17. **Objection to intervention in trial below cannot be made on appeal.** An objection cannot be made on appeal for the first time that certain persons could not intervene in an action prosecuted in an inferior court. McKenty v. Gladwin, 10 Cal. 227.

18. **Decision of lower court as to right of parties to intervene cannot be reviewed on mandamus.** A motion for leave to intervene in an action, made at any stage of the proceedings, presents a judicial question, the decision of which cannot be reviewed or controlled by the supreme court by mandamus, however erroneous it may be. People v. Sexton, 37 Cal. 532.

Generally. See Dutil v. Pacheco, 21 Cal. 441; 82 Am. Dec. 749.

§ 388. **Associates may be sued by name of association.** When two or more persons, associated in any business, transact such business under a

common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability.

Partners under fictitious name must file certificate. See Civ. Code, §§ 2466 et seq.

Legislation § 388. 1. Enacted March 11, **1872**; based on Practice Act, § 656 (Stats. 1854, Redding ed. p. 72, Kerr ed. p. 102, § 68), reading as at present down to the words "more of the associates," the section then proceeding, "but the judgment in such case shall bind only the joint property of the associates." When enacted in 1872, the section read the same as now, except for the clause, "and the individual property of the party or parties served with process."

2. Amendment by Stats. **1901**, p. 127; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 704; the code commissioner saying, "The words 'and the individual property of the party or parties served with process' have been added, thus avoiding multiplicity of suits."

Parties associated in business. Two or more persons, transacting business under a common name, may be sued under such common name (Hearst v. Egglestone, 55 Cal. 365; Harrison v. McCormick, 69 Cal. 616; 11 Pac. 456; Goodlett v. St. Elmo Investment Co., 94 Cal. 297; 29 Pac. 505); but the plaintiff is not bound to sue them by their common name. Harrison v. McCormick, 69 Cal. 616; 11 Pac. 456. Where it is alleged in the complaint that the defendant is a copartnership, but no attempt is made to allege who comprise it, the action is one under this section. John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589, 590; 117 Pac. 690. Many exceptions exist to the general rule, that, in equity, all must be parties who have an interest in the object of the suit; but all persons in being, capable of appearing, who are interested, must be brought into court. Los Angeles County v. Winans, 13 Cal. App. 234; 109 Pac. 640. Before the amendment of the Practice Act, in a case where the plaintiff sued H. & Co. under their common name, alleging that other persons composing the firm were unknown to him, and on the trial was unable to prove that there was any person or persons associated with H., it was held that the words "& Co." might be stricken out and the cause proceed against H. alone. Mulliken v. Hull, 5 Cal. 245. Plaintiff may join as defendants all claiming title adversely from a common source, whether they are a voluntary association, copartners, or individuals. Senior v. Anderson, 115 Cal. 496; 47 Pac. 454. A judgment not appealed from cannot be modified. John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589; 117 Pac. 690.

Common name. The action must be against the parties in the association, in the name in which they transact their business. King v. Randlett, 33 Cal. 318. Persons who have been carrying on business under a common name may be sued in such name. San Francisco Sulphur Co. v. Ætna Indemnity Co., 11 Cal. App. 695; 106 Pac. 111. Where a party seeks the advantages secured to him by this section, he ought to show substantially, in his complaint, that the conditions stated therein exist in his case. Welsh v. Kirkpatrick, 30 Cal. 202; 89 Am. Dec. 85; Maclay Co. v. Meads, 14 Cal. App. 363; 112 Pac. 195; 113 Pac. 364. The benefit fund of an unincorporated society belongs absolutely to the beneficiaries, when named; and an action cannot be maintained, under this section, by personal representatives. Swift v. San Francisco Stock etc. Board, 67 Cal. 567; 8 Pac. 94; Hoeft v. Supreme Lodge, 113 Cal. 91; 33 L. R. A. 174; 45 Pac. 185. Actions against partnerships may be brought against the individual partners, or against the firm name under which the partnership transacts business. Harrison v. McCormick, 69 Cal. 616; 11 Pac. 456. A copartnership sued in its common name, under this section, as it stood prior to its amendment in 1907, was regarded as a distinct entity. John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589; 117 Pac. 690. Where associates are not sued in their common name, but in their individual names, this section does not apply. Feder v. Epstein, 69 Cal. 456; 10 Pac. 785; Davidson v. Knox, 67 Cal. 143; 7 Pac. 413. A suit against a copartnership, in its common name, is not a suit against the individuals comprising the copartnership. John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589; 117 Pac. 690. Where the members of a firm are described as defendants in the caption of the complaint, but in the body thereof as defendant, in the singular number, a demurrer for ambiguity should be sustained, and a judgment based thereon must be reversed. Hawley Bros. Hardware Co. v. Brownstone, 123 Cal. 643; 56 Pac. 468. The action must be brought against all members of the partnership; where brought against the individuals, this section does not apply. Harrison v. McCormick, 69 Cal. 616; 11 Pac. 456; Gilman v. Cosgrove, 22 Cal. 356; Cotes v. Campbell, 3 Cal. 191; Morrison v. Bradley, 5 Cal. 503; Farmer v. Cram, 7 Cal. 135. A dormant partner need not be joined as a party defendant, because he stands in the relation of an

undisclosed principal. Tomlinson v. Spencer, 5 Cal. 291. The association designated by the common name is the only proper party defendant, under this section; and the only judgment authorized thereunder, prior to the amendment of 1907, was a judgment binding the joint property of the associates. John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589; 117 Pac. 690. An action by an association, in the common name, is not within this section; the names of the partners should be given. Gilman v. Cosgrove, 22 Cal. 356; Harrison v. McCormick, 69 Cal. 616; 11 Pac. 456.

Judgment binds joint property. Under this section, there can be no judgment against the separate property of any associate or partner, not served or made a party; the judgment is a lien only upon the individual interests of those served. Davidson v. Knox, 67 Cal. 143; 7 Pac. 413; Feder v. Epstein, 69 Cal. 456; 10 Pac. 785; Golden State etc. Iron Works v. Davidson, 73 Cal. 389; 15 Pac. 20. Judgment for or against one or more of several defendants, under §§ 578, 579, post, is authorized only under the rules established by the code or the general principles of law (McDonald v. Porsh, 136 Cal. 302; 68 Pac. 817), and a sale under it transfers only the individual interest of the partners made parties. Golden Gate etc. Iron Works v. Davidson, 73 Cal. 389; 15 Pac. 20; Davidson v. Knox, 67 Cal. 143; 7 Pac. 413. Where an association of persons, transacting business under a common name, contracts a debt, secured by a mortgage of one or more of the associates, or of a third person, the mortgagee, in his action to foreclose, may proceed against the association, under this section, for the purpose of obtaining a deficiency judgment binding only the joint property of the associates. Goodlett v. St. Elmo Investment Co., 94 Cal. 297; 29 Pac. 505. The joint property of all the defendants may be bound by the service of summons upon one or more of a larger number of associates. Los Angeles County v. Winans, 13 Cal. App. 234; 109 Pac. 640. Service on one partner, in an action against the copartnership, binds the firm property; but it will not, where the action is against the partners as individuals. Maclay Co. v. Meads, 14 Cal. App. 363; 112 Pac. 195.

Right of unincorporated association to sue in association name in absence of permissive statute. See note 6 Am. St. Rep. 833.

CODE COMMISSIONERS' NOTE. This is substantially § 656 of the Practice Act, inserted here as the appropriate place for it.

1. **Action may be brought against a defendant, but not for a plaintiff, in firm name.** Defendants may be sued in firm name, but an action cannot be brought by plaintiffs in firm name. Gilman v. Cosgrove, 22 Cal. 357.

2. **Plaintiff cannot sue in the name of the firm.** A complaint should set forth the names of the individuals composing the firm as plaintiffs, if the action is intended to be in behalf of the individuals composing such firm. Gilman v. Cosgrove, 22 Cal. 357.

3. **Complaint in an action against a company by its company name.** If the complaint does not show the existence of the conditions provided for in this section, and a judgment is rendered by default, it is a debatable question whether or not the judgment is void. But if the conditions, as required by this section, appear in the complaint, and the summons was served on one of the members of the company, and judgment is had by default against the company, the judgment may be enforced against the joint property of the company. Welsh v. Kirkpatrick, 30 Cal. 202; 89 Am. Dec. 85.

§ 389. Court, when to decide controversy or to order other parties to be brought in. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an action for the recovery of real or personal property, or to determine conflicting claims thereto, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment.

Joining landlord. Ante, § 379; Civ. Code, § 1949.

Party, adding and striking out name of. Ante, § 473.

Legislation § 389. 1. Enacted March 11, **1872**; based on Practice Act, § 17 (New York Code, § 122), which read same as § 389 now reads, down to the words "presence of other parties," thereafter reading and ending "the court shall order them to be brought in."

2. Amended by Stats. **1897**, p. 9, to read as at present, but not containing the clause, "or to determine conflicting claims thereto."

3. Amendment by Stats. **1901**, p. 127; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 704; the code commissioner saying, "The words 'or to determine conflicting claims thereto' have been added, thus authorizing the bringing in of new parties in actions to determine conflicting claims of real or personal property, and thus avoiding multiplicity of actions."

Construction of section. This section is applicable to proceedings for the revocation of the probate of a will; it does not apply merely to parties who were not named in the first instance. San Francisco Protestant Orphan Asylum v. Superior

Court, 116 Cal. 443; 48 Pac. 379. The right to have new parties brought in under this section still exists, and this may be done whenever the court finds it necessary for a proper determination of the controversy before it. Merchants' Trust Co. v. Bentel, 10 Cal. App. 75; 101 Pac. 31.

Saving rights of others. The right to bring in new parties is to be exercised when the court finds them necessary for the proper determination of the controversy before it; but this right is subject to its power to determine the controversy before it, without bringing in new parties, when it can be done without prejudice to the rights of others, or by a saving of their rights. O'Connor v. Irvine, 74 Cal. 435; 16 Pac. 236; Alison v. Goldtree, 117 Cal. 545; 49 Pac. 571; Merchants' Trust Co. v. Bentel, 10 Cal. App. 75; 101 Pac. 31. A stockholder is a proper party defendant, and should be permitted to be made such, upon proper application, where it is alleged that the corporation will not defend in good faith. Waymire v. San Francisco etc. Ry. Co., 112 Cal. 646; 44 Pac. 1086.

When new parties may be brought in. Where other persons are interested in the subject-matter, without whose presence the controversy cannot be fully determined, the court should order them brought in (Settembre v. Putnam, 30 Cal. 490; Gates v. Lane, 44 Cal. 392; Robinson v. Gleason, 53 Cal. 38; Harrison v. McCormick, 69 Cal. 616; 11 Pac. 456; O'Connor v. Irvine, 74 Cal. 435; 16 Pac. 236; Tregear v. Etiwanda Water Co., 76 Cal. 537; 9 Am. St. Rep. 245; 18 Pac. 658; Winter v. McMillan, 87 Cal. 256; 22 Am. St. Rep. 243; 25 Pac. 407; Cuyamaca Granite Co. v. Pacific Paving Co., 95 Cal. 252; 30 Pac. 525); although the parties to the action have not objected to such defect of parties; and the failure of the court to order such necessary parties to be brought in, is fatal to the judgment (O'Connor v. Irvine, 74 Cal. 435; 16 Pac. 236; Settembre v. Putnam, 30 Cal. 490, 498; Gates v. Lane, 44 Cal. 392; Winter v. McMillan, 87 Cal. 256; 22 Am. St. Rep. 243; 25 Pac. 407; Alison v. Goldtree, 117 Cal. 545; 49 Pac. 571; Mitau v. Roddan, 149 Cal. 1; 6 L. R. A. (N. S.) 275; 84 Pac. 145); but this section does not authorize the court to bring into the action, for determination, a controversy between one of the parties and a stranger, which is irrelevant to the action between the parties before it. Alpers v. Bliss, 145 Cal. 565; 79 Pac. 171. Persons receiving an interest pendente lite must be brought in, when their presence is necessary to a full determination of the controversy. Ashton v. Heggerty, 130 Cal. 516; 62 Pac. 934; Treasurer v. Commercial Coal Mining Co., 23 Cal. 390; Ralston v. Bank of California, 112 Cal. 208; 44 Pac. 476. It is the policy of the law, and the peculiar province of a court of equity, to have a complete determination of a controversy before the court, when it can be done; but when this cannot be done without the presence of other parties, they may be brought in, under the provisions of this section (Newhall v. Bank of Livermore, 136 Cal. 533; 69 Pac. 248; Boskowitz v. Thompson, 144 Cal. 724; 78 Pac. 290; Churchill v. Woodworth, 148 Cal. 669; 113 Am. St. Rep. 324; 84 Pac. 155); but the attention of the court must be called to the defect, in some manner. Syvertson v. Butler, 3 Cal. App. 345; 85 Pac. 164. Where the contest can be settled without affecting the rights of others, there is no ground or reason for bringing in other parties; such procedure is not required by this section (Lytle Creek Water Co. v. Perdew, 65 Cal. 447; 4 Pac. 426; Merchants' Trust Co. v. Bentel, 10 Cal. App. 75; 101 Pac. 31); nor can the court order other parties to be brought in, when, on the coming in of the answer, it is of the opinion that they are not necessary to a full determination of the controversy. Hughson v. Crane, 115 Cal. 404; 47 Pac. 120; Syvertson v. Butler, 3 Cal. App. 345; 85 Pac. 164. A plaintiff, not knowing which one of two defendants is liable for a wrongful act, cannot implead them together, and ask the court to fix the liability, without stating a cause of action against either. Hannon v. Nuevo Land Co., 14 Cal. App. 700; 112 Pac. 1103. In a controversy involving the obligation of three defendants to pay the balance due on a promissory note, the question of contribution among the co-guarantors is not necessary to its determination. Merchants' Trust Co. v. Bentel, 10 Cal. App. 75; 101 Pac. 31. Though a defendant, after answer, is adjudicated a bankrupt, this does not affect the foreclosure of a mechanic's lien against his property, by the plaintiff, nor require that the trustee in bankruptcy shall be made a party to the action. Kritzer v. Tracy Engineering Co., 16 Cal. App. 287; 116 Pac. 700.

Issuance of alias summons. See note post, § 408.

Parties necessary to a complete determination. A subsequent vendee is a necessary party to an action to quiet title, and should be brought in. Birch v. Cooper, 136 Cal. 636; 69 Pac. 420. A person claiming an interest in the controversy is entitled to come in and defend such interest. Wilson v. Baker, 64 Cal. 475; 2 Pac. 253. The beneficiary is a necessary party in an action to declare a trust and compel the performance of it, where the trustee claims to own the property in his own right, to the exclusion of the beneficiary. O'Connor v. Irvine, 74 Cal. 435; 16 Pac. 236. The beneficiary in possession, for whose benefit the plaintiff holds the legal title, is a proper party, and may be brought in by cross-complaint. Winter v. McMillan, 87 Cal. 256; 22 Am. St. Rep. 243; 25 Pac. 407. In an action to restrain the collection of an excessive assessment for interest on the

bonds of an irrigation district, brought against the collector, neither the irrigation district, its agent for the sale of the bonds, nor the holder of illegal bonds, is a necessary party, and should not be brought in. Hughson v. Crane, 115 Cal. 404; 47 Pac. 120. In an action on a joint contract, all the parties thereto must be brought in. Harrison v. McCormick, 69 Cal. 616; 11 Pac. 456; Gates v. Lane, 44 Cal. 392; Cuyamaca Granite Co. v. Pacific Paving Co., 95 Cal. 252; 30 Pac. 525. In an action to foreclose a mortgage upon an undivided interest, a prior mortgagee of the whole estate is a proper party defendant, and, by cross-complaint, he may bring in the owners of the other undivided interests and the subsequent mortgagee, and ask the foreclosure of his mortgage. Newhall v. Bank of Livermore, 136 Cal. 533; 69 Pac. 248. Where a third party holds two mortgages, one on the land in litigation and the other on another parcel, he may set up both mortgages and have them foreclosed. Stockton Sav. & L. Soc. v. Harrold, 127 Cal. 612; 60 Pac. 165; and see Brill v. Shively, 93 Cal. 674; 29 Pac. 324; Newhall v. Bank of Livermore, 136 Cal. 533; 69 Pac. 248. In an action to compel a corporation to transfer stock, sold under foreclosure of a mortgage thereon, the mortgagor is not a necessary party, and need not be brought in. Tregear v. Etiwanda Water Co., 76 Cal. 537; 9 Am. St. Rep. 245; 18 Pac. 658. A motion to vacate a previous order, sustaining a demurrer to the cross-complaint of the defendant, made after some of the defendants have answered, should be entertained, where no final judgment has been entered in favor of such defendants. De la Beckwith v. Superior Court, 146 Cal. 496; 80 Pac. 717. In a partnership accounting, the assignee of a partner is a necessary party, and should be brought in. Cuyamaca Granite Co. v. Pacific Paving Co., 95 Cal. 252; 30 Pac. 525. A purchaser, after issue joined, is properly ordered in as a party defendant, so that the whole controversy may be determined. Robinson v. Gleason, 53 Cal. 38. Different persons, using the waters of a stream, under separate appropriations, are tenants in common, and any one may maintain a suit to enjoin trespass and diversion of water without joining the others, and the failure to bring them in is not error. Lytle Creek Water Co. v. Perdew, 65 Cal. 447; 4 Pac. 426.

Supplemental pleadings. Where facts occur subsequently to the filing of a pleading, and which change the liability of the defendant, and a third party becomes interested, and a necessary party by reason thereof, as by the marriage of a female defendant, or by the purchase of an interest pendente lite, such party should be brought in by supplemental pleadings. Van Maren v. Johnson, 15 Cal. 308; McMinn v. O'Connor, 27 Cal. 238; Moss v. Shear, 30 Cal. 467. But simply ordering parties brought in, or inserting necessary facts in the pleadings and their names as parties, does not give the court jurisdiction over them; as to them, it is a new action; their names must be inserted in the summons, and process served on them, the same as in an original suit, unless they voluntarily appear. Pico v. Webster, 14 Cal. 202; 73 Am. Dec. 647; Powers v. Braly, 75 Cal. 237; 17 Pac. 197.

Cross-complaint. Necessary parties may be brought in by way of cross-complaint. Winter v. McMillan, 87 Cal. 256; 22 Am. St. Rep. 243; 25 Pac. 407; Eureka v. Gates, 120 Cal. 54; 52 Pac. 125; Lewis v. Fox, 122 Cal. 244; 54 Pac. 823. Leave to file a cross-complaint, bringing in new parties, made ex parte, may be vacated without notice, by the judge who made it. Alpers v. Bliss, 145 Cal. 565; 79 Pac. 171. New issues cannot be set up by cross-complaint, nor can new parties be brought in to set up an issue not involved in the original action. East Riverside Irrigation Dist. v. Holcomb, 126 Cal. 315; 58 Pac. 817. The general rule is, that a plaintiff may select the parties defendant, and that new parties, brought in against his will, cannot be allowed to set up against him new defenses and affirmative causes of action which the original defendant could not set up, especially where the granting of the relief sought by the complaint could not prejudice the new matters and causes of action sought to be adjudicated. East Riverside Irrigation Dist. v. Holcomb, 126 Cal. 315; 58 Pac. 817.

Alias summons. Where parties are brought in by order of the court, or by stipulation of the parties, there may be service of an alias summons by publication. Bank of Venice v. Hutchinson, 19 Cal. App. 219; 125 Pac. 252.

Waiver of objection. An objection that one interested in the litigation should have been made a party is waived, unless presented by demurrer or answer. Bell v. Solomons, 142 Cal. 59; 75 Pac. 649.

Amendment of pleading by changing character in which defendant is sued as bringing in new parties. See note, 10 Ann. Cas. 150.

CODE COMMISSIONERS' NOTE. 1. Application and construction of section. See Brooks v. Hager, 5 Cal. 281; see note 1 to § 385, ante; and note 1 to § 387, ante.

2. Clause additional to the section as it stood before the adoption of the Code of Civil Procedure. The last sentence, commencing, "And when, in an action for the recovery of real or personal property," etc., is a new provision.

3. All rights determined in one action. A court of equity will not permit litigation by piecemeal. The whole subject-matter, and all the parties, should be before it, and their respective claims determined once and forever. Wilson v. Lassen, 5 Cal. 116. The rights of all should be adjusted, and nothing left open for future litigation, if it can be helped. Ord v. McKee, 5 Cal. 516.

4. Order to bring in other parties. Where it turns out, upon the trial, that a complete determination of the controversy cannot be had without the presence of other parties, the court should, of its own motion, order them to be

brought in before a final disposition of the case. Settembre v. Putnam, 30 Cal. 497.

5. Court may bring in other parties, without waiting for demurrer. The omission of the defendant to demur for want of parties, does not affect the power of the court, under this section of the code, from directing other parties to be brought in, if it finds that it cannot completely determine the case in their absence. Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423. But the right of demurrer was given to enable the court to bring in necessary parties. Warner v. Steamship Uncle Sam, 9 Cal. 697.

6. What may be tried in partition. Any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in such action. De Uprey v. De Uprey, 27 Cal. 330; 87 Am. Dec. 81.

7. Parties to suit for partition. A married woman, whose husband is sued in partition, is a necessary party, if she claims a homestead right to or an interest in the property in dispute. De Uprey v. De Uprey, 27 Cal. 329; 87 Am. Dec. 81.

8. Disclaimer in partition. In an action of partition, a defendant cannot claim that the action be dismissed as to him, on the ground that his answer disclaims any interest in the land, unless he has made the disclaimer in absolute and unconditional terms. De Uprey v. De Uprey, 27 Cal. 329; 87 Am. Dec. 81.

9. Wife must be brought in, in action to foreclose mortgage on homestead. In an action to foreclose a mortgage against a husband, where the defendant sets up the right of homestead, the court should order the wife of defendant to be brought in as a party, as no decision upon the question of homestead can be conclusive, either upon the husband or the wife, unless both are parties. Marks v. Marsh, 9 Cal. 96.

10. Even accommodation grantees and fictitious depositaries of title may be brought in. Although some of the parties may be mere accommodation grantees and fictitious depositaries of title, still they have a right to be heard at law in their own defense, before courts of chancery can pronounce definitely on their claims. Knowles v. Inches, 12 Cal. 213.

11. Who are unnecessary parties, and need not be brought in. See Peralta v. Simon, 5 Cal. 313.

12. If persons are not made parties, they are unaffected by judgment. Persons not parties to a suit in ejectment, and in possession before and at the time it is brought, or those claiming under them, cannot be ousted by the writ of restitution issued upon a judgment therein, in favor of the plaintiff. See also, for other particulars, Sampson v. Ohleyer, 22 Cal. 200.

§ 390. Actions against fire departments. Causes of action upon contract, or for damages arising out of, or pertaining or incident to the official administration of the fire departments created by acts of the legislature of this state, shall be brought directly by and against the municipality by its corporate name wherein the damage was sustained. And the said boards of fire commissioners shall not be sued as such, except to compel or restrain the performance of acts proper to be compelled or restrained under and not within the discretion intended to be conferred by this act.

Legislation § 390. **1.** Added by Stats. **1885**, p. 92.

2. Repeal by Stats. **1901**, p. 128; unconstitutional. See note ante, § 5.

TITLE IV.

PLACE OF TRIAL OF CIVIL ACTIONS.

§ 392. Certain actions to be tried where the subject or some part thereof is situated.
§ 393. Other actions, where the cause or some part thereof arose.
§ 394. Place of trial of actions against counties.
§ 395. Actions to be tried in county in which defendant resides, etc. If defendant does not reside in state.
§ 396. Action may be tried in any county, unless the defendant demand a trial in the proper county.
§ 397. Place of trial may be changed in certain cases.
§ 398. When judge is disqualified, cause to be transferred.
§ 399. Papers to be transmitted. Costs, etc. Jurisdiction, etc.
§ 400. Proceedings after judgment in certain cases transferred.

§ 392. Certain actions to be tried where the subject or some part thereof is situated. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code:

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property;

2. For partition of real property;

3. For the foreclosures of all liens and mortgages on real property.

Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.

Riot. Actions for damages caused by, must be tried in county in which property injured is situated. Pol. Code, § 4453.

Legislation § 392. **1.** Enacted March 11, **1872**; based on Practice Act, § 18, as amended by Stats. 1861, p. 494, which (1) had the word "shall" instead of "must," and the word "act" instead of "code," in the first paragraph, (2) in subd. 2, had the word "the" before "partition," (3) subd. 3 ended with the words "real property," and (4) section ended with the paragraph, "Provided, that where such real property is situate partly in one county and partly in another, the plaintiff may select either of said counties, and the county so selected shall be the proper county for the trial of any, or all, of such actions as are mentioned in the first, second, and third, subdivisions of this section." When enacted in 1872, the proviso paragraph was changed to read: "Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action."

2. Amended by Code Amdts. **1875–76**, p. 90, and in subd. 3 the words "a mortgage of" changed to "all liens and mortgages on."

3. Amended by Stats. **1889**, p. 352, (1) omitting, in subd. 2, the word "the" before "partition," and (2) adding, at end of subd. 3, after words "such action," the proviso, "provided, that in the case mentioned in this subdivision, if the plaintiff prays in his complaint for an injunction pending the action, or applies pending the action for an injunction, the proper county for the trial shall be the county in which the defendant resides or a majority of the defendants reside at the commencement of the action."

4. Amendment by Stats. **1901**, p. 128; unconstitutional. See note ante, § 5.

5. Amended by Stats. **1907**, p. 700; the code commissioner saying, "The former provision at the end of the section, that if in an action to recover real property an injunction is at any time applied for, the proper county for the trial is that in which the defendant resides, is omitted. The old provision is inconsistent with § 5 of article vi of the constitution, requiring actions of this character to be brought in the county in which the property, or some part thereof, is situated."

County where the subject of the action is situated. This section is a limitation of the general jurisdiction of the superior court, and is to be strictly construed; it goes no further than to prohibit the commencement of certain enumerated actions affecting real property, in counties other than those in which the land is situated. Miller & Lux v. Kern County Land Co., 140 Cal. 132; 73 Pac. 836; Wood v. Thompson, 5 Cal. App. 247; 90 Pac. 38. As this section declares an exception to the general rule, the conditions under which the exception is claimed must be clearly and distinctly shown. Smith v. Smith, 88 Cal. 572; 26 Pac. 356; Brady v. Times-Mirror Co., 106 Cal. 56; 39 Pac. 209. It is only where real estate alone is the subject-matter of the suit that the provisions of this section can be invoked against the defendant. Smith v. Smith, 88 Cal. 572; 26 Pac. 356; Anaheim Odd Fellows' Hall Ass'n v. Mitchell, 6 Cal. App. 431; 92 Pac. 531. An action for the determination, in any form, of a right of interest in real estate, is triable in the county in which the property is situated. Franklin v. Dutton, 79 Cal. 605; 21 Pac. 964. The word "action" does not include "special proceedings"; and as originally enacted, §§ 392 to 395 referred only to "actions" as defined by

§ 22, ante, and not to "special proceedings" as defined by the sections following § 22. Santa Rosa v. Fountain Water Co., 138 Cal. 579; 71 Pac. 1123, 1136; Lake Pleasanton Water Co. v. Contra Costa Water Co., 67 Cal. 659; 8 Pac. 501; Aliso Water Co. v. Baker, 95 Cal. 268; 30 Pac. 537; Siskiyou County v. Gamlich, 110 Cal. 94; 42 Pac. 468; Southern Pacific R. R. Co. v. Southern California Ry. Co., 111 Cal. 221; 43 Pac. 602; San Francisco etc. Ry. Co. v. Gould, 122 Cal. 601; 55 Pac. 411; Alameda County v. Crocker, 125 Cal. 101; 57 Pac. 766. The nature of an action is determined by the nature of the relief that can be granted in it. Robinson v. Williams, 12 Cal. App. 515; 107 Pac. 705. Actions are deemed transitory, where the transactions upon which they are founded may occur anywhere; local, where their cause is in its nature essentially local. Ophir Silver Mining Co. v. Superior Court, 147 Cal. 467; 3 Ann. Cas. 340; 82 Pac. 70. The provision as to the place where the action shall be tried does not affect the jurisdiction of the court (Herd v. Tuohy, 133 Cal. 55; 65 Pac. 139; Grocers' Fruit etc. Union v. Kern County Land Co., 150 Cal. 466; 89 Pac. 120), but is a matter of legislative regulation. Security Loan etc. Co. v. Kauffman, 108 Cal. 214; 41 Pac. 467. There is a distinction between the jurisdiction of courts, and the right to have the action tried in the county of defendants' residence: the court may have jurisdiction, and still the defendant may be entitled to have the place of trial changed. State v. Campbell, 3 Cal. App. 602; 86 Pac. 840. Each of the defendants has a right to the trial of the cause in the county in which the land is situated (O'Neil v. O'Neil, 54 Cal. 187), but there is no requirement that actions for injury to real property shall be commenced in that county. Miller & Lux v. Madera Canal etc. Co., 155 Cal. 59; 22 L. R. A. (N. S.) 391; 99 Pac. 502. The proper place for the trial of an action for injury to real property is in the county where such property is situated (Miller & Lux v. Kern County Land Co., 6 Cal. Unrep. 684; 65 Pac. 312), where a change of the place of trial may be ordered for special reasons. Ophir Silver Mining Co. v. Superior Court, 147 Cal. 467; 3 Ann. Cas. 340; 82 Pac. 70. Where an action against a corporation for injury to real estate is brought in the county where it has its principal place of business, which is not that where the land is situated, the defendant cannot demand, as a matter of right, and without any showing of grounds, that the place of trial be changed. Miller & Lux v. Kern County Land Co., 134 Cal. 586; 66 Pac. 856. See also Miller & Lux v. Kern County Land Co., 140 Cal. 132; 73 Pac. 836. An action to enforce a trust in land should be tried in the county where the land is situated, though an incidental accounting is also asked for. Hannah v. Canty, 1 Cal. App. 225; 81 Pac. 1035. An action for the destruction of the plaintiff's buildings by fire, caused by negligence, must be tried in the county where the land is situated (Las Animas etc. Land Co. v. Fatjo, 9 Cal. App. 318; 99 Pac. 393), as must also an action to cancel a contract for the purchase of land. Robinson v. Williams, 12 Cal. App. 515; 107 Pac. 705. In an action to recover real property, the complaint need not state the residence of the parties: the location of the land determines the venue. Doll v. Feller, 16 Cal. 432. An action to quiet title to land must be brought in the county where the land is situated (Fritts v. Camp, 94 Cal. 393; 29 Pac. 867; Pacific Yacht Club v. Sausalito Bay Water Co., 98 Cal. 487; 33 Pac. 322); as must also an action brought on a trust deed (Staacke v. Bell, 125 Cal. 309; 57 Pac. 1012; More v. Superior Court, 64 Cal. 345; 28 Pac. 117; Le Breton v. Superior Court, 66 Cal. 27; 4 Pac. 777); and an action to reform a contract of sale of land (Franklin v. Dutton, 79 Cal. 605; 21 Pac. 964); and an action to set aside a fraudulent sale of land by an administrator, and to annul the order of sale. Sloss v. De Toro, 77 Cal. 129; 19 Pac. 233. Domestic corporations, as well as natural persons, have the right to have real or quasi-real actions tried in the county in which the land is situated. Cook v. Ray Mfg. Co., 159 Cal. 694; 115 Pac. 318. An action for the specific performance of a contract for the sale of land may be commenced in the county of the principal place of business of a corporation defendant, but the corporation has the right to have the place of trial changed to the county where the land is situated. Grocers' Fruit Growing Union v. Kern County Land Co., 150 Cal. 466; 89 Pac. 120. The court assumed, in an action to set aside conveyances of land, release of interest therein, and certain assignments of mortgages, that such action was a real action, and within the provisions of this section. Kimball v. Tripp, 136 Cal. 631; 69 Pac. 428. An action to cancel a deficiency judgment, improperly rendered in another county, in a foreclosure suit, upon ex parte application, after the right thereto had been lost by the decree, and a levy thereunder made, upon lands in another county, seems to have been properly brought in the county in which the lands levied upon are situated. Herd v. Tuohy, 133 Cal. 55; 65 Pac. 139. Though an action has been properly commenced under this section, yet the court is bound by the mandatory terms of § 394, post, concerning a transfer of the action. Yuba County v. North America etc. Mining Co., 12 Cal. App. 223; 107 Pac. 139.

"Or some part thereof is situated." An action for the partition of distinct parcels of land, situated in different counties, may be brought in any county in which any

portion of the land is situated; the term "real property" is used in the code, and the term "real estate" is used in the constitution, and either term, in its popular as well as in its legal acceptation, is broad enough to include several distinct parcels of land, as well as one entire tract. Murphy v. Superior Court, 138 Cal. 69; 70 Pac. 1070. An action must be wholly local in its nature, under this section, to entitle it to be tried in a county other than that of the residence of the defendant; and if real and personal actions are joined, the case falls within § 395, post, and must be tried in the county of the residence of the defendant. Smith v. Smith, 88 Cal. 572; 26 Pac. 356; Warner v. Warner, 100 Cal. 11; 34 Pac. 523; Booker v. Aitken, 140 Cal. 471; 74 Pac. 11.

Subject to power of court to change venue. Where an action is brought in the wrong county, a motion for a change of venue, and not a demurrer, is the proper remedy. Watts v. White, 13 Cal. 321. A demand filed is essential to the validity of an application for a change of venue. Estrada v. Oreña, 54 Cal. 407; Byrne v. Byrne, 57 Cal. 348; Warner v. Warner, 100 Cal. 11; 34 Pac. 523. Where an action to compel the conveyance of land is commenced in the county in which the land is situated, the place of trial may be changed, either by consent of the parties or by order of the court, to another county, to promote the convenience of the witnesses. Duffy v. Duffy, 104 Cal. 602; 38 Pac. 443. By amending his complaint, the plaintiff cannot deprive the defendant of any right existing at the time the motion is made for change of venue. Buell v. Dodge, 57 Cal. 645; Ah Fong v. Sternes, 79 Cal. 30; 21 Pac. 381; Brady v. Times-Mirror Co., 106 Cal. 56; 39 Pac. 209; Remington Sewing Machine Co. v. Cole, 62 Cal. 311. One of several defendants may apply for a change of venue, and he is entitled to have such change, on a proper showing, notwithstanding a co-defendant has waived his right to a change. O'Neil v. O'Neil, 54 Cal. 187; Warner v. Warner, 100 Cal. 11; 34 Pac. 523; Pieper v. Centinela Land Co., 56 Cal. 173; McKenzie v. Barling, 101 Cal. 459; 36 Pac. 8. The right of change is absolute; the court has no discretion in the matter, where timely application and proper showing is made (Watts v. White, 13 Cal. 321; Hennessy v. Nicol, 105 Cal. 138; 38 Pac. 649); but the court is not bound, of its own motion, to change the place of trial. Watts v. White, 13 Cal. 321 (overruling, so far as conflicting, Vallejo v. Randall, 5 Cal. 461). The right to a change of the place of trial of a cause involving the title to or the right to the possession of real property is a legal right, and may be waived (Watts v. White, 13 Cal. 321; Vallejo v. Randall, 5 Cal. 461; O'Neil v. O'Neil, 54 Cal. 187; Hearne v. De Young, 111 Cal. 373; 43 Pac. 1108); but the waiver of the right, by one defendant, does not affect the right of the others. O'Neil v. O'Neil, 54 Cal. 187. The right is waived by consenting to a trial in another county (Duffy v. Duffy, 104 Cal. 602; 38 Pac. 443); and also by stipulating that the case be set for trial at a time to suit the convenience of a judge called in to try the cause. Schultz v. McLean, 109 Cal. 437; 42 Pac. 557.

Venue of actions for recovery of real property. Actions to recover real property, or an interest therein, or for injuries thereto, or for determining any right or interest therein, must be commenced in the county in which the land is situated. Baker v. Fireman's Fund Ins. Co., 73 Cal. 182; 14 Pac. 686; Williams v. Hall, 79 Cal. 606; 21 Pac. 965. The constitution requires that "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated" (Goldtree v. McAlister, 86 Cal. 93; 23 Pac. 207; 24 Pac. 801; Campbell v. West, 86 Cal. 197; 24 Pac. 1000; Rogers v. Cady, 104 Cal. 288; 43 Am. St. Rep. 100; 38 Pac. 81; Herd v. Tuohy, 133 Cal. 55; 65 Pac. 139; Miller & Lux v. Kern County Land Co., 140 Cal. 132; 73 Pac. 836; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201; 92 Pac. 184); and this provision is not retroactive (Watt v. Wright, 66 Cal. 202; 5 Pac. 91); nor does it provide that the action shall be tried, but simply that it shall be commenced, in the county in which the land is situated (Duffy v. Duffy, 104 Cal. 602; 38 Pac. 443); and the statutory provision of the third subdivision of this section is not an element going to the jurisdiction of the court, but is a matter of legislative regulation. Security Loan etc. Co. v. Kauffmann, 108 Cal. 214; 41 Pac. 467. The privilege secured to a defendant, under this section, may be lost by laches, or waived by submitting to the jurisdiction of the court of another county, and the like. Warner v. Warner, 100 Cal. 11; 34 Pac. 523.

For determination of right or interest. An action for the determination of a right or interest, in any form, in real estate, is triable in the county where the land is situated (Williams v. Hall, 79 Cal. 606; 21 Pac. 965; Bentley v. Fraser, 16 Cal. App. 560; 117 Pac. 683); as is also an action for the reformation of a contract of sale of land (Franklin v. Dutton, 79 Cal. 605; 21 Pac. 964); and an action for partition is maintainable in any county in which a part of the property is situated. Middlecoff v. Cronise, 155 Cal. 185; 17 Ann. Cas. 1159; 100 Pac. 232. An action to annul or cancel a mortgage is one for the determination of a right or interest in real property (Smith v. Smith, 88 Cal. 572; 26 Pac. 356; Baker v. Fireman's Fund Ins.

Co., 73 Cal. 182; 14 Pac. 686); as is also an action to enforce a trust in real property, and to avoid a deed (Booker v. Aitken, 140 Cal. 471; 74 Pac. 11); and an action for the rescission of the sale of a mine and water rights. Bartley v. Fraser, 16 Cal. App. 560; 117 Pac. 683.

Venue in actions for injury to real property. An action for injury to real property is within this section (People v. Selby Smelting etc. Co., 163 Cal. 84; Ann. Cas. 1913E, 1267; 124 Pac. 692, 1135), although caused by acts done in another county (Last Chance Water Ditch Co. v. Emigrant Ditch Co., 129 Cal. 277; 61 Pac. 960), and an action to abate a nuisance, also causing injury to real property. Marysville v. North Bloomfield etc. Mining Co., 66 Cal. 343; 5 Pac. 507. An action to enjoin the diversion of water from a ditch situated in two counties may be brought in either county; and a corporation defendant having its principal place of business in the county other than that in which the action is brought, is not entitled to a change of the place of trial to that county. Last Chance Water Ditch Co. v. Emigrant Ditch Co., 129 Cal. 277; 61 Pac. 960. An action to enjoin the erection of a dam, which will permanently injure real estate, is within this section (Drinkhouse v. Spring Valley Water Works, 80 Cal. 308; 22 Pac. 252); as is also an action to restrain mining upon certain land (Ophir Silver Mining Co. v. Superior Court, 147 Cal. 467; 3 Ann. Cas. 340; 82 Pac. 70), and an action for damages occasioned by the destruction of buildings by fire. Las Animas etc. Land Co. v. Fatjo, 9 Cal. App. 318; 99 Pac. 393.

For partition of real property. An action for the partition of real property among tenants in common, who derive title from the same source, is within this section. Murphy v. Superior Court, 138 Cal. 69; 70 Pac. 1070.

For the foreclosure of liens and mortgages. An action to enforce a vendor's lien on land is within this section (Southern Pacific R. R. Co. v. Pixley, 103 Cal. 118; 37 Pac. 194; Baker v. Fireman's Fund Ins. Co., 73 Cal. 182; 14 Pac. 686); as is also an action for the foreclosure of a mortgage (Goldtree v. McAlister, 86 Cal. 93; 23 Pac. 407; 24 Pac. 801; Campbell v. West, 86 Cal. 197; 24 Pac. 1000; Staacke v. Bell, 125 Cal. 309; 57 Pac. 1012), and an action to foreclose a tax lien (People v. Plumas-Eureka Mining Co., 51 Cal. 566); and an action to cancel a mortgage for fraud. Bailey v. Cox, 102 Cal. 333; 36 Pac. 650. In an action to foreclose a mortgage on land, the plaintiff must both allege and prove that the land is situated in the county in which the action is brought. Campbell v. West, 86 Cal. 197; 24 Pac. 1000. Every court takes judicial notice of the existence and boundaries of the territory within which it exercises jurisdiction, as well as of the subject-matter over which jurisdiction has been conferred on it. People v. Oakland Water Front Co., 118 Cal. 234; 50 Pac. 305. A decree of foreclosure, rendered by the court of the wrong county, is void. Rogers v. Cady, 104 Cal. 288; 43 Am. St. Rep. 100; 38 Pac. 81.

Personal actions. An action for an accounting, even though involving real estate, is personal, and is not within this section. Clark v. Brown, 83 Cal. 181; 23 Pac. 289; Smith v. Smith, 88 Cal. 572; 26 Pac. 356. Such an action must be tried in the county where the defendant resides, although the land is situated in another county. Smith v. Smith, 88 Cal. 572; 26 Pac. 356; Warner v. Warner, 100 Cal. 11; 34 Pac. 523; Bailey v. Cox, 102 Cal. 333; 36 Pac. 650; Griffin etc. Co. v. Magnolia etc. Fruit Cannery Co., 107 Cal. 378; 40 Pac. 495. Nor is an action for the breach of a covenant in a deed, nor an action for the cancellation of a deed, for a divorce, and for a division of the community property, within this section (Warner v. Warner, 100 Cal. 11; 34 Pac. 523); nor an action for the removal of a trustee of real property (More v. Superior Court, 64 Cal. 345; 28 Pac. 117); nor an action for the settlement of a trust in relation to real and personal property (Le Breton v. Superior Court, 66 Cal. 27; 4 Pac. 777); nor an action in the nature of a creditor's bill, to set aside a deed made by an executor, on the ground of fraud (Beach v. Hodgdon, 66 Cal. 187; 5 Pac. 77); nor an action in which mandamus is sought, to compel the sheriff to execute a deed (McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655); nor an action to recover the purchase-money for land sold (Samuel v. Allen, 98 Cal. 406; 33 Pac. 273); nor an action against a wife to recover the cost of a party-wall (Anaheim Odd Fellows' Hall Ass'n v. Mitchell, 6 Cal. App. 431; 92 Pac. 331); nor an action for damages for the fraud of an agent in the sale of shares of stock. Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237; 104 Pac. 698. An action to remove a trustee of mining property is personal: he has the right to have the cause tried in the county of his residence. Golden Cross Mining etc. Co. v. Spiers, 115 Cal. 247; 47 Pac. 108.

Forum in which action for damages to realty must be brought. See note 3 Ann. Cas. 344.

Venue of action to recover shares of stock. See note Ann. Cas. 1913D, 506.

Venue of action to set aside transfer of realty within state as in fraud of creditors. See note Ann. Cas. 1913D, 663.

CODE COMMISSIONERS' NOTE. 1. Actions to foreclose mortgages must be tried in the county in which the subject of the action, or some part thereof, is situated. Vallejo v. Randall, 5 Cal. 462; but see Watts v. White, 13 Cal. 324, overruling this case in some particulars.

2. **Residence of parties in actions concerning real property is immaterial.** It is unnecessary to mention the residence of the parties, or either of them, in actions concerning real property. The statute only provides for the trial of actions in certain counties; and with reference to actions to recover real property, the situation of the premises, and not the residence of the parties, determines the county. Doll v. Feller, 16 Cal. 433.

3. **Mining claims are within the provisions of this section.** See Hughes v. Devlin, 23 Cal. 506, affirming Watts v. White, 13 Cal. 324.

4. Not applicable to probate proceedings. This section does not apply to probate proceedings. Estate of Scott, 15 Cal. 220.

5. Court is not bound, on its own motion, to change the venue. It is a matter of right as to the parties, however. For convenience, parties have a right to a trial of particular cases in particular counties. This is a mere privilege, which may be waived by those entitled to it. It must be claimed at the proper time, and in the proper way. It is not, by our statute, matter in abatement of the writ, but a mere privilege of trial of the suit in the given county. The party desiring a change of venue should move the court to change the place of trial, and then the court, in the proper case, has no discretion to refuse the motion. It seems to be made by the statute a matter of peremptory right. We think the court is not bound, of its own motion, to change the venue, and overrule so far the case of Vallejo v. Randall, 5 Cal. 461, if that case is to be so construed. Watts v. White, 13 Cal. 324.

§ 393. **Other actions, where the cause or some part thereof arose.** Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

1. For the recovery of a penalty or forfeiture imposed by statute; except, that when it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offense was committed;

2. Against a public officer, or person especially appointed to execute his duties, for an act done by him in virtue of his office; or against a person who, by his command or in his aid, does anything touching the duties of such officer.

Legislation § 393. Enacted March 11, **1872**; based on Practice Act, § 19 (New York Code, § 124).

Actions defined. The word "actions," as used in this section, refers to such actions as are defined in § 22, ante, and does not include "special proceedings." Santa Rosa v. Fountain Water Co., 138 Cal. 579; 71 Pac. 1123, 1136.

Actions for the recovery of a penalty. An action for the recovery of a statutory penalty must be tried in the county where the cause of action, or some part thereof, arose. Ah Fong v. Sternes, 79 Cal. 30; 21 Pac. 381.

Actions against a public officer. The second subdivision of this section applies only to such affirmative acts of an officer as directly interfere with the personal rights or property of the person complaining, such as wrongful arrests, trespass, and conversion, and not to mere omissions or neglect of official duty. McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655; Bonestell v. Curry, 153 Cal. 418; 95 Pac. 887; State Commission v. Welch, 154 Cal. 775; 99 Pac. 181. An executor is not a public officer, within this section; and he is entitled to have a change of venue to the county of his residence, when sued in the county in which the estate is being administered, particularly in the absence of a motion to retain the case in the county for the convenience of witnesses. Thompson v. Wood, 115 Cal. 301; 47 Pac. 50. In an action for false imprisonment, the defendant has the right to have the place of trial changed to the county of his residence. Ah Fong v. Sternes, 79 Cal. 30; 21 Pac. 381. Statutory provisions determining the proper place of trial do not affect the jurisdiction of the court. Herd v. Tuohy, 133 Cal. 55; 65 Pac. 139. Probate proceedings were not civil actions, within the meaning of §§ 18–21 of the Practice Act. Estate of Scott, 15 Cal. 220. An action for damages for fraud in the sale of stock is personal and transitory, and not within this section. Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237; 104 Pac. 698.

CODE COMMISSIONERS' NOTE. The second subdivision of this section, which provides that actions against a public officer for acts done by him in virtue of his office, shall be tried in the county where the cause, or some part thereof, arose, applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interferes with the property or rights of a third person, and not to mere omissions or neglect of official duty. Elliot v. Cronk, 13 Wend. 35; Hopkins v. Haywood, 13 Wend. 265; McMillan v. Richards, 9 Cal. 420; 70 Am. Dec. 655.

§ 394. **Place of trial of actions against counties.** An action or proceeding against a county, or city and county, may be commenced and tried in such county, or city and county, unless such action or proceeding is brought by a county, or city and county, in which case it may be tried in any county, or city and county, not a party thereto. Whenever an action or proceeding is brought by a county, city and county, or city, against a resident of another county, city and county, or city, or a corporation doing business

in the latter, the action or proceeding must be, on motion of the said defendant, transferred for trial to a county, or city and county, other than the plaintiff, if the plaintiff is a county, or city and county, and other than that in which the plaintiff is situated, if the plaintiff is a city, and other than that in which the defendant resides or is doing business or is situated. Whenever an action or proceeding is brought against a county, city and county, or city, in any county, or city and county, other than the defendant, if the defendant is a county, or city and county, or, if the defendant is a city, other than that in which the defendant is situated, the action or proceeding must be, on motion of the said defendant, transferred for trial to a county, or city and county, other than that in which the plaintiff, or any of the plaintiffs, resides, or is doing business, or is situated, and other than the plaintiff county, or city and county, or county in which such plaintiff city is situated, and other than the defendant county, or city and county, or county in which such defendant city is situated. In any action or proceeding, the parties thereto may, by stipulation in writing, or made in open court, and entered in the minutes, agree upon any county, or city and county, for the place of trial thereof. This section shall apply to actions or proceedings now pending or hereafter brought.

Actions against cities for injuries from mobs. See Pol. Code, § 4453.

Legislation § 394. **1.** Enacted March 11, **1872** (based on Stats. 1854, Redding ed. p. 45, Kerr ed. p. 194), and then read: "§ 394. Actions against counties may be commenced and tried in any county in the judicial district in which such county is situated, unless such actions are between counties, in which case they may be commenced and tried in any county not a party thereto."

2. Amended by Stats. **1881**, p. 23, to read: "An action against a county, or city and county, may be commenced and tried in such county, or city and county, unless such action is brought by a county, or city and county, in which case it may be commenced and tried in any county, or city and county, not a party thereto."

3. Amended by Stats. **1891**, p. 56, by adding the proviso: "provided further, that whenever an action is brought by a county or city against citizens of another county, or a corporation doing business in the latter, the action must be, on the motion of the defendant, transferred for trial to a county other than the plaintiff, if the plaintiff be a county, and other than that in which the plaintiff is situated if the plaintiff be a city."

4. Amendment by Stats. **1901**, p. 128; unconstitutional. See note ante, § 5.

5. Amended by Stats. **1907**, p. 700, (1) in the first sentence, striking out "city and county," after "county," in the three instances; (2) changing the proviso into a sentence, and incidentally striking out "provided further, that"; (3) substituting "residents" for "citizens"; (4) inserting "or city" after "another county"; (5) substituting "is" for "be" in the two instances. The code commissioner says, in his note, "The word 'citizen' is stricken out, and the word 'residence' is inserted, that having been the legislative intent in the original enactment of the section."

6. Amended by Stats. **1915**, p. 721, the old section being recast, and two new sentences added at the end thereof.

Section not special legislation. This section is not special legislation, merely because it provides a different rule in the case of non-resident defendants from that which applies to resident defendants. Yuba County v. North America etc. Mining Co., 12 Cal. App. 223; 107 Pac. 139.

Action defined. The word "action," as used in this section, does not include a special proceeding. Santa Rosa v. Fountain Water Co., 138 Cal. 579; 71 Pac. 1123, 1136.

Action by a county. Where, in an action by a county against the county treasurer and the sureties on his bond, a motion is made by a substituted administrator of a deceased surety for a change of the place of trial to the county of the residence of the surety, the burden of proof is on such administrator to show that none of the other defendants resided in the county at the time suit was brought. Modoc County v. Madden, 136 Cal. 134; 68 Pac. 491; Hearne v. De Young, 111 Cal. 373; 43 Pac. 1108; Greenleaf v. Jacks, 133 Cal. 506; 65 Pac. 1039. This section applies to an action by a county against a non-resident to enjoin the pollution of a stream (Yuba County v. North America etc. Mining Co., 12 Cal. App. 223; 107 Pac. 139); and to all actions brought by the state. State v. Campbell, 3 Cal. App. 602; 86 Pac. 840. The language of this section which applies to an action by a county, as plaintiff, against a corporation doing business in another county, is mandatory, that the action must, on motion of the defendant, be transferred to a county other than the plaintiff. Yuba County v. North America etc. Mining Co., 12 Cal. App. 223; 107 Pac. 139.

Venue of action against municipal corporation. See note 25 L. R. A. (N. S.) 711.

CODE COMMISSIONERS' NOTE. Stats. 1854, p. 194.

§ 395. Actions to be tried in county in which defendant resides, etc. If defendant does not reside in state. In all other cases, the action must be

tried in the county in which the defendants, or some of them, reside at the commencement of the action, or if it be an action for injury to person, or property, or for death from wrongful act, or negligence, in the county where the injury occurs, or the injury causing death occurs, or in the county in which the defendants, or some of them, reside at the commencement of the action. If none of the defendants reside in the state, or, if residing in the state, and the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint, and if the defendant is about to depart from the state, such action may be tried in any county where either of the parties reside, or service is had, subject however, to the power of the court to change the place of trial, as provided in this code. If any person is improperly joined as a defendant, or has been made a defendant solely for the purpose of having the action tried in the county where he resides, his residence must not be considered in determining which is the proper county for the trial of the action.

Change of venue in criminal actions. See Pen. Code, §§ 1033, 1034.

Legislation § 395. 1. Enacted March 11, **1872**; based on Practice Act, § 20 (New York Code, § 125), as amended by Stats. 1858, p. 82, which read: "In all other cases, the action shall be tried in the county in which the defendants, or any one of them, may reside at the commencement of the action; or, if none of the defendants reside in the state, or, if residing in this state, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if any defendant or defendants may be about to depart from the state, such action may be tried in any county where either of the parties may reside or service be had; subject, however, to the power of the court to change the place of trial as provided in this act." When enacted in 1872, (1) the words "action. If none" read "action; or, if none," (2) the words "residing in the state," read "residing in this state," (3) and the section ended with the words "provided in this code."

2. Amendment by Stats. **1901**, p. 128; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 700, the code commissioner saying, "The last sentence of this section has been added, and the amendment thereby made is intended to reach cases where a person has been made a defendant solely for the purpose of having an action tried in the county wherein he resides, thus taking away from the defendant properly joined and from the real defendants the rights of change of venue intended to be vouchsafed to them in other sections of the code."

4. Amended by Stats. **1911**, p. 847, adding to the end of the first sentence all the matter beginning with "or if it be an action for injury," the other sentences not being amended.

Construction of section. This section applies to an action for damages for personal injuries (McDonald v. California Timber Co., 151 Cal. 159; 90 Pac. 548); and also to actions brought by the state (State v. Campbell, 3 Cal. App. 602; 86 Pac. 840); and to an action for the fraud of an agent in the sale of corporate stock (Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237; 104 Pac. 698); and to an action on a note past due, without reference to the place of its execution or payment (Bell v. Camm, 10 Cal. App. 388; 102 Pac. 225); but it does not apply to special proceedings, such as those for the condemnation of land (Santa Rosa v. Fountain Water Co., 138 Cal. 579; 71 Pac. 1123, 1136); nor to an action to set aside a deed. Sloss v. De Toro, 77 Cal. 129; 19 Pac. 233. Actions for the condemnation of land must be brought and tried in the county where the land is situated, unless transferred to another county, as provided in this section. Santa Rosa v. Fountain Water Co., 138 Cal. 579; 71 Pac. 1123, 1136. Condemnation proceedings should be tried in the county where the land is situated, although the defendants therein reside elsewhere. John Heinlen Co. v. Superior Court, 17 Cal. App. 660; 121 Pac. 293. The defendant's right to have an action tried in the county of his residence is subordinate to the direction in § 392, ante, that a local action, as one to enforce a trust in mining property, must be tried in the county where the property is situated. McFarland v. Martin, 144 Cal. 771; 78 Pac. 239. One who properly should have been made a plaintiff, but who refuses to become such, and is therefore made a nominal defendant, is not a "defendant" within this section. Donohoe v. Wooster, 163 Cal. 114; 124 Pac. 730. The proceedings for the settlement of an estate, and matters connected therewith, is not a civil action, within the meaning of this section, so as to transfer it from one county to another. Estate of Scott, 15 Cal. 220. The positive provision of the statute, that actions shall be commenced in a particular county, must be carried out; but that does not prohibit a change of the place of trial. Uhlfelder v. Levy, 9 Cal. 607. The term "proper county" means the county in which the action is required to be tried, subject to the power of the court to change the place of trial. Cook v. Pendergast, 61 Cal. 72. The right of a plaintiff, by this section, to have an action tried in a

county other than that in which the defendant resides, is exceptional; and if he would claim such right, he must bring himself within the terms of the exception. Brady v. Times Mirror Co., 106 Cal. 56; 39 Pac. 209.

Residence of parties. The right of the defendant to have the action tried in the county where he resides at the time of the commencement of the suit, is provided by this section (Palmer & Rey v. Barclay, 92 Cal. 199; 28 Pac. 226); and where there is no express provision to the contrary, the proper county for trial, subject to the power of the court to change the place of trial on account of convenience of witnesses, disqualification of judge, and inability to have an impartial trial, is the county in which the defendants, or some of them, reside at the commencement of the action. Bonestell v. Curry, 153 Cal. 418; 95 Pac. 887. A personal action to recover a money judgment is triable in the county of defendant's residence (Anaheim Odd Fellows' Hall Ass'n v. Mitchell, 6 Cal. App. 431; 92 Pac. 331); as is also an action to compel a county treasurer to pay over certain moneys to the state treasurer. State Commission v. Welch, 154 Cal. 775; 99 Pac. 181. If one defendant resides in one county and a co-defendant in another county, the plaintiff may have the cause tried in either county. O'Brien v. O'Brien, 16 Cal. App. 193; 116 Pac. 696; Hellman v. Logan, 148 Cal. 58; 82 Pac. 848. An action to recover damages for the loss of property by fire, caused by the negligence of the defendants, may be brought in the county of the residence of either defendant. Quint v. Dimond, 135 Cal. 572; 67 Pac. 1034. An action to recover a partnership interest, and for an accounting, must be tried in the county in which the defendants, or some of them, reside at the commencement of the action; it is only where none of the defendants are residents of the state that the plaintiff can designate in his complaint the place of trial (Banta v. Wink, 119 Cal. 78; 51 Pac. 17); and the burden of proof is on the moving party to show that no defendant resides in the county where the suit is commenced. Modoc County v. Madden, 136 Cal. 134; 68 Pac. 491. The test is, Does one of the necessary parties reside in the county where the action is brought? and if so, it may be tried there. Hellman v. Logan, 148 Cal. 58; 82 Pac. 848. In the United States generally, and particularly in this state, the distinction between local and transitory actions, so far as any consequence attends it, depends entirely upon statutory law, and does not coincide with or depend upon the distinction between actions in rem and actions in personam (Fresno Nat. Bank v. Superior Court, 83 Cal. 491; 24 Pac. 157); but an action to compel the execution of a deed does not involve the determination of an interest in real property, and it may be commenced and tried in the county where the relator resides. McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655.

Where residence of defendant is unknown. The right to designate the county in which to bring the action is not an arbitrary right, or optional with the plaintiff upon a mere statement that the residence of the defendant is unknown to him; he must state facts sufficient to show that he has resorted to such means to ascertain the defendant's residence as would be expected of a reasonable man in seeking in good faith to make the discovery. Mahler v. Drummer Boy Gold Mining Co., 7 Cal. App. 190, 192, 93 Pac. 1064.

Venue in actions against corporations, generally. A corporation may be sued in the county where it has its principal place of business. Fresno Nat. Bank v. Superior Court, 83 Cal. 491; 24 Pac. 157; Buck v. Eureka, 97 Cal. 135; 31 Pac. 845; White v. Fresno Nat. Bank, 98 Cal. 166; 32 Pac. 979; Trezevant v. W. R. Strong Co., 102 Cal. 47; 36 Pac. 395.

Corporations, as well as natural persons, are entitled to have personal or transitory actions tried in the county of their residence. Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237; 104 Pac. 698. An action against a corporation to recover damages for injuries to real property may be brought and tried in the county where its principal place of business is situated, although not the one in which the land is located. Miller & Lux v. Kern County Land Co., 134 Cal. 586; 66 Pac. 856. Actions against foreign corporations may be brought and tried in any county of the state, in the absence of a statute conferring upon them a county residence. Waechter v. Atchison etc. Ry. Co., 10 Cal. App. 70; 101 Pac. 41; Thomas v. Placerville etc. Mining Co., 65 Cal. 600; 4 Pac. 641.

Constitutional provision as to venue of actions against corporations. Under § 16 of article XII of the constitution, a personal action against a domestic corporation may, at the option of the plaintiff, be commenced in one of the designated counties, other than the one in which the defendant has its principal place of business, and may be prosecuted to final judgment where commenced, unless the defendant can allege and show some sufficient ground for a change of the place of trial, distinct from the fact that the residence of the corporation is in another county (Cook v. Ray Mfg. Co., 159 Cal. 694; 115 Pac. 318); but that section applies only to domestic corporations or associations, and not to foreign corporations (Waechter v. Atchison etc. Ry. Co., 10 Cal. App. 70; 101 Pac. 41); and its provisions are applicable

in actions in tort as well as in actions on contracts. Miller & Lux v. Kern County Land Co., 134 Cal. 586; 66 Pac. 856; Lewis v. South Pac. Coast R. R. Co., 66 Cal. 209; 5 Pac. 79; Fresno Nat. Bank v. Superior Court, 83 Cal. 491; 24 Pac. 157; Trezevant v. W. R. Strong Co., 102 Cal. 47; 36 Pac. 395; Brady v. Times-Mirror Co., 106 Cal. 56; 39 Pac. 209. The word "may" does not mean "must," in the provision of that section, that a corporation "may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated." Miller & Lux v. Kern County Land Co., 134 Cal. 586; 66 Pac. 856; Griffin & Skelly Co. v. Magnolia etc. Fruit Cannery Co., 107 Cal. 378; 40 Pac. 495. Nor does that section violate the fourteenth amendment of the Federal constitution, in depriving domestic corporations of the equal protection of the laws. Cook v. Ray Mfg. Co., 159 Cal. 694; 115 Pac. 318.

Residence of corporations. The place of residence of a corporation, foreign or domestic, is the place where, by its articles of incorporation, it has its principal place of business (Waechter v. Atchison etc. Ry. Co., 10 Cal. App. 70; 101 Pac. 41; Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237; 104 Pac. 698); and the principal place of business of a domestic corporation is its residence, within the meaning of this section. California Southern R. R. Co. v. Southern Pacific R. R. Co., 65 Cal. 394; 4 Pac. 344; Waechter v. Atchison etc. Ry. Co., 10 Cal. App. 70; 101 Pac. 41; Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237; 104 Pac. 698; Jenkins v. California Stage Co., 22 Cal. 537; McSherry v. Pennsylvania etc. Mining Co., 97 Cal. 637, 643; 32 Pac. 711; Trezevant v. W. R. Strong Co., 102 Cal. 47; 36 Pac. 395; Buck v. Eureka, 97 Cal. 135; 31 Pac. 845; but see Cohn v. Central Pacific R. R. Co., 71 Cal. 488; 12 Pac. 498; Howell v. Stetefeldt Furnace Co., 69 Cal. 153; 10 Pac. 390. Compliance by a foreign corporation with the laws of this state in regard to the establishment of a principal place of business in this state, does not make it a domestic corporation. Waechter v. Atchison etc. Ry. Co., 10 Cal. App. 70; 101 Pac. 41. A municipal corporation, though not capable of having a "residence," in the ordinary and restricted sense of that word, occupies a position at least as favorable as a trading corporation, and, a fortiori, a municipal corporation "resides" where its territory is, and where all its constituents reside. Buck v. Eureka, 97 Cal. 135; 31 Pac. 845.

Right of corporations to change of venue. Where a suit is not commenced in any one of the counties designated in § 16 of article XII of the constitution, the defendant is entitled, upon motion and a proper showing, to have the place of trial changed to the county of its principal place of business. Cohn v. Central Pacific R. R. Co., 71 Cal. 488; 12 Pac. 498; California Southern R. R. Co. v. Southern Pacific R. R. Co., 65 Cal. 293; 4 Pac. 12; Fresno Nat. Bank v. Superior Court, 83 Cal. 491; 24 Pac. 157. A corporation, on being sued in the county where the liability arose, cannot insist upon a change of venue to the county in which it has its principal place of business. Trezevant v. W. R. Strong Co., 102 Cal. 47; 36 Pac. 395. A change of venue can be granted, although an action is brought in a county designated by the constitutional rule of procedure; but this change cannot be made on the ground, merely, that the legislature has provided that some other county is the proper county because that would amount, pro tanto, to a legislative repeal of a constitutional provision: grounds for such change must be shown. Miller & Lux v. Kern County Land Co., 134 Cal. 586; 66 Pac. 856; Lewis v. South Pacific Coast R. R. Co., 66 Cal. 209; 5 Pac. 79; Fresno Nat. Bank v. Superior Court, 83 Cal. 491; 24 Pac. 157; Trezevant v. W. R. Strong Co., 102 Cal. 47; 36 Pac. 395. The plaintiff is entitled to the constitutional right to sue a corporation in the county where the contract was made, only when it is the sole defendant; but where the plaintiff joins as defendant one residing in another county, he thereby waives the benefit of the provision, and cannot deprive such defendant of his right, under this section, to have the action tried in the county of his residence. Griffin etc. Co. v. Magnolia etc. Fruit Cannery Co., 107 Cal. 378; 40 Pac. 495; Brady v. Times-Mirror Co., 106 Cal. 56; 39 Pac. 209; Smith v. Smith, 88 Cal. 572; 26 Pac. 356. If an action is brought in one county, for the conversion of goods by a corporation having its principal place of business in another county, the defendant, upon demand duly made therefor, is, in the absence of a counter-showing, entitled to an order changing the place of trial to the county of his residence. Wong Fung Hing v. San Francisco Relief etc. Funds, 15 Cal. App. 537; 115 Pac. 331. If a transitory action is not brought in the county of the residence of personal defendants, the joinder of a foreign corporation as a co-defendant will not prevent a change of the place of trial to the county of their residence. Pittman v. Carstenbrook, 11 Cal. App. 224; 104 Pac. 699.

Right to change of venue. It is the statutory right of the defendant to have the place of trial changed to the county of his residence, upon proper and timely application, there being no counter-application to have the trial retained for the convenience of witnesses. Bailey v. Sloan,

65 Cal. 387; 4 Pac. 349. The test of the right to a change of venue is to be made by ascertaining who are necessary parties to the action as set forth in the complaint (Hellman v. Logan, 148 Cal. 58; 82 Pac. 848); and the right to the change must be determined by the condition of things existing at the time the parties claiming it first appeared in the action. Remington Sewing Machine Co. v. Cole, 62 Cal. 311; Ah Fong v. Sternes, 79 Cal. 30; 21 Pac. 381; McKenzie v. Barling, 101 Cal. 459; 36 Pac. 8. When a local is joined with a transitory cause of action, the defendant is entitled, under this section, to have the place of trial changed to the county of his residence (Smith v. Smith, 88 Cal. 572; 26 Pac. 356; Warner v. Warner, 100 Cal. 11; 34 Pac. 523; Bailey v. Cox, 102 Cal. 333; 36 Pac. 650); and also in a personal action, to recover a personal judgment. Anaheim Odd Fellows' Hall Ass'n v. Mitchell, 6 Cal. App. 431; 92 Pac. 331. If all the defendants are non-residents of the county in which the action is brought, any one of them is entitled to a change of the place of trial, notwithstanding the opposition of the others. Ludington Exploration Co. v. La Fortuna etc. Mining Co., 4 Cal. App. 369; 88 Pac. 290; Wood v. Herman Mining Co., 139 Cal. 713; 73 Pac. 588; but see Mahler v. Drummer Boy Gold Mining Co., 7 Cal. App. 190; 93 Pac. 1064. Where the action is dismissed as to certain defendants, the others are entitled to a change of venue to the county of their residence. Remington Sewing Machine Co. v. Cole, 62 Cal. 311.

Defeat of right to change of venue. The plaintiff cannot deprive the defendant of the right to a change of venue, under this section, by joining with him, as a defendant, one who resides in the county where the action is brought, but against whom no cause of action is stated, or from whom no relief is demanded. Sayward v. Houghton, 82 Cal. 628; 23 Pac. 120; McKenzie v. Barling, 101 Cal. 459; 36 Pac. 8; Brady v. Times-Mirror Co., 106 Cal. 56; 39 Pac. 209; Thompson v. Wood, 115 Cal. 301; 47 Pac. 50; McDonald v. California Timber Co., 151 Cal. 159; 90 Pac. 548. The joining, as a party defendant, of one against whom no cause of action is stated, does not deprive the other defendant of the right to have the action brought in the county of his residence; nor does the joinder of a person as a defendant, who refuses to become a plaintiff, deprive a non-resident defendant of the right to a change of the place of trial (Donohoe v. Wooster, 163 Cal. 114; 124 Pac. 730); nor does the plaintiff's ignorance of the defendant's residence debar the latter of his right to have the place of trial changed to the county of his residence. Thurber v. Thurber, 113 Cal. 607; 45 Pac. 852.

Application for change of venue. The party seeking to avail himself of the right granted should make his application for the change of venue upon his first appearance in court (Powell v. Sutro, 80 Cal. 559; 22 Pac. 308); otherwise he waives it. Cook v. Pendergast, 61 Cal. 72; Hearne v. De Young, 111 Cal. 373; 43 Pac. 1108; Remington Sewing Machine Co. v. Cole, 62 Cal. 311. Under this section, and § 396, post, but one right is given to a defendant in a personal action to move to change the place of trial of the action to the county of his residence, and but one time is fixed when he may assert it; even then, only upon a sufficient showing in his affidavit of merits is he entitled to an order therefor. McNeill & Co. v. Doe, 163 Cal. 338; 125 Pac. 345. In order properly to raise the issue as to a fraudulent attempt to prevent a change of venue, as by a fraudulent joinder of a defendant for that purpose, the fraud should be distinctly specified in the notice of motion. Henderson v. Cohen, 10 Cal. App. 580; 102 Pac. 826.

Granting of application. In an action for alimony, the defendant has the right to have the cause tried in the county of his residence, and an application, under this section, for removal thereto must be granted, before other or further proceedings in the case. Hennessy v. Nicol, 105 Cal. 138; 38 Pac. 649. Where there are two or more defendants, the cause is properly transferred for trial to the county of the residence of the only necessary and proper party. Bartley v. Fraser, 16 Cal. App. 560; 117 Pac. 683.

Denial of application. An action for damages for the destruction of plaintiff's buildings by fire, caused by negligence, is triable in the county where the land is situated; and the defendants cannot, under this section, have the action removed to the county of their residence. Las Animas etc. Land Co. v. Fatjo, 9 Cal. App. 318; 99 Pac. 393. A motion for a change of venue is properly denied, where one of the defendants, whose residence is in the county where the action was commenced, is a proper party, and does not join in the motion. Paxton v. Paxton, 150 Cal. 667; 89 Pac. 1083. A defendant who moves for a change to the county of his residence, must show by his moving-papers that none of the other defendants reside in the county in which the action is brought, or the motion will be denied (Greenleaf v. Jacks, 133 Cal. 506; 65 Pac. 1039); and the motion will also be denied where the complaint fails to show the residence of the defendant, if he does not prove in what county he resides. Hearne v. De Young, 111 Cal. 373; 43 Pac. 1108. If any of the defendants reside in the county in which the suit is brought, a motion to change the place of trial to a county in which other defendants reside will be refused, unless all of the defendants join in the motion, or good reason is shown why they have not so

joined. McKenzie v. Barling, 101 Cal. 459; 36 Pac. 8; Quint v. Dimond, 135 Cal. 572; 67 Pac. 1034; Mahler v. Drummer Boy Gold Mining Co., 7 Cal. App. 190; 93 Pac. 1064; Sullivan v. Lusk, 7 Cal. App. 186; 94 Pac. 91, 92.

Discretion of court. When proper application is made for a change of venue, the court has no discretion to refuse to hear the motion, or to impose terms as a condition precedent to the hearing. Hennessy v. Nicol, 105 Cal. 138; 38 Pac. 649. The discretion of the court in granting or refusing a motion for a change of venue, is not always controlling; and where the record discloses no reason for not granting a change of venue, the order denying the motion cannot be justified on the ground that the granting of such orders is in the discretion of the court. Carr v. Stern, 17 Cal. App. 397; 120 Pac. 35.

Appeal. An order refusing to grant a change of venue, where one of the defendants resides in the county in which the action is brought, will not be disturbed. Hirschfeld v. Sevier, 77 Cal. 448; 19 Pac. 819. The question whether a defendant resides in the county to which a transfer is requested is to be determined, primarily, by the court in which the action is instituted, and its finding will not be disturbed on appeal, where the evidence was conflicting, though it was entirely documentary. Bradley v. Davis, 156 Cal. 267; 104 Pac. 302; Henderson v. Cohen, 10 Cal. App. 580; 102 Pac. 826.

Transfer of case. The court to which the case is transferred acquires jurisdiction at the moment the court transferring the case loses jurisdiction. Chase v. Superior Court, 154 Cal. 789; 99 Pac. 355.

Trial of actions, where the subject, or some part thereof, is situated. See note ante, § 392.

Constitutional right of party defendant to be sued in county of his residence. See note Ann. Cas. 1912C, 614.

Venue of action for death caused by negligence. See note 4 L. R. A. (N. S.) 263.

Venue of action in state court against foreign corporation. See note 70 L. R. A. (N. S.) 696.

CODE COMMISSIONERS' NOTE. 1. Corporation has a residence where its principal office or place of business is established, and is included within the provisions of this section. Jenkins v. California Stage Co., 22 Cal. 538; see also Louisville R. R. Co. v. Letson, 2 How. (U. S.) 497; 11 L. Ed. 353; Angell and Ames on Corporations, pp. 6, 265, 404–407, 440.

2. Action tried where defendant resides. Defendant has a right to have the case tried in the county where he resides, except in the cases otherwise provided by this code. Loehr v. Latham, 15 Cal. 418.

3. When a public officer is defendant. See § 393, ante, and note.

4. Not applicable to probate proceedings. This section does not apply to probate proceedings. See Estate of Scott, 15 Cal. 220.

5. Habeas corpus not to run out of county. The writ of habeas corpus should not issue to run out of the county, unless for good cause shown, as the absence, disability, or refusal to act of the local judge, or other reason showing that the object and reason of the law requires its issuance. Ex parte Ellis, 11 Cal. 225.

§ 396. Action may be tried in any county, unless the defendant demand a trial in the proper county. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county.

Legislation § 396. 1. Enacted March 11, **1872.**
2. Amendment by Stats. **1901**, p. 129; unconstitutional. See note ante, § 5.
3. Amended by Stats. **1907**, p. 701; the code commissioner saying, "The words 'appears and' are omitted before the word 'answers,' as superfluous."

Application of section. This section is applicable to actions brought by the state. State v. Campbell, 3 Cal. App. 602; 86 Pac. 840.

Actions according to residence of parties. See note ante, § 395.

When application for change of venue must be made. An application for a change of the place of trial must be made by the defendant in his answer, or contemporaneously with the filing of the answer of a demurrer (Cook v. Pendergast, 61 Cal. 72; Tooms v. Randall, 3 Cal. 438; Reyes v. Sanford, 5 Cal. 117; Pearkes v. Freer, 9 Cal. 642; Jones v. Frost, 28 Cal. 245; Mahe v. Reynolds, 38 Cal. 560); and must be prosecuted with diligence; but the trial court must, upon the facts of the particular case, determine whether there has been undue delay. Pascoe v. Baker, 158 Cal. 232; 110 Pac. 815. The right to a change of the place of trial is a mere privilege, and is waived by failure to make application therefor at the proper time (Cook v. Pendergast, 61 Cal. 72; Remington Sewing Machine Co. v. Cole, 62 Cal. 311; Ah Fong v. Sternes, 79 Cal. 30; 21 Pac. 381; Powell v. Sutro, 80 Cal. 559; 22 Pac. 308; Pennie v. Visher, 94 Cal. 323; 29 Pac. 711; Herd v. Tuohy, 133 Cal. 55; 65 Pac. 139; Bell v. Camm, 10 Cal. App. 388; 102 Pac. 225); but the right is not waived by filing an amended demurrer. Pittman v. Carstenbrook, 11 Cal. App. 224; 104 Pac. 699. The defendant does not appear and demur, within the meaning of this section, until he files the demurrer; and it is sufficient to file the notice, affidavit, and demand at the same time with the filing of the demurrer (Fletcher v. Maginnis, 136 Cal. 362; 68 Pac. 1015); but it comes too late after the demurrer is amended. Union

Lumber Co. v. Metropolis Construction Co., 13 Cal. App. 584; 110 Pac. 329. The defendant must also appear, and demur or answer, at the same time that he makes his application for a change of the place of trial. Nicholl v. Nicholl, 66 Cal. 36; 4 Pac. 882; Bagley v. Cohen, 121 Cal. 604; 53 Pac. 1117. If the grounds upon which the motion is made appear upon the face of the complaint, the demand should be made at or before the time of filing the demurrer, or the motion will be deemed waived. Pearkes v. Freer, 9 Cal. 642. A fraudulent joinder of a fictitious defendant, for the purpose of defeating the real defendant's right to have the cause removed to the proper county for trial, will not prevent the real defendant, upon motion, from securing a removal of the cause to the proper county; and where fraud in joining a resident of the county to prevent removal is the ground of the motion, it should be distinctly specified in the notice. McDonald v. California Timber Co., 151 Cal. 159; 90 Pac. 548. An action commenced in a justice's court, and transferred to the superior court, cannot be transferred to the county of the defendant's residence, where the demand was not made at the time of his appearance in the justice's court. Powell v. Sutro, 80 Cal. 559; 22 Pac. 308. A demurrer or answer to an amended complaint, by a defendant who has demurred to the original complaint, does not constitute a first appearance, within this section; the filing of an amended complaint is not the commencing of a new action. Jones v. Frost, 28 Cal. 245. A defendant who demurs to a complaint without answering must demand a transfer before or when he demurs. Cook v. Pendergast, 61 Cal. 72. The plaintiff cannot resist a motion for change of venue, made on the ground that the action was not commenced in the proper county, by a showing of convenience of witnesses, unless an answer has been filed and issue joined. Cook v. Pendergast, 61 Cal. 72. An order refusing to change the place of trial, made upon conflicting affidavits, is not reviewable. Bernon v. Bernon, 15 Cal. App. 341; 114 Pac. 1000.

Affidavit of merits. To make a prima facie showing on advice of counsel, the affidavit of merits should state that the defendant fully and fairly stated "all the facts of the case" to his counsel, and that, after making such statement, he was advised by such counsel that he had, and that he verily believes that he has, a good and substantial defense to the action upon the merits; but where the affidavit alleges that he has stated fully and fairly "the case," it is sufficient (Woodward v. Backus, 20 Cal. 137; Reidy v. Scott, 53 Cal. 69; Rowland v. Coyne, 55 Cal. 1; Watkins v. Degener, 63 Cal. 500; Buell v. Dodge, 63 Cal. 553; Rathgeb v. Tiscornia, 66 Cal. 96; 4 Pac. 987; Nolan v. McDuffie, 125 Cal. 334; 58 Pac. 4); but an affidavit that the defendant has stated "his" case is not sufficient. Nickerson v. California Raisin Co., 61 Cal. 268; People v. Larue, 66 Cal. 235; 5 Pac. 157; Morgan v. McDonald, 70 Cal. 32; 11 Pac. 350. Belief in the advice of the attorney need not be stated. Watt v. Bradley, 95 Cal. 415; 30 Pac. 557. The terms "attorney," "counselor," and "attorney at law" are used synonymously. Pittman v. Carstenbrook, 11 Cal. App. 224; 104 Pac. 699. An affidavit by one of several defendants, in behalf of all, is sufficient (Rowland v. Coyne, 55 Cal. 1; Watkins v. Degener, 63 Cal. 500; People v. Larue, 66 Cal. 235; 5 Pac. 157; Palmer & Rey v. Barclay, 92 Cal. 199; 28 Pac. 226; McSherry v. Pennsylvania etc. Mining Co., 97 Cal. 637; 32 Pac. 711; Wood v. Herman Mining Co., 139 Cal. 713; 73 Pac. 588); as is also an affidavit by a party's attorney if it shows the merits, and adequate excuse for not being made by the defendant personally (Nicholl v. Nicholl, 66 Cal. 36; 4 Pac. 882); but such an affidavit is insufficient, where the attorney does not state that he knows the facts of the case, or that the defendant has fully and fairly stated his whole case to him, or fails to state a good excuse for the failure of the defendant personally to make it. Bailey v. Taaffe, 29 Cal. 422. An insufficient affidavit may be amended after the time of appearing and demurring or answering, and by a defendant other than he who first made the affidavit. Palmer & Rey v. Barclay, 92 Cal. 199; 28 Pac. 226; Nolan v. McDuffie, 125 Cal. 334; 58 Pac. 4. The omission of the title of the cause or court will not invalidate the affidavit, where the action is intelligently referred to therein. Watt v. Bradley, 95 Cal. 415; 30 Pac. 557. The transfer, when title to real estate is involved, should be made on mere suggestion; it is unnecessary to file an affidavit. Fritts v. Camp, 94 Cal. 393; 29 Pac. 867. If the complaint does not show the residence of the defendant, the burden of proof is cast upon him to show the county of his residence, if he would secure a change of venue; and if there are several defendants, he must show that none of them are residents of the county in which the action is brought. Hearne v. De Young, 111 Cal. 373; 43 Pac. 1108; Greenleaf v. Jacks, 133 Cal. 506; 65 Pac. 1039; Greenleaf v. Jack, 135 Cal. 154; 67 Pac. 17; Quint v. Dimond, 135 Cal. 572; 67 Pac. 1034; Modoc County v. Madden, 136 Cal. 134; 68 Pac. 491. When the application is made on the ground of convenience of witnesses, an affidavit of merits is not required (Pascoe v. Baker, 158 Cal. 232; 110 Pac. 815); nor is the affidavit required on a motion by the plaintiff for a retransfer of the case. Pascoe v. Baker, 158 Cal. 232; 110 Pac. 815.

Demand in writing, and affidavit of merits. To secure a change of place of trial, there must be a demand in writing and an affidavit of merits; the affidavit of merits may be amended. Jaques v. Owens, 18 Cal. App. 114; 122 Pac. 430. The procedure for asserting the right to a change of place of trial, is not regulated solely by this section, but by § 397, post, also. Bohn v. Bohn, 164 Cal. 532; 129 Pac. 981. On appeal from an order changing the place of trial, the record should show the demand for the change, and also whether the respondent had answered or demurred at the time he filed his affidavit of merits and made demand for such change. Harrison v. Cousins, 16 Cal. App. 515; 117 Pac. 564. The effect of the demand and motion is to intercept all judicial action, and to suspend the power of the court to act upon any other question, until it has been determined; the hearing cannot be postponed until the answer is filed, nor for the purpose of permitting the plaintiff's cross-motion to be heard at the same time; nor can the court rule upon the demurrer filed, or consider the propriety of the amendment to the complaint, or impose any terms as a condition for the transfer of the case; the defendants are entitled to have the motion determined upon the conditions existing at the time of their appearance, and to have all judicial action in the case determined in the superior court of the proper county. Heald v. Hendy, 65 Cal. 321; 4 Pac. 27; Ah Fong v. Sternes, 79 Cal. 30; 21 Pac. 381; Hennessy v. Nicol, 105 Cal. 138; 38 Pac. 649; Griffin etc. Co. v. Magnolia etc. Fruit Cannery Co., 107 Cal. 378; 40 Pac. 495; Thurber v. Thurber, 113 Cal. 607; 45 Pac. 852; Nolan v. McDuffie, 125 Cal. 334; 58 Pac. 4. Actions involving real estate must be transferred on demand: the court has no discretion. Watts v. White, 13 Cal. 321. The convenience of witnesses should be considered, and the motion denied if the convenience of witnesses or the ends of justice require that the action be retained in the county where the action is pending. Loehr v. Latham, 15 Cal. 418; Jenkins v. California Stage Co., 22 Cal. 537; Hanchett v. Finch, 47 Cal. 192; Edwards v. Southern Pacific R. R. Co., 48 Cal. 460; Hall v. Central Pacific R. R. Co., 49 Cal. 454; Reavis v. Cowell, 56 Cal. 588. All the defendants must join in the demand, in personal actions (Pieper v. Centinela Land Co., 56 Cal. 173; Remington Sewing Machine Co. v. Cole, 62 Cal. 311; McKenzie v. Barling, 101 Cal. 459; 36 Pac. 8); but a defendant against whom no relief is sought, or who is improperly joined, need not unite in a demand, or be considered in determining the proper county of the trial. Buell v. Dodge, 57 Cal. 645; Remington Sewing Machine Co. v. Cole, 62 Cal. 311; Sayward v. Houghton, 82 Cal. 628; McKenzie v. Barling, 101 Cal. 459; 36 Pac. 8; Bailey v. Cox, 102 Cal. 333; 36 Pac. 650; Brady v. Times Mirror Co., 106 Cal. 56; 39 Pac. 209. Persons properly plaintiffs, and made defendants without any allegation that they refused to join the plaintiff in commencing the suit, should not be considered in determining the application by other defendants for a change of venue on the ground of residence. Read v. San Diego Union Co., 6 Cal. Unrep. 703; 65 Pac. 567. The question as to who are proper and necessary defendants must be determined from the complaint; and the effect of the complaint cannot be varied by the affidavit filed. McKenzie v. Barling, 101 Cal. 459; 36 Pac. 8; Quint v. Dimond, 135 Cal. 572; 67 Pac. 1034; and see Lakeshore Cattle Co. v. Modoc Land etc. Co., 108 Cal. 261; 41 Pac. 472; Bowers v. Modoc Land etc. Co., 117 Cal. 50; 48 Pac. 979. Only those who are residents of the state need join in the demand to change the place of trial (Banta v. Wink, 119 Cal. 78; 51 Pac. 17); and only the defendants who are served, or who have appeared, need join in the demand (Rathgeb v. Tisconnia, 66 Cal. 96; 4 Pac. 987; McSherry v. Pennsylvania etc. Mining Co., 97 Cal. 637; 32 Pac. 711; Wood v. Herman Mining Co., 139 Cal. 713; 73 Pac. 588); but all necessary defendants who have been served, or who have appeared, must join in the motion where the action is brought in the proper county. Pittman v. Carstenbrook, 11 Cal. App. 224; 104 Pac. 699. Defendants who have appeared and demanded the change of place of trial to the county of their residence, cannot be deprived of the right by other defendants, who appear after the demand and consent to a trial in the county where the action was commenced, if it affirmatively appears that no defendants reside in the county. Wood v. Herman Mining Co., 139 Cal. 713; 73 Pac. 588; Pieper v. Centinela Land Co., 56 Cal. 173. The demand of a defendant sued under his true name, with others sued under fictitious names, the return of summons showing service on the former only, and the affidavit showing that all the defendants are residents of another county, cannot be defeated by the subsequent return of an alias summons, stating that one of the defendants sued under a fictitious name is a resident of the county in which the action is brought, in the absence of an amendment of the complaint describing him under his true name, and of an affidavit or a showing by the plaintiff as to the person intended to be sued under such fictitious name. Baehman v. Cathry, 113 Cal. 498; 45 Pac. 814; Alameda County v. Crocker, 125 Cal. 101; 57 Pac. 766. All the defendants must join in the demand, or sufficient reason must be shown for failure to join, or it must be made to appear that those who have not joined are not proper parties. Pieper v. Centinela Land Co., 56 Cal. 173; McKenzie v. Barling, 101 Cal. 459; 36 Pac. 8; Wood v. Herman Min-

ing Co., 139 Cal. 713; 73 Pac. 588. The discretion of the court in determining the motion for a change of the place of trial, on the ground of the convenience of witnesses, will not be disturbed, where no abuse of discretion is shown. Pascoe v. Baker, 158 Cal. 232; 110 Pac. 815. A party may, either expressly or by implication, waive his right to have a cause tried in a particular county. Hearne v. De Young, 111 Cal. 373; 43 Pac. 1108. If the county in which the action is commenced is not the proper place for the trial thereof, the only remedy of the defendant is a demand for a change of venue, and if he fails to demand the transfer, he waives objection to the venue. Herd v. Tuohy, 133 Cal. 55; 65 Pac. 139.

Actions against corporations. The provisions of § 16 of article XII of the constitution, as to the jurisdiction of corporations, are, in effect, permissive, and were intended to give the plaintiff the right to select the county in which to try the action; and the superior court of any county in the state is not, by that section, deprived of jurisdiction to hear all classes of actions generally within the limits of the jurisdiction conferred upon it by § 5 of article VI. Bond v. Karma-Ajax Consol. Mining Co., 15 Cal. App. 469; 115 Pac. 254. Whether affidavits contradicting the complaint as to the county where the alleged liability of a corporation was incurred can be used to vary or contradict the allegations of the complaint, has not been decided, except where the order has been sustained on the ground of a conflict of evidence. Lake Shore Cattle Co. v. Modoc Land etc. Co., 108 Cal. 261; 41 Pac. 472; Bowers v. Modoc Land etc. Co., 117 Cal. 50; 48 Pac. 979; Brown v. San Francisco Sav. Union, 122 Cal. 648; 55 Pac. 598; but see McSherry v. Pennsylvania etc. Mining Co., 97 Cal. 637; 32 Pac. 711. The affidavit, where the facts contained therein are not in the complaint, or are stated as conclusions, may be used to show the county where the contract was made or was to be performed, or where the obligation or liability arose or the breach occurred, or the location of the principal business place of the defendant corporation. Ivey v. Kern County Land Co., 115 Cal. 196, 197; 46 Pac. 926; Byrum v. Stockton etc. Agricultural Works, 91 Cal. 657; 27 Pac. 1093. If the county in which the action was brought is not the county where the contract was made or was to be performed, or in which the obligation or liability was incurred or the breach occurred, the defendant corporation is entitled to a change of the place of trial to the county where its principal place of business is located. Cohn v. Central Pacific R. R. Co., 71 Cal. 488; 12 Pac. 498. The defendant corporation cannot require a change of the place of trial to the county where its principal place of business is located, merely because it is the place of its residence; for the constitution gives to the plaintiff the right to sue the corporation in any of the counties therein referred to: 1. Where the contract is made; 2. Where it is to be performed; 3. Where the obligation or liability arises; 4. Where the breach occurs; and 5. In the county where the principal place of business is situated; and the option thus given includes more than the bare right to choose the county where the complaint shall be filed in the first instance; it confers also upon the plaintiff the right to prosecute such action in the county where it is commenced, unless the place of trial is changed for some other reason than that of the residence of the defendant. Miller & Lux v. Kern County Land Co., 134 Cal. 586; 66 Pac. 856; and see also Lewis v. South Pacific Coast R. R. Co., 66 Cal. 209; 5 Pac. 79; Fresno Nat. Bank v. Superior Court, 83 Cal. 491; 24 Pac. 157; Trezevant v. W. R. Strong Co., 102 Cal. 47; 36 Pac. 395; Ivey v. Kern County Land Co., 115 Cal. 196; 46 Pac. 926; Brown v. San Francisco Sav. Union, 122 Cal. 648; 55 Pac. 598; C. E. Whitney & Co. v. Sellers' Commission Co., 130 Cal. 188; 62 Pac. 472; Bank of Yolo v. Sperry Flour Co., 141 Cal. 314; 65 L. R. A. 90; 74 Pac. 855. The joinder of other defendants, in an action against a corporation, is a waiver by the plaintiff of his right to have the action tried in the counties designated by the constitution; and the proper place of trial must be determined by the provisions of the code. Brady v. Times Mirror Co., 106 Cal. 56; 39 Pac. 209; Griffin etc. Co. v. Magnolia etc. Fruit Cannery Co., 107 Cal. 378; 40 Pac. 495; Miller & Lux v. Kern County Land Co., 134 Cal. 586; 66 Pac. 856; Aisbett v. Paradise Mountain Mining etc. Co., 21 Cal. App. 267; 131 Pac. 776. A foreign corporation may be sued in any county in the state; and having no residence in any county in the state, it cannot demand transfer on the ground of residence. Thomas v. Placerville etc. Mining Co., 65 Cal. 600; 4 Pac. 641. A municipal corporation resides in the county wherein its territory lies, within the meaning of this section, and may demand that the trial be held in the county of its residence. Buck v. Eureka, 97 Cal. 135; 31 Pac. 845.

Proper county. The "proper county" is the county in which actions are required to be tried, "subject to the power of the court to change the place of trial" by §§ 392, 393, 394, 395, ante. Cook v. Pendergast, 61 Cal. 72; Paige v. Carroll, 61 Cal. 215.

Jurisdiction. Generally, the jurisdiction of the court is not affected by the fact that the action was not commenced in the proper county (Herd v. Tuohy, 133 Cal. 55; 65 Pac. 139; Miller & Lux v. Kern County Land Co., 140 Cal. 132; 73 Pac. 836); but actions to recover realty must

be commenced in the county where the property is situated, otherwise the court is without jurisdiction, and the case must be dismissed; change of place of trial is not the proper remedy, under such circumstances (Urton v. Woolsey, 87 Cal. 38; 25 Pac. 154; Fritts v. Camp, 94 Cal. 393; 29 Pac. 867; Pacific Yacht Club v. Sausalito Bay Water Co., 98 Cal. 487; 33 Pac. 322; Waters v. Pool, 130 Cal. 136; 62 Pac. 385; Herd v. Tuohy, 133 Cal. 55; 65 Pac. 139), and a motion to dismiss for want of jurisdiction is not waived by the subsequent filing of a demurrer, answer, or demand for a change of venue. Fresno Nat. Bank v. Superior Court, 83 Cal. 491; 24 Pac. 157. Where an action to procure the cancellation of agreements relating to land situated in several counties is commenced in one of such counties, the defendant cannot, by disclaiming any interest in the land situated in such county, demand a change of the place of trial to the county of his residence, in which part of the land is situated. Pennie v. Visher, 94 Cal. 323; 29 Pac. 711. Where a new county is created after the commencement of an action to enforce a lien upon real estate, the court is not divested of jurisdiction, if such real estate is situated in the new county. Security Loan etc. Co. v. Kauffman, 108 Cal. 214; 41 Pac. 467.

Personal and transitory actions. If the complaint be regarded as stating two separate causes of action, upon one of which the defendant would be entitled to a change of venue, but not upon the other, it should be construed most strongly against the plaintiff, and the defendant's demand for a change of venue should be granted. Ah Fong v. Sternes, 79 Cal. 30; 21 Pac. 381; Brady v. Times Mirror Co., 106 Cal. 56; 39 Pac. 209; Griffin etc. Co. v. Magnolia etc. Fruit Cannery Co., 107 Cal. 378; 40 Pac. 495. Conditions existing at the time of the appearance, so far as the pleadings are concerned, determine the proper county for the trial of personal actions; the dismissal of the action against a co-defendant, who did not join in the demand, after demand and motion have been made, cannot confer the right to a change. Remington Sewing Machine Co. v. Cole, 62 Cal. 311; Ah Fong v. Sternes, 79 Cal. 30; 21 Pac. 381. The fact that some of the defendants are non-residents of the state does not deprive the other defendants of the right to have the case tried in the county in which they, or some of them, reside at the commencement of the action. Banta v. Wink, 119 Cal. 78; 51 Pac. 17. All actions for the recovery of money must be tried in the county where the defendant resides, unless he directly or impliedly consents to a trial elsewhere. State v. Campbell, 3 Cal. App. 602; 86 Pac. 840. An action for fraud in the sale of stock is personal and transitory, and not within this section. Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237; 104 Pac. 698. The place for commencing the action is not necessarily the proper county for the trial. Hancock v. Burton, 61 Cal. 70; Warner v. Warner, 100 Cal. 11; 34 Pac. 523; Duffy v. Duffy, 104 Cal. 602; 38 Pac. 443; Staacke v. Bell, 125 Cal. 309; 57 Pac. 1012. If the case is not one of those mentioned in §§ 392, 393, and 394, ante, the residence of the defendant is the proper county for the trial; and if the action has been commenced elsewhere, it is the right of the defendant to have the place of trial changed to the proper county: the statute is peremptory, and the court has no discretion in the matter. Watkins v. Degener, 63 Cal. 500; McFarland v. Martin, 144 Cal. 771; 78 Pac. 239; Loehr v. Latham, 15 Cal. 418; Smith v. Smith, 88 Cal. 572; 26 Pac. 356; Hennessy v. Nicol, 105 Cal. 138; 38 Pac. 649; Thurber v. Thurber, 113 Cal. 607; 45 Pac. 852; Booker v. Aitken, 140 Cal. 471; 74 Pac. 11; Schilling v. Buhne, 139 Cal. 611; 73 Pac. 431. The county of the residence of one proper and necessary defendant is a proper county for the trial. Hirschfeld v. Sevier, 77 Cal. 448; 19 Pac. 819; McKenzie v. Barling, 101 Cal. 459; 36 Pac. 8; Hearne v. De Young, 111 Cal. 373; 43 Pac. 1108; Greenleaf v. Jacks, 133 Cal. 506; 65 Pac. 1039; Quint v. Dimond, 135 Cal. 572; 67 Pac. 1034; Modoc County v. Madden, 136 Cal. 134; 68 Pac. 491. The consent of resident defendants to a change to a county which would be the proper county as to the other defendants were they not joined, does not make it obligatory upon the court to order the transfer. Hirschfeld v. Sevier, 77 Cal. 448; 19 Pac. 819; Greenleaf v. Jack, 135 Cal. 154; 67 Pac. 17. One involuntarily substituted as the sole defendant in an action is entitled to a change of the place of trial to the county of his residence, notwithstanding the failure of the original defendant to demand such a change. Howell v. Stetefeldt Furnace Co., 69 Cal. 153; 10 Pac. 390. An association of persons, although not formally a corporation, may be sued in the county where its liability arose. Kendrick v. Diamond Creek etc. Mining Co., 94 Cal. 137; 29 Pac. 324. Executors sued upon a claim against the estate of the decedent, in the county in which the estate is being administered, but who reside in another county, are entitled, upon proper motion, to a change of venue to the county of their residence, where no counter-motion is made that the case be retained for the convenience of witnesses, and no facts are shown in reply to the motion. Thompson v. Wood, 115 Cal. 301; 47 Pac. 50. A change of place of trial cannot be demanded on the ground of residence, in an action taken to the superior court by appeal or transfer from a justice's court. Gross v. Superior Court, 71 Cal. 382; 12 Pac. 264; Luco v. Superior Court, 71 Cal. 555; 12 Pac. 677. Where

the plaintiff unites in the same action a local cause of action with one that is transitory, the defendant is entitled to have the action tried in the county of his residence, and also where the principal object of the action is the adjustment of questions personal in character; an action must be wholly local in its nature, to entitle it to be tried in a county other than that of the residence of the defendant; the plaintiff cannot, by writing in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both actions tried in a county other than that in which he resides. Smith v. Smith, 88 Cal. 572; 26 Pac. 356; Warner v. Warner, 100 Cal. 11; 34 Pac. 523; Bailey v. Cox, 102 Cal. 333; 36 Pac. 650; Booker v. Aitken, 140 Cal. 471; 74 Pac. 11.

Notice of application. No notice of the application for a change of venue is required, where there are no contesting affidavits: the court must make the order for the change, as demanded, regardless of notice. Bohn v. Bohn, 16 Cal. App. 179; 116 Pac. 568. No notice of the application for a change of the place of trial need be given to non-resident co-defendants who have not been served with summons nor made an appearance. Wood v. Herman Mining Co., 139 Cal. 713; 73 Pac. 588.

Waiver of right to change of venue. A party may waive his absolute right to a change of the place of trial, and there is a waiver where the procedure for asserting it is not followed. Bohn v. Bohn, 164 Cal. 532; 129 Pac. 981. A defendant, when served with summons, is bound to appear and either demur or answer; and his demand for a change of venue can be made only at the time he answers or demurs. Witter v. Phelps, 163 Cal. 655; 126 Pac. 593. A party cannot be deprived of the right of transfer by an amendment of the complaint. Buell v. Dodge, 57 Cal. 645; Brady v. Times Mirror Co., 106 Cal. 56; 39 Pac. 209.

Conflicting evidence. Where the evidence as to residence is conflicting, the determination of the trial court as to the proper county will not be reversed upon appeal. Creditors v. Welch, 55 Cal. 469; Hastings v. Keller, 69 Cal. 606; 11 Pac. 218; Daniels v. Church, 96 Cal. 13; 30 Pac. 798; Ludwig v. Harry, 126 Cal. 377; 58 Pac. 858. The court will not go into the merits of the action, on a motion to change the place of trial. O'Brien v. O'Brien, 16 Cal. App. 193; 116 Pac. 696. The affidavit of a party, other than the defendant, on a motion for a change of venue, in order to be of any value as proof on the question of residence, must state some fact or facts to aid the court in forming a conclusion upon that question. O'Brien v. O'Brien, 16 Cal. App. 103; 116 Pac. 692.

Timeliness of motion for change of venue or change of judge made after trial of cause. See note 8 Ann. Cas. 758.

CODE COMMISSIONERS' NOTE. See note to § 397, post.

§ 397. Place of trial may be changed in certain cases. The court may, on motion, change the place of trial in the following cases:

1. When the county designated in the complaint is not the proper county;

2. When there is reason to believe that an impartial trial cannot be had therein;

3. When the convenience of witnesses and the ends of justice would be promoted by the change;

4. When from any cause there is no judge of the court qualified to act.

Appeal from order as to change of venue. Post, § 939, subd. 3.

Judge, when disqualified. See ante, § 170.

Mandamus and prohibition. Controlling action of court on motion to change place of trial by resort to these writs. See post, §§ 1085, 1102.

Legislation § 397. 1. Enacted March 11, 1872; based on Practice Act, § 21 (New York Code, § 126), the words "in the action," at the end of subd. 4, being omitted when adopted in 1872, subd. 4, then reading, "4. When from any cause the judge is disqualified from acting."

2. Amendment by Stats. 1901, p. 129; unconstitutional. See note ante, § 5.

3. Amended by Stats. 1907, p. 701; the code commissioner saying, "Subdivision 4 is so amended that there need not be any change from the place of trial, if there is any judge within the county not disqualified from acting. This was certainly the real legislative intent."

Transfer from one department to another. A transfer from one department of the same court to another, by order of the presiding judge, in violation of the rules of the court, does not affect the jurisdiction. White v. Superior Court, 110 Cal. 60; 42 Pac. 480. This section is applicable, in counties having more than one judge, only when no judge is qualified to act. Petition of Los Angeles Trust Co., 158 Cal. 603; 112 Pac. 56.

Criminal actions. This section has no application to criminal actions. People v. Ebey, 6 Cal. App. 769; 93 Pac. 379.

Where county designated is not proper county. The authority given to the court by this section, to change the place of trial when the county designated in the complaint is not the proper county, is a limitation upon its power, and necessarily implies that if the county designated in the complaint is the proper county, the place of trial cannot be changed, except for some good reason authorized by the code. Mc-

Farland v. Martin, 144 Cal. 771; 78 Pac. 239.

Residence. Conditions cannot be imposed, where the defendant makes a demand, at the proper time and in the proper manner, for a change of the place of trial to the county of his residence. Hennessy v. Nicol, 105 Cal. 138; 38 Pac. 649.

Where impartial trial cannot be had. The place of trial may also be changed on the ground that a fair and impartial trial cannot be had in the county where the action was commenced. Cook v. Pendergast, 61 Cal. 72; Grewell v. Walden, 23 Cal. 165.

Waiver of right. The right to have the cause tried in a particular county is a personal privilege, which the party may waive, either expressly or by implication (Tooms v. Randall, 3 Cal. 438; Reyes v. Sanford, 5 Cal. 117; Pearkes v. Freer, 9 Cal. 642; Watts v. White, 13 Cal. 321; Jones v. Frost, 28 Cal. 245; Cook v. Pendergast, 61 Cal. 72; Powell v. Sutro, 80 Cal. 559; 22 Pac. 308; Warner v. Warner, 100 Cal. 11; 34 Pac. 523; Brady v. Times-Mirror Co., 106 Cal. 56; 39 Pac. 209; Hearne v. De Young, 111 Cal. 373; 43 Pac. 1108; Herd v. Tuohy, 133 Cal. 55; 65 Pac. 139); but in an action concerning real estate, a failure to appeal from the first order denying the motion for a change, for want of an affidavit of merits, is not a waiver of the right to move again for the transfer of the cause to the proper county (Fritts v. Camp, 94 Cal. 393; 29 Pac. 867); nor is the filing of a motion to strike out portions of the complaint a waiver of the right to demand a change of the place of trial (Wood v. Herman Mining Co., 139 Cal. 713; 73 Pac. 588); neither is the right waived by amending the demurrer. Pittman v. Carstenbrook, 11 Cal. App. 224; 104 Pac. 699.

Change for convenience of witnesses. The place of trial may be changed for the convenience of witnesses (Haun v. Robinson, 162 Cal. 760; 121 Pac. 1132); and the trial court has a wide discretion in applications on this ground (Pascoe v. Baker, 158 Cal. 232; 110 Pac. 815), and its rulings will not be disturbed, where the affidavits as to residence are conflicting. Bernou v. Bernou, 15 Cal. App. 341; 114 Pac. 1000. The court must grant the change, if the affidavits show clearly that the convenience of the witnesses will be promoted thereby (Thompson v. Brandt, 98 Cal. 155; 32 Pac. 890; Ivey v. Kern County Land Co., 115 Cal. 196; 46 Pac. 926; C. E. Whitney & Co. v. Sellers' Commission Co., 130 Cal. 188; 62 Pac. 472); and the court may consider the relative expense of producing evidence; but the affidavits should set forth the particulars regarding such expense (Schilling v. Buhne, 139 Cal. 611; 73 Pac. 431; Miller & Lux v. Kern County Land Co., 140 Cal. 132; 73 Pac. 836); and must show that the witnesses are material and necessary to the defendant, and must state what is expected to be proved by them, that the court may judge of their materiality. Ennis-Brown Co. v. Long, 7 Cal. App. 313; 94 Pac. 250. The determination of a motion for the rechange of a cause to the first place of venue, for the convenience of witnesses, rests largely in the discretion of the court, and will not be disturbed on appeal, except for abuse of discretion. Wong Fung Hing v. San Francisco Relief etc. Funds, 15 Cal. App. 537; 115 Pac. 331. A refusal to change the place of trial for the convenience of witnesses is an abuse of discretion, where there is practically no legal showing in opposition to the motion. Carr v. Stern, 17 Cal. App. 397; 120 Pac. 35. There is no abuse of discretion in denying a motion for a change, on the ground of the convenience of witnesses, if the affidavits of the plaintiff, in opposition to the motion, show that his witnesses will be inconvenienced. McNeill & Co. v. Doe, 163 Cal. 338; 125 Pac. 345. Where the convenience of witnesses is alleged in opposition to the motion for change on the ground of the residence of the defendant, the evidence as to the convenience of the witnesses should be as full and particular as that required upon the application to transfer the trial. Loehr v. Latham, 15 Cal. 418. The plaintiff may move to change the place of trial after the issues are made, on the ground that the convenience of witnesses and the ends of justice will thereby be promoted (Cook v. Pendergast, 61 Cal. 72); and when the application is made on this ground, no affidavit of merits is necessary. Pascoe v. Baker, 158 Cal. 232; 110 Pac. 815. In an action to foreclose a mortgage upon land situated partly in two counties, where the affidavits establish clearly that the convenience of the witnesses will be promoted by a change, the motion should be granted. Thompson v. Brandt, 98 Cal. 155; 32 Pac. 890. Where the action is brought to quiet title to stock of a corporation defendant having its principal place of business in the county to which the change of venue is sought, and the transactions involved were concluded in that county, and the plaintiff's grantor and all the defendants owning stock reside therein, and the plaintiff has business relations therein, the motion is properly granted. Grant v. Bannister, 145 Cal. 219; 78 Pac. 653. A motion either to change the place of trial, or to retain it for trial in a county other than the proper county, based upon the convenience of witnesses, will not be entertained, where the defendant appears by demurrer only. Wong Fung Hing v. San Francisco Relief etc. Funds, 15 Cal. App. 537; 115 Pac. 331. Until an answer is filed and issues of facts are joined, it cannot be said that a production of witnesses upon a trial will be required.

Wong Fung Hing v. San Francisco Relief etc. Funds, 15 Cal. App. 537; 115 Pac. 331.

Motion for change. This section contemplates that the order shall be made "on motion," but the basis of the motion is the demand and the affidavit of merits; the "motion" is the formal application in court for the order. Jaques v. Owens, 18 Cal. App. 114; 122 Pac. 430. The motion must be made upon notice to the plaintiff, which notice must be in writing, and conform to the requirements of § 1010, post. Bohn v. Bohn, 164 Cal. 532; 129 Pac. 981. To obtain a change of the place of trial, an application must be made to the court for an order of transfer; such application is a motion, and, under this section, the motion for the change must be made, in addition to the demand and affidavit. Bohn v. Bohn, 164 Cal. 532; 129 Pac. 981. Upon the motion, the question of residence must be decided upon probative facts; these are the facts that should be set forth in the affidavit. Bernou v. Bernou, 15 Cal. App. 341; 114 Pac. 1000. A corporation sued, in a transitory action, in a county other than that of its principal place of business, may insist upon a change of the place of trial. Krogh v. Pacific Gateway etc. Co., 11 Cal. App. 237; 104 Pac. 698. If there are several defendants in a personal action, a non-resident defendant, moving alone, is not entitled to have the place of trial changed to the county of his residence, in the absence of a showing that none of the other defendants are residents of the county in which the action was brought. Donohoe v. Wooster, 163 Cal. 114; 124 Pac. 730. In condemnation proceedings, the place of trial cannot be changed to the place of residence of the defendants. Santa Rosa v. Fountain Water Co., 138 Cal. 579; 71 Pac. 1123, 1136. The right to a change of the place of trial must be determined by the conditions existing at the time of the appearance of the party demanding the change. Donohoe v. Wooster, 163 Cal. 114; 124 Pac. 730.

When an appeal may be taken. An appeal may be taken directly upon an order changing or refusing to change the place of trial. Remington Sewing Machine Co. v. Cole, 62 Cal. 311; Broder v. Conklin, 98 Cal. 360; 33 Pac. 211; San Joaquin County v. Superior Court, 98 Cal. 602; 33 Pac. 482. Under the Practice Act, an appeal did not lie from an order granting a change of the place of trial; the remedy for an erroneous change of place of trial was by appeal from the final judgment. Juan v. Ingoldsby, 6 Cal. 439; Martin v. Travers, 7 Cal. 253; People v. Sexton, 24 Cal. 78. Although the taking of an appeal from an order denying a motion to change the place of trial entitles the appellant to a continuance of the general cause in the court below while the appeal is pending, yet it does not follow that the trial court has, by reason of the pendency of the appeal, lost jurisdiction of the case or that a trial of the case, pending the appeal, would be a proceeding without or in excess of the jurisdiction of the trial court; it might amount to an error for which the judgment would be reversed on appeal, but there can be no such excess of jurisdiction as to authorize a writ of prohibition. People v. Whitney, 47 Cal. 584; Southern Pacific R. R. Co. v. Superior Court, 63 Cal. 607; Howell v. Thompson, 70 Cal. 635; 11 Pac. 789. A judgment against the appellant, after an appeal from and before the reversal of the order refusing to change the place of trial, will be reversed upon appeal from the judgment, without inquiry as to the commission of errors on the trial, although the appellant may have appeared at the trial and contested the right of the respondent to recover. Howell v. Thompson, 70 Cal. 635; 11 Pac. 789; Pierson v. McCahill, 23 Cal. 249. The place for filing the notice and undertaking on appeal from an order changing the place of trial to another county, is in the office of the clerk of the superior court of the county which made the order; if filed with the clerk of the county to which the transfer is made, the appeal is ineffectual, and will be dismissed. Mansfield v. O'Keefe, 133 Cal. 362; 65 Pac. 825. Although the affidavit upon which the application to change the venue is made may not show any legal cause for the change, still, if the court grants the application, it has acted judicially upon a matter within its cognizance, and the order is valid and conclusive, unless reversed on appeal. People v. Sexton, 24 Cal. 78. The action of the court in proceeding to trial, pending an appeal from an order denying a motion for a change of the place of trial, is not void, and will not be stayed by writ of prohibition. People v. Whitney, 47 Cal. 584; Howell v. Thompson, 70 Cal. 635; 11 Pac. 789; Southern Pacific R. R. Co. v. Superior Court, 63 Cal. 607. If the motion for a change of the place of trial, on the ground that a fair and impartial trial cannot be had, is made upon conflicting affidavits, a denial of the motion will be sustained on appeal, where the voir dire examination of the jurors is not in the record, and it does not appear that a single citizen liable for jury duty in the county is disqualified from giving the plaintiff a fair and impartial trial. Carpenter v. Sibley, 15 Cal. App. 589; 119 Pac. 391.

Change of venue. See note 74 Am. Dec. 241.

Number of times party is entitled to change of venue. See note 7 Ann. Cas. 304.

County to which venue may be changed in absence of statute requiring change to be to nearest or adjoining county. See note 9 Ann. Cas. 177.

CODE COMMISSIONERS' NOTE. 1. Motion, when made. Where the convenience of witnesses is the ground of the motion, it should not be made till after issue joined. Hubbard v. National

Protection Ins. Co., 11 How. Pr. 149; Merrill v. Grinnell, 10 How. Pr. 31; 12 N. Y. Leg. Obs. 286; Hinchman v. Butler, 7 How. Pr. 462; Hartman v. Spencer, 5 How. Pr. 135; see also Sup. Ct. Rules, pp. 59, 60.

2. **When motion must be made.** In Reyes v. Sanford, 5 Cal. 117, and in Tooms v. Randall, 3 Cal. 438, it was held that an objection to the venue must be made in the answer, and comes too late after an answer to the merits; it follows that such a motion, on grounds disclosed by the complaint, must be made before or at the time of filing demurrer. By filing a demurrer, and consenting to set the case for trial at a particular day, the defendant waives his right to move for a change of venue. Pearkes v. Freer, 9 Cal. 643; see also Jones v. Frost, 28 Cal. 246. See § 396, which modifies the rule of these distinctions in some respects.

3. **Parties, and not court, to make motion.** Motion should be made by the parties to the suit, and not by the court in the first instance. Watts v. White, 13 Cal. 324.

4. **Change of venue discretionary with judge.** The granting of a change of venue on the ground that a fair and impartial trial cannot be had, and other grounds, is discretionary with the courts, and is subject to revision, only in cases of clear abuse. Watson v. Whitney, 23 Cal. 378; Sloan v. Smith, 3 Cal. 410; Pierson v. McCahill, 22 Cal. 131; People v. Sexton, 24 Cal. 78; People v. Fisher, 6 Cal. 155, commenting on People v. Lee, 5 Cal. 354. And the granting of time to file counter-affidavits, on a motion to change the place of trial, is a matter of discretion in the lower court. Pierson v. McCahill, 22 Cal. 127.

5. **When change of venue is not discretionary.** The court has no discretion as to change of venue when an action concerning real estate is brought in the wrong county. A motion to change the place of trial, and not a demurrer, is the proper proceeding, and the trial must be changed as a matter of right. Watts v. White, 13 Cal. 321.

6. **Right to change place of trial may be waived.** For convenience, parties have a right to a trial of particular cases in particular counties. This is a mere privilege, which may be waived by those entitled to it. It must be claimed at the proper time, and in the proper way. It is not, by our statute, matter in abatement of the writ, but a mere privilege of trial of the suit in the given county. The party desiring a change of venue should move the court to change the place of trial, and then the court, in the proper case, has no discretion to refuse the motion. It seems to be a matter of peremptory right. We think the court is not bound, of its own motion, to change the venue, and overrule, so far, the case of Vallejo v. Randall, 5 Cal. 461, if that case is to be so construed. Watts v. White 13 Cal. 324.

7. **Resisting change of venue. What facts should govern court in granting change.** When a defendant applies for a change of the place of trial, on the ground that the action was not brought in the county where he resides, the plaintiff has a right to oppose the motion, by showing that the "convenience of witnesses and the ends of justice would be promoted" by refusing the change, and such facts should govern and control the court in determining the question whether the application for the change should be granted or not. Loehr v. Latham, 15 Cal. 418; Pierson v. McCahill, 22 Cal. 127; Jenkins v. California Stage Co., 22 Cal. 538; see also Fickens v. Jones (not reported), 2 Parker's Cal. Dig., p. 82.

8. **Opposing the motion.** The motion, on the part of the defendant, to change the place of trial for the convenience of witnesses, may be resisted by the plaintiff by affidavit, showing that he has an equal or greater number of material witnesses than the defendant, residing in or near the county in which venue is laid. Gilbert v. Chapman, 1 How. Pr. 56; Spencer v. Hulbert, 2 Cai. 374; Du Boys v. Fronk, 3 Cai. 95; Stoutenbergh v. Legg, 2 Johns. 481; Anonymous, 7 Cow. 102; Onondaga County Bank v. Shepherd, 19 Wend. 10; Sherwood v. Steele, 12 Wend. 294.

9. **When action commenced in wrong court, it may yet be retained there, if convenience of witnesses require it. Practice in such case.** When defendant was not sued in the county of his residence, and moved to change the place of trial to such county, plaintiff may make a counter-motion to retain the cause on account of convenience of witnesses, and then defendant can reply to the allegations as to the convenience of witnesses; or plaintiff, instead of a counter-motion, may simply resist the motion of defendant, but reasonable time should be allowed defendant, if desired, to meet the matter set up in opposition to the original motion. Loehr v. Latham, 15 Cal. 418; Pierson v. McCahill, 22 Cal. 127. But if the plaintiff should neglect to present the facts as to convenience of witnesses, and the place of trial should once be changed to the county where defendant resides, it is doubtful whether the plaintiff can afterwards apply to the court to which it has thus been removed, to have it sent back again. Pierson v. McCahill, 22 Cal. 127.

10. **The affidavit by plaintiff to retain a cause for trial in a county not the residence of the defendant,** upon the ground of convenience of witnesses, must contain the names of the witnesses, and the evidence as to the convenience should be as full and particular as that which is required upon application for this cause to transfer the trial to another county. Loehr v. Latham, 15 Cal. 418.

11. **Affidavit on motion for change of venue must state what.** The facts should be stated in the affidavit in such a manner as to enable the court to draw its own inference whether or not an impartial trial could be had in the particular case, admitting that a prejudice did exist in the community against the defendant. Sloan v. Smith, 3 Cal. 412.

12. **Where the witnesses of plaintiff reside in the place from which defendant applies to move the trial.** If the affidavit of a defendant for a change of venue, because a fair trial cannot be had, shows that all the witnesses of the plaintiff reside in the place from which the defendant seeks to remove the cause, it has an appearance as though he was endeavoring to escape from the effects of their testimony by a removal of the cause, and should cause the application to be regarded with suspicion. Sloan v. Smith, 3 Cal. 412.

13. **The plaintiff in an action may have the place of trial changed** upon a proper showing, equally with the defendant. There is nothing in the statute forbidding it. This section does not confine this motion to the defendant, but leaves it open for both parties. As a general rule, the action should be commenced in the county where the defendants reside; but if, after the issues are made up and each party knows the facts necessary to be proved, the plaintiff should find that the convenience of his witnesses requires that the trial should be had in some other county, where the cause of action arose, and where his witnesses reside, he is certainly as much entitled to a change as the defendant would be under the same circumstances, and he should not be denied that right because he has brought his action in the county where the defendants reside, or where the personal property in controversy may happen to be found. The present case shows the importance of thus establishing the rule. (See facts.) Grewell v. Walden, 23 Cal. 169. In New York, however, it was held that the plaintiff cannot directly move to change his venue, but may change it, by amending his complaint, of course, within the time allowed, or by motion for leave to amend, after the time to amend, of course, has expired. Swartwout v. Payne, 16 Johns. 149; Wakeman v. Sprague, 7 Cow. 164.

14. **Where a strong prejudice exists, so that a fair and impartial trial cannot be had.** See Fickens v. Jones (not reported), 2 Parker's Cal. Dig., p. 82.

15. **The influence of the office of sheriff** is not sufficient cause to change the venue, on the ground that it will prevent a fair and impartial trial. Baker v. Sleight, 2 Cai. 46.

16. **The existence of a party spirit** in the county where the venue is laid, against the party making the application, is not adequate ground for changing the place of trial. Zobieskie v. Bauder, 1 Cai. 487.

17. **Where there are more defendants than one, all must join in the motion.** Sailly v. Hutton, 6 Wend. 508; Welling v. Sweet, 1 How. Pr. 156. And where all do not so join, good reason must be shown therefor. Id. And this doctrine was

established in Fickens v. Jones (not reported), 2 Parker's Cal. Dig., p. 82.

18. **When all defendants need not join in motion.** In an action against several defendants, where some of them have suffered default, the others may move to change the venue. Chace v. Benham, 12 Wend. 200. So if the action be in form against several defendants, and process be served upon a part only. Brittan v. Peabody, 4 Hill, 62, n.

19. **Incapacity of judge to act.** Section 170 of this code provides that "A judge cannot act as such in any of the following cases: When he is related to either party by consanguinity or affinity within the third degree. . . . But this section does not apply to the arrangement of the calendar or the regulation of the order of business." These are the only exceptions mentioned. This section (§ 397) of the code authorizes the court to change the place of trial, "when, from any cause, the judge is disqualified from acting in the action." These are mere formal matters, which determine no question in dispute between the parties, in any way affecting the merits of the controversy. But, beyond these acts, the judge is totally disqualified from sitting in the case. Even if no objection is made, he has no right to act, and ought, of his own motion, to decline to sit as judge. In Oakley v. Aspinwall, 3 N. Y. 547, where a judge sat in the case at the earnest solicitation of the party most interested in excluding him, and with the consent of both parties, it was held that the judgment which depended upon his concurrence was vitiated. People v. De la Guerra, 24 Cal. 77; see also De la Guerra v. Burton, 23 Cal. 592.

20. **Incapacity of judge, exhibition of partisan feeling by judge, etc.** The exhibition, by a judge, of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper, and reprehensible, as calculated to throw suspicion upon the judgment of the court, and bring the administration of justice into contempt, is not, under our statute, sufficient to authorize a change of venue, on the ground that the judge is disqualified from sitting. The law establishes a different rule for determining the qualification of judges from that applied to jurors. McCauley v. Weller, 12 Cal. 523; see also People v. Williams, 24 Cal. 31.

21. **Change of venue in probate court.** When the probate judge is interested in an estate, or in money coming to the heirs therefrom, he has no jurisdiction to act as judge therein, and should grant a change of venue. It is no excuse for refusing a change of venue, in such case, to say that the judge decided correctly upon the matter before him, after refusing such change of venue. Estate of White, 37 Cal. 190.

22. **Fraudulent debtor confessing several fraudulent judgments in different courts.** See Uhlfelder v. Levy, 9 Cal. 607.

23. **The effect of an appeal from order refusing change of venue** is to stay all further proceedings in the action until the determination of such appeal. Pierson v. McCahill, 23 Cal. 249.

24. **Transfer of actions to United States courts.** See Greely v. Townsend, 25 Cal. 604; People v. Hager, 20 Cal. 167; Calderwood v. Braly, 28 Cal. 97; Magraw v. McGlynn, 32 Cal. 257. See the subject fully discussed in notes 13, 14, 15, 16, of § 33, ante. The provisions of "An Act to provide for certifying and removing certain cases from the courts of this state to the United States circuit courts, and to remove by writ of error certain cases from the supreme court of this state to the supreme court of the United States," passed April 9, 1855 (Stats. 1855, p. 80), have been omitted from the code. It has been held that the state legislature had no power to confer jurisdiction on the Federal courts, nor to provide for the mode of exercising its jurisdiction. Say the court in Greely v. Townsend: The origin and history of the act of the 9th of April, 1855 (Stats. 1855, p. 80), are well known. Five months prior to its passage the then supreme court of this state, in the case of Johnson v. Gordon, 4 Cal. 368, had decided that the twenty-fifth section of the Federal Judiciary Act of 1789 was unconstitutional, and declared that no case could be taken from a state to a Federal court by writ of error or otherwise. The decision was made upon the authority of the court of appeals of Virginia, in the case of Martin v. Hunter's Lessee, and in harmony with the ultra state rights doctrine of Calhoun and his political followers, the soundness of which is now undergoing its last test upon the bloody battle-fields of the republic. Startled by the judicial enunciation of this doctrine by the highest court of the state, . . . the legislature sought to provide a remedy against its supposed evils by interposing a barrier to its further judicial progress, apparently without pausing to consider whether a remedy was within the constitutional reach of state legislation. The motive was a good one; but, as all must admit, the power was wanting. It is not within the constitutional power of a state legislature to confer jurisdiction upon Federal courts, or prescribe the means or mode of its exercise. That subject belongs exclusively to the Federal government, and must be regulated solely by the Federal constitution and the laws of Congress. While, therefore, I appreciate the motive of the legislature in passing the act in question, I am compelled to deny its power, and must hold that, so far as the act attempts to prescribe a rule for judicial conduct in cases like the present, it is wholly inoperative. Greely v. Townsend, 25 Cal. 613; see also People v. Judge of Jackson Circuit Court, 21 Mich. 577; 4 Am. Rep. 504.

§ 398. When judge is disqualified, cause to be transferred. If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, or if, from any cause, the court orders the place of trial changed, it must be transferred for trial to a court the parties may agree upon, by stipulation in writing, or made in open court and entered in the minutes; or, if they do not so agree, then to the nearest or most accessible court, where the like objection or cause for making the order does not exist, as follows:

1. If in a superior court, to another superior court.
2. If in a justices' court, to another justices' court in the same county.

Legislation § 398. 1. Enacted March 11, **1872.**

2. Amended by Stats. **1881**, p. 23, to read as at present, except for the words "or most accessible," added in 1897; (1) changing "for any cause" to "from any cause," (2) omitting the words "to be" before the word "changed," (3) in subd. 1, changing the word "district" to "superior" in both instances, (4) renumbering subd. 4 as subd. 2, (5) omitting subd. 2 and subd. 3, which read: "2. If in a county court, to some other county court; 3. If in the probate court, to some other probate court."

3. Amended by Stats. **1897**, p. 184.

When judge is disqualified. This section applies to the judge acting at the time of the application, and not necessarily to the superior judge of the county. Paige v. Carroll, 61 Cal. 215; Upton v. Upton, 94

Cal. 26; 29 Pac. 411; Krumdick v. Crump, 98 Cal. 117; 32 Pac. 800. The construction of this section should be liberal, with a view to effect its object and to promote justice. Paige v. Carroll, 61 Cal. 215. Where the motion for change of venue is presented for hearing before a judge who is qualified to try the case, the motion is properly denied. Santa Cruz Bank v. Taylor, 125 Cal. 249; 57 Pac. 987; Paige v. Carroll, 61 Cal. 215; Finn v. Spagnoli, 67 Cal. 330; 7 Pac. 746; Upton v. Upton, 94 Cal. 26; 29 Pac. 411; Krumdick v. Crump, 98 Cal. 117; 32 Pac. 800. A motion on the ground of bias or prejudice of the judge must be decided upon the affidavits filed: the judge is not permitted to use his own knowledge of the matter (People v. Hubbard, 22 Cal. 34; People v. Compton, 123 Cal. 403; 56 Pac. 44; People v. Blackman, 127 Cal. 248; 59 Pac. 573; Morehouse v. Morehouse, 136 Cal. 332; 68 Pac. 976), except where the ground of disqualification alleged is the interest of the judge; the knowledge of the judge in such case would be more certain and satisfactory than any evidence. Southern California etc. Road Co. v. San Bernardino Nat. Bank, 100 Cal. 316; 34 Pac. 711. The burden is on the moving party to show disqualification; there is no presumption of disqualification. Dakan v. Superior Court, 2 Cal. App. 52; 82 Pac. 1129. The right to make and file an affidavit as to the disqualification of a judge is not restricted to any particular party. Parrish v. Riverside Trust Co., 7 Cal. App. 95; 93 Pac. 685. Even if no objection is made, a disqualified judge has no right to act, and ought, of his own motion, to decline to sit as a judge. People v. De la Guerra, 24 Cal. 73; Tracy v. Colby, 55 Cal. 67. A judgment, after an improper refusal to grant a change of venue on the ground of the disqualification of the judge, is void, and will be reversed on appeal, without consideration of its merits (Meyer v. San Diego, 121 Cal. 113; 53 Pac. 1128); but jurisdiction is not divested by giving notice of the motion; and if the motion is properly denied, the judgment is not affected thereby. Dakan v. Superior Court, 2 Cal. App. 52; 82 Pac. 1129. By the change of venue granted by a judge who is a party to or interested in the action, jurisdiction is conferred upon the court to which the transfer is made. Oakland v. Hart, 129 Cal. 98; 61 Pac. 779. There is no presumption that a judge is disqualified; whether disqualification exists is a judicial question, to be determined by the tribunal before which it is presented, and the facts establishing it must be set forth by affidavits. Dakan v. Superior Court, 2 Cal. App. 52; 82 Pac. 1129.

Nearest and most accessible court. The words "most accessible" mean most accessible from the court in which the action is pending; and the words "nearest court" mean the court nearest that in which the action is pending; but the "most accessible" court may not be the "nearest" court. Anaheim Water Co. v. Jurupa Land etc. Co., 128 Cal. 568; 61 Pac. 80. The determination of this question is a matter within the jurisdiction of the disqualified judge, and an error therein would not render the judgment void. Gage v. Downey, 79 Cal. 140; 21 Pac. 527, 855. In case of the disqualification of a judge, the law selects the judge to try the cause; the disqualified judge has no discretion in the selection. Parrish v. Riverside Trust Co., 7 Cal. App. 95; 93 Pac. 685. A judge who is interested in an action or proceeding can only act as directed by law; he cannot transfer the same to a judge of his own selection, nor call in any other judge to try the cause. John Heinlen Co. v. Superior Court, 17 Cal. App. 660; 121 Pac. 293. The provision for a change to another county is applicable, only when all the judges of the county are disqualified, and there is no judge of the court qualified to act. Petition of Los Angeles Trust Co., 158 Cal. 603; 112 Pac. 56.

Transfer may be compelled. Mandamus will issue to enforce the right of transfer (Livermore v. Brundage, 64 Cal. 299; 30 Pac. 848; Krumdick v. Crump, 98 Cal. 117; 32 Pac. 800); and prohibition will issue to restrain a judge from proceeding in the action, where he is disqualified by reason of interest, although the court in which he presides has jurisdiction of the action (North Bloomfield etc. Mining Co. v. Keyser, 58 Cal. 315; Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121); but the showing of bias and prejudice must be clear, or prohibition will not issue. Dakan v. Superior Court, 2 Cal. App. 52; 82 Pac. 1129. While the motion remains undetermined, prohibition will not issue (Chester v. Colby, 52 Cal. 516; Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121); and the right to claim a transfer is waived by a subsequent stipulation that the cause may be set for trial at any time that may suit the convenience of the judge called to try the same, and by an appearance before the judge called to preside, without objection, and obtaining leave to file an amended complaint, and arguing the demurrer thereto. Schultz v. McLean, 109 Cal. 437; 42 Pac. 557. By consenting to the calling in of a qualified judge, the party is precluded from raising the question of irregularity of manner in calling him in, or of his right to hear the cause. Oakland v. Hart, 129 Cal. 98; 61 Pac. 779.

Power of disqualified judge. The power of the disqualified judge is limited, so that he may not act at all, except so far as the action may be affected by the arrangement of the calendar of his court for regulation

of the order of business, and except to transfer the case to some other court for trial; he has but one thing to do, and it is his duty to do that thing at once; there should be no postponement on account of the absence of the adverse party, no continuances, no time given for the filing of briefs, no holding under advisement, no entertaining of any counter-motion based upon grounds calling for the exercise of judicial discretion. People v. De la Guerra, 24 Cal. 73; Estate of White, 37 Cal. 190; Livermore v. Brundage, 64 Cal. 299; 30 Pac. 848; Krumdick v. Crump, 98 Cal. 117; 32 Pac. 800; Anaheim Water Co. v. Jurupa Land etc. Co., 128 Cal. 568; 61 Pac. 80. The dismissal of an action involves judicial discretion; and if made by a disqualified judge, it is void. People v. De la Guerra, 24 Cal. 73. A motion for a new trial must be transferred for hearing, where the judge becomes disqualified; the hearing and disposition of a motion for a new trial amounts to a trial, within the meaning of this section. Finn v. Spagnoli, 67 Cal. 330; 7 Pac. 746. A cause which the judge is disqualified to try may be transferred by him to another department of the same court, instead of to the superior court of another county. Petition of Los Angeles Trust Co., 158 Cal. 603; 112 Pac. 56; Regents of University v. Turner, 159 Cal. 541; Ann. Cas. 1912C, 1162; 114 Pac. 842. A disqualified judge may call in a judge, who is not disqualified, to act in his place. Upton v. Upton, 94 Cal. 26; 29 Pac. 411; Paige v. Carroll, 61 Cal. 215. The disqualified judge has no discretion: he must perform the duty imposed by this section (Parrish v. Riverside Trust Co., 7 Cal. App. 95; 93 Pac. 685); and the duty imposed is not satisfied by simply calling in a judge who is not disqualified. Remy v. Olds, 5 Cal. Unrep. 182; 42 Pac. 239. This section applies to a proceeding in eminent domain, where the judge is disqualified for interest. John Heinlen Co. v. Superior Court, 17 Cal. App. 660; 121 Pac. 293. A disqualified judge may arrange the calendar and adjust the order of business, but it has no power to take any preliminary step in the prosecution of a criminal case. People v. Ehey, 6 Cal. App. 769; 93 Pac. 379.

§ 399. Papers to be transmitted. Costs, etc. Jurisdiction, etc. When an order is made transferring an action or proceeding for trial, the clerk of the court or justice of the peace, must transmit the pleadings and papers therein to the clerk or justice of the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made when the action or proceeding was originally commenced in the proper county. In all other cases such costs and fees shall be paid by the plaintiff. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

Costs.

1. On removal of criminal action, chargeable against county. See Pol. Code, §§ 4345–4347.
2. On changing place of trial, in justice's court. See post, § 836.

Legislation § 399. 1. Enacted March 11, **1872**. 2. Amended by Stats. **1909**, c. 723, in sentence beginning "The costs," adding, after "was made," the words "when the action or proceeding was originally commenced in the proper county. In all other cases such costs and fees shall be paid by the plaintiff."

Order of transfer. An order for transfer gives jurisdiction to the court of the county to which the action is transferred; such jurisdiction is not affected by irregularities in the manner of transmitting the papers, and an objection thereto will not be heard for the first time on appeal. People v. Suesser, 142 Cal. 354; 75 Pac. 1093. It is not necessary that the court acting upon the motion in the case, shall have jurisdiction by a previous filing of the notice. Younglove v. Steinman, 80 Cal. 375; 22 Pac. 189.

Costs and fees. One party may pay the costs, and procure the transfer of the papers in the case, where they are properly chargeable to the other party. Brooks v. Douglass, 32 Cal. 208. The order changing the place of trial does not become void for non-payment of costs. Chase v. Superior Court, 154 Cal. 789; 99 Pac. 355. Before the amendment to this section in 1909, the costs and fees were payable by the party at whose instance the order was made. Modoc County v. Madden, 136 Cal. 134; 68 Pac. 491; Estep v. Armstrong, 69 Cal. 536; 11 Pac. 132. The order changing the place of trial divests the transferring court of jurisdiction, and vests it in the court to which the transfer is made. Chase v. Superior Court, 154 Cal. 789; 99 Pac. 355.

§ 400. Proceedings after judgment in certain cases transferred. When an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to any court of a county other than the

county in which the real estate, or some portion of it, is situated, the clerk of such court must, after final judgment therein, certify, under his seal of office, and transmit to the corresponding court of the county in which the real estate affected by the action is situated, a copy of the judgment. The clerk receiving such copy must file, docket, and record the judgment in the records of the court, briefly designating it as a judgment transferred from —— court (naming the proper court).

Legislation § 400. Enacted March 11, **1872.**

Trial of issue in probate. The probate court of one county has jurisdiction to change the place of trial of an issue of fact to the probate court of another county; and the result of the trial can be certified to the former court. People v. Almy, 46 Cal. 245.

TITLE V.

MANNER OF COMMENCING CIVIL ACTIONS.

§ 405. Actions, how commenced.
§ 406. Complaint, how indorsed. When summons may be issued, and how waived.
§ 407. Summons, how issued, directed, and what to contain.
§ 408. Manner and time of issuing alias summons.
§ 409. Notice of the pendency of an action affecting the title to real property.
§ 410. Summons, how served and returned.
§ 411. Summons, how served.
§ 412. Cases in which service of summons may be by publication. Certificate of residence.
§ 413. Manner of publication.
§ 414. Proceedings where there are several defendants, and part only are served.
§ 415. Proof of service, how made.
§ 416. When jurisdiction of action acquired.

§ 405. Actions, how commenced. Civil actions in the courts of this state are commenced by filing a complaint.

Legislation § 405. 1. Enacted March 11, **1872**; based on Practice Act, § 22 (New York Code, § 127), as amended by Stats. 1855, p. 303, which read: "Civil actions in the district courts, superior court of the city of San Francisco, and the county courts, shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, and the issuing of a summons thereon; provided, that after the filing of the complaint a defendant in the action may appear, answer or demur, whether the summons has been issued or not, and such appearance, answer or demurrer shall be deemed a waiver of summons." When enacted in 1872, § 405 had the words "and the issuing of summons thereon" at the end of the section.

2. Amended by Code Amdts. **1873–74**, p. 296.

Actions, how commenced. Under the Practice Act, civil actions were commenced by filing the complaint with the clerk of the court, and the issuance of summons thereon (Ex parte Cohen, 6 Cal. 318; People v. O'Neil, 47 Cal. 109; Ex parte Hollis, 59 Cal. 405; Huerstal v. Muir, 62 Cal. 479; Adams v. Patterson, 35 Cal. 122); and the action was not deemed commenced until summons was actually issued. Flandreau v. White, 18 Cal. 639; Green v. Jackson Water Co., 10 Cal. 374; Sharp v. Maguire, 19 Cal. 577. The mode of commencing an action, and of acquiring jurisdiction of the parties, is controlled by the code, and not by the common law. Dupuy v. Shear, 29 Cal. 238; Adams v. Patterson, 35 Cal. 122. Where no complaint is filed, an action cannot be considered as commenced. Tinn v. United States District Attorney, 148 Cal. 773; 113 Am. St. Rep. 354; 84 Pac. 152. An action was commenced when the original complaint was filed (Allen v. Marshall, 34 Cal. 165); but where the complaint did not state a cause of action until the amendment thereof, the suit was not deemed commenced until the filing of the amended complaint. Anderson v. Mayers, 50 Cal. 525. Where there is no evidence that the complaint was ever filed, the defendant, on an appeal taken by him, is estopped to deny that it was duly filed. Mahlstadt v. Blanc, 34 Cal. 577. The filing of the complaint operates to stop the running of the statute of limitations, only as to those who were made defendants at the time it was filed; the filing of a supplemental complaint is the commencement of a new action as to added defendants. Jeffers v. Cook, 58 Cal. 147. The statute of limitations declares that the action shall be deemed commenced, within its meaning, "when the complaint has been filed in the proper court": the filing of the complaint, without the issuance of summons thereon, stops the running of the statute. Pimental v. San Francisco, 21 Cal. 351; Allen v. Marshall, 34 Cal. 165. The failure of a corporation to file its articles of incorporation, simply deprives it of the right to maintain an action until the statute is complied with. Riverdale Mining Co. v. Wicks, 14 Cal. App. 526; 112 Pac. 896.

CODE COMMISSIONERS' NOTE. 1. Actions, when commenced. Actions are commenced by filing complaint and issuing summons. Dupuy v. Shear, 29 Cal. 239. And an action is not commenced until the issuance of summons under the provisions of the statute limiting the time for the enforcement of mechanics' liens. Green v. Jackson Water Co., 10 Cal. 375. The provisions of § 350, that actions are commenced within the meaning of the statute of limitations, upon the filing of a complaint without the issuance of summons, does not apply to time of commencing an action for the enforcement of a mechanic's lien; such an action is not commenced until complaint is filed and summons issued. See Flandreau v. White, 18 Cal. 640.

2. Action commenced, within the meaning of statute of limitations. The action is commenced, within the meaning of the title as to time of commencing actions, as soon as the complaint is filed. See note to § 350, ante (statute of limitations), referring to Sharp v. Maguire, 19 Cal. 577; Pimental v. San Francisco, 21 Cal. 351; Allen v. Marshall, 34 Cal. 165; Adams v. Patterson, 35 Cal. 124.

§ 406. Complaint, how indorsed. When summons may be issued, and how waived. The clerk must indorse on the complaint the day, month, and year that it is filed, and at any time within one year thereafter, the plaintiff may have a summons issued, and if the action be brought against two or more defendants, who reside in different counties, may have a summons issued for each of such counties at the same time. But at any time within the

year after the complaint is filed, the defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons; or, if the action be brought upon a joint contract of two or more defendants, and one of them has appeared within the year, the other or others may be served or appear after the year at any time before trial.

Admission of service by defendant. Post, § 415.
Alias summons. Post, § 408.
Appearance. Post, §§ 416, 1014.

Legislation § 406. 1. Enacted March 11, **1872**; based on Practice Act, § 23, as amended by Stats. 1860, p. 298, which read: "The clerk shall indorse on the complaint, the day, month, and year, the same is filed, and at any time within one year after the filing of the same, the plaintiff may have a summons issued. The summons shall be signed by the clerk and directed to the defendant, and be issued under the seal of the court." When enacted in 1872, § 406 read: "The clerk must indorse on the complaint the day, month, and year that it is filed, and at any time within one year thereafter the plaintiff may have summons issued. But at any time after the complaint is filed the defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons."
2. Amended by Code Amdts. **1873–74**, p. 296.
3. Amendment by Stats. **1901**, p. 129; unconstitutional. See note ante, § 5.

Issuance of summons. The only object of the summons is to bring a party into court: if that object is attained by the appearance and pleading of the party, there can be no injury to him. Smith v. Curtis, 7 Cal. 584; Ford v. Bushard, 116 Cal. 273; 48 Pac. 119. A summons is to be issued, as a matter of course, upon application to the clerk; no order by the court or judge is required. Dupuy v. Shear, 29 Cal. 238. The Practice Act required that a copy of the complaint, certified by the clerk, should be served with the summons; and it was held that the summons was not issued, within the meaning of that act, unless accompanied by a certified copy of the complaint, and all papers essential to a valid personal service on the defendant, duly attested. Reynolds v. Page, 35 Cal. 296. If no summons is issued within a year after the filing of the complaint, the action may properly be dismissed. Reynolds v. Page, 35 Cal. 296; Grigsby v. Napa County, 36 Cal. 585; 95 Am. Dec. 213; Carpentier v. Minturn, 39 Cal. 450; Linden etc. Mining Co. v. Sheplar, 53 Cal. 245; Cowell v. Stuart, 69 Cal. 525; 11 Pac. 57; Kubli v. Hawkett, 89 Cal. 638; 27 Pac. 57; First Nat. Bank v. Nason, 115 Cal. 626; 47 Pac. 595; People v. Jefferds, 126 Cal. 296; 58 Pac. 704.

Time of issuance. The time within which a summons can be issued is limited to one year after the filing of the complaint. Dupuy v. Shear, 29 Cal. 238. Before the amendment of § 23 of the Practice Act in 1860, a summons could be issued at any time after filing the complaint; but it was doubtless found that to permit summons to be issued at any time would indefinitely extend the statute of limitations. Dupuy v. Shear, 29 Cal. 238; Reynolds v. Page, 35 Cal. 296.

Service of summons. When the defendant is found and actually served, the court acquires jurisdiction of his person; and the question whether there has been reasonable diligence in making the service within the time limited, is left open, to be considered and decided by the court upon the facts of the case. Murray v. Gleeson, 100 Cal. 511; 35 Pac. 88.

Waiver of summons by appearance. Appearance by attorney, whether authorized or not, binds the party, except in case of the fraud or insolvency of the attorney (Suydam v. Pitcher, 4 Cal. 280; Holmes v. Rogers, 13 Cal. 191; Sampson v. Ohleyer, 22 Cal. 200); and answering is an appearance, and a waiver of the issuing of summons (Hayes v. Shattuck, 21 Cal. 51; Shay v. Superior Court, 57 Cal. 541); as is also consent to time of trial, after appearance. Cronise v. Carghill, 4 Cal. 120. Where counsel appears expressly for two named defendants, his signature to papers in the case, thereafter, as attorney for the defendants, will be considered as limited to those for whom he expressly appeared. Spangel v. Dellinger, 42 Cal. 148; Hobbs v. Duff, 43 Cal. 485; Kenney v. Parks, 120 Cal. 22; 52 Pac. 40. Where one appears, and objects only to the consideration of the case, or to the procedure, for want of jurisdiction, the appearance is special; where he appears, and asks for any relief which could be given to a party only in a pending case, the appearance is general, no matter how carefully or expressly it may be stated that the appearance is special; it is the character of the relief asked, not the intention of the party that it shall or shall not constitute a general appearance, which is material. In re Clarke, 125 Cal. 388; 58 Pac. 22.

CODE COMMISSIONERS' NOTE. 1. Summons is waived by voluntary appearance of defendant. Although the action is said, by § 405 of the code, to be commenced by the filing a complaint and issuing a summons, yet by § 416 it is provided that a voluntary appearance shall be equivalent to personal service of the summons. Putting in an answer is an appearance, and such appearance must be held to be a waiver of the mere formality of issuing a summons, the service of which, in such case, becomes unnecessary. The only purpose of the summons is to bring the defendant into court. It is constantly said by courts, when actions are commenced by the service of process, as by capias ad respondendum, that a voluntary appearance waives all defects of process, even when objection is taken in the same action. Under our practice, the plaintiff, by filing his complaint, goes himself into court; and although he may not choose to take out a summons, we think he cannot object to the defendant coming in and answering the complaint, any more than he could object to the defendant's voluntary appearance after the plaintiff had taken out a summons which he did not choose to serve. Quite as little can the defendant in a collateral

action object that there was no action pending, after having voluntarily put in an answer to the complaint on file. Hayes v. Shattuck, 21 Cal. 54.

2. Summons is waived by appearance of defendant's attorney. See Suydam v. Pitcher, 4 Cal. 280.

3. When appearance by mistake does not avoid issuance of summons. If an attorney, authorized to appear for a part, only, of several defendants, inadvertently files an answer for all, and, discovering his mistake, obtains an order allowing him to withdraw his answer and file a new one, limited to the defendants for whom he intended to answer, the court acquires jurisdiction only of those defendants for whom the attorney finally appears. Forbes v. Hyde, 31 Cal. 342.

4. Time when summons may issue. In 1860, this section was amended so as to read as follows: "And at any time within one year after the filing of the same, the plaintiff may have a summons issued." These are the only provisions prescribing the mode of commencing suits and authorizing the issue of a summons. The summons authorized by this section to be issued, whether one or more, issues as a matter of course upon application to the clerk. The party, upon filing his complaint and paying the costs, has a right to it, and no order by the court or judge is required. But the section was amended in 1860, and limited the time within which the summons provided for in that and the preceding section could be issued to one year after the filing of the complaint. This is an amendment which merely affects the mode of proceeding, and all proceedings thereafter taken must be in accordance with that provision. A summons thereafter to be issued as a matter of absolute right, must issue by virtue of the provisions of the section as amended, because there is no other provision authorizing the issue of any summons. Conceding, then, that under the provisions of §§ 405 and 406, a party may have more than one summons issued on the same complaint, they must all be issued within the time prescribed, for if he relies upon the provisions of that section to establish his right, he cannot have more than these provisions authorize. A technical alias summons is not known to our law, and, in fact, under our system of practice, there is no necessity for one. The summons specifies no return-day, and when it has once been issued, it may be served and returned at any time, without reference to the time of the commencement of the next term of court. It is served by delivering a copy to the defendant. If more than one summons is authorized by the Practice Act, the second has no necessary connection with or dependence upon the first. It is based upon the complaint alone. The capias ad respondendum, under the common-law system, was returnable at the next succeeding term of the court, and a return of the writ was a necessary prerequisite to the issuing of an alias. It was also necessary, on return of the capias, that a continuance-roll should be made up, and, unless there was a continuance, there was nothing to connect an alias, or pluries, with the capias upon which it depended, and the suit failed. Unless the continuity of the proceedings was kept up by a continuance-roll from the issuing of the capias to the issuing of the alias or pluries upon which the defendant was arrested, the issue of the capias within the time specified in the statute of limitations would not save the action, where the arrest was made on an alias issued after the statute had run upon the demand in suit. A party might, doubtless, issue as many writs of capias as he pleased on the same demand, without reference to the return of the prior writ; but in such case the suing out of such writ would be the institution of a new suit, and not be a process in the same suit. But these principles have no relevancy to our system. Dupuy v. Shear, 29 Cal. 241.

5. Service of summons after notice of motion to dismiss for want of prosecution. If notice is given of a motion to dismiss an action for want of prosecution, before summons is served, and the plaintiff then serves the summons, and at the end of ten days takes a default, but judgment is not entered up, the entry of the default does not preclude the court from dismissing the action. The dismissal takes effect by relation back to the time of service of the motion. Grigsby v. Napa County, 36 Cal. 585; 95 Am. Dec. 213.

6. Dismissing action for want of prosecution. This court will not reverse a judgment dismissing an action for want of prosecution, unless there has been an abuse of discretion in the court below in giving the judgment; and it devolves upon the appellant to show such abuse of discretion; and allowing an action to rest without service of summons, for two years and eight months after the summons is issued, is such a want of diligence as to justify the court in dismissing the action. Grigsby v. Napa County, 36 Cal. 585; 95 Am. Dec. 213.

7. When the court must order summons to issue. If the court had any authority to direct a second summons to issue, after the expiration of a year from the filing of the complaint, it must be because, by filing the complaint, and issuing a summons thereon, a suit had been commenced, within the meaning of the provisions of the Practice Act, and there was thenceforth a suit pending and within the control of the court, which the court, by virtue of its general powers over the subject-matter, was authorized to dispose of; and, as incident to this power, it was authorized to direct process to issue for the purpose of acquiring jurisdiction of the person. We can perceive no other ground upon which to base the power of the court to make the order. Conceding this authority to exist, the exercise of the power rests in the sound legal discretion of the court. The order for the issue of the summons in the first instance (see facts) was made upon an ex parte application, and, doubtless, without much consideration. Afterwards, the question was more fully considered upon the motion to vacate the order and set aside the summons, when both parties were heard upon the merits. The court then came to the conclusion that the order had been made and the summons issued improvidently, and the summons was thereupon set aside. The court, upon a full hearing, exercised its judicial discretion, and we are not prepared to say it was not soundly exercised. Dupuy v. Shear, 29 Cal. 242.

8. Issuance of summons within one year. What constitutes issuance of summons. Section 410 provides that "at any time within one year after the filing of the same [the complaint] the plaintiff may have summons issued"; and § 28 provides that "a copy of the complaint shall be served with the summons." Under this last provision, the service of a copy of the complaint is held to be essential to a valid service. McMillan v. Reynolds, 11 Cal. 373. What is intended by the terms "issuing a summons thereon," and "may have a summons issued"? Does this statute simply mean the delivery of the technical summons alone, duly signed and sealed? or does it mean that the summons shall be issued with the accompanying copy of the complaint, which is absolutely necessary to enable the plaintiff to procure a valid service? It is evident to our minds that the latter is the true construction. To adhere strictly to the letter in this instance, and hold the delivery of a summons sufficient, would truly be to stick in the bark. The issuing of the summons intended, is issuing it accompanied with everything necessary to enable the party, when he receives it, to make it available for the purpose of effecting a valid service. The issuing of a summons without a copy of the complaint would be a nugatory act, whereas something practical must have been intended. The summons cannot be said to be issued, within the meaning of the act, till it is in a condition to serve. Before the amendment of 1860, the summons might be issued at any time after filing the complaint; but by the amendment of that year it could only be issued within a year. It was doubtless found that to permit the summons to be issued at any time, without limitation, enabled plaintiffs to indefinitely extend the statute of limitations. At all events, the amendment was adopted, and it was evidently the intention to require parties to proceed with their litigation within a reasonable time—to place themselves, at least, in a condition to effect service of process. And we think the summons not issued, within the meaning of the act, till all the papers essen-

tial to enable the plaintiff to make a valid personal appearance on the defendants, duly attested, are placed at his disposal. Reynolds v. Page, 35 Cal. 300; see also opinion of Rhoades, J., dissenting.

9. Generally. See note 2 to § 405.

§ 407. Summons, how issued, directed, and what to contain. The summons must be directed to the defendant, signed by the clerk, and issued under the seal of the court, and must contain:

1. The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed;

2. A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within thirty days, if served elsewhere;

3. A notice that, unless the defendant so appears and answers, the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint.

Style of process. Const., art. vi, § 20.

Sovereignty, resides in the people. Pol. Code, § 30.

Legislation § 407. 1. Enacted March 11, **1872**; based on Practice Act, §§ 23, 24, 25, 26. (See ante, Legislation § 406, for § 23.) As amended by Stats. 1859, p. 39, § 24 read: "The summons shall state the parties to the action, the court in which it is brought, the county in which the complaint is filed, the cause and general nature of the action, and require the defendant to appear and answer the complaint within the time mentioned in the next section, after the service of summons, exclusive of the day of service, or that judgment by default will be taken against him, according to the prayer of the complaint, briefly stating the sum of money or other relief demanded in the complaint, and the clerk shall also indorse on the summons the names of the plaintiff's attorneys." Practice Act, § 25, read: "The time in which the summons shall require the defendant to answer the complaint, shall be as follows: 1. If the defendant is served within the county in which the action is brought, ten days: 2. If the defendant is served out of the county, but in the district in which the action is brought, twenty days; 3. In all other cases, forty days." Practice Act, § 26 (New York Code, § 129), read: "There shall also be inserted in the summons a notice, in substance, as follows: 1. In an action arising on contract for the recovery only of money or damages, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint; 2. In other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the court for the relief demanded therein." When enacted in 1872, § 407 read the same as at present to the end of subd. 1, and the remainder of the section read: "2. The cause and general nature of the action; 3. A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within twenty days, if served out of the county but in the district in which the action is brought, and within forty days if served elsewhere; 4. In an action arising on contract, for the recovery of money or damages only, a notice that unless the defendant so appears and answers the plaintiff will take judgment for the sum demanded in the complaint (stating it); 5. In other actions, a notice that unless defendant so appears and answers the plaintiff will apply to the court for the relief demanded in the complaint. The name of the plaintiff's attorney must be indorsed on the summons."

2. Amended by Code Amdts. **1880**, p. 13, (1) changing subd. 2 to read: "2. A statement of the nature of the action in general terms"; (2) changing subd. 3, after the words "brought," to read, "within thirty days, if served elsewhere."

3. Amended by Stats. **1897**, p. 53.

4. Amendment by Stats. **1901**, p. 129; unconstitutional. See note ante, § 5.

Signed by the clerk. The provision of this section, that the summons must be signed by the clerk, is sufficiently complied with by affixing a printed signature. Ligare v. California Southern R. R. Co., 76 Cal. 610; 18 Pac. 777.

Names of the parties. The form of the summons is prescribed by law, and is mandatory, not directory; it must contain all that is required by the statute, whether deemed needful or not, and, among other things, it must state the names of all the parties (Lyman v. Milton, 44 Cal. 630; Ward v. Ward, 59 Cal. 139); but the name of the attorney is not a part of the summons. People v. Wrin, 143 Cal. 11; 76 Pac. 646. Where there are several defendants to the action, it is not sufficient to designate some as et al., which indicates that there are some parties who are not named. Lyman v. Milton, 44 Cal. 630; Ward v. Ward, 59 Cal. 139.

The court in which it is brought. A summons which wrongly designates the court of the county in which brought is sufficient in this regard, if issued under the seal and attested by the judge of the proper court. Crane v. Brannan, 3 Cal. 192.

Direction to appear. The date for the appearance of the defendant must be fixed as prescribed by the code (Deidesheimer v. Brown, 8 Cal. 339); and where radically defective, the service must be set aside. State v. Woodlief, 2 Cal. 241; Porter v. Hermann, 8 Cal. 619. The date of the appearance depends upon the date of the service. Savings and Loan Society v. Thompson, 32 Cal. 347. The defendant must appear specially, and move to dismiss a defective summons (Lyman v. Milton, 44 Cal. 630; Kent v. West, 50 Cal. 185; Arroyo Ditch etc. Co. v. Superior Court, 92 Cal. 47; 27 Am. St. Rep. 91; 28 Pac. 54); for defects are waived by pleading. Sears v. Starbird, 78 Cal. 225; 20 Pac. 547.

Notice to be contained in summons. This section does not assume to declare the particulars of the summons, but it declares the matters it must contain; and a substantial compliance with its requirements is all that is required. Stanquist v. Hebbard, 122 Cal. 268; 54 Pac. 841; Granger v. Sherriff, 133 Cal. 416; 65 Pac. 873. A notice that the plaintiff will take judgment for the relief demanded in the complaint is, in substance, a notice that he will apply to the court for the relief. Clark v. Palmer, 90 Cal. 504; 27 Pac. 375; People v. Dodge, 104 Cal. 487; 38 Pac. 203. A summons that does not apprise the defendant that, upon his failure to appear and answer, the plaintiff will take judgment against him, is fatally defective. Porter v. Hermann, 8 Cal. 619; Keybers v. McComber, 67 Cal. 395; 7 Pac. 838. Reference to the complaint on file is sufficient, even though there is an amended complaint. Dowling v. Comerford, 99 Cal. 204; 33 Pac. 853. Formerly, the code required the summons to state the cause and general nature of the action (King v. Blood, 41 Cal. 314; Bewick v. Muir, 83 Cal. 368; 23 Pac. 389; People v. Dodge, 104 Cal. 487; 38 Pac. 203); but it was then held that the summons was sufficient, if it stated the nature of the action in general terms (Bewick v. Muir, 83 Cal. 368; 23 Pac. 389; People v. Dodge, 104 Cal. 487; 38 Pac. 203), or if the nature of the action was described by reference to the complaint served therewith (Calderwood v. Brooks, 28 Cal. 151); it was sufficient, however, if it stated substantially the cause and general nature of the action set forth in the complaint (People v. Greene, 52 Cal. 577); and if defectively stated, it made the action voidable only. People v. Dodge, 104 Cal. 487; 38 Pac. 203. The summons is not void because the relief asked for is stated in the alternative. Stanquist v. Hebbard, 122 Cal. 268; 54 Pac. 841. If the summons is radically defective for want of legal sufficiency, the whole proceeding may be dismissed, but not for want of some immaterial recitation which does not affect the rights of the parties (Polock v. Hunt, 2 Cal. 193; Whitwell v. Barbier, 7 Cal. 54); but the court has power to amend a summons, pending its service. Baldwin v. Foster, 157 Cal. 643; 108 Pac. 714. While the Practice Act required the answer to be filed within a limited time after service of the summons, yet the defendant could put in an answer at any time before final judgment, even after default entered, and without application to the court for that purpose. Stevens v. Ross, 1 Cal. 94.

Amendment of summons. The summons is the process whereby parties defendant are brought into court so as to give the court jurisdiction of their persons. Nellis v. Justices' Court, 20 Cal. App. 394; 129 Pac. 472. The court has full power to amend its process, pending service thereof; and it must be presumed, where an amended summons is collaterally attacked, that it was properly issued upon an order of the court, where nothing appears to the contrary. Baldwin v. Foster, 157 Cal. 643; 108 Pac. 714.

Effect of summons issued without seal of court. See note 20 L. R. A. 425.

Description of parties in process. See note 40 L. R. A. (N. S.) 566.

CODE COMMISSIONERS' NOTE. The preceding section embodies in a condensed form the substance of §§ 24, 25, and 26, and the last clause of § 23, of the Practice Act.

1. **Form of summons. Proceeding by defendant on defective summons.** "The summons is the process by which parties defendant are brought into court, so as to give the court jurisdiction of their persons. Its form is prescribed by law; and whatever the form may be, it must be observed, at least substantially. It may be that a summons, under our system, is required to state more than is necessary for the information of the defendant; that a copy of the complaint served by the sheriff or the attorney would have been all that is needful. If that be so, it is a matter for the legislature, and not for the courts. We entertain no doubt that a summons must contain all that is required by the statute, whether deemed needful or not, and, among other things, must state the parties to the action. It may be that when the defendant moved to quash the summons for insufficiency, the court might have entertained a counter-motion to have it amended, by inserting the omitted names of the defendants, and, on its being so amended, might have denied the original motion. In Polock v. Hunt, 2 Cal. 193, it was held that the court had power to amend the summons so as to make it conform to the law, when it operated no hardship or surprise to the defendants. No such counter-motion, however, was made in this case, and we cannot pass upon that question." Lyman v. Milton, 44 Cal. 630.

Motion to dismiss defective summons. "A defendant has a right to appear for the purpose of moving to dismiss a defective summons, and it is error in the court to refuse him that privilege. Nor does the fact that he afterwards appears and answers waive his right or cure the error." Deidesheimer v. Brown, 8 Cal. 339; Gray v. Hawes, 8 Cal. 569; Lyman v. Milton, 44 Cal. 630.

2. **Defective summons. Summons must apprise defendant of what.** In an action for fraudulently converting money of plaintiff, it was held that the summons was fatally defective in this, that it did not apprise the defendant that, upon his failure to appear and answer, the plaintiff would take judgment against him for fraudulently converting the property of the plaintiff. The notice in the summons was that "if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment against you for the said sum of $11,156.62, interest and costs," etc. Under such a notice the plaintiff could only take an ordinary judgment upon default for the money demanded. A defective summons will not sustain a judgment by default. State v. Woodlief, 2 Cal. 241; Porter v. Hermann, 8 Cal. 625.

3. **Defective summons will not support judgment by default.** If the summons be extremely defective in not conforming to the provisions of the code, it is insufficient to support a judgment by default. State v. Woodlief, 2 Cal. 242.

4. **Amendment of summons.** Court has power to amend summons so as to make it conform to law, if it operates no hardship or surprise to defendants. Polock v. Hunt, 2 Cal. 194; Lyman v. Milton, 44 Cal. 630.

5. **Object of summons. Appearance sufficient.** The only object of a summons is to bring a party into court, and if that object be obtained by the appearance and pleading of a party, there can be no injury to him. Smith v. Curtis, 7 Cal. 587.

6. Time in which summons shall require defendant to answer. Subdivision 3 of this section allows a party ten days after the service of the summons to file his answer, if served in the county; twenty days if out of the county, but within the judicial district; and forty days in all other cases. A non-resident of the state would therefore come under the last clause, and be entitled to forty days after the service of the summons. Grewell v. Henderson, 5 Cal. 465.

Time to answer when summons is served by publication. And if summons is served by publication on defendant, non-resident of the state, he has forty days after the lapse of the period of publication. Grewell v. Henderson, 5 Cal. 465.

7. Judicial notice of local divisions of state, counties, etc., under subdivision 3. Courts take judicial notice of the territorial extent of the jurisdiction and sovereignty exercised de facto by their own government, and of the local divisions of the country, as into states, counties, cities, towns, and the like, so far as political government is concerned. People v. Smith, 1 Cal. 9; see also § 1875, post.

8. Answer filed after time for answering has expired. It is perhaps not strictly regular to file the answer after the time for answering has expired, without leave of the court. But if the default of the defendant had not been entered, we think the filing was not a nullity. It was, at most, a mere irregularity, for which the answer might have been stricken out, but on account of which the plaintiff was not entitled to have it set aside, unless the court, in the exercise of its discretion, deemed such to be the proper course. The whole proceedings were in fieri, and our opinion is, that the court had absolute power, either to retain the answer or to permit another to be filed, or to pursue whatever course in that respect the justice of the case required. A defendant cannot, for these purposes, be considered in default until his default has been actually entered in accordance with the statute. Bowers v. Dickerson, 18 Cal. 421.

§ 408. Manner and time of issuing alias summons. If the summons is returned without being served on any or all of the defendants, or if it has been lost, the clerk, upon the demand of the plaintiff, may issue an alias summons in the same form as the original; provided, that no such alias summons shall be issued after the expiration of one year from the date of the filing of the complaint.

New summons, in action for forcible entry and detainer. See post, § 1167.

Legislation § 408. 1. Enacted March 11, **1872**, and then read: "If the summons is returned without being served on any or all of the defendants, the clerk, upon the demand of the plaintiff, may issue an alias summons in the same form as the original."

2. Amended by Code Amdts. **1875–76**, p. 90, adding the words "or if it has been lost."

3. Amended by Stats. **1887**, p. 50.

4. Amendment by Stats. **1901**, p. 130; unconstitutional. See note ante, § 5.

Time for issuance of alias summons. The clerk cannot issue an alias summons after the time fixed by statute (White v. Superior Court, 126 Cal. 245; 58 Pac. 450; Modoc Land etc. Co. v. Superior Court, 128 Cal. 255; 60 Pac. 848; Siskiyou County Bank v. Hoyt, 132 Cal. 81; 64 Pac. 118; Sharpstein v. Eells, 132 Cal. 507; 64 Pac. 1080; Grant v. McArthur, 137 Cal. 270; 70 Pac. 88; Swortfiguer v. White, 141 Cal. 576; 75 Pac. 172); but this does not impair the power of the court to authorize a summons to be withdrawn for further service or service by publication. Rue v. Quinn, 137 Cal. 651; 66 Pac. 216; 70 Pac. 732. An alias summons, issued at any time prior to the commencement of the publication service ordered, is sufficient to sustain a default judgment. Doyle v. Hampton, 159 Cal. 729; 116 Pac. 39. The issuance of an alias summons may be assumed from the recitals of the judgment. Doyle v. Hampton, 159 Cal. 729; 116 Pac. 39.

Form of alias summons. The provision of this section as to the form of an alias summons means no more than that it shall conform to the requirements of § 407, ante; it does not preclude the insertion therein of the name of a defendant, omitted, through a clerical error, from the original summons. Doyle v. Hampton, 159 Cal. 729; 116 Pac. 39. This section has no reference to the service of an alias summons, where parties are brought in by order of the court, or by stipulation, under the provision of § 389, ante, and does not preclude service by publication. Bank of Venice v. Hutchinson, 19 Cal. App. 219; 125 Pac. 252. Unlike a summons, the length of personal notice, by citation, in a probate proceeding, may be prescribed by the court; otherwise it is five days. San Francisco Protestant Orphan Asylum v. Superior Court, 116 Cal. 443; 48 Pac. 379.

§ 409. Notice of the pendency of an action affecting the title to real property. In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, and the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only, shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive

notice of the pendency of the action, and only of its pendency against parties designated by their real names.

Lis pendens, in suit to quiet title. See post, § 749.

Partition. Recording notice of suit. Post, § 755.

Person in possession of real property, action against, cannot be prejudiced by any alienation made by him. Post, § 747.

Legislation § 409. **1.** Enacted March 11, **1872**; based on Practice Act, § 27 (New York Code, § 132), which, as amended by Stats. 1871–72, p. 189, read: "In an action affecting the title to real property, or the right to the possession of real property, the plaintiff, at the time of filing his complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record with the county recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties to and the object of the action, and a description of the property in that county affected thereby; and the defendant may also, in such notice, state the nature and extent of the relief claimed in the answer. From the time of filing for record only, shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby." When enacted in 1872, (1) the words "the title to," before "real property," were omitted, (2) after the latter, the words "or the right to the possession of real property" were omitted, (3) before "complaint," the word "his" was changed to "the," (4) the words "record with the county recorder" were changed to "file with the recorder," (5) the words "or defense" were added before "and a description," (6) the clause beginning "and the defendant" and ending "answer" was omitted, (7) the words "filing for record only, shall" were changed to "filing, only, is," and (8) the word "be" was omitted before "constructive."

2. Amended by Code Amdts. **1873–74**, p. 297.

3. Amendment by Stats. **1901**, p. 130; unconstitutional. See note ante, § 5.

Notice of pendency of action. The common-law doctrine in reference to purchasers pendente lite is qualified by this section; and a purchaser pendente lite, though not a party, is not bound by the result of the controversy, unless notice of lis pendens is filed with the recorder. Richardson v. White, 18 Cal. 102; Ault v. Gassaway, 18 Cal. 205; Grattan v. Wiggins, 23 Cal. 16; Horn v. Jones, 28 Cal. 194; Corwin v. Bensley, 43 Cal. 253; Partridge v. Shepard, 71 Cal. 470; 12 Pac. 480; Warnock v. Harlow, 96 Cal. 298; 31 Am. St. Rep. 209; 31 Pac. 166; McNamara v. Oakland Building etc. Ass'n, 132 Cal. 247; 64 Pac. 277. Notice of lis pendens is not jurisdictional. Blackburn v. Bucksport etc. R. R. Co., 7 Cal. App. 649; 95 Pac. 668.

Character of actions to which applicable. The common-law doctrine of lis pendens did not apply to proceedings before a board exercising quasi-judicial functions, but only to those before a court; and the statute has not so extended it. Curran v. Shattuck, 24 Cal. 427. The object of the rule in equity was, not to restrict the right of alienation of the prevailing party, but to hold the interest of the losing party subservient to the judgment. Corwin v. Bensley, 43 Cal. 253; Welton v. Cook, 61 Cal. 481. It does not apply to proceedings in ejectment, but to proceedings in chancery, the purpose of which is to "affect titles" by turning equitable estates into legal ones, or to enforce liens upon legal estates (Wattson v. Dowling, 26 Cal. 124); nor does it apply to actions affecting the possession of real property, but only to actions which operate directly on the title, and by the result of which some change as to the title is wrought; examples of which are found in actions for the condemnation of real estate, and for the specific performance of contracts relating thereto, for the foreclosure of mortgages or other liens, and the like. Long v. Neville, 29 Cal. 131; Partridge v. Shepard, 71 Cal. 470; 12 Pac. 480. The filing of a notice of lis pendens affects only those parties designated by their real names. Davidson v. All Persons, 18 Cal. App. 723; 124 Pac. 570. Notice of lis pendens, filed during the pendency of a divorce suit, has no legal significance. Mayberry v. Whittier, 144 Cal. 322; 78 Pac. 16. A purchaser of land is not affected by proceedings for its condemnation, where no notice of lis pendens is filed (Bensley v. Mountain Lake Water Co., 13 Cal. 306; 73 Am. Dec. 575), as this section applies to condemnation proceedings; and the word "purchaser" includes those who acquire a homestead interest in the property. Roach v. Riverside Water Co., 74 Cal. 263; 15 Pac. 776; McNamara v. Oakland Building etc. Ass'n, 132 Cal. 247; 64 Pac. 277. It also applies to an action to foreclose the lien of a street assessment. Page v. W. W. Chase Co., 145 Cal. 578; 79 Pac. 278. A defendant asking affirmative relief in a cross-complaint may file a lis pendens (Blackburn v. Bucksport etc. R. R. Co., 7 Cal. App. 649; 95 Pac. 668); and notice of an action affecting the title to real estate may be recorded. De Wolfskill v. Smith, 5 Cal. App. 175; 89 Pac. 1001.

Filing of notice for record. The plaintiff in an action to establish and enforce a trust, who has filed notice of lis pendens therein, is entitled to be made a party to the foreclosure of a lien upon the property. Randall v. Duff, 79 Cal. 115; 3 L. R. A. 754; 19 Pac. 532; 21 Pac. 610. The mere pendency of an action does not, as at common law, charge a subsequent purchaser; but notice of lis pendens must appear of record. Warnock v. Harlow, 96 Cal. 298; 31 Am. St. Rep. 209; 31 Pac. 166; Carpenter v. Lewis, 119 Cal. 18; 50 Pac. 925; Commercial Bank v. Pritchard, 126 Cal. 600; 59 Pac. 130. This section applies only to actions pending, not to judgments and decrees rendered, which, at common law, were notice to all persons. Grattan v. Wiggins, 23 Cal. 16, 17; Horn v. Jones, 28 Cal. 194. The filing of a notice of lis pendens in an action to foreclose a mortgage does not operate as notice to the

grantees of the mortgagor; they must be made parties. Jeffers v. Cook, 58 Cal. 147.

Constructive and actual notice. The object of the notice is to give the opportunity of defense, and also to notify third persons of the litigation, that they may not purchase, except advisedly (Richardson v. White, 18 Cal. 102); and was intended as a substitute for the rule, that the pendency of the suit was itself constructive notice; and where a party has actual notice, he is as much bound by the judgment as if lis pendens had been filed. Sampson v. Ohleyer, 22 Cal. 200; Blackburn v. Bucksport etc. R. R. Co., 7 Cal. App. 649; 95 Pac. 668. The rules of law relating to actual notice, and the effect thereof upon parties dealing with or taking possession of the property in litigation, are in no sense changed by this section. Sampson v. Ohleyer, 22 Cal. 200. The filing of the notice of lis pendens does not operate as a prior recording of a subsequent conveyance; nor is the notice such an instrument as the statute contemplates. Warnock v. Harlow, 96 Cal. 298; 31 Am. St. Rep. 209; 31 Pac. 166. The word "instrument," as used in the code, will invariably be found to indicate some written paper or instrument, signed and delivered by one person to another, transferring the title to or creating a lien upon property, or giving a right to a debt or duty: it nowhere embraces a writ of any kind. Hoag v. Howard, 55 Cal. 564; Warnock v. Harlow, 96 Cal. 298; 31 Am. St. Rep. 209; 31 Pac. 166. Inquiry whether the purchaser had actual notice is unnecessary, for, by the terms of the statute, the notice of lis pendens filed with the recorder is the only notice of the pendency of the action that binds subsequent encumbrancers or purchasers. Corwin v. Bensley, 43 Cal. 253.

Subsequent purchaser or encumbrancer. If any defendant, against whom judgment is rendered, was in possession at the time of the commencement of the action, any other party who took possession after the filing of the notice of lis pendens, or with actual notice of the pendency of the action, is bound by the judgment, and may be dispossessed by execution, the same as though he were a party to the judgment. Fogarty v. Sparks, 22 Cal. 142. The effect of the notice of lis pendens is to make a subsequent purchaser a mere volunteer, affected by the judgment rendered in the action. Gregory v. Haynes, 13 Cal. 591; Haynes v. Calderwood, 23 Cal. 409. In an action affecting title to real estate, the notice of lis pendens binds purchasers from the defendants, who can only take subject to the decree rendered in the action. Curtis v. Sutter, 15 Cal. 259; Welton v. Cook, 61 Cal. 481. Notice of lis pendens is unnecessary, in an action to enforce a tax lien on property; the assessment creates a lien which is not extinguished until the tax is paid or the property is sold; and the lien of the judgment, by operation of law, relates back to and takes effect from the date of the assessment. Reeve v. Kennedy, 43 Cal. 643. Where a notice of lis pendens is filed, the defendant cannot, by transfer of his possession, defeat the action; if the law were otherwise, it would be in the power of the defendant to put the plaintiff to a new action as often as he thought proper to assign. Sampson v. Ohleyer, 22 Cal. 200; Ferrea v. Chabot, 63 Cal. 564.

The law of lis pendens. See notes 14 Am. Dec. 774; 39 Am. Rep. 487; 56 Am. St. Rep. 853.

Effect of lis pendens upon prior executory contract for sale of land. See note 7 Ann. Cas. 1092.

Application of doctrine of lis pendens to purchase after judgment and before institution of proceedings to review. See note 9 Ann. Cas. 987.

Filing of lis pendens as notice of assignment See note 66 L. R. A. 771.

Protection to one purchasing after decree and before any steps have been taken to review the same. See note 10 L. R. A. (N. S.) 443.

Effect of filing of lis pendens on marketability of title. See note 38 L. R. A. (N. S.) 29.

CODE COMMISSIONERS' NOTE. 1. Construction of section. Applicable to suits in ejectment. Section 27 of the Practice Act reads as follows: "In an action affecting the title of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file with the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties to, and the object of, the action or defense, and a description of the property in that county affected thereby; and the defendant may also, in such notice, state the nature and extent of the relief claimed in the answer. From the time of filing, only, is the pendency of the action constructive notice to a purchaser or encumbrancer of the property affected thereby." This was held, however, to have no relation to proceedings in ejectment, but to proceedings in chancery, the purpose of which is to affect titles by turning equitable estates into legal ones or to dispose of legal estates by vendition for the purpose of satisfying liens upon them, etc. Wattson v. Dowling, 26 Cal. 125. So, also, it was held that the section did not apply to actions affecting the possession of real property, but only to actions affecting the title—it was held that the section only applied "to actions which operate directly upon the title, and by the result of which some change as to the title is wrought; examples of which are found in actions for the condemnation of real estate and the specific performance of contracts relating thereto, for the foreclosure of mortgages, or other liens and the like." Long v. Neville, 29 Cal. 135. In order to remedy this defect, if it could be so called, and make the section applicable to ejectment suits, the legislature of 1872 passed the following act: Stats. 1871–72, p. 189. "An Act to amend an act entitled An Act to regulate proceedings in civil cases in courts of justice of this state, passed April twenty-ninth, eighteen hundred and fifty-one." Approved March 2, 1872. [Quoting the act.] But as this act is amendatory of an act which is repealed by the code, it does not affect § 409, and is repealed when the code takes effect, that is, on the first day of January, 1873. See § 18, ante. Section 409, however, accomplishes the same object by omitting the words "title to" between the words "affecting" and "real property." So that now the cases of Wattson v. Dowling, 26 Cal. 125, and Long v. Neville, 29 Cal. 135, so far as they hold that this section is not applicable to ejectment suits, etc., cease to be of any effect. It is clear that an action which affects the right to possession of real property certainly must be held as "affecting real property," and consequently this section is applicable to suits in ejectment and actions affecting the right to possession of real

property in like manner with actions affecting the title to real property.

2. Application of section. In Richardson v. White, 18 Cal. 106, this section was held to apply to those purchasing or taking encumbrances upon the property after filing of notice of pendency of the action (Ault v. Gassaway, 18 Cal. 205); but this section only applies to actions pending, and not to judgments and decrees rendered, which, at common law, it would seem, were notice to all persons. Sorrell v. Carpenter, 2 P. Wms. 482; 24 Eng. Reprint, 825; Searle v. Lane, 2 Vern. 37, 88; 23 Eng. Reprint, 634, 667; Monell v. Lawrence, 12 Johns. 534; Watlington v. Howley, 1 Dessaus. (S. C.) 170; Grattan v. Wiggins, 23 Cal. 38.

3. Section not applicable to proceedings before supervisors. The common-law doctrine of lis pendens does not apply to the proceedings before a board of supervisors. Curran v. Shattuck, 24 Cal. 434.

4. Purchaser in good faith, with no notice of lis pendens. Where proceedings for the condemnation of property were pending, a purchaser in good faith, where no notice of pendency of action is filed, is unaffected by the proceedings. Bensley v. Mountain Lake Water Co., 13 Cal. 307; 73 Am. Dec. 575.

5. Notice of pendency of suit must be filed, to have effect to charge purchaser. Under our statute, the mere pendency of a suit does not charge the purchaser of the subject of it as a purchaser pendente lite, at common law. A notice of lis pendens, to have that effect, must be filed or appear of record. Head v. Fordyce, 17 Cal. 151. The general rule is, that one not a party to a suit is not affected by the judgment. The exception at common law is, that a pendente lite purchaser, though not a party, was so affected; the qualification of the doctrine made by our statute is, that such purchaser is not affected, unless notice of such lis pendens be filed with the recorder. It is not necessary to consider whether actual notice would not supply the place of this constructive notice, for the bill makes no such case. The common-law doctrine of lis pendens rests upon the fiction of notice to all persons of the pendency of suits; and to remedy the evils which might grow out of the transfer of apparent legal titles or rights of action to persons ignorant of litigation respecting them, this provision was inserted in our statute. We consider our statute, not as giving new rights to the plaintiff, but as a limitation upon the rights which he had before. If no lis pendens be filed, the party acquiring an interest or claim, pendente lite, stands wholly unaffected by the suit. If he has any rights which, but for the suit, he could set up, he may still maintain those rights. But he would not be foreclosed by a judgment against the party to the suit, from whom he obtained his assignment. The object of the statute evidently was to add to the common-law rule a single term, to wit, to require for constructive notice not only a suit, but filing a notice of it; so that this rule is as if it read: "The commencement of a suit and the filing of notice of it are constructive notice to all the world of the action, and purchasers or assignees, afterwards becoming such, are mere volunteers, and bound by the judgment. Richardson v. White, 18 Cal. 106. The rule of law was settled, that "every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. And therefore a purchase made of property actually in litigation, pendente lite, for a valuable consideration, and without any express or implied notice, in point of fact, affects the purchaser in the same manner as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit." 1 Story's Equity, § 405. This rule sometimes operated as a hardship upon parties who had no actual notice, and the code (§ 409) provides that the plaintiff or defendant may file a notice of the pendency of the action with the recorder of the county in which the property is situated, and the law provides, that, "from the time of filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby." In no other respect are the rules of law relating to the subject changed by the statute. A purchaser or encumbrancer of property, instead of being required to examine all the suits pending in the several courts, to ascertain whether any of them relate to or affect the real estate he is negotiating about, has now only to examine the notices of lis pendens filed in the recorder's office of the county where the real estate is situated, and he is only bound by constructive notice of what may there appear. The rules of law relating to actual notice of a pending action, and the effect of such actual notice upon parties dealing with or taking possession of property in litigation, are in no sense changed by this section of the Practice Act, but remain the same as before this law was passed. Richardson v. White, 18 Cal. 102; Bensley v. Mountain Lake Water Co., 13 Cal. 306; 73 Am. Dec. 575; Head v. Fordyce, 17 Cal. 149; Ault v. Gassaway, 18 Cal. 205; Sampson v. Ohleyer, 22 Cal. 210.

6. Purchaser during pendency of action, but where no notice is filed. If a party purchases land during the pendency of an action to foreclose a mortgage on it, but where no notice of lis pendens has been filed, and he purchase without notice, after entry of default but before final judgment, he is not bound by the judgment, even if final judgment gives constructive notice to parties dealing with the subject-matter. Abadie v. Lobero, 36 Cal. 400.

7. Effect of a notice of pendency of action upon subsequent purchasers. It was held that the effect of the lis pendens was to make a subsequent purchaser a mere volunteer, affected by the judgment rendered, or which might be rendered, in the suit, of the pendency of which notice was given. Gregory v. Haynes, 13 Cal. 594; see also Gregory v. Haynes, 21 Cal. 446; and these cases are affirmed in Haynes v. Calderwood, 23 Cal. 410; see also Curtis v. Sutter, 15 Cal. 263. Where an action to set aside a fraudulent deed was commenced, and a notice of the pendency of the action was filed, it was held that a party who bought of the defendant subsequent to the filing of the notice of lis pendens was bound by the decree. Hurlbutt v. Butenop, 27 Cal. 56. And in an action to foreclose a mortgage, a purchaser, subsequent to notice of lis pendens filed, was held to stand in the same position as his grantor, as to the issuance of a writ of assistance in favor of a purchaser under the decree of foreclosure. Montgomery v. Byers, 21 Cal. 107. A notice of lis pendens having been duly filed, a party purchasing from the defendant while the action was pending, and after the notice was filed, is bound and estopped by the judgment therein. Calderwood v. Tevis, 23 Cal. 337.

8. Subsequent purchaser with notice of lis pendens. A purchaser of land, with notice of the pendency of an action for the foreclosure of a mortgage on it, or a purchaser after final judgment, in either case is bound by the judgment. Abadie v. Lobero, 36 Cal. 399.

9. Purchaser pendente lite, estopped by the decree. If an action is brought against a corporation to foreclose a mortgage, purporting to have been executed by it, and a lis pendens is filed, and a decree is rendered enforcing the mortgage, a party who buys the mortgaged property, pendente lite, at sheriff's sale, made on a judgment which does not enforce a lien older than the lis pendens, is estopped from saying that the mortgage was not the act of the corporation. A party who has no interest in mortgaged property at the time an action is brought to foreclose the mortgage, and who buys, pendente lite, and after a lis pendens has been filed, is not a necessary party to the foreclosure. Horn v. Jones, 28 Cal. 194.

10. Actual notice of pendency of action, of same effect as filing of notice of lis pendens. If notice of lis pendens is filed, there can be no doubt that every party acquiring an interest in the premises subsequent to the filing would have been bound by the judgment in the foreclosure suit without being made a party. Hurlbutt v. Butenop, 27 Cal. 56; Horn v. Jones, 28 Cal. 194; Haynes v. Calderwood, 23 Cal. 409. It does not appear in this case that a notice of lis pendens was in fact filed. But the object of filing such a notice is to afford constructive notice of the pendency of the action. This is the only effect indicated by the code (§ 409). The ob-

ject being to afford notice, actual notice must certainly be as effectual as constructive notice under the statute. We can perceive no good reason why a party taking an interest in a tract of land, pending a proceeding to foreclose a mortgage upon it, with actual notice of the action, should not be bound by the judgment, although no notice of lis pendens has been filed. We think he is, and so hold the law to be. Sharp v. Lumley, 34 Cal. 615; see also Sampson v. Ohleyer, 22 Cal. 210.

11. What constitutes actual notice of pendency of action. In this case a foreclosure suit was commenced before the petition in insolvency was filed. In the schedule attached to the petition in insolvency, the debt, and the mortgage upon the land in controversy to secure it, were specifically described, and this statement appended: "Suit for foreclosure commenced." And the order of the judge expressly provided "that all actions now pending may be prosecuted to judgment." This order allowed the action for foreclosure to proceed; and the assignee in insolvency, and all parties purchasing from him, had notice of the pendency of the foreclosure suit, and they are bound by the judgment. Sharp v. Lumley, 34 Cal. 615.

Sufficient notice to put one on inquiry as to pendency of action. See Grattan v. Wiggins, 23 Cal. 38.

12. When an action is considered pending. An action is still pending, after a default, until final judgment has been entered. Abadie v. Lobero, 36 Cal. 400.

§ 410. Summons, how served and returned. The summons may be served by the sheriff of the county where the defendant is found, or by any other person over the age of eighteen, not a party to the action. A copy of the complaint must be served, with the summons, upon each of the defendants. When the summons is served by the sheriff, it must be returned, with his certificate of its service, and of the service of any copy of the complaint, where such copy is served, to the office of the clerk from which it issued. When it is served by any other person, it must be returned to the same place, with an affidavit of such person of its service, and of the service of a copy of the complaint, where such copy is served.

Process, how returnable to another county. See Pol. Code, § 4158.

Return of sheriff, prima facie evidence. See Pol. Code, § 4159.

Delay of sheriff in making return, liability. See Pol. Code, § 4160.

Legislation § 410. 1. Enacted March 11, **1872;** based on Practice Act, § 28, as amended by Stats. 1869–70, p. 574, which read: "The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him or appointed by a judge of the court in which the action is brought, or by any white male citizen of the United States over twenty-one years of age, who is competent to be a witness on the trial of the action, except as hereinafter provided; a copy of the complaint shall be served with the summons. Where the summons is served by the sheriff or his deputy, it shall be returned, with the certificate or affidavit of the officer of its service and of the service of the copy of the complaint, to the office of the clerk from which the summons issued. When the summons is served by any other person, as before provided, it shall be returned to the office of the clerk from which it issued, with the affidavit of such person of its service, and of the service of a copy of the complaint. If there be more than one defendant in the action, and such defendants reside within the county, a copy of the complaint need be served on only one of the defendants." When enacted in 1872, § 410 read: "The summons may be served by the sheriff of the county where the defendant is found, or by any other person not a party to the action. A copy of the complaint must be served with the summons, unless there is more than one defendant residing in the same county, in which case a copy of the complaint must be served upon one of them. When the summons is served by the sheriff it must be returned, with his certificate of its service, and of the service of a copy of the complaint, to the office of the clerk from which it issued. When it is served by any other person it must be returned to the same place, with an affidavit of such person of its service, and of the service of a copy of the complaint."

2. Amended by Stats. **1873–74,** p. 297, to read as at present, except that the words "upon each of the defendants" were changed from "unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants."

3. Amended by Stats. **1893,** p. 207.

4. Amendment by Stats. **1901,** p. 130; unconstitutional. See note ante, § 5.

Copy of complaint must be served. A copy of the complaint must be served with the summons. Southern Pac. R. R. Co. v. Superior Court, 59 Cal. 471. The Practice Act did not require a copy to be served on each defendant: service of a copy on one of the defendants residing in the county was sufficient. Calderwood v. Brooks, 28 Cal. 151. Where the summons has never been served upon the defendant, the service of an amended complaint upon him is void. Powers v. Braly, 75 Cal. 237; 17 Pac. 197.

Return of sheriff. In making service of the summons, and in the return thereof, the provisions of the statute must be, and must appear to have been, substantially observed and followed by the officer; otherwise the proceedings cannot be supported upon a direct appeal. People v. Bernal, 43 Cal. 385. The failure of the return to show that a copy of the complaint was served is a mere irregularity, and does not affect the validity of the judgment. Shirran v. Dallas, 21 Cal. App. 405; 132 Pac. 88, 454. The officer may always amend his return so as to conform to the facts, if there are no intervening rights to be affected. Newhall v. Provost, 6 Cal. 85; Gavitt v. Doub, 23 Cal. 78; Rousset v. Boyle, 45 Cal. 64; Hewell v. Lane, 53 Cal. 213; People v. Murback, 64 Cal. 369; 30 Pac. 608; Allison v. Thomas, 72 Cal. 562; 1 Am. St. Rep. 89; 14 Pac. 309; Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146; 16 Pac. 887; People v. Goldenson, 76 Cal. 328; 19 Pac. 161; McGrath v. Wallace, 116 Cal. 548; 48 Pac. 719. A mistake in the date of the sheriff's return

may be corrected at any time. Ritter v. Scannell, 11 Cal. 238; 70 Am. Dec. 775; Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509. It will be presumed in favor of the officer who has the general power of making the service, that he discharged his duty in the legal mode. Curtis v. Herrick, 14 Cal. 117; 73 Am. Dec. 632. A defendant who was legally served, and who did not defend, on the ground that he was not the party intended to be served, cannot, after judgment against him, resist its enforcement on that ground. Brum v. Ivins, 154 Cal. 17; 129 Am. St. Rep. 137; 96 Pac. 876. A return, that the defendant cannot be found within the county, is sufficient. Rue v. Quinn, 137 Cal. 651; 66 Pac. 216; 70 Pac. 732.

Service by one other than sheriff. The right to serve process does not belong to every private individual; it is restricted to a particular class, and as to them, it is given to be exercised only under particular circumstances, and, to be legal, the service must be by some one authorized, as well by personal capacity to act as by the existence of the particular facts which impart the authority or control the mode of action; the validity of the act of service depends upon its being authorized, and it must appear in the record. McMillan v. Reynolds, 11 Cal. 372. The provision authorizing service by one other than the sheriff has been held constitutional. Hibernia Sav. & L. Soc. v. Clarke, 110 Cal. 27; 42 Pac. 425; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742.

Affidavit of service. A certificate by a constable is not sufficient to confer jurisdiction (Berentz v. Belmont Oil Mining Co., 148 Cal. 577; 113 Am. St. Rep. 308; 84 Pac. 47; Berentz v. Kern King Oil etc. Co., 7 Cal. Unrep. 214; 84 Pac. 45); nor is one by a deputy sheriff. Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089. Where the service is made by one other than the sheriff, or the person appointed by the judge, the affidavit should show that such person possessed the qualifications enumerated in the section; but an objection goes only to the formality of the return, which may be amended; and the judgment is good against a collateral attack for a mere irregularity of service. Dorente v. Sullivan, 7 Cal. 279; Pellier v. Gillespie, 67 Cal. 582; 8 Pac. 185. The statute does not require the summons to be filed, but only returned with the affidavit of service to the office of the issuing clerk; and where returned and filed with the affidavit annexed, this is sufficient. Hibernia Sav. & L. Soc. v. Clarke, 110 Cal. 27; 42 Pac. 425. The affidavit, when made by a person other than the sheriff, must state that at the time of service the person making the same was over eighteen years of age. Maynard v. MacCrellish, 57 Cal. 355; Howard v. Galloway, 60 Cal. 10; Weil v. Bent, 60 Cal. 603; Doerfler v. Schmidt, 64 Cal. 265; 30 Pac. 816; Lyons v. Cunningham, 66 Cal. 42; 4 Pac. 938; Barney v. Vigoureaux, 75 Cal. 376; 17 Pac. 433; Horton v. Gallardo, 88 Cal. 581; 26 Pac. 375; Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509. Where a person other than the sheriff attempts to make service upon a defendant within the county, he should, as a rule, be required to show, in his affidavit, the nature of the effort made by him to serve the party, and, where practicable, give the reasons why service could not be made. Kahn v. Matthai, 115 Cal. 689; 47 Pac. 698. An affidavit of service of summons may be amended nunc pro tunc. Woodward v. Brown, 119 Cal. 283; 63 Am. St. Rep. 108; 51 Pac. 2, 542. It need not appear by the return that the party serving a summons in unlawful detainer did so at the request of the plaintiff or his attorney. Block v. Kearney, 6 Cal. Unrep. 660; 64 Pac. 267. It is the fact of proper service, and not the proof thereof, that gives the court jurisdiction. Morrissey v. Gray, 160 Cal. 390; 117 Pac. 438.

Amendment of return. The power of the court to order returns amended is not affected by mere lapse of time, or by the fact that the officer making the return is, at the time of the proposed amendment, out of office. Morrissey v. Gray, 160 Cal. 390; 117 Pac. 438. The amendment of the return is permitted in support of the judgment actually given, but not where the effect would be to avoid the judgment, or render it erroneous, or subject it to reversal. Morrissey v. Gray, 160 Cal. 390; 117 Pac. 438. Where the facts conferring jurisdiction exist, but the record of them, by way of the return, is defective, great liberality is allowed in permitting an amended return to be filed. Morrissey v. Gray, 160 Cal. 390; 117 Pac. 438.

Service of process by attorney or agent of plaintiff. See note 102 Am. St. Rep. 694.

CODE COMMISSIONERS' NOTE. 1. Service of summons by person other than the sheriff. Formerly § 28 of the Practice Act provided that "service of summons might be made by," among other persons, "any white male citizen over twenty-one years of age, who is competent to be a witness on the trial of the action," etc., and "a copy of the complaint, certified by the clerk, should be served with the summons." Under these provisions, affidavits of service of summons were held to be defective, which did not state that the person serving it was a white male citizen, and over twenty-one years of age, and competent to testify; and that a certified copy of the complaint accompanied the summons. See McMillan v. Reynolds, 11 Cal. 378; Hahn v. Kelly, 34 Cal. 404; 94 Am. Dec. 742; Reynolds v. Page, 35 Cal. 299; Curtis v. Herrick, 14 Cal. 119; 73 Am. Dec. 632. It will be observed, however, that § 410 of the code omits the requirements, that the person making service shall be a "white male citizen of the age of twenty-one years," and also that the copy of the complaint shall be certified by the clerk, etc. The only requirement is, that he shall not be a party to the action. Of course, as a matter of proof of service, he must be competent to make an affidavit. See also Dimick v. Campbell, 31 Cal. 239; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742, affirmed in Quivey v. Porter, 37 Cal. 458; see also Reynolds v. Page, 35 Cal. 299.

2. Service by deputy, and his return thereon. The return of the service of summons issued in an action was signed Elijah T. Cole, D. S., and it was held that such a return was insufficient to prove service, and that the act and return of a deputy is a nullity, unless done in the name and by the authority of the sheriff. Rowley v. Howard, 23 Cal. 403, affirming Joyce v. Joyce, 5 Cal. 449; and, to the same effect, see Lewes v. Thompsen, 3 Cal. 266.

3. Return by sheriff. Amendments thereto. Correction of mistakes. The sheriff has no right, after making a return, to amend it so as to affect rights which have already vested. Newhall v. Provost, 6 Cal. 87. But a mistake in the date may be corrected any time. Ritter v. Scannell, 11 Cal. 249; 70 Am. Dec. 775.

4. Service where there are more than one defendant residing in same county. Where the affidavit states the county in which service was made, and one of defendants makes default, it will be presumed that he was a resident of the county where service was made. A copy of the complaint need be served on but one of several defendants residing in same county. Calderwood v. Brooks, 28 Cal. 153.

5. Proof of service of summons and complaint. See § 415, post, and notes.

§ 411. Summons, how served. The summons must be served by delivering a copy thereof as follows:

1. If the suit is against a corporation formed under the laws of this state: to the president or other head of the corporation, vice-president, secretary, assistant secretary, cashier or managing agent thereof.

2. If suit is against a foreign corporation, or a non-resident joint-stock company or association, doing business and having a managing or business agent, cashier or secretary within this state: to such agent, cashier or secretary.

3. If against a minor, under the age of fourteen years, residing within this state: to such minor, personally, and also to his father, mother, or guardian: or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

4. If against a person residing within this state who has been judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed: to such person, and also to his guardian.

5. If against a county, city or town: to the president of the board of supervisors, president of the council or trustees, or other head of the legislative department thereof.

6. In all other cases to the defendant personally.

Association, service may be on one of members of. Ante, § 388.

Return of summons. Post, § 581a.

Telegraph, service by. Post, § 1017.

Legislation § 411. 1. Enacted March 11, **1872** (based on Practice Act, § 29, as amended by Stats. 1861, p. 496), and then read: "§ 411. The summons must be served by delivering a copy thereof, as follows: 1. [Same as the present amendment (1915)]; 2. If the suit is against a foreign corporation, or a non-resident joint-stock company or association doing business and having a managing or business agent, cashier, or secretary within this state: to such agent, cashier, or secretary; 3. If against a minor under the age of fourteen years: to such minor personally, and also to his father, mother, or guardian; or if there be none within the state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed; 4. If against a person judicially declared to be of unsound mind or incapable of conducting his own affairs, and for whom a guardian has been appointed: to such guardian;" [subds. 5 and 6 reading the same as the present amendment (1915).]

2. Amended by Code Amdts. **1873–74**, p. 298.

3. Amended by Stats. **1915**, p. 943, (1) in subd. 1, inserting "vice-president" and "assistant secretary"; (2) in subd 2, striking out "the" in the phrase "If the suit"; (3) in subd. 3, second clause, "this" substituted for "the," in the phrase "within the state." The other changes are in matters of punctuation, probably the result of carelessness.

Kinds of service. Service of summons may be personal, or, in some cases, by publication. People v. Huber, 20 Cal. 81. "Personal service" means the actual delivery of the process to the defendant in person. Holiness Church v. Metropolitan Church Association, 12 Cal. App. 445; 107 Pac. 633. Personal service of writs and process can only be made by delivery to the person (Edmondson v. Mason, 16 Cal. 386); and where the return shows that the summons was served upon one not designated as the defendant, it is insufficient. Adams v. Town, 3 Cal. 247. "Personal service" upon a corporation, domestic or foreign, is made, under this section, by delivering a copy of the summons, together with a copy of the complaint, to certain designated officers thereof. Holiness Church v. Metropolitan Church Association, 12 Cal. App. 445; 107 Pac. 633. A party regularly served, though by a wrong name, is bound, unless he comes in and sets up the misnomer and whatever defense he may have. Brum v. Ivins, 154 Cal. 17; 129 Am. St. Rep. 137; 96 Pac. 876. Service on a foreign corporation, in a manner other than

that authorized by § 405 of the Civil Code, though a person designated by such corporation, resident in the state, is a constructive and not a personal service. Holiness Church v. Metropolitan Church Association, 12 Cal. App. 445; 107 Pac. 633.

Service in suit against domestic corporation. In a suit against a domestic corporation, service must be upon its president or other head, or on its secretary, cashier, or managing agent; service upon "J. S., one of the proprietors of the company," is insufficient. O'Brien v. Shaw's Flat etc. Canal Co., 10 Cal. 343. Service must be made upon one of the officers named in the statute. Aiken v. Quartz Rock etc. Mining Co., 6 Cal. 186; O'Brien v. Shaw's Flat etc. Canal Co., 10 Cal. 343. Service on the receiving and paying teller of a bank cannot bind the corporation (Kennedy v. Hibernia Sav. & L. Soc., 38 Cal. 151; Blanc v. Paymaster Mining Co., 95 Cal. 524; 29 Am. St. Rep. 149; 30 Pac. 765); but service upon a president de jure is sufficient. Eel River Nav. Co. v. Struver, 41 Cal. 616. While the service may be on the president, yet the sheriff making the service must make the return according to the fact. People v. Lee, 128 Cal. 330; 60 Pac. 854.

Action against a foreign corporation. A foreign corporation must be "doing business" in this state, to justify service upon it through a managing agent. Dickinson v. Zubiate Min. Co., 11 Cal. App. 656; 106 Pac. 123. A single transaction by a foreign corporation does not constitute doing business within the state, so as to authorize the service of summons. Jameson v. Simonds Saw Co., 2 Cal. App. 582; 84 Pac. 289. The service must be upon the person designated by the corporation as its agent, cashier, or secretary. Eureka etc. Canal Co. v. Superior Court, 66 Cal. 311; 5 Pac. 490; Jameson v. Simonds Saw Co., 2 Cal. App. 582; 84 Pac. 289. Service upon a traveling solicitor, not shown to be a partner or managing agent of a copartnership, is not sufficient. Booth v. Gamble-Robinson Commission Co., 139 Cal. 175; 72 Pac. 908. Service is also insufficient, when made on a person whose name is appended to advertisements as general manager of a railroad "route," and who is not a party to the action, nor has ever been the managing or business agent, cashier, or secretary of the defendant, within this state. Norton v. Atchison etc. R. R. Co., 97 Cal. 388; 33 Am. St. Rep. 198; 30 Pac. 585; 32 Pac. 452. The term "business agent" does not mean every person intrusted with a commission or an employment by a foreign corporation: it means one performing the duties of managing agent, cashier, or secretary of the corporation. Jameson v. Simonds Saw Co., 2 Cal. App. 582; 84 Pac. 289. The service of summons, in this state, upon the president of a foreign corporation, is insufficient to support a judgment by default, where neither the complaint nor the affidavit of service of summons shows the required statutory facts. R. H. Herron Co. v. Westside Electric Co., 18 Cal. App. 778; 124 Pac. 455.

Service in action against a minor. The third subdivision of this section, providing for service upon an infant, has no application to the service of a notice in a special proceeding. Estate of Hamilton, 120 Cal. 421; 52 Pac. 708. The provision requiring personal service upon an infant under the age of fourteen, and also upon his guardian, is mandatory. Gray v. Palmer, 9 Cal. 616. An infant under the age of fourteen years, not served with process, cannot nominate the attorney, nor can the court appoint a guardian ad litem until after service upon him (McCloskey v. Sweeney, 66 Cal. 53; 4 Pac. 943; Redmond v. Peterson, 102 Cal. 595; 41 Am. St. Rep. 204; 36 Pac. 923; Johnson v. San Francisco Sav. Union, 63 Cal. 554), as the court has no right to appoint a guardian until the infant is brought into court. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. Sufficiency of service of summons upon minors. Richardson v. Loupe, 80 Cal. 490; 22 Pac. 227.

Service in action against person of unsound mind. In an action against an incompetent person, service must be upon both the incompetent and his guardian (Justice v. Ott, 87 Cal. 530; 25 Pac. 691); but where, although the person is alleged to be insane, it does not apear that any guardian has been judicially appointed, service upon the defendant personally is sufficient. Sacramento Sav. Bank v. Spencer, 53 Cal. 737. No valid judgment can be rendered against an insane person, unless he has been served with summons. In re Lambert, 134 Cal. 626; 86 Am. St. Rep. 296; 55 L. R. A. 856; 66 Pac. 851.

What return sufficient in justice's court. Cardwell v. Sabichi, 59 Cal. 490.

Citation, how served. See note post, § 1709.

Service of process on one of several partners. See notes 44 Am. Dec. 570; 20 Ann. Cas. 1238.

Service of process on corporations. See note 66 Am. Dec. 119.

Who is "agent" within statute providing for service of process on agent of foreign corporation. See note 19 Ann. Cas. 200.

Who may be served in suit against foreign corporation. See note 23 L. R. A. 490.

Who is managing agent of foreign corporation for purposes of service of process. See note 4 L. R. A. (N. S.) 460.

Service of process upon foreign corporation not doing business in state as basis of judgment in personam. See note 8 L. R. A. (N. S.) 538.

Right to serve process in action against corporation upon non-resident officer who is within state as party or witness. See note 24 L. R. A. (N. S.) 276.

CODE COMMISSIONERS' NOTE. 1. Service of summons on officers of corporation. Service must be on one of the officers mentioned in subdivision 1 of this section. Aiken v. Quartz Rock Mariposa Mining Co., 6 Cal. 186; and a return is sufficient which states that service was made on

J. S., one of the "proprietors" of a company; it must state that such person was either "president or head of the corporation, secretary, cashier, or managing agent thereof." O'Brien v. Shaw's Flat etc. Canal Co., 10 Cal. 343; Adams v. Town, 3 Cal. 247.

2. Service of summons on officers of corporation. Where the return of the sheriff stated that service was made "on A and B, the president and secretary of the corporation," it was held that it was primary evidence that the persons named were such officers, and that the return was not erroneous on account of its form. Rowe v. Table Mountain Water Co., 10 Cal. 441; Wilson v. Spring Hill Quartz-Mining Co., 10 Cal. 445.

3. Service on officers of corporation. Managing agent, defined. In a case where the corporation was a banking firm, it was held that service on the "teller" of the bank was not sufficient. It must be strictly on the president, or other head of the corporation, secretary, cashier, or managing agent. Kennedy v. Hibernia Sav. & L. Soc., 38 Cal. 154. If service is made on an agent of a corporation, it must be on the managing agent, and not on one of its general business agents. See Kennedy v. Hibernia Sav. & L. Soc., 38 Cal. 154. At common law, service was required on the president or principal officer of the corporation. Angell and Ames on Corporations, § 637; 1 Tidd's Practice, p. 116; McQueen v. Middletown Manufacturing Co., 16 Johns. 6.

4. Infant under fourteen years of age, how served. When the suit is against a minor under the age of fourteen, service is to be made by delivering a copy of summons and complaint to him personally, and, also, to his father, mother, or guardian, etc.; and in cases where such infant resides out of the state, and his residence is known to plaintiff, a copy of the summons should be deposited in the post-office, directed to the infant, in the same manner as if he were over fourteen. Gray v. Palmer, 9 Cal. 638.

5. What constitutes personal service. The personal service of writs and process can only be made by delivering a copy to the party upon whom the service is required. So far as summons is concerned, the statute designates the mode (§ 411). Independently of the statute, the mode would be by showing the original under the seal of the court, and delivering a copy. Edmondson v. Mason, 16 Cal. 388.

6. Service of summons. Redelivery and service after return. After a summons has been served on some of the defendants and returned, the court may order that it should be redelivered to plaintiff for further service on other defendants, either in the same or another county. Hancock v. Preuss, 40 Cal. 572.

§ 412. Cases in which service of summons may be by publication. Certificate of residence. Where the person on whom service is to be made resides out of the state; or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons; or is a corporation having no managing or business agent, cashier or secretary, or other officer upon whom summons may be served, who, after due diligence cannot be found within the state, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit, or by the complaint on file [t]herein, that it is an action which relates to or the subject of which is real or personal property in this state, in which such person defendant or corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or corporation from any interest therein, such court or judge may make an order that the service be made by the publication of the summons; provided, that where service is sought to be made upon a person who cannot, after due diligence, be found within the state it must first appear to the court by the affidavit aforesaid that there has not been filed, on behalf of such person, in the county where such action is pending, the certificate of residence provided for by section one thousand one hundred and sixty-three of the Civil Code in the county in which the action is brought; or that said certificate was so filed and that the defendant cannot be found at the place named in said certificate, which latter fact must be made to appear by the certificate of the sheriff of the county wherein said defendant claims residence in and by said certificate of residence, and which certificate of said sheriff must show that service of said summons was attempted upon said defendant at the place named in said certificate of residence but that said defendant was not to be found thereat.

Summons.

1. Publication of, in suit to quiet title, when authorized. See post, §§ 749, 750.

2. Service of, in justice's court, by publication. See post, § 849.

Legislation § 412. 1. Enacted March 11, **1872**; based on Practice Act, § 30 (New York Code, § 135); and the section then read: "Where the person on whom the service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier, or secretary within the state, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof, or a county judge, and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may make an order that the service be made by the publication of the summons." When enacted in 1872, (1) the phrase was added, "or is a foreign corporation having no managing or business agent, cashier, or secretary within the state"; (2) "also appears by such affidavit, or by the verified complaint on file," was substituted for "shall in like manner appear"; and the words "judge may make" were substituted for "judge may grant."

2. Amended by Code Amdts. **1880**, p. 13, striking out the words "or a county judge."

3. Amended by Stats. **1893**, p. 285, adding, before "such court or judge," and after "party to the action," near the end of the section, "or when it appears by such affidavit, or by the complaint on file [t]herein, that it is an action which relates to or the subject of which is real or personal property in this state, in which such person defendant, or foreign corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or foreign corporation from any interest therein."

4. Amendment by Stats. **1901**, p. 130; unconstitutional. See note ante, § 5.

5. Amended by Stats. **1905**, p. 141, (1) substituting semicolons for commas, in the first part of the section, before the phrases beginning "or has departed," "or cannot," "or conceals himself," "or is a foreign corporation"; (2) adding the proviso.

6. Amended by Stats. **1913**, p. 69 (approved April 23, 1913), (1) after the words "or secretary within the state," adding "or is a domestic corporation the officers and agents of which, upon whom, under the law, service may be made binding upon the corporation, cannot after due diligence, be found within the state"; (2) substituting a semicolon for a comma before "provided," and adding a comma after that word.

7. Amended by Stats. **1913**, p. 1422 (approved May 20, 1913), (1) striking out the word "foreign" before "corporation" in the three instances; (2) recasting the amendment of April 23d, noted supra.

Service by publication. This section is general, and in terms applies to all actions; it is not invalid because it includes proceedings purely in personam as well as proceedings in rem. Perkins v. Wakeham, 86 Cal. 580; 21 Am. St. Rep. 67; 25 Pac. 51. Service of summons by publication is set on foot by an affidavit showing the existence of the statutory facts. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. The facts may appear either by affidavit or verified complaint, or by both (Ligare v. California Southern R. R. Co., 76 Cal. 610; 18 Pac. 777); but where the complaint is unverified, the affidavit must state facts showing that a cause of action exists against the defendant. Yolo County v. Knight, 70 Cal. 430; 11 Pac. 662. All of the required facts must appear; the existence of one condition is not enough (Braly v. Seaman, 30 Cal. 610); but where the affidavit is sufficient in form, the court must accept the statements as true, and make the order as demanded. Dunlap v. Steere, 92 Cal. 344; 27 Am. St. Rep. 143; 16 L. R. A. 361; 28 Pac. 563. The existence of a cause of action against the defendant is a jurisdictional fact. Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445; 71 Pac. 498; Estate of McNeil, 155 Cal. 333; 100 Pac. 1086.

Where defendant conceals himself. Where the defendant conceals himself to avoid service, he cannot complain of want of personal service (Ware v. Robinson, 9 Cal. 107); nor, where the facts of concealment and residence appear to exist, has he the right to question the truth of the allegations after the expiration of six months; he is deemed to be in court, under such circumstances, and must be held to know the allegations of the complaint, and to admit them to be true (Ware v. Robinson, 9 Cal. 107; Jordan v. Giblin, 12 Cal. 100); and where the affidavit shows that he resides within the state, but has disappeared, and cannot be found therein, and it appears that he is concealing himself to avoid service, an order of publication is properly made. Bradford v. McAvoy, 99 Cal. 324; 33 Pac. 1091. Proof that the defendant secreted himself to avoid service may be made, to avoid a dismissal under § 581a; but, where the evidence is conflicting, a finding that he did so secrete himself is conclusive upon appeal. Wilson v. Leo, 19 Cal. App. 793; 127 Pac. 1043. The return of the officer is sufficient evidence of due diligence; and where the affidavit shows that the defendant resides in the township or county, and sets out the facts respecting his absenting himself from his home, there is a sufficient showing to justify an order of publication. Seaver v. Fitzgerald, 23 Cal. 85.

Where the defendant is absent or is a nonresident. Where the affidavit shows that the plaintiff has a cause of action against the defendant, and refers to his verified complaint containing a like showing, and that the defendant is a non-resident of the state, it is sufficient to warrant an order of service of summons by publication. Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73. Where the affidavit shows that the person upon whom service is to be made resides out of the state, it is not necessary to set forth that such person cannot, after due diligence, be found within the state. Parsons v. Weis, 144 Cal. 410; 77 Pac. 1007. While the provisions of this section for service upon nonresidents by publication are general, and in terms apply to all actions, yet the section is not invalid because it includes proceedings purely in personam. Perkins v. Wakeham, 86 Cal. 580; 21 Am. St. Rep. 67; 25 Pac. 51. A corporation is deemed to have departed from the state when all its agents and officers, upon whom service can be

made, have departed therefrom. McKendrick v. Western Zinc Mining Co., 165 Cal. 24; 130 Pac. 865.

Actions relating to real estate. An action for the specific performance of a contract for the conveyance of real estate is an action for the determination of a right or interest in real property. Tutt v. Davis, 13 Cal. App. 715; 110 Pac. 690. Service of process, in an action for the specific performance of a contract for the sale of real property, may be made by publication. Tutt v. Davis, 13 Cal. App. 715; 110 Pac. 690. In an attachment suit against a wife's separate estate, jurisdiction of her husband, as a co-defendant, may be obtained by publication of summons against him, where he cannot be personally served. Bank of Venice v. Hutchinson, 19 Cal. App. 219; 125 Pac. 252.

Service on foreign corporation. Where a foreign corporation defendant has no agent in this state, service may be made upon the secretary of state. Olender v. Crystalline Mining Co., 149 Cal. 482; 86 Pac. 1082.

Service under McEnerney Act. The method of giving notice prescribed in this section is valid. Title etc. Restoration Co. v. Kerrigan, 150 Cal. 289; 119 Am. St. Rep. 199; 88 Pac. 356; 8 L. R. A. (N. S.) 682.

Service under Torrens Act. Service of notice, under the Torrens Act, must be personal, except where, under this section and § 413, post, service may be made by publication. Robinson v. Kerrigan, 151 Cal. 40; 121 Am. St. Rep. 90; 12 Ann. Cas. 829; 90 Pac. 129.

Order for publication. An order for the publication of summons will be upheld, where the necessary facts are set forth in the affidavit. Rue v. Quinn, 137 Cal. 651; 66 Pac. 216; 70 Pac. 732; Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444; 115 Pac. 58; Emery v. Kipp, 154 Cal. 83; 129 Am. St. Rep. 141; 19 L. R. A. (N. S.) 983; 97 Pac. 17; Roberts v. Jacob, 154 Cal. 307; 97 Pac. 671; 223 U. S. 261; 56 L. Ed. 429; 32 Sup. Ct. Rep. 303. Otherwise, the trial judge does not abuse his discretion in refusing to make such order. Bender v. Hutton, 160 Cal. 372; 117 Pac. 322.

Service in divorce cases. A provision for alimony, in a decree of divorce, obtained against a husband in another state, upon substituted service of summons, is void for want of jurisdiction of the husband. In re McMullin, 164 Cal. 504; 129 Pac. 773; Application of McMullen, 19 Cal. App. 481; 126 Pac. 368.

Necessity of affidavit. Where the facts in the affidavit are sufficient to justify a finding, that the defendant cannot, after due diligence, be found within the state, an order of service by publication is proper. Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444; 115 Pac. 58. An affidavit for the publication of summons, in an action in which the complaint is not verified, must state probative facts upon which the court can ultimately conclude that a cause of action against defendant exists and that he is a necessary and proper party. People v. Mulcahy, 159 Cal. 34; 112 Pac. 853. This section is not effective, unless strictly pursued. Ricketson v. Richardson, 26 Cal. 149. A judgment by default, based on insufficient service by publication, will be set aside on motion. Wilson v. Leo, 19 Cal. App. 793; 127 Pac. 1043. A money judgment cannot be rendered against a non-resident upon service by publication, where there is no showing of jurisdiction of the court over property of such non-resident within the state. Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444; 115 Pac. 58. The rendition of a judgment upon service by publication, where the affidavit is sufficient, is not a violation of any constitutional guaranty of due process of law. Roberts v. Jacob, 154 Cal. 307; 97 Pac. 671; 223 U. S. 261; 56 L. Ed. 429; 32 Sup. Ct. Rep. 303. Where the affidavit is insufficient, an order for service by publication, inadvertently and improperly made, is properly quashed. Wilson v. Leo, 19 Cal. App. 793; 127 Pac. 1043. There is no provision, in terms, in this section, that the date of the affidavit shall be disclosed therein, but it is indicated clearly that the affidavit must be presented and verified at the time of the application for the order. Bank of Venice v. Hutchinson, 19 Cal. App. 219; 125 Pac. 252. The plaintiff, to avail himself of constructive service of summons, must in fact have exercised due diligence: a mere formal compliance with the provisions of the statute, or a statement to that effect in his affidavit, will not suffice. Stern v. Judson, 163 Cal. 726; 127 Pac. 38. The affidavit must be filed before trial, and the order of publication may be made only upon a sufficient affidavit, otherwise the court has no jurisdiction; but, where the order is not void, the court cannot set it aside, except upon notice. Zumbusch v. Superior Court, 21 Cal. App. 76; 130 Pac. 1070.

Contents of affidavit. An affidavit which fails to show whether the residence of the defendant was known to the plaintiff, or that he did not know where he might be found, is insufficient. Braly v. Seaman, 30 Cal. 610. The facts set forth in the affidavit must show that due diligence was used to find the defendant within the state, and that he could not be found. Rue v. Quinn, 137 Cal. 651; 66 Pac. 216; 70 Pac. 732; Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444; 115 Pac. 58. The affidavit must show with accuracy the efforts made to serve the defendant (Kahn v. Matthai, 115 Cal. 689; 47 Pac. 698); and such an inquiry should be shown as that the court may say that due diligence has been exercised (Roberts v. Jacob, 154 Cal. 307; 97 Pac. 671; Jacob v. Roberts, 223

U. S. 261; 56 L. Ed. 429; 32 Sup. Ct. Rep. 303); but where the exercise of diligence was merely an inquiry of one friend of the defendant, as to his whereabouts, the showing is insufficient. Swain v. Chase, 12 Cal. 283. Where the defendant is alleged to be a non-resident, the affidavit need not show diligence. Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73; Parsons v. Weis, 144 Cal. 410; 77 Pac. 1007; Johnson v. Miner, 144 Cal. 785; 78 Pac. 240. A showing that the defendant resides out of the state is sufficient. Furnish v. Mullan, 76 Cal. 646; 18 Pac. 854. Where the affidavit gives in detail the facts showing the attempts to serve the defendant in several counties specified, the court is authorized to infer diligence therefrom. Ligare v. California Southern R. R. Co., 76 Cal. 610; 18 Pac. 777; Chapman v. Moore, 151 Cal. 509, 513; 121 Am. St. Rep. 130; 91 Pac. 324. It is not required by this section that the affidavit shall state that the residence of the defendant is not known to the affiant (Ligare v. California Southern R. R. Co., 76 Cal. 610; 18 Pac. 777); but an affidavit in the language of the statute is not sufficient. Ricketson v. Richardson, 26 Cal. 149. Unless the affidavit contains some evidence tending to establish every material jurisdictional fact, the judge has no legal authority to make the order. Forbes v. Hyde, 31 Cal. 342. The affidavit should be prepared with reference to the condition of things as they exist at the time the order for publication is made. Forbes v. Hyde, 31 Cal. 342; Cohn v. Kember, 47 Cal. 144. In a proceeding based upon constructive service, the conditions of the statute must be strictly pursued. Cohn v. Kember, 47 Cal. 144. It is not required that it shall appear that a writ of attachment has been levied as a preliminary step to the order of publication; the court may not require anything in addition to the requirements of the code. Johnson v. Miner, 144 Cal. 785; 78 Pac. 240. To authorize service by publication, it must appear that a cause of action exists against the defendant. Estate of McNeil, 155 Cal. 333; 100 Pac. 1086. Facts sufficient to constitute a cause of action must be shown, either by the complaint or the affidavit. Braly v. Seaman, 30 Cal. 610; Yolo County v. Knight, 70 Cal. 430; 11 Pac. 662; Columbia Screw Co. v. Warner Lock Co., 118 Cal. 445; 71 Pac. 498. Where no affidavit is filed, the complaint must be verified. People v. Mulcahy, 159 Cal. 34; 112 Pac. 853. Where the complaint is not verified, an affidavit, made by the attorney, in order to show the existence of a cause of action, must state that the facts are within his knowledge. Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445; 71 Pac. 498. Where the plaintiff is absent from the county, his attorney may make the affidavit, if the facts are known to him, and it may be made upon information and belief. Rue v. Quinn, 137 Cal. 651; 66 Pac. 216; 70 Pac. 732. An affidavit, by the attorney for the plaintiff, on information and belief, that the defendant is in fact within the state, and conceals himself to avoid service of summons, is only prima facie evidence of these facts; if untrue in point of fact, the defendant may, at any time, institute suit to set aside the judgment, on the ground of fraud. Ware v. Robinson, 9 Cal. 107. The ultimate facts of the statute are to be found from the probative facts in the affidavit. Ricketson v. Richardson, 26 Cal. 149; Braly v. Seaman, 30 Cal. 610; Forbes v. Hyde, 31 Cal. 342; Yolo County v. Knight, 70 Cal. 430; 11 Pac. 662. Where the affidavit is false, the judgment by default is properly vacated. Dunlap v. Steere, 92 Cal. 344; 27 Am. St. Rep. 143; 16 L. R. A. 361; 28 Pac. 563; Fealey v. Fealey, 104 Cal. 354; 43 Am. St. Rep. 111; 38 Pac. 49; Sullivan v. Lumsden, 118 Cal. 664; 50 Pac. 777; Parsons v. Weis, 144 Cal. 410; 77 Pac. 1007. The judgment of the superior court imports absolute verity; and defects in or the insufficiency of the affidavits and order showing service by publication cannot be considered in a collateral attack upon a judgment which recites the service of summons by publication. McCauley v. Fulton, 44 Cal. 355. The primary object and purpose of the signature of the officer to the jurat is to witness the signature of the affiant. Bank of Venice v. Hutchinson, 19 Cal. App. 219; 125 Pac. 252. An obvious mistake appearing in the jurat does not vitiate either the affidavit or the order. Bank of Venice v. Hutchinson, 19 Cal. App. 219; 125 Pac. 252. Where the date is omitted in the jurat, it will be presumed that the affidavit was made at the time of presentation, nothing to the contrary appearing. Bank of Venice v. Hutchinson, 19 Cal. App. 219; 125 Pac. 252.

Affidavit and order not part of judgment roll. People v. Thomas, 101 Cal. 571; 36 Pac. 9.

Sufficiency of affidavit. Roberts v. Jacob, 154 Cal. 307; 97 Pac. 671.

Showing of diligence necessary. Chapman v. Moore, 151 Cal. 509; 121 Am. St. Rep. 130; 91 Pac. 324.

Constructive or substituted service on resident in action in personam as due process of law. See note 35 L. R. A. (N. S.) 292.

CODE COMMISSIONERS' NOTE. 1. Applicable to corporations. This section would have been applicable to corporations without specially mentioning them, the word "person" covering artificial as well as natural persons. See Douglass v. Pacific Mail S. S. Co., 4 Cal. 304.

2. Section to be strictly pursued. It has been held that the sections providing for the service of summons on a defendant by publication, were in derogation of the common law, and must be strictly pursued. Ricketson v. Richardson, 26 Cal. 152; Jordan v. Giblin, 12 Cal. 102; Braly v. Seaman, 30 Cal. 617; Forbes v. Hyde, 31 Cal. 342; People v. Huber, 20 Cal. 81; McMinn v. Whelan, 27 Cal. 309; but see § 4, ante, and see Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742.

3. Requisites of affidavit for order of publication. Sections 412 and 413 treat of the same general subject, and they must be read together, for the purpose of ascertaining what the affidavit and order should contain, in order to satisfy the law and make the service complete. It must appear from the affidavit that the person upon whom service is to be made either resides out of the state or has departed from the state, or cannot, after due diligence, be found within the state; or that he conceals himself to avoid service, and that the plaintiff has a cause of action against him; or that he has a cause of action, to the complete determination of which he is a necessary or proper party; and also whether his residence is known, and if known, it should be stated. An affidavit which merely repeats the language or substance of the statute is not sufficient. Unavoidably, the statute cannot go into details, but is compelled to content itself with a statement of the ultimate facts, which must be made to appear, leaving the detail to be supplied by the affidavit from the facts and circumstances of the particular case. Between the statute and the affidavit there is a relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. To illustrate: It is not sufficient to state generally, that, after due diligence, the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party, should be stated. To hold that a bald repetition of the statute is sufficient, is to strip the court or judge to whom the application is made of all judicial functions, and allow the party himself to determine, in his own way, the existence of jurisdictional facts,—a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the court or judge from the probatory facts stated in the affidavit, before the order for publication can be legally entered. The affidavit must show whether the residence of the person upon whom service is sought is known to the affiant, and if known, the residence must be stated. It is true that this is not required, in terms, in § 412, which is more especially devoted to the affidavit; but, as we have already said, the whole statute upon the subject of service by publication is to be read together, and § 413 requires that, where the residence is known, the order shall direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person, to be served at his place of residence. In granting the order, the court or judge acts judicially, and can know nothing about the facts upon which the order is to be granted, except from the affidavit presented by the applicant. Ricketson v. Richardson, 26 Cal. 152. See also Brady v. Seaman, 30 Cal. 617; Jordan v. Giblin, 12 Cal. 100.

4. Affidavits to obtain order of publication, what facts must be stated therein. Section 412 provides, that "When the person on whom the service is to be made resides out of the state, . . . and the fact shall appear by affidavit to the satisfaction of the court, or a judge thereof, . . . such court or judge may grant an order that the service be made by publication of summons." The fact must appear by affidavit, before jurisdiction to make the order attaches. That is to say, there must be an affidavit containing a statement of some fact which would be legal evidence, having some appreciable tendency to make the jurisdictional fact appear, for the judge to act upon, before he has any jurisdiction to make the order. Unless the affidavit contains some such evidence, tending to establish every material jurisdictional fact, the judge has no legal authority to be satisfied, and, if he makes the order, he acts without jurisdiction, and all proceedings based upon it are void. But he is only to be satisfied upon some evidence presented in the form prescribed; and if the affidavit presents legal evidence which has an appreciable tendency to prove every material jurisdictional fact, and the mind of the judge is too easily satisfied, this is but error, for he was authorized to weigh the testimony, and if satisfied, make the order. It is therefore not void, but erroneous. Forbes v. Hyde, 31 Cal. 350.

5. Affidavit must show cause of action. The statute provides that "When the person on whom the service is to be made resides out of the state, . . . and the fact shall appear by affidavit, . . . and it shall in like manner appear, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order," etc. The existence of a cause of action, etc., then, is also a jurisdictional fact which must appear "in like manner," that is to say, by affidavit. The statute as clearly makes a cause of action, as non-residence, a jurisdictional fact, and we can no more disregard the one than the other. If this fact does not appear by the affidavit upon which the order for publication was founded, then there was a want of jurisdiction, and the order and publication are void. The only statement in the affidavit is the following: "Deponent further says, that he is a counselor at law and resides in this city, and that he has a good cause of action in this suit against the said defendant, and that he is a necessary and proper party defendant thereto, as he verily believes." What "fact appears by affidavit" here? Simply that the affiant believes he has a good cause of action in this suit against defendant, and believes that Harris is a necessary and proper party defendant. But such an averment is neither the statement of an ultimate fact, such as is required to be stated in a pleading, nor of a probative fact from which such ultimate fact may be deduced, nor a fact of any sort which in any way legally tends to prove such ultimate or probative fact, or from which it may be inferred. It is not the statement of a fact at all. It is merely the statement of the opinion of the witness in relation to a point upon which the judge is required to form his own opinion upon facts which must appear by affidavit. The judge may have entire confidence in the ability of the affiant as a lawyer, and in his opinion upon a question of law, and the witness may be equally well qualified to determine the point; but the law does not permit him to act upon such confidence or qualifications. Facts are the proper, and only proper, subjects to be set out in affidavits, under the provisions of the statute, to serve as the basis of judicial action. The affiant's general expression of opinion or belief, without the facts upon which it is founded, is in no sense legal evidence, and does not tend, in any degree, to prove the jurisdictional facts, without which the judge had no authority to make the order. Forbes v. Hyde, 31 Cal. 353. Under this section of the code, the complaint, if verified, may be used to show that a cause of action exists.

6. Affidavit that defendant was concealing himself. Could not be found after due diligence, etc. An affidavit of an attorney for the plaintiff, for an order of publication of summons on defendant, which shows that diligent search had been made for him by the sheriff, and that he was concealing himself to avoid service, was held to be sufficient. Anderson v. Parker, 6 Cal. 201. The affidavit states that the defendant, D. C. Seaver, was at the time a resident of the first township, in the county of Contra Costa; that he had occupied a house on a tract of land claimed by him to be his own and which he had cultivated up to the commencement of the suit, and for a long time previous; that on the twenty-second day of October, the day before the commencement of the suit, he left his residence, informing his servants that he would be back that evening or the next day; that the summons in the suit was put in the hands of a proper constable, who made diligent search and was wholly unable to serve it; that Seaver had not returned to his residence, and that he believed he concealed himself for the purpose of avoiding the service of the summons; and that the claim sued on is a just debt. The return of the summons by the constable is, "Not found in the county." The return of the officer, that the party could not be found, is sufficient evidence of proper diligence, and the affidavit of the plaintiff in that action, showing that the defendant resided in the township and county, and the facts respecting his absenting himself from his home, show sufficient to entitle the plaintiff to the order of

publication. Seaver v. Fitzgerald, 23 Cal. 90. An affidavit for order of publication of summons, stating that defendant C. could not, after due diligence, be found in the county; that inquiry had been made of one F., an intimate friend of defendant, as to his whereabouts, and F. was unable to give the information; and that plaintiff did not know where defendant could be found within the state,—was held to be insufficient. The affidavit does not show that defendant had left the state, or that any diligence had been used to ascertain his whereabouts, beyond inquiry of a single individual, and no pretense was made that defendant was concealing himself to avoid service. Swain v. Chase, 12 Cal. 285.

7. Residence, when known, to be stated. Residence, if known, should be stated in the affidavit. Gray v. Palmer, 9 Cal. 637.

8. Affidavit made a long time before order of publication. Objection was made that it was incompetent for the court to make the order upon affidavits some four months old—it is plain, to our minds, from an examination of §§ 412 and 413 of the code, that the affidavits should be prepared with reference to the condition of things as they exist at the time when the order for publication is applied for—the residence of the defendant, or the inability to find him at that time. The proceedings are to follow each other in reasonably quick succession. The order for publication, when made, must "direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence," when known. It must not only be deposited, but it must be done forthwith. The object of the statute is, if possible, to secure actual notice of the pendency of the action. In this and the neighboring states and territories, the residences of a large portion of the people are notoriously temporary. It is important, therefore, that the inquiry as to residence should be directed to the time when the order and deposit in the post-office is to be made; and we have no doubt that it was so intended by the legislature. If an affidavit can be used as the basis of an order which was made four months before the order, it can be used when made four years before; and in both cases there would be great probability that the notice contemplated by the statute would fail of reaching the defendant. In many instances the party to be served may have returned, and could be easily, if inquiry were to be made at a later period. In People v. Huber, 20 Cal. 82, the court say: "The Practice Act contemplates that the judge must be satisfied, by affidavit, of the absence of the defendant at the time when he is applied to for his order, and when it is to take effect. If an order might be procured in advance, and held four days before taking out the summons, it might be so held for a much longer time, and so that when the summons actually issues the defendant may have returned to the state." We have no doubt of the correctness of this view. If the question were presented to us on appeal from the judgment, we should not hesitate to reverse it, on the ground that the affidavits, made so long a time before obtaining the order for publication based on them, would be totally insufficient to show a non-residence, or absence from the state, or that the defendant could not, after due diligence, be found within the state at the time of procuring the order. Forbes v. Hyde, 31 Cal. 351.

§ 413. Manner of publication. The order must direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the state, or absent therefrom, must not be less than two months. In case of publication, where the residence of a non-resident or absent defendant is known, the court or judge must direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the post-office, and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication.

Publication.

1. Proof of. Post, §§ 2010, 2011.

2. Of summons, in suit to quiet title, manner of. See post, §§ 749, 750.

Judgment by default. Post, § 585, subd. 3.

Legislation § 413. 1. Enacted March 11, **1872;** identical with Practice Act, § 31 (New York Code, § 135), as amended by Stats. 1871–72, p. 190.

2. Amended by Code Amdts. **1873–74,** p. 299, (1) adding the word "and" before the words "in either case," which, in the original, began a sentence; and (2) omitting after "order for publication" (the end of the present section) the sentence, "In actions upon contracts for the direct payment of money, the court in its discretion may, instead of ordering publication, or may after publication, appoint an attorney to appear for the non-resident, absent, or concealed defendant, and conduct the proceedings on his part."

3. Amendment by Stats. **1901,** p. 131; unconstitutional. See note ante, § 5.

Constructive service. The power of the legislature to provide for constructive service of process is well settled. Eitel v. Foote, 39 Cal. 439; Crall v. Poso Irrigation Dist., 87 Cal. 140; 26 Pac. 797.

The order of publication. Where the affidavit is sufficient to sustain the order, it is immaterial that the judge had other sources of information (Ligare v. California Southern R. R. Co., 76 Cal. 610; 18 Pac. 777), but the order must be based solely on facts stated. Ricketson v. Richardson, 26 Cal. 149. The provision that the order must direct a copy to be deposited in the post-office, where the residence of a non-resident or absent resident is known, is applicable only in these cases. Ligare v. California Southern R. R. Co., 76 Cal. 610; 18 Pac. 777. Where the affidavit shows that the residence of the person to be served is known, the court must also direct a copy of the complaint to be deposited in the post-office, directed to him, at such place of residence; and it must appear that this direction has been complied with. Parsons v. Weis, 144 Cal. 410; 77 Pac. 1007. The deposit of summons and complaint may be made in any

post-office. Mudge v. Steinhart, 78 Cal. 34; 12 Am. St. Rep. 17; 20 Pac. 147. Where the plaintiff fails to procure the service within the time fixed for its return, he is entitled to a new summons, and a continuance of the case until he can procure service, by publication or otherwise. Seaver v. Fitzgerald, 23 Cal. 85.

Personal service out of the state. Personal service out of the state may be made, only after publication has been ordered. McBlain v. McBlain, 77 Cal. 507; 20 Pac. 61. To be effective, this section must be strictly pursued. Ricketson v. Richardson, 26 Cal. 149.

Sufficiency of affidavit. San Diego Sav. Bank v. Goodsell, 137 Cal. 420; 70 Pac. 299.

The publication. Publication affects only the service of summons, and the defendant has forty days to answer after the lapse of the period of publication. Grewell v. Henderson, 5 Cal. 465; Stearns v. Aguirre, 6 Cal. 176. A publication once every week, for fourteen weeks, consecutively, answers the requirement of an order for publication for the period of three calendar months. Savings and Loan Society v. Thompson, 32 Cal. 347; Derby & Co. v. Modesto, 104 Cal. 515; 38 Pac. 900. Where, at the time of the institution of the suit, and for several days afterwards, the defendant was a resident of the state, but at the time of filing the affidavit he was beyond its limits, a publication for the period of thirty days was insufficient, where the statute required three months. Jordan v. Giblin, 12 Cal. 100. A publication against a defendant residing out of the state, or absent therefrom, must not be less than two months, and thirty days must elapse after that time, before default can be taken. Foster v. Vehmeyer, 133 Cal. 459; 65 Pac. 974. Where, pending publication, an order is made, substituting attorneys, the publication may be completed as commenced, with the original attorney's name indorsed on the summons. Dunlap v. Steere, 92 Cal. 344; 27 Am. St. Rep. 143; 16 L. R. A. 361; 28 Pac. 563. Publication made in a daily paper, regularly issued on Sundays, does not vitiate the service, on the ground that Sunday is dies non. Savings and Loan Society v. Thompson, 32 Cal. 347; Derby & Co. v. Modesto, 104 Cal. 515; 38 Pac. 900; Smith v. Hazard, 110 Cal. 145; 42 Pac. 465. That the paper designated is the one most likely to give notice to the person to be served, need not be stated in the order. Seaver v. Fitzgerald, 23 Cal. 85.

Deposit of copy in post-office. The summons must not only be deposited, but it must also be done "forthwith" (Forbes v. Hyde, 31 Cal. 342); that is, as soon as, by reasonable exertion, it may be, which will vary according to the circumstances of each particular case; like the term "immediately," "forthwith" is not, in law, necessarily construed as the time immediately succeeding, without an interval, but an effectual and lawful time, allowing all the adjuncts and accomplements necessary to give an act to be performed full legal effect. Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73. Where the deposit of a copy is made on the day the order is signed, the omission therefrom of the word "forthwith," does not render the proceedings void, where the jurisdictional facts are stated. Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73.

CODE COMMISSIONERS' NOTE. 1. Additional requirements under Statute 1871–72. The legislature of 1871–72 passed the following act: Stats. 1871–72, p. 392. "An Act concerning service of summons upon absent defendants by publication." Approved March 15, 1872. [Quoting the act.]

2. Form of order for publication. When it may be issued, and what facts must be stated. An order to publish a summons cannot be made in advance of the issuance of the summons. If, after complaint filed, and before any summons was issued, the judge ordered that "summons do issue," and that it be published, and without any further order summons was subsequently issued and published, the court did not require jurisdiction, and the order was a nullity. A judge cannot order a summons to issue, but can only order a summons already issued to be served in a special manner. People v. Huber, 20 Cal. 81.

3. Publication of summons on supplemental complaint, where summons was published on original complaint. If an order is made for publication of summons, and a summons is issued, and a supplemental complaint was afterwards filed and a summons issued thereon, the original action becomes merged in the action as supplemented, and the court will not acquire jurisdiction of the person of absent defendants by publication of the original summons, but the summons issued on the supplemental complaint must be published also. McMinn v. Whelan, 27 Cal. 300; see also Forbes v. Hyde, 31 Cal. 342; People v. Huber, 20 Cal. 81; see also Lawrence v. Bolton, 3 Paige, 295; Scudder v. Voorhis, 1 Barb. 55.

4. Order designating newspaper need not state what. The order of publication is not defective because in designating the newspaper in which to publish the summons, it did not state that such paper was "most likely to give notice to the person to be served," or which summons was to be thus published. The order directs the summons to be published in a certain newspaper, with the time it was to be thus published, and the presumption is, that the justice designated such particular paper because it was most likely to give notice to the person to be served, but it was not necessary for him to state in the order that such was his reason. Seaver v. Fitzgerald, 23 Cal. 91.

5. Published summons must agree with original summons. The summons cannot be altered, and no new matter can be interpolated, after the order for its publication is made. It must be published in the form in which it existed when the order for its publication was made. McMinn v. Whelan, 27 Cal. 314. But if a comparison of the published summons with the original shows that the difference between the two are purely literal, and the sense and meaning of the original and of the published version of the summons are identical, that is enough. Sharp v. Daugney, 33 Cal. 513.

6. Constitutionality of section, so far as it relates to appointment of attorney, etc. It has been contended that this section, so far as it allows the court to appoint attorneys for defendants in lieu of publication, was "unconstitutional and against the principles of free government," under the provision in the constitution, that no person shall "be deprived of life, liberty, or property without due process of law." But the constitutionality of this section was upheld by the court, in Ware v. Robinson, 9 Cal. 111.

7. When the court may appoint attorney. If the defendant is concealed for the purpose of avoiding service. See Ware v. Robinson, 9 Cal.

107. Where the defendant cannot, after due diligence, be found. See Jordan v. Giblin, 12 Cal. 100. See also, as to judgment against defendants in such cases, § 473, post, where, within six months of rendition of judgment, the court may allow defendant to answer to the merits of original action; and in this connection see Jordan v. Giblin, 12 Cal. 100.

8. How time of publication is computed. Formerly, publication was required (against a non-resident of the state) to be at least once a week, and for a time "not less than three months." Under the law as it then stood, it was held that a summons published "from the 10th of January to the 9th of April, inclusive," was published for the period of three full calendar months. The 9th of January and the 10th of April cannot be included. The summons had been published for three calendar months at the close of the 9th day of April, and the first day of the forty within which defendant was required to answer was on the 10th of April. Savings and Loan Society v. Thompson, 32 Cal. 350. Where the last day of the publication of a summons occurs in the same week in which the three months expires, the publication was held to have been made for a sufficient time, and the court has acquired jurisdiction, although this day is not fully three months from the first day of publication. Savings and Loan Society v. Thompson, 32 Cal. 352; see also Ronkendorff v. Taylor's Lessees, 4 Pet. 361; 7 L. Ed. 886. The month contemplated by this section (§ 413) is a calendar, not a lunar, month. Savings and Loan Society v. Thompson, 32 Cal. 350; Sprague v. Norway, 31 Cal. 173; see § 17, ante, subd. 6.

9. Mailing summons and complaint, directed to residence of defendant. If the residence of a non-resident of the state or an absentee is known, a copy of the complaint and summons must be put into the post-office, directed to such defendant at his place of residence, and this is the case also as to an infant under the age of fourteen years. Gray v. Palmer, 9 Cal. 638.

10. Defendant has forty days after last day of publication to answer. The defendant, after the last day of publication, has forty days in which to file answer. Service of summons is complete at the expiration of the period of publication, and the time for answering commences to run at that time. Grewell v. Henderson, 5 Cal. 465; see also Savings and Loan Society v. Thompson, 32 Cal. 352.

11. Justices' practice. Order of publication made by justice of the peace. This and the following section are made specially applicable to justices' courts. See § 849, post. Section 845, post, relating to practice in justices' courts, fixes twelve days as the time within which summons must require defendant to answer; but § 849, by permitting service to be made by publication, necessarily requires that the time should exceed ten days, and that the provisions of this section (§ 412) and the following section (§ 413) should be pursued in justices' courts. Hisler v. Carr, 34 Cal. 646; see also Seaver v. Fitzgerald, 23 Cal. 86.

12. General effect of judgment obtained by publication of summons, etc. A judgment obtained by publication of summons against a defendant out of the state in which the judgment is rendered, though it may be enforced against his property in that state, has no binding force in personam, and is a mere nullity when attempted to be enforced in another state. Kane v. Cook, 8 Cal. 449; see note to § 415, post.

13. When judgment may be attacked for defect in affidavit or order for publication. See the very elaborate opinions in the case of Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742, contained in note to § 415, post; also Jordan v. Giblin, 12 Cal. 100; People v. Huber, 20 Cal. 81; Forbes v. Hyde, 31 Cal. 342; Braly v. Seaman, 30 Cal. 610.

§ 414. Proceedings where there are several defendants, and part only are served. When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.

Joining persons severally liable upon instruments. Ante, § 383.

Judgment against some defendants, proceedings continuing against others. Post, § 579.

Joint debtors, proceedings against, after judgment against some. Post, §§ 989 et seq.

Legislation § 414. Enacted March 11, **1872**; based on Practice Act, § 32 (New York Code, § 135), which read: "Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows: 1. If the action be against the defendants jointly indebted upon a contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendant served; or, 2. If the action be against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants."

Construction of section. This section does not apply to actions for the foreclosure of mortgages on real estate. Bowen v. May, 12 Cal. 348.

Defendants jointly and severally liable. In an action against two or more defendants, the plaintiff, failing to make out the joint liability of all, may take judgment against one or more. Rowe v. Chandler, 1 Cal. 167; Sterling v. Hanson, 1 Cal. 478; Lewis v. Clarkin, 18 Cal. 399; People v. Frisbie, 18 Cal. 402; Shain v. Forbes, 82 Cal. 577; 23 Pac. 198. In an action against a married woman, the husband is a necessary party defendant, and must also be served; he is joined solely for the protection of the wife. McDonald v. Porsh, 136 Cal. 301; 68 Pac. 817. The bringing of an action against all the guarantors upon a joint and several obligation is not a waiver of the right to their several liability, although judgment is obtained against some, and others have not been served. Melander v. Western National Bank, 21 Cal. App. 462; 132 Pac. 265.

Service on all essential to a several judgment. Service upon all the defendants, whether charged as joint or several debtors, is essential to the validity of a several judgment against each. Treat v. McCall, 10 Cal. 511; Bowen v. May, 12 Cal. 348; Schloss v. White, 16 Cal. 65. Where only one of two defendants, jointly indebted, is served, a several judgment may be entered against him. Hirschfield v. Franklin, 6 Cal. 607. In an action against partners, the plaintiff may proceed against the defendants alone who are served; to sustain a judgment against a defendant, he must have been served with process, or brought into court through some form of law. Ingraham v. Gildemeester, 2 Cal. 88; Schloss v. White, 16

Cal. 65. In an action against three copartners, where one did not appear, and no default was entered against him, and it appeared that he died after the action was commenced, the verdict should have been entered only against the others, who answered; if he was served and failed to answer, his default should have been regularly entered; if he was not served, the action should have regularly proceeded against the defendants who were served, or who appeared and answered. Alpers v. Schammel, 75 Cal. 590; 17 Pac. 708. At common law, where a joint action was brought against several defendants, and one of them was not served, no judgment could be effective against the rest until such defendant was driven to outlawry. Stearns v. Aguirre, 6 Cal. 176.

Proper judgment, where all not served. In an action upon a joint and several promissory note, where one of the defendants makes default, and the other answers, it is error to enter final judgment against the defaulting defendant, pending the proceeding. Stearns v. Aguirre, 6 Cal. 176; Ware v. Robinson, 9 Cal. 107. When the action is against several defendants jointly, only a portion of whom are served, judgment may be taken against those who are served, and proceedings afterwards had against those not served. Roberts v. Donovan, 70 Cal. 108; 9 Pac. 180; 11 Pac. 599. In an action against defendants severally liable, the clerk may, upon the application of the plaintiff, enter judgment, upon default, against the parties served, without regard to the other parties named in the complaint. Kelly v. Van Austin, 17 Cal. 564. In an action against several defendants on their joint contract, for the recovery of damages only, the clerk has power to enter the separate defaults of those defendants who have been served and have not answered, and to enter a joint judgment by default against all of those served, although other of the defendants have not been served; but he has no power to enter a judgment by default against a part only of the defendants, who have been served and have not answered. Wharton v. Harlan, 68 Cal. 422; 9 Pac. 727. In an action on a joint demand against two defendants, where service was made on one, who answered, but service was not made on the other, who did not appear, judgment entered against the former is not void. Kelly v. Bandini, 50 Cal. 530. In an action against defendants jointly and not severally liable, where all are not served, the clerk may, upon application of the plaintiff, enter judgment against all, to be enforced against the joint property of all, and the separate property of those served; entry in any other form is unavailing for any purpose. Kelly v. Van Austin, 17 Cal. 564; Wallace v. Eldredge, 27 Cal. 495; and see Glidden v. Packard, 28 Cal. 649; Willson v. Cleaveland, 30 Cal. 192; Welsh v. Kirkpatrick, 30 Cal. 202; 89 Am. Dec. 85; Providence Tool Co. v. Prader, 32 Cal. 634; 91 Am. Dec. 598; Sacramento County v. Central Pacific R. R. Co., 61 Cal. 250; Junkans v. Bergin, 64 Cal. 203; 30 Pac. 627; Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089; Lacoste v. Eastland, 117 Cal. 673; 49 Pac. 1046; Kennedy v. Mulligan, 136 Cal. 556; 69 Pac. 291. The party not served is not a proper party defendant in an action on the judgment against the party served. Tay v. Hawley, 39 Cal. 93; Stewart v. Spaulding, 72 Cal. 264; 13 Pac. 661; Cooper v. Burch, 140 Cal. 548; 74 Pac. 37. In an action against two or more defendants, where all are not served, the judgment must bind the joint property of all. Bowen v. May, 12 Cal. 348. Where the action is upon a joint and several contract, the court may proceed against one defendant, who voluntarily appears, and render judgment against him. Bell v. Adams, 150 Cal. 772; 90 Pac. 118. In an action against the defendants jointly, on a joint and several obligation, the entry of final judgment, upon default, against one, is a discharge of the other. Stearns v. Aguirre, 6 Cal. 176. In an action against two partners, both of whom were served, where the answer denied the indebtedness, and the plaintiff failed to establish a joint indebtedness, a verdict in favor of one and against the other is valid. Rowe v. Chandler, 1 Cal. 167. In an action against copartners, in which all the individuals composing the firm are set forth in the complaint and summons, judgment cannot be rendered against those who have not been served and who do not appear. Davidson v. Knox, 67 Cal. 143; 7 Pac. 413; Feder v. Epstein, 69 Cal. 456; 10 Pac. 785. Evidence that an action is against the individual members of a partnership, doing business under a particular firm name, cannot serve as an allegation of that fact. San Francisco Sulphur Co. v. Ætna Indemnity Co., 11 Cal. App. 695; 106 Pac. 111. If a complaint is against persons individually named, the addition of words describing a partnership cannot make the partnership described a party defendant to the action. Maclay Co. v. Meads, 14 Cal. App. 363; 112 Pac. 195. A partnership is properly sued, where the action is expressly brought against it as such. Maclay Co. v. Meads, 14 Cal. App. 363; 112 Pac. 195.

CODE COMMISSIONERS' NOTE. 1. Construction of section generally. Section 32 of the Practice Act, from which this section is taken, reads as follows: "§ 32. Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows: 1. If the action be against the defendants jointly indebted upon a contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment, it may be

entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendant served; or, 2. If the action be against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants." This section provides that: "If the action be against defendants jointly indebted upon a contract, he may proceed against the defendants served, unless the court otherwise direct,"—that is to say, unless the court requires the other defendants to be served before proceeding to trial and judgment. If he does "proceed against the defendants served," the section provides that he shall take judgment against all of the defendants, to be enforced against the joint property of all the defendants, and the separate property of those served. By the terms of the statute, the plaintiff proceeds only against the defendants served, and judgment is entered against them, but not against those who were not served. The defendants not served are not bound by the judgment, nor are they personally liable for its satisfaction; but the statute provides that the property in which they are jointly interested with the other defendants may be taken in execution for the satisfaction of the judgment. This provision of the statute will hereafter be noticed. When cases involving this or similar provisions of the statutes of other states have been under consideration, it has been repeatedly held that the statute changed the common-law rule, which is, that, in an action upon a joint contract, the plaintiff must recover against all or none. People v. Frisbie, 18 Cal. 402; Lewis v. Clarkin, 18 Cal. 399. The language of those cases clearly indicates that, under the statutory rule, the plaintiff may recover upon a joint contract against one, or any number less than all of the joint debtors, that is to say, he may take judgment in the usual form against those served, and, in addition, the judgment may be enforced against the joint property of all the joint debtors. But the judgment is against those only who were served with process. The statute provides that the "joint property" of all the defendants may be taken in execution for the satisfaction of the judgment, but none of the cases in this court defines such joint property. We have not noticed in any of the cases in New York that the question has been distinctly passed upon as to what property constitutes the "joint property" mentioned in the statute; but it is assumed in several cases that it is partnership property which is meant by that term. Mason v. Denison, 15 Wend. 64; Mervin v. Kumbel, 23 Wend. 293; Sterne v. Bentley, 3 How. Pr. 331. In Mason v. Denison, it is said that the term applies to the property which one defendant might apply to the satisfaction of the debt, without consulting his co-contractor. Accepting the restriction indicated in that case, or even limiting the meaning of "joint property" to partnership property of the persons alleged to be joint debtors, we are utterly unable to see how a judgment that is to be enforced against the interest in such property of a person who has not been served with process, and has not appeared in the action, can be maintained. It is a cardinal principle of jurisprudence, that a judgment shall not bind or conclude a man, either in respect to his person or property, unless he has had his day in court. No person shall be deprived of life, liberty, or property without due process of law, says the constitution; but this principle is older than written constitutions, and, without invoking the constitutional declaration, every person may, as a matter of common right, insist that he be heard in his own defense before judgment passes which binds, charges, or injuriously affects his person or his estate. It is no answer to say that the judgment affects only the joint property of the defendants,—property that either of the debtors might apply to the satisfaction of the common debt,—for that assumes that the defendants are joint debtors, and that may be to the defendant who is not served the vital point of the controversy. He may be ready to admit every allegation of the complaint, except that he is a party to the contract; or he may even admit the contract, and yet be ready, if an opportunity were presented, to make a successful defense, on the ground of fraud, failure of consideration, payment, accord and satisfaction, etc. The defendant who is served may be ignorant of the defenses upon which his co-defendants would rely; or he may, either negligently or purposely, omit to present them. And, whatever his answer may be, he only appears for himself; and there is nothing in the law regulating the acquisition or disposition of joint property which confers upon one joint owner the right to defend actions for his fellows. Unless it can be shown that such property is under the ban of law, a judgment which subjects to execution the interest of a person who has no opportunity to be heard in the action cannot be upheld without violating principles which lie at the base of all judicial proceedings. Tay v. Hawley, 39 Cal. 95.

2. **Constitutionality of section.** See note 1. There have been several cases in this court involving the consideration of this statute, and this question does not seem to have been presented or considered, but the validity of the statute seems to have been tacitly assumed. In New York the validity of a similar statute is recognized, and actions on the judgment have been maintained against the defendants not served. Dando v. Doll, 2 Johns. 87; Bank of Columbia v. Newcomb, 6 Johns. 98; Taylor v. Pettibone, 16 Johns. 66. In the subsequent case of Mervin v. Kumbel, 23 Wend. 293, it was considered that the authority of those cases was binding upon the court; but it is evident from the opinions delivered in the case, and particularly that of Mr. Justice Bronson, that the judgment, so far as it affects the defendants not served, cannot be sustained on any sensible or even plausible ground. To say that a person is liable to an action on a judgment, but that he may, in that action, litigate the cause of action upon which the judgment was rendered—to hold that he may be sued upon the judgment, but that if he pleads the proper matters in defense, the judgment is not even prima facie evidence against him—is, to our minds, altogether unsatisfactory and illogical. There is a further ground for holding that the defendant who was not served is not a proper party to an action on the judgment. Provision is made in the code, by which a defendant who was not originally served with the summons may be bound by the judgment. (§§ 989 to 994.) He is summoned to show cause why he should not be bound by the judgment, and he may answer the complaint, as he might have done had he been originally served, or he may deny the judgment, or may set up any defense that may have arisen subsequently to the judgment. These proceedings furnish, in our opinion, the exclusive mode by which he can be bound by the judgment, and they necessarily imply that he is not already bound by it. The action is really an action on the original joint contract, and matters of defense in respect to the judgment are merely incidental to the action. Were it not for the statute, no action could be maintained against him on the contract, for the reason that it would become merged in the first judgment; and the merger is restrained, only for the purpose and to the extent of enabling the proceedings to be had as prescribed in the statute. Those provisions of the statute are useless if it is true that an action can be maintained on the judgment against a defendant not served in the former action. Tay v. Hawley, 39 Cal. 97.

3. **Personal judgment cannot be entered against one of several defendants jointly liable.** In an action against defendants jointly liable, it was held to be error to enter a personal judgment against one of the defendants who was not served with process. Treat v. McCall, 10 Cal. 512. And where all defendants were jointly liable and all served, judgment by default cannot be entered against one of them. This section of the code

applies only where all of the defendants have not been served. Stearns v. Aguirre, 7 Cal. 449.

4. **Section not applicable to foreclosing suits.** It was held that this provision, which, in an action against two or more defendants, all of whom were not served with process, authorized judgment to be entered to bind the joint property of all, did not apply to proceedings for the foreclosure of a mortgage upon real estate. Bowen v. May, 12 Cal. 351.

5. **Appearance recited in record confined to parties served.** Where the record recites, in general terms, the appearance of the parties, such appearance will be confined to those parties served with process. Miller v. Ewing, 8 Smedes & M. 421; Torrey v. Jordan, 4 How. (Miss.) 401; Dean v. McKinstry, 2 Smedes & M. 213; Edwards v. Toomer, 14 Smedes & M. 76; Chester v. Miller, 13 Cal. 560.

6. **Where plaintiff waives right to delay trial until all the defendants were served.** See Meagher v. Gagliardo, 35 Cal. 602.

7. **Judgment cannot be had against defendant not served.** In an action against defendant sued as partners it was held that to sustain a judgment against a defendant he must be served with process, or brought into court through some of the forms of law. Ingraham v. Gildemester, 2 Cal. 89; see also Estell v. Chenery, 3 Cal. 468. And where process was not served on a party in a suit against several defendants jointly liable, he cannot be made a defendant in a suit upon the judgment against the party served. Tay v. Hawley, 39 Cal. 93.

8. **Actions against defendants severally liable, and action against defendants jointly liable.** It was held that "if the action be against defendants severally liable, the clerk can, upon application of the plaintiff, enter judgment upon default against the parties served, without regard to the other parties named in the complaint. If the action be against defendants jointly and not severally liable, and only a portion of them are served, the clerk can also, upon like application, enter judgment; but in that case it must be entered against all the defendants, and so as to be enforced against the joint property of all, and the separate property of those served." Kelly v. Van Austin, 17 Cal. 566. But see Tay v. Hawley, supra.

9. **For several judgments against defendants, etc.,** see §§ 578, 579, post.

10. **When one or more may sue or defend for all.** See §§ 382, 383, 384, ante.

11. **For proceedings against joint debtors,** see §§ 989–994.

§ 415. Proof of service, how made.

Proof of the service of summons and complaint must be as follows:

1. If served by the sheriff, his certificate thereof;

2. If by any other person, his affidavit thereof; or,

3. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the post-office, if the same has been deposited; or,

4. The written admission of the defendant.

In case of service otherwise than by publication, the certificate or affidavit must state the time and place of service.

Proof of service by affidavit. See post, § 2009.

Legislation § 415. 1. Enacted March 11, **1872**; based on Practice Act, §§ 33, 34 (New York Code, § 138). When enacted in 1872, (1) in the first paragraph, the words after "service" were changed from "of the summons shall be as follows"; (2) in subd. 2, the clause, "or his deputy, the affidavit or certificate of such sheriff or deputy," was omitted, and "his certificate thereof" inserted; (3) in subd. 3, the word "has" was changed from "shall have"; in subd. 5 (which was § 34), the word "must" was changed from "shall," and the word "the" omitted before "service."

2. Amendment by Stats. **1901**, p. 131; unconstitutional. See note ante, § 5.

Return of service by sheriff. The sheriff's return is prima facie evidence of service (People v. Lee, 128 Cal. 330; 60 Pac. 854); and a description, in the return, of the party served as an officer of a corporation, is prima facie evidence of the status of that person. Rowe v. Table Mountain Water Co., 10 Cal. 441; Wilson v. Spring Hill Quartz Mining Co., 10 Cal. 445; Golden Gate Consol. Mining Co. v. Superior Court, 65 Cal. 187; 3 Pac. 628; Keener v. Eagle Lake Land etc. Co., 110 Cal. 627; 43 Pac. 14. A deputy's return must be in the name of the sheriff. Joyce v. Joyce, 5 Cal. 449; Rowley v. Howard, 23 Cal. 401; Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089. A certificate return by a constable is sufficient, only in a justice's court. Cardwell v. Sabichi, 59 Cal. 490; Berentz v. Belmont Oil Mining Co., 148 Cal. 577, 580; 113 Am. St. Rep. 308; 84 Pac. 47. The return may be amended. Pico v. Sunol, 6 Cal. 294; Drake v. Duvenick, 45 Cal. 455; Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146; 16 Pac. 887; Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509. The presumption is in favor of the validity of the return (Curtis v. Herrick, 14 Cal. 117; 73 Am. Dec. 632; Brown v. Lawson, 51 Cal. 615), unless it appears on the face thereof that it is insufficient (People v. Bernal, 43 Cal. 385); and the presumption of the legality of service will not overcome facts to the contrary in the return (Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742); as where, in an action against a domestic corporation, the return shows the defendant to be a foreign corporation. Elder v. Grunsky, 127 Cal. 67; 59 Pac. 300. The sheriff's return is not traversable; nor will the court permit it to be collaterally attacked, even where he is shown to be guilty of fraud and collusion; the law presumes that every officer will fully perform his duty, and that he has done so in every instance, until the contrary is shown; a fortiori, it will never bend this principle upon the hypothesis that a sworn officer of the law will commit perjury. Egery v. Buchanan, 5 Cal. 53; Johnson v. Gorham,

6 Cal. 195; 65 Am. Dec. 501. The sheriff's return is sufficient to show the date of admission of service. Crane v. Brannan, 3 Cal. 192; Alderson v. Bell, 9 Cal. 315; Montgomery v. Tutt, 11 Cal. 307. The official capacity of the officer making the service must be stated in the return. Rowley v. Howard, 23 Cal. 401. The court may allow proof of service to be amended and filed nunc pro tunc as of the date of judgment, if the return is omitted or incorrectly made, but the facts exist which give the court jurisdiction. Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509; overruling Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089; Howard v. McChesney, 103 Cal. 536; 37 Pac. 523; Woodward v. Brown, 119 Cal. 283; 63 Am. St. Rep. 108; 51 Pac. 2, 542; Bank of Orland v. Dodson, 127 Cal. 208; 78 Am. St. Rep. 42; 59 Pac. 584. The clerk, in the absence of proof of service, cannot enter default of defendant. Stearns v. Aguirre, 7 Cal. 443; Kelly v. Van Austin, 17 Cal. 564; Glidden v. Packard, 28 Cal. 649; Willson v. Cleaveland, 30 Cal. 192; Welsh v. Kirkpatrick, 30 Cal. 202; 89 Am. Dec. 85; Bond v. Pacheco, 30 Cal. 530; Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089. Where the original summons, with proof of service, is lost from the files of the court, the order of the court, upon proof of the loss, that a copy thereof may be filed and used in place of the original, is a determination that such copy is a correct copy of the original, and it is entitled to the same weight as original. Hibernia Sav. & L. Soc. v. Matthai, 116 Cal. 424; 48 Pac. 370.

Affidavit of return by other person. The return must show that the person making service is properly qualified. McMillan v. Reynolds, 11 Cal. 372. A return stating that a copy of the summons was personally served on the defendant is proof that a copy of the summons was delivered to defendant personally, and is sufficient to give the court jurisdiction. Drake v. Duvenick, 45 Cal. 455. The return, where service was by another than the sheriff, may be amended. Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509. A return, which states the facts making the affiant a competent witness, is sufficient, without stating that he is competent. Dimick v. Campbell, 31 Cal. 238. There is a presumption that the defendant resides in the county in which he is served with process. Calderwood v. Brooks, 28 Cal. 151; King v. Blood, 41 Cal. 314; Pellier v. Gillespie, 67 Cal. 582; 8 Pac. 185. The affidavit of the person making the service, where it is the only evidence of service, must show the facts required by the statute, and must be sworn to before it can be used as evidence. Hamilton v. Hamilton, 20 Cal. App. 117; 128 Pac. 338. The affidavit being the only evidence of service, the court acquires no jurisdiction unless it is made as required by law. Hamilton v. Hamilton, 20 Cal. 117; 128 Pac. 338. If the summons was duly and regularly served, a defendant admitting the fact in his application to vacate a default judgment, is in no position to object to defects in the affidavit of service. Hamilton v. Hamilton, 20 Cal. App. 117; 128 Pac. 338.

Return in cases of service by publication. The affidavit and the order, directing the publication of the summons, constitute no part of the judgment roll. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. Proof that the order of publication was complied with, and showing a compliance with the law, is a sufficient showing of such service. Sharp v. Daugney, 33 Cal. 505. Where the affidavit of proof of publication shows the time and place of the hearing, that it was made by the "principal clerk" of the designated newspaper, and that he had charge of all the advertisements therein, there is a substantial compliance with the requirements of this section. Pool v. Simmons, 134 Cal. 621; 66 Pac. 872. Where it is clear from the affidavit that there is but one clerk in the newspaper-office, it is unnecessary that he should describe himself as principal clerk. Gray v. Palmer, 9 Cal. 616. An affidavit showing that the summons was printed weekly, for the required time, in a newspaper published both daily and weekly, is sufficient. Woodward v. Brown, 119 Cal. 283; 63 Am. St. Rep. 108; 51 Pac. 2, 542. Where the affidavit of the printer states that the summons was published one month, but the judgment states that it was published three months, or that service has been had upon the defendant, it will be presumed that other proof than that contained in the judgment roll was rendered; to presume to the contrary would be to deny to the record that absolute verity which must be accorded to it. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. Where proof is made of service by publication, proof of service by the sheriff is unnecessary. Seaver v. Fitzgerald, 23 Cal. 85. Proof of service by publication is by the affidavit of the printer, or his foreman or principal clerk, setting forth the fact, and where and how long, and an affidavit showing a deposit in the post-office, if such deposit was made. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. It is immaterial by whom the deposit of summons in the post-office is made. Sharp v. Daugney, 33 Cal. 505.

Admission of service. An acknowledgment of service is sufficient, only when reduced to writing and subscribed by the party; a verbal acknowledgment to the sheriff will not suffice. Montgomery v. Tutt, 11 Cal. 307. When the proof of service consists of written admissions of the defendants, such admissions, to be available, should be accompanied by some evi-

dence of the genuineness of the signatures of the parties; in the absence of such evidence, the court cannot notice them (Alderson v. Bell, 9 Cal. 315; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742); but where the judgment recites that the defendant was regularly served with process, the presumption follows, that there existed every fact essential to the jurisdiction of the person. Shirran v. Dallas, 21 Cal. App. 405; 132 Pac. 88, 454.

CODE COMMISSIONERS' NOTE. 1. What is meant by proof of service. Effect of judgment on defective service. Said Sanderson, J., in his elaborate and able opinion in the case of Hahn v. Kelly, 34 Cal. 403, 94 Am. Dec. 742: "There are two modes" [reprinting to the last paragraph of the opinion on p. 41]. See also, as to jurisdiction of defendant by service of summons and in support of the case of Hahn v. Kelly, above cited, the following cases: Sharp v. Brunnings, 35 Cal. 528; Quivey v. Porter, 37 Cal. 458.

2. Judgment cannot be attacked collaterally on defective return. If the return is defective, the defendant must appeal from the judgment. A mere irregularity of service is not sufficient to enable him to attack the judgment collaterally. Dorente v. Sullivan, 7 Cal. 280; see Hahn v. Kelly, 34 Cal. 403; 94 Am. Dec. 742 (note 1, supra); Peck v. Strauss, 33 Cal. 678.

3. A sheriff's return is not traversable, and a court will not permit it collaterally to be attacked, even if the officer is shown to have been guilty of fraud and collusion. Sewell on Sheriffs, p. 387; Watson on Sheriffs, p. 72; Egery v. Buchanan, 5 Cal. 56.

4. Service by sheriff on officers of a corporation. See § 411, ante, notes 1, 2, 3.

5. Presumption in favor of return, when place where served is not stated. When the place where the writ was served is not stated in the return, the court should assume that it was served within the jurisdiction of the sheriff to whom it was directed. Crane v. Brannan, 3 Cal. 194; Pico v. Sunol, 6 Cal. 294.

6. Return by deputy to be made in name of principal. If a return is made by a deputy, it must be made in the name of the sheriff. Joyce v. Joyce, 5 Cal. 449; Rowley v. Howard, 23 Cal. 401; see [code commissioners'] note to § 410, ante.

7. Affidavit of service by person other than sheriff or deputy. The affidavit of the person serving the summons must show all the facts which are required to make a valid service under the provisions of the four preceding sections. The facts necessary to show a valid service must appear affirmatively. See McMillan v. Reynolds, 11 Cal. 372; Dimick v. Campbell, 31 Cal. 238; see also Peck v. Strauss, 33 Cal. 678.

8. Proof of service by publication. The publication of summons may be proved by the affidavit of the clerk, of the publisher of the paper, and the fact that the summons was deposited in a post-office may also be proved by affidavit; nor is it necessary that the constable (in justice's court) state in his return on the summons that such publication was made and such deposit made in the post-office. Seaver v. Fitzgerald, 23 Cal. 86.

9. Affidavit of publication by printer. An affidavit in the following terms, "H. F. W., principal clerk in the office of the Union," etc., "deposes and says that the notice," etc., was held insufficient. By the third subdivision of this section the fact that service has been made by publication is to be proved by the "affidavit of the printer, his foreman, or principal clerk." These are the only persons competent to testify on the subject. That the affiant was one of the three is itself a substantive fact, and must be proved as such before the court in which the action is pending can render judgment against the parties to whom notice is intended to be given. In the affidavit above given the affiant swears to nothing except as to matters set forth after the word "deposes." He names himself as principal clerk, but he does not swear that such was his position in fact. Ex parte Bank of Monroe, 7 Hill, 178; 42 Am. Dec. 61; Cunningham v. Goelet, 4 Den. 71; Staples v. Fairchild, 3 N. Y. 44; Payne v. Young, 8 N. Y. 158; see particularly, for correct form, 2 Barb. Ch. Prac. 706; and Hill v. Hoover, 5 Wis. 370; Steinbach v. Leese, 27 Cal. 299. But it was held that if there is but one clerk in a printing-office he need not be described in the affidavit of publication as "principal" clerk. See Gray v. Palmer, 9 Cal. 616. And it was held that an objection that the affidavit was made by a publisher and proprietor, and not by the "printer, foreman, or principal clerk," was fully met by Bunce v. Reed, 16 Barb. 347. It was held in that case that for the purposes of the question, printers and publishers might be considered synonymous, the latter being within the spirit of the statute. Sharp v. Daugney, 33 Cal. 513. And so, also, the affidavit of the "proprietor" of a printing-office was held sufficient. Proprietor and printer are regarded as synonymous terms. Quivey v. Porter, 37 Cal. 464. Where the affidavit of the printer was to the effect that publication had been made one month, but the judgment of the court recites that it was published three months, the recital imparts absolute verity, and it must be presumed that some additional proof had been made to the court before judgment. Hahn v. Kelly, 34 Cal. 403; 94 Am. Dec. 742.

10. Affidavit of deposit of summons in post-office. It is not a ground for objection to the affidavit that it does not state that the deposit was made in a United States post-office, nor that there was communication by mail between the place of deposit and the place to which the package was addressed. Sharp v. Daugney, 33 Cal. 514. And a copy of summons and complaint must be mailed to a minor under fourteen years of age. A failure to do so cannot be rectified by the appearance of the mother of the child on her own behalf. Gray v. Palmer, 9 Cal. 616.

11. Admission of service by defendant. An admission of service must be in writing, signed by the defendant; an oral admission will not be sufficient. Montgomery v. Tutt, 11 Cal. 307. The place of service need not be stated in the admission. The statute does not require an admission of service to designate the place where the service was made. The object of such designation, when required, is to determine the period within which the answer must be filed, or when default may be taken. Alderson v. Bell, 9 Cal. 321; Crane v. Brannan, 3 Cal. 194. And generally, as to admission of service, see Sharp v. Brunnings, 35 Cal. 533; Crane v. Brannan, 3 Cal. 194.

12. Evidence of genuineness of written admissions of defendants. Proof of signatures. It is well settled that courts will take judicial notice of the signatures of their officers, as such, but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signatures of the parties. In the absence of such evidence, the court cannot notice them. Litchfield v. Burwell, 5 How. Pr. 346; Alderson v. Bell, 9 Cal. 321.

§ 416. When jurisdiction of action acquired. From the time of the service of the summons and of a copy of the complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication when service by publication is ordered, the court is deemed to

have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him.

Admission of service. Ante, § 415.
Appearance. Post, § 1014.
Waiver of summons. Ante, § 406.

Legislation § 416. 1. Enacted March 11, **1872;** based on Practice Act, § 35 (New York Code, § 139), which read: "From the time of the service of the summons and copy of complaint in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to personal service of the summons upon him." When enacted in 1872, (1) the word "is," in both instances, was changed from "shall be," and (2) the last sentence was changed to begin with "The" instead of "A."

2. Amended by Code Amdts. **1873–74,** p. 299.

Jurisdiction of the parties. A judgment obtained by fraud, or rendered by a court not having jurisdiction, may be treated as an absolute nullity from the start. Carpentier v. Oakland, 30 Cal. 439. Where the defendant, in an action upon a domestic judgment, was not served with summons in the original action, evidence to impeach the judgment for want of service is admissible; but if the parties stipulate that there was no service, and evidence is admitted to that effect, without objection, it is the duty of the court to declare the judgment void, upon the admitted facts. People v. Harrison, 107 Cal. 541; 40 Pac. 956. The court has no jurisdiction to grant relief against defendants, without service upon them of a cross-complaint filed in the action, although they made default. White v. Patton, 87 Cal. 151; 25 Pac. 270. Want of jurisdiction may be raised at any time. Hastings v. Cunningham, 39 Cal. 137; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Pearson v. Pearson, 46 Cal. 609; People v. Thomas, 101 Cal. 571; 36 Pac. 9. Until fraud or want of jurisdiction is shown in the proper mode, and according to the proper rules of evidence, a judgment obtained by fraud, or rendered by a court not having jurisdiction, is not void; for it has the form and semblance of a valid judgment, and it may be enforced as such until reversed or set aside by some proceedings. Carpentier v. Oakland, 30 Cal. 439. The power of a court of law to inquire into jurisdiction is limited to an inspection of the record. Carpentier v. Oakland, 30 Cal. 439; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Hobbs v. Duff, 43 Cal. 485; Hodgdon v. Southern Pacific R. R. Co., 75 Cal. 642; 17 Pac. 928; Hill v. City Cab etc. Co., 79 Cal. 188; 21 Pac. 728; Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074; Colton Land etc. Co. v. Swartz, 99 Cal. 278; 33 Pac. 878; Estate of Eichhoff, 101 Cal. 600; 36 Pac. 11; Butler v. Soule, 124 Cal. 69; 56 Pac. 601; People v. Perris Irrigation Dist., 132 Cal. 289; 64 Pac. 399, 773. The presentations of a false affidavit, for the purpose of obtaining an order for service of summons by publication, is an act of fraud, and any judgment which rests upon it must be set aside. Dunlap v. Steere, 92 Cal. 344; 27 Am. St. Rep. 143; 16 L. R. A. 361; 28 Pac. 563. The first point decided by any court, although it may not be in terms, is that the court has jurisdiction; otherwise it would not proceed to determine the rights of the parties. Clary v. Hoagland, 6 Cal. 685; Coulter v. Stark, 7 Cal. 244. In suits in personam, in courts other than admiralty, no man can be deprived of his property without first having been personally cited to appear and make his defense, except by virtue of some positive statutory enactment. Loring v. Illsley, 1 Cal. 24; Parsons v. Davis, 3 Cal. 321; Schloss v. White, 16 Cal. 65; Rowley v. Howard, 23 Cal. 401; Linott v. Rowland, 119 Cal. 452; 51 Pac. 687; Whitwell v. Barbier, 7 Cal. 54; Gray v. Hawes, 8 Cal. 562; Sharp v. Daugney, 33 Cal. 505. The fact of service is material, and from the time service is made, the court is deemed to have acquired jurisdiction; the return of service may be formal or informal, perfect or imperfect, still, if it is in fact made, the court acquires jurisdiction of the person of defendant, and the judgment thereafter rendered cannot be attacked collaterally. Drake v. Duvenick, 45 Cal. 455; Sacramento Sav. Bank v. Spencer, 53 Cal. 737; Keybers v. McComber, 67 Cal. 395; 7 Pac. 838; Estate of Eichhoff, 101 Cal. 600; 36 Pac. 11; Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509. Jurisdiction is given, in this state, by a form of notice prescribed by statute, which, in such cases, must be substantially pursued; and where a general power of serving process is given to an officer, a general return of service is sufficient, but where the power to serve process is exceptional, and given only on prescribed conditions, there the authority is special, and the particular facts must be shown, in order to give effect to the service. McMillan v. Reynolds, 11 Cal. 372; Sharp v. Daugney, 33 Cal. 505; Linott v. Rowland, 119 Cal. 452; 51 Pac. 687. It is immaterial whether the jurisdiction of the court appears affirmatively upon the judgment roll or not, for, if it does not, it will be conclusively presumed. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Hobbs v. Duff, 43 Cal. 485; Butler v. Soule, 124 Cal. 69; 56 Pac. 601; People v. Perris Irrigation Dist., 132 Cal. 289; 64 Pac. 399, 773.

Effect of irregularities. Presumptions in favor of judgment. Where the order of service by publication fails to direct the summons to be deposited "forthwith" in

the post-office, but the summons was so deposited, the omission of the word "forthwith" from the order is a mere irregularity, which might, perhaps, be good cause to set aside the proceedings on a direct motion for that purpose, but would not affect the judgment. Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73. Where service is made by publication of summons against an absent defendant, a personal judgment cannot be entered against him. Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73; Blumberg v. Birch, 99 Cal. 416; 37 Am. St. Rep. 67; 34 Pac. 102; De la Montanya v. De la Montanya, 112 Cal. 101; 53 Am. St. Rep. 165; 32 L. R. A. 82; 44 Pac. 345. The jurisdiction of all our courts is special and limited, as defined by the constitution, and they do not proceed according to the course of the common law, but according to the course of the code, which prescribes, in almost every particular, a course very different from that of the common law. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. Where there is no proof in the record, of what was done in obtaining service, it will be presumed that legal service was in fact made; but where the record shows what was done to obtain service, it cannot be presumed that something different was in fact done. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Latta v. Tutton, 122 Cal. 279; 68 Am. St. Rep. 30; 54 Pac. 844. Unless the record shows to the contrary, it will be presumed, in support of the judgment, that a court of general jurisdiction acquired the necessary jurisdiction over the parties; in this respect, the record cannot be impeached, in a collateral proceeding, by proof aliunde. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Sharp v. Brunnings, 35 Cal. 528; Reily v. Lancaster, 39 Cal. 354, 356; Eitel v. Foote, 39 Cal. 439; Branson v. Caruthers, 49 Cal. 374; McCauley v. Fulton, 44 Cal. 355. The presumptions of law are in favor of the jurisdiction and of the regularity of proceedings of superior courts, or courts of general jurisdiction, but they are not in favor of the jurisdiction and regularity of the proceedings of inferior courts, or courts of limited jurisdiction, and parties who claim any right or benefit under their judgments must show their jurisdiction affirmatively; the only limitation put upon the rule is founded upon a distinction between courts. Barrett v. Carney, 33 Cal. 530; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Ryder v. Cohn, 37 Cal. 69; Quivey v. Porter, 37 Cal. 458; Mahoney v. Middleton, 41 Cal. 41; McKinley v. Tuttle, 42 Cal. 570; Drake v. Duvenick, 45 Cal. 455; Wood v. Jordan, 125 Cal. 261; 57 Pac. 997. Upon a collateral attack, recitals, in the judgment, of service upon defendant, are conclusive of the question of jurisdiction of his person, where the judgment is rendered by a court of superior jurisdiction. McCauley v. Fulton, 44 Cal. 355; Drake v. Duvenick, 45 Cal. 455; Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73; Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146; 16 Pac. 887. The recitals in a judgment are the court's record of its own acts, and although, upon a direct appeal, the jurisdiction of the court is not to be established by its mere assertion, in the judgment, that it acquired jurisdiction, yet if such recital finds support in other portions in the record, which, under any condition of facts, could exist, it will be presumed, in the absence of a contrary showing, that such condition of facts existed. Siehler v. Look, 93 Cal. 600; 29 Pac. 220. The validity of a tax judgment is to be ascertained by the same tests, has the benefit of the same presumptions, is subject to attack in the same mode and by the same means, as the judgment in an action of any other class. Eitel v. Foote, 39 Cal. 439; Mayo v. Haynie, 50 Cal. 70; Wood v. Jordan, 125 Cal. 261; 57 Pac. 997; People v. Perris Irrigation Dist., 132 Cal. 289; 64 Pac. 399, 773. The validity of the judgment is to be conclusively presumed from the existence of the judgment itself, unless it affirmatively appears from the record that the court had not jurisdiction. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. The summons to be served is any legal summons issued in the case; and where the first summons has been returned not served, the second summons is the one to be served by publication, the first one having no longer any force. Seaver v. Fitzgerald, 23 Cal. 86. A summons which does not comply with the requirements of law will not support a judgment by default. State v. Woodlief, 2 Cal. 241; Porter v. Hermann, 8 Cal. 619; People v. Weil, 53 Cal. 253. Where no summons is issued, and no service made until four years after the filing of the complaint, the court does not obtain jurisdiction. Reynolds v. Page, 35 Cal. 296. There is, however, a very decided distinction between want of jurisdiction and irregularity in procuring jurisdiction; the true test in such cases is, whether the omission complained of is of substance or of form; if of substance, the judgment is a nullity; if of form, only an irregularity. Whitwell v. Barbier, 7 Cal. 54. Irregularities and defects in the summons, or in the service or return thereof, are immaterial, when the defendant appears in the action. Blackburn v. Bucksport etc. R. R. Co., 7 Cal. App. 649; 95 Pac. 668. Upon the appearance of a defendant, the court acquires jurisdiction. Hodgkins v. Dunham, 10 Cal. App. 690; 103 Pac. 351. A defective statement in a summons does not render judgment by default, after personal service, susceptible to collateral attack. Keybers v. McComber, 67 Cal. 395; 7 Pac. 838; Dore v. Dougherty, 72 Cal. 232; 1 Am. St. Rep. 48; 73 Pac. 621; People v. Dodge, 104 Cal. 487; 38 Pac. 203. In

case of collateral attack upon a judgment for lack of jurisdiction, all presumptions not contradicted by or inconsistent with the record are in favor of the correctness of the judgment; the main difference between a collateral attack and a direct attack is, that, in the former, the record alone can be inspected, and is conclusively presumed to be correct; while on direct attack the true facts may be shown, and thus the judgment itself, on appeal, may be reversed or modified. Lyons v. Roach, 84 Cal. 27; 23 Pac. 1026; Sichler v. Look, 93 Cal. 600; 29 Pac. 220; Kahn v. Matthai, 115 Cal. 689; 47 Pac. 698. Where the appearance is general, although stated to be special, it must be considered as a general appearance in the case. Thompson v. Alford, 128 Cal. 227; 60 Pac. 686. Where the court acquires jurisdiction by service of its process, it does not lose it by neglect to make proof of such service a matter of record; the subsequent amendment of the record, by supplying such proof, will support the judgment. Hibernia Sav. & L. Soc. v. Matthai, 116 Cal. 424; 48 Pac. 370. And if judgment is prematurely entered thereafter, it is only an irregularity: it will not be set aside, unless it appears that the result will be different from that already reached. California Casket Co. v. McGinn, 10 Cal. App. 5; 100 Pac. 1077, 1079. In an action for divorce, the court has no jurisdiction to award alimony, where the defendant was not in the state when the action was begun, nor afterwards made any appearance in the action; the court has jurisdiction, in such cases, only to decree dissolution of the marriage. De la Montanya v. De la Montanya, 112 Cal. 101; 53 Am. St. Rep. 165; 32 L. R. A. 82; 44 Pac. 345.

When jurisdiction of the person is acquired. The affidavit for service by publication should show with accuracy the efforts made to serve the defendant with summons, and the reason why such service could not be made. Kahn v. Matthai, 115 Cal. 689; 47 Pac. 698; Rue v. Quinn, 137 Cal. 651; 66 Pac. 216; 70 Pac. 732. The affidavit must show two facts: 1. The exercise of due diligence to find the defendant within the state; and 2. The failure to find him, after due diligence. Rue v. Quinn, 137 Cal. 651, 655; 66 Pac. 216; 70 Pac. 732. The fact of service, not the proof thereof, gives the court jurisdiction, and it has authority to receive an amended affidavit of service after judgment, and before the roll is made up. Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146; 16 Pac. 887; Sichler v. Look, 93 Cal. 600; 29 Pac. 220; Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509; Bank of Orland v. Dodson, 127 Cal. 208; 78 Am. St. Rep. 42; 59 Pac. 584. The court does not acquire jurisdiction, by constructive service of summons by publication in a foreclosure suit, to enter or docket a personal judgment against the defendant for any deficiency left unpaid by the proceeds of the sale. Blumberg v. Birch, 99 Cal. 416; 37 Am. St. Rep. 67; 34 Pac. 102; Latta v. Tutton, 122 Cal. 279; 68 Am. St. Rep. 30; 54 Pac. 844. The return need not show anything not required by the statute. Williamson v. Cummings Rock Drill Co., 95 Cal. 652; 30 Pac. 762. Where the affidavit is insufficient, the clerk has no authority to enter default, and the court has no jurisdiction to enter judgment: both default and judgment, so entered, are void. Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509. The service of the summons and complaint gives the court jurisdiction in personam to try and determine every description of question, whether dilatory or in chief, that can possibly arise in the action, and if the affidavit showing service fails to show that the affiant was competent at the date of the service, it is but an irregularity, to be disposed of by motion to quash, or by grant of further time to answer, or to be the basis of a motion in arrest, or for a new trial, or of proceedings in error, but it does not show a want of jurisdiction. Peck v. Strauss, 33 Cal. 678; Drake v. Duvenick, 45 Cal. 455; Ex parte Ah Men, 77 Cal. 198; 11 Am. St. Rep. 263; 19 Pac. 380; Meredith v. Santa Clara Mining Ass'n, 60 Cal. 617. Defendants not served are not bound by the judgment, nor are they personally liable for its satisfaction; the statute provides that property in which they are jointly interested with other defendants may be taken in execution to satisfy the judgment. Tay v. Hawley, 39 Cal. 93; Stewart v. Spaulding, 72 Cal. 264; 13 Pac. 661. The purpose in effecting service of summons upon a defendant in a civil action, whether personal or merely constructive, is to acquire that jurisdiction of his person which is ordinarily indispensable to enable the court to proceed to judgment; and if such service, of the one character or the other, is effected pursuant to the provisions of law, in a case where the subject-matter is itself one cognizable by the court before which the defendant is cited to appear, it results, upon general principles, that the court may rightly proceed to determine the case, and that its judgment cannot be questioned for mere lack of jurisdiction to render it. People v. Bernal, 43 Cal. 385. Defendants, by pleading to the merits of the case, waive any objection they may have to defects in the process and its service. Desmond v. Superior Court, 59 Cal. 274; Sears v. Starbird, 78 Cal. 225; 20 Pac. 547. The presumption of service by delivery to the defendant personally arises from the affidavit that the affiant "personally served" the defendant. Drake v. Duvenick, 45 Cal. 455. The code requires that the summons shall be embodied in the judgment roll; but, where absent there-

from, if it appears that it was in fact issued, that it was sufficient in form, and that it was duly served, a sufficient prima facie showing is made to give the court jurisdiction of the person of defendant, and to support the judgment upon direct attack by appeal. Kahn v. Matthai, 115 Cal. 689; 47 Pac. 698. A recital in the judgment that the defendant was duly served is a direct adjudication upon the point, and is as conclusive upon the parties as any other fact decided, if it does not appear affirmatively, from other portions of the record, that the recital is untrue. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. Where the defendant was never served, the court never acquired jurisdiction to enter judgment against him. Barney v. Vigoureaux, 75 Cal. 376; 17 Pac. 433. Service upon the attorney in fact of the defendant is not service upon the defendant, and the court does not acquire jurisdiction over the defendant. Drake v. Duvenick, 45 Cal. 455. Where, in an action in a justice's court, the complaint was filed against a corporation, and the return showed service of summons, addressed to the corporation, upon a member of the corporation, the court did not acquire jurisdiction over the defendant corporation. King v. Randlett, 33 Cal. 318. The defendant is presumed to be a resident of the county wherein he is served. King v. Blood, 41 Cal. 314.

Voluntary appearance. Courts will not take judicial notice of the signatures of the parties to the cause: when proof of service consists of the written admission of the defendants, such admission, to be available, should be accompanied with some evidence of the genuineness of the signatures. Alderson v. Bell, 9 Cal. 315. An appearance entered by the attorney of the party, whether authorized or not, is a good and sufficient appearance to bind the party, except where fraud is used, or the attorney is unable to respond in damages. Suydam v. Pitcher, 4 Cal. 280. When attorneys inadvertently appear and answer for all the defendants, intending to appear and answer for only part of them, and, upon discovery of the mistake, the answer and appearance are, by order of the court, withdrawn, the court has no jurisdiction, in consequence of inadvertence. Forbes v. Hyde, 31 Cal. 342. Although no summons is issued, the authority of the attorney to appear will be presumed, although there is no evidence of such authority, if nothing to the contrary appears. Suydam v. Pitcher, 4 Cal. 280; Turner v. Caruthers, 17 Cal. 431; Hayes v. Shattuck, 21 Cal. 51; Ventura County v. Clay, 119 Cal. 213; 51 Pac. 189; Pacific Paving Co. v. Vizelich, 141 Cal. 4; 74 Pac. 352. The appearance of a licensed attorney and counselor is prima facie evidence that he has been retained in the cause: it would be a dangerous practice to afford litigants the opportunity to avail themselves of, or to escape from the judgments of courts upon, such a plea. Suydam v. Pitcher, 4 Cal. 280; Holmes v. Rogers, 13 Cal. 191; Sampson v. Ohleyer, 22 Cal. 200. A special appearance may be made for the purpose of quashing the summons or proof of service, but a demurrer to the complaint is a submission to jurisdiction. McDonald v. Agnew, 122 Cal. 448; 55 Pac. 125. The appearance of the defendant after judgment, to move to dismiss the case, does not cure the fatal defect of want of jurisdiction. Deidesheimer v. Brown, 8 Cal. 339. Where a party is not brought into court, nor does he come in and thus waive the necessity of service, the court has no jurisdiction over him, and a judgment against him is a nullity. Gray v. Hawes, 8 Cal. 562. Where an attorney appears, and objects only because the court has not acquired jurisdiction of the person of the defendant, the appearance is special, and no statement to that effect, in notice or motion, is required, or can have any effect if made. Security Loan etc. Co. v. Boston etc. Fruit Co., 126 Cal. 418; 58 Pac. 941; 59 Pac. 296; Thompson v. Alford, 128 Cal. 227; 60 Pac. 686. The recital of appearance in the record is never conclusive; and where the expression is general, it is confined to those parties who have been served. Chester v. Miller, 13 Cal. 558. Where an attorney appears for a defendant in a court of general jurisdiction, the court thereby acquires jurisdiction of the person of the defendant; if such appearance was without authority, that fact cannot be shown, as a defense at law, in a suit upon the judgment: the defendant is left to his remedy against the attorney for damages if solvent, or to his remedy in equity if insolvent. Carpentier v. Oakland, 30 Cal. 439. Where the answer has the signature of the attorney of record and that of an associate attorney attached to it, the court is not bound to determine whether the signature of the attorney of record was put there by the associate without his authority. Willson v. Cleaveland, 30 Cal. 192. Where the defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction of the cause and of his person, a special appearance is converted into a general one: it is a submission to the jurisdiction of the court, as completely as if he had been regularly served with process, whether such an appearance, upon its terms, is limited to a special appearance or not. Security Loan etc. Co. v. Boston etc. Fruit Co., 126 Cal. 418; 58 Pac. 941; 59 Pac. 296; Thompson v. Alford, 128 Cal. 227; 60 Pac. 686. It is the character of the relief asked, and not the intention of the party that it shall or shall not constitute a general appearance, that

is material. Security Loan etc. Co. v. Boston etc. Fruit Co., 126 Cal. 418; 58 Pac. 941; 59 Pac. 296. The voluntary appearance of the defendant is equivalent to personal service of summons and a copy of the complaint upon him, and an appearance without being summoned confers jurisdiction equally with appearance after being summoned; under our practice, a person who is not named in the complaint nor served with summons, and who is interested in the matter in litigation, may become a party by obtaining leave to file a complaint in intervention. Tyrrell v. Baldwin, 67 Cal. 1; 6 Pac. 867. Jurisdiction of the persons of original defendants may be acquired by the service of the summons or by their voluntary appearance: whatever jurisdiction is acquired by service is therefore acquired by voluntary appearance. Hibernia Sav. & L. Soc. v. Cochran, 141 Cal. 653; 75 Pac. 315. Putting in an answer is an appearance, and such appearance is a waiver of the mere formality of the issuing of the summons: the only purpose of the summons is to bring the defendant into court. Hayes v. Shattuck, 21 Cal. 51; Shay v. Superior Court, 57 Cal. 541. Where the complaint is filed, and the attorneys for the defendant appear for him, and file a notice, "We have been retained by and hereby appear for the above-named defendant in the above-entitled action," the court thereby acquires jurisdiction of the defendant, although no summons is issued. Dyer v. North, 44 Cal. 157. Where the court has jurisdiction of the subject-matter, and all the parties are before it, the filing of a cross-complaint, ordered by the court, does not affect its jurisdiction. Hansen v. Wagner, 133 Cal. 69; 65 Pac. 142. The voluntary appearance of a defendant, by his attorney, is equivalent to personal service of the summons and complaint. Western Lumber etc. Co. v. Merchants' Amusement Co., 13 Cal. App. 4; 108 Pac. 891.

CODE COMMISSIONERS' NOTE. 1. When the court acquires jurisdiction. In order to give a court jurisdiction of the subject-matter, so as to enable it to issue orders or process, it is necessary that the action should be commenced as prescribed by § 405, ante. Ex parte Cohen, 6 Cal. 320.

2. Appearance defined. See § 1014, post.

3. Voluntary appearance of defendant. The only object of a summons is to bring a party into court; and if that object be attained by the appearance and pleading of a party, there can be no injury to him. Smith v. Curtis, 7 Cal. 587. And if no summons was issued, and yet the defendant appears, the court by his appearance acquired jurisdiction. Hayes v. Shattuck, 21 Cal. 54. A voluntary appearance is sufficient to confer jurisdiction. See Mahlstadt v. Blanc, 34 Cal. 577.

4. **Appearance by attorney.** An appearance entered by attorney, whether authorized or not, was held a good and sufficient appearance to bind the party, except in those cases where fraud has been used, or it is shown the attorney is unable to respond to damages. An appearance by attorney at common law, and by the express letter of our statute, amounts to an acknowledgment or waiver of service. Suydam v. Pitcher, 4 Cal. 280. And the authority of an attorney to appear is presumed. Suydam v. Pitcher, 4 Cal. 280; Hayes v. Shattuck, 21 Cal. 54; see also Carpentier v. Oakland, 30 Cal. 439.

5. **Appearance by attorney. Attorney has management of case.** A party to an action may appear in his own proper person, or by attorney, but he cannot do both. If he appears by attorney, he must be heard through him, and such attorney has the management and control of the action. Board of Commissioners v. Younger, 29 Cal. 149; 87 Am. Dec. 164.

6. **Appearance by mistake of attorney.** Where an attorney only authorized to appear for a few of several defendants inadvertently files an answer for all, and discovering the mistake obtains an order to withdraw his answer and file a new one limited to the defendants for whom he intended to answer, the court has jurisdiction only of those defendants for whom the attorney finally appears. Forbes v. Hyde, 31 Cal. 346.

7. **Genuineness of signature of attorney of record.** If the signature of the attorney of record, and that of an associate attorney is affixed to the pleadings, the court will not strike it out. The court will not try the question, whether the signature of the attorney of record was genuine or put there by his associate without his authority. Wilson v. Cleaveland, 30 Cal. 200.

8. **Defendant served with process, but not given statutory time for appearance.** In case that the defendant, although served with process, was not given the time allowed by statute to appear and answer, this would be good reason in the court below to have quashed the writ upon motion by amicus curiæ, or for extension of time to appear and answer on motion of defendant; it would have been a good objection also on error, arrest of judgment, or motion for a new trial, but the defendant having been summoned to appear on a day certain, it cannot be said that the court had no jurisdiction of the person, so as to render its judgment a nullity. Whitwell v. Barbier, 7 Cal. 64.

9. **Defendant must have been cited to appear, before judgment can be entered against him.** In suits in personam in courts other than admiralty courts, no man can be deprived of his property without having been first personally cited to appear and make his defense, unless by virtue of some positive statutory enactment. Loring v. Illsley, 1 Cal. 29.

10. **Judgment cannot be sustained if defendant was not served and did not appear.** See opinion in case of Hawkins v. Abbott, 40 Cal. 640.

TITLE VI.

PLEADINGS IN CIVIL ACTIONS.

Chapter I. Pleadings in General. §§ 420–422.
II. Complaint. §§ 425–427.
III. Demurrer to Complaint. §§ 430–434.
IV. Answer. §§ 437–442.
V. Demurrer to Answer. §§ 443, 444.
VI. Verification of Pleadings. §§ 446–449.
VII. General Rules of Pleading. §§ 452–465.
VIII. Variance. Mistakes in Pleadings and Amendments. §§ 469–476.

CHAPTER I.

PLEADINGS IN GENERAL.

§ 420. Definition of pleadings.
§ 421. This code prescribes the form and rules of pleadings.
§ 422. What pleadings are allowed.

§ 420. Definition of pleadings. The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.

Legislation § 420. Enacted March 11, **1872**; re-enactment of Practice Act, § 36.

Pleadings or formal allegations. The term "pleading" includes a sworn petition, complaint, or affidavit, without regard to what it may be termed, upon which an order to show cause is made (California Title Ins. etc. Co. v. Consolidated Piedmont Cable Co., 117 Cal. 237; 49 Pac. 1; Duff v. Duff, 71 Cal. 513; 12 Pac. 570), and also a petition for letters of administration. Duff v. Duff, 71 Cal. 513; 12 Pac. 570. While the word "practice" includes all "pleadings," yet "pleadings" never includes all "practice." People v. Central Pacific R. R. Co., 83 Cal. 393; 23 Pac. 303.

CODE COMMISSIONERS' NOTE. As to parties intervening, see § 387, ante.

§ 421. This code prescribes the form and rules of pleadings. The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this code.

One form of action. Ante, § 307.
Rules of pleading, generally. Post, §§ 452 et seq.

Legislation § 421. Enacted March 11, **1872**; based on Practice Act, § 37 (New York Code, § 140), which read: "All the forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed in this act."

Rules prescribed by the code. The words "this code," in this section, refer to the Code of Civil Procedure. People v. Central Pacific R. R. Co., 83 Cal. 393; 23 Pac. 303. The character and sufficiency of a pleading will be determined by the court from the facts alleged in it. McDougald v. Hulet, 132 Cal. 154; 64 Pac. 278. It is not what a pleading is called, but the facts which it sets up, that determines its character. McDougald v. Hulet, 132 Cal. 154; 64 Pac. 278.

Forms of actions abolished. Under the code, we have but one system of rules respecting pleadings, which governs all cases, both actions at law and suits in equity: the former distinctions between common-law pleading and equity pleading no longer exist. Bowen v. Aubrey, 22 Cal. 566. There is only one form of action in this state: it has no name, and no action can be defeated because not properly named. Faulkner v. First Nat. Bank, 130 Cal. 258; 62 Pac. 463. All actions are now, in effect, special actions on the case. Rogers v. Duhart, 97 Cal. 500, 505; 32 Pac. 570. It was the design of the framers of the new system to make the pleadings conform, so far as possible, to the old chancery, rather than to the common-law, forms, for the obvious reason that the chancery forms are better adapted to the new system, which requires the pleader to state, in ordinary and concise language, the facts constituting his cause of action or defense. Brown v. Martin, 25 Cal. 82; Johnson v. Polhemus, 99 Cal. 240; 33 Pac. 908. The common-law system of procedure has been abolished, with a view to the removal of all stumbling-blocks, and to substitute simplicity and directness for complexity and circuity of action. Kimball v. Lohmas, 31 Cal. 154. The complaint now merely consists of a statement

of the facts constituting the cause of action, in ordinary and concise language (Wright v. Superior Court, 139 Cal. 469; 73 Pac. 145); but the defendant may set out the statement in two separate forms, where there is a doubt as to his ability safely to plead the case in one mode only. Wilson v. Smith, 61 Cal. 209. While the distinctions in the form of actions ex delicto and ex contractu are abolished, and one form of action, only, is substituted, yet the principles of law which govern such actions are retained. Lubert v. Chauviteau, 3 Cal. 458; 58 Am. Dec. 415. Relief is administered without reference to the technical and artificial rules of the common law upon this subject, and the only restrictions upon the pleader, in respect to stating the different causes of action in the same complaint, are those imposed by statute. Jones v. Steamship Cortes, 17 Cal. 487; 79 Am. Dec. 142. In an action for the conversion of personal property, it is immaterial in which mode the plaintiff seeks redress; he may waive the tort and sue in assumpsit; whether he claims in assumpsit, as upon a sale, or for the value of the goods, as by conversion, he can establish only a pecuniary obligation, which the defendant may controvert by any facts connected with the transaction out of which the plaintiff's claim arose. Story etc. Commercial Co. v. Story, 100 Cal. 30; 34 Pac. 671. It is error to suppose, that, because the statute abolishes the distinctions in the form of actions, it is immaterial what the substantial allegations of pleadings are, or that all the distinctions which the law makes in causes of action are swept away. Sampson v. Shaeffer, 3 Cal. 196; Miller v. Van Tassel, 24 Cal. 459; Story etc. Commercial Co. v. Story, 100 Cal. 30; 34 Pac. 671; Marsteller v. Leavitt, 130 Cal. 149; 62 Pac. 384. While the mere forms of pleadings are simplified, yet the body of the law is preserved, with those general principles and unerring rules, those sound and logical conclusions, which constitute its justice and justify its glory as a science. Sampson v. Shaeffer, 3 Cal. 196. Where the allegations in the complaint were not supported by the evidence, because the plaintiff had mistaken his form of action, yet, his remedy being in contract and not in tort, such a variance, under the former practice, was ground for reversal. Butler v. Collins, 11 Cal. 391. The statute makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons: it does not give one rule to determine the effect of a pleading when the defendant is an individual, and another and different rule when the defendant is a corporation. San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

CODE COMMISSIONERS' NOTE. Under the code, we have but one system of rules respecting pleadings, which govern all cases, both at law and in equity. Bowen v. Aubrey, 22 Cal. 569; Payne v. Treadwell, 16 Cal. 243; see also Easterly v. Bassignano, 20 Cal. 489; Goodwin v. Hammond, 13 Cal. 169; 73 Am. Dec. 574; Riddle v. Baker, 13 Cal. 302; Piercy v. Sabin, 10 Cal. 27; 70 Am. Dec. 692.

§ 422. What pleadings are allowed. The only pleadings allowed on the part of the plaintiff are:

1. The complaint;
2. The demurrer to the answer;
3. The demurrer to the cross-complaint;
4. The answer to the cross-complaint.

And on the part of the defendant:

1. The demurrer to the complaint;
2. The answer;
3. The cross-complaint;
4. The demurrer to the answer to the cross-complaint.

Legislation § 422. 1. Enacted March 11, **1872**; based on Practice Act, § 38, as amended by Stats. 1865–66, p. 701, which read: "The pleadings on the part of the plaintiff shall be the complaint or demurrer to the defendant's answer; the pleadings on the part of the defendant to the original complaint or cross-complaint of a co-defendant shall be the demurrer or answer. When a defendant is entitled to relief as against the plaintiff alone, or against the plaintiff and a co-defendant, he may make a separate statement in his answer of the necessary facts, with a prayer for the relief sought, instead of bringing a distinct cross-action. All pleadings subsequent to the original complaint shall be filed with the clerk, and a copy thereof served on the adverse party or his attorney, if the adverse party or his attorney live within the county where the action is pending; provided, that when the answer contains a cross-complaint, the parties plaintiff or defendant, or his or their attorney thereto, shall be served with a copy thereof, and shall have the same time thereafter to plead thereto that is allowed for pleading to the original complaint after service of the summons." When enacted in 1872, § 422 read as at present, except that it did not contain subds. 3, 4, in either place.

2. Amendment by Stats. **1901**, p. 132; unconstitutional. See note ante, § 5.

3. Amended by Code Amdts. **1907**, p. 705.

The only pleadings allowed. The only pleadings allowed are prescribed in this section. Estate of Wooten, 56 Cal. 322; People v. Superior Court, 114 Cal. 466; 46 Pac. 383. A replication has no place under our system of pleading (Moore v. Copp, 119 Cal. 429; 51 Pac. 630); and dilatory

pleas are made causes of demurrer (Brown v. Martin, 25 Cal. 82); and a cross-complaint is a pleading on the part of the defendant. Wood v. Johnston, 8 Cal. App. 258; 96 Pac. 508.

CODE COMMISSIONERS' NOTE. In their report to the legislature, the commissioners say: "We have been urged to restore the 'reply,' and the arguments in favor of its restoration are convincing. Were we making the law, instead of drafting a bill to be passed upon by the law-making power, we would feel no hesitation whatever as to our course. The 'reply' once formed a part of our system of pleading, and after a short trial it was abandoned. Were we to restore it, we would be met with this fact as an objection. After careful consideration we have determined not to move in the premises. The 'cross-complaint' has been omitted, for we think it may be safely said that no member of the profession has ever found any use for it. Nothing can be brought into a case by 'cross-complaint' that could not, under our system, be brought in by answer."

CHAPTER II.

COMPLAINT.

§ 425. Complaint, first pleading.
§ 426. Complaint, what to contain.
§ 426a. Statement of facts in divorce complaint.
§ 427. What causes of action may be joined.

§ 425. Complaint, first pleading. The first pleading on the part of the plaintiff is the complaint.

Legislation § 425. Enacted March 11, 1872.

§ 426. Complaint, what to contain. The complaint must contain:

1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action;

2. A statement of the facts constituting the cause of action, in ordinary and concise language;

3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated.

Title. Papers defectively entitled. Post, § 1046.
Venue. Ante, §§ 392–400.
Parties. Ante, §§ 367–390.
Parties, misjoinder or non-joinder. Post, § 430.
Association may be sued under common name. Ante, § 388.
Intervention. Ante, § 387.
Fictitious names for defendants. Post, § 474.
Abbreviations and numerals. Ante, § 186.
Construction of pleadings to be liberal. Post, § 452.
Errors and defects to be disregarded. Post, § 475.
Material allegations, not controverted, taken as true. Post, § 462.
Service of complaint. Ante, § 410.
Several causes of action, uniting. Post, § 427.
Pleading, in particular cases. See specific title.
Amendment.
1. Of pleadings. Post, §§ 472, 473.
2. Of complaint. Post, § 432.
Effect of setting out written instrument, if genuineness not denied on oath. Post, §§ 447–449.
Variance. Post, §§ 469 et seq.
Gold coin, allegations to obtain judgment in. Post, § 667.
Supplemental complaint. Post, § 464.
Verification of pleadings. Post, § 446.

Legislation § 426. Enacted March 11, 1872; based on Practice Act, § 39 (New York Code, § 142). When enacted in 1872, (1) in the introductory paragraph, "must" was changed from "shall"; (2) in subd. 1, (a) "specifying" was omitted before "the name," (b) the words "the name of" were omitted before "county," (c) and the words "plaintiff and defendant" were omitted at the end of the subdivision; (3) in subd. 3, "must" was changed from "shall."

The title of the action. The caption is no part of the complaint, unless referred to by appropriate allegations in the body thereof; but where the caption of the complaint conflicts with the facts stated in the body thereof, a demurrer for uncertainty and ambiguity should be sustained. Hawley Bros. Hardware Co. v. Brownstone, 123 Cal. 643; 56 Pac. 468. A mistake in the designation of the court, however, is not such irregularity as will affect substantial rights, and may be disregarded. Ex parte Fil Ki, 79 Cal. 584; 21 Pac. 974.

Statement of cause of action. The "cause of action" is a present, subsisting cause of action, entitling the plaintiff to judgment, at the time the action is commenced. Hentsch v. Porter, 10 Cal. 555. A complaint, to be good, must show a cause of action in favor of the plaintiff and against the defendant, existing at the time the action is commenced. Affierbach v. McGovern, 79 Cal. 268; 21 Pac. 837. Where only the facts constituting the cause of action are to be alleged, under the code, it is not requisite to aver either the consideration or the promise, when liability is implied from the facts alleged. McFarland v. Holcomb, 123 Cal. 84; 55 Pac. 761. The complaint should state expressly and in direct terms the facts constituting the cause of action; inference, argument, and hypothesis are not permitted. Joseph v. Holt, 37 Cal. 250; Green v. Palmer, 15 Cal. 411; 76 Am. Dec. 492; Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481; 49 Pac. 573. Argumentative pleading is not permissible under the code, any more than it was at common law. Burkett v. Griffith, 90 Cal. 532; 25 Am. St. Rep. 151; 13 L. R. A. 707; 27 Pac. 527. Where the facts stated in the complaint

are substantially those required to support a particular common-law action, the principles of pleading and practice which apply to such common-law action are applicable to the facts pleaded. Faulkner v. First Nat. Bank, 130 Cal. 258; 62 Pac. 463. The complaint should be founded upon the theory under which the plaintiff is entitled to recover, and should state all the facts essential to support that theory; failing in these respects, it is radically defective, and does not state facts sufficient to constitute a cause of action. Buena Vista Fruit etc. Co. v. Tuohy, 107 Cal. 243; 40 Pac. 386. The cause of action is made up of facts upon which the plaintiff's right to sue is based, and upon which the defendant's duty has arisen, coupled with facts which constitute the latter's wrong. Hutchinson v. Ainsworth, 73 Cal. 452; 2 Am. St. Rep. 823; 15 Pac. 82. Evidence of facts, or stipulations as to the facts of the case, cannot make a case broader than it appears from the allegations of the pleadings, nor do they entitle a party to any relief beyond that to which he is entitled by the averments. Hicks v. Murray, 43 Cal. 515. The facts set up in the pleading determine its character and sufficiency. McDougald v. Hulet, 132 Cal. 154; 64 Pac. 278.

Ordinary and concise language. The ultimate, and not the probative, facts are to be alleged in a pleading (McCaughey v. Schuette, 117 Cal. 223; 59 Am. St. Rep. 176; 46 Pac. 666; 48 Pac. 1088); and words should be given their ordinary meaning, unless modified by the context. Christensen v. Cram, 156 Cal. 633; 105 Pac. 950. The defendant is entitled to a distinct statement of the facts asserted by the plaintiff to exist: alternative allegations are not permitted. Jamison v. King, 50 Cal. 132. A complaint, to be sufficient, must contain a statement of facts which, without the aid of conjectured facts not stated, shows a complete cause of action. Going v. Dinwiddie, 86 Cal. 633; 25 Pac. 129. In pleading, the essential facts, upon which the legal points in the controversy depend, should be stated with clearness and precision, so that nothing is left for the court to surmise. Gates v. Lane, 44 Cal. 392. This section contemplates the English language; a foreign language is not "ordinary language," within the meaning of that provision. Stevens v. Kobayshi, 20 Cal. App. 153; 128 Pac. 419. It is sufficient to state in ordinary and concise language the facts constituting the cause of action: if the defendant desires further particulars, he may call for them, and they must be given to him within a reasonable time. Aydelotte v. Bloom, 13 Cal. App. 56; 108 Pac. 877.

Sufficiency of facts. Every fact which a plaintiff will be called upon to prove at the trial must be averred in his complaint. Henke v. Eureka Endowment Ass'n, 100 Cal. 429; 34 Pac. 1089. Where a complaint sets forth a number of causes of action, in separate counts, a general demurrer interposed to the complaint, as a whole, will not be sustained, if any single count states facts sufficient to constitute a cause of action. Krieger v. Feeny, 14 Cal. App. 538; 112 Pac. 901. Though the averments of a complaint do not involve the statement of an express promise to pay a stipulated sum for merchandise furnished, yet they may still be sufficient to entitle the plaintiff to a judgment for whatever the evidence may disclose that the merchandise is reasonably worth. Krieger v. Feeny, 14 Cal. App. 538; 112 Pac. 901. In an action by a vendor to recover damages for the breach of a contract for the sale and purchase of real estate, where the vendor agreed to put the vendee in possession, allegations, in the complaint, of contemporaneous oral understandings, do not excuse the necessity of an allegation of actual delivery of possession by the vendor. Pierce v. Edwards, 150 Cal. 650; 89 Pac. 600. A complaint in an action upon a note, set forth therein, which shows that it was made payable to the order of a bank, and not to the plaintiff, and which does not allege any indorsement or transfer of the note to the plaintiff, does not state a cause of action. Ball v. Lowe, 135 Cal. 678; 68 Pac. 106. Unless there is a contract in writing, signed by the party to be charged, authorizing a real-estate broker to sell or exchange real property, the broker cannot recover his commissions. Zeimer v. Antisell, 75 Cal. 509; 17 Pac. 642; McPhail v. Buell, 87 Cal. 115; 25 Pac. 266; Dolan v. O'Toole, 129 Cal. 488; 62 Pac. 92; Jamison v. Hyde, 141 Cal. 109; 74 Pac. 695; Dreyfus v. Richardson, 20 Cal. App. 800; 130 Pac. 161; Naylor v. Ashton, 20 Cal. App. 544; 130 Pac. 181; Holland v. Flash, 20 Cal. App. 686; 130 Pac. 32. A general authority given to brokers, to negotiate a loan upon the defendant's property, at a specified rate of interest, which is not successfully negotiated, cannot be construed as a general authority to negotiate a sale or exchange of the property. Holland v. Flash, 20 Cal. App. 686; 130 Pac. 32. A complaint against a judicial officer for false imprisonment must aver, in terms, that the acts constituting the imprisonment were without or in excess of his jurisdiction, or facts from which a want of jurisdiction appears. Going v. Dinwiddie, 86 Cal. 633; 25 Pac. 129. In an action of forcible entry and unlawful detainer, it is not necessary for the plaintiff specially to plead punitive damages. San Francisco etc. Society v. Leonard, 17 Cal. App. 254; 119 Pac. 405. One who claims that his conduct has been influenced, to his prejudice, by alleged false statements of another, must allege that he believed them to be true, and relied on them in his subsequent actions re-

lating to the subject thereof. Burke v. Maguire, 154 Cal. 456; 98 Pac. 21. One who seeks equity must do equity: a complaint in equity which does not offer to do equity, is demurrable. Buena Vista Fruit etc. Co. v. Tuohy, 107 Cal. 243; 40 Pac. 386. An allegation in the complaint, "that the said defendant executed to this plaintiff a promissory note," is equivalent to an allegation "that the defendant made his note payable to the plaintiff"; and an averment that the defendant executed to the plaintiff his note in writing includes and imports a delivery of the same to the plaintiff. Hook v. White, 36 Cal. 299. The common counts for money had and received may be used to recover money obtained by false and fraudulent representations. Minor v. Baldridge, 123 Cal. 187; 55 Pac. 783; Winkler v. Jerrue, 20 Cal. App. 555; 129 Pac. 804. If money, according to the allegations of a complaint to recover money paid for a subscription to stock, is paid on account of a subscription for the purchase of stock in one corporation, but is diverted to payment on account of stock in another corporation, and it is shown that certain named defendants acted as agents of both corporations in the matter, the complaint states a good cause of action against both the corporation defendant and the agents. Gray v. Ellis, 164 Cal. 481; 129 Pac. 791. The annexing of a contract to complaint, and making it a part thereof, cannot supply the want of the essential averments in the pleading. Hayt v. Bentel, 164 Cal. 680; 130 Pac. 432. A complaint in an action to recover damages for an assault and battery is sufficient, where the assault, the means employed, and the character thereof are fully set forth. Jones v. Lewis, 19 Cal. App. 575; 126 Pac. 853. Where the complaint, in an action for goods sold and delivered, alleges a sale and delivery to defendants other than the corporation defendant, and that such corporation assumed the liability of such other defendants, the sale and delivery alleged is material to the alleged liability of the corporation, and the plaintiff is bound by the material allegations of his complaint. Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469. Where the terms of a special contract have been varied or modified by the agreement of the parties, an action for the amount earned should be in the form of indebitatus assumpsit, and not upon the contract. Naylor v. Adams, 15 Cal. App. 548; 115 Pac. 335. In a complaint for the foreclosure of a mechanic's lien, an allegation of the agreed price, both in the claim of lien and in the complaint, is a sufficient prima facie allegation of value, and is sufficient, in the absence of a demurrer for uncertainty. Coghlan v. Quartararo, 15 Cal. App. 662; 115 Pac. 664. The rule which permits the pleader to declare upon a contract in hæc verba is, and must be, limited to cases where the instrument set out contains the formal contract, showing in express terms the promises and undertaking on both sides. Joseph v. Holt, 37 Cal. 250. A contract in writing may be declared on according to its legal effect, or in hæc verba. Joseph v. Holt, 37 Cal. 250. A complaint for relief against a judgment or decree, on the ground of alleged fraud in its procurement, which does not state nor show any fact constituting a defense to the merits of the original action, and which does not show that the moving party is able to present to the court the evidence constituting that defense, does not state a cause of action. Bell v. Thompson, 147 Cal. 689; 82 Pac. 327. The complaint, in an action to recover upon an assigned claim, should state that the plaintiff is the owner of the claim. Krieger v. Feeny, 14 Cal. App. 538; 112 Pac. 901. The allegation that a certain condition exists because of a certain fact, necessarily carries with it the implication that that fact also exists. Bank of Anderson v. Home Ins. Co., 14 Cal. App. 208; 111 Pac. 507. The use of adverbs, such as "willfully," "unlawfully," "wrongfully," "illegally," "groundless," etc., cannot supply omitted facts. Going v. Dinwiddie, 86 Cal. 633; 25 Pac. 129. The use of the terms "wrongfully," "unlawfully," "illegally," and "without authority of law," are mere conclusions of law. Hedges v. Dam, 72 Cal. 520; 14 Pac. 133. The word "due," in a finding, is not the equivalent of "unpaid." Ryan v. Jacques, 103 Cal. 280, 37 Pac. 186. The time of alleged ouster is not material in a complaint in ejectment. Kidder v. Stevens, 60 Cal. 414; Collier v. Corbett, 15 Cal. 183. Where the pleading shows that a cause of action would not arise until the expiration of a certain period, it must appear that such time had elapsed before suit was commenced. Doyle v. Phœnix Ins. Co., 44 Cal. 264. The allegation of unnecessary matter may be treated as surplusage. Rogers v. Duhart, 97 Cal. 500; 32 Pac. 570. An allegation of actual fraud is not sustained by proof of mistake; nor can it be said that mistake, as a legal proposition, amounts to constructive fraud. Mercier v. Lewis, 39 Cal. 532. An allegation as to the filing of a bond is sufficient, without an averment of its execution and delivery. Sacramento County v. Bird, 31 Cal. 66. Where the complaint alleged that the plaintiff was entitled, by virtue of a prior appropriation, to all the water flowing in a cañon at the head of a ditch, and that the defendant diverted the water to the plaintiff's damage, it is not necessary to state whether the water was supplied at the head of the ditch by one or more smaller streams. Priest v. Union Canal Co., 6 Cal. 170. In an action brought on a stockholder's liability, an averment that the corporation became indebted to a cer-

tain amount is a sufficient allegation of the creation of the indebtedness, as against a general demurrer: and any ambiguity or uncertainty is waived by failure to demur on these grounds. Duke v. Huntington, 130 Cal. 272; 62 Pac. 510; Whitehurst v. Stuart, 129 Cal. 194; 61 Pac. 963. Allegations must be accepted as true upon demurrer, so far, only, as they relate to matters of fact, as distinguished from matters of law. Ohm v. San Francisco, 92 Cal. 437; 28 Pac. 580. The complaint of a married woman, in an action to recover damages for an alleged wrongful seizure of her personal property, which fails to state that the property was her separate property, is defective. Thomas v. Desmond, 63 Cal. 426. A complaint, although insufficient to correct a mistake in a deed, may yet be sufficient as a complaint in an action to quiet title. Smith v. Matthews, 81 Cal. 120; 22 Pac. 409. An allegation that the plaintiff is seised in fee, is of an ultimate fact, and is a sufficient statement of the right of the plaintiff, in an action of ejectment or to quiet title. Heeser v. Miller, 77 Cal. 192; 19 Pac. 375; Payne v. Treadwell, 16 Cal. 220; Garwood v. Hastings, 38 Cal. 216; Ferrer v. Home Mut. Ins. Co., 47 Cal. 416; Rough v. Simmons, 65 Cal. 227; 3 Pac. 804; 15 Morrison's Min. Rep. 298. Ultimate facts, only, should be pleaded: neither evidence nor conclusions of law should be set forth. Hubbell v. Hubbell, 7 Cal. App. 661; 95 Pac. 664. Pleadings are to be most strictly construed against the party making them. Campbell v. Jones, 38 Cal. 507. The sufficiency of the complaint to support the judgment must be reviewed upon an appeal from the judgment. Wells Fargo & Co. v. McCarthy, 5 Cal. App. 301; 90 Pac. 203.

Evidence and law not to be pleaded. The facts must be distinguished from evidence of the facts; the latter pertains to the trial, and has no place in the pleadings. Green v. Palmer, 15 Cal. 411; 76 Am. Dec. 492. There is no necessity to put the law into the pleading (People v. Common Council, 85 Cal. 369; 24 Pac. 727), nor is it necessary to allege matter of law in the complaint (Board of Supervisors v. Bird, 31 Cal. 66); nor need matters implied by law be pleaded (Wilhoit v. Cunningham, 87 Cal. 453; 25 Pac. 675; Kraner v. Halsey, 82 Cal. 209; 22 Pac. 1137); nor need probative facts be averred in the complaint (Dambmann v. White, 48 Cal. 439), and they will be stricken out as surplusage, on motion (Miles v. McDermott, 31 Cal. 270; Gates v. Salmon, 46 Cal. 361); nor should presumptions of law be stated. Henke v. Eureka Endowment Ass'n, 100 Cal. 429; 34 Pac. 1089.

Presumptions need not be averred. Presumptions of law need not be averred. Henke v. Eureka Endowment Ass'n, 100 Cal. 429; 34 Pac. 1089; Cuthill v. Peabody, 19 Cal. App. 304; 125 Pac. 926. Where a contract is required to be in writing, the presumption that it was in writing necessarily follows the allegation of its making. Cuthill v. Peabody, 19 Cal. App. 304; 125 Pac. 926. Fraud is not presumed; and whenever it constitutes an element of a cause of action of an affirmative nature, or is invoked as conferring a right, it must be alleged. Estate of Yoell, 164 Cal. 540; 129 Pac. 999. The plaintiff, in an action on a promissory note, is presumed to be the owner and holder of the note at the commencement of the action: no allegation as to ownership is required. Pryce v. Jordan, 69 Cal. 569; 11 Pac. 185; Kirk v. Roberts, 3 Cal. Unrep. 671; 31 Pac. 620; Hook v. White, 36 Cal. 299. Whatever is an essential element to a cause of action must be presented by a distinct averment; it cannot be left to an inference to be drawn from the construction of an instrument, whether set forth by copy in the body of the complaint, or attached thereto as an exhibit. Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481; 49 Pac. 573.

Legal conclusions. In legal proceedings, it is the means by which a result is to be reached which must determine whether a given conclusion is one of fact or law; if from the facts in evidence the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such; if, on the other hand, resort must be had to artificial processes of law in order to reach a final determination, the result is a conclusion of law. Levins v. Rovegno, 71 Cal. 273; 12 Pac. 161. An averment or a statement may be of a fact or of a conclusion of law, according to the context. Levins v. Rovegno, 71 Cal. 273; 12 Pac. 161; Turner v. White, 73 Cal. 299; 14 Pac. 794; Lataillade v. Oreña, 91 Cal. 565; 25 Am. St. Rep. 219; 27 Pac. 924. A conclusion of law tenders no issue: a complaint depending upon such an allegation is insufficient and demurrable. Callahan v. Broderick, 124 Cal. 80; 56 Pac. 782; Branham v. Mayor and Common Council, 24 Cal. 585; Aurrecoechea v. Sinclair, 60 Cal. 532; Johnson v. Kirby, 65 Cal. 482; 4 Pac. 458; Spring Valley Water Works v. San Francisco, 82 Cal. 286; 16 Am. St. Rep. 116; 6 L. R. A. 756; 22 Pac. 910, 1046; Glide v. Dwyer, 83 Cal. 477; 23 Pac. 706; Ohm v. San Francisco, 92 Cal. 437; 28 Pac. 580. A conclusion of law is not required to be denied in the answer. People v. Hastings, 29 Cal. 449. A statement of conclusions of law is not the statement of an issuable fact, and should be avoided. Going v. Dinwiddie, 86 Cal. 633; 25 Pac. 129; Postal Telegraph Cable Co. v. Los Angeles, 164 Cal. 156; 128 Pac. 19. A statement that the parties entered into a parol contract of partnership is not the statement of a mere legal conclusion; it presents an issuable fact. Doudell v. Shoo, 20 Cal.

App. 424; 129 Pac. 478. An averment that one is the "owner and holder" of an instrument, is simply the averment of a conclusion of law. Wedderspoon v. Rogers, 32 Cal. 569; Poorman v. Mills & Co., 35 Cal. 118; 95 Am. Dec. 90; Hook v. White, 36 Cal. 299; Kennedy etc. Lumber Co. v. S. S. Construction Co., 123 Cal. 584; 56 Pac. 457; Curtin v. Kowalsky, 145 Cal. 431; 78 Pac. 962; People's Home Sav. Bank v. Stadtmuller, 150 Cal. 106; 88 Pac. 280. An allegation of joint liability is but a legal conclusion (Ghiradelli v. Bourland, 32 Cal. 585); as is also an allegation, made on information and belief, that no notice was given: it is not an averment of a fact. Stokes v. Geddes, 46 Cal. 17. Where the pleader, in an action to quiet title, sets forth specifically the links in his chain of title, a general allegation of ownership will be treated as a mere conclusion of law from the facts stated. Gruwell v. Seybolt, 82 Cal. 7; 22 Pac. 938; Kidwell v. Ketler, 146 Cal. 12; 79 Pac. 514; and see Dye v. Dye, 11 Cal. 163; Levins v. Rovegno, 71 Cal. 273; 12 Pac. 161; Turner v. White, 73 Cal. 299; 14 Pac. 794; Heeser v. Miller, 77 Cal. 192; 19 Pac. 375; Savings and Loan Society v. Burnett, 106 Cal. 514; 39 Pac. 922. The words, "there is now due," etc., present but a conclusion of law, and not an averment of a fact; the breach of the contract to pay is of the essence of the cause of action, and must be alleged; a failure to allege which is a defect, going to the statement of the cause of action, which is not waived by a failure to demur. Ryan v. Holliday, 110 Cal. 335; 42 Pac. 891; Frisch v. Caler, 21 Cal. 71; Roberts v. Treadwell, 50 Cal. 520; Scroufe v. Clay, 71 Cal. 123; 11 Pac. 882; Barney v. Vigoreaux, 92 Cal. 631; 28 Pac. 678. Where the complaint shows that the defendant threatened to sell the property of the plaintiff for the non-payment of an illegal tax, but fails to show that the defendant was at that time armed with any authority, real or apparent, to carry out his threat, there is no showing of any legal duress of person or property, sufficient to establish compulsion or coercion. Bank of Santa Rosa v. Chalfant, 52 Cal. 170. In the absence of all explanation, the court is justified in directing the jury to infer a conversion or an ouster from the fact of demand and refusal of a co-tenant to be let into possession. Carpentier v. Mendenhall, 28 Cal. 484; 87 Am. Dec. 135. The right to possession follows as a conclusion of law from seisin, and need not be alleged. Payne v. Treadwell, 16 Cal. 220; Boles v. Weifenback, 15 Cal. 144; Salmon v. Symonds, 24 Cal. 260; Keller v. De Ocana, 48 Cal. 638; Hihn v. Mangenberg, 89 Cal. 268; 26 Pac. 968; F. A. Hihn Co. v. Fleckner, 106 Cal. 95; 39 Pac. 214; McCaughey v. Schuette, 117 Cal. 223; 59 Am. St. Rep. 176; 46 Pac. 666; 48 Pac. 1088; Fredericks v. Tracy, 98 Cal. 658; 33 Pac. 750.

Defective statement of facts. Statements of facts must be concisely made, and, when once made, should not be repeated. Green v. Palmer, 15 Cal. 411; 76 Am. Dec. 492. Only the ultimate facts need be pleaded. Green v. Palmer, 15 Cal. 411; Babcock v. Goodrich, 47 Cal. 488. Pleadings do not subserve the purpose intended, where the court is compelled to surmise essential facts. Gates v. Lane, 44 Cal. 392. If facts are stated, although imperfectly, showing the liability of the defendant, the complaint must be sustained. Ryan v. Jacques, 103 Cal. 280; 37 Pac. 186; Tehama County v. Bryan, 68 Cal. 57; 8 Pac. 673; Harnish v. Bramer, 71 Cal. 155; 11 Pac. 888; Brown v. Weldon, 71 Cal. 393; 12 Pac. 280; Hughes v. Alsip, 112 Cal. 587; 44 Pac. 1027. Irrelevant and surplus matter, although objectionable, will not vitiate the complaint, if otherwise sufficient. Smith v. Matthews, 81 Cal. 120; 22 Pac. 409. Irregularities or defects in the statement of a cause of action may be waived by failing to answer, or by answering to the merits; but a defective cause of action is not cured by failure to answer or by verdict. Harmon v. Ashmead, 60 Cal. 439; Abbe v. Marr, 14 Cal. 210; Choynski v. Cohen, 39 Cal. 501; 2 Am. Rep. 476. Where one count in the complaint is defective, the judgment must be reversed, notwithstanding the other counts may be good, where the verdict is general, and it is not certain upon which count it was founded. Barron v. Frink, 30 Cal. 486. The judgment cannot be sustained, unless the proof establishes the cause of action alleged in the complaint, even though a different cause of action is fully proven. Nichols v. Randall, 136 Cal. 426; 69 Pac. 26; Benedict v. Bray, 2 Cal. 251; 56 Am. Dec. 332; Stout v. Coffin, 28 Cal. 65; Mondran v. Goux, 51 Cal. 151; Devoe v. Devoe, 51 Cal. 543; Murdock v. Clarke, 59 Cal. 683; Bryan v. Tormey, 84 Cal. 126; 24 Pac. 319. One good count in the complaint, sustained by the findings, will support the judgment, which will not be reversed because of the insufficient statement of other causes of action. Terrill v. Terrill, 109 Cal. 413; 42 Pac. 137; Hunt v. San Francisco, 11 Cal. 250; Barron v. Frink, 30 Cal. 486; Bernstein v. Downs, 112 Cal. 197; 44 Pac. 557. A substantial averment of facts, although defective in form, will support the verdict or a default judgment. People v. Rains, 23 Cal. 127. Where each count is sufficient as against a general demurrer, the complaint is sufficient to support the verdict and judgment. Bernstein v. Downs, 112 Cal. 197; 44 Pac. 557.

Defective allegations, how cured. Defective allegations are cured by verdict; all intendments will be made in support of the judgment thereon. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692; 75 Pac. 564; Hentsch v. Porter, 10 Cal. 555; People v. Rains, 23 Cal. 127; San Francisco v. Pennie,

93 Cal. 465; 29 Pac. 66; Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111. Defects in manner, rather than in matter, of averment do not render the complaint so radically insufficient as not to sustain the judgment. Russell v. Mixer, 42 Cal. 475. Averments lacking in the complaint cannot be supplied by a general reference to recitals of facts in an exhibit annexed to and made a part of the complaint. Mayor and Common Council v. Signoret, 50 Cal. 298. The entire absence of any allegation whatever is not within the rule that the defective allegation of a fact may be cured by default or verdict. Hentsch v. Porter, 10 Cal. 555; Richards v. Travelers Ins. Co., 80 Cal. 505; 22 Pac. 939. A defective complaint is cured by the judgment, as to all such averments as may, by fair and reasonable intendment, be found to have been pleaded. Alexander v. McDow, 108 Cal. 25; 41 Pac. 44. Tender of issue of seisin or ownership at the date of bringing suit in ejectment should be made; but the defendant may tender the issue in his answer, and where this is done, the defect in the complaint is cured. Vance v. Anderson, 113 Cal. 532; 45 Pac. 816; Schenck v. Hartford Fire Ins. Co., 71 Cal. 28; 11 Pac. 807; Cohen v. Knox, 90 Cal. 266; 13 L. R. A. 711; 27 Pac. 215; Diefendorff v. Hopkins, 95 Cal. 343; 28 Pac. 265; 30 Pac. 549; San Diego County v. Seifert, 97 Cal. 594; 32 Pac. 644.

Breach of duty. An action upon a contract must show a breach thereof. Richards v. Travelers Ins. Co., 80 Cal. 505; 22 Pac. 939; Morgan v. Menzies, 60 Cal. 341; Du Brutz v. Jessup, 70 Cal. 75; 11 Pac. 498. If there is not an entire failure to state the fact of a breach of the contract sued upon, or to allege the non-payment of money sought to be recovered, and the averment is simply uncertain and defective, the defect can be reached only by special demurrer, particularly designating the specific point at which it is aimed. Grant v. Sheerin, 84 Cal. 197; 23 Pac. 1094. Where each count of the complaint alleges that the defendant "has not paid any part of the amount due, as aforesaid," this is not a legal conclusion, but a sufficient averment of non-payment. Krieger v. Feeny, 14 Cal. App. 538; 112 Pac. 901. A complaint to recover a deposit made upon a contract to sell land is sufficient, where the facts stated therein show that the plaintiff has done all that was required of him. Snowden v. Derrick, 14 Cal. App. 309; 111 Pac. 757. A complaint to recover damages for the breach of a contract to construct a building, which alleges a failure to do the work, an abandonment thereof in an uncompleted condition, a refusal by the defendant to perform the contract, and the reasonable cost of completing the building, states a sufficient cause of action as against a general demurrer. Bacigalupi v. Phœnix Bldg. etc. Co., 14 Cal. App. 632; 112 Pac. 892. In an action to enjoin a continuous trespass on a right of way, it is not necessary to allege, in the complaint, that the plaintiff was the owner of the right of way at the time the right to the use thereof was first violated. Miller & Lux v. Kern County Land Co., 154 Cal. 785; 99 Pac. 179. The complaint in an action on a contract to sell a crop, estimated to contain twenty carloads, more or less, alleging the delivery to the defendant of nine car-loads, and the acceptance thereof and part payment therefor by him, and seeking to recover the balance due, states a cause of action. Hills v. Edmund Peycke Co., 14 Cal. App. 32; 110 Pac. 1088. Where, in an action to foreclose a mechanic's lien, the building contract provides for the submission of disputes to arbitration, the complaint must show a compliance with such provision; but where it avers the completion of the contract, the acceptance of the building, and states no dispute, there is a waiver, by such acceptance, of the defendant's right to have any dispute settled by arbitration. Burke v. Dittus, 8 Cal. App. 175; 96 Pac. 330. An averment in a complaint, that a specified sum "is now due and owing," etc., though the statement of a legal conclusion, in which the material fact of non-payment is implied, is sufficient to sustain a judgment by default. Penrose v. Winter, 135 Cal. 289; 67 Pac. 772 (overruling Ryan v. Holliday, 110 Cal. 335; 42 Pac. 891); and see Burke v. Dittus, 8 Cal. App. 175; 96 Pac. 330. A complaint for a judgment against the estate of a deceased executrix cannot be held good as a complaint in equity to follow a trust fund, and to obtain an order on the administrator of her estate to turn over to the plaintiff the share of the trust fund claimed by the plaintiff, when no breach of trust is alleged in the complaint, made by either the executrix or her administrator. Burke v. Maguire, 154 Cal. 456; 98 Pac. 21. In an action to recover money alleged to be due on a contract, an averment that the defendant has "failed, neglected, and refused to pay," said money, or any part thereof, is a sufficient allegation of non-payment, when tested by general demurrer. O'Hanlon v. Denvir, 81 Cal. 60; 15 Am. St. Rep. 19; 22 Pac. 407; Rankin v. Sisters of Mercy, 82 Cal. 88; 22 Pac. 1134; Grant v. Sheerin, 84 Cal. 197; 23 Pac. 1094; Gardner v. Donnelly, 86 Cal. 367; 24 Pac. 1072; Irwin v. Insurance Company, 16 Cal. App. 143; 116 Pac. 294. Such an averment was held not sufficient, in Scroufe v. Clay, 71 Cal. 123; 11 Pac. 882. A complaint which alleges, in effect, that the defendant cut a canal through the natural bank of a river, and, after so doing, failed to take proper precautions to prevent the waters of the river from flooding

the plaintiff's land, and also alleges that the waters of the river did in fact flood his land to his injury, sufficiently states a cause of action as against a general demurrer. Perkins v. Blauth, 163 Cal. 782; 127 Pac. 50. A complaint on a contract to sell and improve a lot states no cause of action, where it does not allege any contract to convey. Hoffman v. Osborn, 15 Cal. App. 125; 113 Pac. 705. Where a contract is payable in installments, and suit is brought for a breach of such contract, the complaint should not only allege that the defendant has made default in the payment of one or more of the installments, but also that such default has continued for the prescribed period. Southern California Music Co. v. Skinner, 17 Cal. App. 205; 119 Pac. 106.

Allegations must be direct. Material allegations must be distinctly stated in pleadings, and are not to be inferred from doubtful or obscure language. Campbell v. Jones, 38 Cal. 507. It is not sufficient to state a material fact, in a complaint, by way of recital; it should be directly averred. Denver v. Burton, 28 Cal. 549. A complaint should allege a material fact by way of direct averment, and not by inference. Stringer v. Davis, 30 Cal. 318.

Consideration. A written contract carries with it the presumption of a consideration, as a matter of law; and the burden is cast upon the defendant to show the contrary, to avoid the contract. Cuthill v. Peabody, 19 Cal. App. 304; 125 Pac. 926. It is not necessary to a good complaint that the consideration of a contract should be alleged. Cuthill v. Peabody, 19 Cal. App. 304; 125 Pac. 926. It is not necessary to aver a consideration in a complaint, where it is implied by law (Henke v. Eureka Endowment Ass'n, 100 Cal. 429; 34 Pac. 1089); nor is it necessary to aver either a consideration or a promise, where either is implied as a legal conclusion from the facts alleged. Krieger v. Feeny, 14 Cal. App. 538; 112 Pac. 901. No special averment of a consideration is necessary in support of an instrument in writing importing a consideration; the necessity of pleading a consideration is obviated, not by the mode of pleading it, but by the fact that it is in writing. Henke v. Eureka Endowment Ass'n 100 Cal. 429; 34 Pac. 1089; and see McCarty v. Beach, 10 Cal. 461; Wills v. Kempt, 17 Cal. 98; Goddard v. Fulton, 21 Cal. 430. A complaint for the specific performance of a contract for the sale of land must allege the adequacy of the consideration received by the defendant. Sunrise Land Co. v. Root, 160 Cal. 95; 116 Pac. 72.

Anticipating defenses. It is not necessary, in a complaint, to anticipate or negative any defense or counterclaim. Hills v. Edmund Peycke Co., 14 Cal. App. 32; 110 Pac. 1088; Kirk v. Roberts, 3 Cal. Unrep. 671; 31 Pac. 620. If relief and discharge is set out in bar of the action, still, under our system of pleading, which permits no replication, the defense of fraud is open to the plaintiff, without special averment; and it is equally open to him to rebut the effect of a release, by the same evidence, when, though not pleaded by the defendant, it is offered and admitted in evidence. Montgomery v. Rauer, 125 Cal. 227; 57 Pac. 894. The anticipation of a defense may render the complaint objectionable for uncertainty. Munson v. Bowen, 80 Cal. 572; 22 Pac. 253. If there was a mistake in inserting the name of the payee of a note sued upon, the facts constituting such mistake must be set forth in the complaint. Ball v. Lowe, 135 Cal. 678; 68 Pac. 106. Where the complaint states a cause of action, the defendant, if he admits such facts, must, to set up a defense, allege new matter sufficient to defeat the legal operation of the facts stated in the complaint. McDonald v. Davidson, 30 Cal. 173.

Allegations on information and belief. Where the allegations of the complaint relate to facts, the truth of which is particularly within the knowledge of the defendant, there can be no valid objection to their being based on information and belief; and § 446 seems to contemplate that the averments of a pleading may be so based; the fact that the records of the defendant, a corporation, were open to the inspection of the plaintiff does not affect the rule, for the reason that such records may be contradicted, if they do not speak the truth. McDermont v. Anaheim Union Water Co., 124 Cal. 112; 56 Pac. 779. A complaint alleging that certain services were to be performed for the plaintiff by the defendant, implies an agreement to pay a quantum meruit, and is good, as against a general demurrer, so far as the question of consideration is concerned. Semi-Tropic Spiritualists' Ass'n v. Johnson, 163 Cal. 639; 126 Pac. 488. If a verified complaint alleges facts "on information and belief," such averments do not present anything more than hearsay testimony, incompetent for the proof of a fact. Kullman v. Superior Court, 15 Cal. App. 276; 114 Pac. 589.

Pleading a written instrument. A contract may be declared on according to its legal effect, or in hæc verba; and where the latter is the case, it must be taken and considered as a part of the complaint (Murdock v. Brooks, 38 Cal. 596; Lambert v. Haskell, 80 Cal. 611; 22 Pac. 327; White v. Soto, 82 Cal. 654; 23 Pac. 210); and this course is more consistent with the mode of pleading adopted in this state Joseph v. Holt, 37 Cal. 250. A copy of a note annexed to the complaint, and referred to therein, forms a part of the complaint. Ward v. Clay, 82 Cal. 502; 23 Pac. 50, 227; Whitby v. Rowell, 82 Cal. 635; 23 Pac. 40, 382; Savings Bank v. Burns, 104 Cal. 473; 38 Pac. 102. Matters of sub-

stance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits, merely attached to the pleading; whatever is an essential element to the cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint. Burkett v. Griffith, 90 Cal. 532; 25 Am. St. Rep. 151; 13 L. R. A. 767; 27 Pac. 527; Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481; 49 Pac. 573. To plead an instrument by setting it forth in full is a recognized mode of pleading in this state; the instrument must be one on which an action or defense is founded, and must be free from defect or ambiguity; and if not, the pleader must put some construction upon it by averment; all that is accomplished by setting forth the instrument in full is to allege its existence and character; it does not involve an assertion of the truth of preliminary or collateral matters recited therein. Lambert v. Haskell, 80 Cal. 611; 22 Pac. 327. Where a subsequent count refers to a preceding count, which is definite and certain, and prays that it be deemed and taken as a part of the cause of action as though set out at length, such reference is sufficient, and it is unnecessary to repeat at length, in each of the succeeding counts, the facts therein. Treweek v. Howard, 105 Cal. 434; 39 Pac. 20. Records and papers cannot be made a part of the pleading by merely referring to them, and praying that they may be made a part of such pleading, without annexing the originals or copies as exhibits, or incorporating them with it, so as to form a part of the record in the case. People v. De la Guerra, 24 Cal. 73; Mayor and Common Council v. Signoret, 50 Cal. 298; Lambert v. Haskell, 80 Cal. 611; 22 Pac. 327; Ward v. Clay, 82 Cal. 502; 23 Pac. 50, 227; Whitby v. Rowell, 82 Cal. 635; 23 Pac. 40, 382. The rule as to exhibits is the same, whether the instrument is set forth by a copy in the body of the complaint or is attached thereto as an exhibit. Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481; 49 Pac. 573. There is no difference between setting forth an exhibit in an instrument, such as an undertaking in the body of the pleading, or in annexing it as an exhibit and making it part of the pleading by proper reference; in each case the copy is a part of the pleading. Lambert v. Haskell, 80 Cal. 611; 22 Pac. 327. Where a note is sued upon, a copy thereof in the complaint need not show the internal-revenue stamp required upon the original note; in order to defeat recovery on an unstamped note, it must appear not only that it is unstamped, but also that the stamp has been fraudulently omitted, which can be done only by answer. Hallock v. Jaudin, 34 Cal. 167.

Demand of relief. The theory of the provision that the complaint must contain a demand of the relief which the plaintiff claims, is, that the plaintiff shall not only state the specific facts which constitute his cause of action, but that he shall also state the specific relief to which he considers himself entitled; the policy is, to apprise the opposite party of the precise nature of the demand, in order that he may come prepared to meet it. Nevada County etc. Canal Co. v. Kidd, 37 Cal. 282.

Any relief embraced in the issues may be granted. Where the issues are clearly shown in the complaint and answer, the court is authorized to grant any relief embraced therein. Hurlbutt v. Spaulding Sav. Co., 93 Cal. 55; 28 Pac. 795; Blumberg v. Birch, 99 Cal. 416; 37 Am. St. Rep. 67; 34 Pac. 102. The complaint, while setting forth a single cause of action, may, at the same time, ask for different relief from different defendants; the character of the complaint is to be determined from its contents, rather than from a misnomer on the part of the pleader. Security Loan etc. Co. v. Mattern, 131 Cal. 326; 63 Pac. 482. Legal and equitable relief are administered in the same forum, according to the same general plan; and a party cannot be denied his rights, merely because he is not entitled to relief at law or in equity, as the case may be; he can be sent out of the court only where, upon his facts, he is entitled to no relief, either at law or in equity. Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423. The amount for which judgment is demanded in the complaint determines the jurisdiction (Rodley v. Curry, 120 Cal. 541; 52 Pac. 999); but the prayer of the complaint does not conclude the question of jurisdiction, regardless of the allegations on which it is founded. Lehnhardt v. Jennings, 119 Cal. 192; 48 Pac. 56; 51 Pac. 195; Jackson v. Whartenby, 5 Cal. 94. Where the facts may constitute two or more different causes of action, and may authorize different judgments, the prayer becomes significant, and may determine the nature of the action. Nevada County etc. Canal Co. v. Kidd, 37 Cal. 282; People v. Mier, 24 Cal. 61; Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722. A court of equity will not, even under a prayer for general relief, permit a party to go beyond the scope of the case made by the bill; nor will it, ordinarily, permit a bill, framed for one purpose, answer for another and distinct purpose, especially if the defendant might be surprised or prejudiced thereby. Johnson v. Polhemus, 99 Cal. 240; 33 Pac. 908. Where the allegations of the complaint are insufficient to entitle the plaintiff to introduce proofs as to any damages suffered by him, that fact does not impair its sufficiency to establish his right to equitable relief; nor is it any ob-

jection to the complaint, that a judgment for damages and for preventive relief is sought in the same action. Bradley v. Anglo-American Gas etc. Co., 102 Cal. 627; 36 Pac. 1011. The legislature is not prohibited from regulating the practice and proceedings in suits in equity because the constitution has conferred upon the superior court jurisdiction in such cases; and having such power, it cannot be doubted that it has also the power to regulate the practice of granting preventive relief. Wright v. Superior Court, 139 Cal. 469; 73 Pac. 145. Where the complaint sets forth only one cause of action, and the relief sought has reference only to this cause of action, it is no objection to the complaint that the relief sought is not single. Wickersham v. Crittenden, 93 Cal. 17; 28 Pac. 788; and see Montgomery v. McLaury, 143 Cal. 83; 76 Pac. 964. The right to both legal and equitable relief is based upon the same facts. San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549; 29 L. R. A. 839; 41 Pac. 495. In a case of an equitable character, the prayer of the complaint may be disregarded, where the facts stated are sufficient to support the decision. Wakefield v. Wakefield, 16 Cal. App. 113; 116 Pac. 309. The relief demanded in the complaint does not indicate the character of the action; the substance of the action determines its character, and this must generally be ascertained by a reference to the allegations of the complaint, without regard to the nature of the relief prayed for. Bartley v. Fraser, 16 Cal. App. 560; 117 Pac. 683.

Amendments. An amended complaint supersedes the original. Bray v. Lowery, 163 Cal. 256; 124 Pac. 1004. Where no attempt is made to state a new cause of action in an amended complaint, the amendment, though made after the expiration of the period of limitation for the action, relates back to the time of its commencement. Ruiz v. Santa Barbara Gas etc. Co., 164 Cal. 188; 128 Pac. 330. The complaint, whether original or amended, can properly speak only of things which occurred either before or concurrently with the commencement of the action. California Farm etc. Co. v. Schiappa-Pietra, 151 Cal. 732; 91 Pac. 593. Where, in order to prevent the bar of the statute, the complaint was filed on the last day, the statute is not pleadable, either by demurrer or answer, merely because the signature to the complaint is omitted; an unsigned complaint is not void. Canadian Bank v. Leale, 14 Cal. App. 307; 111 Pac. 759. In an action of forcible entry and unlawful detainer, it is an abuse of discretion to refuse to allow the plaintiff to amend his complaint so as to set up special damages, where the application to amend is made before trial, and there is no objection of surprise on the part of defendant. San Francisco etc. Building Society v. Leonard, 17 Cal. App. 254; 119 Pac. 405. A cause of action to quiet title is not changed by an amendment, where the first complaint states the wrongful claim of defendant in general terms, while the second gives the details. Henry v. Phillips, 163 Cal. 135; Ann. Cas. 1914A, 39; 124 Pac. 837. Where the complaint, with proposed amendments, states a cause of action, refusal to allow the amendments is error. Campbell-Kawananakoa v. Campbell, 152 Cal. 201; 93 Pac. 184. A cause of action to recover damages for the breach of a contract, as set forth in an original complaint, in which the plaintiffs are described as "formerly copartners," is not changed by an amendment which avers that the plaintiffs continued to be copartners in the subject-matter of the litigation. Ahlers v. Smiley, 163 Cal. 200; 124 Pac. 827.

Estoppel must be pleaded. Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469.

What answer must contain. See note post, § 437.

Contracts that must be in writing. See Civ. Code, § 1624.

Allowance of common counts under code system. See note 57 Am. Dec. 544.

CODE COMMISSIONERS' NOTE. 1. General rules of pleading under the code. The court, in the case of Green v. Palmer, 15 Cal. 414, 76 Am. Dec. 492, lay down the following valuable rules to be observed in pleading:

[We give the entire manual written by David Dudley Field, from which the court makes only certain extracts. We have also inserted the title of cases and a digest of various decisions under the rules, which they are intended to explain. The rules generally, however, are as given in Green v. Palmer.—Ed.]

First rule. The pleadings must be true. That is to say, the pleader must set forth his case as he believes it. In this respect, pleadings under the code differ much from pleadings at common law; for, though it was sometimes said to be a rule of that law that the truth should be stated, yet it was equally a rule, that certain fictions should be stated; which was much as if one should say, the pleadings must be true, except when required to be false. Thus the declarations in trover and ejectment were standing falsehoods; while the general issue in assumpsit, the statements under a videlicet, the usual averments of place, time, and amount, and many other allegations, were little better. When a lawyer wrote out a statement and put it on the files of a court, that his client was possessed of a ship, had casually lost it, and the defendant had found it, the truth being that his client had never had possession, while the defendant had had the ship in his own hands from the time it was built; it is difficult to conceive of a man of education being reduced to a position more distasteful. Not a single purpose of pleading was subserved by such statement. It did not apprise the defendant of the nature of the plaintiff's claim; it did not inform the court or jury of that which they were to try; and it did not preserve a record of the point decided. When to such a statement the defendant pleaded the general issue, that plea being nearly universal, it might truly be said that in no stage of the proceedings, before or at the trial, or when judgment was rendered, did the records of the court contain anything from which one could gather the nature of the controversy. Every word of

truth in the whole proceeding was oral and unrecorded; everything which was written down was deceptive and false. So of an action of ejectment, under our revised statutes, even after the uncouth barbarisms of fictitious plaintiffs and casual ejectors had been abolished. The plaintiff was obliged to allege, falsely in most cases, that on some day after his title accrued he was possessed of the premises in question, and that the defendant afterwards entered into them, and unlawfully withheld them from the plaintiff. The defendant pleaded that he was not guilty of unlawfully withholding the premises. These pleadings seem to have been framed on the model of those in trover, and answered as little the true purpose of pleadings. Neither the parties, nor the court, nor the jury, before the oral developments of the trial, could guess the claim or defense; and the record afterwards did not show what had been really decided. The usual averments in assault and battery were that the defendant assaulted and beat the plaintiff with sticks, stones, knives, etc., though the defendant had but touched the plaintiff with the tip of his finger. If a note made at Singapore or Calcutta were brought to suit in a county in this state, the court was innocently informed that Singapore or Calcutta lay in that county. These were some, and some only, of the untruths which common-law pleading required, recommended, or encouraged. Under this code, however, the rule is universal and inexorable, that nothing whatever should be alleged which is not believed to be true; and the lawyer who inserts any statement, no matter how trivial, which he does not believe, violates that rule, and with it, his duty as an officer of the law. It has been argued, and sometimes adjudged, that the plaintiff may still set forth his case in different counts, as they were called. But consider for a moment what those counts were. They were generally not different causes of action, but different forms of stating the same cause. Now, as there can be but one true statement of one transaction, and as the code requires the pleadings to be true, it should seem to follow that different ways of stating the same claim are no longer permissible. They were never permitted in a bill of equity. If the plaintiff have different causes of action, he may, of course, and should, set them forth; but he should not set forth the same cause of action in different forms; and when he sets forth different causes, they should be called claims or causes of action, and not counts, because the term count conveys a wrong impression and tends to preserve a nomenclature, and, with the nomenclature, rules no longer in existence.

Second rule. **Facts only must be stated.** This means the physical facts cognizable by the senses or capable of being shown to a jury without the aid of legal inferences; the facts, as contradistinguished from the law, from argument, from hypothesis, and from the evidence of the facts. A legal inference or conclusion from the facts should not be stated; that is not the province of the pleadings under our system, which is, to develop the facts. To apply the law to the facts—that is, to draw thence legal inferences or conclusions—is the province of the court. See Levinson v. Schwartz, 22 Cal. 229; Payne v. Treadwell, 5 Cal. 310; Payne v. Treadwell, 16 Cal. 246, overruling Godwin v. Stebbins, 2 Cal. 105. The words "wrongful or unlawful," when conclusions of law. See Payne v. Treadwell, 16 Cal. 246. An averment that the plaintiff was the owner or holder of a note is not the averment of an issuable fact, it is but the averment of a conclusion of law. Wedderspoon v. Rogers, 32 Cal. 572; so, also, that a certain amount is due upon a note. Frisch v. Caler, 21 Cal. 71. An averment that a "location was duly and properly made, according to the provisions of an act," is a legal conclusion, the conditions of the act, and the performance thereof, should be stated. People v. Jackson, 24 Cal. 632. The promise to pay alleged in the common counts in assumpsit were merely conclusions of law. Wilkins v. Stidger, 22 Cal. 235; 83 Am. Dec. 64. Where goods were sold on credit, a general averment in an answer that the "term of credit has not expired" is a conclusion of law. Levinson v. Schwartz, 22 Cal. 229. An averment "that any right that plaintiffs may have ever had to the possession," etc., they forfeited by a noncompliance with the rules, customs, and regulations of the miners of the diggings embracing the claims in dispute, prior to the defendant's entry, is a statement of a conclusion of law. Dutch Flat Water Co. v. Mooney, 12 Cal. 534. The averment in the complaint that the ayuntamiento had full power and lawful authority to do the act in question is but an averment of a conclusion of law, and does not tender an issue of fact. Branham v. Mayor and Common Council, 24 Cal. 602. Argument in a pleading is equally inappropriate, for that is to be made orally before the court, when the facts are developed. Hypothetical statements are improper, for the court is to deal not with hypothetical cases, but with the facts of the case in hand. Snow v. Halstead, 1 Cal. 361. The defendant's pretenses are equally improper, as they are not the facts of the plaintiff's case. The facts must be carefully distinguished from the evidence of the facts. The latter pertains to the trial, and has no place in the pleadings. Coryell v. Cain, 16 Cal. 567; Willson v. Cleaveland, 30 Cal. 200; Larco v. Casaneuava, 30 Cal. 565; Racouillat v. Rene, 32 Cal. 455; Depuy v. Williams, 26 Cal. 214. But inasmuch as the evidence is but a series of facts, it has sometimes been thought difficult to distinguish between the greater facts which ought to be set forth in a pleading and those other and lesser facts which go to prove the former. There ought, however, to be no embarrassment on the part of any lawyer who has ever framed or who understands special verdicts. These have been long known, and the rule is as old as their existence, that they must contain the facts found and not the evidence to prove them. The essential facts must be stated directly, in unequivocal language, and not left to be inferred. The language of a pleading is construed most strongly against the pleader. Campbell v. Jones, 38 Cal. 508; Moore v. Besse, 30 Cal. 572; but see also Marshall v. Shafter, 32 Cal. 191. Facts which are material should be stated in the pleadings by direct averment, and not by inference. Stringer v. Davis, 30 Cal. 318. Allegations simply by way of recitals are insufficient. Stringer v. Davis, 30 Cal. 318; Denver v. Burton, 28 Cal. 549; Shafer v. Bear River etc. Mining Co., 4 Cal. 294; see particularly Halleck v. Mixer, 16 Cal. 577. The next rule, however, gives us a satisfactory test by which to distinguish the facts from the evidence.

Third rule. **Those facts, and those only, must be stated which constitute the cause of action, the defense, or the reply.** Therefore: First. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. For example, when a writing is by the statute of frauds made necessary to the validity of a contract, the writing must be averred, that being one of the facts necessary to constitute a cause of action. The plaintiff, on his part, must allege all that he will have to prove to maintain his action; the defendant, on his part, all that he must prove to defeat the plaintiff, after the complaint is admitted or proved. See also Jerome v. Stebbins, 14 Cal. 458; Racouillat v. Rene, 32 Cal. 455. Second. He must allege nothing affirmatively, which he is not required to prove. This is sometimes put in the following form: that is to say, that those facts, and those only, should be stated which the party would be required to prove. But this is inaccurate, as negative allegations are frequently necessary, and they are not to be proved (Payne v. Treadwell, 16 Cal. 243); as, for example, in an action on a promissory note, the plaintiff must allege not only the making of the note, but that it has not been paid. The rule, however, applies to all affirmative allegations, and, thus applied, is universal. No matter what averments were held to be necessary in the former scheme of pleading, nothing of an affirmative character is now necessary beyond what the party must prove. For instance, it is enough to allege that the defendant published a

libel of the plaintiff, without adding that he did it falsely or maliciously; the falsehood being presumed, and the malice being inferred from the falsehood. It must be recollected, then, in the first place, that every fact essential to the claim or defense should be stated. If this part of the rule be violated, the adverse party may demur. In the second place, that nothing should be stated which is not essential to the claim or defense, or, in other words, that none but issuable facts should be stated. If this part of the rule be violated, the adverse party may move to strike out the unessential parts. See Piercy v. Sabin, 10 Cal. 22; 70 Am. Dec. 692. What is and what is not essential, an uninstructed person might not readily discover, but a lawyer ought not to be in doubt.

An unessential, or, what is the same thing, an immaterial allegation, is one which can be stricken out from the pleading without leaving it insufficient, and, of course, need not be proved or disproved. See § 463, post. The following question will determine in every case whether an allegation be material. Can it be made the subject of a material issue? In other words, if it be denied, will the failure to prove it decide the cause in whole or in part? If it will not, then the fact alleged is not material; it is not one of those which constitute the cause of action, defense, or reply. To illustrate this, let us suppose an ultimate fact, upon the establishment of which the claim or defense depends, and that the establishment of this fact depends upon the establishment of three or four prior facts, which, being established, prove this. It is the ultimate fact, and not the prior or probative facts, which should be set forth. Miles v. McDermott, 31 Cal. 272; Grewell v. Walden, 23 Cal. 169; see also Marshall v. Shafter, 32 Cal. 193. As, for example, an action upon the covenants of a deed; the execution and delivery of the deed are ultimate facts upon which the claim depends. When these come to be proved, it may appear, perhaps, that the deed was delivered first in escrow, till the performance of certain conditions by the grantee; that these were afterwards performed, and then the delivery became absolute. These, however, are circumstances which, though they will appear in proof, should not be pleaded. Or, take the case of an action for land, where the question is one of boundary. The point in issue is, whether the defendant is in possession of the plaintiff's land, that being affirmed by the plaintiff and denied by the defendant. It would be out of place for either party to insert in his pleading a correspondence respecting the dividing fence, or the acts of the parties toward a practical location, because, however important these might be in evidence, they might not determine the cause, since, if the correspondence or the practical location were disproved, the question of the true boundary, according to the deeds, would still remain. If, in an action for a libel, the defendant justifies, he must allege the truth of the charge, not the defendant's admissions tending to prove the truth, since the admissions might be disproved, and yet the charge be true. So, in an action upon a mortgage, if the defense be payment, the fact of payment must be alleged, not the evidence of the plaintiff's admission that it had been paid, since there may have been no admission, but nevertheless a payment.

It has been already said that some latitude is allowable in respect to the number of facts to be stated, depending upon the relief sought. In an action to enforce a written agreement, nothing behind the fact of the agreement need be alleged; while in an action to reform an instrument, the circumstances under which it was made may be most properly set forth. It results, then, from what has been stated, under the present rule: first, that the pleader must insert in his pleading whatever he is to prove; secondly, that he must insert no affirmative allegation which he is not to prove; and thirdly, that what he does insert must be decisive of some part of the cause, one way or the other. In an action of ejectment to obtain a recovery, the title of the plaintiff is the ultimate fact—the fact in issue. The facts going to support his alleged title are probative facts, which, if disputed by the defendant, are facts in controversy. Marshall v. Shafter, 32 Cal. 193, and cases cited. Complaint should not state facts anticipating a defense. The only object to be gained by such pleading is to put the adverse party upon his oath without making him a witness, and the effect of allowing this would be to establish a system of discovery in conflict with the spirit of the statute. Canfield v. Tobias, 21 Cal. 351. It was held to be bad pleading to state in the complaint a discharge in insolvency, or a new promise. Nothing which constitutes matter of defense should be averred in the complaint. The former is a matter of defense, to be set up by the defendant; and the latter is a matter of replication, either by way of plea or evidence, as the system of pleading may be. Smith v. Richmond, 19 Cal. 483.

Fourth rule. All statements must be concisely made, and when once made, must not be repeated. At common law, as well as in chancery, the pleadings were the very opposite of concise. If there were lawyers who thought differently, they were swayed by peculiarities of taste or education. The "terseness of the common law" had as little to justify or recommend it as those other abused phrases, "The law is the perfection of reason," and "The wisdom of our ancestors." Even the forms with which we are most familiar, the traditional forms in daily use, appear to have been framed with an irresistible instinct towards the use of several words to express the meaning of one. If the declaration was for money lent, that was set forth as "money lent and advanced"; if for money paid, it was for money "paid, laid out, and expended"; if for money received, it was, "had and received"; as if, in each instance, one of these words did not express as much as all of them. There were really no concise pleadings at common law, excepting the fictitious ones. A declaration on the case, or in covenant, or in assumpsit on a policy of insurance, or other special agreement, was long, involved, and full of repetitions. The declarations in trover, ejectment, and replevin were short; but they were false, or disclosed nothing. Every pleading that set forth the facts, set them forth wrapped in a cloud of words. A statute referred to was "the statute in such case made and provided." The spirit of redundancy went, indeed, beyond pleadings, and pervaded all writings which came from the hands of lawyers. Conveyances piled expression upon expression, till the sense was nearly lost sight of. Land was "given, granted, bargained, sold, aliened, remised, released, conveyed, and confirmed," two or three times over in every deed. Statutes were overloaded, till the head grew weary with their endless involutions. Thus, also, such words as "duly," "wrongfully," and "unlawfully," so frequently used in pleadings, might better be omitted. They tender no issue, and serve only to detract from that logical directness and simplicity of statement which ought always to be observed in a pleading. Miles v. McDermott, 31 Cal. 272; Halleck v. Mixer, 16 Cal. 574. See, as to surplusage, §§ 453 to 465, post.

There never was a greater slander upon the code than to say that it permits long pleadings. On the contrary, it enjoins conciseness everywhere; and if in any pleading that was ever written under its rule there be an unnecessary word, it was put there in disregard of its provisions. Nor is it possible to frame or conceive of a system proceeding upon the idea of disclosing the facts of the case, which could require greater conciseness than is here required. If pleadings are not to set forth the real claim and defense, they are useless, and had better be dispensed with. A summons to appear before the court and jury on a particular day, to try the rights of the parties on a particular subject, would be just as useful. But if a pleading is to be a statement of the claim or defense, can the wit of man contrive to make it briefer than a concise statement of the facts? If an immaterial statement be inserted, or even an unnecessary word, the courts have the power to strike it out. To avoid repetition, as

well as to obtain conciseness, logical order is necessary. There are persons who are incapable of making a logical statement of anything, and such persons will be bad pleaders under the code. But a man of education, as every lawyer is supposed to be, ought to have no difficulty in setting forth any occurrence in its logical, which is its natural, order. And if he does this, and sets forth only the facts on which his case hinges, and uses no more words than are necessary, we shall have brevity and substance, and hear no more of long pleadings, unnecessary recitals, or immaterial averments. The foregoing are general rules, applicable alike to the complaint and answer. How successfully and rapidly they will develop the issues if they be strictly applied, is easily to be seen, since every allegation must be essential to some part of the claim or defense, and the denial of any one must be so far decisive of the case. At common law each plea was to be an answer to the whole declaration; and as there might be as many pleas as one wished, every material allegation might be successively denied. All this may be done under the code in less time, with greater certainty, and in fewer words. The pleadings will be considered in the order in which they naturally occur, omitting, however, any observations respecting the demurrer. There is nothing in the frame of that which requires particular notice, further than to observe that it does not perform an office so extensive as it performed in common-law pleadings. There are many objections formerly brought before the court upon demurrer, which are now brought before it upon a simple motion.

The complaint. This is to contain:

1. The title. Specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action [i. e., all the parties, plaintiff and defendant].

—— Court,
County of ——,
A, B, & C, D,
agt.
E, F, G, H, & J, K.

2. The statement. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.

A B, plaintiff, complains [or alleges],
First ——
Second ——
Third ——

And so on; or if there be more than one cause of action, which may be united under § 427, post, thus:

A B, plaintiff, complains [or alleges],
For a first cause of action:
First ——
Second ——
Third ——
For a second cause of action:
First ——
Second ——
Third ——
And so on.

There is an advantage in numbering the allegations, as it tends to produce clearness of statement, logical order, and conciseness, and separates the allegations, leading to singleness of issues.

3. The demand. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof must be stated.

Wherefore the plaintiff demands judgment that he recover of the defendant the sum of $——, with interest from the day of ——, or judgment that the defendant execute and deliver to the plaintiff a conveyance of, etc., and be also enjoined from, etc.

Some attorneys add: "And that the plaintiff may have such other relief as the case requires," copying the prayer for relief formerly used in chancery; but this is useless, since the court must give such relief as the case requires, whether demanded or not. See § 580. It is, besides, unauthorized. See Rollins v. Forbes, 10 Cal. 299; Truebody v. Jacobson, 2 Cal. 269; People v. Turner, 1 Cal. 152. Demand for treble damages must be expressly inserted. See Chipman v. Emeric, 5 Cal. 239.

2. Object of code to narrow the evidence on trial. It was the intention of the code to require the pleadings to be so framed as not only to apprise the parties of the facts to be proved by them respectively, but to narrow the proofs on the trial. Piercy v. Sabin, 10 Cal. 22; 70 Am. Dec. 692.

3. Complaint must contain name of court and county where action is brought. So far as concerns the place of trial of civil actions, see §§ 392 to 400, inclusive.

4. Complaint must contain names of the parties to the action. As to who are the proper parties in an action, see §§ 308, and 367 to 389, inclusive.

5. Averment in complaint which must be made to authorize arrest of defendant. Porter v. Herman, 8 Cal. 623; Ex parte Cohen, 6 Cal. 318; Davis v. Robinson, 10 Cal. 411.

6. Pleading in actions to recover the possession of real property. It is usual to speak of the action to recover the possession of real property as an action of ejectment, and it is possible that with the technical designation it is sometimes thought that some of the technical allegations peculiar to the old form of the action are still necessary; but such is not the case. There is but one form of civil actions in this state, and all the forms of pleadings and the rules by which their sufficiency is to be determined are prescribed by the code. The complaint must contain "a statement of the facts constituting the cause of action, in ordinary and concise language," and it may be verified by the oath of the party, in which case the answer must also be verified. The system in this state requires the facts to be alleged as they exist, and repudiates all fictions; and only such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation which is the basis of the action, or to negative an inference from an act which is in itself indifferent. Now, what facts must be proved to recover in ejectment? These only: that the plaintiff is seised of the premises, or of some estate therein in fee, or for life, or for years, and that the defendant was in their possession at the commencement of the action. The seisin is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyances from a paramount source of title, or by evidence of prior possession. It is the ultimate fact upon which the claim to recover depends, and it is facts of this character which must be alleged, and not the prior or probative facts which go to establish them. It is the ultimate facts—which could not be struck out of a pleading without leaving it insufficient—and not the evidence of those facts, which must be stated. It is sufficient, therefore, in a complaint in ejectment, for the plaintiff to aver in respect to his title, that he is seised of the premises, or of some estate therein in fee, or for life, or for years, according to the fact. The right to the possession follows as a conclusion of law from the seisin, and need not be alleged. The possession of the defendant is of course a pleadable and issuable fact, and the only question of difficulty arises from the supposed necessity of negativing its possible rightful character. That negative allegations, which are not required to be proved, may in some actions be necessary, may be admitted; but is there any such necessity as to the possession of the defendant in an action of ejectment? It seems to us that the substance of a complaint in ejectment under our practice is this: "A owns certain real property, or some interest in it; the defendant has obtained possession of it, and withholds the possession from him." If the defendant's holding rests upon any existing right, he should be compelled to show it affirmatively in defense. The right of possession accompanies the ownership, and from the allegation of the fact of ownership—which is the allegation of seisin in "ordinary language"—the right of present possession is presumed as a matter of law. We do not think, therefore, any allegation beyond that of possession by the defendant is necessary, except

that he withholds the possession from the plaintiff. The allegation that the possession is "wrongful or unlawful" is not the statement of a fact, but of a conclusion of law. The words are mere surplusage, and, though they do not vitiate, they do no good. The withholding of the possession from one who is seised of the premises is presumptively adverse to his right, and wrongful. It is by force of this presumption that the plaintiff can rest, in the first instance, his case at the trial upon proof of his seisin, and of the possession by the defendant. From these facts, when established, the law implies a right to the present possession in the plaintiff, and a holding adverse to that right in the defendant.

Where the plaintiff has been in possession of the premises for which he sues, it will be sufficient for him to allege in his complaint such possession, and the entry, ouster, and continued withholding by the defendant. Such allegations are proper when they correspond with the facts, but they are not essential, as is thought by many members of the bar. In this state, the possession does not always accompany the legal title. The statute authorizes a sale and conveyance of land held adversely by third persons; and the legal title is frequently held by parties who never had the possession. In the courts of New York —and it is well known that the Practice Code was taken principally from the Code of Procedure of that state—there was at one time some conflict of opinion as to what were sufficient allegations in a complaint in ejectment under the code. It is now, however, settled by the supreme court of that state substantially in accordance with the views we have expressed. In Ensign v. Sherman, 14 How. Pr. 439, the plaintiff averred in her complaint that she had lawful title, as the owner in fee-simple, to the real estate in controversy, which was described; that the defendant was in possession of it, and unlawfully withheld possession thereof from her; and, on demurrer, the complaint was held sufficient. Walter v. Lockwood, 23 Barb. 228, is to the same effect. In Sanders v. Leavy, 16 How. Pr. 308, the complaint was similar to the complaint in the cases cited, and was demurred to on the ground that it did not state facts sufficient to constitute a cause of action; because, first, it did not allege that the plaintiff or his grantor was ever in possession; and second, it did not allege that such possession was disturbed and they were evicted by the defendant, his grantors, or predecessors. And it was contended on the argument, as in the case at bar, that the allegations as to the plaintiff's title and the defendant's possession were not averments of facts, but of conclusions of law; but the court held the complaint sufficient, and gave judgment against the demurrer. "To recover real estate," said Mr. Justice Ingraham, in delivering the opinion, "what is it necessary for the plaintiff to prove? Two things: first, that he is the owner of the property; secondly, that the defendant withholds from him the possession without right. Both facts are plainly averred in the complaint." The designation of the withholding of the possession by the defendant, in the cases cited, as unlawful, is not considered as constituting any valid ground of objection. In Sanders v. Leavy, the attention of the court was specially directed, in the argument of counsel, to this mode of characterizing the act. For the reasons we have already stated, we consider it unnecessary to give it any character by special designation; for, being against one who is seised of the premises, it is presumptively adverse and wrongful. To allege that it is unlawful, is merely to state that which follows under the circumstances, as a conclusion of law from the act itself.

The decisions of this court in respect to the necessary allegations of a complaint in ejectment have not been uniform, and perhaps on no one subject of pleading is there so much embarrassment felt by the profession in consequence. In Gladwin v. Stebbins (reported as Godwin v. Stebbins, in 2 Cal. 105), the complaint averred that the plaintiffs were "lawfully entitled to the possession of the premises," and the court held that the allegation was of a material fact, and therefore sufficient. In this respect we think the opinion cannot be sustained. The averment is clearly a mere statement of a conclusion of law. In Payne v. Treadwell, 5 Cal. 310, the complaint alleged that the plaintiffs had "lawful title as owners in fee-simple of the premises," and "that the defendant is in possession and unlawfully withholds the same"; and on demurrer the court held the complaint insufficient. "Notwithstanding," said Chief Justice Murray, in delivering the opinion, "our statute has dispensed with the old form of pleading, and it is no longer necessary to allege a fictitious demise, etc., still I apprehend that facts sufficient must be pleaded to show the plaintiff's right to recover, and it will not do to state conclusions of law in place thereof. The allegation that the defendant is in possession, and unlawfully withholds the premises, is insufficient; it is a conclusion of law drawn from the character of defendant's possession, the circumstances of which should be stated." The decision, as is apparent, does not relate to the allegation as to the plaintiff's title, notwithstanding the general observations of the chief justice; it applies only to the allegation as to the withholding of the possession by the defendant. So far as this was alleged to have been unlawful, the allegation was of a conclusion of law. But the giving of a certain character to the withholding, as unlawful, did not change the material fact that the possession was withheld; and this, as we have seen, taken in connection with the previous allegations of title in the plaintiff, and possession by the defendant, was sufficient. A more particular statement of "the circumstances" of the defendant's possession or withholding is not necessary, under our system of practice. The decision, in this respect, has tended to produce inconvenience to practitioners, and prolixity in pleading, and we have no hesitation in overruling it.

In Gregory v. Haynes, 13 Cal. 591, it was held that the findings by the court below—that one of the defendants, and not the plaintiff, was the owner, and entitled to the possession of the property in controversy, and that the defendants did not unlawfully detain the same from the plaintiff —would not support the judgment, and the decision was based upon the ground that the ownership and right of possession were not facts, in the legal sense of that term, but conclusions of law. We have had great doubt of the correctness of this decision, ever since it was rendered; and upon the examination which we have given to the subject, in considering the case at bar, we are satisfied that we erred, and are glad we have an opportunity, at so early a day, of correcting our error. The fact was found that one of the defendants was the owner of the premises in controversy, and that fact alone was sufficient to support the judgment against the plaintiff, nothing else having been found to qualify the right to the possession which accompanies the title. The balance of the findings might have been treated as surplusage. The claim of the plaintiff having been thus disposed of, it was unnecessary to find as to the character of the defendants' detention of the premises. In Boles v. Weifenback, 15 Cal. 144, and Boles v. Cohen, 15 Cal. 150, the opinion states that substantial averments of the complaint were only that the plaintiffs were the owners of the property in question, and that the defendant was in possession of it. It does not state that there was any averment that the possession was withheld from the plaintiffs. If such averment were in fact made in the complaint, the decision cannot be sustained. Payne v. Treadwell, 16 Cal. 243; see also Payne v. Treadwell, 5 Cal. 310. When a complaint will be treated as a declaration in ejectment. See Ramirez v. Murray, 4 Cal. 293. It is better to simplify the pleadings by allowing these general averments in actions of ejectment than to introduce the unnecessary confusion which long and complex statements of the facts must necessarily produce. A holding over by the plaintiff is, in effect, an ouster, and may be so charged. If in every case all the facts connected with the title and the wrongful acts of

the defendant be inserted in the complaint, the pleadings would be swollen to immoderate dimensions, without benefit to the parties. Garrison v. Sampson, 15 Cal. 95.

Residence of parties not to be alleged. Doll v. Feller, 16 Cal. 432.

Averment of title in general terms or specific deraignment of title—facts to be set out in latter case. Castro v Richardson, 18 Cal. 478. Title or possession to be stated. Id.; Steinback v. Fitzpatrick, 12 Cal. 295; Salmon v. Symonds, 24 Cal. 266; Marshall v. Shafter, 32 Cal. 176; Yount v. Howell, 14 Cal. 465.

Ouster. An allegation of wrongful withholding of possession has the same effect as an allegation of ouster. Marshall v. Shafter, 32 Cal. 176. Ouster. Wrongful withholding of possession must be stated. Id. Exact time of ouster need not be alleged. Collier v. Corbett, 15 Cal. 183. When ouster is alleged to have taken place before title accrued to party ousted, it is a fatal defect. See Coryell v. Cain, 16 Cal. 567. When prior possession is claimed, actual ouster must be alleged. Watson v. Zimmerman, 6 Cal. 46; see also Boles v. Cohen, 15 Cal. 150. In the case of Coryell v. Cain, it was held, that, under the facts in that case, the complaint should only have alleged, that on some day designated, the plaintiffs were possessed of the land, describing it; that while thus possessed the defendant entered upon the same and ousted them, and has ever since withheld the possession from them, to their damage—specifying such sum as might cover the value of the use and occupation from the date of the ouster. Coryell v. Cain, 16 Cal. 571. The mesne conveyances, through which title is derived, are matters of evidence, and should not be stated at length in the complaint. Id. A continued adverse holding must be alleged in complaint. Steinback v. Fitzpatrick, 12 Cal. 295. Unnecessary description and evidence of facts should be stricken from complaint. Willson v. Cleaveland, 30 Cal. 192. In our practice, to entitle the plaintiff in ejectment to recover, it is only necessary to establish his right of possession and the occupation of the defendant at that time. The date at which plaintiff's right accrued or the defendant's occupation commenced, is material only with reference to the claim for mesne profits. See Yount v. Howell, 14 Cal. 465; Stark v. Barrett, 15 Cal. 365. If action is for two separate pieces of land, the complaint must set out each of the two causes of action separately, and each cause of action must affect all the parties to the action, and not require trials to be held in different places. Boles v. Cohen, 15 Cal. 150. The complaint may ask, in addition to a recovery of the property, an injunction, restraining the commission of trespass in the nature of waste, pending the action. The grounds of equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is claimed. Natoma etc. Mining Co. v. Clarkin, 14 Cal. 544. A complaint that alleges he is in possession in one place, and in another avers that he is not, shows no cause of action. Dickinson v. Maguire, 9 Cal. 46. A complaint in ejectment, alleging title in plaintiff under a sheriff's sale, made by one sheriff, and a deed executed by his successor, was held sufficient. Alderson v. Bell, 9 Cal. 315. The allegation of the value of the use and occupation, rents, and profits of the premises, for the period which the defendants were in the wrongful possession and excluded the plaintiff, is sufficient to charge defendants, without any averment that they received such rents and profits. The terms "rents and profits" are not here used in a technical sense. The whole averment is, in effect, only that the value of the use of the premises, while plaintiffs were wrongfully excluded, was the amount stated. Patterson v. Ely, 19 Cal. 40. As to actions of ejectment for mineral lands, as to what are necessary averments and sufficient pleadings, see Smith v. Doe, 15 Cal. 100. The complaint in an action for the recovery of the possession of real property is not required to be in any particular form: it must be controlled by the facts of the case which are sought to be put in issue. See the matter discussed in Caperton v. Schmidt, 26 Cal. 490; 85 Am. Dec. 187.

7. **Actions of ejectment. What must be averred.** The law in respect to actions of ejectment has been materially modified by § 379, ante; see cases there cited, and compare for sufficiency of pleadings. There is no room for doubt that whenever a landlord is entitled to bring an action under that act against a tenant at sufferance, after having given the requisite notice to quit, etc., he may, instead of proceeding under that act, maintain an action of ejectment. In such action it is not requisite that the complaint should state the tenancy, its termination, the notice, etc.; and when it appears from the pleadings that such tenancy existed, it will be presumed, in support of the judgment in favor of the landlord, that it was proven on the trial that he had taken the necessary steps to terminate the tenancy before the commencement of the action, and was then entitled to recover, unless the contrary is shown by a statement or a bill of exceptions. McCarthy v. Yale, 39 Cal. 585.

Complaint in ejectment. Although it is thought by many that a style of pleading in the action of ejectment which would show the right or title under which the plaintiff claims the possession, and the true position of the defendant, both in respect to the title and the possession, would be far preferable to the present system, and would enable the judgment roll to exhibit the issues which were tried and determined with more distinctness and certainty, yet the present system has become so completely established that a change, if any is desirable, ought to come from the legislature. The complaint in this case alleges the damages sustained by the entry and withholding of the possession by the defendant, and the value of the mesne profits; and we entertain no doubt that they are sufficient to support the judgment. The judgment does not specify whether the sum of three hundred dollars was awarded for the damages or mesne profits, or for both; but the presumption is, that the judgment was sustained by the evidence; and whether that sum was awarded for one or both of those demands, the judgment is a bar to a further recovery for the same cause. McCarthy v. Yale, 39 Cal. 585; Id., July term, 1872.

8. **Action to quiet title to land.** It has been held that complaint must aver that plaintiff was in possession. See Pralus v. Jefferson Gold etc. Mining Co., 34 Cal. 558; Brooks v. Calderwood, 34 Cal. 563. But not necessarily so, under this code. See § 738, post, and notes.

9. **Where corporations are plaintiffs.** It must be alleged that the party plaintiff is a corporation incorporated under the laws of this state, etc. See California Steam Nav. Co. v. Wright, 6 Cal. 258; 65 Am. Dec. 511; Cumberland College v. Ish, 22 Cal. 641; see, however, Shoe & Leather Bank v. Brown, 9 Abb. Pr. 218; see also Connecticut Bank v. Smith, 9 Abb. Pr. 168; see this case, also, as to foreign corporation requiring same allegation. It is unnecessary to specify the date and title of the acts amending the act incorporating the corporation. It is sufficient to designate the original act of incorporation, and refer generally to the other acts amendatory thereof. Sun Mutual Ins. Co. v. Dwight, 1 Hilt. 51. In a suit brought by a corporation or its assignee, upon an agreement with the corporation, no specific allegation of the incorporation of the company is necessary. A statement of the name of the corporation and of the making of the agreement between the defendant and the company, and of what the company did in fulfillment of the agreement, includes the idea of the legal existence of the company; and the fact of incorporation is mere evidence in support of it, not essential to be particularly stated in the pleading. Norris v. Stops, Hob. 211; Henriques v. Dutch West India Co., 2 Ld. Raym. 1536; Bank of United States v. Haskins, 1 Johns. Cas. 132; Bennington Iron Co. v. Rutherford, 18 N. J. L. 105; 35 Am. Dec. 528; 18 N. J. L. 158; Harris v. Muskingum Mfg. Co., 4 Blackf. (Ind.) 267; 29 Am. Dec. 372; Richardson v. St. Joseph

Iron Co., 5 Blackf. 146; 33 Am. Dec. 460; Dutchess Cotton Manufactory v. Davis, 14 Johns. 239; 7 Am. Dec. 459; Bank of Utica v. Smalley, 2 Cow. 770, 778; 14 Am. Dec. 526; Michigan Bank v. Williams, 5 Wend. 478, 482; Kennedy v. Cotton, 28 Barb. 59.

10. Pleadings in actions against corporations. See preceding note; also California Steam Nav. Co. v. Wright, 6 Cal. 258; 65 Am. Dec. 511; Lincoln v. Colusa County, 28 Cal. 662; and see note to § 354, Civ. Code, subd. 2.

11. Suits against corporations, municipal and others. In an action against a municipal corporation, the complaint set out the bond sued on; avers the defendant to be a corporation; that the corporation made and delivered the bond on good consideration, and this was done under an ordinance passed by the proper agents of the corporation, having authority for that purpose; and that the defendant has failed to pay. This is enough, prima facie, to show a liability on the part of the corporation. We see no more necessity for a plaintiff suing a corporation on a note or bond, to set out the ordinance which empowered the corporate authorities to make the contract, than for a plaintiff, suing a principal on a note executed by attorney, to set out in the complaint the power of attorney. Nor is it necessary to set out the vote or other proceedings of the corporate agents, nor to give any further description of the agents than that given in the complaint. The bonds themselves are set out or minutely described, and these show by whom they were executed; and the persons signing them are averred to be the agents of the corporation, duly empowered for that purpose. Underhill v. Trustees of City of Sonora, 17 Cal. 176. The complaint was held to not state facts sufficient to constitute a cause of action. Where the allegation is, that the plaintiff, as a justice of the peace, performed services, at the request of the district attorney for that county, in cases wherein the people of the state were plaintiffs, to the amount of three thousand two hundred dollars, "and that the defendant thereby became and is liable to pay the said sum," there is no allegation of the means by which the county became liable. It is not alleged that the services were rendered for or were procured by the county, or that the county received any benefit from their performance; nor is it stated that judgments were rendered in those cases, nor that the defendants in those actions have not paid, or were unable to pay, for the services. Miner v. Solano County, 26 Cal. 116.

12. Actions by and against counties. Counties are quasi-corporations, and have power to sue and be sued. See Pol. Code, §§ 4003, 4075. The right to sue a county is not limited to cases of tort, malfeasance, etc., but is given in every case of account. See, for decisions on former law, Price v. Sacramento County, 6 Cal. 254; McCann v. Sierra County, 7 Cal. 123. Under the law prior to adoption of code, the claim must first have been presented to supervisors and rejected; and it is probable that such continues to be the law under the code. See the sections of Political Code above cited, and also the cases cited in this note.

13. Actions by and between husband and wife. Action for division of community property after decree of divorce averments in complaint. See Johnson v. Johnson, 11 Cal. 200; 70 Am. Dec. 774; Dye v. Dye, 11 Cal. 163. Action by wife to recover homestead granted away by husband alone. Harper v. Forbes, 15 Cal. 202. Suit for distributive share of estate of alleged deceased husband, averment of existence of marriage. Letters v. Cady, 10 Cal. 533; People v. Anderson, 26 Cal. 129. No allegation of separate property is required in complaint in an action against the wife for her separate debt, for which she was liable in personam before coverture. Bostic v. Love, 16 Cal. 69. Allegation as to married woman being a sole trader. Aiken v. Davis, 17 Cal. 119.

14. Complaint for relief generally on the ground of fraud. Facts constituting the fraud to be set out. Kent v. Snyder, 30 Cal. 666; Porter v. Hermann, 8 Cal. 623. The fraud is the substantial cause for action, not the discovery thereof; and if the fraud occurred, before commencing action, more than the stated time within which actions may be brought, the cause of action is barred by the statute of limitations. Carpentier v. Oakland, 30 Cal. 444; Sublette v. Tinney, 9 Cal. 423; see, however, Boyd v. Blankman, 29 Cal. 20; 87 Am. Dec. 146.

15. Action to vacate judgment on ground of fraud, etc. See Bibend v. Kreutz, 20 Cal. 109; Snow v. Halstead, 1 Cal. 359; Castle v. Bader, 23 Cal. 75; Riddle v. Baker, 13 Cal. 295; Mecker v. Harris, 19 Cal. 278; 79 Am. Dec. 215; Crane v. Hirshfelder, 17 Cal. 467.

16. Action to cancel conveyance on the ground of fraud. As to statement of particular facts and circumstances, which may be required to show, on the face of complaint, that the conveyance was fraudulently made, see Kohner v. Ashenauer, 17 Cal. 578. Averment that grantee was a fictitious person, and that the conveyance was made to hinder and defraud creditors. Purkitt v. Polack, 17 Cal. 327. General averment of fraud as to conveyance, that it was to hinder and defraud creditors, etc. See Harris v. Taylor, 15 Cal. 348; also Hager v. Shindler, 29 Cal. 47. The facts constituting the fraud must be definitely and specifically alleged. Castle v. Bader, 23 Cal. 75; Snow v. Halstead, 1 Cal. 359; Oakland v. Carpentier, 21 Cal. 642. So, also, to vacate a patent on the ground of its fraudulent procurement. Semple v. Hagar, 27 Cal. 166. Where a deed was deposited with third person, to be delivered to grantee, but grantor subsequently directs third person not to deliver deed, it must be averred that third person has or is about to deliver such deed, or threatens so to do. See Fitch v. Bunch, 30 Cal. 208. Generally as to averments in complaint, in action to set aside a conveyance, on ground of fraud, see cases above cited, and also Watts v. White, 13 Cal. 321; People v. Jackson, 24 Cal. 632; Hager v. Shindler, 29 Cal. 47; De Leon v. Higuera, 15 Cal. 483.

17. Complaint to set aside fraudulent conveyance. In a suit for a fraudulent conveyance, it is not irrelevant or redundant to set out in detail the inceptive steps which culminated in the alleged fraudulent conveyance. Perkins v. Center, 35 Cal. 714.

18. Complaint to compel reconveyance of one of two tracts of land granted by mistake. In an action to compel reconveyance of one of two tracts of land described in the same deed, which it is averred was conveyed by mistake, the complaint must show clearly that a mistake was committed, or explain why the plaintiff included in the conveyance the second tract, after having described the one intended to be conveyed. Barfield v. Price, 40 Cal. 535.

19. What allegations sufficient for injunctions. See Bigelow v. Gove, 7 Cal. 135; Tuolumne Water Co. v. Chapman, 8 Cal. 392; Knowles v. Inches, 12 Cal. 212; Henshaw v. Clark, 14 Cal. 460; Hicks v. Michael, 15 Cal. 107; Head v. Fordyce, 17 Cal. 149; Hicks v. Compton, 18 Cal. 206. If the complaint does not show that no adequate or complete remedy at law exists, then injunction cannot be granted. Leach v. Day, 27 Cal. 645; Tomlinson v. Rubio, 16 Cal. 202; De Witt v. Hays, 2 Cal. 463; 56 Am. Dec. 352. See also McCann v. Sierra County, 7 Cal. 121. See, generally, for miscellaneous matters relating to sufficiency of averments, the above-cited cases, and also O'Conner v. Corbitt, 3 Cal. 370; Hihn v. Peck, 18 Cal. 640; Smith v. Sparrow, 13 Cal. 596; Coker v. Simpson, 7 Cal. 340; More v. Ord, 15 Cal. 204; McDonald v. Bear River etc. Mining Co., 15 Cal. 145; Sanchez v. Carriaga, 31 Cal. 170; Logan v. Hillegass, 16 Cal. 200. An allegation, simply, of great and irreparable injury is insufficient; the facts stated must show the court that the apprehension of such injury is well founded. De Witt v. Hays, 2 Cal. 463; 56 Am. Dec. 352; Waldron v. Marsh, 5 Cal. 119; Branch Turnpike Co. v. Board of Supervisors, 13 Cal. 190; Leach v. Day, 27 Cal. 643.

20. Action to foreclose mortgage, liens, etc. Averments of ownership of note and mortgage. Rollins v. Forbes, 10 Cal. 299. Mortgage stipulating for payment of counsel fees, not exceeding five per cent of the amount due, see Carriere v. Minturn, 5 Cal. 435. A general averment, that a person who is joined as defendant with mortgagor has or claims to have some interest in the premises, sufficient. See Anthony v. Nye, 30

Cal. 401; see, generally, Vassault v. Austin, 32 Cal. 597; Stringer v. Davis, 30 Cal. 318; Shafer v. Bear River etc. Mining Co., 4 Cal. 294; Hunt v. Waterman, 12 Cal. 301.

21. Redemption of mortgage. No allegation of tender of amount due upon mortgage, previous to beginning action, need be made. Daubenspeck v. Platt, 22 Cal. 330.

22. More than one ground of action stated in complaint. Action on contract, etc. It is necessary only for plaintiffs to state the facts of their case in ordinary and concise language, and if such facts showed that they had a right of action against the defendants, it is clearly sufficient, even though it also showed that they had a right to recover upon two different legal grounds. It may be (see facts of case) that the plaintiffs paid the money to the defendants by mistake, and also hold them liable as indorsers or guarantors. Either would constitute a good cause of action, and it does not make their complaint insufficient because they have two grounds of recovery instead of one. Mills v. Barney, 22 Cal. 247.

23. Action on contract. Complaint on contract for purchase by defendant of certain goods, to aver a readiness or offer of delivery or performance. Barron v. Frink, 30 Cal. 486.

24. Complaint on executory contract. In Dunham v. Pettee, 8 N. Y. 512, it was held, that in an executory contract for the sale of a quantity of iron, to be paid for on delivery within a certain period, the obligations of the one party to pay and the other to deliver were mutual and dependent; and that in an action by the seller for the price, it was not enough simply to show the default of the purchaser, but that he must show that he was ready or offered to deliver the property. That whichever party in such case seeks to enforce the contract against the other must show performance, or a tender of performance, or a readiness to perform on his part; and that, until that is shown, he himself is in default. Barron v. Frink, 30 Cal. 488.

25. Averment of damages in complaint for breach of contract. In a suit to recover damages for breach of a contract, it is sufficient that the complaint alleges the contract, the breach complained of, and general damages. Barber v. Cazalis, 30 Cal. 96.

26. Contract may be set forth in complaint in the precise terms in which it is written, or according to its legal effect. A contract may be declared on according to its legal effect, or in hæc verba. If the former mode should be adopted, then the defendant may, by the rule of the common law in a proper case, crave oyer of the instrument; and if it appear that its provisions have been misstated, he may set out the contract in hæc verba, and demur on the ground of the variance. But where the plaintiff sets forth the contract in the terms in which it is written, and then proceeds by averment to put a false construction upon the terms, the allegations, as repugnant to the terms, should be regarded as surplusage to be struck out on motion. 1 Chitty's Pleading, p. 232; Stoddard v. Treadwell, 26 Cal. 300; see also Joseph v. Holt, 37 Cal. 250. And consideration need not be alleged for a contract if the contract be set out in complaint in the very terms in which it is written. See McCarty v. Beach, 10 Cal. 461; Wills v. Kempt, 17 Cal. 101; see Civ. Code, §§ 1614, 1629. A written agreement imports consideration, and seals are abolished.

27. Complaint on written contract. Joseph v. Holt, 37 Cal. 250.

28. What should be stated in complaint in an action on a contract. The party to a written contract who has performed his part of it, can bring an action against the other party who has failed to fulfill, for work and labor done and performed; but the execution of the contract, its terms, the performance of the same on the part of the plaintiff, and the non-performance by the other party, and the damages sustained, should be alleged, and if there has been variation from the terms of the written contract in the progress of the work, by consent of the parties, that fact should also be averred, and the performance of the contract as varied stated in the complaint. When, by the terms of the contract, the party who has failed to fulfill was to execute his note for the money due, his failure to do so should be averred, for the ground of action against him is his failure to execute the note. O'Connor v. Dingley, 26 Cal. 17; see also, for pleadings on contract, Kalkman v. Baylis, 23 Cal. 303.

29. Assignment of breach of contract of guaranty. Dabovich v. Emeric, 7 Cal. 209.

30. Complaint, where correction of mistake in contract is sought. If a material clause has been omitted by mistake in drawing up a contract, a party seeking to avail himself of the actual contract must obtain a reformation of the writing, by a distinct proceeding to reform it, or by specially pleading the mistake in the suit in which the contract is pleaded, and asking its correction as independent relief. Under a pleading which simply states the terms of a contract, the introduction of a written agreement respecting the subject-matter cannot be followed by oral proof of a material clause alleged to have been omitted by mistake from the writing. Pierson v. McCahill, 21 Cal. 122.

31. Action upon an assignment of contract. If an action be brought on an assignment of a contract to one party by another, the pleadings should at least have alleged a positive transfer or assignment, and the character of it, so that the other party might be put upon notice of what he had to meet. Stearns v. Martin, 4 Cal. 229.

32. The performance of conditions precedent must be alleged. And if not alleged, the failure to do so must be taken advantage of by demurrer in the lower court. The defect cannot be shown after verdict rendered. Happe v. Stout, 2 Cal. 462

33. Waiver of tort. As to waiver of tort and maintenance of action upon other grounds, see Lubert v. Chauviteau, 3 Cal. 458; 58 Am. Dec. 415; Miller v. Van Tassel, 24 Cal. 463. But so, also, if the failure to comply with a contract is a tort, the party aggrieved may bring an action in tort, instead of an action upon the contract. Sheldon v. Steamship Uncle Sam, 18 Cal. 526; 79 Am. Dec. 193.

34. Assumpsit. Waiver of tort. If personal property has been wrongfully taken, the tort may be waived and an action in nature of assumpsit be maintained for the recovery of the value of the property so taken. Fratt v. Clark, 12 Cal. 89.

35. Action of trover. See Pelberg v. Gorham, 23 Cal. 349; Nickerson v. California Stage Co., 10 Cal. 520. Conversion is the gist of the action of trover, and must be alleged. Rogers v. Huie, 2 Cal. 571; 56 Am. Dec. 363.

36. Complaint in replevin. Lazard v. Wheeler, 22 Cal. 139; Halleck v. Mixer, 16 Cal. 574.

37. Complaint in actions to recover property seized by sheriff under process. See § 689, post; see also Ghiradelli v. Bourland, 32 Cal. 585; Kendall v. Clark, 10 Cal. 17; 70 Am. Dec. 691; Towdy v. Ellis, 22 Cal. 650; Killey v. Scannell, 12 Cal. 73.

38. Condition precedent to be alleged. If the payment of a promissory note is agreed by the parties to be made conditional upon the payment by the payee of a certain debt of the payor, such payment is a condition precedent, and must be alleged in complaint to have been made, or plaintiff's right of action on the note is demurrable. Rogers v. Cody, 8 Cal. 324.

39. Complaints in action for purchase-money for goods sold and delivered. The sale and delivery of the goods to the defendant, the place and the manner in which the indebtedness accrued, and whether it was on account of defendant or another, must be alleged. Mershon v. Randall, 4 Cal. 324. Also, the amounts due severally for either goods or money. Cordier v. Schloss, 18 Cal. 576. It is a sufficient allegation which states that defendant is indebted to plaintiff in a certain sum for goods sold and delivered to him at his request, and that defendant has never paid for them. Abadie v. Carrillo, 32 Cal. 172 An allegation setting forth that plaintiffs had purchased "a quantity of malt from P. & W., then and there acting as the agents of defendant," is only another form of declaring that they had purchased from the defendant. It is sufficiently certain to prevent any misapprehension of its meaning, and is no good cause for demurrer. Cochran v. Goodman, 3 Cal. 245.

40. Facts which must be stated in complaint in such action. The complaint contains several counts, which are in the ordinary form of counts in indebitatus assumpsit, for goods sold and delivered, and money paid and expended; and it is objected to, not by demurrer, but after answer, as defective in not stating facts sufficient to constitute a cause of action. The objection is not well taken. The complaint is sufficient in its allegations, and if they were deemed too general, the defendant could have applied for and obtained an order upon the plaintiffs to furnish a bill of particulars. It states a promise by the defendant, and its consideration and breach. Allen v. Patterson, 7 N. Y. 476; 57 Am. Dec. 542; Beekman v. Platner, 15 Barb. 550; Adam v. Holley, 12 How. Pr. 326; Cudlipp v. Whipple, 1 Abb. Pr. 107; Freeborn v. Glazer, 10 Cal. 338.

41. Complaint in action for moneys had and received, loaned or paid out, etc. If the action is for money had and received to the use of the plaintiff, and the facts stated in the complaint show clearly that the defendants are in possession of money which, in equity and conscience, they are bound to pay over, it is not demurrable. Kreutz v. Livingston, 15 Cal. 346. A demand must be alleged in the complaint. Reina v. Cross, 6 Cal. 31. Where the complaint shows the demand to be barred by the statute of limitations, it is demurrable. See Keller v. Hicks, 22 Cal. 457; 83 Am. Dec. 78. Averments in action to recover money loaned. See Lambert v. Slade, 3 Cal. 330. And it was held that in an action to recover money laid out and expended for another's benefit, the complaint stated a sufficient cause of action, which averred that defendant was justly indebted to plaintiff in the sum of three thousand dollars, for money paid, laid out, and expended for the use and benefit of defendant, and at his special instance and request, to wit, at, etc., and on the first day of April, 1857, and in the sum of three thousand dollars, for money found to be due from the defendant to plaintiff on an account then stated between them, and the defendant being so indebted to the plaintiff, afterwards, to wit, on the day and year aforesaid, at the place aforesaid, undertook and faithfully promised the plaintiff to pay the same, etc., and that said sum is due and unpaid. De Witt v. Porter, 13 Cal. 171. An averment in a complaint, that defendant owes plaintiff a certain sum for professional services rendered at a certain time, at defendant's request, is sufficient, without alleging the value of the services, or defendant's promise to pay therefor. Wilkins v. Stidger, 22 Cal. 235; 83 Am. Dec. 64.

42. Money had and received. A complaint for money had and received must allege a demand, or it is demurrable. Greenfield v. Steamer Gunnell, 6 Cal. 68.

43. When tender of purchase-money is to be averred. In an action for non-delivery of produce contracted for and to be delivered on demand and upon payment, it is not necessary to aver an actual tender; an averment that plaintiff was ready and willing to receive and pay for it was sufficient. 1 Parsons on Contracts, p. 449; Crosby v. Watkins, 12 Cal. 88.

44. When a demand must be averred. An allegation that defendant sold to plaintiffs certain produce, and after the sale executed a guaranty that the share of plaintiffs should be at their disposal, and stating that a demand for the same and the refusal of the defendant to deliver, is demurrable, as it should have contained an assignment of the breach of the contract of guaranty, for the material point at issue is, whether the defendant undertook to deliver. In this case the sale operated as a delivery. There was no necessity of a demand on defendant, unless for the purpose of enabling him to comply with his guaranty. Dabovich v. Emeric, 7 Cal. 212.

45. Averment of a refusal to execute a deed. It was held that the failure to aver refusal is fatal to the action, and may be taken advantage of on the ground that the complaint does not state facts sufficient to constitute a cause of action. (See facts.) Dodge v. Clark, 17 Cal. 586. A refusal, or a breach of a contract, must be stated in direct, plain, and unequivocal words. Moore v. Besse, 30 Cal. 570.

46. When and how papers and records can be made part of a pleading. Records and papers cannot be made a part of a pleading by merely referring to them, and praying that they may be taken as a part of such pleading, without annexing the originals or copies as exhibits, or incorporating them with it, so as to form a part of the record in the cause. People v. De la Guerra, 24 Cal. 78. In an action to foreclose a mortgage, the complaint referred to a copy of the mortgage annexed, and referred thereto for a correct description of the land, and this was held sufficient for the purposes of the action. See Emeric v. Tams, 6 Cal. 155.

47. Complaints in actions to compel an account. In an action to compel an account, a complaint is sufficient to entitle plaintiff to a decree directing an account which alleges that plaintiff and defendants are parties in a company known as the "Miners' Ditch Company"; that defendants exclude plaintiff from participation in the business or benefit from it; that they have received large sums of money from the same, and refuse to account or pay him anything, etc. Smith v. Fagan, 17 Cal. 178. A request for and refusal to account must be alleged in complaint. Bushnell v. McCauley, 7 Cal. 421. A complaint in an action for rents and proceeds from the leasing and the sale of certain property containing an averment, in general terms, that a copartnership exists as to the property between plaintiff and defendants, without averring any partnership agreement, and then states that plaintiff acquired his interest in the property by the purchase of an undivided interest from other persons than defendants, does not state facts sufficient either for a dissolution and settlement of the affairs of a partnership, or for a partition. Bradley v. Harkness, 26 Cal. 69.

48. Complaint in actions to recover specific personal property. Complaint will be held defective if it appears that defendant came rightfully to the possession of the property, and no averment is made of demand and refusal to deliver the property. Campbell v. Jones, 38 Cal. 508.

49. Demand and refusal, how pleaded. An averment that defendant "has failed, refused, and neglected so to return" the property sued for, is not an allegation of the special and formal demand and refusal to deliver, required in actions to recover specific personal property. Campbell v. Jones, 38 Cal. 508.

50. Complaint in an action for conspiracy. Where two or more persons are sued for a wrong done, it may be necessary to prove a previous combination, in order to secure a joint recovery; but it is never necessary to allege it, and if alleged, it is not to be considered as the gist of the action. That lies in the wrongful and damaging act done. Herron v. Hughes, 25 Cal. 560.

51. Pleadings in actions for damages. What must be averred. See Tuolumne County Water Co. v. Columbia etc. Water Co., 10 Cal. 193; Hoffman v. Tuolumne County Water Co., 10 Cal. 413; see also Hanson v. Webb, 3 Cal. 236. Grounds of damages to be specially averred. Stevenson v. Smith, 28 Cal. 102; 87 Am. Dec. 107. So, also, for loss of time, compensation for wages paid, etc. Dabovich v. Emeric, 12 Cal. 171. And if treble damages be given by statute, such must be stated, or statute recited in pleadings. Chipman v. Emeric, 5 Cal. 239.

52. Complaint in action for damages. This case was for damages sustained by the plaintiff, by reason of the refusal of the defendant, sheriff of Siskiyou County, to execute to him a deed for land bought at public sale; but the complaint is fatally defective in this, that it alleges special damages arising from the inability to get rents and profits from the estate, a tavern in Yreka, without averring that the defendant in execution had any title to the premises, or that the plaintiff, if the sheriff had made him a deed, would have been either entitled to receive or been able to recover possession of the property, or rents, or profits. Knight v. Fair, 12 Cal. 297.

53. Complaint in suit for damages against common carrier. It is unnecessary to state a tender of fare. An allegation of the plaintiff's readiness and willingness to pay the carrier the legal amount of fare is sufficient. Tarbell v. Central Pacific R. R. Co., 34 Cal. 622.

54. **Damages for diversion of water.** McDonald v. Bear River etc. Mining Co., 15 Cal. 145; Gale v. Tuolumne Water Co., 14 Cal. 25; Leigh Co. v. Independent Ditch Co., 8 Cal. 323.

55. **Actions for damage or trespass.** The words, "with force and arms, broke and entered," do not confine the proof to the direct and immediate damages, in the same manner as in the old action of trespass, and the facts being clearly set out in the complaint, the addition of these words is surplusage. Darst v. Rush, 14 Cal. 81. Averment of possession to sustain complaint for trespass. McCarron v. O'Connell, 7 Cal. 152. As to matters generally, see Gates v. Kieff, 7 Cal. 124.

56. **Damages for infringement on franchise.** In an action to recover damages, by the owner of a licensed ferry, against a party alleged to have run a ferry within the limits prohibited by law, it was held that the complaint should have alleged that defendant ran his ferry for a fee or reward, on the promise or expectation of it, or that he ran it for other than his own personal use or that of his family; that the omission of those allegations was fatal. Hanson v. Webb, 3 Cal. 237.

57. **Complaint in action of account between cotenants.** The complaint avers a tenancy in common between the parties; the sole and exclusive possession of the premises by the defendant; the receipt by him of the rents, issues, and profits thereof; a demand by the plaintiff of an account of the same, and the payment of his share; the defendant's refusal; and that the rents, issues, and profits amount to eighty-four thousand dollars. These averments, and not the form in which the prayer for judgment is couched, must determine the character of the pleading. The complaint is designated a bill in equity; but the designation does not make it such. There are no special circumstances alleged which withdraw the case from the ordinary remedies at law, and require the interposition of equity. The action is a common-law action of account, and, viewed in this light, the complaint is fatally defective. It does not aver that the defendant occupied the premises upon any agreement with the plaintiff, as receiver or bailiff of his share of the rents and profits. It is essential to a recovery that this circumstance exists, and equally essential to the complaint that it be alleged. Pico v. Columbet, 12 Cal. 419; 73 Am. Dec. 550.

58. **Suits for divorce. What must be averred.** In an action for divorce on the ground of adultery, the charge should have been stated with reasonable certainty as to time and place, so as to have enabled the defendant to prepare to meet it on the trial. Conant v. Conant, 10 Cal. 254; 70 Am. Dec. 717. The information should extend to the particular place or locality where it occurred, though the name of the person with whom may be unknown. Conant v. Conant, 10 Cal. 254; 70 Am. Dec. 717; see also Codd v. Codd, 2 Johns. Ch. 224; Wood v. Wood, 2 Paige, 113; Richards v. Richards, Wright (Ohio), 302; Stokes v. Stokes, 1 Mo. 322; Wright v. Wright, 3 Tex. 168. Averment of residence in state for six months before applying for divorce. Civ. Code, § 128; Bennett v. Bennett, 28 Cal. 599; see, generally, Civ. Code, §§ 82–148, inclusive, and notes.

59. **Complaint averring failure or insufficiency of consideration.** See Keller v. Hicks, 22 Cal. 457; 83 Am. Dec. 78. But a partial failure of consideration cannot be pleaded. See Reese v. Gordon, 19 Cal. 147.

60. **Actions on notes, bills of exchange, etc.** Complaint upon promissory note should allege the non-payment thereof, not that a certain amount is due thereon. Frisch v. Caler, 21 Cal. 71; Brown v. Orr, 29 Cal. 120. Where complaint stated that defendant made and delivered note to plaintiff, a further allegation, that plaintiff "is still the owner and holder of the note," is a conclusion of law. See Wedderspoon v. Rogers, 32 Cal. 569. A complaint, which regards the maker and the guarantor of a note as joint makers, and contains no allegation of demand and notice, is demurrable. Lightstone v. Laurencel, 4 Cal. 277. In a suit against the maker of a note, or the acceptor of a bill of exchange, where the place of payment is fixed, an averment of presentment at that place, and refusal to pay, is unnecessary. Montgomery v. Tutt, 11 Cal. 307. **No allegation of a promise in writing** is required in a suit brought upon a promise made by the defendant to accept a draft which another might draw to him. Wakefield v. Greenhood, 29 Cal. 597. An indorser of a note, payable on demand, demand not being made until thirteen months after the indorsement to plaintiff, is, prima facie, not liable. The delay is unreasonable. In such case, facts to excuse the delay are an essential part of the complaint, and must be alleged. Jerome v. Stebbins, 14 Cal. 457. Where demand is barred, new promise to be alleged. Smith v. Richmond, 19 Cal. 476.

61. **Pleading statute of limitation. New promise, etc.** See note to § 312, ante; see also, particularly, § 458, post.

62. **Actions upon undertakings.** Description of the bond in complaint. Mills v. Gleason, 21 Cal. 274; Morgan v. Thrift, 2 Cal. 562; Baker v. Cornwall, 4 Cal. 15. Action for breach, no notice to defendant need be averred. People v. Edwards, 9 Cal. 286. Undertaking on appeal. Tissot v. Darling, 9 Cal. 278. Bond for release of property attached. Palmer v. Melvin, 6 Cal. 651; McMillan v. Dana, 18 Cal. 339; Williamson v. Blattan, 9 Cal. 500. Actions against sureties on injunction bonds. Tarpey v. Shillenberger, 10 Cal. 390; Lally v. Wise, 28 Cal. 540. Recognizance under Penal Code. People v. Smith, 18 Cal. 498; Mendocino County v. Lamar, 30 Cal. 627. Undertaking given in replevin suit. Clary v. Rolland, 24 Cal. 147; Mills v. Gleason, 21 Cal. 274.

Actions on official bonds Averments in complaint. Mendocino County v. Morris, 32 Cal. 145; Ghiradelli v. Bourland, 32 Cal. 585; Van Pelt v. Littler, 14 Cal. 194; Sacramento County v. Bird, 31 Cal. 66.

63. **Action for collection of taxes.** People v. Pico, 20 Cal. 595; People v. Holladay, 25 Cal. 300.

64. **Claims against estates of decedent's executors and administrators.** The failure of plaintiff to aver in complaint, in an action upon a claim against an estate, its presentation to and rejection by the administrator, is an objection that is demurrable on the ground that the complaint does not state facts sufficient to constitute a cause of action. Ellissen v. Halleck, 6 Cal. 393; Falkner v. Folsom's Executor, 6 Cal. 412; Hentsch v. Porter, 10 Cal. 558; but these cases are overruled by Fallon v. Butler, 21 Cal. 24; 81 Am. Dec. 140; and the correctness of the latter decision is questioned in Ellis v. Polhemus, 27 Cal. 354. The case of Ellissen v. Halleck, 6 Cal. 393, is referred to in the following cases: Falkner v. Folsom's Executor, 6 Cal. 412; McCann v. Sierra County, 7 Cal. 123; Williamson v. Blattan, 9 Cal. 500; Piercy v. Sabin, 10 Cal. 30; 70 Am. Dec. 692; Willis v. Farley, 24 Cal. 498.

65. **Complaint by or against executor, etc.** Complaint must allege that executor is entitled to sue in that capacity; or if suit is against an administrator, the complaint must show that the party sued was appointed and was acting in such capacity. Barfield v. Price, 40 Cal. 536.

66. **Complaint against absent debtor.** If the plaintiff desire to subject the assets of an absent debtor to the payment of his claim, he must show that he is without a remedy at law; and if the complaint discloses such remedy at law, it will be dismissed upon demurrer. Lupton v. Lupton, 3 Cal. 120.

67. **Filing supplemental complaint.** It was held that it is no objection to a supplemental complaint that it prays for a different relief, and fails to bring in all the other creditors, who are alleged by the defense as entitled to a ratable distribution. (See facts.) Baker v. Bartol, 6 Cal. 483.

68. **Demand for relief.** See § 580, post. The court will grant such relief as the facts stated in the complaint will justify. People v. Turner, 1 Cal. 152; Truebody v. Jacobson, 2 Cal. 269; Rollins v. Forbes, 10 Cal. 299. A complaint in trespass may conclude with a demand for injunction. Gates v. Kieff, 7 Cal. 125. So, also, where action is brought to test priority of appropriation of water. Marius v. Bicknell, 10 Cal. 217. Demand for treble damages must be expressly inserted. How inserted. See Chipman v. Emeric, 5 Cal. 239.

§ 426a. Statement of facts in divorce complaint. In an action for divorce the complaint must set forth, for the statistics required to be collected by the state bureau of vital statistics, among other matters as near as can be ascertained the following facts:

(1) The state or country in which the parties were married.

(2) The date of marriage.

(3) The date of separation.

(4) The number of years from marriage to separation.

(5) The number of children of the marriage, if any, and if none, a statement of that fact.

(6) The ages of the minor children.

Legislation § 426a. Added by Stats. **1913**, p. 232.

§ 427. What causes of action may be joined. The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

1. Contracts, express or implied;

2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same;

3. Claims to recover specific personal property, with or without damages for the withholding thereof;

4. Claims against a trustee by virtue of a contract or by operation of law;

5. Injuries to character;

6. Injuries to person;

7. Injuries to property;

8. Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.

The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person; provided, however, that in any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages suffered or sustained by the husband alone, including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband; provided, further, that causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately.

Legislation § 427. **1.** Enacted March 11, **1872**; based on Practice Act, § 64 (New York Code, § 167), as amended by Stats. 1855, p. 196. The changes therefrom are noted infra.

2. Amendment by Stats. **1901**, p. 133; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 705, adding subd. 8.

4. Amended by Stats. **1913**, p. 219, (1) in introductory paragraph, striking out "they," before "all arise"; (2) adding the first proviso to the end of the final paragraph.

5. Amended by Stats. **1915**, p. 30, (1) in introductory paragraph, inserting "they" (stricken out in 1913); (2) in final paragraph, adding the second proviso.

Joinder of causes of action, in general. The plaintiff may unite several causes of action, where all the matters complained of are parts of one transaction (Pfister v. Dascey, 65 Cal. 403; 4 Pac. 393; Kyle v. Craig, 125 Cal. 107; 57 Pac. 791); and the fact that both legal and equitable causes of action are joined does not preclude the court from granting the relief warranted

by the facts. Gray v. Dougherty, 25 Cal. 266. It is the settled practice in equity, in order to avoid a multiplicity of suits, to allow suit, in the same action, for every species of relief necessary to secure the rights of the plaintiff in the subject-matter. Doudell v. Shoo, 20 Cal. App. 424; 129 Pac. 478. There is no requirement in the code that distinct causes of action shall correspond to or be consistent with each other. Cowan v. Abbott, 92 Cal. 100; 28 Pac. 213. Causes of action cannot be united, except when authorized by statute (Smith v. Omnibus R. R. Co., 36 Cal. 281; Dyer v. Barstow, 50 Cal. 652; Reynolds v. Lincoln, 71 Cal. 183; 9 Pac. 176; 12 Pac. 449; Stark v. Wellman, 96 Cal. 400; 31 Pac. 259; Mallory v. Thomas, 98 Cal. 644; 33 Pac. 757; Thelin v. Stewart, 100 Cal. 372; 34 Pac. 861); and although expressly authorized, yet the plaintiff is not compelled to unite them. Realty Construction etc. Co. v. Superior Court, 156 Cal. 543; 132 Pac. 1048. Damages arising from single wrongs, though at different times, make but one cause of action. Hall v. Susskind, 109 Cal. 203; 41 Pac. 1012. A demurrer is properly sustained to a complaint which shows a misjoinder of causes of action and of parties. Lapique v. Munroe, 19 Cal. App. 253; 125 Pac. 760.

Causes of action arising out of contracts. Several causes of action arising out of contracts are properly united. Keller v. Hicks, 22 Cal. 457; 83 Am. Dec. 78. Thus, a cause of action based upon an express contract may be united with one based upon an implied contract. Cowan v. Abbott, 92 Cal. 100; 28 Pac. 213; Olmstead v. Dauphiny, 104 Cal. 635; 38 Pac. 505. An action upon a contract for the direct payment of money may be united with one arising out of a contract, wherein the damages for its breach are unliquidated, and for which the plaintiff is not entitled to a writ of attachment. Baldwin v. Napa etc. Wine Co., 137 Cal. 646; 70 Pac. 732; Hathaway v. Davis, 33 Cal. 161. There is no misjoinder of causes of action in a suit in equity to settle the affairs of a partnership, where the subject-matter of the suit relates to but one transaction, and the principal relief asked is to establish the partnership and for an accounting of the partnership assets and business. Doudell v. Shoo, 20 Cal. App. 424; 129 Pac. 478; Bremner v. Leavitt, 109 Cal. 130; 41 Pac. 859. A cause of action for work and labor performed by the plaintiff for the defendant may be joined with a similar cause assigned to the plaintiff. Fraser v. Oakdale Lumber etc. Co., 73 Cal. 187; 14 Pac. 829. A cause of action for damages for breach of contract, with each term of the contract separately and specifically alleged, and all summed up in one general allegation of damages, may be joined with a cause of action on quantum meruit, which particularizes each item of work and labor performed and materials furnished, and the reasonable value thereof, where they all arise out of contracts expressed or implied. Remy v. Olds, 88 Cal. 537; 26 Pac. 355. A cause of action for a commission, based upon a sale of property made under a given state of facts, may be united with a cause of action based upon a sale made under another state of facts; both causes of action being based upon the same contract, and the plaintiff being entitled to recover upon either, he should not be compelled to elect upon which he will proceed. Rucker v. Hall, 105 Cal. 425; 38 Pac. 962; Wilson v. Smith, 61 Cal. 209. In an action for the purchase price of goods, an allegation that a further sum is due as interest does not constitute a separate cause of action. Friend & Terry Lumber Co. v. Miller, 67 Cal. 464; 8 Pac. 40. The owner of property adjacent to a street is not a party to a contract for the improvement of the street, made between the contractor and the superintendent of streets, within the meaning of the first subdivision of this section. Dyer v. Barstow, 50 Cal. 652. The plaintiff may unite, or sue separately on, causes of action for the foreclosure of a lien for street-work, as to each lot, under the same contract, although one person may own two or more of such lots. Realty Construction etc. Co. v. Superior Court, 165 Cal. 543; 132 Pac. 1048. Several causes of action upon contracts for the direct payment of money may be united, where one of them is secured by pledge of personal property, while the others are unsecured. Baldwin v. Napa etc. Wine Co., 137 Cal. 646; 70 Pac. 732. Where the contract alleged is an entirety, and the defendant's promises are all founded upon the same consideration, the plaintiff may ask for a money judgment, and for the specific performance of an agreement to convey; and it is his duty to unite both in the same action, if he wishes to enforce both. Mann v. Higgins, 83 Cal. 66; 23 Pac. 206.

Causes of action on contract and tort. A cause of action for breach of contract cannot be joined with one for injuries resulting from a tort (Stark v. Wellman, 96 Cal. 400; 31 Pac. 259); nor can a cause of action for the violation of the terms of an express contract be joined with one for the conversion of personal property (Stark v. Wellman, 96 Cal. 400; 31 Pac. 259); but, if they arise out of the same transaction, actions ex delicto and actions ex contractu may be joined. Boulden v. Thompson, 21 Cal. App. 279; 131 Pac. 755.

Claims to recover specific real property. A claim to recover specific real property, with damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same, may be united. Furlong v. Cooney, 72 Cal. 322; 14 Pac. 12; Sullivan v. Davis, 4 Cal. 291.

Causes of action to recover possession of several distinct and separate parcels of land may be united, where they are separately stated, affect all the parties to the action, and do not require different places of trial. Boles v. Cohen, 15 Cal. 150. Claims for rents, issues, and profits, and for damages for withholding, in an action to recover specific real property, are in the nature of alleged trespass for mesne profits, which can be recovered only after or contemporaneously with judgment for the recovery of possession of the demanded premises; and, when united with ejectment, judgment for such damages can be rendered only when there is also judgment for recovery of possession. Locke v. Peters, 65 Cal. 161; 3 Pac. 657. Specific real property, with damages, may be recovered; but recovery of damages cannot be had, where the plaintiff fails to recover the property. Carpentier v. Mendenhall, 28 Cal. 484; 87 Am. Dec. 135. A cause of action to recover possession of real property may be joined with one for rents, issues, and profits. Beckman v. Waters, 3 Cal. App. 734; 86 Pac. 997.

Claims to recover specific personal property. A cause of action to recover specific personal property, with or without damages for the withholding thereof, cannot be united with a cause of action for injury to the property. Hall v. Susskind, 109 Cal. 203; 41 Pac. 1012.

Claims against a trustee. A claim to enforce an express or implied trust may be united with a claim to enforce a vendor's lien existing without any written contract. Burt v. Wilson, 28 Cal. 632; 87 Am. Dec. 142. The cause of action in a complaint, under § 738, post, is not within the purview of the fourth subdivision of this section. Reynolds v. Lincoln, 71 Cal. 183; 9 Pac. 176; 12 Pac. 449. A complaint which states one cause of action in ejectment and one for the establishment of a trust, is good, in the absence of a demurrer for misjoinder of causes of action. Everson v. Mayhew, 85 Cal. 1; 21 Pac. 431; 24 Pac. 382. Several causes of action upon claims against a trustee, by virtue of a contract or by operation of law, may be united, though they may relate to distinct parcels of real estate. Murphy v. Crowley, 140 Cal. 141; 73 Pac. 820.

Injuries to character. In an action for conspiracy, which in one aspect is for the publication of a libel, and in another is for malicious prosecution, each cause of action should be separately stated in the complaint, so that the defendant may plead to them separately. White v. Cox, 46 Cal. 169. Where the complaint alleges wrongful acts of the defendant, by which the property of the plaintiff is damaged, his character injured, and his health permanently impaired, there is a misjoinder of distinct causes of action. Lamb v. Harbaugh, 105 Cal. 680; 39 Pac. 56.

Injuries to person. A cause of action for injury to the person cannot be joined with one for injury to property. Thelin v. Stewart, 100 Cal. 372; 34 Pac. 861; Schermerhorn v. Los Angeles Pacific R. R. Co., 18 Cal. App. 454; 123 Pac. 351.

Injuries to property. Any number of separate causes of action for distinct nuisances may be united, where they affect all the parties. Astill v. South Yuba Water Co., 146 Cal. 55; 79 Pac. 594. A cause of action to abate a nuisance may be united with one to recover damages incurred by reason thereof. Grandona v. Lovdal, 70 Cal. 161; 11 Pac. 623. A complaint seeking an injunction against the operation of a quarry, and for damages sustained thereby, does not set up two causes of action. Rooney v. Gray Bros., 145 Cal. 753; 79 Pac. 523. Where the several owners of a stream join as plaintiffs in an action for damages for diverting the waters of the stream, and for an injunction to restrain the further diversion thereof, the complaint is subject to a demurrer, both for a misjoinder of parties plaintiff and for a misjoinder of causes of action. Foreman v. Boyle, 88 Cal. 290; 26 Pac. 94.

Transactions connected with same subject-matter. A cause of action to quiet title and to declare a deed a mortgage, arising out of the same transaction, is not a union of two causes of action. Louvall v. Gridley, 70 Cal. 507; 11 Pac. 777. Two or more causes of action against a toll-collector, for penalties incurred for demanding and collecting excessive toll, are improperly united, even if separately stated. Brown v. Rice, 51 Cal. 489. An action to foreclose a mortgage executed by two persons, to secure a note made by one of them, and praying for judgment against the maker of the note and for a decree of foreclosure against both, is not demurrable on the ground of misjoinder of causes of action. Rollins v. Forbes, 10 Cal. 299; Althof v. Conheim, 38 Cal. 230; 99 Am. Dec. 363; Bailey v. Dale, 71 Cal. 34; 11 Pac. 804; Levy v. Noble, 135 Cal. 559; 67 Pac. 1033.

Causes of action must affect all parties. Causes of action which do not affect the same parties cannot be properly united (Johnson v. Kirby, 65 Cal. 482; 4 Pac. 458; Hall v. Susskind, 109 Cal. 203; 41 Pac. 1012); but a cause of action against a defendant individually may be united with a like cause of action against him in a representative capacity. Sacramento County v. Glann, 14 Cal. App. 780; 113 Pac. 360. A complaint stating eighteen separate and distinct causes of action, all in one count, and affecting eighteen different persons, is defective (People v. Central Pacific R. R. Co., 83 Cal. 393; 23 Pac. 303); but, it having been settled that a defendant who is the owner of all the lots in a foreclosure suit may be joined in a simple action to enforce the lien, no difference is

perceivable, where the single action is brought against three owners in common of all the lots in suit (Barber Asphalt Paving Co. v. Crist, 21 Cal. App. 1; 130 Pac. 435); and where the suit is upon several distinct contracts, by the same parties, relating to the same transaction, involving joint and joint and several liabilities. Melander v. Western National Bank, 21 Cal. App. 462; 132 Pac. 265.

Causes of action must belong to the same class. A complaint cannot mingle several distinct causes of action, not all belonging to any one of the classes mentioned. Cosgrove v. Fisk, 90 Cal. 75; 27 Pac. 56. Several causes of action, all arising out of injury to the person, or all arising out of injury to property, may be united, provided that all the causes of action so united belong to one of the classes designated in this section. Schermerhorn v. Los Angeles etc. R. R. Co., 18 Cal. App. 454; 123 Pac. 351.

Causes of action must be separately stated. The provision for a separate statement of causes of action does not authorize the joinder of separate causes of action to enforce separate forfeitures arising under a statute. Smith v. Omnibus R. R. Co., 36 Cal. 281; Reed v. Omnibus R. R. Co., 33 Cal. 212. Where the complaint includes two or more of the several classes, and does not separately state the causes of action, but unites them in one count, there is a clear violation of the provisions of the act (McCarty v. Fremont, 23 Cal. 196); but a misjoinder of causes of action, which does not affect the substantial rights of the parties, is not ground for a reversal of the judgment. Reynolds v. Lincoln, 71 Cal. 183; 9 Pac. 176; 12 Pac. 449. Pleading one cause of action in several counts does not affect the substantial rights of the opposing party. Pennie v. Hildreth, 81 Cal. 127; 22 Pac. 398. The statement of a cause of action in several counts, instead of one, does not, of itself, render the complaint ambiguous and uncertain, or open to a general demurrer. Demartin v. Albert, 68 Cal. 277; 9 Pac. 157. The common counts cannot all be united in one count as one cause of action, without any specification of the sums due upon each several causes of action. Buckingham v. Waters, 14 Cal. 146. Each count must contain all the facts necessary to constitute a cause of action, and its defects cannot be supplied from statements outside of it, unless expressly referred to in it, and not then if matters in it relate to the gravamen. Haskell v. Haskell, 54 Cal. 262; Baldwin v. Ellis, 68 Cal. 495; 9 Pac. 652; Pennie v. Hildreth, 81 Cal. 127; 22 Pac. 398; Bidwell v. Babcock, 87 Cal. 29; 25 Pac. 752; Green v. Clifford, 94 Cal. 49; 29 Pac. 331; Reading v. Reading, 96 Cal. 4; 30 Pac. 803; Hopkins v. Contra Costa County, 106 Cal. 566; 39 Pac. 933; Barlow v. Burns, 40 Cal. 351. Where separate counts are not necessary, and where the entire complaint states a cause of action, the judgment will not be reversed on the ground that each cause in the complaint is not complete. Pennie v. Hildreth, 81 Cal. 127; 22 Pac. 398. Forcible entry and forcible detainer are distinct offenses, or separate causes of action, and should be separately stated (Valencia v. Couch, 32 Cal. 339; 91 Am. Dec. 589); but the complaint cannot be amended for the purpose of stating forcible entry and forcible detainer in separate counts, where no objection is raised by demurrer to the complaint, which does not separately state each distinct offense. Valencia v. Couch, 32 Cal. 339; 91 Am. Dec. 589. Where the gist of the action is negligence, the plaintiff may set forth all the facts, the indirect consequences of which resulted in the injuries complained of. Fraler v. Sears Union Water Co., 12 Cal. 555; 73 Am. Dec. 562. A motion to compel a plaintiff to elect between counts is properly denied, where, in the first count, he alleges delivery to the defendants, under an agreement to make returns of proceeds at a given price, and the second count is laid on quantum valebat, and the third count alleges an agreement to sell and deliver for a fixed price. Estrella Vineyard Co. v. Butler, 125 Cal. 232; 57 Pac. 980; Cowan v. Abbott, 92 Cal. 100; 28 Pac. 213.

Remedy where causes of action not separately stated. Where causes of action may be properly united, but are not separately stated, the remedy is not by demurrer, but by a motion to make the pleading more definite and certain, by separating and distinctly stating the different causes of action. City Carpet Beating etc. Works v. Jones, 102 Cal. 506; 36 Pac. 841; and see Bernero v. South British etc. Ins. Co., 65 Cal. 386; 4 Pac. 382; Fraser v. Oakdale Lumber etc. Co., 73 Cal. 187; 14 Pac. 829; Jacob v. Lorenz, 98 Cal. 332; 33 Pac. 119; Murphy v. Crowley, 140 Cal. 141; 73 Pac. 820. The defect of a failure to state separately the causes of action united in the complaint cannot be reached by a motion to dismiss the action. Watson v. San Francisco etc. R. R. Co., 50 Cal. 523. Where the complaint improperly unites two causes of action, advantage of the defect must be taken by demurrer, or it is waived. Reynolds v. Lincoln, 71 Cal. 183; 9 Pac. 176; 12 Pac. 449. It is not waived, however, where the defendant submits to trial, the objection having been previously raised by demurrer. Thelin v. Stewart, 100 Cal. 372; 34 Pac. 861.

Joinder and splitting of claims for injury to person and property arising out of single tort. See notes 3 Ann. Cas. 464; Ann. Cas. 1912D, 256.

Necessity under code practice that causes of action joined affect all parties defendant. See note, 3 Ann. Cas. 285.

Joinder of causes of action accruing to plaintiff individually and in representative capacity. See note Ann. Cas. 1912B, 1258.

Whether injuries both to person and to property constitute but one or more than one cause of action. See notes 50 L. R. A. 161; 36 L. R. A. (N. S.) 240.

Conclusiveness of judgment in wife's suit for personal injuries in husband's action for loss of services and expenses. See note 10 L. R. A. (N. S.) 140.

Right of husband to recover for loss of consortium through personal injury to wife. See note 33 L. R. A. (N. S.) 1042.

Right to join in one complaint claims of ordinary and gross negligence arising out of one state of facts. See note 31 L. R. A. (N. S.) 158.

CODE COMMISSIONERS' NOTE. 1. Contracts express or implied. A cause of action against an indorser on the note, and a cause of action in equity to foreclose the mortgage, were held to be properly joined. Eastman v. Turman, 24 Cal. 382. Mortgage assigned as security for debt due by mortgagee—assignee may unite his causes of action against mortgagor, mortgagee, and parties having liens or encumbrances on the property mortgaged, and make these persons all parties. Farwell v. Jackson, 28 Cal. 107. Action for foreclosure of mortgage made by husband and wife together to secure a note made only by husband, cause of action against husband for amount due on note and interest, and also against husband and wife for foreclosure and sale of property, held to be properly united. Rollins v. Forbes, 10 Cal. 299. Legal and equitable claims, founded upon instruments in writing, may be united. Gray v. Dougherty, 25 Cal. 266. Cause of action for enforcement of trust, either express or implied, may be united with cause of action to enforce vender's lien existing without any written contract. Both of the claims being founded on trusts, one lying in contract and the other arising by act and operation of law. Burt v. Wilson, 28 Cal. 638; 87 Am. Dec. 142. See also, generally, under this head, Keller v. Hicks, 22 Cal. 457; 83 Am. Dec. 78; Weaver v. Conger, 10 Cal. 233.

2. **Claims to recover specific real property, with or without damages, or for waste and the rents or profits.** Sullivan v. Davis, 4 Cal. 291; Gale v. Tuolumne Water Co., 14 Cal. 25.

3. **Injuries to property.** More v. Massini, 32 Cal. 595, 596. Claims for value of the property destroyed, and for the damages caused by its destruction, may be united. Tendesen v. Marshall, 3 Cal. 440. Uniting claim for injury and damages. See Fraler v. Sears Union Water Co., 12 Cal. 555; 73 Am. Dec. 562.

4. **Causes of action separately stated.** Though united in one complaint, the different causes of action must be separately stated. McCarty v. Fremont, 23 Cal. 197; Buckingham v. Waters, 14 Cal. 146; Cordier v. Schloss, 18 Cal. 581. Ejectment may be for two distinct pieces of land, but the two causes of action must be separately stated, affect all the parties to the action, and not require different places of trial. Boles v. Cohen, 15 Cal. 150.

5. **Generally.** A complaint against a sheriff and his sureties, averring trespass of sheriff and against his sureties as signers of the bond, and not otherwise, the causes are not properly united. Ghiradelli v. Beurland, 32 Cal. 585. Claim for damages for personal tort cannot be united with claim properly cognizable in court of equity. Mayo v. Madden, 4 Cal. 27. A claim for the possession of real property, with damages for detention, cannot be joined in the same complaint, under any system of pleading, with a claim for consequential damages arising from a change of a road, by which a tavern-keeper may have been injured in his business. Bowles v. Sacramento Turnpike etc. Co., 5 Cal. 225. A claim for damages may be united with a demand for a statutory penalty, in an action against a sheriff for failing to execute and return process. There is no necessity for bringing two suits. Pearkes v. Freer, 9 Cal. 642.

CHAPTER III.

DEMURRER TO COMPLAINT.

§ 430. When defendant may demur.
§ 431. Demurrer must specify grounds. May be taken to part. May answer and demur at same time.
§ 432. What proceedings are to be had when complaint is amended.
§ 433. Objection not appearing on complaint, may be taken by answer.
§ 434. Objections, when deemed waived.

§ 430. When defendant may demur. The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action;

2. That the plaintiff has not legal capacity to sue.

3. That there is another action pending between the same parties for the same cause;

4. That there is a defect or misjoinder of parties plaintiff or defendant;

5. That several causes of action have been improperly united, or not separately stated;

6. That the complaint does not state facts sufficient to constitute a cause of action;

7. That the complaint is ambiguous;

8. That the complaint is unintelligible; or,

9. That the complaint is uncertain.

General and special demurrer. See post, § 431.
Demurring and answering at same time. Post, §§ 431, 441.
Serving demurrer. Post, § 465.
Judgment on demurrer. Post, § 636.
Demurrer is an appearance. Post, § 1014.

Waiving objections by not demurring. Post, § 434.

Legislation § 430. 1. Enacted March 11, **1872**; re-enactment of Practice Act, § 40 (New York Code, § 144), as amended by Stats. 1859, p. 139. 2. Amendment by Stats. **1901**, p. 133; unconstitutional. See note ante, § 5. 3. Amended by Stats. **1907**, p. 706, (1) striking out the word "or" at the end of subds. 1, 2, 3, 4, 6; (2) in subd. 5, adding, after the word "or," the words "not separately stated"; (3) rearranging subd. 7 into the present subds. 7, 8, 9, that subdivision formerly reading, "7. That the complaint is ambiguous, unintelligible, or uncertain."

Objections that may be reached by demurrer. The code contemplates one demurrer to a pleading, in which may be taken any or all of the objections enumerated in this section (People v. Central Pacific R. R. Co., 76 Cal. 29; 18 Pac. 90); and no grounds of demurrer, other than those enumerated, can be considered. Kyle v. Craig, 125 Cal. 107; 57 Pac. 791; Mitchell v. Steelman, 8 Cal. 363; Hentsch v. Porter, 10 Cal. 555; Bernero v. South British etc. Ins. Co., 65 Cal. 386; 4 Pac. 382. A demurrer is a pleading, within the meaning of the statute and the common law. Davis v. Honey Lake Water Co., 98 Cal. 415; 33 Pac. 270. The office of the demurrer is, not to set out the facts, but merely to raise questions of law as to the sufficiency of the facts to constitute a cause of action or defense. Brennan v. Ford, 46 Cal. 7; Cook v. De la Guerra, 24 Cal. 237. The legal character of the causes of demurrer is the same, whether assigned in a demurrer or in an answer. Brown v. Martin, 25 Cal. 82. Want of consideration for the execution of an instrument, apparent from the averments of the complaint, may be taken advantage of by demurrer (McCarty v. Beach, 10 Cal. 461; Mulford v. Estudillo, 17 Cal. 618); and also where the agreement sued on is within the statute of frauds (Harper v. Goldschmidt, 156 Cal. 245; 134 Am. St. Rep. 124; 104 Pac. 451); and the failure of a complaint, based upon alleged fraud, to aver facts showing fraud, is ground of demurrer. Cosgrove v. Fisk, 90 Cal. 75; 27 Pac. 56; Payne v. Elliot, 54 Cal. 339; 35 Am. Rep. 80; Pehrson v. Hewitt, 79 Cal. 594; 21 Pac. 950. Conclusions of law are not admitted by a demurrer. Buttner v. Kasser, 19 Cal. App. 755; 127 Pac. 811. The pleading must show on its face a cause of demurrer. Mulford v. Estudillo, 17 Cal. 618; Miles v. Thorne, 38 Cal. 335; 99 Am. Dec. 384. Thus, a failure to serve a copy of the complaint with the summons is not a ground of demurrer, the omission not appearing on the face of the complaint. Ghiradelli v. Greene, 56 Cal. 629. Only the defects appearing on the face of the complaint can be reached by demurrer; defects or uncertainties, made apparent only by allegation of facts, cannot be raised by it. Cook v. De la Guerra, 24 Cal. 237; Kamm v. Bank of California, 74 Cal. 191; 15 Pac. 765; Mulford v. Estudillo, 17 Cal. 618; Ghiradelli v. Greene, 56 Cal. 629. Irrelevant and immaterial matters in the complaint, which do not affect the sufficiency thereof, cannot be reached by demurrer, but must be made the subject of a motion to strike out. Bremner v. Leavitt, 109 Cal. 130; 41 Pac. 859. An objection to a pleading which contains all the essential averments, but states them in form too general to enable the defendant to meet them by a specific technical defense, should be met, not by demurrer, but by motion to make the pleading more specific. Pfister v. Wade, 69 Cal. 133; 10 Pac. 369; but see contra, McFarland v. Holcomb, 123 Cal. 84; 55 Pac. 761. The prayer of the complaint is not a subject of demurrer (Rollins v. Forbes, 10 Cal. 299; De Leon v. Higuera, 15 Cal. 483; Poett v. Stearns, 28 Cal. 226; Althof v. Conheim, 38 Cal. 230; 99 Am. Dec. 363; Bailey v. Dale, 71 Cal. 34; 11 Pac. 804; Levy v. Noble, 135 Cal. 559; 67 Pac. 1033); neither is surplusage (Mitchell v. Steelman, 8 Cal. 363); nor will a matter of form be noticed on demurrer (Phelps v. Owens, 11 Cal. 22; Ward v. Clay, 82 Cal. 502; 23 Pac. 50, 227); hence, failure to specify the name of the county, or the court or the title, or that the complaint does not show where either of the parties resides, is not a ground of demurrer (Otero v. Bullard, 3 Cal. 188); nor is an exception to an executor's account a pleading which may be demurred to (Estate of Sanderson, 74 Cal. 199; 15 Pac. 753); nor can want of verification of pleadings be raised by demurrer (Turner v. Hamilton, 13 Wyo. 408; 80 Pac. 664); nor is the non-appearance, in the record, of the Christian name of one plaintiff, a good ground of demurrer (Nelson v. Highland, 13 Cal. 74); nor is the setting up two accounts for one cause of action, in the complaint (Kyle v. Craig, 125 Cal. 107; 57 Pac. 791); nor is an objection that the statute gives a person another remedy (Triscony v. Brandenstein, 66 Cal. 514; 6 Pac. 384); nor a failure to allege special damage in an action for breach of contract (McCarty v. Beach, 10 Cal. 461); nor a failure to show that plaintiffs were innocent purchasers in good faith and without notice. McDermont v. Anaheim Union Water Co., 124 Cal. 112; 56 Pac. 779.

Plea of limitations. The bar of the statute of limitations may be taken advantage of by demurrer, where the defect clearly and affirmatively appears on the face of the complaint. Sublette v. Tinney, 9 Cal. 423; Barringer v. Warden, 12 Cal. 311; Ord v. De la Guerra, 18 Cal. 67; Smith v. Hall, 19 Cal. 85; Mason v. Cronise, 20 Cal. 211; Brown v. Martin, 25 Cal. 82; Harmon v. Page, 62 Cal. 448; Farris v. Merritt, 63 Cal. 118; Cameron v. San Francisco, 68 Cal. 390; 9 Pac. 430; Wise v. Williams, 72 Cal. 544; 14 Pac. 204; Wise v. Hogan, 77 Cal. 184; 19 Pac. 278; Jenness v. Bowen,

77 Cal. 310; 19 Pac. 522; Doe v. Sanger, 78 Cal. 150; 20 Pac. 366; Kraner v. Halsey, 82 Cal. 209; 22 Pac. 1137; Redington v. Cornwell, 90 Cal. 49; 27 Pac. 40; Pleasant v. Samuels, 114 Cal. 34; 45 Pac. 998; Williams v. Bergin, 116 Cal. 56; 47 Pac. 877; McFarland v. Holcomb, 123 Cal. 84; 55 Pac. 761; Lloyd v. Davis, 123 Cal. 348; 55 Pac. 1003. Where a counterclaim appears upon the face of the answer to be barred by the statute, it must be specially pleaded to by demurrer on that ground, or it is waived. Bliss v. Sneath, 119 Cal. 526; 51 Pac. 848. A demurrer on the ground of the bar of the statute is sustained, not because the complaint states, as the time when the cause of action accrued, any period, the time from which to the commencement of the action corresponds with the time prescribed in any particular statute as bar, but because the time, as stated since it accrued, exceeds the time defined as a limitation of actions of that nature. Boyd v. Blankman, 29 Cal. 19; 87 Am. Dec. 146. Where an allegation of the complaint is consistent with the conclusion that the debt is not barred, the defense must be raised by plea, and not by demurrer. Curtiss v. Ætna Life Ins. Co., 90 Cal. 245; 25 Am. St. Rep. 114; 27 Pac. 211. The bar of the statute must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action, though it is not specified in the code as a ground of demurrer. Bell v. Bank of California, 153 Cal. 234; 94 Pac. 889. Where the complaint shows that the statute has run, the defendant may set it up either by demurrer or answer; but when the complaint does not so show, the defendant must plead his right by answer. California Safe Deposit etc. Co. v. Sierra Valleys Ry. Co., 158 Cal. 690; Ann. Cas. 1912A, 729; 112 Pac. 274.

Want of jurisdiction. Lack of jurisdiction must appear on the face of the complaint, to be a ground of demurrer. Doll v. Feller, 16 Cal. 432.

Lack of legal capacity to sue. It must affirmatively appear that the plaintiff has no legal capacity to sue, to be a ground of demurrer. Swamp etc. Land District v. Feck, 60 Cal. 403; Miller v. Luco, 80 Cal. 257; 22 Pac. 195; Wilhoit v. Cunningham, 87 Cal. 453; 25 Pac. 675; Locke v. Klunker, 123 Cal. 231; 55 Pac. 993; Redding Gold etc. Mining Co. v. National Surety Co., 18 Cal. App. 488; 123 Pac. 544. The want of capacity to sue can be raised by demurrer, only it appears upon the face of the complaint. Redding Gold Min. Co. v. National Surety Co., 18 Cal. App. 488; 123 Pac. 544. The objection that the plaintiff has not legal capacity to sue must be taken by demurrer or answer, or it is waived. Bollinger v. Bollinger, 154 Cal. 695; 99 Pac. 196. The authority of the attorney-general to institute an action in behalf of the people, to determine adverse claims to real property, does not come within an objection, raised by demurrer, of want of capacity in the plaintiff to sue, and it is doubtful if it comes within any of the grounds of demurrer mentioned in this section; the proper practice is to move to dismiss the information. People v. Oakland Water Front Co., 118 Cal. 234; 50 Pac. 305.

Plea in abatement. The general rule as to pleas in abatement is, that, before one suit can be pleaded in abatement of another, it must appear that the plaintiffs are the same in both suits. Helfrich v. Romer, 16 Cal. App. 433; 118 Pac. 458. The pendency of a prior action, between the same parties, for the same cause, is a good plea in abatement. Goytino v. McAleer, 4 Cal. App. 655; 88 Pac. 991. The general rule is, that articles of incorporation must be of record in the clerk's office at the time that a plea in abatement is interposed; otherwise the plea is good. Riverdale Mining Co. v. Wicks, 14 Cal. App. 526; 112 Pac. 896.

Defect or misjoinder of parties. The word "defect," as used in the fourth subdivision, means a defect in the complaint, by reason of having either too many or too few parties. Rowe v. Chandler, 1 Cal. 167. Misjoinder of parties may be taken advantage of by demurrer (Warner v. Wilson, 4 Cal. 310; Peralta v. Simon, 5 Cal. 313; Jacks v. Cooke, 6 Cal. 164); but a demurrer does not lie, where a defect of parties does not appear on the face of the complaint. Cook v. De la Guerra, 24 Cal. 237; Frost v. Harford, 40 Cal. 165. Misjoinder of parties, not appearing on the face of the complaint, is not a ground of demurrer (Frost v. Harford, 40 Cal. 165); and where there is but one party defendant, a demurrer for misjoinder of parties defendant is properly overruled. Lorenzana v. Camarillo, 45 Cal. 125. Where a complaint is filed against several defendants, for several and distinct causes, having no relation to or dependence upon one another, a demurrer for misjoinder of parties and of causes of action will be sustained; but where several persons have been jointly concerned in a series of fraudulent transactions, they may be united as defendants in an action to annul the fraudulent acts. Andrews v. Pratt, 44 Cal. 309. The non-joinder of necessary parties, plaintiff or defendant, should be taken advantage of by demurrer (Andrews v. Mokelumne Hill Co., 7 Cal. 330; Whitney v. Stark, 8 Cal. 514; 68 Am. Dec. 360; MacLeod v. Moran, 11 Cal. App. 622; 105 Pac. 932; Redfield v. Oakland Consol. Street Ry. Co., 110 Cal. 277; 42 Pac. 822, 1063); and if not taken by demurrer or answer, it is waived. Baker & Hamilton v. Lambert, 5 Cal. App. 708; 91 Pac. 340; Farmer v. Behmer, 9 Cal. App. 773; 100 Pac. 901. The failure of a partner to join his copartners as parties plaintiff should be taken advantage of by demurrer (Wil-

liams v. Southern Pacific R. R. Co., 110 Cal. 457; 42 Pac. 974); as should also the point that a person is a necessary party defendant. MacLeod v. Moran, 11 Cal. App. 622; 105 Pac. 932. In an action of foreclosure, a general allegation that the defendant had or claimed some interest in the mortgaged premises is sufficient as against a demurrer on the ground of defect of parties. Poett v. Stearns, 28 Cal. 226. A defendant against whom a sufficient cause of action is alleged cannot demur for misjoinder of defendants, unless his interests would be affected thereby. Gardner v. Samuels, 116 Cal. 84; 58 Am. St. Rep. 135; 47 Pac. 935. A defect in parties plaintiff, apparent upon the face of the complaint, or it appearing therefrom that the plaintiff has not the legal capacity to sue, must be taken advantage of by demurrer, on either ground, or it is waived. Tingley v. Times Mirror, 151 Cal. 1; 89 Pac. 1097. An objection for non-joinder of the husband, as a necessary party plaintiff, in an action by the wife, must be specially urged by demurrer if the matter appears on the face of the complaint, or by answer if it does not so appear. Work v. Campbell, 164 Cal. 343; 128 Pac. 943. Where new parties, plaintiff and defendant, were joined, in an amended complaint, without leave of court, it must be presumed, upon appeal, that such complaint was filed by leave of court; and, as it supersedes the original, an objection thereto cannot be raised upon special demurrer to the complaint, but only on motion to strike out. Harvey v. Meigs, 17 Cal. App. 353; 119 Pac. 941.

Several causes of action improperly united, or not separately stated. This section applies to causes of action which cannot be embraced in the same action, though separately stated, and not to causes of action which may properly be joined in the same action, but which are not separately stated; the remedy for the latter is by motion to make the pleadings more definite and certain. City Carpet Beating etc. Works v. Jones, 102 Cal. 506; 36 Pac. 841; Bernero v. South British etc. Ins. Co., 65 Cal. 386; 4 Pac. 382; Fraser v. Oakdale Lumber etc. Co., 73 Cal. 187; 14 Pac. 829; Jacob v. Lorenz, 98 Cal. 332; 33 Pac. 119; Sutter County v. McGriff, 130 Cal. 124; 62 Pac. 412; San Francisco Paving Co. v. Fairfield, 134 Cal. 220; 66 Pac. 255; Murphy v. Crowley, 140 Cal. 141; 73 Pac. 820; but see contra, McFarland v. Holcomb, 123 Cal. 84; 55 Pac. 761. The fact that several causes of action were not separately stated was not ground of demurrer prior to the amendment of 1907 to this section. Huene v. Cribb, 9 Cal. App. 141; 98 Pac. 78. A joinder of causes of action, not all belonging to any one of the classes mentioned in § 427, ante, renders the complaint obnoxious to a demurrer on the ground that several causes of action are improperly united. Cosgrove v. Fisk, 90 Cal. 75; 27 Pac. 56; Watson v. San Francisco etc. R. R. Co., 41 Cal. 17; Barber Asphalt Paving Co. v. Crist, 21 Cal. App. 1; 130 Pac. 435. Thus, a joinder of a cause of action for injuries to a wife, with one in favor of the husband for loss of the services of and expenses incurred for the wife, renders the complaint subject to demurrer for an improper joinder of causes of action (McKune v. Santa Clara Valley Mill etc. Co., 110 Cal. 480; 42 Pac. 980); but a demurrer for misjoinder of causes of action will not lie because several species of remedy may be had in the enforcement of a single right. Beronio v. Ventura County Lumber Co., 129 Cal. 232; 79 Am. St. Rep. 118; 61 Pac. 958. To entitle the plaintiff to punitive damages in an action for trespass to real property, circumstances of aggravation must be pleaded in such a manner as that there shall be no ambiguity or uncertainty in determining that they are set forth solely for the purpose of establishing such claim; and if they are pleaded in such a manner as would be proper in an action brought to recover damages other than those for the trespass, the complaint will, for that reason, be subject to a demurrer for misjoinder of causes of action. Lamb v. Harbaugh, 105 Cal. 680; 39 Pac. 56. While a demurrer lies where different causes of action are not separately stated, yet the fact that two independent contracts are included in one count is not prejudicial error, where they are treated as one. Fairchild etc. Co. v. Southern Refining Co., 158 Cal. 264; 110 Pac. 951. A complaint in an action to foreclose a street assessment, which otherwise states a good cause of action, is not demurrable because containing a prayer for attorney's fees. Millsap v. Balfour, 154 Cal. 303; 97 Pac. 668. The seeking of different kinds of relief does not establish different causes of action: a demand for alternative monetary relief is not subject to the objection that the complaint states two causes of action. Messer v. Hibernia Sav. & L. Soc., 149 Cal. 122; 84 Pac. 835.

Insufficiency of facts to constitute a cause of action. This section applies to those cases in which no cause of action whatever arises from the complaint, and does not include cases in which misjoinder of parties appears upon the face of the pleading. Summers v. Farish, 10 Cal. 347; Tatum v. Rosenthal, 95 Cal. 129; 29 Am. St. Rep. 97; 30 Pac. 136. A general demurrer cannot reach objections going only to a part of the cause of action. McCann v. Pennie, 100 Cal. 547; 35 Pac. 158. Insufficiency of the facts alleged may be tested by general demurrer. Callahan v. Broderick, 124 Cal. 80; 56 Pac. 782. Inferential statements, or statements by way of recital, cannot be attacked by general

demurrer: it is available only where there is a total absence of some material fact. Bliss v. Sneath, 103 Cal. 43; 36 Pac. 1029; Santa Barbara v. Eldred, 108 Cal. 294; 41 Pac. 410; Fuller Desk Co. v. McDade, 113 Cal. 360; 45 Pac. 694; McKay v. New York Life Ins. Co., 124 Cal. 270; 56 Pac. 1112. A complaint entitling the plaintiff to relief, either legal or equitable, is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action (White v. Lyons, 42 Cal. 279; Mora v. Le Roy, 58 Cal. 8; McPherson v. Weston, 64 Cal. 275; 30 Pac. 842; Hulsman v. Todd, 96 Cal. 228; 31 Pac. 39; Whitehead v. Sweet, 126 Cal. 67; 58 Pac. 376; Jones v. Iverson, 131 Cal. 101; 63 Pac. 135; Poett v. Stearns, 28 Cal. 226); and where a complaint states a cause of action addressed either to the legal or equitable side of the court, it is good as against a general demurrer (Swan v. Talbot, 152 Cal. 142; 17 L. R. A. (N. S.) 1066; 94 Pac. 238); but the complaint must allow a cause of action in the plaintiff, or the general demurrer will lie: it is not sufficient that it show a cause of action in somebody. Dixon v. Cardozo, 106 Cal. 506; 39 Pac. 857. A complaint sufficient to sustain judgment is good as against general demurrer. Lawrence Nat. Bank v. Kowalsky, 105 Cal. 41; 38 Pac. 517. A failure to state all the facts essential to recovery may be attacked by general demurrer. Tehama County v. Bryan, 68 Cal. 57; 8 Pac. 673; Harnish v. Bramer, 71 Cal. 155; 11 Pac. 888. The pleader, in counting upon a contract according to its legal effect, is not required to allege that the conditions stated are all of the conditions of the contract. Smith v. Jaccard, 20 Cal. App. 280; 128 Pac. 1023. A failure to allege the presentation of a claim to the administrator and a rejection by him, before the commencement of the action, is a ground of general demurrer; without it the complaint does not state facts sufficient to constitute a cause of action. Heutsch v. Porter, 10 Cal. 555; Ellissen v. Halleck, 6 Cal. 386; Burke v. Maguire, 154 Cal. 456; 98 Pac. 21. A failure to allege non-payment of money sought to be recovered may be reached by general demurrer, on the ground that the complaint states no cause of action. Grant v. Sheerin, 84 Cal. 197; 23 Pac. 1094; Richards v. Travelers Ins. Co., 80 Cal. 505; 22 Pac. 939; Bliss v. Sneath, 103 Cal. 43; 36 Pac. 1029. An insufficient cause of action in intervention is properly met by demurrer, and not by motion to strike out. Cameron v. Ah Quong, 8 Cal. App. 310; 96 Pac. 1025. Where the facts necessary to sustain a cause of action are shown to exist, although inaccurately or ambiguously stated, or appear by necessary implication, a general demurrer to the complaint will be overruled (Amestoy v. Electric Rapid Transit Co., 95 Cal. 311; 30 Pac. 550); such defects can be reached only by special demurrer (Semi-Tropic Spiritualists' Ass'n v. Johnson, 163 Cal. 639; 126 Pac. 488); as the complaint will be held good, where the necessary allegations appear by way of legal conclusions, in the absence of a special demurrer. Wells Fargo & Co. v. McCarthy, 5 Cal. App. 301; 90 Pac. 203. If there is not an entire failure in a complaint to state non-payment, the averment is simply defective, and can be reached only by special demurrer directed to that point. Burke v. Dittus, 8 Cal. App. 175; 96 Pac. 330. The failure of the plaintiff, in an action on an assigned claim, to aver that he was the owner thereof at the time of the commencement of the action, is ground for special demurrer, but is good as against a general demurrer. Krieger v. Feeny, 14 Cal. App. 538; 112 Pac. 901. By anticipating a defense, in addition to stating a cause of action, the complaint is not rendered bad as against a general demurrer. Munson v. Bowen, 80 Cal. 572; 22 Pac. 253. The bar of the statute of limitations cannot be raised under a general demurrer that the complaint does not state facts sufficient to constitute a cause of action. Brown v. Martin, 25 Cal. 82; Farwell v. Jackson, 28 Cal. 105; California Safe Deposit etc. Co. v. Sierra Valleys Ry. Co., 158 Cal. 690; Ann. Cas. 1912A, 729; 112 Pac. 274. The failure of a plaintiff corporation to aver that it is a corporation is not available, either upon general demurrer for want of a cause of action, or upon special demurrer for want of capacity to sue. Los Angeles Ry. Co. v. Davis, 146 Cal. 179; 106 Am. St. Rep. 20; 79 Pac. 865. The defense of laches may be raised by demurrer: it is, in substance, a defense that the bill does not show equity, or in the language of this section, that the complaint does not state facts sufficient to constitute a cause of action. Kleinclaus v. Dubard, 147 Cal. 245; 81 Pac. 516; Wadleigh v. Phelps, 149 Cal. 627; 87 Pac. 93. A clerical error in a complaint cannot be taken advantage of by general demurrer. Blasingame v. Home Ins. Co., 75 Cal. 633; 17 Pac. 925. An objection that the averments of a complaint are contradictory cannot be raised upon a general demurrer: it must be presented by a special demurrer for uncertainty (Heeser v. Miller, 77 Cal. 192; 19 Pac. 375; Churchill v. Lauer, 84 Cal. 233; 24 Pac. 107); nor can an objection to a variance between an exhibit and the allegations of a complaint be raised by general demurrer (Blasingame v. Home Ins. Co., 75 Cal. 633; 17 Pac. 925; San Francisco Sulphur Co. v. Ætna Indemnity Co., 11 Cal. App. 695; 106 Pac. 111); nor can objection be taken for defectiveness in the complaint, because the facts are inartificially stated. Nevin v. Thompson, 4 Cal. Unrep. 390; 35 Pac. 160. A cause of action stated in only one of several counts

of a complaint is sufficient as against a demurrer on the ground "that said complaint does not allege facts sufficient to constitute a cause of action." Jensen v. Dorr, 159 Cal. 742; 116 Pac. 553. Where the complaint in a suit brought for breach of a contract payable in installments fails to show that an installment, the payment of which was required under the contract, had been due and unpaid for the prescribed period, it shows no cause of action upon the contract. Southern California Music Co. v. Skinner, 17 Cal. App. 205; 119 Pac. 106. Where there is no attempt to aver non-payment of money due upon a contract, either by an allegation amounting only to a conclusion of law, or otherwise, the complaint does not state a cause of action; and this can be urged at any time, even without a demurrer. Burke v. Dittus, 8 Cal. App. 175; 96 Pac. 330. The failure of a corporation to allege that it has filed its articles is not a failure to allege a cause of action, and is therefore not a ground of demurrer. Bernheim Distilling Co. v. Elmore, 12 Cal. App. 85; 106 Pac. 720; Riverdale Mining Co. v. Wicks, 14 Cal. App. 526; 112 Pac. 896. A demurrer to a complaint for a money judgment on a promissory note and for breach of contract, should be sustained, on the ground that the complaint does not state facts sufficient to constitute a cause of action, where the note is not due, and no breach of the contract is shown. Southern California Music Co., 17 Cal. App. 205; 119 Pac. 106.

Ambiguity, uncertainty, and unintelligibility. That the complaint is ambiguous, unintelligible, or uncertain is made a ground of demurrer: a motion to make it more definite and certain is not proper practice. McFarland v. Holcomb, 123 Cal. 84; 55 Pac. 761. Ambiguity and uncertainty are made separate grounds of demurrer by this section. Wilhoit v. Cunningham, 87 Cal. 453; 25 Pac. 675. Unintelligibility is a ground of demurrer (Tibbets v. Riverside Land etc. Co., 61 Cal. 160); as is also uncertainty (Kraner v. Halsey, 82 Cal. 209; 22 Pac. 1137; Mallory v. Thomas, 98 Cal. 644; 33 Pac. 757; Southern California Music Co. v. Skinner, 17 Cal. App. 205; 119 Pac. 106; Du Bois v. Padgham, 18 Cal. App. 298; 123 Pac. 207); but uncertainty does not include ambiguity. Kraner v. Halsey, 82 Cal. 209; 22 Pac. 1137. The objection of uncertainty goes rather to the doubt as to what the pleader means by the facts alleged, not to the failure to allege sufficient facts. Callahan v. Broderick, 124 Cal. 80; 56 Pac. 782. A complaint is neither ambiguous nor uncertain, where the precise purpose of the action and the relief sought clearly appear. Doudell v. Shoo, 20 Cal. App. 424; 129 Pac. 478. Where the complaint is easy of comprehension and free from reasonable doubt, it is not subject to demurrer on the ground of ambiguity. Salmon v. Wilson, 41 Cal. 595; Applegarth v. Dean, 68 Cal. 491; 13 Pac. 587; Kraner v. Halsey, 82 Cal. 209; 22 Pac. 1137; Whitehead v. Sweet, 126 Cal. 67; 58 Pac. 376; Jones v. Iverson, 131 Cal. 101; 63 Pac. 135. A mere clerical error in the complaint is not objectionable to a demurrer for ambiguity, unintelligibility, and uncertainty. Fay v. McKeever, 59 Cal. 307; Hawley Bros. Hardware Co. v. Brownstone, 123 Cal. 643; 56 Pac. 468. A complaint which in one part avers a covenant for a lease, and in another states matter which constitutes a contract for a present lease, is ambiguous. Crow v. Hildreth, 39 Cal. 618. A complaint for trespass, which fails to state separately the items of damages to the premises, and the damages sustained by injuries to the plaintiff's business, is subject to a demurrer for uncertainty. Mallory v. Thomas, 98 Cal. 644; 33 Pac. 757; Lamb v. Harbaugh, 105 Cal. 680; 39 Pac. 56. A failure to set forth the items of an account in a complaint is not a ground for a demurrer for ambiguity or uncertainty. Burns v. Cushing, 96 Cal. 669; 31 Pac. 1124; Rogers v. Duff, 97 Cal. 66; 31 Pac. 836; Farwell v. Murray, 104 Cal. 464; 38 Pac. 199; Pleasant v. Samuels, 114 Cal. 34; 45 Pac. 998; Long Beach City School Dist. v. Dodge, 135 Cal. 401; 67 Pac. 499. A failure to state the times at which services were rendered, or when the claim for the items thereof accrued, does not authorize a demurrer for ambiguity or uncertainty. McFarland v. Holcomb, 123 Cal. 84; 55 Pac. 761. A failure to state, in an action to foreclose a lien, the date when such lien was filed and recorded, renders it subject to a demurrer for uncertainty. Williamson v. Joyce, 137 Cal. 151; 69 Pac. 980. The objection that two causes of action are not separately stated cannot be taken by demurrer. Murphy v. Crowley, 140 Cal. 141; 73 Pac. 820. A complaint to annul a corporate assessment on the ground of illegality in the proceedings, which fails to allege the matters constituting such illegality, is demurrable for uncertainty. Hennessey v. Alleghany Mining Co., 159 Cal. 398; 113 Pac. 1071. Where the property of an estate, such as notes and mortgages, is alleged to have been concealed, but uncertainty appears in the description thereof, and no reasonable excuse is given why they are not particularly described, a special demurrer on such grounds is properly sustained. Burke v. Maguire, 154 Cal. 456; 98 Pac. 21. Uncertainty, in pleading, is not material, unless it works a substantial injury. Krieger v. Feeny, 14 Cal. App. 538; 112 Pac. 901. Less certainty is required in the allegations of the complaint, where the facts are such as that plaintiff cannot, from their nature, have as full information as the defendant. Harvey v. Meigs, 17 Cal. App. 353; 119 Pac. 941.

Stating different cause of action in different counts under code. See note 72 Am. Dec. 588.

Speaking demurrers. See note 14 Ann. Cas. 348.

CODE COMMISSIONERS' NOTE. 1. Court has no jurisdiction of the person of defendant, or the subject of the action. See Willis v. Farley, 24 Cal. 491; Ellissen v. Halleck, 6 Cal. 386. In courts of general jurisdiction the want of jurisdiction must appear affirmatively on face of complaint, but such is not the case with courts of special or limited jurisdiction, and in the last-named court every fact necessary to give jurisdiction must appear in the complaint. Doll v. Feller, 16 Cal. 432.

2. Plaintiff has not legal capacity to sue. When plaintiff has not legal capacity to sue because he is not a real party in interest. White v. Steam-tug Mary Ann, 6 Cal. 462; 65 Am. Dec. 523; Oliver v. Walsh, 6 Cal. 456.

3. Another action pending between same parties for same cause. Cunningham v. Harris, 5 Cal. 81; Nickerson v. California Stage Co., 10 Cal. 520; Barnett v. Kilbourne, 3 Cal. 327; Ayres v. Bensley, 32 Cal. 620. The defense of a prior lis pendens is available, only where the plaintiff, at least, in both actions, is the same person. Certain Logs of Mahogany, 2 Sumn. 593; Fed. Cas. No. 2559; Wadleigh v. Veazie, 3 Sumn. 165; Fed. Cas. No. 17031; O'Connor v. Blake, 29 Cal. 314.

4. Defect or misjoinder of parties. See § 434, post. Where a defect of parties is apparent upon the face of the complaint, the objection must be taken by demurrer, or the same will be waived. Dunn v. Tozer, 10 Cal. 170; Warner v. Wilson, 4 Cal. 310; Andrews v. Mokelumne Hill Co., 7 Cal. 330; Alvarez v. Brannan, 7 Cal. 503; 68 Am. Dec. 274; Rowe v. Bacigalluppi, 21 Cal. 635; Mott v. Smith, 16 Cal. 557; Sampson v. Schaeffer, 3 Cal. 202; Beard v. Knox, 5 Cal. 257; 63 Am. Dec. 125; Tissot v. Throckmorton, 6 Cal. 473; McKune v. McGarvey, 6 Cal. 498; Burroughs v. Lott, 19 Cal. 125; Barber v. Reynolds, 33 Cal. 497. In Summers v. Farish, the court seem to infer that a demurrer on the ground "that the complaint does not state facts sufficient to constitute a cause of action," and which then specifies that the complaint shows no joint cause of action in the plaintiff, and that it prays for a judgment in favor of three plaintiffs for an injury done to one, was a good demurrer for misjoinder of parties; but this point was not expressly decided. See Summers v. Farish, 10 Cal. 350; but see also Grain v. Aldrich, 38 Cal. 521; 99 Am. Dec. 423; Wilson v. Castro, 31 Cal. 427–431. Although the defendant does not demur for want of parties, it does not affect the power of the court under the code (§ 389, ante) from ordering other parties to be brought in, when such parties are necessary to a complete determination of the case. Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423. Complaint is not demurrable because the Christian names of parties are not stated. Nelson v. Highland, 13 Cal. 74. The court having overruled a demurrer made by defendants on the ground of a misjoinder of parties plaintiff, the plaintiffs then moved to amend the complaint by striking out the names of the plaintiffs thus averred to be improperly joined, and the defendants resisted successfully such motion. Such action on the part of defendants was held to be a waiver of the objection of misjoinder raised by their demurrer. Summers v. Farish, 10 Cal. 347; see §§ 367–389, ante, and notes.

5. Several causes of action improperly united. If not demurred to, or the objection is not made by answer, it is deemed waived. Macondray v. Simmons, 1 Cal. 393; Marius v. Bicknell, 10 Cal. 224; Gates v. Kieff, 7 Cal. 124; Jacks v. Cooke, 6 Cal. 164. A declaration which improperly joins an action of trespass quare clausum fregit, ejectment, and prayer for relief in chancery, is demurrable. Bigelow v. Gove, 7 Cal. 134. A demurrer lies to a complaint which asks for equitable relief, if the law and equity are inseparably mixed together; but a demurrer cannot be sustained on the ground, merely, that the complaint seeks a remedy at law, and an equitable relief also. See Gates v. Kieff, 7 Cal. 125; Weaver v. Conger, 10 Cal. 237; Rollins v. Forbes, 10 Cal. 300; Marius v. Bicknell, 10 Cal. 224; but see Bigelow v. Gove, 7 Cal. 133, above cited. And as to uniting improperly several causes of action, see Rollins v. Forbes, 10 Cal. 300; Gale v. Tuolumne Water Co., 14 Cal. 28; People v. Skidmore, 17 Cal. 260; Garr v. Redman, 6 Cal. 574; see notes to § 427, ante.

6. When complaint does not state facts sufficient to constitute cause of action. See notes to § 426, ante. But this ground is confined to cases in which no cause of action at all is shown by the complaint. Summers v. Farish, 10 Cal. 347. And if complaint contain several causes of action, and defendant demur to whole complaint, yet if one cause of action is good, although all others are bad, still the demurrer cannot be sustained. Stoddard v. Treadwell, 26 Cal. 294. It is provided that, unless the demurrer shall distinctly specify the grounds upon which any of the objections to the complaint are taken, it shall be disregarded, excepting, only, the objection to the jurisdiction of the court; and the objection that the complaint does not state facts sufficient to constitute a cause of action. See §§ 431, 434, post. Sections 431 and 434, post, are to be read in conjunction. To give effect to the former, without regard to the excepted objections specified in the latter, would be to abrogate an important provision of the statute. This we have no right to do, and hence (say the court): "We hold the objection taken by demurrer to the complaint, that it does not state facts sufficient to constitute a cause of action, to be well and sufficiently assigned in the language of the statute." Kent v. Snyder, 30 Cal. 672; see also Williamson v. Blattan, 9 Cal. 501. A defect sufficient to defeat the present right of plaintiff, in whole or in part, may be shown as a ground of demurrer. Hentsch v. Porter, 10 Cal. 555. If the complaint states a condition precedent, does not show performance, the defect must be taken advantage of by demurrer in the court below. It is too late to take advantage of such defect after verdict. Happe v. Stout, 2 Cal. 460. So, also, a similar rule prevails as to an omission to aver delivery in suit on a bond. Garcia v. Satrustegui, 4 Cal. 244. A complaint disclosing the fact that the subject had been litigated in a former suit between the same parties, and that in such action the plaintiff in this action had set up the same equity which he claims by this complaint, the complaint was held bad on demurrer, and was ordered to be dismissed. Barnett v. Kilbourne, 3 Cal. 327. Action brought prematurely, before any injury had occurred, demurrable on ground that complaint does not state facts sufficient to constitute cause of action. (See facts.) Harvey v. Chilton, 11 Cal. 114. An action upon an undertaking to release property from an attachment. The complaint did not aver that the property attached was released upon the delivery of the undertaking, and it was held that in this respect it was defective, and could be taken advantage of by demurrer, on the ground that complaint did not state facts sufficient to constitute a cause of action without further specification. Williamson v. Blattan, 9 Cal. 501; referring to Palmer v. Melvin, 6 Cal. 651; Haire v. Baker, 5 N. Y. 357; Johnson v. Wetmore, 12 Barb. 433; Ellissen v. Halleck, 6 Cal. 386. Objections to the demand for relief in complaint cannot be made by demurrer. Rollins v. Forbes, 10 Cal. 299.

7. When the complaint is ambiguous, unintelligible, or uncertain. The demurrer should specify in what the uncertainty or ambiguity consists. Blanc v. Klumpke, 29 Cal. 156; see also Powell v. Ross, 4 Cal. 197. For general matters, see Brown v. Martin, 25 Cal. 88; Mendocino County v. Morris, 32 Cal. 145; People v. Love, 25 Cal. 526. If complaint unites two causes of action improperly, or is unintelligible, ambiguous, or uncertain, these objections must be taken by demurrer, or they are waived. Lawrence v. Montgomery, 37 Cal. 183.

8. Demurrers to whole complaint not good, where some of the causes of action are sufficient. If, where several causes of action are alleged, there are facts stated sufficient to sustain any one of the causes, a demurrer to the whole complaint cannot be sustained. Stoddard v. Tread-

well, 26 Cal. 294; Barber v. Cazalis, 30 Cal. 92; Whiting v. Heslep, 4 Cal. 327; Weaver v. Conger, 10 Cal. 233; Young v. Pearson, 1 Cal. 448. Even if demurrer is good as to part of a complaint (though not to all of it), but is made to the whole, then it cannot be sustained. People v. Morrill, 26 Cal. 360.

9. **Demurrer when demand appears to be barred by statute of limitations.** Statute should be distinctly stated in demurrer. Brown v. Martin, 25 Cal. 89; Farwell v. Jackson, 28 Cal. 106. It was formerly doubted whether a defendant in equity could, by demurrer, make the objection that the remedy was barred by lapse of time, or whether he must not resort to his plea (answer); but it now seems to be settled that if it appears upon the face of the complaint that the suit is barred by lapse of time, the defendant may demur. Humbert v. Rector of Trinity Church, 7 Paige Ch. 197; Sublette v. Tinney, 9 Cal. 423; Smith v. Richmond, 19 Cal. 476. But the bar must clearly appear, in order to sustain demurrer. Ord v. De la Guerra, 18 Cal. 67; Smith v. Richmond, 19 Cal. 476; Barringer v. Warden, 12 Cal. 311; Grattan v. Wiggins, 23 Cal. 16.

10. **What is admitted by demurrer.** A demurrer admits the truth of such facts as are issuable and well pleaded; but it does not admit the conclusions which counsel may choose to draw therefrom, although they may be stated in the complaint. It is to the soundness of those conclusions, whether stated in the complaint or not, that a demurrer is directed, and to which it applies the proper test. Branham v. Mayor and Common Council, 24 Cal. 602; Tuolumne County Water Co. v. Chapman, 8 Cal. 392.

11. **General matters.** The office of a demurrer is to raise issues of law, and, therefore, it should not state facts. Cook v. De la Guerra, 24 Cal. 239. Courts take no notice of mere defects in form, where the demurrer is general. Phelps v. Owens, 11 Cal. 22; Otero v. Bullard, 3 Cal. 188. Demurrer to unessential parts of complaint. Green v. Palmer, 15 Cal. 411; 76 Am. Dec. 492. Demurrer must come within one of the seven grounds allowed by the code. Hentsch v. Porter, 10 Cal. 555. Objections to prayer of complaint cannot be made by demurrer. Rollins v. Forbes, 10 Cal. 299. If demurrer is overruled, and defendant answers, such answer is a waiver of the demurrer. De Boom v. Priestly, 1 Cal. 206.

§ 431. Demurrer must specify grounds. May be taken to part. May answer and demur at same time. The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it does so, it may be disregarded. It may be taken to the whole complaint, or to any of the causes of action stated therein, and the defendant may demur and answer at the same time.

Legislation § 431. 1. Enacted March 11, **1872**; based on Practice Act, §§ 41, 42. These sections read: "§ 41 [New York Code, § 145]. The demurrer shall distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so, it may be disregarded." "§ 42 [New York Code, § 151]. The defendant may demur to the whole complaint, or to one or more of several causes of action stated therein, and answer the residue; or may demur and answer at the same time."

2. Amendment by Stats. **1901**, p. 133; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 706, changing the word "or" to "and," after "therein."

Demurrer must specify grounds. Unless the demurrer distinctly specifies the grounds upon which any of the objections to the complaint are taken, it should be disregarded, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. Kent v. Snyder, 30 Cal. 666. A general demurrer need not specify the grounds on which the objections to the complaint are taken: it is sufficient if it alleges that the complaint does not state facts sufficient to constitute a cause of action. Ellissen v. Halleck, 6 Cal. 386. No particular specification is required in a demurrer for want of facts. California Safe Deposit etc. Co. v. Sierra Valleys Ry. Co., 158 Cal. 690; Ann. Cas. 1912A, 729; 112 Pac. 274. A merely defective averment of an essential allegation can be reached only by special demurrer, directed to the vulnerable point. Burke v. Dittus, 8 Cal. App. 175; 96 Pac. 330. A complaint having more than one count will stand, as against a general demurrer, if any one count states a cause of action. Smith v. Jaccard, 20 Cal. App. 280; 128 Pac. 1023; Harvey v. Meigs, 17 Cal. App. 353; 119 Pac. 941; Krieger v. Feeny, 14 Cal. App. 538; 112 Pac. 901. A special demurrer to the whole complaint, on the ground of ambiguity and uncertainty, is bad, if a good cause of action is elsewhere stated, but is good as to the particular part to which the demurrer is directed. Jones v. Iverson, 131 Cal. 101; 63 Pac. 135. A demurrer for ambiguity, unintelligibility, and uncertainty must specify the particulars on which it is based. Blanc v. Klumpke, 29 Cal. 156; Yolo County v. Sacramento, 36 Cal. 193; Lorenzana v. Camarillo, 45 Cal. 125; Demartin v. Albert, 68 Cal. 277; 9 Pac. 157; Moyle v. Landers, 83 Cal. 579; 23 Pac. 798; Daggett v. Gray, 110 Cal. 169; 42 Pac. 568; A. F. Sharpleigh Hardware Co. v. Knippenberg, 133 Cal. 308; 65 Pac. 621. A complaint stating improperly and defectively all the essential facts can be reached only by special demurrer, particularly designating the specific point at which it is aimed. Himmelmann v. Spanagel, 39 Cal. 401; Tehama County v. Bryan, 68 Cal. 57; 8 Pac. 673; Harnish v. Bramer, 71 Cal. 155; 11 Pac. 888; Grant v. Sheerin, 84 Cal. 197; 23 Pac. 1094; Eachus v. Los Angeles, 130 Cal. 492; 80 Am. St. Rep. 147; 62 Pac. 829; Merritt v. Glidden, 39 Cal. 559; 2 Am. Rep. 479; Jones v. Iverson, 131 Cal. 101; 63 Pac. 135; Burke v. Dittus, 8 Cal. App. 175; 96 Pac. 330. Particular defects to which objection is made for insufficiency of the complaint, which are not specified in the demurrer, cannot be considered on appeal. Olcovich v. Grand Trunk Ry. Co., 20 Cal. App. 349; 129 Pac. 290. Where the complaint is ambiguous and uncertain, a demurrer specifically

stating these as causes of demurrer, and giving the reasons therefor, should be sustained. Palmer v. Lavigne, 104 Cal. 30; 37 Pac. 775. A demurrer on the ground that the complaint is ambiguous, uncertain, and unintelligible, is properly overruled, where the complaint is not defective in all three points (Kraner v. Halsey, 82 Cal. 209; 22 Pac. 1137; White v. Allatt, 87 Cal. 245; 25 Pac. 420; Wilhoit v. Cunningham, 87 Cal. 453; 25 Pac. 675; Spargur v. Heard, 90 Cal. 221; 27 Pac. 198; Greenebaum v. Taylor, 102 Cal. 624; 36 Pac. 957); but where the specification is on the ground of uncertainty only, the demurrer will not be overruled, merely because it contains a conjunctive assignment of ambiguity, unintelligibility, and uncertainty (Field v. Andrada, 106 Cal. 107; 39 Pac. 323); and a demurrer on the ground that it cannot be ascertained from the complaint what the contract sued on is, is insufficient (Sharpleigh Hardware Co. v. Knippenberg, 133 Cal. 308; 65 Pac. 621); as is also a demurrer for misjoinder of causes of action (O'Callaghan v. Bode, 84 Cal. 489; 24 Pac. 269; Healy v. Visalia etc. R. R. Co., 101 Cal. 585; 36 Pac. 125); and also one for misjoinder of parties, which does not specify wherein the misjoinder exists. O'Callaghan v. Bode, 84 Cal. 489; 24 Pac. 269; Gardner v. Samuels, 116 Cal. 84; 58 Am. St. Rep. 135; 47 Pac. 935. It must specify the particular misjoinder (People v. Morrill, 26 Cal. 336); and who else should have been joined, or in what manner the misjoinder consists. Kreling v. Kreling, 118 Cal. 413; 50 Pac. 546; Tatum v. Rosenthal, 93 Cal. 129; 29 Am. St. Rep. 97; 30 Pac. 136. But a demurrer which specifies as one of its grounds the bar of the statute of limitations is sufficient (Williams v. Bergin, 116 Cal. 56; 47 Pac. 877); and a statement that the cause of action is barred by the statute of limitations is sufficient in form (Brennan v. Ford, 46 Cal. 7); but the bar of the statute must be specifically stated in the demurrer as the ground relied on. McFarland v. Holcomb, 123 Cal. 84; 55 Pac. 761; Brown v. Martin, 25 Cal. 82; Farwell v. Jackson, 28 Cal. 105. Except where the benefit of the statute of limitations is claimed, a general demurrer need not specify the particulars wherein the complaint fails to state facts sufficient to constitute a cause of action: it is enough to state that the complaint does not state such facts. Burke v. Maguire, 154 Cal. 456; 98 Pac. 21. A demurrer for want of legal capacity to sue must point out specifically such want of capacity (Los Angeles R. Co. v. Davis, 146 Cal. 179; 106 Am. St. Rep. 20; 79 Pac. 865); and the want of legal capacity of the plaintiff to enter into the contract sued on, in order to entitle him to recover therein, must be distinctly presented in the demurrer. McDaniel v. Yuba County, 14 Cal. 444. A demurrer on the ground that the plaintiffs have no legal capacity to sue is too broad, where one of the plaintiffs has the right. O'Callaghan v. Bode, 84 Cal. 489; 24 Pac. 269. The improper uniting of two causes of action in one count will not be considered upon appeal, where it was not made a ground of demurrer. Bernero v. South British etc. Ins. Co., 65 Cal. 386; 4 Pac. 382. Inconsistency between allegations in the declaration and in the contract on which it is based cannot be considered, when not made one of the grounds of demurrer. Montifiori v. Engels, 3 Cal. 431. Where the complaint states facts sufficient to constitute a cause of action and to entitle the plaintiff to the relief asked, a general demurrer thereto should be overruled. Sisk v. Caswell, 14 Cal. App. 377; 112 Pac. 185.

Demurrer to whole or part of complaint. Where the complaint states two separate and distinct causes of action, a general demurrer is properly sustained, if neither count states a cause of action: it is not necessary that the demurrer should refer to either of the counts separately. Churchill v. Pacific Improvement Co., 96 Cal. 490; 31 Pac. 560. A demurrer stating only one or more of the grounds enumerated in § 430, ante, contains nothing irrelevant and nothing redundant. Davis v. Honey Lake Water Co., 98 Cal. 415; 33 Pac. 270. A demurrer to the whole complaint will be overruled, if any sufficient cause of action is set forth in the complaint. Young v. Pearson, 1 Cal. 448; Knowles v. Baldwin, 125 Cal. 224; 57 Pac. 988. A demurrer, on the ground of the bar of the statute of limitations to the whole cause, will not be sustained, where recovery can be had for any part of the claim sued for. Moyle v. Landers, 3 Cal. Unrep. 113; 21 Pac. 1133; Nelson v. Merced County, 122 Cal. 644; 55 Pac. 421; Sechrist v. Rialto Irrigation Dist., 129 Cal. 640; 62 Pac. 261.

Demur and answer at the same time. This section authorizes the filing of a demurrer and an answer at the same time. People v. McClellan, 31 Cal. 101. If the defendant wishes to obtain a decision upon a question of law arising on the face of the complaint, in advance of the trial, upon an issue of fact joined, the proper practice is to do so by demurrer, in terms, as a distinct pleading: the practice of mixing matters of law and fact in the same pleading should be discountenanced. Brooks v. Douglass, 32 Cal. 208. An answer alleging that a debt, if due, was due to two parties as partners, does not amount to a demurrer to a complaint in the name of one of such parties: a pleading which is half demurrer and half answer cannot be sustained. Andrews v. Mokelumne Hill Co., 7 Cal. 330. Where there is an answer to the merits after the filing of a demurrer, it will be presumed

that the demurrer was waived. Moran v. Abbey, 58 Cal. 163; Bliss v. Sneath, 103 Cal. 43; 36 Pac. 1029.

CODE COMMISSIONERS' NOTE. 1. Demurrer must distinctly specify grounds of objection. See note 6 to § 430, ante; also Kent v. Snyder, 30 Cal. 666.

2. Waiver of demurrer. An answer put in subsequently to a demurrer, is a waiver of the demurrer. De Boom v. Priestly, 1 Cal. 206; Pierce v. Minturn, 1 Cal. 470; Brooks v. Minturn, 1 Cal. 481.

3. May demur and answer at the same time. People v. McClellan, 31 Cal. 103.

4. Demurrer should be filed as a separate pleading. See Brooks v. Douglas, 32 Cal. 208.

§ 432. What proceedings are to be had when complaint is amended. If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments or amended complaint must be served upon the defendants affected thereby. The defendant must answer the amendments, or the complaint as amended, within ten days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases.

Amendment, generally. Post, §§ 472, 473.

Legislation § 432. 1. Enacted March 11, **1872**; based on Practice Act, § 43, as amended by Stats. 1855, p. 196, which read: "If the complaint be amended, a copy of the amendments shall be filed, or the court may in its discretion require the complaint as amended to be filed, and a copy of the amendments shall be served upon every defendant to be affected thereby, or upon his attorney, if he has appeared by attorney; the defendant shall answer in such time as may be ordered by the court, and judgment by default may be entered upon failure to answer, as in other cases." When enacted in 1872, § 432 read: "If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint, as amended, to be filed, and a copy of the amendments to be served upon the defendants affected thereby. The defendant must answer the complaint, as amended, within such time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases."

2. Amended by Code Amdts. **1880**, p. 2.

Proceedings when complaint is amended. This section applies to amendments made after answer, or after the trial of an issue of law arising on demurrer. McGary v. De Pedroreña, 58 Cal. 91. It also applies to amendments made after the parties have been brought into court, and does not require a mode of service differing from that in other cases. Dowling v. Comerford, 99 Cal. 204; 33 Pac. 853. Where the plaintiff wishes to amend after a demurrer to the complaint is sustained, he must request leave at that time. Varni v. Devoto, 10 Cal. App. 304; 101 Pac. 934. An amendment to the complaint, whether it consists of a mere additional averment or effects a change in the original, may be filed by itself, without being incorporated in the original by the engrossment of the complaint as amended. Redington v. Cornwell, 90 Cal. 49; 27 Pac. 40. Where a judgment by default against a defendant has been entered, service of an amended complaint thereafter filed need not be made against such defendant; but a complaint amended after default, and before judgment, must be served. Cole v. Roebling Construction Co., 156 Cal. 443; 105 Pac. 255. A new demurrer is not required, where brief additions made to a complaint, by way of immaterial interlineations, do not make the pleading an amended complaint. Flood v. Templeton, 148 Cal. 374; 83 Pac. 148. The service of an amended complaint implies its filing. Billings v. Palmer, 2 Cal. App. 432; 83 Pac. 1077.

CODE COMMISSIONERS' NOTE. It is the universal practice in this state to answer amended complaints within the same time after service of a copy as in the case of a service of a summons with a copy of the original complaint, and the court seldom fixes any specific time for answering in such cases. The court has, undoubtedly, the power to fix the time, but where no time is fixed the answer must be made within the same time as is allowed in case of service of copy of original complaint with summons. People v. Rains, 23 Cal. 130. If the complaint is amended, and defendant asks an order permitting his answer on file to stand as the answer to the amended complaint, the answer is to be treated as if filed when the order was made. Mulford v. Estudillo, 32 Cal. 131. If the time allowed to answer is until the plaintiff shall select on which count of the complaint he will go to trial, the plaintiff is required to serve a copy of complaint with notice of his election. Willson v. Cleaveland, 30 Cal. 192. As to amended complaint, see also Nevada County etc. Canal Co. v. Kidd, 28 Cal. 673.

§ 433. Objection not appearing on complaint, may be taken by answer. When any of the matters enumerated in section four hundred and thirty do not appear upon the face of the complaint, the objection may be taken by answer.

Legislation § 433. Enacted March 11, **1872**; based on Practice Act, § 44 (New York Code, § 147), which had "section forty" instead of the present "section four hundred and thirty."

Defects not appearing on face of complaint. A defect not appearing on the face of the complaint may be objected to by the answer (Rowe v. Chandler, 1 Cal. 167; Tatum v. Rosenthal, 95 Cal. 129; 29 Am. St. Rep. 97; 30 Pac. 136); and where it does not clearly appear on the face of the complaint, it must be objected to by answer (Wise v. Williams, 72 Cal. 544; 14

Pac. 204; and see Willis v. Farley, 24 Cal. 490; Harmon v. Page, 62 Cal. 448; German Sav. & L. Soc. v. Hutchinson, 68 Cal. 52; 8 Pac. 627; Williams v. Southern Pacific R. R. Co., 110 Cal. 457; 42 Pac. 974), or it is deemed to be waived. Tingley v. Times Mirror Co., 151 Cal. 1; 89 Pac. 1097. Equitable considerations not appearing on the face of the complaint should be presented by answer, where they merit the attention of the court, and are sufficient to warrant the withholding of the decree from the plaintiff. Lange v. Geiser, 138 Cal. 682; 72 Pac. 343. A failure to serve a copy of the complaint on the defendants with the summons must be objected to by answer (Ghiradelli v. Greene, 56 Cal. 629); as must also an objection to misjoinder of causes of action (Jacks v. Cooke, 6 Cal. 164), and also an objection to misjoinder of parties, where the misjoinder does not appear on the face of the complaint. Warner v. Wilson, 4 Cal. 310; Jacks v. Cooke, 6 Cal. 164; Hastings v. Stark, 36 Cal. 122; Rutenberg v. Main, 47 Cal. 213; Tingley v. Times Mirror Co., 151 Cal. 1; 89 Pac. 1097. The omission of an affidavit, essential to the validity of an assignment, must be objected to by answer, where it does not appear on the face of the complaint. Wilhoit v. Cunningham, 87 Cal. 453; 25 Pac. 675. Want of legal capacity in the plaintiff to sue, which does not appear in the complaint, can be raised only by answer (Swamp etc. Land District v. Feck, 60 Cal. 403); the general issue is not sufficient. California Steam Nav. Co. v. Wright, 8 Cal. 585. A failure to allege that the plaintiff is a corporation, and hence entitled to sue, must be objected to by answer: it is not available upon general demurrer. Los Angeles Ry. Co. v. Davis, 146 Cal. 179; 106 Am. St. Rep. 20; 79 Pac. 865. The pendency of another action is a good plea in abatement, when pleaded in bar. Goytino v. McAleer, 4 Cal. App. 655; 88 Pac. 891. The defendant may set up the bar of the statute of limitations either by demurrer or by answer, if the complaint shows on its face that the statute has run; otherwise he must plead his right by answer. California Safe Deposit etc. Co. v. Sierra Valleys Ry. Co., 158 Cal. 690; Ann. Cas. 1912A, 729; 112 Pac. 274.

CODE COMMISSIONERS' NOTE. If the defect does not appear upon the face of the complaint, the objection may be taken by answer, and where the defendant did not know that too many parties were joined as plaintiffs until the same was made apparent in evidence, he should be allowed leave to amend his answer during the trial. Gillam v. Sigman, 29 Cal. 637.

§ 434. Objections, when deemed waived. If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

Legislation § 434. Enacted March 11, 1872; based on Practice Act, § 45 (New York Code, § 148), which had (1) the word "such" after "If no," and (2) the word "shall" instead of "must."

Defects waived by failure to object. All merely technical objections to the complaint are waived by failure to demur. Dennison v. Chapman, 105 Cal. 447; 39 Pac. 61. An informality in the pleading is waived by failure to demur (Cronise v. Carghill, 4 Cal. 120); as is also an objection to allegations, by way of recital. Fuller Desk Co. v. McDade, 113 Cal. 360; 45 Pac. 694. Although defects in the mode of alleging a cause of action do not impair the validity of a judgment, yet they should be presented by special demurrer. Schmidt v. Market Street etc. R. R. Co., 90 Cal. 37; 27 Pac. 61; Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111; Bringham v. Knox, 127 Cal. 40; 59 Pac. 198; Larkin v. Mullen, 128 Cal. 449; 60 Pac. 1091; Eachus v. Los Angeles, 130 Cal. 492; 80 Am. St. Rep. 147; 62 Pac. 829. An objection going to the sufficiency of the statement of facts in the complaint, but not to the sufficiency of the facts themselves, is waived, unless presented by special demurrer (Conde v. Dreisam Gold Mining Co., 3 Cal. App. 583; 86 Pac. 825); a complaint lacking the essential and necessary allegations is not cured by verdict or judgment. Arnold v. American Ins. Co., 148 Cal. 660; 84 Pac. 182. An objection to matter not appearing upon the face of the complaint, except that the complaint fails to state facts sufficient to constitute a cause of action, must be taken by answer, or it is deemed to be waived. Baker & Hamilton v. Lambert, 5 Cal. App. 708; 91 Pac. 340; Pryal v. Pryal, 7 Cal. Unrep. 134; 71 Pac. 802; Mitau v. Roddan, 149 Cal. 1; 6 L. R. A. (N. S.) 275; 84 Pac. 145; Tingley v. Times Mirror Co., 151 Cal. 1; 89 Pac. 1097; Los Angeles Ry. Co. v. Davis, 146 Cal. 179; 106 Am. St. Rep. 20; 79 Pac. 865. Any uncertainty of statement in the complaint is waived, where objection thereto was not made in the lower court (Parke & Lacy Co. v. Inter Nos Oil etc. Co., 147 Cal. 490; 82 Pac. 51); as is also an objection that the complaint fails to contain certain allegations, which would make it more certain. Wyman v. Hooker, 2 Cal. App. 36; 83 Pac. 79. An objection for want of verification is waived, if not made before answer. Greenfield v. Steamer Gunnell, 6 Cal. 67. An objection for failure to allege the delivery of a bond sued on is waived by failure to take advantage of it by demurrer (Garcia v. Satrustegui, 4 Cal. 244); as is also an objection for failure to allege

the performance of a condition precedent, in an action on a contract, setting up the condition (Happe v. Stout, 2 Cal. 460); and also an objection for failure to state separately a distinct cause of action (Valencia v. Couch, 32 Cal. 339; 91 Am. Dec. 589; Bernero v. South British etc. Ins. Co., 65 Cal. 386; 4 Pac. 382), and an objection for failure to join the husband as a party, in an action by the wife (Work v. Campbell 164 Cal. 343; 128 Pac. 943); and an objection for misjoinder of causes of action (Macondray v. Simmons, 1 Cal. 393; Jacks v. Cooke, 6 Cal. 164; Marius v. Bicknell, 10 Cal. 217; Lawrence v. Montgomery, 37 Cal. 183; McClory v. McClory, 38 Cal. 575; Cox v. Western Pacific R. R. Co., 47 Cal. 87; Roberts v. Eldred, 73 Cal. 394; 15 Pac. 16; Witkowski v. Hern, 82 Cal. 604; 23 Pac. 132; Eversdon v. Mayhew, 85 Cal. 1; 21 Pac. 431; 24 Pac. 382; Healy v. Visalia etc. R. R. Co., 101 Cal. 585; 36 Pac. 125; McKune v. Santa Clara Valley Mill etc. Co., 110 Cal. 480; 42 Pac. 980; Fellows v. Los Angeles, 151 Cal. 52; 90 Pac. 137); and an objection for misjoinder of parties (Warner v. Wilson, 4 Cal. 310; Jacks v. Cooke, 6 Cal. 164; Tissot v. Throckmorton, 6 Cal. 471; Dunn v. Tozer, 10 Cal. 167; Van Maren v. Johnson, 15 Cal. 308; Mott v. Smith, 16 Cal. 533; Rowe v. Bacigalluppi, 21 Cal. 633; Gillam v. Sigman, 29 Cal. 637; McKee v. Greene, 31 Cal. 418; Calderwood v. Pyser, 31 Cal. 333; Hastings v. Stark, 36 Cal. 122; Rutenberg v. Main, 47 Cal. 213; Tennant v. Pfister, 51 Cal. 511; Heinlen v. Heilbron, 71 Cal. 557; 12 Pac. 673; Gruhn v. Stanley, 92 Cal. 86; 28 Pac. 56; Ah Tong v. Earle Fruit Co., 112 Cal. 679; 45 Pac. 7; Kerry v. Pacific Marine Co., 121 Cal. 564; 66 Am. St. Rep. 65; 54 Pac. 89; Hopper v. Barnes, 113 Cal. 636; 45 Pac. 874; Kippen v. Ollasson, 136 Cal. 640; 69 Pac. 293; Dewey v. Parcells, 137 Cal. 305; 70 Pac. 174); and an objection for non-joinder of parties (Ashton v. Zeila Mining Co., 134 Cal. 408; 66 Pac. 494; Reclamation District v. Van Loben Sels, 145 Cal. 181; 78 Pac. 638; Williams v. Southern Pacific R. R. Co., 110 Cal. 457; 42 Pac. 974; Ah Tong v. Earle Fruit Co., 112 Cal. 679; 45 Pac. 7; Smith v. Cucamonga Water Co., 160 Cal. 611; 117 Pac. 764), where the party not joined is not an indispensable party. Potter v. Dear, 95 Cal. 578; 30 Pac. 777. An objection for non-joinder cannot be taken on appeal. Beard v. Knox, 5 Cal. 252; 63 Am. Dec. 125. Where a defect in parties plaintiff is apparent upon the face of the complaint, or where it appears therefrom that plaintiff has not the legal capacity to sue, an objection on either ground must be taken by demurrer, or is waived; or if such defects do not appear upon the face of the complaint, any objection or defense thereto must be taken advantage of by answer, or it is waived. Tingley v. Times Mirror Co., 151 Cal. 1; 89 Pac. 1097. Where, in an action by heirs, the defendant goes to trial without raising the issue, by answer, that there are other heirs, the objection that there are other heirs is waived. Salmon v. Rathjens, 152 Cal. 290; 92 Pac. 733. Where a partner is sued individually upon a partnership obligation, the plaintiff may recover, if the defendant fails to plead a non-joinder of his copartner: such failure is a waiver of the objection. Baker & Hamilton v. Lambert, 5 Cal. App. 708; 91 Pac. 340. The non-joinder of a tenant as a party to an injunction suit cannot be urged, when not raised by demurrer or answer. Farmer v. Behmer, 9 Cal. App. 773; 100 Pac. 901. Objection to defect of parties cannot be taken by nonsuit (Whitney v. Stark, 8 Cal. 514; 68 Am. Dec. 360; Rowe v. Bacigalluppi, 21 Cal. 633; Pavisich v. Bean, 48 Cal. 364; Williams v. Southern Pacific R. Co., 110 Cal. 457; 42 Pac. 974); hence, a failure properly to object renders valid a judgment against those named therein, and authorizes its introduction under the averments of the original complaint, in an action on such judgment. Lewis v. Adams, 70 Cal. 403; 59 Am. Rep. 423; 11 Pac 833. A defect of parties plaintiff, which does not appear upon the face of the complaint, is waived, unless objection thereto is raised by answer. Russ v. Tuttle, 158 Cal. 226; 110 Pac. 813. Want of legal capacity of the plaintiff to sue is waived, where not objected to by demurrer or answer. Phillips v. Goldtree, 74 Cal. 151; 13 Pac. 313; 15 Pac. 451; Baldwin v. Second Street Cable R. R. Co., 77 Cal. 390; 19 Pac. 644; Quan Wye v. Chin Lin Hee, 123 Cal. 185; 55 Pac. 783; Susanville v. Long, 144 Cal. 362; 77 Pac. 987; Cook v. Fowler, 101 Cal. 89; 35 Pac. 431. An objection, that a cause of action failed to state the appointment of a guardian ad litem, not having been taken by demurrer or answer, is waived, and cannot be raised on appeal (Wedel v. Herman, 59 Cal. 507); and an objection amounting to grounds of special demurrer will not be considered for the first time on appeal (Gale v. Tuolumne County Water Co., 44 Cal. 43); and the objection is waived, by a failure to plead in abatement that articles of incorporation have not been filed (Southern Pacific R. R. Co. v. Purcell, 77 Cal. 69; 18 Pac. 886; Ontario State Bank v. Tibbits, 80 Cal. 68; 22 Pac. 66; South Yuba Water etc. Co. v. Rosa, 80 Cal. 333; 22 Pac. 222; Riverdale Mining Co. v. Wicks, 14 Cal. App. 526; 112 Pac. 896); and that a foreign corporation has not complied with the statute authorizing it to do business in the state. Bernheim Distilling Co. v. Elmore, 12 Cal. App. 85; 106 Pac. 720. The privilege of the statute of limitations is waived, if not taken advantage of by demurrer or answer (Grattan v. Wiggins, 23 Cal. 16; Brown v. Martin, 25 Cal. 82; People v. Broadway Wharf Co., 31 Cal. 33; Kelley v. Kriess, 68 Cal. 210; 9 Pac. 129; Gilbert v. Sleeper, 71 Cal. 290; 12 Pac. 172; Reagan v. Justice's Court,

75 Cal. 253; 17 Pac. 195; Allen v. Haley, 77 Cal. 575; 20 Pac. 90); and where the defendant seeks, by general demurrer, to avail himself of the personal privilege of the bar of the statute, he must specify such privilege as a particular ground of his general demurrer, or it is deemed to be waived. Burke v. Maguire, 154 Cal. 456; 98 Pac. 21. Although it appears upon the face of the complaint that the cause of action is barred, yet the privilege is not waived by a failure to demur, as it may be set up by answer. California Safe Deposit etc. Co. v. Sierra Valleys Ry. Co., 158 Cal. 690; Ann. Cas. 1912A, 729; 112 Pac. 274. An objection that securities sued on do not import a consideration must be taken advantage of by demurrer, or it is waived. Powell v. Ross, 4 Cal. 197. A defect in the title, in not showing the trust relation of the plaintiffs, cannot be objected to otherwise than by special demurrer. Lasar v. Johnson, 125 Cal. 549; 58 Pac. 161. Objection to the failure to allege the presentation of a claim to the administrator of an estate is waived by a failure to demur on such grounds; the objection that the complaint was not sufficiently definite and certain, and that it did not state facts sufficient to constitute a cause of action, does not raise the question. Hentsch v. Porter, 10 Cal. 555; Chase v. Evoy, 58 Cal. 348; Coleman v. Woodworth, 28 Cal. 567; Bank of Stockton v. Howland, 42 Cal. 129; Bemmerly v. Woodward, 124 Cal. 568; 57 Pac. 561. Where one count of a complaint is good, the objection that the other counts do not state facts sufficient to constitute a cause of action, is not waived by failure to demur. Lyden v. Spohn-Patrick Co., 155 Cal. 177; 100 Pac. 236. An error in overruling a demurrer to a complaint is cured, where the plaintiff subsequently amends his complaint in the particular to which the demurrer was directed, and the amended complaint is not demurred to. Walsh v. McKeen, 75 Cal. 519; 17 Pac. 673.

Objection for insufficiency of facts, not waived. An objection that the complaint does not state facts sufficient to constitute a cause of action, may be urged at any time, without demurrer (Flood v. Templeton, 148 Cal. 374; 83 Pac. 148; Arnold v. American Ins. Co., 148 Cal. 660; 84 Pac. 182; Neale v. Morrow, 163 Cal. 445; 145 Pac. 1052; Wells Fargo & Co. v. McCarthy, 5 Cal. App. 301; 90 Pac. 203; Burke v. Dittus, 8 Cal. App. 175; 96 Pac. 330; Cameron v. Ah Quong, 8 Cal. App. 310; 96 Pac. 1025), except where the benefit of a personal privilege, such as the statute of limitations, is claimed; consequently, an objection to the failure of the complaint against an estate, on a contract, to allege the presentation of a claim to the administrator is not waived, nor has the administrator any power to waive it. Burke v. Maguire, 154 Cal. 456; 98 Pac. 21. Where the complaint of an intervener, upon which the judgment in his favor is based, fails to state a cause of action for want of essential facts, objection thereto is not waived by failure to demur. Cameron v. Ah Quong, 8 Cal. App. 310; 96 Pac. 1025. A stipulation that a general demurrer may be overruled does not estop the defendant from relying on the failure of the complaint to state a cause of action, at any subsequent stage of the proceedings. Hitchcock v. Caruthers, 82 Cal. 523; 23 Pac. 48; Evans v. Gerken, 105 Cal. 311; 38 Pac. 725; Morris v. Courtney, 120 Cal. 63; 52 Pac. 129. The fact that the demurrer was overruled by consent does not preclude the defendant from attacking the judgment on the ground that it rests on a complaint inherently defective. Banbury v. Arnold, 91 Cal. 606; 27 Pac. 934; Jones v. Los Angeles etc. Ry. Co., 4 Cal. Unrep. 755; 37 Pac. 656. The failure of the complaint to state facts sufficient to constitute a cause of action cannot be disregarded on appeal, though a demurrer was interposed on such ground and overruled. Conde v. Dreisam Gold Mining Co., 3 Cal. App. 583; 86 Pac. 825; Haskell v. Moore, 29 Cal. 437. A general demurrer is not waived by the filing of an answer subsequently to the overruling of the demurrer. Hurley v. Ryan, 119 Cal. 71; 51 Pac. 20; Curtiss v. Bachman, 84 Cal. 216; 24 Pac. 379.

CODE COMMISSIONERS' NOTE. See note 6 to § 430, ante.

CHAPTER IV.

ANSWER.

§ 437. Answer, what to contain.
§ 437a. Actions to recover insurance. What defendant claiming exemption must set up.
§ 438. When counterclaim may be set up.
§ 439. When defendant omits to set up counterclaim.
§ 440. Counterclaim not barred by death or assignment.
§ 441. Answer may contain several grounds of defense. Defendant may answer part and demur to part of complaint.
§ 442. Cross-complaint.

§ 437. Answer, what to contain. The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.

2. A statement of any new matter constituting a defense or counterclaim.

If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint.

Pleas in abatement. See ante, § 430.
Amendment. Post, §§ 472, 473.
Appearance, answering is. Post, § 1014.
Counterclaim. Post, §§ 438–441.
Cross-complaint. Post, § 442.
Death of party. Ante, § 385.
Disability of party. Ante, § 385.
Errors and defects to be disregarded. Post, § 475.
Gold, coin, etc. Allegations as to money being payable in, should be denied. Post, § 667.
Striking out. Post, § 453.
Supplemental answer. Post, § 464.
Time to answer, extension of. Post, § 1054.
Writing, setting forth, in answer, effect of. Post, §§ 448, 449.
Particular actions, answers in. See specific title.

Legislation § 437. 1. Enacted March 11, **1872;** evidently based on Practice Act, § 46, as amended by Stats. 1865–66, p. 702, which read: "The answer of the defendant shall contain: 1. If the complaint be verified, a specific denial to each allegation of the complaint controverted by the defendant, or a denial thereof according to his information and belief; if the complaint be not verified, then a general denial to each of said allegations, but a general denial shall only put in issue the material and express allegations of the complaint. 2. A statement of matter in avoidance, a counterclaim constituting a defense, or the subject-matter of cross-complaint which may entitle a defendant to relief against the plaintiff alone, or against the plaintiff and a co-defendant." When enacted in 1872, (1) in subd. 1, (a) "shall only put" was changed to "only puts," and (b) the words "and express" were stricken out before "allegations"; (2) subd. 2 was changed to read, "2. A statement of any new matter in avoidance, or constituting a defense or counterclaim."

2. Amended by Code Amdts. **1873–74,** p. 300.

Form of denial. Any form of denial which fairly meets and traverses the allegations is admissible; the form of the denial, if not evasive, is immaterial; it may be a direct denial, or an assertion controverting what the plaintiff alleges. Hill v. Smith, 27 Cal. 476. The fact that the traverse is in an affirmative instead of a negative form is immaterial (Scott v. Wood, 81 Cal. 398; 22 Pac. 871); and it is not essential that the traverse shall be expressed in negative words: an averment, in the answer, controverting what is alleged in the complaint, is equivalent to a denial (Perkins v. Brock, 80 Cal. 320; 22 Pac. 194; Stetson v. Briggs, 114 Cal. 511; 46 Pac. 603); and an affirmative allegation in the complaint may be traversed in the answer by an affirmative allegation inconsistent with it. Siter v. Jewett, 33 Cal. 92; Churchill v. Baumann, 95 Cal. 541; 3 Pac. 770. The statement that the defendant, for answer, says that he denies, etc., is a good denial (Espinosa v. Gregory, 40 Cal. 58); but a denial in the conjunctive is bad. Bartlett Estate Co. v. Fraser, 11 Cal. App. 373; 105 Pac. 130. If several material facts are stated conjunctively in a verified complaint, an answer which undertakes to deny these averments as a whole, conjunctively stated, is evasive, and an admission of the allegations thus attempted to be denied. Doll v. Good, 38 Cal. 287; Gulf of California Nav. etc. Co. v. State Investment etc. Co., 70 Cal. 586; 12 Pac. 473; Westbay v. Gray, 116 Cal. 660; 48 Pac. 800; Duckworth v. Watsonville Water etc. Co., 150 Cal. 520; 89 Pac. 338; Blodgett v. Scott, 11 Cal. App. 310; 104 Pac. 842; Kinney v. Maryland Casualty Co., 15 Cal. App. 571, 573; 115 Pac. 456. The defendant is not required to deny the allegations in any more specific language than that in which they are set forth in the complaint. McDonald v. Pacific Debenture Co., 146 Cal. 667; 80 Pac. 1090. An issue is made up when a proposition is affirmed on one side and denied on the other, and it is immaterial whether the denial precedes or follows the affirmation; where a negative allegation is necessary in stating the cause of action, it must, of course, precede an averment of the fact negatived, but its position upon the record does not render it inoperative or useless; it constitutes the basis of the issue joined by the subsequent averment, and the latter operates as a traverse, and not as an averment of new matter. Frisch v. Caler, 21 Cal. 71. The answer is sufficient if it states facts inconsistent with the allegations of the complaint, and which, if true, would defeat the plaintiff's right to recover. Pfister v. Wade, 69 Cal. 133; 10 Pac. 369. Any allegation in the answer, which, if found to be true, necessarily shows that the allegation of the complaint, as to the same matter, is untrue, is a good traverse, and sufficient as a denial. Burris v. People's Ditch Co., 104 Cal. 248; 37 Pac. 922. The defendant should set forth the true nature of his defense in his answer. Walton v. Minturn, 1 Cal. 362. A denial, whether general or special, puts in issue only the allegations of the complaint; the difference between a general and a special denial, in this respect, is only in the extent to which the allegations are traversed. Coles v. Soulsby, 21 Cal. 47.

The general denial. The common-law rule has been changed as to what may be proved under the general issue, so that, under our system, a special defense must be specially pleaded; a general denial puts in issue only the material allegations of the complaint (Elder v. Spinks, 53 Cal. 293; Michalitschke

Bros. & Co. v. Wells Fargo & Co., 118 Cal. 683; 50 Pac. 847), and puts in issue only the material allegations of an unverified complaint. Glazier v. Clift, 10 Cal. 303; Mentone Irrigation Co. v. Redlands Electric Light etc. Co., 155 Cal. 323; 7 Ann. Cas. 1222; 22 L. R. A. (N. S.) 382; 100 Pac. 1082; San Francisco Commercial Agency v. Widemann, 19 Cal. App. 209; 124 Pac. 1056. A denial, whether general or special, puts in issue only the allegations of the complaint: the difference between a general and a special denial, in this respect, is only in the extent to which the allegations are traversed. Coles v. Soulsby, 21 Cal. 47. A general denial of an unverified complaint to quiet title puts in issue the plaintiff's interest in or ownership of the land (Pennie v. Hildreth, 81 Cal. 127; 22 Pac. 398); and a general denial of an unverified complaint by an administrator puts in issue the appointment, qualification, etc., of the plaintiff (Pennie v. Hildreth, 81 Cal. 127; 22 Pac. 398); and a general denial of value, in such a complaint, puts in issue the value. Paden v. Goldbaum, 4 Cal. Unrep. 767; 37 Pac. 759. A general denial of an unverified complaint, in an action by the assignee of a cause of action, puts in issue the assignment and the plaintiff's right to sue, and the burden is upon the plaintiff to prove the assignment. Brown v. Curtis, 128 Cal. 193; 60 Pac. 773. In ejectment, the defendant may, under a general denial, show that the consideration of the deed, upon which the plaintiff bases his title and right of entry, was illegal, and the deed therefore void. Sparrow v. Rhoades, 76 Cal. 208; 9 Am. St. Rep. 197; 18 Pac. 245. The general denial has the same influence as the general issue at common law (Piercy v. Sabin, 10 Cal. 22; 70 Am. Dec. 692; Gavin v. Annan, 2 Cal. 494, and McLarren v. Spalding, 2 Cal. 510), and should not be stricken out as sham or frivolous; under it, payment or failure of consideration may be proved; it admits nothing, under our statute, but the execution of the instrument declared on. Brooks v. Chilton, 6 Cal. 640. A general denial of an unverified complaint on a promissory note does not put in issue the due execution of the note; hence judgment cannot be rendered against the defendant on the pleadings (Hastings v. Dollarhide, 18 Cal. 390; Davanay v. Eggenhoff, 43 Cal. 395); and the denial cannot be stricken out as sham; the defendant has the right to put the plaintiff to proof of his demand, and require that he establish it by evidence admissible for such purpose. Fay v. Cobb, 51 Cal. 313. A want of legal capacity to sue is a personal disability, that may or may not be set up by the defendant: a general denial does not raise this issue. California Steam Nav. Co. v. Wright, 8 Cal. 585; White v. Moses, 11 Cal. 68; Bank of Shasta v. Boyd, 99 Cal. 604; 34 Pac. 337; Brown v. Curtis, 128 Cal. 193; 60 Pac. 773. The allegation of non-payment of a promissory note is material: when the complaint is not verified, non-payment is put in issue by a general denial. Bank of Shasta v. Boyd, 99 Cal. 604; 34 Pac. 337.

The specific denial. If no general denial is made, and specific denials are resorted to, there must be an actual denial, and not one evasive in form and substance. Marsters v. Lash, 61 Cal. 622. The rules of pleading, under our system, are intended to prevent evasion, and to require a denial of every specific averment in a sworn complaint, in substance and in spirit, and not merely a denial of its literal truth: whenever the defendant fails to make such denial, he admits the averment. Doll v. Good, 38 Cal. 287 This was the law of the old equity system of pleading, the rules of which were probably the most perfect for the elucidation of truth ever devised, and they are not less the rules of our present system. Blankman v. Vallejo, 15 Cal. 638. The allegations of a pleading are taken most strongly against the pleader; hence, it is necessary that he should make with distinctness and precision, and without evasion, the allegations; where the pleadings are verified, it is necessary to shape their allegations and denials so as to correspond with at least the admitted facts. Landers v. Bolton, 26 Cal. 393. The evasion of a material or controlling allegation of the complaint is a significant circumstance against the defendant. Baker v. Baker, 13 Cal. 87. In an action to foreclose a mortgage, a denial of the authority of the officers of the corporation defendant to execute the mortgage, without a denial of a ratification alleged, does not raise a material issue, and the plaintiff is entitled to judgment. Gribble v. Columbus Brewing Co., 100 Cal. 67; 34 Pac. 527. In an action to foreclose a laborer's lien, a denial that the plaintiff did work "as a miner" is equivocal and evasive, and raises no issue. Curnow v. Happy Valley etc. Hydraulic Co., 68 Cal. 262; 9 Pac. 149. In an action against the indorser of a note, a denial of due or legal notice of the presentation of the note for payment, and of the non-payment thereof, raises no issue of fact. Young v. Miller, 63 Cal. 302. A denial that an official act alleged was originally performed by the officer in his official capacity is evasive, and tenders no material issue. Shepard v. McNeil, 38 Cal. 72. To deny that no part of the principal sum mentioned in a promissory note sued on has been paid, and to deny that the whole of the principal sum and interest has not been paid, is evasive, and does not present a sufficient denial of an allegation of non-payment. Westbay v. Gray, 116 Cal. 660; 48 Pac. 800. A denial of the value of property sued for, in the language of the complaint, is evasive and of no effect. Marsters v. Lash, 61 Cal. 622. A release should be specially pleaded. Grunwald v. Freese, 4 Cal. Unrep. 182; 34 Pac. 73.

Denial of material or immaterial allegations. A mere denial that the plaintiff is the owner of a note sued on, which appears to have been made to the plaintiff, tenders no material issue, and is irrelevant. Wedderspoon v. Rogers, 32 Cal. 569; Poorman v. Mills, 35 Cal. 118; 95 Am. Dec. 90; Frost v. Harford, 40 Cal. 165; Monroe v. Fohl, 72 Cal. 568; 14 Pac. 514; Bank of Shasta v. Boyd, 99 Cal. 604; 34 Pac. 337. The denial of allegations of indebtedness, as to time, amount, work, etc., in the words of the complaint, raises an immaterial issue, instead of meeting the substantial matter averred, and is therefore insufficient. Caulfield v. Sanders, 17 Cal. 569. Immaterial allegations in a complaint need not be answered (Doyle v. Franklin, 48 Cal. 537); and where they are answered, both the complaint and the answer, so far as they relate thereto, must be disregarded, when the sufficiency of the pleading and the issues is brought in question (Jones v. Petaluma, 36 Cal. 230; Canfield v. Tobias, 21 Cal. 349); nor is the defendant bound to answer matters of evidence which the plaintiff chooses to allege in his complaint; if the plaintiff requires testimony of the defendant, the proper mode is to put him on the stand as a witness. Racouillat v. Rene, 32 Cal. 450.

Statement of new matter. All new matter of defense must be specially pleaded in the answer. Walton v. Minturn, 1 Cal. 362; Piercy v. Sabin, 10 Cal. 22; 70 Am. Dec. 692; Moss v. Shear, 30 Cal. 467; Coles v. Soulsby, 21 Cal. 47; Glazer v. Clift, 10 Cal. 303; Michalitschke v. Wells Fargo & Co., 118 Cal. 683; 50 Pac. 847; Hawkins v. Borland, 14 Cal. 413; Hatton v. Gregg, 4 Cal. App. 542; 88 Pac. 594; Robinson v. American Fish etc. Co., 17 Cal. App. 212, 221; 119 Pac. 388. A denial, whether general or specific, puts in issue only the allegations of the complaint; new matter must be specially pleaded, and whatever admits that a cause of action, as stated in the complaint, once existed, but at the same time avoids it, i. e., shows that it has ceased to exist, is new matter; it is that matter which the defendant must affirmatively establish. Coles v. Soulsby, 21 Cal. 47; Moss v. Shear, 30 Cal. 467; Wilson v. California Central R. R. Co., 94 Cal. 166; 17 L. R. A. 685; 29 Pac. 861. Whether the matter is new or not, must be determined from the matter itself, and not from the form in which it is pleaded; the test is, whether it operates as a traverse, or by way of confession and avoidance. Frisch v. Caler, 21 Cal. 71. New matter is that which admits that the cause of action stated in the complaint once existed, but at the same time avoids it, that is, shows that it has ceased to exist; such as release, and accord and satisfaction; it is a matter arising subsequently to the origin of the cause of action, and which the defendant must affirmatively plead and establish; but it is otherwise as to matter showing that a cause of action did not exist when the action was begun, and going to prove that a cause of action had not accrued when the suit was brought, which, at common law, it was permissible to show, under the general issue, and new matter was not, according to the strict original principles of the common law, admissible under the general issue, any more than under the system established by the code. Landis v. Morrissey, 69 Cal. 83; 10 Pac. 258. New matter is that which, under the rules of evidence, the defendant must affirmatively establish; if the onus of proof is thrown upon the defendant, the matter to be proved by him is new matter; a defense that concedes that the plaintiff once had a good cause of action, but insists that it no longer exists, involves new matter. Piercy v. Sabin, 10 Cal. 22; 70 Am. Dec. 692; Coles v. Soulsby, 21 Cal. 47. New matter is something relied on by the defendant, which is not put in issue by the plaintiff: anything showing that the plaintiff has not the right of recovery at all, or to the extent he claims, on the case as he makes it, is not new matter, and may be given in evidence upon an issue joined by an allegation in the complaint and its denial in the answer. Bridges v. Paige, 13 Cal. 640; Bank of Paso Robles v. Blackburn, 2 Cal. App. 146; 83 Pac. 262. If the answer, directly or by necessary implication, admits the truth of all the essential allegations of the complaint which show a cause of action, but sets forth facts from which it results that, notwithstanding the truth of the allegations, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter; but if those facts only show that some essential allegation of the complaint is not true, then such facts are not new matter, but only a traverse. Goddard v. Fulton, 21 Cal. 430; Frisch v. Caler, 21 Cal. 71. Any matter which does not avoid or discharge a cause of action theretofore existing, but the purpose of which is to show that the alleged cause of action never did exist, and that material allegations of the complaint are not true, is not new matter required to be specially pleaded. Churchill v. Baumann, 95 Cal. 541; 30 Pac. 770. The defense that the defendant acquired title to the property affected in an ejectment suit, subsequently to the commencement of the action and to his answer therein, is new matter, and must be set up by a supplemental answer in the nature of a plea puis darrein continuance. Moss v. Shear, 30 Cal. 467. Evidence that an injury charged to the negligence of the defendant was caused by the negligence of a third party, is matter of denial, simply, and not new matter of defense. Jackson v. Feather River etc. Water Co., 14 Cal. 18. In an action for goods sold and delivered, evidence that the goods were sold on a credit which had not expired when the action was commenced is not new matter. Landis v. Morrissey, 69 Cal. 83; 10 Pac.

258. An averment that a third party, not sued, is the owner of the property affected by the complaint, is not new matter, but merely a traverse of the allegation of the complaint as to ownership. Robinson v. Merrill, 87 Cal. 11; 25 Pac. 162. The defendant may, in ejectment, under the general denial, give in evidence title in himself: the allegation of such title in the answer does not constitute new matter, nor present any new issue. Marshall v. Shafter, 32 Cal. 176. A defense of unskillful work is new matter, and must be set up in an action on the contract for payment. Kendall v. Vallejo, 1 Cal. 371. The defense of payment is not ordinarily new matter, and need not be set up as a special defense (Brown v. Orr, 29 Cal. 120; Davanay v. Eggenhoff, 43 Cal. 395; Fairchild v. Amsbaugh, 22 Cal. 572; Wetmore v. San Francisco, 44 Cal. 294; Mendocino County v. Johnson, 125 Cal. 337; 58 Pac. 5); but may be put in issue by a general denial. Davanay v. Eggenhoff, 43 Cal. 395. The plea of former recovery is new matter, and must be set up in the answer, such defenses admitting the contract as alleged, but avoiding it by matter ex post facto (Piercy v. Sabin, 10 Cal. 22; 70 Am. Dec. 692); and in an action on a promissory note, pleas of want of consideration and payment are affirmative defenses, and must be pleaded. Pastene v. Pardini, 135 Cal. 431; 67 Pac. 681. A levy of execution on personal property, sufficient to satisfy the judgment, is not a payment: that fact must be alleged as new matter. Mulford v. Estudillo, 23 Cal. 94. The defense of negligence of a fellow-servant cannot be invoked, unless it is pleaded. Reeve v. Colusa Gas etc. Co., 152 Cal. 99; 92 Pac. 89. If the plaintiff omits to set forth the entire transaction out of which his claim arose, the defendant may supply this omission by setting forth in his answer the omitted facts; the plaintiff cannot select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist upon a judgment on this fact alone, if the fact is so connected with others that it forms only a portion of the transaction. Story & Isham Commercial Co. v. Story, 109 Cal. 30; 34 Pac. 671. If the answer to a complaint in ejectment fails to state a specific and definite time of the making of a verbal lease, and the plaintiff fails to demur specially to the answer, the defendant is entitled to render such time specific and definite by proof. Armstrong v. Garate, 15 Cal. App. 57; 113 Pac. 698. In an action by a vendor to quiet title, where the contract of sale provides for a rescission of the contract by the vendor upon default of the purchaser in payment of purchase-money, the facts entitling the defendant to a return of purchase-money paid must be specially pleaded. Stratton v. California Land etc. Co., 86 Cal. 353; 24 Pac. 1065. In an action for the recovery of real property, a title by prescription, if not pleaded, is not in issue. Allen v. McKay & Co., 6 Cal. Unrep. 993; 70 Pac. 8. Where both parties treat an affirmative defense as denied, the want of a formal answer thereto will be deemed waived. Kern Valley Bank v. Koehn, 19 Cal. App. 247; 125 Pac. 358.

Denial, where the complaint is verified. A general denial of all the allegations of a verified complaint, followed by separate general denials of each specific allegation, is not sufficient to raise an issue upon the facts stated in the complaint. Hensley v. Tartar, 14 Cal. 508. Where the answer to a verified complaint does not deny the facts therein alleged, they are deemed to be admitted. Blanck v. Commonwealth etc. Corporation, 19 Cal. App. 720; 127 Pac. 805; Rose v. Lelande, 20 Cal. App. 502; 129 Pac. 599; Alden v. Mayfield, 164 Cal. 6; 127 Pac. 45. The rules of pleading, in answer to a verified complaint, as to facts presumptively known, apply as well to corporations defendant as to individuals. Zany v. Rawhide Gold Mining Co., 15 Cal. App. 373; 114 Pac. 1026.

When denial must be positive. The forms of denial prescribed by statute—positively, and upon information and belief—cannot be indiscriminately used; if the facts alleged in the complaint are presumptively within the knowledge of the defendant, he must answer positively: a denial upon information and belief will be treated as an evasion. Curtis v. Richards, 9 Cal. 33. An averment of a fact peculiarly within the knowledge of the defendant, and which is a part of his official duty to know, must be made positively, and not upon information and belief. McConoughey v. Jackson, 101 Cal. 265; 40 Am. St. Rep. 53; 35 Pac. 863. Where the facts stated in a verified complaint are presumptively known to the defendant, or where he has the means of ascertaining, as by consulting public records, whether or not such facts are true, a positive answer is required to raise an issue: an evasive answer, on information and belief, raises no issue, but admits the verified allegations so answered. Mulcahy v. Buckley, 100 Cal. 484; 35 Pac. 144; Mullally v. Townsend, 119 Cal. 47; 50 Pac. 1066; Raphael Weill & Co. v. Crittenden, 139 Cal. 488; 73 Pac. 238; Jensen v. Dorr, 159 Cal. 742; 116 Pac. 553; Bartlett Estate Co. v. Fraser, 11 Cal. App. 373; 105 Pac. 130; Reclamation District v. Snowball, 160 Cal. 695; 117 Pac. 905; 118 Pac. 514, 515; Le Breton v. Stanley Contracting Co., 15 Cal. App. 429; 114 Pac. 1028, 1030; Zany v. Rawhide Gold Mining Co., 15 Cal. App. 373; 114 Pac. 1026. A defendant is not at liberty to answer any allegation for want of information and belief upon the subject, sufficient to enable him to answer it, when he may be presumed to know, or when he is aware before answering, that he has the means

of ascertaining whether or not such allegation is true; and such an answer is improper, where it appears that the defendant knew, before answering, that he could certainly ascertain whether or not the plaintiff had recorded his claim of lien, as alleged in the complaint, by examining a public record in the county in which the land upon which the lien is claimed is situated (Mulcahy v. Buckley, 100 Cal. 484; 35 Pac. 144); but the sufficiency of a recorded document to create a mechanic's lien may be denied upon information and belief. Hagman v. Williams, 88 Cal. 146; 25 Pac. 1111. It is difficult to define with more exact precision when an answer should be positive in its denials, than to say that when the material facts alleged in the complaint are presumptively within the knowledge of the defendant, he must traverse them, if he undertakes to do so at all, directly and positively, or he must show how it is that he is without knowledge of such material facts; he must, by a proper statement of facts or circumstances, overcome the presumption of knowledge on his part, which being done, his answer on information and belief will be deemed all that the law requires. Vassault v. Austin, 32 Cal. 597; Brown v. Scott, 25 Cal. 189; Loveland v. Garner, 74 Cal. 298; 15 Pac. 844; Gribble v. Columbus Brewing Co., 100 Cal. 67; 34 Pac. 527. Rules of pleading are intended to prevent evasion, and require a denial of every averment in a sworn complaint, in substance and in spirit, and not merely a denial of its literal truth. Doll v. Good, 38 Cal. 287; Zany v. Rawhide Gold Min. Co., 15 Cal. App. 373; 114 Pac. 1026; Kinney v. Maryland Casualty Co., 15 Cal. App. 571; 115 Pac. 456.

Denial on information and belief. The only object in requiring the defendant to state his belief is to dispense with the necessity of proof on the part of the plaintiff; and if he admits that he believes the fact to be true, it stands as confessed; the clear result of the requirement is, that the defendant must state his actual belief, whether founded upon mere hearsay evidence, general report, or other information; and when he does so state it, he is precluded from controverting the alleged fact which he believes, but does not know, to exist; and the practical result is, that the plaintiff may establish the existence of a fact, not known to the defendant, by the defendant's mere belief, based upon incompetent evidence; the statute changes the law of evidence in favor of the plaintiff, and against the defendant; it permits the plaintiff to verify his complaint, and then the defendant is compelled to state his belief as to facts he does not know to exist, and when those facts, unknown to the defendant, are alleged and sworn to by the plaintiff, upon his own knowledge, the defendant is compelled either to believe them to be true or to believe the plaintiff guilty of perjury. The object of the statute is to sift the conscience of the defendant, and obtain from him his belief; he must answer according to his belief, whether that belief is founded upon sufficient or insufficient information; the word "belief," as used in the statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant, drawn from information; there is a clear distinction between positive knowledge and mere belief, and they cannot both exist together. Humphreys v. McCall, 9 Cal. 59; 70 Am. Dec. 621. A denial "upon his information and belief," instead of in the statutory language, "according to his information and belief," is sufficient (Kirstein v. Madden, 38 Cal. 158), being substantially the same as a denial "according to his information and belief." Roussin v. Stewart, 33 Cal. 208. A denial upon information and belief is not sufficient to justify the dissolution of a temporary restraining order or injunction on the ground that the equities of the bill are fully denied by the answer. Porter v. Jennings, 89 Cal. 440; 26 Pac. 965; Dingley v. Buckner, 11 Cal. App. 181; 104 Pac. 478; Chace v. Jennings, 3 Cal. Unrep. 474; 28 Pac. 681. As to matters not presumably within the knowledge of a defendant, a denial upon information and belief is permissible, and a specific denial of each of the allegations as to such matters is not essential, although the complaint is verified. Jensen v. Dorr, 159 Cal. 742; 116 Pac. 553. The defendant may not answer an allegation, the truth of which he may ascertain from the public records, by an averment that he has no information or belief on the subject. Mulcahy v. Buckley, 100 Cal. 484; 35 Pac. 144. An administrator may deny, upon information and belief, an allegation that his intestate executed certain deeds. Thompson v. Lynch, 29 Cal. 189. In an action to foreclose a mortgage, allegations in the answer of a wife, denying, upon information and belief, that the mortgagee delivered the mortgage to her, or to her and her husband, at her request, do not amount to a denial that the document was delivered to her husband acting for her, or negative in any way the presumption of her full knowledge of the transaction. Phillips v. Phillips, 163 Cal. 530; 127 Pac. 346. A denial in the answer, for want of information and belief, framed in the conjunctive form, that plaintiff is now, and at all times mentioned in the complaint has been, a corporation, etc., is insufficient to raise an issue. Bartlett Estate Co. v. Fraser, 11 Cal. App. 373; 105 Pac. 130. If a defendant, presumed to know the facts, has a lack of knowledge in fact, an explanation is essential, where he makes a denial upon information and belief, as to how it happens that he is without such knowledge. Zany v. Rawhide Gold Mining Co., 15 Cal. App. 373; 114 Pac. 1026.

Defenses that are admissible without being specially pleaded. See note 69 Am. Dec. 705.

When denials on information and belief are permissible. See notes 70 Am. Dec. 625; 133 Am. St. Rep. 106.

Sufficiency of general denial coupled with admissions. See note 13 Ann. Cas. 884.

Action of replevin as subject to counterclaim. See notes Ann. Cas. 1913A, 105; 24 L. R. A. (N. S.) 748.

Necessity that defendant designate counterclaim as such in pleading. See note Ann. Cas. 1913A, 1079.

Effect of denial on information and belief of matter necessarily within knowledge of defendant. See notes Ann. Cas. 1912C, 283; 30 L. R. A. (N. S.) 771.

CODE COMMISSIONERS' NOTE. 1. Answer to contain what. General rules. The answer. This is to contain:

1. **A general or specific denial** of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

A general denial asserts in a single sentence that every allegation of the complaint is untrue. When a complaint is false in every one of its allegations, the defendant may, if he chooses, group them together, instead of denying each allegation in its turn, and may thus make the denial general, so as to cover all the allegations at once. But this is far from being equivalent to the general issue in common-law pleadings; for that, besides denying all the plaintiff's allegations, denied also that he had any cause of action, even if his allegations were true, and thus enabled the defendant not only to adduce evidence in disproof of the plaintiff's case, but generally in discharge of it, if not disproved. A specific denial singles out specific allegations, and denies them. All allegations not denied are, for the purposes of the action, taken as true. An express admission is, therefore, improper. In equity pleadings, under the former system, express admissions were proper, and often necessary; but in this respect, as in others, there is a wide difference between that system and the one established by the code. A denial must be of the substance of the allegation, not of its form. When, therefore, as is sometimes the case, a defendant denies that an allegation is true in manner and form as stated, or denies that he did what is charged against him at the time and place stated, he puts himself upon the form of the statement, rather than upon its substance, and fails to make that denial which the law requires. His answer is, then, what is sometimes called a negative pregnant; that is, a denial whose truth was consistent with the truth of every material part of the allegation denied. A denial need not be in the very language of the allegation denied, though that is the best mode, when it can be done with truth. Sometimes it is necessary to make what may be called a partial denial; as, for example, when the complaint professes to give the substance of an agreement, which the defendant does not admit to be correctly given, he may answer that the only agreement made on the subject was as follows, and then it set forth.

2. **A statement of new matter** in avoidance or constituting a defense or counterclaim, in ordinary and concise language, without repetition.

All the defenses must be kept distinct. Each of them should begin with some expression to indicate that it is a new defense, thus: And for a further defense, the defendant answers or alleges, etc. (See Gates v. Kieff, 7 Cal. 125.) Every defense, legal and equitable, may be interposed.

A counterclaim is a cross-demand—a claim of the plaintiff against the defendant. It is more extensive than set-off, the latter being confined to money claims, and those of a particular description, while the former extends not only to money claims, but to recoupment and to equitable defenses, when affirmative relief is sought on the part of the defendant. The main design is, as far as possible, to dispose of the whole controversy between the parties in one action, avoiding thus the multiplication of suits, and bringing the whole of a transaction, or a connected series of transactions, into one view, to be judged as a whole. The counterclaim must show a cause of action in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action. If, for example, the claim and defense be, as they generally are, such that the plaintiff might recover against one of several defendants, that defendant may, on his part, assert his counterclaim against the plaintiff. The cause of action set forth in the counterclaim must arise either out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, as in case of independent covenants in a deed; or it must be connected with the subject of the action, as in case of an assault upon the defendant by the plaintiff which led to the violence charged in the complaint; or if the action itself be on contract, then any other cause of action, arising also on contract and existing at the commencement of the action, may be the ground of a counterclaim.

In the answer, as well as in the complaint, it is desirable to break the matter into distinct paragraphs, and to number them.

When, therefore, a complaint is brought to an attorney, and he is to prepare an answer, his first question of his client should be: "Is any part of this complaint false?" and if it be so, that part must be specified and denied; he should next inquire if there be any defense which would discharge the defendant if the complaint were proved to be true; and, lastly, he should learn if there be a counterclaim which will avail his client. The different defenses naturally present themselves in the following order:

Denial.
- General.
- Specific.
  - Total.
  - Partial.

Defenses in discharge.

Counterclaim.
- Set-off.
- Recoupment.
- Other claim of defendant on same contract or transaction.
- Other claim of defendant connected with the subject of action.
- Money claim on separate contract against money claim on contract.
- Equitable defense, with a claim of affirmative relief.

The true design of pleading is sometimes misapprehended. It is not to exercise the art of lawyers, but to obtain justice for clients; and in furtherance of that design, it seeks to ascertain and record the facts of the controversy. To ascertain the facts, it is necessary that each party make his own statement of them, and when the points of disagreement are ascertained, evidence is called in. There are persons who prefer oral pleading at the trial. Others prefer oral pleading in the presence of a judge, preparatory to the trial; and of that opinion are some distinguished lawyers in England. The arguments for it are, that it is simpler, quicker, and more certain. The majority, however, are in favor of written pleadings exchanged between the parties before the trial. They reason thus: If there were but two parties, and those near the judge, oral pleading might be preferable; but when the parties are numerous, or distant, the inconvenience of bringing them all before the judge at the same time, to make their respective statements and counter-statements, would be hardly tolerable. Therefore, they would neither call in the jury nor bring the parties before the judge, till they had interchanged with each other written statements of the facts, and ascertained the points of difference. In what manner to order these written statements, so that they shall most surely and most easily evolve the points of difference, is the problem of pleading. How this problem is solved with us, is submitted to the judgment of those who reason for themselves.

The common law sought, by its peculiar scheme of written altercations, to bring out the precise points in dispute, and in doing so, instituted an intricate and toilsome process, which wearied the attorney and the suitor, and failed to attain the end at last. And even if it had been true,

as its friends claimed for it, that this scheme was entirely successful in the production of single and close issues, that would not have decided the question of retaining it. For it could not have been maintained in any respect, without upholding the distinction between legal and equitable proceedings, nor could it have been maintained in its integrity without retaining the forms of action. They greatly err, who conceive that they can abolish the forms of action, and yet preserve, as a whole, that mass of regulations, subtilities, and conceits, which formed what was styled the system of pleading at common law. Some of the rules might perhaps have been preserved, when the forms of pleading were abolished; but greater inconvenience and confusion would have resulted from an attempt to modify the system for the purpose of adapting it to a single form of action, than from its entire reconstruction. Whatever was useful in the old system of common law or equity was of course ready for use in the new; but the old had to be taken down, and a new one reconstructed, if any permanent good was to be accomplished. These may be regarded as legal axioms: first, that no scheme of procedure can last which does not provide for the adjudication of the whole of a controversy, be it partly legal and partly equitable, in one action; secondly, that neither the common-law pleading nor the equity pleadings subserved that purpose and attained that end; and, therefore, thirdly, that a new system was indispensable, selecting what was good in each, and adding what seemed to be necessary to make a consistent whole. It certainly would be agreeable to know that in obtaining the benefits of a new and uniform system, we did not lose a single advantage of either of the old. Let us see whether such be not the fact. In the first place, there were, under the old system, in the greater number of the cases, no real issues whatever; the issues were nominal in all cases of general pleading, as has been already explained. So far, certainly, the advantage is greatly on the side of the code. In the next place, the advantage in respect to that smaller number of cases where the pleading was special, is also on the side of the code. What produces an issue? An allegation denied. Under the code the defendant must deny or discharge himself; and if he discharge himself, his allegations in discharge are denied by force of the law. Here there is no general pleading till you get beyond the answer, and then for the first time you meet the general issue—a statutory general issue. The defenses by discharge are few in comparison with defenses by denial, not more probably than as one to ten. And if the affirmations and denials are stated with ordinary skill, they constitute issues as simple and precise as it is possible to put in words. It is only when the pleader is ignorant of his art that they are otherwise. If a pleading contain involved statements, or immaterial averments, lay it not to the account of the law which is violated, but to him who disregards it. The remedy is with the courts. If he who assumes to act as attorney be so faulty in his mind or education as to be unable to make a plain and logical statement, or to contradict one with precision, the court can rectify the pleading, and punish him. They are also vested with the power to make general rules for the purpose of carrying the code into full effect. If they find pleaders inattentive, let them establish as a positive rule what is now the dictate of convenience, and require the allegations to be separated, to be confined each to a single point, and to be numbered. If issues as single and as narrow as it is possible to produce are not thus secured, it is not possible to secure them by any schemes of legislation or any rules of court.

2. **Difference between effect of general and special denial.** A denial, whether general or special, only puts in issue the allegations of the complaint. The difference between a general and special denial in this respect is only in the extent to which the allegations are traversed. Coles v. Soulsby, 21 Cal. 47.

3. **General denial.** In an action for malicious prosecution, the defendants filed a general denial, and also averred that they had nothing to do with the prosecution, except as witnesses; plaintiff filed a replication taking issue on this averment. If plaintiff regarded this as a good defense and joined issue on it, defendants cannot complain; though, probably, the matter was put in issue by the general denial, and the replication was unnecessary. Dreux v. Domec, 18 Cal. 83; White v. Moses, 11 Cal. 69; Brooks v. Chilton, 6 Cal. 640.

4. **Qualified general denial.** A general denial of the averments of a verified complaint, with the qualifying words, "except as hereinafter admitted," does not put in issue any of its allegations. Levinson v. Schwartz, 22 Cal. 229.

5. **Specific denial.** A specific denial to each allegation of a complaint is a separate denial of the particular allegation controverted. The plaintiff, if he verified his complaint, could compel the defendant to deny specifically each separate allegation. San Francisco Gas Co. v. San Francisco, 9 Cal. 453. The rules of pleading are meant to prevent evasion, and require a denial of every specific averment in a verified complaint, in substance and in spirit, and not merely a denial of its literal truth; and whenever the defendant fails to make such denial, he admits the averment. Blankman v. Vallejo, 15 Cal. 638; see also Fish v. Redington, 31 Cal. 185.

6. **In ejectment, all matter of defense must be stated in answer.** In ejectment, the defendant is bound to bring forward all matter of a strictly defensive character, or be precluded from again litigating the same; but he is not bound to set up or litigate new matter constituting a cause of action in his favor. Ayres v. Bensley, 32 Cal. 620.

7. **Denial on information and belief.** If, from the nature of the fact alleged, the knowledge is presumptively on information, defendant is not bound to deny positively, but only "according to his information and belief"; in such case he must answer according to both his information and belief. The word "belief" means the actual conclusion of the defendant drawn from information. Humphreys v. McCall, 9 Cal. 59; 70 Am. Dec. 621. A denial is not sufficient which states that the defendant, a municipal corporation, has no knowledge or information "in respect to the obligations of a count in a verified complaint, and therefore denies the same." San Francisco Gas Co. v. San Francisco, 9 Cal. 453; see also Brown v. Scott, 25 Cal. 189, and cases there cited; also Fish v. Redington, 31 Cal. 185.

8. **Denial on information and belief by administrator.** An allegation, by an administrator, as defendant, which "avers, on information and belief, that no such deed or deeds were ever executed," is a sufficient denial of an allegation in the complaint that decedent executed and delivered the particular deeds referred to. Thompson v. Lynch, 29 Cal. 189.

9. **Denial on information and belief, when insufficient.** If the averments of a verified complaint are presumptively within the knowledge of the defendant, a denial of the same in the answer, according to his information and belief, is evasive of the issue tendered. It should state how it happened that defendant is not informed of the fact alleged. Brown v. Scott, 25 Cal. 194. And as to what may and what may not be denied upon information and belief, see Humphreys v. McCall, 9 Cal. 59; 70 Am. Dec. 621; Kuhland v. Sedgwick, 17 Cal. 123; Vassault v. Austin, 32 Cal. 597; Ord v. Steamer Uncle Sam, 13 Cal. 369; San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Brown v. Scott, 25 Cal. 189; Fish v. Redington, 31 Cal. 185. An averment of the death of plaintiff's ancestor, in a verified complaint, will not be controverted by answer, "that defendant has not sufficient knowledge to form a belief," and therefore neither admits nor denies. Anderson v. Parker, 6 Cal. 197. The allegation of a verified complaint cannot be controverted by a denial of sufficient knowledge or information upon the subject to form a belief. Curtis v. Richards, 9 Cal. 33; San Francisco Gas Co. v. San Francisco, 9 Cal. 453. A denial "on information and belief" is sufficient. It is not necessary to follow the precise words of the

statute, by saying "on his information and belief," etc. Roussin v. Stewart, 33 Cal. 208.

10. What are good denials. Instead of denying the complaint in express terms, averments that the defendant did not commit the act charged, or that the facts alleged to exist do not exist, traverse the matters alleged, and are good denials of the allegations of complaint. Hill v. Smith, 27 Cal. 479. If defendant does not deny the charges in a complaint, making out a prima facie case for the plaintiffs, on him will rest the onus of proving his affirmative allegations. Thompson v. Lee, 8 Cal. 275. See also Caulfield v. Sanders, 17 Cal. 569. Averments of mere evidence are not admitted by failure to deny them in the answer. Racouillat v. Rene, 32 Cal. 450. If the complaint is verified, a general denial in the answer admits all its material allegations. Pico v. Colimas, 32 Cal. 578.

11. Denial, when sufficient, "upon information and belief." A denial of a material allegation of a complaint, "upon information and belief," is a sufficient denial to raise issue thereupon. Jones v. Petaluma, 36 Cal. 231, affirming Vassault v. Austin, 32 Cal. 597, and Roussin v. Stewart, 33 Cal. 208.

12. What is a sufficient denial. Waiving insufficiency of denial. Where certain material allegations of the complaint were so defectively denied that such denials might, upon motion, have been stricken out as sham and irrelevant, yet, without any objection, the plaintiff was allowed to introduce evidence in support of the averments, during the trial it was held that, by the introduction of such evidence, the plaintiff waived all objection to sufficiency of such denial, and the court properly refused to instruct the jury that the facts averred were admitted to be true, because not properly denied. Tynan v. Walker, 35 Cal. 635; 95 Am. Dec. 152.

13. Denial of material allegations only sufficient. A denial of the ultimate facts, or material allegations of the complaint, is sufficient. Moore v. Murdock, 26 Cal. 524; Racouillat v. Rene, 32 Cal. 450.

14. What is a sufficient denial to put plaintiff on proof as to a contract. Murphy v. Napa County, 20 Cal. 487.

15. Setting forth contract in terms in answer. Defendant may ask profert of a written instrument, or may, if it is misstated in complaint, set forth in his answer the contract in haec verba, and then demur on the ground of variance. Stoddard v. Treadwell, 26 Cal. 294.

16. Matter contained in complaint by way of anticipating a defense need not be denied. The complaint stated a cause of action for goods sold, and, in addition, with a view to meet a probable defense of payment based upon the giving of certain notes by defendant and a receipt in full by plaintiff, stated the making of the notes and receipt and alleged facts attending the transaction, which, if true, avoided its effect as payment by reason of fraud and misrepresentation on the part of defendant. The answer admitted the original demand, and averred payment by the notes referred to in the complaint, but did not deny the allegations in the complaint respecting the fraud of defendant in the transaction. It was held that the allegations of the complaint in reference to the transaction, claimed to operate as payment, were not material allegations requiring a denial, and were not therefore admitted by the failure of defendant to deny them. Canfield v. Tobias, 21 Cal. 349.

17. Conclusions of law must not be denied. Denial of debt, without a denial of any of the facts from which the debt followed, as a conclusion of law, raises no issue. Curtis v. Richards, 9 Cal. 33; Wells v. McPike, 21 Cal. 215. A denial of a conclusion of law, without the denial of the facts, is insufficient. Nelson v. Murray, 23 Cal. 338; Wedderspoon v. Rogers, 32 Cal. 569; People v. Board of Supervisors, 27 Cal. 655.

18. Denial of conclusions of law admission of certain facts. If a complaint alleges that defendant "wrongfully and unlawfully" took and carried away personal property, and the answer denies that defendant "wrongfully and unlawfully" took and carried it away, it is an admission of the taking and carrying away, and only a denial of its wrongful character. Lay v. Neville, 25 Cal. 549.

19. Answering one of several averments. An averment purporting to answer the whole complaint, but in fact only answering one of the two averments, is bad. This was the rule at common law, and it applies under our system. Wallace v. Bear River etc. Mining Co., 18 Cal. 461.

20. General denial under forcible entry and detainer act. Under the act concerning forcible entries and unlawful detainer, a verified "general denial" was a sufficient denial of a complaint duly verified. Sullivan v. Cary, 17 Cal. 85.

21. Denial of conclusion of law and immaterial issues insufficient denial. The complaint alleged that on a certain day plaintiff was the owner and in possession of the property, and that its value was a certain sum. The answer, denying that on the day specified "the plaintiff was the owner and lawfully in possession," and as to its value, averring that the defendant has no knowledge, etc., and therefore denies that it is worth the said sum, is insufficient, because it raises an immaterial issue as to time; and, as to the possession of the property, it amounts merely to a conclusion of law. Kuhland v. Sedgwick, 17 Cal. 123. An answer to allegations in a complaint which states the rendition of a judgment against the defendant, and states the character of the judgment, denying that the defendant became or was lawfully bound by the judgment, is only a denial of a conclusion of law, and does not raise an issue of fact. If the judgment can be attacked collaterally, the answer must specify the points of its invalidity. People v. Board of Supervisors, 27 Cal. 655. And if the passage of a municipal ordinance is alleged, an answer stating, in general terms, that the ordinance is void and illegal, is insufficient, as no issue of fact is raised. People v. Board of Supervisors, 27 Cal. 655.

22. What are deemed insufficient denials. In a suit to recover the possession of personal property, an averment, that the "plaintiff was the owner and in possession of the property," is not traversed by an answer which denies that the "plaintiff was the owner and entitled to the possession of the property." Nor is the averment that the "defendant wrongfully took the property from plaintiff's possession, and from thence to the time the action was commenced wrongfully detained the same," traversed by a denial "that the defendant at any time wrongfully took and detained the property from the plaintiff. If the answer does not traverse the material allegations of the complaint, and does not set forth facts sufficient to constitute a defense, and the pleadings are not verified, a closing denial, that "the defendants, denying each and every allegation set forth in plaintiff's complaint not consistent with the foregoing answer," fails to raise any issue, and is bad. Richardson v. Smith, 29 Cal. 530. An answer is insufficient and bad if it does not deny any of the material allegations of a verified complaint, either positively or according to information and belief; these are the only forms in which the allegations of a verified complaint can be controverted so as to raise an issue. A denial in any other form is unknown to our system of practice, and is bad. San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

23. What are deemed sham or irrelevant answers. Sham or irrelevant answers may be stricken out, on motion. Answers consisting in whole or in part of defective denials, which do not explicitly traverse the material allegations of the complaint, are, as to such denials, sham and irrelevant, within the meaning of the code. Tynan v. Walker, 35 Cal. 646, 95 Am. Dec. 152, citing People v. McCumber, 18 N. Y. 315; 72 Am. Dec. 515; Gay v. Winter, 34 Cal. 153.

24. Denial of allegations stated conjunctively in verified complaint. An answer is insufficient which attempts to deny these allegations as a whole, conjunctively stated. And the allegation

thus attempted to be denied is, in fact, admitted. Doll v. Good, 38 Cal. 287. The material facts of the complaint, stated conjunctively, except the allegation that by reason of the premises the plaintiff has been injured and sustained damage in the sum of ten thousand dollars, are undertaken to be answered by the defendants denying them as a whole, as conjunctively stated, as will be seen by placing any one aggregated statement of facts in the complaint in juxtaposition with the answer thereto. This mode of answering is in violation of the principles of common-law pleading, and not less so of the statute, which provides that the defendant's answer to a verified complaint shall contain a specific denial to each allegation of the complaint controverted, or a denial thereof according to the defendants' information and belief. Those interested, and who have any doubt on the subject, will find the following authorities worthy of careful examination: Blankman v. Vallejo, 15 Cal. 638; Kuhland v. Sedgwick, 17 Cal. 123; Caulfield v. Sanders, 17 Cal. 569; Brown v. Scott, 25 Cal. 195; Landers v. Bolton, 26 Cal. 417; Busenius v. Coffee, 14 Cal. 91; Hensley v. Tartar, 14 Cal. 508; Hopkins v. Everett, 6 How. Pr. 159; Salinger v. Lusk, 7 How. Pr. 430; Davison v. Powell, 16 How. Pr. 467; Shearman v. New York Central Mills, 1 Abb. Pr. 187; Baker v. Bailey, 16 Barb. 54; Fish v. Redington, 31 Cal. 194.

25. Insufficient denial is admission of truth of averments in complaint. On failure of proper denials, plaintiff is entitled to judgment upon the pleadings. The rules of pleading, under our system, are intended to prevent evasion and to require a denial of every specific averment in a sworn complaint, in substance and in spirit, and merely a denial of its literal truth, and whenever the defendant fails to make such denial he admits the averment. Doll v. Good, 38 Cal. 290, citing, as authority, Smith v. Richmond, 15 Cal. 501; Blankman v. Vallejo, 15 Cal. 638; Castro v. Wetmore, 16 Cal. 380; Higgins v. Wortell, 18 Cal. 333; Woodworth v. Knowlton, 22 Cal. 169; Landers v. Bolton, 26 Cal. 417; Morrill v. Morrill, 26 Cal. 292; Camden v. Mullen, 29 Cal. 564; Blood v. Light, 31 Cal. 115.

26. Failure to deny, when not an admission. If a complaint alleges the value of all the property destroyed, for which the action is brought, in gross—for some items of which no recovery can be had—an answer containing no denial of the averment of value, does not thereby admit the value of the property for which a recovery may be had. Nunan v. San Francisco, 38 Cal. 689.

27. Denial of averment in the exact words of the complaint. Denial of immaterial issues. A denial of a debt as to time, amount, and work, in the precise words of the complaint, raises only an immaterial issue upon these particulars, instead of meeting the substantial matter averred, and is therefore bad. Caulfield v. Sanders, 17 Cal. 569. The code system is intended to prevent evasion, and to require a denial of each specific averment in a verified complaint in substance and in spirit, and not merely a denial of its literal truth; and whenever the defendant fails to make such denial, he admits the allegations. Smith v. Richmond, 15 Cal. 501; see Camden v. Mullen, 29 Cal. 564; Leffingwell v. Griffing, 31 Cal. 231; Landers v. Bolton, 26 Cal. 416. A denial merely of what is non-essential in the allegations of a complaint, is an admission of all that is essential to a recovery. Leffingwell v. Griffing, 31 Cal. 231.

28. Denial of indebtedness in exact amount is bad. Where the complaint, verified, avers that defendant is indebted to plaintiff for goods, wares, and merchandise, sold and delivered, in the sum of eight hundred and twenty-eight dollars and sixteen cents, an answer denying that defendant is indebted in the sum of eight hundred and twenty-eight dollars, sixteen cents, as is set out in the complaint, is bad. Higgins v. Wortell, 18 Cal. 330; see Woodworth v. Knowlton, 22 Cal. 164; Towdy v. Ellis, 22 Cal. 650; Verzan v. McGregor, 23 Cal. 339.

29. Other insufficient and bad denials. Where an allegation in a verified complaint embraces several distinct propositions stated conjunctively, a denial in the answer, of the entire averments following the exact words of the complaint, raises no issues, and is bad. Woodworth v. Knowlton, 22 Cal. 164; Reed v. Calderwood, 32 Cal. 109. When several averments are not joined by the conjunction "and," a denial of the allegations, conjunctively, will not amount to a denial of the allegations; each proposition should be separately denied. Fitch v. Bunch, 30 Cal. 208; More v. Delvalle, 28 Cal. 170; Fish v. Redington, 31 Cal. 185. An answer to a material allegation of a verified complaint which denies the same upon information and belief, is insufficient. Nelson v. Murray, 23 Cal. 338.

30. Other insufficient denials. An answer to a verified complaint which denies "generally and specifically each and every material allegation in the complaint, the same as if such an allegation were herein recapitulated," and also denying each allegation in the same form, with certain qualifications and exceptions, does not raise an issue upon any fact stated in the complaint. Hensley v. Tartar, 14 Cal. 508. An allegation, in a verified complaint, that "defendants wrongfully and unlawfully entered upon and dispossessed" plaintiff, is not sufficiently denied by a denial that "defendants wrongfully and unlawfully entered and dispossessed plaintiff," because such denial admits entry and ouster. Busenius v. Coffee, 14 Cal. 91.

31. Consistency of answer in all its parts. Where the admissions in an answer are opposed to its general denials, the denials will be disregarded, and judgment given upon the former, where the complaint is verified, and the answer consists of such admissions and denials. Fremont v. Seals, 18 Cal. 433; see also Klink v. Cohen, 13 Cal. 623; Uridias v. Morrell, 25 Cal. 35. Where an amended answer is inconsistent with the original answer, the two cannot stand together. Kuhland v. Sedgwick, 17 Cal. 123. A verified answer must not deny in one sentence what it admits to be true in the next. Hensley v. Tartar, 14 Cal. 508.

32. Sufficiency of denial, how to be determined. In order to determine whether the denials of an answer are evasive, each separate denial of each separate averment must be taken by itself. If the answer to a particular averment is a denial of it, and there is no admission in the answer inconsistent with the denial, an issue is fairly made. Racouillat v. Rene, 32 Cal. 450.

33. Misjoinder and non-joinder of parties plaintiff and defendant. Objection to misjoinder of parties defendant should be taken by demurrer or answer. An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them. Warner v. Wilson, 4 Cal. 313. Where two are joined as plaintiff in an action for the recovery of possession of land, a denial in the answer, that the plaintiffs were in possession of the land, does not raise the issue of a misjoinder of either of the plaintiffs. Gillam v. Sigman, 29 Cal. 637. For non-joinder of parties plaintiff, see Whitney v. Stark, 8 Cal. 516; 68 Am. Dec. 360. And for answer setting up misjoinder and non-joinder of parties. Fulton v. Cox, 40 Cal. 105.

34. An answer is not evidence. Goodwin v. Hammond, 13 Cal. 168; 73 Am. Dec. 574. Nor does it require two witnesses to controvert a verified answer. Bostic v. Love, 16 Cal. 69; Blankman v. Vallejo, 15 Cal. 638.

35. What proof may be made under specific and general denials. See Jackson v. Feather River etc. Water Co., 14 Cal. 18; Hawkins v. Borland, 14 Cal. 413. It was held, that defendant may prove an eviction on a claim for rent in arrear, under the plea nil debit, or general denial. McLarren v. Spalding, 2 Cal. 510. But this was overruled in Piercy v. Sabin, 10 Cal. 30; 70 Am. Dec. 692; and consequently an eviction must be set up in the answer.

36. Allegations of complaint admitted, when not denied. Unless the answer denies the allegations of the complaint, they are admitted, and constitute conclusive evidence of the extent of the damages claimed. Patterson v. Ely, 19 Cal. 28. The failure to deny a material allegation is an admission of the facts contained in such averment, and such admission is conclusive. Burke v. Table Mountain Water Co., 12 Cal. 403. Under the code, a specific denial of one or more allegations is held to be an admission of all others well pleaded. De Ro v. Cordes, 4 Cal. 117. An admission without fraud to rights of client, by an attorney of record, of the correctness of an amount due, for which judgment is taken, destroys the effect of a denial in an answer. Taylor v. Randall, 5 Cal. 79. An answer is not proof for defendant, but an admission in the answer of a fact stated in the complaint is conclusive evidence against him. Blankman v. Vallejo, 15 Cal. 638. If the complaint contains two causes of action, and the answer takes issue on the allegations of but one, plaintiff is entitled to judgment on the other. Leffingwell v. Griffing, 31 Cal. 231.

37. Allegations not denied are deemed to be admitted. The intent of the statute is fully carried out by excluding parol testimony to contradict a deed; but where parties admit the real facts of the transaction in their pleadings, these admissions are to be taken as modifications of the instrument. Lee v. Evans, 8 Cal. 424. No evidence is required as to facts not denied. Patterson v. Ely, 19 Cal. 28.

38. What must be specifically stated in answer. Special defenses. Statute of limitations, see § 458, post, also note 47, post. Release. Coles v. Soulsby, 21 Cal. 50; Turner v. Carathers, 17 Cal. 431. Statute of frauds. Osborne v. Endicott, 6 Cal. 149; 65 Am. Dec. 498. Subsequently acquired title by defendant in ejectment. Moss v. Shear, 30 Cal. 468. Transfer of title by plaintiff. Id. Tax titles. Russell v. Mann, 22 Cal. 132. Tax titles accruing after action commenced. McMinn v. O'Connor, 27 Cal. 246; see "Supplemental Answer." Composition with creditors. Smith v. Owens, 21 Cal. 11. Counterclaim should be pleaded. Hicks v. Green, 9 Cal. 74. Disclaimers. Noe v. Card, 14 Cal. 576; De Uprey v. De Uprey, 27 Cal. 331; 87 Am. Dec. 81. Equitable titles, defenses, and estoppels. Clarke v. Huber, 25 Cal. 597; Carpentier v. Oakland, 30 Cal. 439; Flandreau v. Downey, 23 Cal. 354; Blum v. Robertson, 24 Cal. 146; Downer v. Smith, 24 Cal. 124. Estoppels. Clarke v. Huber, 25 Cal. 593. An estoppel by deed or matter of record should be pleaded as such, where there is an opportunity to plead it. Flandreau v. Downey, 23 Cal. 354. Eviction of the tenant must be set up when. Piercy v. Sabin, 10 Cal. 30; 70 Am. Dec. 692. For fixture of mining claims. Wiseman v. McNulty, 25 Cal. 230; Dutch Flat Water Co. v. Mooney, 12 Cal. 534. Former recovery. Vance v. Olinger, 27 Cal. 358; Marshall v. Shafter, 32 Cal. 176. Fraud, etc. People v. Board of Supervisors, 27 Cal. 656. Grant of an easement of servitude. American Company v. Bradford, 27 Cal. 368. Misjoinder of parties plaintiff, owing to matters which have occurred pending the action, must be taken by supplemental answer, or it is waived. Calderwood v. Pyser, 31 Cal. 333. New matter must be specially pleaded. Coles v. Soulsby, 21 Cal. 47. New matter occurring after issue joined must be set up by supplemental answer. Jessup v. King, 4 Cal. 331. Payment. Coles v. Soulsby, 21 Cal. 47; Frisch v. Caler, 21 Cal. 71. In Frisch v. Caler, 21 Cal. 71, it is held that a plea of payment is not new matter, and in Fairchild v. Amsbaugh, 22 Cal. 575, the court say, it follows, that it is not necessary to set it up as a special defense in the answer; but this is opposed to the opinion of Field, C. J., in Green v. Palmer, 15 Cal. 417; 76 Am. Dec. 492; and Burnett, J., in Piercy v. Sabin, 10 Cal. 27; 70 Am. Dec. 692; and to the numerous authorities in New York and elsewhere; see Voorhees' New York Code, 8th ed., pp. 274, 284b; Vansantvoord's Pleading, p. 454; see Piercy v. Sabin, 10 Cal. 30; 70 Am. Dec. 692. Unworkmanlike manner of doing work. Kendall v. Vallejo, 1 Cal. 371. Want of capacity in a plaintiff to sue. California Steam Nav. Co. v. Wright, 8 Cal. 585. That items in an account are overcharged. Terry v. Sickles, 13 Cal. 427. Abandonment of land need not be pleaded. Willson v. Cleaveland, 30 Cal. 192. Abandonment was affirmatively averred by the defendant in St. John v. Kidd, 26 Cal. 266. Abandonment. Tooms v. Randall, 3 Cal. 438; Hentsch v. Porter, 10 Cal. 555. Another action pending was pleaded in the case of O'Connor v. Blake, 29 Cal. 314; Calaveras County v. Brockway, 30 Cal. 325. Accord and satisfaction. Coles v. Soulsby, 21 Cal. 47; Piercy v. Sabin, 10 Cal. 30; 70 Am. Dec. 692.

39. Pleading discharge in insolvency. Rahm v. Minis, 40 Cal. 421.

40. Pleading equitable titles. It is not the province of the jury, but of the court, to pass upon the equitable title set up in the answer, and it must be sufficiently pleaded to authorize the court to grant a decree which will estop the further prosecution of the action. Downer v. Smith, 24 Cal. 114; Arguello v. Edinger, 10 Cal. 150; Lestrade v. Barth, 19 Cal. 660; Patterson v. Ely, 19 Cal. 28; Estrada v. Murphy, 19 Cal. 248; Meador v. Parsons, 19 Cal. 294; Blum v. Robertson, 24 Cal. 127; Davis v. Davis, 26 Cal. 38; 85 Am. Dec. 157; Clarke v. Huber, 25 Cal. 593.

41. New matter set up in answer. Where the pleadings are verified, every matter of defense not directly responsive in the allegations of that complaint must be alleged in the answer. Terry v. Sickles, 13 Cal. 427. New matter must be specially pleaded; and, in ejectment, a transfer of title by the plaintiff, or a title acquired by defendant pending the action, must be pleaded by supplemental answer, or it cannot be given in evidence. Moss v. Shear, 30 Cal. 468.

42. Introduction of new matter in avoidance. When defendant seeks to introduce into the case a defense not disclosed by the pleadings; when something relied on by defendant which is not put in issue by the plaintiff, this is new matter. Bridges v. Paige 13 Cal. 640; see also Coles v. Soulsby, 21 Cal. 47.

In Piercy v. Sabin, 10 Cal. 27, 70 Am. Dec. 692, the court say: "Under § 437, there are only two classes of defense allowed. The first consists of a simple denial; and the second, of the allegation of new affirmative matter. And as the code has abolished all distinctions in the forms of action, and requires only a simple statement of the facts constituting the cause of action or defense, these two classes of defense must be the same in all cases.

"The plaintiff is required to state in his complaint the facts that constitute his cause of action; and it seems to have been the intention of the code to adopt the true and just rule, that the defendant must either deny the facts as alleged or confess and avoid them. It is certain that where new matter exists it must be stated in the answer. The answer 'shall contain a statement of any new matter constituting a defense.' The language of this section is very clear, that this new matter, whatever it may be, must be set up in the answer. The question then arises, What is 'new matter,' in the contemplation of the code itself? New matter is that which, under the rules of evidence, the defendant must affirmatively establish. If the onus of proof is thrown upon the defendant, the matter to be proved by him is new matter. A defense that concedes that the plaintiff once had a good cause of action, but insists that it no longer exists, involves new matter. 1 Chitty's Pleading, p. 472; Gilbert v. Cram, 12 How. Pr. 455; Radde v. Ruckgaber, 3 Duer, 685; Brazil v. Isham, 12 N. Y. 17.

"If facts which occur subsequently to the date of the original transaction do not constitute new matter, what facts do constitute it? And if any subsequent matter can properly be called 'new matter,' must not all subsequent mat-

ters be equally entitled to the same designation? The language of the code is explicit, that the 'answer shall contain a statement of any new matter constituting a defense.' The code makes no distinction between different classes of new matter. All new matter of defense must be stated in the answer.

"This feature of the code is one of the most beneficial and obvious improvements upon the former system. This classification of defenses is simple, logical, and just. Each party is distinctly apprised of all the allegations to be proven by the other; and each is, therefore, prepared to meet the proofs of his adversary. The plaintiff is compelled to set out every fact necessary to constitute his cause of action, and the defendant every new matter of defense. This is required by the true principles of pleading. 1 Chitty's Pleading, p. 526.

"Two of the leading ends contemplated by the code are simplicity and economy. Adams v. Hackett, 7 Cal. 187. As contributing to the attainment of these ends, it was the intention of the code to require the pleadings to be so framed as not only to apprise the parties of the facts to be proved by them, respectively, but to narrow the proofs upon the trial. The intention is clearly shown, not only by the spirit and general scope of the system, but by particular provisions. The different provisions of the act, when construed together and legitimately applied, lead to this conclusion.

"If we take the theory to be true, that, under our system, the defendant, by simply denying the allegations of the complaint, may give in evidence all matters which could be formerly given in evidence under the general issue, it is difficult to perceive what purpose the code has accomplished by the provisions of § 437. The classification of defenses therein found would be substantially useless. In vain has that section provided that the answer shall contain a statement of any new matter constituting a defense, when nearly all such matter could be given in evidence under a simple denial in the answer. Under the former system, almost every matter in discharge of the action could be given in evidence under the general issue.

"But this theory would seem to be liable to the most substantial objections, and to lead, in practice, to bad results.

"The plaintiff states the facts that constitute his cause of action. He is not required to state conclusions of law. The liability of the defendant is the result or conclusion which the law draws from the facts alleged. If a complaint should only allege that the defendant was indebted to the plaintiff in a named sum, which the defendant refused to pay, the complaint would not state facts sufficient to constitute a cause of action. The complaint must allege the facts that constitute the indebtedness. When, therefore, the facts constituting the cause of action are stated, a simple denial of these facts can properly put in issue only the constituent facts, and not the mere conclusion from the facts. The plaintiff, therefore, comes prepared to prove the facts, as alleged. But if the defendant, under his simple denial, is permitted to prove almost everything in discharge of the action, the plaintiff cannot know how to avoid surprise upon the trial, unless he comes prepared to meet every possible ground that may be taken by the defendant. The result is a great and unnecessary increase of costs in many cases. The plaintiff is not to blame, because he could not know what he had to meet. The defendant is not to blame, because he only wished to deny the allegations of the complaint, and not to introduce any new matter. But the rule would not allow him to do so, in a form that would apprise the plaintiff clearly of all he intended, and no more. The rule made his answer wider than he intended. He simply denied the allegations of the complaint. He could do no less, if he defended at all.

"If it be said that, under § 441, the defendant may plead as many defenses as he may have, and in this way compel the plaintiff to come prepared to meet as many grounds as he would have had to meet under the general issue, we reply, that the argument is not sound. Under the view we have taken, the defendant may protect himself against unnecessary costs by only putting in issue the allegations of the complaint, or by conceding them to be true and setting up new matter, thus narrowing the proofs upon the trial. So under our view, the plaintiff is protected against sham defenses, which may be stricken out on motion. Post, § 453. A sham answer is one good in form, but false in fact, and not pleaded in good faith. It sets up new matter which is false. Nichols v. Jones, 6 How. Pr. 355; Ostrom v. Bixby, 9 How. Pr. 57, 215, 217; Voorhies' Code, p. 177, note B.

"But if it be true that under a simple denial in the answer the defendant may give in evidence any defense formerly admissible under the general issue, the provisions of § 453, allowing sham answers to be stricken out, would possess but very little practical utility. A simple denial could not be treated as a sham answer; and yet all the purposes of vexation could be as well accomplished by it as by separate defenses. So the provisions of § 441, requiring defenses to be separately stated, would be almost useless. As most of these new matters could be given in evidence under the negative answer, they need not be stated at all.

"Anciently, in England, the general issue was seldom pleaded, except when the defendant meant wholly to deny the allegations of the declaration. Matters in discharge of the action were specially pleaded. But by acts of Parliament special matter was allowed to be given in evidence, under the general issue, in certain cases, affecting public officers. The rule was gradually extended to other cases. It was the opinion of Sir William Blackstone that this relaxation of strictness, anciently observed, did not produce the confusion anticipated. This supposition prevailed for a long time, but subsequent experience led to a change of opinion. The result of this change was the adoption of the Reg. Gen. Hil. T., 4 W., p. 4, 'which puts an end to the misapplication and abuse of the general issue, and compels a defendant, in terms, to deny particular parts of the declaration, and to plead specially every matter of defense, not merely consisting of denial of the allegations of the declaration.' 1 Chitty's Pleading, pp. 473, 512.

"These regulations restored the ancient rule, and placed the science of pleading upon its true principle. The framers of the New York code, from which ours is mainly taken, would seem to have intended to accomplish the same result. It has been there held, and seems now to be the well-settled rule, that new matter must be set forth in the answer. Payment, an award, or a former recovery, must be pleaded. Calkins v. Packer, 21 Barb. 275; Brazil v. Isham, 12 N. Y. 17. Such defenses admit the contract as alleged, but avoid it by matters ex post facto.

"The decisions of this court have not been uniform upon this question. The classification of defenses, under § 45 of the Practice Act of 1850, was the same as that under § 437 of our present code. It was held by this court, in several cases, that all new matter must be set up in the answer. Ladd v. Stevenson, 1 Cal. 18; Grogan v. Ruckle, 1 Cal. 195; Walton v. Minturn, 1 Cal. 363; Kendall v. Vallejo, 1 Cal. 372. But in the case of Gavin v. Annan, 2 Cal. 494, it was held that a general denial has the same influence as the general issue at common law, and, under it, accord and satisfaction may be shown. To the same effect was the decision in the case of McLarren v. Spalding, 2 Cal. 510."

The general denial only puts in issue averments made in the complaint. New matter must be specially pleaded, and must be affirmatively established. Glazer v. Clift, 10 Cal. 303. Where a negative allegation is made, preceding an averment by the opposite party of the fact negatived, it constitutes the basis of the issue joined by the subsequent averment, and the matter traverses the negative allegation, and is not new matter. Frisch v. Caler, 21 Cal. 71. As to what is and is not new matter, see also Goddard v. Fulton, 21 Cal.

430; Woodworth v. Knowlton, 22 Cal. 164; Mulford v. Estudillo, 23 Cal. 94; Ayres v. Bensley, 32 Cal. 620; Coles v. Soulsby, 21 Cal. 47.

Where the averments of an answer, although stated in an affirmative form, are, in effect, only a denial of the allegations of the complaint, they do not constitute new matter, within the meaning of our Practice Act. If the answer, either directly or by way of necessary implication, admits the truth of all the essential averments of the complaint which show a cause of action, but sets forth facts from which it results that, notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter; but if the facts averred in the answer only show that some essential allegation of the complaint is untrue, then they are not new matter, but only a traverse. And, generally, as to new matter, see Goddard v. Fulton, 21 Cal. 430.

43. Matter in abatement. Pleas in abatement are not favored, and the party must prove the plea as pleaded. Thompson v. Lyon, 14 Cal. 39. Failure to join. Whitney v. Stark, 8 Cal. 514; 68 Am. Dec. 360. Pendency of prior action. Primm v. Gray, 10 Cal. 522; Thompson v. Lyon, 14 Cal. 39; Calaveras County v. Brockway, 30 Cal. 325; People v. De la Guerra, 24 Cal. 73; O'Connor v. Blake, 29 Cal. 312. Misjoinder or misnomer of parties defendant. Warner v. Wilson, 4 Cal. 310; Dunn v. Tozer, 10 Cal. 170; Rowe v. Bacigalluppi, 21 Cal. 633. Change of venue. Tooms v. Randall, 3 Cal. 438. Non-presentation of claim to administrator. Hentsch v. Porter, 10 Cal. 555. Wherever the defense is that the plaintiff cannot maintain any action at any time, it must be pleaded in bar; but matter which only defeats the present proceeding, and does not show that the plaintiff is forever concluded, must generally be pleaded in abatement. Hentsch v. Porter, 10 Cal. 555. Want of authority in the attorney of record to commence an action, cannot be pleaded in abatement. Turner v. Caruthers, 17 Cal. 431.

44. Answer to enable court to render cross-judgment for defendant for value of personal property. In a suit to recover personal property, in order to enable the defendant to obtain the value of the property on judgment of dismissal against the plaintiff for default, the answer must contain some averment as to the change of possession from defendant to plaintiff. The judgment of return or value is in the nature of a cross-judgment, and must be based upon proper averments. Where plaintiff takes the property, the defendant must claim its return in his answer, to enable the court to give the judgment in the alternative form. Gould v. Scannell, 13 Cal. 430.

45. Objection to pleading, when deemed waived. Improper pleading, how cured. Where an equitable estoppel in pais is not properly pleaded, but on the trial evidence is introduced without objection, in the same manner as if it had been properly pleaded, and a verdict is rendered upon the evidence without objection, the objection to the pleading will be deemed waived, and the case will be considered as though the estoppel had been properly pleaded. Davis v. Davis, 26 Cal. 38; 85 Am. Dec. 157. The introduction of evidence without objection in support of it will not cure the omission of specially pleading a defense. Smith v. Owens, 21 Cal. 11; McComb v. Reed, 28 Cal. 281; 87 Am. Dec. 115.

46. Answers in justification. See Thornburgh v. Hand, 7 Cal. 554; Walker v. Woods, 15 Cal. 66; Glazer v. Clift, 10 Cal. 303; Coles v. Soulsby, 21 Cal. 47, and cases cited; Killey v. Scannell, 12 Cal. 73; Lentz v. Victor, 17 Cal. 271; Knox v. Marshall, 19 Cal. 617; Pico v. Colimas, 32 Cal. 578; Towdy v. Ellis, 22 Cal. 650; Richardson v. Smith, 29 Cal. 529; McComb v. Reed, 28 Cal. 281; 87 Am. Dec. 115.

47. Pleading statute of limitation. See §§ 312–363, ante, and notes, and particularly § 458, post.

48. Answer in ejectment suit. For general matters, see Hawkins v. Reichert, 28 Cal. 534; Schenk v. Evoy, 24 Cal. 113; Blankman v. Vallejo, 15 Cal. 638; Piercy v. Sabin, 10 Cal. 22; 70 Am. Dec. 692; Powell v. Oullahan, 14 Cal. 114; Williams v. Young, 17 Cal. 403; La Rue v. Oppenheimer, 20 Cal. 517; Gregory v. Haynes, 13 Cal. 591; Bodley v. Ferguson, 30 Cal. 511; Smith v. Doe, 15 Cal. 100; Marshall v. Shafter, 32 Cal. 176; Stephens v. Mansfield, 11 Cal. 363; Patterson v. Ely, 19 Cal. 28; McGarvey v. Little, 15 Cal. 31; Guy v. Hanly, 21 Cal. 397; Bell v. Brown, 22 Cal. 671; Ladd v. Stevenson, 1 Cal. 18; Moss v. Shear, 25 Cal. 44; 85 Am. Dec. 94; Burke v. Table Mountain Water Co., 12 Cal. 403; Willson v. Cleaveland, 30 Cal. 192; Busenius v. Coffee, 14 Cal. 91; Lestrade v. Barth, 19 Cal. 660; Estrada v. Murphy, 19 Cal. 248; Meador v. Parsons, 19 Cal. 294; Davis v. Davis, 26 Cal. 38; 85 Am. Dec. 157; Downer v. Smith, 24 Cal. 124; Blum v. Robertson, 24 Cal. 146; see, however, § 379, ante, which materially changes the former law as to ejectment cases.

49. Stating fraud sufficiently in answer. Gushee v. Leavitt, 5 Cal. 160; 63 Am. Dec. 116; Ward v. Packard, 18 Cal. 391; Lamott v. Butler, 18 Cal. 32; Kinney v. Osborne, 14 Cal. 112; King v. Davis, 34 Cal. 100; People v. Board of Supervisors, 27 Cal. 656.

50. Actions for divorce. Conant v. Conant, 10 Cal. 249; 70 Am. Dec. 717; Washburn v. Washburn, 9 Cal. 475; Fox v. Fox, 25 Cal. 587; Bennett v. Bennett, 28 Cal. 599.

51. Verification of inconsistent answer, when perjury. Pleadings will be construed most strongly against the pleader. When a fact which is directly averred in one part of a verified pleading is in another part directly denied, whether it be in the statement of several causes of action in a complaint or of several defenses in an answer, the party verifying it is guilty of perjury. Bell v. Brown, 22 Cal. 671.

§ 437a. Actions to recover insurance. What defendant claiming exemption must set up. In an action to recover upon a contract of insurance wherein the defendant claims exemption from liability upon the ground that, although the proximate cause of the loss was a peril insured against, the loss was remotely caused by or would not have occurred but for a peril excepted in the contract of insurance, the defendant shall in his answer set forth and specify the peril which was the proximate cause of the loss, in what manner the peril excepted contributed to the loss or itself caused the peril insured against, and if he claim that the peril excepted caused the peril insured against, he shall in his answer set forth and specify upon what premises or at what place the peril excepted caused the peril insured against.

Legislation § 437a. Added by Stats. **1907**, p. 836.

§ 438. When counterclaim may be set up. The counterclaim mentioned in the last section [section four hundred and thirty-seven] must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action.

Dismissing action, where counterclaim. Post, § 581.

Omission to set up counterclaim prevents future action thereon. Post, § 439.

Compensated, cross-demands deemed. Post, § 440.

Legislation § 438. Enacted March 11, 1872; based on Practice Act, § 47 (New York Code, § 150), as amended by Stats. 1860, p. 299, which read: "The county [counter]claim mentioned in the last section shall be one existing in favor of the defendant or plaintiff, and against a plaintiff or defendant, between whom a several judgment might be had in the action and arising out of one of the following causes of action: 1. A cause of action arising out of the transaction set forth in the complaint or answer, as the foundation of the plaintiff's claim, or defendant's defense, or connected with the subject of the action. 2. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action."

Counterclaim, defined. This section defines what a counterclaim is, as well as when it may be pleaded; it practically says that a counterclaim is defined to be what the section says may be pleaded as such. Ainsworth v. Bank of California, 119 Cal. 470; 63 Am. St. Rep. 135; 39 L. R. A. 686; 51 Pac. 952. To constitute a counterclaim, the facts must be such as would entitle the defendant to relief against the plaintiff in a separate action; the subject-matter of the answer may be a good defense to the action, but it is not a counterclaim, unless the defendant can recover judgment thereon in an independent action. Belleau v. Thompson, 33 Cal. 495. The term "counterclaim" is broader in its scope and meaning than "set-off," and includes not only demands which are the subject of set-off and recoupment, but also equitable demands; a set-off, prior to the code, could, in most of the states, only be interposed where the demand was certain, or capable of being made certain by calculation, and could not be sustained for unliquidated damages in a court of law. Roberts v. Donovan, 70 Cal. 108; 9 Pac. 180; 11 Pac. 599. The term "set-off" differs from "recoupment," in that it is more properly applicable to demands independent in their nature and origin, while "recoupment" simply implies a cutting down of a demand by deductions arising out of the same transaction; and "counterclaim," as used in the code, includes both recoupment and set-off, and is, strictly speaking, a pleading by which matters arising out of recoupment or set-off are averred. St. Louis Nat. Bank v. Gay, 101 Cal. 286; 35 Pac. 876. A counterclaim must in some way qualify or defeat the judgment to which the plaintiff is otherwise entitled; in a foreclosure suit, a defendant who is personally liable for the debt, or whose land is bound by the lien, may properly introduce an offset; but where his personal liability is not in question, and where he disclaims all interest in the mortgaged premises, he cannot counterclaim against the plaintiff on a note, bond, or covenant. Meyer v. Quiggle, 140 Cal. 495; 74 Pac. 40. To require a finding upon any affirmative matter urged to a counterclaim, it must constitute a defense thereto, and be supported by some evidence. L. Scatena & Co. v. Van Loben Sels, 19 Cal. App. 423; 126 Pac. 187. A demand that does not conform to the provisions of this section is not available as a counterclaim. Harron v. Wilson, 4 Cal. App. 488; 88 Pac. 512. Cross-demands against the estate of a deceased person, are ineffectual as counterclaims, if they are barred by the statute of limitations, and were not presented to the personal representative of the deceased. C. Moore v. Gould, 151 Cal. 723; 91 Pac. 616.

How pleaded. A counterclaim must be denominated as such in the answer, in order to be effective (Carpenter v. Hewel, 67 Cal. 589; 8 Pac. 314; Brannan v. Paty, 58 Cal. 330) and where affirmative matter is designated a counterclaim, the defendant cannot, after the trial, treat the same as a cross-complaint, and take judgment on that theory. McAbee v. Randall, 41 Cal. 136. The form in which the plaintiff sets out his cause of action is not conclusive upon the right of the defendant to set forth his counterclaim in his answer; but if other facts in the same transaction are so connected with those set forth in the complaint as to defeat their legal effect, the defendant may set them up, regardless of the form which the plaintiff may have chosen for presenting his own side of the case. Story & Isham Commercial Co. v. Story, 100 Cal. 30; 34 Pac. 671. New matter constituting a counterclaim is deemed controverted by the plaintiff, and the burden of proof is on the defendant. Herold v. Smith, 34 Cal. 122.

Must exist in favor of defendant and against plaintiff. The test is very simple

by which it may be determined what is a proper subject of counterclaim: it must be a claim existing, and constituting a right of action, in favor of the defendant and against the plaintiff at the time of the commencement of the action. Chase v. Evoy, 58 Cal. 348. A judgment against parties alleged to be beneficially interested in a claim sued upon is not the subject of a counterclaim; and the fact that such parties are insolvent does not change the rule. Duff v. Hobbs, 19 Cal. 646. In an action by an administrator on a promissory note, the defendant cannot counterclaim his alleged share in an indebtedness of the decedent to a corporation formed by them as partners, for which alleged indebtedness no claim was presented against the estate. Reed v. Johnson, 127 Cal. 538; 59 Pac. 986. In an action against an administrator on a promissory note, where the defendant alleged in his answer that his intestate signed the note for the accommodation of a co-maker, and that, prior to the commencement of the action, the plaintiff was indebted to such co-maker, and such co-maker assigned said indebtedness, after the death of the intestate, to another of the co-makers for the benefit of the latter and of the intestate, the facts stated do not constitute a counterclaim. Chase v. Evoy, 58 Cal. 348. A surety cannot set up a counterclaim existing in favor of his principal; nor can a counterclaim against the plaintiff and another person be set up; nor one in favor of the defendant and a stranger to the action; nor one in favor of another person: the test being, whether the defendant could maintain an independent action on the demand. Roberts v. Donovan, 70 Cal. 108; 9 Pac. 180; 11 Pac. 599; Chase v. Evoy, 58 Cal. 340; Stockton Sav. & L. Soc. v. Giddings, 96 Cal. 84; 30 Pac. 1016. Where three defendants are sued on a joint bond, the counterclaim of one against the plaintiff cannot be interposed. Roberts v. Donovan, 70 Cal. 108; 9 Pac. 180; 11 Pac. 599. The counterclaim of one defendant cannot be interposed in an action against two or more. McDonald v. Poole, 113 Cal. 437; 45 Pac. 702.

Demands must be reciprocal. The rights of several parties to plead a counterclaim in defense to an action by one against the others, for a breach of their respective obligations arising out of the facts in controversy are reciprocal; the entire transaction, and the rights resulting therefrom, are to be determined by the court. Story & Isham Commercial Co. v. Story, 100 Cal. 30; 34 Pac. 671. A surety on a note given for the purchase price of property, cannot set up as a counterclaim the breach of the contract of warranty, not being a party to it. Stockton Sav. & L. Soc. v. Giddings, 96 Cal. 84; 31 Am. St. Rep. 181; 21 L. R. A. 406; 30 Pac. 1016.

Partnership demands. A defendant cannot set up a counterclaim against the plaintiff and several other persons as co-partners. Wood v. Brush, 72 Cal. 224; 13 Pac. 627. In an action for breach of a covenant to indemnify the plaintiff against liabilities, the defendant cannot set up, as a counterclaim, demands which were matters of partnership between the parties. Haskell v. Moore, 29 Cal. 437. In an action for goods sold and delivered, partnership claims, unadjusted, which may be the subject of an accounting, do not constitute proper counterclaim. Lane v. Turner, 114 Cal. 396; 46 Pac. 290.

Counterclaim arising out of transaction set forth in the complaint. A matter that does not arise out of the transaction set forth in the complaint, and which is not the subject of the action, does not constitute a counterclaim. James v. Center, 53 Cal. 31; Harron v. Wilson, 4 Cal. App. 488; 88 Pac. 512. A contract is a transaction, but a transaction is not necessarily a contract. Roberts v. Donovan, 70 Cal. 108; 9 Pac. 180; 11 Pac. 599. In ejectment, where the defendant, after denying the ownership of the plaintiff and averring title in himself, sets up a lease to the plaintiff from himself, and claims thereunder rent for use and occupation, no matters arising out of the transaction or connected with the subject of the action being alleged, a proper counterclaim is not stated. Carpenter v. Hewel, 67 Cal. 589; 8 Pac. 314. A counterclaim for indebtedness due cannot be set up in a proceeding in unlawful detainer (Kelly v. Teague, 63 Cal. 68), as neither a counterclaim or cross-complaint is permissible in such actions. Knight v. Black, 19 Cal. App. 518; 126 Pac. 512. In an action to foreclose a mortgage, an averment of the answer, that after the execution thereof, the defendant sold the plaintiff an interest in certain property as part of the consideration for the cancellation of the mortgage, is a valid counterclaim. Richmond v. Lattin, 64 Cal. 273; 30 Pac. 818. In an action by a lessee against the lessor for the foreclosure of a mortgage, rent due from the lessee to the lessor need not be set up as a counterclaim, and the failure so to set it up is not a waiver, there being no connection between the note and the mortgage and the lease of the premises, which were separate and distinct contracts. Brosnan v. Kramer, 135 Cal. 36; 66 Pac. 979. In an action founded on tort, the facts may be of such character that a counterclaim or cross-complaint will lie, on the theory that the tort is a transaction (Glide v. Kayser, 142 Cal. 419; 76 Pac. 50; and see Meyer v. Quiggle, 140 Cal. 495; 74 Pac. 46); but a counterclaim or cross-complaint, founded on damages to real property, cannot be properly pleaded to a complaint for the recovery of personal property. Glide v. Kayser, 142 Cal. 419; 76 Pac. 50. In an action to quiet title, demand for damages for breach of a contract is not a proper subject of counterclaim, where it does not arise out of any transaction set forth in the complaint as a

foundation of the plaintiff's claim, nor have any connection with the land. Meyer v. Quiggle, 140 Cal. 495; 74 Pac. 40. In an action to quiet title brought by one in possession, the answer of the defendant, stating facts essential to a complaint in ejectment, and demanding possession of the premises, does not constitute a counterclaim. Moyle v. Porter, 51 Cal. 639. In an action to foreclose a street assessment, the defendant cannot set up a counterclaim for damages to the land in the prosecution of the work. Engebretsen v. Gay, 158 Cal. 27; 109 Pac. 879. In an action for services in making an abstract of title, the claim of the defendant, that, as the abstract was not made in time, he thereby suffered damages through the loss of a contingent real estate investment, cannot be set up as a counterclaim. Pendleton v. Cline, 85 Cal. 142; 24 Pac. 659. In an action for the balance due on a note secured by pledge, after sale thereof, a counterclaim cannot be set up for damages occasioned by negligence in the use of the pledge, where the defendant consented to such use. Damon v. Waldteufel, 99 Cal. 234; 33 Pac. 903. In an action on a promissory note, the defendant may allege that he is an indorser for accommodation only, and that no demand for payment was made on the maker, or notice of dishonor, etc., given him as an indorser; but he cannot set up the same as a counterclaim, praying it to be adjudged that he is in no wise indebted or liable to the plaintiff on the note. Belleau v. Thompson, 33 Cal. 495. In a proceeding by an heir to procure the payment of an allowed claim, the claim of the executor that the claimant be charged with the value of the use and occupation of property of the estate in his possession, is properly a counterclaim, and must be set up by pleading. Estate of Couts, 100 Cal. 400; 34 Pac. 865. In an action to recover money claimed to be due, the value of the use and occupation of premises held by the plaintiff under a third party, by title adverse to the defendant, cannot be set up as a counterclaim. Quinn v. Smith, 49 Cal. 163. In an action for the restitution of money received by virtue of a judgment of foreclosure, reversed as to some property included in the mortgage, but finally affirmed as to all the other property, a deficiency judgment is a proper subject of counterclaim. Dowdell v. Carpy, 137 Cal. 333; 70 Pac. 167. In an action upon a money demand, founded upon a contract, the defendant cannot file a counterclaim or cross-complaint setting up a mere naked trespass on his property after the commencement of the action. Wangenheim v. Graham, 39 Cal. 169. Where collaterals are lost through the negligence of the pledgee, he is answerable for the loss, and the pledgor may set up a counterclaim for the loss, in an action upon the principal debt. Hawley Bros. Hardware Co. v. Brownstone, 123 Cal. 643; 56 Pac. 468. Where, in practice, the rebates of half the commissions on shipments made by the defendant to the plaintiff were paid at the end of each year, only such rebates on commissions due at the end of any year which expires before the commencement of the action are the proper subject of a counterclaim. L. Scatena & Co. v. Van Loben Sels, 19 Cal. App. 423; 126 Pac. 187.

Action arising upon contract. Where the claim of the plaintiff arises on contract, the defendant may counterclaim any cause arising upon a contract that existed at the commencement of the action. Stoddard v. Treadwell, 26 Cal. 294. While a counterclaim sounding in tort cannot be set up as a defense to an action arising upon contract, yet a promise to pay damages for an injury resulting from tort is a matter arising upon contract, and, as such, may be pleaded as a counterclaim to an action founded upon contract. Poly v. Williams, 101 Cal. 648; 36 Pac. 102. An action for the breach of a contract to deliver merchandise is an action arising upon contract, and a counterclaim may be set up by the defendant therein for goods sold and delivered. Davis v. Hurgren, 125 Cal. 48; 57 Pac. 684. In an action upon an original contract, a substituted contract, superseding the original, cannot be pleaded as a counterclaim, under the first subdivision of this section; but, the facts showing a cause of action in favor of the defendant, and it being a different contract from that described in the complaint, it may be properly pleaded under the second subdivision. Griswold v. Pieratt, 110 Cal. 259, 42 Pac. 820. Where money advanced to a mortgagee by a mortgagor, with interest thereon, is to be applied in payment of a mortgage if a survey of the mortgaged property is confirmed, but is to be returned with interest if not confirmed, there can be no counterclaim for further interest, in a proceeding to foreclose the mortgage, after the payments and the interest thereon amount to the sum of the mortgage debt, and the survey is confirmed. Coleman v. Commins, 77 Cal. 548; 20 Pac. 77. In an action by a vendor to foreclose agreements for the sale of land, the vendee is entitled to set up, as a counterclaim, an indebtedness due him from the vendor, under a contract, entered into subsequently to the breach of the agreement sued on, whereby the vendor agreed to purchase his equitable interest in the land, and to enforce a vendor's lien therefor. Rogers Development Co. v. Southern California Real Estate Inv. Co., 159 Cal. 735; 35 L. R. A. (N. S.) 543; 115 Pac. 934. In an action founded on contract, the defendant may set up, by way of counterclaim, a cause of action, in his favor, against the plaintiff, for a balance due on an open mutual and current account. Lindsay v. Stewart, 72 Cal. 540; 14 Pac. 516. In an action by an administrator to recover a mortgage debt due the estate, promissory notes, assigned before

maturity, may be set up as a counterclaim by the assignee, although not presented for allowance, if action could be maintained on them at the commencement of the foreclosure suit; but if the notes were assigned after maturity, the assignee takes them subject to all existing equities between the maker and the payee, and they cannot be the subject of a counterclaim, but must be set up as an equitable defense. Lyon v. Petty, 65 Cal. 322; 4 Pac. 103. In an action by a guarantor of rent, to have it decreed what amount was due and unpaid, the lessor may set up, by way of counterclaim, the contract of guaranty and the amount due thereunder, and seek judgment therefor against the plaintiff (McDougald v. Hulet, 132 Cal. 154; 64 Pac. 278); and a prayer for general relief is a sufficient foundation for any relief appropriate to the facts stated. Rogers Development Co. v. Southern California etc. Inv. Co., 159 Cal. 735; 115 Pac. 934. In an action for moneys deposited with the plaintiff, a note secured by a mortgage cannot be set up as a counterclaim or set-off. McKean v. German-American Sav. Bank, 118 Cal. 334; 50 Pac. 656.

Amount of counterclaim. Under the first subdivision, the amount of the counterclaim is of no jurisdictional moment. Griswold v. Pieratt, 110 Cal. 259; 42 Pac. 820. In an action on a contract, another cause of action on a contract, in favor of the defendant, may be set up as a counterclaim, although it does not amount to three hundred dollars. Freeman v. Seitz, 126 Cal. 291; 58 Pac. 690. A counterclaim or set-off of less than three hundred dollars, in an action in the superior court, pleaded as defensive matter, can be properly entertained, and is as much a matter of defense as would be the plea of the payment of a like sum. Freeman v. Seitz, 126 Cal. 291; 58 Pac. 690. An action in a justice's court may be restrained, where the defendant has a counterclaim for more than three hundred dollars, arising out of the transaction upon which the claim is founded, and neither party can secure adequate relief without having the subject of the counterclaim passed upon. Gregory v. Diggs, 113 Cal. 196; 45 Pac. 261.

Complaint suspends limitations on counterclaim. The filing of the original complaint operates to suspend the statute of limitations as to a demand which is the subject of a counterclaim (McDougald v. Hulet, 132 Cal. 154; 64 Pac. 278), if it was not then barred, though, if standing alone, the statute would run against it before the answer is filed. Perkins v. West Coast Lumber Co., 120 Cal. 27; 52 Pac. 118.

Scope and office of counterclaim under the code. See note 89 Am. Dec. 482.

CODE COMMISSIONERS' NOTE. 1. Counterclaim, evidence of. Loss of profits as a counterclaim. Unliquidated damages as counterclaim. Counterclaim, when not set up in answer, evidence thereof, etc. In Stoddard v. Treadwell, 26 Cal. 303–309, Justice Shafter, in a very elaborate opinion upon these subjects says [the code commissioners quote six pages therefrom].

2. **When set-off is allowed, and what set-off may consist of.** A decree, rendered in an action on a bond, and to foreclose a mortgage as security therefor, which, after reciting the amount found due on the bond, directed that the mortgaged premises be sold, and out of the proceeds, the costs and the amount found due on the bond and accruing interest be paid, and the sheriff pay such surplus into court, but that if the proceeds were insufficient to pay the debt, interest, and costs, the sheriff should report the amount of such deficiency or balance, and the plaintiff have execution against the defendants for the deficiency, merges the original debt in such judgment, so far as to make it a certain and liquidated demand, existing at the date when the amount of balance was ascertained by the sheriff, sufficient as a foundation of a right of action or set-off. A cestui que trust, who is insolvent, cannot, in equity, enforce and collect, through his trustee, a judgment against a party who holds a just and valid demand against the cestui que trust, which he has no means of enforcing or collecting if a set-off is denied; and it is unnecessary that the demand sought to be used as a set-off should be in the form of a personal judgment. Hobbs v. Duff, 23 Cal. 596. The next position is, that the rules of set-off are the same in equity as at law. It is true that courts of law and equity follow the same general doctrines on the subject of set-off; but where some equity intervenes, independent of the fact of mutual unconnected debts, courts of equity will take jurisdiction, and determine the matter upon the principles of natural equity. And when the law could not give a proper remedy, as in the case of the insolvency of one of the parties, equity will afford relief. Barbour on Set-off, p. 190; Lindsay v. Jackson, 2 Paige, 581. The demands in this case are judgments, and the aid of a court of equity is invoked because the defendants in one of the judgments are insolvent, and the plaintiff in the other is not the real party in interest, but a trustee for the insolvent defendants in the other judgments. Each of these facts forms a ground for applying to a court of equity, and entitles the plaintiffs to equitable relief. On a complaint filed to set off one judgment or decree against another, the jurisdiction of a court of chancery is more extensive than that of common-law courts. In equity, a set-off in such cases is a matter of right, and not of discretion, and it depends, not upon the statutes of set-off, but upon the equitable jurisdiction of the court over its suitors. Barbour on Set-off, p. 194. And the set-off will be allowed as between the real parties in interest, regardless of a nominal party. O'Connor v. Murphy, 1 H. Bl. 657. A person who holds a claim as a trustee cannot have it set off against a demand due from him in his own right. Fair v. McIver, 16 East, 130. And upon the same principle, we think it clear that a set-off should be made in equity as between the real parties in interest, even though one of the judgments is in the name of a trustee, who holds for the use and benefit of such real parties. Wolf v. Beales, 6 Serg. & R. 242; 9 Am. Dec. 425; Barbour on Set-off, pp. 16, 71–73. In other words, the court will decree a set-off as between the real owners or persons beneficially interested in the several demands. Russell v. Conway, 11 Cal. 93. Another position taken by the appellants is, that Fisher should have pleaded the balance due on the judgment of foreclosure, as a set-off against the damages in the action brought by Wm. R. Duff against him and the Knoxes for a specific performance; and not having done so, the plaintiffs claiming under him are estopped or barred from maintaining this action. If he had so pleaded it in that suit, it would probably have been held that the court could not entertain the defense or allow the set-off in that action, on the same grounds that it was ruled out in the subsequent action of Duff v. Hobbs, 19 Cal. 646. But, independent of that, it is clear that a party does not lose his right to bring a separate action for a demand which he might have pleaded as a set-

off, but neglected to do. Barbour on Set-off, p. 21, Hobbs v. Duff, 23 Cal. 628.

3. **Offsets.** What may be. Action on an appeal bond, in which defendants claim the right to offset the balance of a decree in a foreclosure suit, which they have purchased and now hold against D. and R., and eleven other defendants in that suit, upon the ground that D. and R. are the parties beneficially interested in the claim in suit in this action, and that they and the other eleven defendants in the decree sought to be offset are insolvent. It was decided that the set-off cannot be allowed, as well because of the provisions of this section, which requires a counterclaim to be between parties to the record, between whom a several judgment might be had in the action, as of the provisions of §§ 626 and 666, post, which would require a judgment for the excess to be given against the plaintiff, although, as against him, it is not claimed that defendants have any demand. The matter set up in the answer is not a defense, legal or equitable, in any other sense than as being purely an offset, and, therefore, such matter cannot be relied on as an equitable defense independent of, and beyond the right of, offset given by the code. Duff v. Hobbs, 19 Cal. 646, commenting on, and in some particulars disapproving, Naglee v. Palmer, 7 Cal. 543, and Russell v. Conway, 11 Cal. 93, and citing as authority the cases of Wheeler v. Raymond, 5 Cow. 231; Warner v. Barker, 3 Wend. 400; Spencer v. Babcock, 22 Barb. 326; Ferreira v. Depew, 4 Abb. Pr. 131.

4. **What constitutes an offset.** A claim, to constitute a set-off, must be such that the party pleading it could obtain a several judgment upon it; and a joint debt cannot be made a set-off against a several one. To justify the allowance of a set-off of joint debt due from plaintiff, and another against the individual claim of plaintiff, upon equitable grounds, besides showing that the joint debtors owe a considerable amount, and that their property is encumbered by judgments, mortgages, and attachments, it must also be shown that they are insolvent, or that the defendants are in danger of losing their demand. Howard v. Shores, 20 Cal. 277.

5. **Damages for breach of contract as a counterclaim.** If plaintiff asks, in his complaint, for damages for the breach, on the part of the defendant, of a written contract between the parties, the defendant may interpose in his answer a counterclaim for damages for a breach of the contract by plaintiffs. Dennis v. Belt, 30 Cal. 247.

6. **Counterclaim defined.** A counterclaim is a cause of action in favor of the defendant, upon which he might have sued the plaintiff and obtained affirmative relief, in a separate action. Belleau v. Thompson, 33 Cal. 495.

7. **A joint claim by two persons must not be set up as a counterclaim by the defendant,** but he may amend and aver that the whole interest therein had been transferred to him. Stearns v. Martin, 4 Cal. 229; but if the legal and equitable liabilities on claims of money become vested in or may be urged against one, they may be set off against separate demands, and vice versa. Russell v. Conway, 11 Cal. 101; Collins v. Butler, 14 Cal. 223.

8. **What is necessary to constitute set-off at law.** To authorize a set-off at law, the debts must be between the parties in their own rights, and must be of the same kind and quality, and be clearly ascertained or liquidated; they must be certain and determined debts. Naglee v. Palmer, 7 Cal. 543; see this doubted, however, in Duff v. Hobbs, 19 Cal. 646.

9. **What may be set up as a counterclaim, etc., in suits on contracts.** Plaintiff sues for balance due on a contract for erecting a building, and a small sum for extra work. Defendant seeks to offset a claim for two and one third months' rent lost by him, because of the neglect of plaintiff to finish the building within the time specified in the contract, defendant having at the date of the contract leased the building to responsible tenants, the lease to take effect from the time of its completion, as required under the contract; but it was decided that defendant cannot offset his rents, because the circumstances show that the contract was modified by the parties as to the time for the completion of the building. McGinley v. Hardy, 18 Cal. 115.

10. **Copartnership claims, debts, etc., as set-offs, when.** A party may purchase cross-demands against a partnership, and set them up as a defense to a debt due by him to a partnership. Naglee v. Minturn, 8 Cal. 540; Marye v. Jones, 9 Cal. 335. In a suit to recover damages for breach of a covenant to indemnify plaintiff against liabilities, the defendant cannot set up as a counterclaim demands which were matters of partnership between the parties. Haskell v. Moore, 29 Cal. 437. When partners are sued as factors, their claim for disbursements, commissions, etc., need not be stated in their answer as set-offs. Lubert v. Chauviteau, 3 Cal. 463; 58 Am. Dec. 415.

11. **Equity will enforce set-off, when.** When the parties have mutual demands against each other, which are so situated that it is impossible for the party claiming a set-off to obtain satisfaction of his claim by an ordinary suit at law or in equity, then upon the filing of a bill a court of equity will enforce the equitable set-off. Russell v. Conway, 11 Cal. 93; see also Collins v. Butler, 14 Cal. 227; Hobbs v. Duff, 23 Cal. 596.

12. **Judgments, when set-offs, and how.** When a person seeks to set off judgments in different courts, he must go into the court in which the judgment against himself was recovered. Russell v. Conway, 11 Cal. 101. See also, as to judgments as set-offs, Beckman v. Manlove, 18 Cal. 388; Collins v. Butler, 14 Cal. 227; Porter v. Liscom, 22 Cal. 430; 83 Am. Dec. 76; and particularly Hobbs v. Duff, 23 Cal. 596.

13. **Breach of warranty as counterclaim by way of recoupment.** See Earl v. Bull, 15 Cal. 425.

14. **Set-offs should be specially pleaded.** See Hicks v. Green, 9 Cal. 75; Wallace v. Bear River etc. Mining Co., 18 Cal. 461; Bernard v. Mullot, 1 Cal. 368; Cole v. Swanston, 1 Cal. 51; 52 Am. Dec. 288.

§ 439. When defendant omits to set up counterclaim. If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.

Legislation § 439. 1. Enacted March 11, **1872**, and then read: "If the defendant omit to set up a counterclaim in the cases mentioned in the first subdivision of the last section, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

2. Amendment by Stats. **1901**, p. 134; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 706; the code commissioner saying, "The causes of action, with respect to which the defendant is obliged to assert a counterclaim, are limited to those arising out of the transaction set forth in the complaint."

Effect of failure to set up counterclaim. This section refers to the cause of action provided for in the first subdivision of § 438, ante. Brosnan v. Kramer, 135 Cal. 36; 66 Pac. 979. A defendant may set up new matter in his answer, constituting a counterclaim, and have any affirmative re-

lief to which he may be entitled; but it does not follow therefrom that he is compelled to do so; such a rule might become mischievous in its results, for the defendant might then be wholly unprepared to make out his case for the want of testimony, which, at another time, might be at his command; and while the statute provides that the defendant may set out new matter as a defense in his favor, and obtain affirmative relief, yet it nowhere provides that he shall do it, under a penalty of forfeiture of his claim: he may therefore do it or not, at his option. Ayres v. Bensley, 32 Cal. 620. Damages for deceit in the sale of property must be set up as a counterclaim in an action to recover the purchase-money: an action cannot be maintained therefor, as an independent action, unless brought before the commencement of the action for the purchase-money. Collins v. Townsend, 58 Cal. 608. To be available, a defendant's claim for unliquidated damages, conceding that it is a cross-demand, should be pleaded. Perkins v. West Coast Lumber Co., 5 Cal. App. 674; 48 Pac. 982. The failure to assert a cross-claim when a demand is presented for payment does not involve a waiver of the counterclaim. Stoddard v. Treadwell, 26 Cal. 294. A claim for rents received by a mortgagee for the use of the mortgagor is not barred by a failure to set them up as a counterclaim in an action to foreclose the mortgage. Freeman v. Campbell, 109 Cal. 360; 42 Pac. 35. A claim for money, the proceeds of crops, paid to a mortgagee, under a mistake that he was entitled to such proceeds, which had been assigned by the mortgagor before answer filed in the foreclosure suit, is not so legally connected with the subject of the action as to be barred by failure to plead it as a counterclaim. Gregory v. Clabrough, 129 Cal. 475; 62 Pac. 72.

§ 440. Counterclaim not barred by death or assignment. When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other.

Legislation § 440. 1. Enacted March 11, **1872**; based on Practice Act, § 48, which read: "When cross-demands have existed between persons, under such circumstances, that if one had brought an action against the other, a counterclaim could have been set up, neither shall be deprived of the benefit thereof, by the assignment or death of the other; but the two demands [shall] be deemed compensated, so far as they equal each other." When enacted in 1872, (1) the word "can," before the words "be deprived," was changed from "shall," (2) the word "must" was added before "be deemed," and (3), at the end of the section, this sentence was added: "But a claim existing in favor of the maker of a negotiable instrument and against a holder after maturity, intermediate between the payee and the last holder, is not a cross-demand."

2. Amended by Code Amdts. **1873–74**, p. 300.

Cross-demands must exist. The rights of the parties under this section are mutual. Moore v. Gould, 151 Cal. 723; 91 Pac. 616. The mere existence of cross-demands will not justify a set-off in a court of chancery: there must be some peculiar circumstances, based upon equitable grounds, to warrant the court in interfering; and if there are cross-demands between the parties, of such a nature that, if both were recoverable at law, they would be the subject of a set-off, then, and in such a case, if either of the demands be a matter of equitable jurisdiction, the set-off will be enforced in equity; as, for example, if a legal debt is due to the defendant by the plaintiff, and the plaintiff is the assignee of a legal debt due to a third person from the plaintiff, which has been duly assigned to himself, a court of equity will set off the one against the other, if both debts could properly be the subject of a set-off at law (Naglee v. Palmer, 7 Cal. 543), and will do equity to the defendant, although no offset or quantum meruit is pleaded. Turner v. Fidelity Loan Concern, 2 Cal. App. 122; 83 Pac. 62, 70.

Counterclaim may be set up when two demands are compensated. The demand that may be used to compensate another, under this section, must be such as would constitute the subject-matter of the statutory counterclaim; counterclaims differ from the equitable right of set-off, which requires some peculiar circumstances, based upon equitable grounds, such as fraud, insolvency, or the like, to warrant the interference of the court; both the statutory right and the equitable right, however, are founded on the idea that mutual existing indebtedness, arising out of contracts between parties to the record, creates a compensation or payment of both demands, so far as they equal each other; but, under the code, the two demands must be mutual, and coexist as separate causes of action at the commencement of the action upon the principal demand. Lyon v. Petty, 65 Cal. 322; 4 Pac. 103. Cross-demands, under this section, can be deemed compensated, so far as they equal each other, only under such circumstances as where, if one party should bring an action against another, a counterclaim could be set up. McKean v. German-American Sav. Bank, 118 Cal. 334; 50 Pac. 656. Thus, in an accounting, the defendant is entitled to credit for payments made by him to the plaintiff, and the cross-demands must be deemed

compensated so far as they equal each other. Dillon v. Cross, 5 Cal. App. 766; 91 Pac. 439. Promissory notes of a deceased person, due at the time of his death, but upon which no claims were presented, and upon which action was barred at the time of the commencement of an action by his administrator to foreclose a mortgage held by the deceased, not due at the time of his death, are not subject to counterclaim or set-off; neither constituting a cause of action upon which a counterclaim was maintainable at the commencement of the foreclosure suit, nor constituting such counterclaim at the time of the death of the decedent, the mortgage debt not then being due, and no cause of action existing thereon. Lyon v. Petty, 65 Cal. 322; 4 Pac. 103. A draft drawn by the plaintiff on the defendant, but not presented or paid, creates no cause of action in the defendant, and consequently creates no right of set-off. Wakeman v. Vanderbilt, 3 Cal. 380. Where a vendor owes the vendee a sum sufficient to pay the contract liability, and the one debt can offset the other, the two demands, so far as they equal each other, are deemed compensated, under this section. Williams v. Pratt, 10 Cal. App. 625; 103 Pac. 151.

Effect of death of party. This section relates to the situation of the parties at the time of the commencement of the action; the death of one of the parties to the demand, though before the maturity thereof, does not change their relative rights in pleading a counterclaim, or in compensating the claims so far as they equal each other, provided the set-off is due when the action is commenced. Ainsworth v. Bank of California, 119 Cal. 470; 63 Am. St. Rep. 135; 39 L. R. A. 686; 51 Pac. 952.

Effect of assignment by party. The owner of premises cannot set off a claim for damages, sustained by being compelled to make repairs on certain work done by a contractor, against the assignee of the contractor, where such claim arose after notice of the assignment. First Nat. Bank v. Perris Irrigation Dist., 107 Cal. 55; 40 Pac. 45. One judgment may be set off against another judgment rendered in the same court (Haskins v. Jordan, 123 Cal. 157; 55 Pac. 786); and a judgment in favor of the defendant may be set off pro tanto against a judgment in favor of the plaintiff in the same action; and this right of set-off is not lost by assignment, by the plaintiff, before making the motion to offset (Porter v. Liscom, 22 Cal. 430; 83 Am. Dec. 76); but the assignee of a judgment, to use it as an offset to a judgment against himself, must show that he is the absolute owner of the judgment and holds beneficial control of it. Jones v. Chalfant, 55 Cal. 505. The assignee of a judgment is deemed to have notice of all the matters disclosed by the record in the action in which the judgment was rendered, and therefore takes judgment subject to the right of set-off disclosed in the record. Hobbs v. Duff, 23 Cal. 596. The purchaser and assignee of a judgment, even for a valuable consideration and without notice, takes subject to a right of set-off existing at the time of the assignment. McCabe v. Grey, 20 Cal. 509; Porter v. Liscom, 22 Cal. 430; 83 Am. Dec. 76; St. Louis Nat. Bank v. Gay, 101 Cal. 286; 35 Pac. 876; Haskins v. Jordan, 123 Cal. 157; 55 Pac. 786. The judgment against an assignor of the plaintiff or party beneficially interested cannot be pleaded as a set-off or counterclaim. Duff v. Hobbs, 19 Cal. 646. Where the relation of debtor and creditor exists between the parties, and one becomes vested with a right of action against the other, such right is assignable, and enforceable by the assignee, subject to any defense or counterclaim against the assignor. Watkins v. Glas, 5 Cal. App. 68; 89 Pac. 840.

CODE COMMISSIONERS' NOTE. Vinton v. Crowe, 4 Cal. 309. The last clause is added to the section at the instance of Justice Wallace. Although a party may set up an equitable defense to an action at law, his remedy is not confined to that proceeding. He may let the judgment go at law, and file his bill in equity for relief. Lorraine v. Long, 6 Cal. 453.

§ 441. Answer may contain several grounds of defense. Defendant may answer part and demur to part of complaint. The defendant may set forth by answer as many defenses and counterclaims as he may have. They must be separately stated, and the several defenses must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue.

Legislation § 441. Enacted March 11, 1872; based on Practice Act, § 49 (New York Code, § 150), which had (1) the words "shall each," instead of "must," before "be separately," and (2) the word "shall," instead of "must," before "refer"; but did not have the last sentence.

Defendant may set up all his defenses. That the defendant may set forth as many defenses as he thinks proper, is a right fully recognized, as is also the fact that pleading one defense cannot be held a waiver of another in the same answer, even though inconsistent. Bell v. Brown, 22 Cal. 671; Snipsic Co. v. Smith, 7 Cal. App. 150; 93 Pac. 1035; Harding v. Harding, 148 Cal. 397; 83 Pac. 434; and see McDonald v. Southern California Ry. Co.,

101 Cal. 206; 35 Pac. 643, 646. The defendant may rely on several distinct defenses: he is not concluded by one plea, so long as he has others which go to the whole action (Youngs v. Bell, 4 Cal. 201); nor is he required to elect between defenses. Harding v. Harding, 148 Cal. 397; 83 Pac. 434. If the plaintiff objects to inconsistent defenses, he must move to strike out one or the other, or apply for an order compelling the defendant to elect as to which one he will rely upon. Buhne v. Corbett, 43 Cal. 264; Banta v. Siller, 121 Cal. 414; 53 Pac. 935. Inconsistent defenses and hypothetical pleadings are permitted. Eppinger v. Kendrick, 114 Cal. 620; 46 Pac. 613. The defendant may plead any and all of his defenses, and they may be inconsistent with one another, and the effect of a denial in one defense is not aided by setting up affirmative matter in another. Miles v. Woodward, 115 Cal. 308; 46 Pac. 1076; Shepherd-Teague Co. v. Hermann, 12 Cal. App. 394; 107 Pac. 622. He may set up negative as well as affirmative defenses; and affirmative matter, separately pleaded, does not operate as a waiver or withdrawal of the denial in another portion of the answer. Billings v. Drew, 52 Cal. 565. He may deny that he controlled the instrument causing an accident, and, as a separate defense, may deny that the accident occurred through his negligence, and allege contributory negligence of the plaintiff. Banta v. Siller, 121 Cal. 414; 53 Pac. 935. If a plea or defense, separately pleaded, contain several matters, these should not be repugnant or inconsistent in themselves; but the plea or defense, regarded as an entirety, if otherwise sufficient in form or substance, is not to be defeated or disregarded, merely because it is inconsistent with some other defense. Buhne v. Corbett, 43 Cal. 264. The object of sworn pleadings is to elicit the truth; therefore the answer should be consistent, and not deny in one sentence what is admitted to be true in the next. Hensley v. Tartar, 14 Cal. 508. A statement in one defense cannot be used as evidence upon another issue; to allow such would be to deprive the defendant of the benefit of his denials. McDonald v. Southern California Ry. Co., 101 Cal. 206; 35 Pac. 643, 646. In an action for a statutory penalty for a failure to make and post reports of a mining corporation, the defendant may deny the violation of the statute, and, by separate defense, aver matters in extenuation, excuse, and defense; and the effect of a denial in one defense is not waived by the setting up of affirmative matter in another; and, in such case, it is incumbent upon the plaintiff to prove the defendant's violation of the statute. Miles v. Woodward, 115 Cal. 308; 46 Pac. 1076. Inconsistency between defenses will not justify striking out other defenses. Baker v. Southern California Ry. Co., 106 Cal. 257; 46 Am. St. Rep. 237; 39 Pac. 610; McDonald v. Southern California Ry. Co., 101 Cal. 206; 35 Pac. 643, 646. A denial of the title of the plaintiff, and a separate defense of the statute of limitations, are not inconsistent defenses. Willson v. Cleaveland, 30 Cal. 192.

Right to plead inconsistent defenses. See note 48 L. R. A. 177.

CODE COMMISSIONERS' NOTE. Inconsistent defenses. In Bell v. Brown, 22 Cal. 679, the court say: "The question of inconsistent defenses and hypothetical pleadings under the code has been adjudicated by the courts of other states in numerous cases, and the right of a defendant to set forth as many defenses as he thinks proper is fully recognized, and also that pleading one defense cannot be held a waiver of another in the same answer, even though inconsistent. In Sweet v. Tuttle, 14 N. Y. 465, Mayhew v. Robinson, 10 How. Pr. 162, and Bridge v. Payson, 5 Sandf. 210, a general denial and plea of non-joinder of defendants were united and held good. So in Gardner v. Clark, 21 N. Y. 399, where a plea of performance and a former action pending were joined. So in Doran v. Dinsmore, 20 How. Pr. 503, where a general denial was coupled with a plea of payment. So in Mott v. Burnett, 2 E. D. Smith, 52, it was held that the defendant might deny making the note sued on, allege a set-off, and that one of the makers of the note had been discharged by the holder. In an action to recover personal property it was held the defendant might answer by a general denial, and set up a justification of the taking. Hackley v. Ogmun, 10 How. Pr. 44. In slander, that he may deny the charge and also justify. Ormsby v. Douglas, 5 Duer, 665; Butler v. Wentworth, 17 Barb. 649; Butler v. Wentworth, 9 How. Pr. 282. So, also, that pleas which were not inconsistent under the former practice are good as answers under the code. Lansingh v. Parker, 9 How. Pr. 288. Held, too, that a defendant should never be required to elect between a denial of a material allegation of the complaint and new matter constituting a defense (Hollenbeck v. Clow, 9 How. Pr. 289); and that it was not necessary that the several defenses in an answer should be consistent with each other. Stiles v. Comstock, 9 How. Pr. 48. Also, that denials of allegations in the complaint may be coupled with a defense of the statute of limitations. Ostrom v. Bixby, 9 How. Pr. 57. Held, too, that a defense might be hypothetically predicated upon a fact alleged in the complaint, as an answer after denying that the plaintiff was the owner of the note sued on, averred that if the plaintiff is the owner, he took it with notice of a failure of the consideration. Brown v. Ryckman, 12 How. Pr. 313. Or if the defendants, by their agents, ever issued the certificate of deposit sued on, the same has been paid. Doran v. Dinsmore, 20 How. Pr. 503. Also held that an implied admission in one of the defenses set up in an answer will not conclude or estop the defendant from proving another defense set up in the same answer, as each defense in an answer stands by itself, and an admission in one is not available against the others. Swift v. Kingsley, 24 Barb. 541. In the case of Ketcham v. Zereiga, 1 E. D. Smith, 553, this question was very fully examined, and the right of a defendant to file inconsistent defenses and hypothetical pleadings, under proper circumstances, was fully maintained. In the case of Youngs v. Bell, 4 Cal. 201, the right of a defendant to set up several distinct defenses, and to rely upon all of them in order to put the plaintiff to his proof, was sustained, and it was held that he was not concluded by one plea, so long as he had others which went to the whole action. See also Kidd v. Laird, 15 Cal. 182; 76 Am. Dec. 472. We are aware that there are several decisions, both in our own and other courts, which have laid down contrary views, but the weight of principle and authority is in favor of the rule, that, under proper circumstances, a defendant may set up several defenses in his answer, inconsistent with each other, though

each defense must be consistent with itself. The cases decided by the court of appeals in the state of New York, and reported in Sweet v. Tuttle, 14 N. Y. 465, and Gardner v. Clark, 21 N. Y. 399, seem to have settled the rule in that state. The view we take harmonizes the new code with the well-established principle of the old system of practice. Works on pleading are full of precedents and forms recognizing fully the right of a defendant to file several pleas, which, though they might be inconsistent with each other, were required each to be consistent with itself. Bell v. Brown, 22 Cal. 679; see also Klink v. Cohen, 13 Cal. 623; Uridias v. Morrell, 25 Cal. 31; Willson v. Cleaveland, 30 Cal. 192; Racouillat v. Rene, 32 Cal. 450."

2. Generally. See Mudd v. Thompson, 34 Cal. 46; Carpentier v. Small, 35 Cal. 347; Racouillat v. Rene, 32 Cal. 450.

§ 442. Cross-complaint. Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action.

Original complaint. Ante, §§ 426, 427.

Dismissing action, where cross-complaint. Post, § 581.

Legislation § 442. 1. Added by Code Amdts. 1873–74. p. 301 (changes noted infra).

2. Amendment by Stats. 1901, p. 134; unconstitutional. See note ante, § 5.

3. Amended by Stats. 1907, p. 706.

4. Amended by Stats. 1909, p. 966, adding the final sentence.

5. Amended by Stats. 1915, p. 298, eliding "to the action," after "party" (added in 1907).

Nature and elements. A cross-complaint must state facts sufficient to entitle the pleader to affirmative relief: it cannot be aided by averments in any of the other pleadings, and must fall, unless sustained by its own allegations; like the complaint, it should contain all the requisite facts. Coulthurst v. Coulthurst, 58 Cal. 239; Kreichbaum v. Melton, 49 Cal. 50. A cross-complaint must state a separate and independent cause of action upon a contract, under the second subdivision of § 438, ante, which is subject to the same grounds of demurrer as an original complaint. Harron v. Wilson, 4 Cal. App. 488; 88 Pac. 512. It must stand or fall on its own allegations of facts. Collins v. Bartlett, 44 Cal. 371. To constitute a counterclaim or cross-complaint, the relief sought must, to some extent, defeat, overcome, or affect the plaintiff's cause of action, or lessen, modify, or interfere with the relief to which the plaintiff is entitled. Yorba v. Ward, 109 Cal. 107; 38 Pac. 48; 41 Pac. 793. A cross-complaint is unnecessary where the relief demanded can be had upon the denials and averments of the answer; but it is proper where full relief cannot be given the defendant upon the answer, and it is sought to have the whole controversy between the parties finally adjudicated and settled in one action. Martin v. Molera, 4 Cal. App. 298; 87 Pac. 1104. Neither a counterclaim nor a cross-complaint is permissible in actions of unlawful detainer (Knight v. Black, 19 Cal. App. 518; 126 Pac. 512), and a cross-complaint is not authorized in a justice's court: it is confined to actions in the superior court. Purcell v. Richardson, 164 Cal. 150; 128 Pac. 31.

Permission of the court. The action of the court in overruling the demurrer of new parties brought in by way of cross-complaint may be taken as evidence of its consent to a cross-complaint. Syvertson v. Butler, 3 Cal. App. 345; 85 Pac. 164.

Relief must relate to or depend upon the transaction upon which the action is brought. Any person made a defendant is authorized to set up by cross-complaint his right to affirmative relief, depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates. Lowe v. Superior Court, 165 Cal. 708; 134 Pac. 190. The cause of action set up in the cross-complaint must relate to or depend upon the contract or transaction upon which the plaintiff's action is brought, or affect the property to which it relates; and in an action to foreclose a material-man's lien, a cross-complaint which alleges that the defendant, to avoid litigation, paid to the plaintiff, upon a date prior to that upon which the complaint alleges the contract for the materials was made, a sum of money in excess of what was then due him, and which asks judgment for such excess, is not authorized by this section. Clark v. Taylor, 91 Cal. 552; 27 Pac. 860. In an action for the foreclosure of an equitable mortgage securing a promissory note, the defendant cannot set up, by way of cross-complaint, a cause of action against the plaintiff for the improper levy of an attachment of the property of the defendant, in a prior action instituted by the plaintiff on the note. Clark v. Kelley, 163 Cal. 207; 124 Pac. 846. In an action to enjoin a diversion of water, a cross-complaint, claiming rights in the water

diverted, but which nowhere shows that the defendant owns or holds by right any lands riparian to the stream, and merely avers that he owns several lots, and has possession and control of others, without averring that he possesses or controls them by right, and states that the stream flows through its natural channel, over and across the land of the defendant; without stating that it flows across the lots owned by him, does not state a cause of action or ground of cross-complaint. Silver Creek etc. Water Co. v. Hayes, 113 Cal. 142; 45 Pac. 191. In an action to set aside certain proceedings as to land, to which plaintiff asserts title, the defendant, being a purchaser in possession, may maintain a cross-complaint to quiet his title as against a void and fraudulent deed to the plaintiff. Stephenson v. Deuel, 125 Cal. 656; 58 Pac. 258. In an action to foreclose a street assessment, a cross-complaint cannot be interposed for injuries to the land in the prosecution of the work. Engebretsen v. Gay, 158 Cal. 27; 109 Pac. 879. This section authorizes a cross-complaint for the specific performance of an agreement to convey the premises to defendant, in an action to recover buildings removed from the plaintiff's land. Hall v. Cole, 4 Cal. Unrep. 928; 38 Pac. 894.

Must affect property to which the action relates. This section authorizes a cross-complaint whenever the defendant seeks affirmative relief affecting the property to which the action relates, and seemingly permits, in an action regarding real estate, the assertion of a title independent of and paramount to that of the plaintiff. Taylor v. McLain, 64 Cal. 513; 2 Pac. 399; Martin v. Molera, 4 Cal. App. 298; 87 Pac. 1104. In an action for damages for injuries to personal property, damages for a trespass upon real estate is not a proper subject for cross-complaint, unless connection between the causes of action is shown. Demartin v. Albert, 68 Cal. 277; 9 Pac. 157. A cross-complaint must affect the same property as that affected by the original complaint; a claim for an entirely distinct piece of property or easement, not in any way connected with that described in the original complaint, cannot be set up by cross-complaint. Bulwer Consol. Mining Co. v. Standard Consol. Mining Co., 83 Cal. 589; 23 Pac. 1102. Where the original action relates to and affects two parcels of property, the defendant is entitled to interpose, by cross-complaint, any defense he may have as to either or both, and to ask any affirmative relief necessary and proper. Eureka v. Gates, 120 Cal. 54; 52 Pac. 125. The requisite of connection of the defendant's cause of action with the subject of the plaintiff's action is not defined or restricted by this section; nor is it provided that the affirmative relief sought shall affect only the property to which the plaintiff's action relates: only some connection is required. Stockton Sav. & L. Soc. v. Harrold, 127 Cal. 612; 60 Pac. 165. In ejectment, a cross-complaint as to other land is improper. McFarland v. Matthai, 7 Cal. App. 599; 95 Pac. 179.

Must be served on parties affected. Service of the cross-complaint should be made on the plaintiff; but where no right of his was prejudiced by the omission to serve him, the judgment will not be reversed because of it, especially where all matters of substance charged in the complaint were pleaded affirmatively in the answer, which was served on him, so that he met, in the prosecution of his own action, every issue which would have been tendered to him had he been served also with the cross-complaint. Mackenzie v. Hodgkin, 126 Cal. 591; 77 Am. St. Rep. 209; 59 Pac. 36. It may be served on the plaintiff's attorney (Ritter v. Braash, 11 Cal. App. 258; 104 Pac. 592), and upon either the adverse party or his attorney. Wood v. Johnston, 8 Cal. App. 258; 96 Pac. 508. A cross-complaint affecting the interest of defaulting defendants must be served upon them. Hibernia Sav. & L. Soc. v. Fella, 54 Cal. 598. A party defendant both to the complaint and cross-complaint, in a foreclosure suit, is entitled to service upon him of the cross-complaint, which prays that the defendants, and all persons claiming under them, be barred and foreclosed of all their rights, claim, and equity of redemption, although the cross-complaint does not allege that such defendant claims an interest in the premises. Houghton v. Tibbets, 126 Cal. 57; 58 Pac. 318.

New parties cannot be brought in. Since the amendment of 1907 to this section, new parties cannot be brought into the case by way of cross-complaint. Merchants' Trust Co. v. Bentel, 10 Cal. App. 75; 101 Pac. 31; Clark v. Kelley, 163 Cal. 207; 124 Pac. 846. The defendant in an action to quiet title may, by cross-complaint, bring in whatever parties are necessary to a determination of the controversy; and where the defendant claims under an execution sale of the interest of a beneficiary in possession, for whose benefit the plaintiff holds the legal title, such beneficiary is a proper and necessary party, and may be brought in by the cross-complaint. Winter v. McMillan, 87 Cal. 256; 22 Am. St. Rep. 243; 25 Pac. 407.

Pleading to cross-complaint. The provision of this section, that, where a cross-complaint has been served by the defendant claiming affirmative relief, the party served "may demur or answer thereto as to the original complaint," is an exception to the rule that new matter in avoidance or constituting a defense or counterclaim must be deemed controverted. Moore v. Copp, 119 Cal. 429; 51 Pac. 630. The defense of an action pending does not apply to cross-suits. Helfrich v. Romer, 16 Cal. App. 433; 118 Pac. 458. Matters of affirmative defense and counterclaim are

deemed denied, and this rule is operative, although the defendant erroneously styles the pleading a cross-complaint. Pfister v. Wade, 69 Cal. 133; 10 Pac. 369.

Nature and extent of cross-bills. See note 83 Am. Dec. 251.

Use of cross-complaint to bring in new parties. See note 26 L. R. A. (N. S.) 127.

CHAPTER V.

DEMURRER TO ANSWER.

§ 443. When plaintiff may demur to answer. § 444. Grounds of demurrer.

§ 443. When plaintiff may demur to answer. The plaintiff may within ten days after the service of the answer demur thereto, or to one or more of the several defenses or counterclaims set up therein.

Demurrer to complaint. Ante, § 430.
Service of demurrer. Post, § 465.
Time to demur, extending. Post, § 1054.
Time to answer, when demurrer overruled, begins to run from service of notice of decision. Post, § 476.

Legislation § 443. 1. Enacted March 11, **1872**; based on Practice Act, § 50 (New York Code, § 152), as amended by Stats. 1865–66, p. 702, which read: "When the answer contains matter in avoidance, or a counterclaim, the plaintiff may, within the number of days in which the defendant is by the summons required to answer, to be computed from the time of the service of a copy of such answer, demur to the same for insufficiency, stating therein the grounds of such demurrer; and when the answer contains a cross-complaint, the parties against whom relief is therein demanded may demur or answer thereto within the like period. Sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, or immaterial, may be stricken out, upon motion, upon such terms as the court in its discretion may impose." When enacted in 1872, § 443 read: "The plaintiff may, within the same length of time after service of the answer as the defendant is allowed to answer after service of summons, demur to the answer of the defendant."

2. Amended by Code Amdts. **1873–74**, p. 301, adding the clause, at the end of the section, "or to one or more of the several defenses or counterclaims set up in the answer."

3. Amendment by Stats. **1901**, p. 134; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 706; the code commissioner saying, "The time within which the plaintiff may demur to the answer is more definitely and clearly fixed by the amendment."

Answer and demurrer applicable to original pleading. This section is applicable only to the original pleadings in a cause, and not to pleadings which are amended or presented at the trial, or during its progress: where a complaint is amended at the trial, the court has the same right to exercise its discretion in determining the time within which an answer, or a demurrer thereto, shall be filed, as it has in determining whether it will allow the amended pleading; and its discretion is not abused by refusing time within which the plaintiff shall demur to an amended pleading, where no ground of demurrer appears. Schultz v. McLean, 109 Cal. 437; 42 Pac. 557.

Disposition of demurrer. Where the record does not show that a demurrer to the answer was disposed of, a judgment in favor of the plaintiff is irregular. Huse v. Moore, 20 Cal. 115. The trial of the case while a demurrer to the answer is still pending amounts only to an irregularity not justifying the granting of a new trial. Calderwood v. Tevis, 23 Cal. 335.

Whether a demurrer to a separate defense may be carried back to the complaint where the defendant has also pleaded a general denial. See note 26 L. R. A. (N. S.) 117.

§ 444. Grounds of demurrer. The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counterclaim have been improperly joined, or not separately stated;

2. That the answer does not state facts sufficient to constitute a defense or counterclaim;

3. That the answer is ambiguous;

4. That the answer is unintelligible; or

5. That the answer is uncertain.

Grounds of demurrer. Ante, § 430.

Legislation § 444. 1. Enacted March 11, **1872**.

2. Amendment by Stats. **1901**, p. 134; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 707, (1) adding the words "or not separately stated," at the end of subd. 1; and (2) rearranging subd. 3, and making subds. 4 and 5, the original subd. 3 reading, "That the answer is ambiguous, unintelligible, or uncertain."

Grounds of demurrer. A demurrer may be made to a counterclaim, on the ground that it does not state facts sufficient to sustain it. Bliss v. Sneath, 119 Cal. 526; 51 Pac. 848. In an action to recover personal property, an answer which denies that the plaintiff is the owner of the property is not demurrable upon the ground

that it does not state facts sufficient to constitute a defense. Carman v. Ross, 64 Cal. 249; 29 Pac. 510. An objection to an answer, on the ground that separate defenses are not separately stated, cannot be taken by demurrer: such defect can be reached only by motion to strike out, or by some other appropriate proceeding. Hagely v. Hagely, 68 Cal. 348; 9 Pac. 305. An objection to an answer for uncertainty should be taken by demurrer. Harney v. McLeran, 66 Cal. 34; 4 Pac. 884. An answer is bad for ambiguity, where it is impossible to determine therefrom what portion is intended to constitute a legal defense to the action, and what portion a cross-complaint. O'Connor v. Frasher, 53 Cal. 435. The answer of a sheriff, in an action for damages for seizing goods, claimed by the plaintiff, under a writ of attachment against his vendor, which denies the plaintiff's title, and pleads that the sale to him was pretended, false, and fraudulent, and made with the purpose and intent to hinder, delay and defraud his creditors, is demurrable on account of the general allegation of fraud. Sukeforth v. Lord, 87 Cal. 399; 25 Pac. 497. In an action to determine conflicting claims to state lands, the defendant is practically out of court, where a demurrer is sustained on the ground that the answer does not show that he is entitled to purchase. Ramsey v. Flournoy, 58 Cal. 260. The plaintiff is privileged to take advantage of the insufficiency of the answer by demurrer or by motion for judgment, either of which, if finally successful, is sufficient as a foundation for a judgment. Le Breton v. Stanley Contracting Co., 15 Cal. App. 429; 114 Pac. 1028.

Demurrer must be definite. A demurrer will be disregarded, where it is so indefinite that it is impossible to determine therefrom to what portion of the answer it relates. Carman v. Ross, 64 Cal. 249, 29 Pac. 510. The demurrer must be directed to the whole of the pleading, or to a particular and separate count, or statement of a cause of action or defense: a demurrer to all of the defendant's answer after a certain line and page is insufficient (Locke v. Peters, 65 Cal. 161; 3 Pac. 657); and a demurrer to the whole answer is improper, though good as against a counterclaim, where the answer also contained a denial constituting a valid defense to the action. Eich v. Greeley, 112 Cal. 171; 44 Pac. 483.

Waiver of demurrer. Filing an answer to a cross-complaint waives a demurrer previously filed thereto. Booth v. Chapman, 59 Cal. 149. The failure of the court to pass upon a demurrer to an answer is not an error of which the defendant can complain, where it does not attend the trial, nor object to a trial at the time, and the plaintiff insists upon trying the issues of fact: Fincher v. Malcomson, 96 Cal. 38; 30 Pac. 835; and see McCarthy v. Yale, 39 Cal. 585; Silcox v. Lang, 78 Cal. 118; 20 Pac. 297.

Waiver by failure to demur. Inconsistent defenses are waived, if not objected to by demurrer or motion to strike out. Uridias v. Morrell, 25 Cal. 31; Klink v. Cohen, 13 Cal. 623. An objection to an answer for uncertainty in denial is waived by a failure to demur therefor. Harney v. McLeran, 66 Cal. 34; 4 Pac. 884. An objection that matter alleged does not constitute a counterclaim, and is not recognized by law as a defense, is not waived by a failure to demur, but may be taken at any time. MacDougall v. Maguire, 35 Cal. 274; 95 Am. Dec. 98. A counterclaim barred by the statute of limitations must be specially pleaded to by demurrer on this ground, or it is waived, and a judgment in favor of the counterclaim will be affirmed on appeal, if the record does not show that the statute was relied upon as a defense. Bliss v. Sneath, 119 Cal. 526; 51 Pac. 848.

CODE COMMISSIONERS' NOTE. When inconsistent defenses are set up, the defect must be reached by motion to strike out one of the defenses. If a motion to strike out will not reach or cure the defect, then the objection may be reached by demurrer; and if no objection be taken to the answer on this ground, defendant, on the trial, may rely on any of his defenses, as under the old system. Klink v. Cohen, 13 Cal. 623; affirmed in Uridias v. Morrell, 25 Cal. 37; see also Arnold v. Dimon, 4 Sandf. 680, and cases cited in Van Santvoord's Pleading, p. 287. But a demurrer cannot be stricken out as a sham or irrelevant defense; it can only be disposed of in the usual way. Larco v. Casaneuava, 30 Cal. 560. Where the plaintiff claims that all the denials are bad, if the answer contains no new matter, he may test the sufficiency of the denials by a motion for judgment upon the pleadings, or by motion to strike out the answer on the ground that it is sham and irrelevant. If some of the denials are good, and the others bad, he may move to strike out the latter. Answers consisting of denials, which do not explicitly traverse the material allegations of the complaint, we hold so far sham and irrelevant within the meaning of the statute. Gay v. Winter, 34 Cal. 161; see also People v. McCumber, 18 N. Y. 315; 72 Am. Dec. 515. Though certain defenses, by way of set-off, are pleaded in the answer in a very informal and inartificial manner, yet, if the facts showing that they constitute valid claims against the plaintiff are sufficiently stated, the defense ought not to be struck out. Wallace v. Bear River etc. Mining Co., 18 Cal. 461. An answer without a verification to a complaint, duly verified, may be stricken out on motion, and judgment asked as upon a default. Drum v. Whiting, 9 Cal. 422. The motion in this case to strike out the answers, because denying on information and belief, was properly overruled. Comerford v. Dupuy, 17 Cal. 308. A verified answer, which in any part contains a distinct denial of a fact material to plaintiff's recovery, cannot, no matter how defective it may be, be treated as a nullity, so as to entitle plaintiff to judgment on the pleadings. Ghirardelli v. McDermott, 22 Cal. 539. When plaintiff moves an affidavit to strike out a defense as "sham," the defendant can defeat the motion by making affidavit that his defense is made in good faith. Gostorfs v. Taaffe, 18 Cal. 385; Wedderspoon v. Rogers, 32 Cal. 569, and cases there cited. Inability of counsel to obtain defendant's verification in time cannot avail in resisting a motion to strike out, and for judgment after the answer is filed. Drum v. Whiting, 9 Cal. 422. If an answer is filed, raising an issue, and a trial

is had, and witnesses are sworn and examined, and the court takes the case into consideration, it cannot then strike out the answer of the defendant and enter his default. Abbott v. Douglass, 28 Cal. 295. For what have been held to be sham and irrelevant defenses, see McDonald v. Bear River etc. Mining Co., 15 Cal. 145; Weimer v. Lowery, 11 Cal. 104; Bates v. Sierra Nevada etc. Mining Co., 18 Cal. 171. Defendants were sued on a note. The complaint was not verified, but set out the note. Defendants pleaded payment. Plaintiff, on affidavits that the plea was false and pleaded in bad faith, moved to strike out the answer, and for judgment, which was granted. The ruling of the court was right. "Sham" answers and defenses are such as are good in form, but false in fact, and pleaded in bad faith; and that such answers, when consisting of affirmative defenses, should be stricken out. Gostorfs v. Taaffe, 18 Cal. 385.

CHAPTER VI.

VERIFICATION OF PLEADINGS.

§ 446. Verification of pleadings.
§ 447. Copy of written instrument contained in complaint admitted, unless answer is verified.
§ 448. When defense is founded on written instrument set out in answer, its execution admitted, unless denied by plaintiff under oath.
§ 449. Exceptions to rules prescribed by two preceding sections.

§ 446. Verification of pleadings. Every pleading must be subscribed by the party or his attorney; and when the complaint is verified, or when the state, or any officer of the state, in his official capacity, is plaintiff, the answer must be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or, unless an officer of the state, in his official capacity, is defendant. In all cases of a verification of a pleading, the affidavit of the party must state that the same is true of his own knowledge, except as to the matters which are herein stated on his information or belief, and as to those matters that he believes it to be true; and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney has his office, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties. When a corporation is a party, the verification may be made by any officer thereof. When the state, or any county thereof, or any officer of the state, or of any county thereof, in his official capacity is plaintiff, the complaint need not be verified.

Attorneys' power to bind client. Ante, § 283.
Verifying accusation for disbarment of attorney. See ante, § 291.
Petition by creditor to appraise homestead must be verified. See Civ. Code, § 1246.

Legislation § 446. **1.** Enacted March 11, **1872;** based on Practice Act, § 51 (New York Code, § 156), as amended by Stats. 1862, p. 562, Practice Act, § 52 (New York Code, § 157); as amended by Stats. 1862, p. 562, and Practice Act, § 55 (New York Code, § 157). These sections read: "§ 51. Every pleading shall be subscribed by the party, or his attorney, and when the complaint is verified by affidavit, the answer shall be verified also, except as provided in the next section." "§ 52. The verification of the answer, required in the last section, may be omitted when an admission of the truth of the complaint might subject the party to prosecution for felony or misdemeanor." "§ 55. In all cases of the verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true. And where a pleading is verified, it shall be by the affidavit of the party, unless he be absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney, or other person verifying the same. When the pleading is verified by the attorney, or any other person except the party, he shall set forth in the affidavit the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; or when the state, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts, except that in actions prosecuted by the attorney-general in behalf of the state the pleadings need not, in any case, be verified."

2. Amendment by Stats. **1901,** p. 134; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907,** p. 707; the code commissioner saying, "The words 'where the attorney had his office' have been substituted for the words 'where the attorney resides,' and the last sentence has been added."

Necessity for and object of verification. The requirement as to the verification of the pleadings must be complied with, to give validity to acts pursuant thereto. Wall v. Mines, 130 Cal. 27; 62 Pac. 386. The object of the verification is to insure good faith in the averments of the party. Patterson v. Ely, 19 Cal. 28; Silcox v. Lang, 78 Cal. 118; 20 Pac. 297. The proper practice, where the answer is unverified, is

to interpose a motion to strike from the files, for judgment on the pleadings, or for judgment for want of answer. Hearst v. Hart, 128 Cal. 327; 60 Pac. 846; and see Drum v. Whiting, 9 Cal. 422; McCullough v. Clark, 41 Cal. 298. Upon the filing of an amended complaint, the averments of the original cannot be used to disprove those of the amended complaint, although by the verification of the original the plaintiff makes the statements his own. Johnson v. Powers, 65 Cal. 179; 3 Pac. 625.

Pleadings which must be verified. A petition for habeas corpus must be verified. Ex parte Walpole, 84 Cal. 584; 24 Pac. 308. Exhibits consisting of pleadings and proceedings in an action brought in the name of the United States need no further verification than the certificate of the clerk of the circuit court of the United States. Ely v. Frisbie, 17 Cal. 250. This section applies only to the verification of pleadings: a claim of lien is not a pleading. Parke & Lacy Co. v. Inter Nos Oil etc. Co., 147 Cal. 490; 82 Pac. 51.

When answer must be verified. In an action on a promissory note, where the complaint is verified, a sworn answer is necessary. Brooks v. Chilton, 6 Cal. 640. An answer without a verification may be stricken out on motion, where the complaint is duly verified. Drum v. Whiting, 9 Cal. 422. But where the answer is verified, and denies a single fact material to a recovery by the plaintiff, it cannot be treated as a nullity. Ghirardelli v. McDermott, 22 Cal. 539. In condemnation proceedings brought in the name of a county, the answer need not be verified. Monterey County v. Cushing, 83 Cal. 507; 23 Pac. 700; San Francisco v. Itsell, 80 Cal. 57; 22 Pac. 74. Correcting the answer, in regard to paging and numbering pleadings, to conform with a rule of the court, does not modify or change its denials or averments so as to require verification, and, when the answer is refiled by leave of court, it cannot be stricken out. Buell v. Beckwith, 59 Cal. 480.

Waiver of verification. A waiver of the verification of the answer, where the complaint is verified, does not admit the sufficiency of the answer, nor dispense with the necessity of a specific denial. Harney v. Porter, 62 Cal. 511. A plaintiff will be held to have waived all objection to the verification, by a failure to except to it at the proper time, and will not be allowed to raise the point for the first time on appeal. McCullough v. Clark, 41 Cal. 298; San Francisco v. Itsell, 80 Cal. 57; 22 Pac. 74.

Sufficiency of verification. The code does not require the defendant, when the answer is verified, to state in the affidavit that he has heard the foregoing answer read, and knows the contents thereof: the matters stated on information or belief, required by the code, are used in opposition to the rest of the answer, that is, to the matters stated positively. Fleming v. Wells, 65 Cal. 336; 4 Pac. 197. A verification is sufficient, which states that the party has read the foregoing petition, and is acquainted with the contents thereof, and the same is true, of his own knowledge and belief: the words "and belief" are mere surplusage. Seattle Coal etc. Co. v. Thomas, 57 Cal. 197. A statement in the verification, that "the matters set forth in the foregoing answer are true," is the equivalent of a statement that "the foregoing answer is true." Fleming v. Wells, 65 Cal. 336; 4 Pac. 197. A verification, that the foregoing complaint is true, of his own knowledge, but not containing the statement that he has read the complaint, or heard the complaint read, and knows the contents thereof, is sufficient (Patterson v. Ely, 19 Cal. 28; Fleming v. Wells, 65 Cal. 336; 4 Pac. 197); as is also a verification, although not in the exact language of the statute, stating "that the foregoing answer is true, of this defendant's own knowledge, except as to the matters therein stated to be upon the information and belief of defendants, and as to those matters he, this defendant, believes the same to be true." Ely v. Frisbie, 17 Cal. 250; Patterson v. Ely, 19 Cal. 28; Kirk v. Rhoades, 46 Cal. 398.

Verification upon information and belief. The verification of a petition in insolvency, upon information and belief, is sufficient, though the statute does not prescribe the form of the verification, since, where there are several creditors having several debts, some of the matters must necessarily be stated upon the information and belief of each of the affiants. Wright v. Cohn, 88 Cal. 328; 26 Pac. 600. In an accusation to disbar an attorney, a verification, by affidavit made upon the information and belief of a person, without explanation why it was not made by one of the informants, and without stating any other reason why he makes it, is insufficient. In re Hotchkiss, 58 Cal. 39. If, in the body of an answer, no fact is stated upon information and belief, the verification is a positive affirmance of the truth of the allegations of the answer. Christopher v. Condogeorge, 128 Cal. 581; 61 Pac. 174; Patterson v. Ely, 19 Cal. 28.

Verification by one co-party. A verification by one co-plaintiff or co-defendant is a sufficient verification. Patterson v. Ely, 19 Cal. 28; Claiborne v. Castle, 98 Cal. 30; 32 Pac. 807; Butterfield v. Graves, 138 Cal. 155; 71 Pac. 510. Where there is but one defendant, and the record states that the answer was verified, it will be inferred therefrom that the verification was by such defendant. Roberts v. Eldred, 73 Cal. 394; 15 Pac. 16.

Where corporation is party. The verification of a petition by a corporation, signed by one who therein states that he

is the vice-president of the corporation, is sufficient. Alvord v. Spring Valley Gold Co., 106 Cal. 574; 40 Pac. 27.

Verification by attorney. An attorney or other person can only verify by reason of the existence of one of these conditions, viz., 1. The absence of the party from the county where the attorney has his office; 2. The inability of the party, from some other cause, to verify it; and 3. That the facts are within the knowledge of the attorney or other person verifying the same; hence, under the third condition, an attorney or other person must have personal knowledge of the facts, and it follows, necessarily, that he must verify from such knowledge, and not from information and belief (Silcox v. Lang, 78 Cal. 118; 20 Pac. 297; Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445; 71 Pac. 498); and the affidavit of an attorney, which does not state that the facts are within his knowledge, but merely that the facts are more fully known to him than to the defendants, is insufficient, under this third condition. Silcox v. Lang, 78 Cal. 118; 20 Pac. 297. A verification by an attorney, setting forth the fact that he is a resident of the county, and that plaintiffs are absent from such county, is sufficient to authorize the verification: it gains no additional force by the addition, that it is for that reason that it is made by the attorney. Stephens v. Parrish, 83 Cal. 561; 23 Pac. 797.

Verification at trial. Where the complaint is verified, it is not error to permit the defendant to verify his answer on the day of trial, unless it is shown that the plaintiff is thereby taken by surprise. Angier v. Masterson, 6 Cal. 61. Where the court refused to permit the answers to be verified, and struck them out without notice, when the action came to trial, more than six months after they were filed, and after depositions had been taken, there was error and an abuse of discretion. Lattimer v. Ryan, 20 Cal. 628. Where, by mistake, a copy of a verified answer was filed, and no objection was raised thereto until the close of the plaintiff's evidence, there was such an abuse of discretion in the court in refusing to permit the answer to be verified and filed as to require a reversal of the judgment. Arrington v. Tupper, 10 Cal. 464.

Who may take jurat. A county recorder, having authority to take an affidavit to be used in any court of justice, has authority to take a jurat, which is, in form and substance, an affidavit (Pfeiffer v. Riehn, 13 Cal. 643); and the district attorney, also, has authority to take a verification of the answer. Haile v. Smith, 128 Cal. 415; 60 Pac. 1032.

Pleading must be signed. By the provisions of this section, every pleading must be subscribed by the plaintiff or his attorney; hence, all pleadings must be in writing or printed: the party is precluded from making any oral pleading whatever. People v. Superior Court, 114 Cal. 466; 46 Pac. 383. Thus, a stipulation, entered in the minutes, waiving the plea of the statute of limitations set up in the answer, does not amount to an amendment of the answer so as to render a finding on such issue unnecessary. Spreckels v. Ord, 72 Cal. 86; 13 Pac. 158. An attorney in fact, who is not an attorney at law, cannot sign his name to the complaint, for his principal, as "plaintiff's attorney": an action so begun is void. Dixey v. Pollock, 8 Cal. 570. Where the attorney's name is printed, instead of written, at the end of the complaint, the judgment is not thereby rendered void or erroneous. Hancock v. Bowman, 49 Cal. 413. Where the court allowed an attorney to insert an omitted signature to an amended complaint to which an answer had been filed, the defendant is not entitled as of right to demur or to answer anew. Smith v. Dorn, 96 Cal. 73; 30 Pac. 1024. Where an attachment was issued on a complaint, made out on a printed form, and the blanks were filled in by the clerk of the court at the request of the plaintiff, but no name was signed to it until the next day, and after other attachments were issued on the same property, when it was signed by the clerk, with the name of the plaintiff's attorney, the action of the clerk, though not correct, is merely an irregularity. Dixey v Pollock, 8 Cal. 570.

Manner and sufficiency of verification of pleading by corporation. See note Ann. Cas. 1913A, 212.

CODE COMMISSIONERS' NOTE. The provisions of § 2 of an act relating to pleadings in behalf of the state, or officers thereof, have been carried into the preceding section. Stats. 1864, p. 261.

1. **What is a sufficient verification.** Where, in ejectment, the verification to the complaint, made by one of the plaintiffs, is, that "the foregoing complaint is true of his own knowledge, except as to the matters therein stated on the information and belief of the plaintiffs, and as to the matters he believes it to be true," the verification, though it does not follow the precise form of the statute, yet is sufficient, although the person making the oath does not state that he has read the complaint, or heard the complaint read, and knows the contents thereof. Copies of the pleadings and proceedings in an action in the United States circuit court, which were attached to an answer as exhibits, need no further verification than what arises from the averment in the answer, that they are such copies; no distinct verification of them is requisite; were it otherwise, the certificate of the United States circuit court is sufficient. Ely v. Frisbie, 17 Cal. 250. If the pleading does not contain a statement of any matter on information and belief, there need be no expression of belief in the affidavit as to any such matter. If he avers matters positively, the verification will be sufficient if his affidavit states that the pleading is true of his own knowledge: if he aver matter "upon information and belief," or "upon information or belief," the verification will be sufficient if his affidavit states that as to the matters thus averred he believes the pleading to be true. The mere observance of the precise letter of the statute is not required. It was not necessary that the verification should have been made by both of the plaintiffs. The affidavit of one of them was sufficient. Patterson

v. Ely, 19 Cal. 28. Attorney of plaintiff, being a notary public, may attest the verification of the complaint. Kuhland v. Sedgwick, 17 Cal. 123.

2. What is accomplished by verification. Objections to verification when made, etc. By verification of the complaint the plaintiff can require a sworn denial, and thus prevent the defendant from interposing a general denial in suits on promissory notes or bills of exchange. Brooks v. Chilton, 6 Cal. 640. Objection to the want of verification of a complaint, where the same is required by the code, must be taken either before answer or with answer. The filing of an answer is a waiver of the objection. Greenfield v. Steamer Gunnell, 6 Cal. 69. An attorney in fact, who is not an attorney at law, cannot sign his name to a complaint for his principal as "plaintiff's attorney," and an action so attempted to be commenced is void, as began without authority by an entire stranger to the plaintiff. Dixey v. Pollock, 8 Cal. 570; see Willson v. Cleaveland, 30 Cal. 192. An answer to a verified complaint must be verified, or it will be stricken out on motion, and an application for a judgment as upon default may be made at the same time; but the answer need not be verified when the defendant would be excused from testifying as a witness to the truth of any matter denied by such answer. Drum v. Whiting, 9 Cal. 422.

3. At what times verification may be made. To a complaint verified, the defendant filed a copy of the original verified answer by mistake; depositions were taken under the pleading, and subsequently went to trial. After the close of the plaintiff's evidence, his counsel then for the first time brought the mistake to the notice of the court by moving for judgment by default. Held: that the court should even then have allowed the defendant to have verified his answer. Arrington v. Tupper, 10 Cal. 464; see also Lattimer v. Ryan, 20 Cal. 628. When the complaint is verified, it is no error to allow the defendant to verify his answer before trial, unless such would act as a surprise to the plaintiff. Angier v. Masterson, 6 Cal. 61.

§ 447. Copy of written instrument contained in complaint admitted, unless answer is verified.

When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified.

Denial of written instrument under oath. See post, § 887.

Legislation § 447. Enacted March 11, **1872**; based on Practice Act, § 53, which had (1) the word "contained" instead of "contains" and (2) the words "shall be" instead of "are."

Verification of answer where action is on written instrument. The genuineness and the due execution of an instrument are regarded as admitted, where a copy of the instrument is attached to the complaint and the answer is not verified (Horn v. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569; Board of Supervisors v. Bird, 31 Cal. 66; Corcoran v. Doll, 32 Cal. 82; Burnett v. Stearns, 33 Cal. 468; Brown v. Weldon, 71 Cal. 393; 12 Pac. 280; Waldrip v. Black, 74 Cal. 409; 16 Pac. 226; Ward v. Clay, 82 Cal. 502; 23 Pac. 50, 227; Bank of Shasta v. Boyd, 99 Cal. 604; 34 Pac. 337; County Bank v. Greenberg, 127 Cal. 26; 59 Pac. 139; Hearst v. Hart, 128 Cal. 327; 60 Pac. 846; Cutten v. Pearsall, 146 Cal. 690; 81 Pac. 25); and this admission covers the whole tenor and effect of the instrument (Burnett v. Stearns, 33 Cal. 468; Ward v. Clay, 82 Cal. 502; 23 Pac. 50, 227); but, in an action against the maker of a note, the indorsement thereon is not admitted by a failure to deny it under oath. Grogan v. Ruckle, 1 Cal. 193; Youngs v. Bell, 4 Cal. 201; Hastings v. Dollarhide, 18 Cal. 390; Mahe v. Reynolds, 38 Cal. 560. The representative of the estate of a person whose signature appears on a bond sued on need not deny on oath its execution by the deceased, in order to prevent its being considered as admitted: the statute does not extend to any others than those who are alleged to have signed the instrument, who are supposed to know the genuineness of their own signatures, and it would be unreasonable to suppose that the representatives of the deceased party possess the same knowledge. Heath v. Lent, 1 Cal. 410. In an action upon a note and mortgage, the terms of the promise sought to be enforced, including the kind of money to be paid, must be ascertained and determined from an inspection and construction of the note; but where the note is set out in the complaint, and its execution is not denied in the answer, a finding upon these matters, whether it agrees or disagrees with the terms of the note, is wholly nugatory. Burnett v. Stearns, 33 Cal. 468. Where the answer fails to deny under oath the genuineness and due execution of the note of a corporation, it is not necessary to prove that the secretary and president of the corporation, who signed the same, were empowered by the corporation so to do. Smith v. Eureka Flour Mills Co., 6 Cal. 1.

CODE COMMISSIONERS' NOTE. The genuineness and due execution of a note, a copy of which is incorporated in the complaint, is admitted, if the answer be not verified. Horn v. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569; Kinney v. Osborne, 14 Cal. 113; see also Corcoran v. Doll, 32 Cal. 83; Burnett v. Stearns, 33 Cal. 473. And if a copy of a bond be set out in the complaint, an answer denying its execution must be verified, or else the execution is deemed admitted. Sacramento County v. Bird, 31 Cal. 66. In a suit brought against the maker of a promissory note, by a special indorsee, the plaintiff must prove the genuineness of the indorsement, although the defendant has not denied the same under oath. Grogan v. Ruckle, 1 Cal. 158; citing also Hardman v. Chamberlin, Morris (Iowa), 104; see also Youngs v. Bell, 4 Cal. 201. It is clear that this section does not extend to any other parties than those who are alleged to have signed the instrument. Where an instrument is alleged in the complaint to have been executed by the intestate, it is not necessary that his administrator should deny the signature of the intestate on oath. It must be proved. Heath v. Lent, 1 Cal. 410.

§ 448. When defense is founded on written instrument set out in answer, its execution admitted, unless denied by plaintiff under oath. When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant.

Legislation § 448. **1.** Enacted March 11, **1872**; based on Practice Act, § 54, as amended by Stats. 1865–66, p. 702, which read: "When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted unless the plaintiff file with the clerk, five days before the commencement of the term at which the action is to be tried, an affidavit denying the same; provided, that the due execution of the instrument shall not be deemed to be admitted by a failure to controvert the same on oath, as prescribed in this and the last preceding section, unless the party controverting the same is, upon demand, permitted to inspect the original before filing such answer." When § 448 was enacted in 1872, (1) the words "shall be" were changed to "are," and (2) the proviso was stricken out.

2. Amended by Code Amdts. **1873–74**, p. 301.

Execution and genuineness of instrument admitted, unless denied under oath by plaintiff. The genuineness and the due execution of an instrument, pleaded in the answer, are admitted by the failure to file an affidavit of denial. Sloan v. Diggins, 49 Cal. 38; Clark v. Child, 66 Cal. 87; 4 Pac. 1058; Rosenthal v. Merced Bank, 110 Cal. 198; 42 Pac. 640; Cordano v. Wright, 159 Cal. 610; Ann. Cas. 1912C, 1044; 115 Pac. 227. The admission is, that the contract is what it purports on its face to be, and that the matters cited in it are true, and that it was executed and delivered by the parties who signed it, and in the capacity in which they appear to have acted. Sloan v. Diggins, 49 Cal. 38. By "genuineness" is meant nothing more than that the instrument is not spurious, counterfeit, or of different import, on its face, from the one executed, but that it is the identical instrument executed by the party. Moore v. Copp, 119 Cal. 429; 51 Pac. 630. An instrument is genuine which is in fact what it purports to be; and it is executed, only when the parties thereto have signed, sealed, and delivered it in the mode prescribed by law. Sloan v. Diggins, 49 Cal. 38. The execution of a written instrument includes its delivery. Clark v. Child, 66 Cal. 87; 4 Pac. 1058. It is not necessary to establish the authority of an agent or partner purporting to sign the names of the plaintiffs to the instrument. Knight v. Whitmore, 125 Cal. 198; 57 Pac. 891. The effect of the admission of the genuineness and the due execution of the instrument, pleaded by the defendant, and not denied, is to avoid the necessity of proof of its genuineness and due execution. Carpenter v. Shinners, 108 Cal. 359; 41 Pac. 473; Knight v. Whitmore, 125 Cal. 198; 57 Pac. 891; Newsom v. Woollacott, 5 Cal. App. 722; 91 Pac. 347; California Packers Co. v. Merritt Fruit Co., 6 Cal. App. 507; 92 Pac. 509. The section applies only to the parties to the instrument, and not to strangers thereto (Marx v. Raley, 6 Cal. App. 479; 92 Pac. 519); it applies to a written contract set up in the answer (Reynolds v. Pennsylvania Oil Co., 150 Cal. 629; 89 Pac. 610), and to a check set forth in the answer (Newsom v. Woollacott, 5 Cal. App. 722; 91 Pac. 347); but not to a letter, pleaded in the answer, which is merely explanatory of a previous letter. Marx v. Raley & Co., 6 Cal. App. 479; 92 Pac. 519. A release set up in the answer is admitted by a failure to deny its execution by affidavit; hence, it must be taken to be what it appears on its face to be. Peterson v. Taylor, 4 Cal. Unrep. 335; 34 Pac. 724; Crowley v. City Railroad Co., 60 Cal. 628; California Packers Co. v. Merritt Fruit Co., 6 Cal. App. 507; 92 Pac. 509; Newsom v. Woollacott, 5 Cal. App. 722; 91 Pac. 347; Clark v. Child, 66 Cal. 87; 4 Pac. 1058.

Defenses admissible on failure to deny execution. Although the genuineness and the execution of an instrument set up in the answer are deemed admitted by a failure to file an affidavit denying it, yet the plaintiff may controvert it by evidence of fraud, mistake, undue influence, compromise, payment, statute of limitations, estoppel, and like defenses; in short, he may, by evidence, controvert the instrument upon any and all grounds, other than its due execution or genuineness. Moore v. Copp, 119 Cal. 429; 51 Pac. 630; Reynolds v. Pennsylvania Oil Co., 150 Cal. 629; 89 Pac. 610. Evidence of mistake, fraud, and the like, may be given to controvert the instrument, although its genuineness and due execution are admitted. Newsom v. Woollacott, 5 Cal. App. 722; 91 Pac. 347; California Packers Co. v. Merritt Fruit Co., 6 Cal. App. 507; 92 Pac. 509. Although the plaintiff did not file an affidavit denying the genuineness and the due execution of an instrument set up in the answer, yet all other affirmative allegations thereof are deemed denied, and the burden of proof is on the defendant to establish them. Clarke v. Fast, 128 Cal. 422; 61 Pac. 72. The affidavit is not evidence, but is only a part of the pleadings (Gernon v. Sisson, 21 Cal. App. 123; 131 Pac. 85); and its terms and legal effect are to be determined from an

inspection of the instrument itself (Newsom v. Woollacott, 5 Cal. App. 722; 91 Pac. 347); it stands as an exponent of the facts therein set out, to be construed by the court, and the conclusions of law are to be deduced therefrom. Carpenter v. Shinners, 108 Cal. 359; 41 Pac. 473. Although an affidavit of the plaintiff, denying the genuineness and the due execution of a note, pleaded in the answer, comes too late, yet he has the right to controvert the note by showing any other matters in confession or avoidance thereof. Myers v. Sierra Valley Stock etc. Ass'n, 122 Cal. 669; 55 Pac. 689. The failure of the plaintiff, in an action to foreclose a mortgage, to file an affidavit denying the genuineness and the due execution of a written instrument, set forth in the answer, purporting to extend the time of payment of the note secured by the mortgage, does not preclude proof by the plaintiff that the extension of time was without consideration. Brooks v. Johnson, 122 Cal. 569; 55 Pac. 423. An admission of the genuineness of a note, not purporting to have been made by the corporation defendant, does not involve an admission that it was a corporation note: it may be shown that it was not authorized by the directors, and was without consideration. Myers v. Sierra Valley etc. Ass'n, 122 Cal. 669; 55 Pac. 689. Where a copy of a deed is annexed to the answer of the defendant, and the plaintiff fails to deny it by affidavit, it is not necessary for the defendant to offer the deed in evidence. Rosenthal v. Merced Bank, 110 Cal. 198; 42 Pac. 640; Rianda v. Watsonville Water etc. Co., 152 Cal. 523; 93 Pac. 79. A will set up in an answer, which is not alleged to have been admitted to probate, is not an instrument upon which any defense or cause of action can be founded; its genuineness and due execution are not admitted by the failure of the plaintiff to deny the same by affidavit. Estate of Christensen, 135 Cal. 674; 68 Pac. 112. Where the defendant sets forth in his answer a written release as a bar to the plaintiff's cause of action, and on the trial introduces evidence showing that such release has never been delivered, he is estopped from claiming the benefit of the admission arising out of the plaintiff's failure to deny by affidavit the genuineness and the due execution of the instrument. Clark v. Child, 66 Cal. 87; 4 Pac. 1058. Where the defendant, in an action upon an alleged joint contract, set up separate contracts for the same matter, the plaintiffs, notwithstanding their failure to file the affidavit required by this section, are not precluded from proving by parol the contract alleged in the complaint. Fox v. Stockton etc. Agricultural Works, 73 Cal. 273; 15 Pac. 430.

New matter as a defense to instrument. While new matter in an answer is deemed controverted without any special replication, and the plaintiff has the right, while not denying the genuineness and the due execution of the instrument set out in the answer, to show other matters in confession or avoidance thereof, yet the court, unless he brings to its attention his purpose to offer such evidence, cannot assume that he desires to make any such defense; and where a motion is made by the defendant to dismiss a petition, on the ground of failure of the petitioner to deny the genuineness and the due execution of an instrument set out in the answer, is not opposed on the ground that the petitioner desires to show that it was not freely entered into, or for an adequate consideration, or that it was superseded by a subsequent agreement, or that its performance was waived, but was opposed on other grounds, the motion is properly granted. Estate of Garcelon, 104 Cal. 570; 43 Am. St. Rep. 134; 32 L. R. A. 595; 38 Pac. 414.

CODE COMMISSIONERS' NOTE. See Ely v. Frisbie, 17 Cal. 250, cited in note 1, § 446, ante.

§ 449. Exceptions to rules prescribed by two preceding sections. But the execution of the instrument mentioned in the two preceding sections, is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is, upon demand, refused an inspection of the original. Such demand must be in writing, served by copy, upon the adverse party or his attorney, and filed with the papers in the case.

Inspection of writings, order for. Post, § 1000.

Legislation § 449. 1. Enacted March 11, **1872**; based on the proviso of Practice Act, § 54, as amended by Stats. 1865–66, p. 702, which read: "Provided, that the due execution of the instrument shall not be deemed to be admitted by a failure to controvert the same on oath, as prescribed in this and the last preceding section, unless the party controverting the same is, upon demand, permitted to inspect the original before filing such answer." When enacted in 1872, § 449 constituted the first paragraph of the present section, except that the word "instrument" was then printed "instruments."

2. Amended by Code Amdts. **1880**, p. 111, adding the last sentence.

CHAPTER VII.

GENERAL RULES OF PLEADING.

§ 452. Pleadings to be liberally construed.
§ 453. Sham and irrelevant answers, etc., may be stricken out.
§ 454. How to state an account in a pleading.
§ 455. Description of real property in a pleading.
§ 456. Judgments, how pleaded.
§ 457. Conditions precedent, how to be pleaded.
§ 458. Statute of limitations, how pleaded.
§ 459. Private statutes, how pleaded.
§ 460. Libel and slander, how stated in complaint.
§ 461. Answer in such cases.
§ 462. Allegations not denied, when to be deemed true. When to be deemed controverted.
§ 463. A material allegation defined.
§ 464. Supplemental complaint and answer.
§ 465. Pleadings subsequent to complaint must be filed and served.

§ 452. Pleadings to be liberally construed. In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

Legislation § 452. Enacted March 11, **1872**; based on Practice Act, § 70 (New York Code, § 159). When enacted in 1872, (1) the word "effect" was changed from "effects," and (2) the word "must" was changed from "shall."

Construction by the court. Pleadings must be construed by the court, as a matter of law: in no case should the construction of pleadings be left to the jury. Tevis v. Hicks, 41 Cal. 123, 127; Taylor v. Middleton, 67 Cal. 656, 657; 8 Pac. 594; 15 Morr. Min. Rep. 284; Glide v. Dwyer, 83 Cal. 477, 479; 23 Pac. 706. This section should be given a liberal construction. Williams v. Pomona Valley Hospital Ass'n, 21 Cal. App. 359; 131 Pac. 888.

Defects not affecting substantial rights. It is a maxim, that the law respects form less than substance (Civ. Code, § 3528); therefore it is the duty of the court, at every stage of the proceedings, to disregard any defect of pleading which does not affect the substantial rights of the parties. Eachus v. Los Angeles, 130 Cal. 492; 80 Am. St. Rep. 147; 62 Pac. 829; Manning v. App Consol. Gold Mining Co., 149 Cal. 35; 84 Pac. 657. A complaint is sufficient, where a substantial cause of action is alleged. Ingraham v. Lyon, 105 Cal. 254; 38 Pac. 892. Grammatical inaccuracies do not vitiate a pleading (In re Ramazzina, 110 Cal. 488; 42 Pac 970); and an allegation of a conclusion of law may be disregarded (Doyle v. Phœnix Ins. Co., 44 Cal. 264); but the pleading should show clearly and affirmatively the relief demanded. Bigelow v. Gove, 7 Cal. 133.

Pleading construed as a whole. The pleading must be construed as a whole. Nevada County etc. Canal Co. v. Kidd, 28 Cal. 673. Its sufficiency is to be determined from its general scope and tenor (Glide v. Dwyer, 83 Cal. 477; 23 Pac. 706; Bates v. Babcock, 95 Cal. 479; 29 Am. St. Rep. 133; 16 L. R. A. 745; 30 Pac. 605; Sprigg v. Barber, 122 Cal. 573; 55 Pac. 419); and every allegation is to be regarded with reference to the context. Alemany v. Petaluma, 38 Cal. 553. It is therefore not permissible to treat an isolated sentence, separated from the context and from other portions of the pleading, as an independent averment, contrary to the manifest intent of the pleader (Farish v. Coon, 40 Cal. 33); but averments contained in a paper, not a part of the pleading, although filed with it, cannot be considered in connection therewith. Kimball v. Union Water Co., 44 Cal. 173; 13 Am. Rep. 157.

Construction against pleader. Gould, in his work on Pleading, p. 141, § 169, says: "The rule is founded, not only upon the presumption that each party's statement is the most favorable to himself, of which his case will admit; but also upon the obviously reasonable principle, that it is incumbent on each pleader, in stating the ground of his action or defense, to explain himself fully and clearly; any ambiguity, uncertainty, or omission in the pleadings, must therefore be at the peril of that party in whose allegations it occurs." The pleader selects the language, and should make himself clear, and where there are two intendments, the pleading will be construed against the pleader; the rule is enforced under the reformed procedure, which requires liberality in the construction of pleadings, where the pleading is reasonably capable of two constructions, one favorable and the other unfavorable to the pleader, and where there is an omission of a fact essential to be pleaded. Woodroof v. Howes, 88 Cal. 184, 198; 26 Pac. 111; Green v. Covillaud, 10 Cal. 317; 70 Am. Dec. 725; Landers v. Bolton, 26 Cal. 393; Castro v. Clarke, 29 Cal. 11, 16; Rogers v. Shannon, 52 Cal. 99; Glide v. Dwyer, 83 Cal. 477; 23 Pac. 706; Silver Creek etc. Water Co. v. Hayes, 113 Cal. 142; 45 Pac. 191. And, in the absence of a special demurrer, where the pleading is capable of different constructions, that which the pleader gives it, or which the court finds necessary to support the action, will be adopted. Ryan v. Jaques, 103 Cal. 280; 37 Pac. 186. The rules of pleading, upon which the statement of the cause of action or defense depends, are founded upon good sense; their object is precision and brevity, which should characterize all pleadings; the pleadings ought to be so drawn that a good issue may be joined thereon, and the court be entitled to give a judgment; it was a rule of the common law, firmly established and

constantly acted upon, that a pleading should be most strongly taken against its author. Estate of Wickersham, 153 Cal. 603; 96 Pac. 311; Evinger v. Moran, 14 Cal. App. 328; 112 Pac. 68. But, however, where the ambiguity has been pointed out by special demurrer, which the court has sustained, on appeal, after refusal to amend, the ambiguity and uncertainty will be resolved against the pleader. McIntyre v. Hauser, 131 Cal. 11; 63 Pac. 69. But this rule will not operate to force a construction that will lead to absurdities, if the pleading is reasonably susceptible of a different interpretation. Marshall v. Shafter, 32 Cal. 176. An interpretation which gives effect is preferred to one that makes void. Civ. Code, § 3541. The interpretation must be reasonable. Civ. Code, § 3542. The rule never requires a pleader to anticipate a defense, or to negative the existence of all other facts whatsoever. Woodroof v. Howes, 88 Cal. 184, 198; 26 Pac. 111; Jaffe v. Lilienthal, 86 Cal. 91; 24 Pac. 835. If, then, the allegation is not susceptible of two meanings, but the question is as to its sufficiency, it will be given the meaning the pleader places on it, if it is reasonably capable of such construction. Moore v. Moore, 56 Cal. 89. The pleading upon which a judgment is founded will be given as favorable an interpretation as its general scope will warrant (Fudickar v. East Riverside Irrigation Dist., 109 Cal. 29; 41 Pac. 1024); and defects in the pleading, consisting of facts appearing by implication only, are cured by verdict or findings necessarily implying the existence of said facts; but this rule does not apply where the findings are contrary to the inference or implication. Hildreth v. Montecito Creek Water Co., 139 Cal. 22; 72 Pac. 395. Where a defect might have been obviated by amendment, and the party proceeds to trial without objecting thereto, he cannot raise the objection for the first time upon appeal. Hill v. Haskin, 51 Cal. 175; Du Bois v. Podgham, 18 Cal. App. 298; 123 Pac. 207.

Facts not alleged will not be assumed. It is an established maxim of jurisprudence, peculiarly applicable to pleadings, that that which does not appear to exist is to be regarded as if it did not exist. Civ. Code, § 3530; Slater v. McAvoy, 123 Cal. 437; 56 Pac. 49; Hildreth v. Montecito Creek Water Co., 139 Cal. 22; 72 Pac. 395. In the construction of a pleading, nothing can be assumed in favor of the pleader which has not been averred (Cogswell v. Bull, 39 Cal. 320; Harris v. Hillegass, 54 Cal. 463; Smith v. Buttner, 90 Cal. 95; 27 Pac. 29); but, on the contrary, agreeably to the maxim just quoted, the court will assume, where a fact is not alleged, that it does not exist (Slater v. McAvoy, 123 Cal. 437, 439; 56 Pac. 49; Hildreth v. Montecito Creek Water Co., 139 Cal. 22; 72 Pac. 395), or that it occurred at a time or place or in a manner to defeat the claim of the pleader. Triscony v. Orr, 49 Cal. 612; Collins v. Townsend, 58 Cal. 608; Hays v. Steiger, 76 Cal. 555; 18 Pac. 670; People v. Wong Wang, 92 Cal. 277; 28 Pac. 270; Krause v. Sacramento, 48 Cal. 221; Benham v. Connor, 113 Cal. 168; 45 Pac. 258; Siskiyou Lumber etc. Co. v. Rostel, 121 Cal. 511, 513; 53 Pac. 1118; Lewiston Turnpike Co. v. Shasta etc. Wagon Road Co., 41 Cal. 562. No intendment can be indulged in aid of a pleading (Callahan v. Loughran, 102 Cal. 476, 482; 36 Pac. 835): whatever facts are necessary to the cause of action must be alleged, or they will be taken as having no existence (Callahan v. Loughran, 102 Cal. 476; 36 Pac. 835; Hildreth v. Montecito Creek Water Co., 139 Cal. 22; 72 Pac. 395); and it will be presumed that every fact that can be proved has been alleged. Gruwell v. Seybolt, 82 Cal. 79; 22 Pac. 938. The court cannot insert any necessary issuable facts in a pleading (Guy v. Washburn, 23 Cal. 111; Moore v. Besse, 30 Cal. 570, 572); and any inference against the pleader, plainly deducible from a failure to allege facts, must be drawn by the court. Chipman v. Emeric, 5 Cal. 49; 63 Am. Dec. 80.

General allegations controlled by those that are specific. General allegations in a pleading are controlled, limited, and modified by particular ones. Hinkley v. Field's Biscuit etc. Co., 91 Cal. 141; 27 Pac. 594; Gruwell v. Seybolt, 82 Cal. 7; 22 Pac. 938. This is in harmony with the maxim, that particular expressions qualify those that are general. Civ. Code, § 3534. But inconsistent allegations nullify one another. Dickinson v. Maguire, 9 Cal. 46.

Dilatory pleas not favored. The party making a dilatory plea relies upon technical law to defeat his adversary: he is therefore held to technical exactness in his pleading. Thompson v. Lyon, 14 Cal. 39, 42.

CODE COMMISSIONERS' NOTE. All pleading is taken most strongly against the pleader (Kashaw v. Kashaw, 3 Cal. 322; Moore v. Besse, 30 Cal. 570; Green v. Covillaud, 10 Cal. 317; 70 Am. Dec. 725); but this rule does not apply where the pleader confesses his pleading is bad, and that it imperfectly and ambiguously expresses his meaning and intent, and therefore appeals to the mercy of the court to be allowed to amend it in furtherance of justice, so as to present his case more clearly. Nevada County etc. Canal Co. v. Kidd, 28 Cal. 684; see also Felch v. Beaudry, 40 Cal. 440. Nor does the rule apply when it would make the pleading absurd, if it will bear any other construction. Marshall v. Shafter, 32 Cal. 176. In construing a pleading, an isolated sentence should not be taken separated from its context, and the effect of an independent averment given to it, unless from the whole pleading such appears to have been the plain intent. Farish v. Coon, 40 Cal. 33. By substantial justice is meant substantial legal justice, to be ascertained and determined by fixed rules and positive statutes, and not the abstract and varying notions of equity which may be entertained by each individual. Stevens v. Ross, 1 Cal. 98; see also Rowe v. Chandler, 1 Cal. 167.

§ 453. Sham and irrelevant answers, etc., may be stricken out. Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose.

Legislation § 453. Enacted March 11, **1872**; based on Practice Act, § 50, as amended by Stats. 1865–66, p. 702, and Practice Act, § 57 (New York Code, § 160). So much of § 50 as relates to the subject read: "Sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, or immaterial, may be stricken out, upon motion, upon such terms as the court in its discretion may impose." And § 57 read: "If irrelevant or redundant matter be inserted in a pleading, it may be stricken out by the court on motion of any person aggrieved thereby."

What is a sham answer. A sham answer is one good in form, but false in fact, and not pleaded in good faith. Piercy v. Sabin, 10 Cal. 22; 70 Am. Dec. 692; Greenbaum v. Turrill, 57 Cal. 285; Gostorfs v. Taaffe, 18 Cal. 385; Wedderspoon v. Rogers, 32 Cal. 569; Continental Building etc. Ass'n v. Boggess, 145 Cal. 30, 34; 78 Pac. 245. A frivolous answer is one that denies no material averment in the complaint and sets up no defense: such an answer entitles the plaintiff to judgment on the pleadings (Hemme v. Hays, 55 Cal. 337); but where the answer is rendered evasive by a mere clerical error, a judgment on the pleadings is not warranted. Raker v. Bucher, 100 Cal. 214; 34 Pac. 654, 849. The code does not change the common-law rule in regard to striking out sham answers: an answer cannot be stricken out upon this ground, where it sets up a sufficient defense (Greenbaum v. Turrill, 57 Cal. 285); as where it traverses all the allegations of the complaint (Brooks v. Chilton, 6 Cal. 640, 642; Abbott v. Douglass, 28 Cal. 295, 297; Fay v. Cobb, 51 Cal. 313, 315), or the greater part thereof (Lybecker v. Murray, 58 Cal. 186); or even one material allegation (Bank of Shasta v. Boyd, 99 Cal. 604; 34 Pac. 337; Toland v. Toland, 123 Cal. 140; 55 Pac. 681; Oroville etc. R. R. Co. v. Supervisors, 37 Cal. 354); but where it raises an issue on immaterial matters only, it may be stricken out. Loveland v. Garner, 74 Cal. 298, 300; 15 Pac. 844. It will be seen, therefore, that it results from the cases, that it is only where a defendant, in bad faith, presents a defense which is manifestly false on its face, or where the answer denies no material allegation of the complaint, or sets up no defense, that the answer may be stricken out: the court will be liberal in the allowance of amendments, where the answer is susceptible of amendment by a statement of known facts, so as to constitute a defense. Burns v. Scoffy, 98 Cal. 271; 33 Pac. 86. A mere inconsistency between the facts alleged and those adduced at the trial does not justify the court in granting the motion to strike out; and the correctness of the order is to be tested by reference to the state of the pleadings at the time it was made. Baker v. Southern California Ry. Co., 106 Cal. 257; 46 Am. St. Rep. 237; 39 Pac. 610. A demurrer, not being a defense, could not, under the Practice Act, be stricken out as sham (Larco v. Casaneuava, 30 Cal. 560, 566); and of course it cannot, under the code, since it only authorizes the striking out of "answers," and not "defenses," as provided in § 50 of the Practice Act. See Davis v. Honey Lake Water Co., 98 Cal. 415; 33 Pac. 270. The court should strike out improper matter from the counterclaim. Bartlett Estate Co. v. Fraser, 11 Cal. App. 373; 105 Pac. 130.

Irrelevant and redundant matter. A pleading should be confined to a simple narrative of such facts as are necessary to constitute a cause of action or defense, and should state the ultimate facts only (Mitchell v. Steelman, 8 Cal. 363), and not probative facts or conclusions of law. California Raisin Growers' Ass'n v. Abbott, 160 Cal. 601; 117 Pac. 767. Irrelevant, immaterial, and evidentiary matter, having no office to fill, should not be inserted in a pleading, nor allowed to encumber the record (Larco v. Casaneuava, 30 Cal. 560, 565; Eich v. Greeley, 112 Cal. 173; 44 Pac. 483; Green v. Palmer, 15 Cal. 414; 76 Am. Dec. 492); and such matter will be stricken out on motion (Coryell v. Cain, 16 Cal. 572; Smith v. Richmond, 19 Cal. 480; Bowen v. Aubrey, 22 Cal. 570; Patterson v. Keystone Mining Co., 30 Cal. 364; Bruck v. Tucker, 42 Cal. 351), as will also irrelevant matter blended with allegations of material facts (Willson v. Cleaveland, 30 Cal. 192); but the court is not bound to strike out matters so blended, where the adverse party is not prejudiced thereby. Sloane v. Southern California Ry. Co., 111 Cal. 668, 684; 32 L. R. A. 193; 44 Pac. 320. Words of description, such as "duly," "wrongfully," and "unlawfully," which tender no issue, and detract from the directness and simplicity of a pleading, will also be stricken out (Miles v. McDermott, 31 Cal. 271), as well as all surplusage (Wheeler v. West, 78 Cal. 95; 20 Pac. 45; Warner v. Steamship Uncle Sam, 9 Cal. 736; Mitchell v. Steelman, 8 Cal. 369; Mora v. Le Roy, 58 Cal. 10; Millan v. Hood, 3 Cal. Unrep. 548; 30 Pac. 1107), and irrelevant matter, not constituting a cause of action or defense (Boggs v. Clark, 37 Cal. 236; Bates v. Sierra Nevada etc. Mining Co., 18 Cal. 171; Weimer v. Lowery, 11 Cal. 104; Silcox v. Lang, 78 Cal. 118; 20 Pac. 297; Barkly v. Copeland, 74 Cal. 1; 5 Am. St. Rep. 413; 15 Pac. 307), and matter of inducement, which adds nothing to the sufficiency of the pleading (Henke v. Eureka Endowment Ass'n, 100 Cal. 429; 34 Pac. 1089; Bremner

v. Leavitt, 109 Cal. 130; 41 Pac. 859); but facts which constitute a necessary part of the pleading, although defectively stated, cannot be reached by the motion. Jackson v. Lebar, 53 Cal. 255; Swain v. Burnette, 76 Cal. 303; 18 Pac. 394; Baker v. Southern California Ry. Co., 106 Cal. 257; 46 Am. St. Rep. 237; 39 Pac. 610; McDermont v. Anaheim Union Water Co., 124 Cal. 112; 56 Pac. 779. The matter to be stricken out must be redundant and irrelevant as to the pleading in which it occurs, not as to a cause of action or defense stated in another pleading. Nevada County etc. Canal Co. v. Kidd, 28 Cal. 673.

Necessity and sufficiency of motion to strike out. Where the facts alleged in a pleading are redundant, the proper remedy is a motion to strike out, and not by demurrer. Henke v. Eureka Endowment Ass'n, 100 Cal. 429; 34 Pac. 1089; Mitchell v. Steelman, 8 Cal. 363. The motion should be specific, and clearly point out the particular matters objected to. People v. Empire Gold etc. Mining Co., 33 Cal. 171. It must not be directed against the whole pleading, but against particular words, clauses, sentences, and allegations. Continental Building etc. Ass'n v. Boggess, 145 Cal. 30; 78 Pac. 245. The court cannot strike out matter of its own motion. Curtis v. Sprague, 41 Cal. 59.

Motion to strike out answer, and hearing thereon. The motion must be made upon notice. Arata v. Tellurium etc. Mining Co., 65 Cal. 340; 4 Pac. 195. If made upon uncontroverted affidavits showing the falsity of the plea and the bad faith of the defendant, it will be stricken out, but where the defendant supports his plea by an affidavit, stating specifically his grounds, he cannot, as a general rule, be deprived of a trial in the ordinary mode. Gostorfs v. Taaffe, 18 Cal. 385. The court cannot dispose of the defendant's answer in a summary way, nor inquire, in advance of the trial, as to the good faith of the defendant in pleading his defense. Fay v. Cobb, 51 Cal. 313. Under no possible circumstances can the court hear oral testimony on the issue of the falsity of the plea, in advance of the trial. Abbott v. Douglass, 28 Cal. 295. The true rule seems to be, that the answer must appear to be sham on its face (Sweetman v. Ramsey, 22 Mont. 323; 56 Pac. 361), or by reference to some matter dehors the record, of which the court may take judicial notice. Edson v. Dillaye, 8 How. Pr. 273; 1 Bac. Abr. 32. All objections to the allegations on the ground that they are sham and irrelevant are waived by introducing evidence. Tynan v. Walker, 35 Cal. 634; 95 Am. Dec. 152; Silvarer v. Hansen, 77 Cal. 579; 20 Pac. 136. Where the name of the attorney of record appears at the foot of an answer, in connection with the name of other counsel, the court, on motion to strike out the answer, will not try the question whether the signature is genuine, or was put there by associate counsel without any express authority. Willson v. Cleaveland, 30 Cal. 192. The action of the court will not be disturbed, except for an abuse of discretion. Clapp v. Vatcher, 9 Cal. App. 462; 99 Pac. 549. A counterclaim cannot be stricken out without notice to the defendant. Curtis v. Sprague, 41 Cal. 55. The correctness of an order striking a special defense from the original answer is to be tested by reference to the state of the pleadings at the time the order was made; and it cannot be supported upon the ground that the defendant subsequently amended his answer by setting up an inconsistent defense: the question is, whether the facts as pleaded would constitute a defense to the cause of action stated in the complaint. Baker v. Southern California Ry. Co., 106 Cal. 257; 46 Am. St. Rep. 237; 39 Pac. 610.

What constitutes frivolous answer. See note 70 Am. Dec. 635.

Striking out answer as sham. See note 72 Am. Dec. 521.

Sham pleadings. See note 113 Am. St. Rep. 639.

CODE COMMISSIONERS' NOTE. 1. Sham answers. See particularly Piercy v. Sabin, 10 Cal. 27; 70 Am. Dec. 692, commented on in note 42 to § 437, ante. A sham answer, said the court, in Piercy v. Sabin, 10 Cal. 27, 70 Am. Dec. 692, was one good in form, but false in fact, and not pleaded in good faith. The same definition, substantially, was given by the court of appeals of New York in the case of the People v. McCumber, 18 N. Y. 315; 72 Am. Dec. 515. It was suggested, however, that the power to strike out should be carefully exercised, and not extended beyond its just limits. "It is a power," said the court, "simply to inquire whether there is in fact any question to be tried, and if there is not, but the defense is a plain fiction, to strike out the fictitious defense. Where a defendant, on a motion to strike out his defense as sham, supports it by an affidavit, stating specially its grounds, he cannot, as a general rule, be deprived of a trial in the ordinary mode—a case for striking out does not exist." Whether the statute applies to any but affirmative defenses, it is unnecessary to determine; but there is no doubt that where affirmative matter is falsely pleaded for the purpose of delay, it should be stricken out. If the defense, however, be bona fide, the affidavit of the defendant to that effect will be a sufficient answer to any attempt to strike it out. Gastorfs v. Taaffe, 18 Cal. 387. When the plaintiff claims that all the denials are bad, if the answer contains no new matter, he may test the sufficiency of the denials by a motion for judgment upon the pleadings, or by motion to strike out the answer, on the ground that it is sham. If some of the denials are deemed good and the others bad, he may move to strike out the latter. This course is authorized under this section. Answers consisting of denials which do not explicitly traverse the material allegations of the complaint, we hold to be so far sham and irrelevant, within the meaning of the statute. People v. McCumber, 18 N. Y. 315; 72 Am. Dec. 515; Gay v. Winter, 34 Cal. 161.

2. Immaterial, redundant, or irrelevant matter. All redundant, immaterial, or irrelevant matter should be stricken out. Bowen v. Aubrey, 22 Cal. 566; Guy v. Washburn, 23 Cal. 111; Willson v. Cleaveland, 30 Cal. 192; Larco v. Casaneuava, 30 Cal. 561; Felch v. Beaudry, 40 Cal. 440.

3. Frivolous defense. An answer by the payor of a note, that the plaintiff is not the lawful

owner or holder of the instrument sued on, when upon its face it runs to him, and which discloses no issuable fact in support of such denial, is simply frivolous. Felch v. Beaudry, 40 Cal. 440. See further sections of this code, relating to complaint, answer, and demurrer.

§ 454. How to state an account in a pleading. It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular.

Exhibiting original account, and delivering copy to adverse party. See post, § 886.

Legislation § 454. 1. Enacted March 11, 1872; based on Practice Act, § 56 (New York Code, § 158). When enacted in 1872, (1) in first line, the words "is not" were changed from "shall not be," and (2) the word "must," before "deliver," was changed from "shall."

2. Amended by Code Amdts. 1880, p. 2.

Purpose and effect of bill of particulars. The object of the bill of particulars is to amplify the pleadings and apprise the adverse party of the specific demand against him. Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371; Ames v. Bell, 5 Cal. App. 1; 89 Pac. 619. The effect of the bill is to restrict the evidence and limit the recovery to the matters set forth therein. Ames v. Bell, 5 Cal. App. 1; 89 Pac. 619; Edelman v. McDonell, 126 Cal. 210; 58 Pac. 528. It becomes a part of the pleading of the party, and he must recover, if at all, on the cause therein stated. Chapman v. Bent, 6 Cal. Unrep. 740; 65 Pac. 959. A defendant can ascertain the items of a claim, under this section. Donegan v. Houston, 5 Cal. App. 626; 90 Pac. 1073. A demand for a copy of the account is the only remedy of a party, who is dissatisfied with the general allegation of indebtedness in the pleading of his adversary. Wise v. Hogan, 77 Cal. 184; 19 Pac. 278; Burns v. Cushing, 96 Cal. 669; 31 Pac. 1124; Rogers v. Duff, 97 Cal. 66; 31 Pac. 836; Farwell v. Murray, 104 Cal. 464; 38 Pac. 199; Pleasant v. Samuels, 114 Cal. 34; 45 Pac. 998; McFarland v. Holcomb, 123 Cal. 84; 55 Pac. 761; Jewell v. Colonial Theater Co., 12 Cal. App. 681; 108 Pac. 527; Aydelotte v. Bloom, 13 Cal. App. 56; 108 Pac. 877. If no bill of particulars is demanded, each item of the account may be proved under the general allegation of the pleading. Knight v. Russ, 77 Cal. 410; 19 Pac. 698; Burns v. Cushing, 96 Cal. 669; 31 Pac. 1124; Tompkins v. Mahoney, 32 Cal. 231; McFarland v. Holcomb, 123 Cal. 84; 55 Pac. 761. In an action for legal services, a bill of particulars may be demanded, though the complaint is not subject to special demurrer for ambiguity and uncertainty. Burns v. Cushing, 96 Cal. 669; 31 Pac. 1124. In an action for services and traveling expenses, any uncertainty as to the sum claimed for either item may be cured by a bill of particulars. Jewell v. Colonial Theater Co., 12 Cal. App. 681; 108 Pac. 527. A mistake in the items of the account, discovered at the trial, does not preclude the party from giving evidence thereof, as the truth of the items is the very point at issue: it is only where the party refuses to furnish any account, after demand in writing, that he is precluded from giving evidence thereof. Graham v. Harmon, 84 Cal. 181; 23 Pac. 1097. This section is applicable to a claim for an aggregate amount for labor done and materials furnished for the construction of a vessel. Jensen v. Dorr, 159 Cal. 742; 116 Pac. 553.

Bill of particulars of account stated. In an action upon a stated account, a party is not authorized, under this section, to demand a bill of particulars of the items of the original account upon which the stated account is based: the stated account is a new contract, and the items of the original account are merged therein (Auzerais v. Naglee, 74 Cal. 60; 15 Pac. 371); but the party is entitled to a copy of the alleged stated account. Coffee v. Williams, 103 Cal. 550; 37 Pac. 504. A complaint in the form of a common count for goods sold and delivered, is sufficient as a statement of a cause of action: the defendant may always exact his statement of the particulars of the account. Salinas Valley Lumber Co. v. Magne-Silica Co., 159 Cal. 182; 112 Pac. 1089.

Further account on order of court. If the bill of particulars is too general, the party cannot ignore it, but should ask for a further account (Providence Tool Co. v. Prader, 32 Cal. 634; 91 Am. Dec. 598); and, when furnished, it supersedes the other. Ames v. Bell, 5 Cal. App. 1; 89 Pac. 619. When the account furnished is adjudged defective, and the court or judge orders a further account, the order must state the particulars in reference to which a further specification is required. Conner v. Hutchinson, 17 Cal. 279. If the bill of particulars furnished under such order is not satisfactory to the party, and he intends to object to the introduction of evidence on the subject, he must obtain an order, previous to the trial, to exclude such evidence. Conner v. Hutchinson, 17 Cal. 279; McCarthy v. Mount Tecarte Land etc. Co., 110 Cal. 687; 43 Pac. 391. An amended bill of particulars may include items of a general account for services not specifically mentioned in previous bills. Ames v. Bell, 5 Cal. App. 1; 89 Pac. 619. Where the court, of its own motion, orders a further

account, it cannot preclude the party from giving evidence, because of his failure so to furnish a further account. Hart v. Speet, 62 Cal. 187.

Waiver of objection to bill of particulars. Objection to a bill of particulars may be waived by delay (Ames v. Bell, 5 Cal. App. 1; 89 Pac. 619); and there is a waiver, by a failure to object to the form or substance of the account furnished, until the commencement of the trial. Dennison v. Smith, 1 Cal. 437. Where a bill of particulars is not so complete as the defendant desires, or is objectionable in any respect, he waives his right to have the plaintiff precluded from giving evidence thereof, if he fails to ask for a further account, or to make any objection to the one delivered. Union Lumber Co. v. Morgan, 162 Cal. 722; 124 Pac. 228.

Amendment of bill of particulars. See note 51 Am. St. Rep. 421.

Bill of particulars in negligence cases. See note 3 Ann. Cas. 161.

CODE COMMISSIONERS' NOTE. The objection that a bill of particulars is not properly verified by the oath of the party comes too late upon the trial. If the bill is not satisfactory to the defendant, either because it is defective in form or in substance, or because it is not verified by the plaintiff, he should immediately return it, or move the court for a further amended bill. Dennison v. Smith, 1 Cal. 437; see also Providence Tool Co. v. Prader, 32 Cal. 634; 91 Am. Dec. 598; Conner v. Hutchinson, 17 Cal. 280. In an action upon a note, defendant, in general terms, without items, set up an account for work and labor, and for money paid, etc. Plaintiff asked for a copy of the account, which was furnished by defendant. Plaintiff gave notice that he would move the court "for a further account of particulars," etc.; and on hearing, the court ordered the same, which defendant supplied. On the trial, plaintiff offered his note, and rested. Defendant offered evidence of the account set up in the answer, to which plaintiff objected, on the ground that "defendant had not furnished an additional bill of particulars," and the court ruled out the evidence. This was an erroneous ruling: first, because the order for a further account was defective, in not stating the particulars, in reference to which a further specification was required; and second, if the bill of particulars, delivered under the order of the court, was not satisfactory, and plaintiff intended to object to any evidence upon the subject, he should have obtained, previous to the trial, an order excluding such evidence. Where a copy of the account sued on, or set forth in the answer, is called for under this section of the code, the items of the account furnished must be stated with as much particularity as the nature of the case admits of; but the law does not require impossibilities; and if the party gives the items as definitely as he can, he does not forfeit his rights because of his inability to comply with a further demand for particulars. Conner v. Hutchinson, 17 Cal. 280. Where the complaint set forth the bill of sale in its precise words, it was held not to be defective in the description of the quantity of the goods sold. A party must be presumed to know what was intended by his own account. Cochran v. Goodman, 3 Cal. 244. If, in an action to recover a certain amount due for legal services, the complaint is in general terms, and the defendant asks for and receives a bill of particulars, he can make no objection to admitting evidence under it. Tompkins v. Mahoney, 32 Cal. 231.

§ 455. Description of real property in a pleading.

In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.

Legislation § 455. Enacted March 11, **1872**; based on Practice Act, § 58, which read: "In an action for the recovery of real property, such property shall be described, with its metes and bounds, in the complaint."

Sufficiency of description of realty. A description by name may be sufficient, where the land is known by a particular name. Hildreth v. White, 66 Cal. 549; 6 Pac. 454. A description of land by name is as good as one by metes and bounds, if it can be rendered certain by evidence; and the fact that the Spanish name of property, when translated into English, is meaningless, does not alter or affect its descriptive quality. Castro v. Gill, 5 Cal. 40; People v. Leet, 23 Cal. 161; Phelan v. Poyoreno, 74 Cal. 448; 13 Pac. 681; 16 Pac. 241. A description is sufficient, where a ranch is designated by name, with the statement that it is bounded by certain misións, and contains six square leagues. More v. Del Valle, 28 Cal. 170. The description of land in a complaint, as being in a certain township, county, and state, and bounded on one side by a certain avenue, and on the other side by the land of a certain person, and on the other two sides by a certain creek, is sufficient. Hihn v. Mangenberg, 89 Cal. 268; 26 Pac. 968; Lawrence v. Davidson, 44 Cal. 177. A description calling for a definite starting-point, the first line being a given distance therefrom to a station fence-post, and all the other lines being described by courses, distances, and monuments, is sufficient. Muir v. Meredith, 82 Cal. 19; 22 Pac. 1080. Where the starting-point in a description is sufficiently definite and certain, and there can be but one such point, this is sufficient, as against an objection that the starting-point is not given. Sherman v. McCarthy, 57 Cal. 507. Where, in the complaint, the lot and block numbers are given, and reference is made to a certain plat of the town, and the street names and distances are given, but reference is made to the caption of the complaint for the name of the county, there is a sufficient description of the premises, and the county is sufficiently indicated. Doll v. Feller, 16 Cal. 432. Where the complaint gives the name of the county where suit is brought, but fails to mention the state, there is no fatal defect. More v. Del Valle, 28 Cal. 170. A description of the premises as being in a certain county and state, giving the number of acres, the commonly known name of the property, and also the distance in a certain direction from a named town, is sufficient. Whitney v. Buckman, 19 Cal.

300. The sufficiency of the description of the premises is a question of fact for the court or jury to determine, where the description does not appear, on the face of the complaint, to be insufficient. Moss v. Shear, 30 Cal. 467. A description giving the starting-point as a certain distance from a government base line, thence east a given distance, thence south to a certain point, thence west to the source of a certain creek, and down said creek to place of beginning, is sufficient. Carpentier v. Grant, 21 Cal. 140. In actions before justices of the peace, strictness of description is not required; and the identification is sufficient, where the premises are described as a tract of land in a certain county, ten miles from a certain town, of a given number of acres, known as part of a certain ranch, on the west side of and bordering a certain creek, and opposite the premises of a certain person. Hernandez v. Simon, 4 Cal. 182.

CODE COMMISSIONERS' NOTE. This section formerly was as follows: "In an action for the recovery of real property, such property shall be described, with its metes and bounds, in the complaint." Foreclosure suits were not controlled by this section (Emeric v. Tams, 6 Cal. 156); and under this section as it then stood, it was held that a complaint describing land by a certain name was as good a description as one by metes and bounds, if it can be rendered sufficiently certain by evidence. Castro v. Gill, 5 Cal. 40; Stanley v. Green, 12 Cal. 148; see also Doll v. Fellers, 16 Cal. 432; Whitney v. Buckman, 19 Cal. 300; Paul v. Silver, 16 Cal. 73; Green v. Palmer, 15 Cal. 411; 76 Am. Dec. 492; Grady v. Early, 18 Cal. 108; Carpentier v. Grant, 21 Cal. 140; Moss v. Shear, 30 Cal. 468. The language of the section, as it now stands, seems to express the general intent of the decisions of our supreme court. For description of real property, see Piercy v. Crandall, 34 Cal. 344.

§ 456. Judgments, how pleaded. In pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction.

Judgment as an estoppel. See post, § 1908.

Legislation § 456. Enacted March 11, **1872**; based on Practice Act, § 59 (New York Code, § 161). When enacted in 1872, (1) the words "court, officer, or board, it is not" were changed from "court or officer of especial jurisdiction, it shall not be," and (2) the word "must" was changed from "shall be bound to."

Jurisdiction of a superior court. A general averment of the jurisdiction of the court that rendered judgment is sufficient (Murdock v. Brooks, 38 Cal. 596), and implies all things essential to jurisdiction. Hibernia Sav. & L. Soc. v. Boyd, 155 Cal. 193; 100 Pac. 239. An allegation, that the plaintiff recovered judgment in the superior court is sufficient. McCutcheon v. Weston, 65 Cal. 37; 2 Pac. 727; Campe v. Lassen, 67 Cal. 139; 7 Pac. 430; Weller v. Dickinson, 93 Cal. 108; 28 Pac. 854; High v. Bank of Commerce, 95 Cal. 386; 29 Am. St. Rep. 121; 30 Pac. 556. An allegation, that the court "adjudged" that the defendant "should pay" to the plaintiff a certain sum, is not a sufficient allegation that the judgment was duly given. Edwards v. Hellings, 99 Cal. 214; 33 Pac. 799. An allegation that an appeal was dismissed by the superior court, if not complying with this section, is cured by an allegation in the answer, that the court made an order that the appeal be dismissed, which said judgment was duly made, duly rendered, and duly given. Moffat v. Greenwalt, 90 Cal. 368; 27 Pac. 296.

Appointment of assignees and receivers. The appointment of an assignee in insolvency is sufficiently alleged by an averment that he was appointed by an order of the proper court "duly given and made." Bull v. Houghton, 65 Cal. 422; 4 Pac. 529. An allegation, that the court duly gave and made an order appointing an assignee on the return-day of notice to the creditors, and a finding that the order was duly given and made, constitute a sufficient averment and finding. Pomeroy v. Gregory, 66 Cal. 572; 6 Pac. 492. An allegation, that the court, by its order duly given, made, and entered, discharged an assignee from all further duty as such, and by another order, then duly given, made, and entered, appointed another assignee, is sufficient to allege jurisdiction to appoint another assignee. Freeman v. Spencer, 128 Cal. 394; 60 Pac. 979. An allegation that the order appointing a receiver was duly made, is equivalent to an allegation that all jurisdictional prerequisites to the appointment existed. Title Insurance etc. Co. v. Grider, 152 Cal. 746; 94 Pac. 601.

Jurisdiction of a probate court. The jurisdiction of a probate court need not be alleged in pleading a judgment of such court, but the judgment may be stated to have been duly given and made. Beans v. Emanuelli, 36 Cal. 117; Wise v. Hogan, 77 Cal. 184; 19 Pac. 278; Smith v. Andrews, 6 Cal. 652. The jurisdiction of the superior court to appoint administrators and executors need not be alleged. Collins v. O'Laverty, 136 Cal. 31; 68 Pac. 327; Judah v. Fredericks, 57 Cal. 389. A defective allegation, that the plaintiff, by order and decree of the court, was duly appointed administrator, and duly qualified as such, is cured by admissions and averments in the answer, recognizing the representative character of the plaintiff as administrator. Kreling v. Kreling, 118 Cal. 413; 50 Pac. 546. An allegation, that letters of administration were issued by the superior court to the plaintiff, who duly qualified as ad-

ministrator, is a sufficient averment of the representative capacity of the plaintiff. McCutcheon v. Weston, 65 Cal. 37; 2 Pac. 727. A complaint averring that a will had been duly probated by the superior court of the county where the deceased resided and owned property at the time of his decease, is a sufficient allegation that the will was admitted to probate by the judgment of the superior court: if the judgment admitting the will to probate is pleaded at all, the adverb "duly" is all that is required. Riddell v. Harrell, 71 Cal. 254; 12 Pac. 67.

Jurisdiction of a justice of the peace. The jurisdiction of a justice of the peace must be affirmatively shown by a party asserting a right under a judgment by such justice. Swain v. Chase, 12 Cal. 283; Rowley v. Howard, 23 Cal. 401; Jolley v. Foltz, 34 Cal. 321. An allegation, in an answer, that a judgment given by a justice of the peace was "duly rendered," is not sufficient: that term is not equivalent to "given or made." Young v. Wright, 52 Cal. 407.

Jurisdiction of a mayor. An allegation, in an action to recover moneys from a city treasurer, that "an order was made and entered by the mayor," removing the defendant from office, is sufficient. Los Angeles v. Mellus, 59 Cal. 444.

Jurisdiction of a city council. An allegation, that a city council "duly passed and adopted" an ordinance, is sufficient (Los Angeles v. Waldron, 65 Cal. 283; 3 Pac. 890); as is also an allegation that a city council duly made and gave its determination to order certain work done (Pacific Paving Co. v. Bolton, 97 Cal. 8; 31 Pac. 625), and an allegation, in an action to enforce the lien of a street assessment, that all the several acts required to be done by said city council, and by said superintendent of streets, has been duly done, made, and performed, in the manner and at the times and in the form required by law, is sufficient. Bituminous Lime Rock etc. Co. v. Fulton, 4 Cal. Unrep. 151, 33 Pac. 1117. Though a complaint alleges that the common council "duly gave and made" its order and resolution ordering certain work to be done, any legal intendment following such allegation is rendered ineffectual by the pleading of a resolution of intention showing that the council never acquired jurisdiction. Crouse v. Barrows, 156 Cal. 154; 103 Pac. 894.

Jurisdiction of a board of supervisors. An allegation that a board of supervisors duly made and passed a resolution of intention to make a street improvement, is sufficient. Buckman v. Hatch, 139 Cal. 53; 72 Pac. 445. An allegation that a contract was signed by the chairman of the board of supervisors, under the authority of the board, and was executed in pursuance of its orders and determinations in that behalf, duly given and made, is sufficient. Babcock v. Goodrich, 47 Cal. 488. An allegation that a board of supervisors duly declared an irrigation district duly organized, is not an averment of the fact or acts required by the legislature to confer jurisdiction on the board, or to constitute the organization of the irrigation district, nor is it an averment that the order, resolution, or declaration of the board of supervisors had been duly given or made. Decker v. Perry, 4 Cal. Unrep. 488; 35 Pac. 1017. An allegation that a board of supervisors duly made and passed a resolution setting aside an assessment for street improvement, and directing the superintendent to issue a new one, is a statement, in legal effect, that everything necessary to be done to give the resolution validity had been done. Williams v. Bergin, 127 Cal. 578; 60 Pac. 164. It is sufficient to aver, substantially, that an order granting a franchise was duly given or made. Gurnsey v. Northern California Power Co., 7 Cal. App. 534; 94 Pac. 858. Although an ordinance is pleaded by implication it is good against a general demurrer. Gurnsey v. Northern California Powder Co., 7 Cal. App. 534; 94 Pac. 858; Lane v. Williams, 156 Cal. 269; 104 Pac. 301.

Pleading of judgments of justices and other inferior officers. See note 27 Am. Dec. 144.

CODE COMMISSIONERS' NOTE. 1. Generally. In this case the certificate states that A. W. Bradford is surrogate of the city and county of New York, and acting clerk of the surrogate's court; that he has compared the transcript of the papers with the original records in the matter of the estate of William Young, and finds the same to be correct, and a true copy of all the proceedings; and that the certificate is in due form of law—in testimony whereof he sets his hand and affixes his seal of office. We do not see what more could be required to authenticate to us the records which the officer certifies. If the papers show upon their face the jurisdiction of the court, it is not necessary that the complaint should aver this jurisdiction; and if it were, then the defect should have been noticed by demurrer, not by motion to exclude, or objection to the admissibility of the transcript. Here it seems the surrogate is judge and clerk of the court. This being so, it was only necessary that the certificate should state the main facts which are made necessary by the acts of Congress to the authentication of the records of a court which has both judge and clerk. Low v. Burrows, 12 Cal. 188. In an action on a note, the answer alleged the discharge in insolvency of defendant. Plaintiff demurred to the answer, on the ground that it did not allege that the note was described, set forth, and included in defendant's schedule. It was decided that, under this section of the code, it was sufficient to allege in the answer that a judgment had been duly rendered, discharging defendant from the demand sued on; and that whether the demand was sufficiently described was matter of evidence, to be determined on the trial, by inspection of the record. Hanscom v. Tower, 17 Cal. 521.

2. Judgments of justices' courts. A person asserting a right under the judgment of a justice must affirmatively show every fact necessary to confer such jurisdiction. Swain v. Chase, 12 Cal. 283.

3. Judgment of a probate court. Where a judgment of the probate court is pleaded, it is unnecessary to allege the facts conferring jurisdiction, but the judgment may be stated to have

been duly rendered. Beans v. Emanuelli, 36 Cal. 117.

4. Judgment of a board. The words "or board" are an addition to the old section. See Himmelman v. Danos, 35 Cal. 448. It was held that a complaint to recover an assessment on a lot in San Francisco for street improvements should show, either by general or special averment, a compliance, by the board of supervisors, with all the steps prescribed by statute to confer jurisdiction upon the board. Himmelman v. Danos, 35 Cal. 448.

§ 457. Conditions precedent, how to be pleaded. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance.

Conditions precedent. See Civ. Code, §§ 1436 et seq.

Legislation § 457. Enacted March 11, 1872; based on Practice Act, § 60 (New York Code, § 162), which (1) had the words "shall not be," instead of "is," before the words "not necessary," and (2) the word "shall," instead of "must," before "establish."

General allegation of performance. An allegation, that the plaintiff did all the work in said contract mentioned, and duly performed, on his part, in every respect, the said work, according to the specifications and terms of the contract, sufficiently avers performance: it is not a statutory averment of performance of conditions precedent. California Improvement Co. v. Reynolds, 123 Cal. 88; 55 Pac. 802; City Street Improvement Co. v. Marysville, 155 Cal. 419; 23 L. R. A. (N. S.) 317; 101 Pac. 308. An allegation, that the plaintiff has fully performed, on his part, all the covenants of the contract, is sufficiently explicit (California Steam Nav. Co. v. Wright, 6 Cal. 258; 65 Am. Dec. 511); and an allegation, that the defendant duly performed all the conditions of the contract on his part to be kept and performed, is sufficient (Griffiths v. Henderson, 49 Cal. 566); as is also an allegation that the plaintiff has performed all and singular his agreements and covenants with the defendant (Moritz v. Lavelle, 77 Cal. 10; 11 Am. St. Rep. 229; 18 Pac. 803); and an averment that the plaintiff has duly performed all of the conditions of said contract to be performed by him to this time. Smith v. Mohn, 87 Cal. 489; 25 Pac. 696. Certain conditions subsequent, the non-performance thereof, matters of defense, and certain negative prohibited acts, need not be pleaded by the plaintiff; but the rule does not extend to the essence of the cause of action. Arnold v. American Ins. Co., 148 Cal. 660; 84 Pac. 182. A complaint that avers a full performance of the contract, is sufficient, in the absence of a special demurrer for uncertainty. Wyman v. Hooker, 2 Cal. App. 36; 83 Pac. 79. It is not necessary to plead specially the facts constituting an estoppel. City Street Improvement Co. v. Marysville, 155 Cal. 419; 23 L. R. A. (N. S.) 317; 101 Pac. 308. This section applies to building contracts. Needham v. Chandler, 8 Cal. App. 124; 96 Pac. 325.

Conditions precedent. Conditions precedent must be pleaded in all cases, excepting those arising out of contract. People v. Holladay, 25 Cal. 300; Cavillaud v. Yale, 3 Cal. 108; 58 Am. Dec. 388; Rogers v. Cody, 8 Cal. 324; Kelly v. Mack, 45 Cal. 303; Laffey v. Kaufman, 134 Cal. 391; 86 Am. St. Rep. 283; 66 Pac. 471. No obligation of a contract is regarded as a condition precedent, unless made so by the express terms of the contract, or by necessary implication; whether the condition is precedent or otherwise, the breach of it does not constitute a defense. Redpath v. Evening Express Co., 4 Cal. App. 361; 88 Pac. 287.

Demand for deed. A vendee is not required to allege demand for a deed from vendor, before commencing suit to recover damages for breach of contract to convey land. Gray v. Dougherty, 25 Cal. 266. An answer alleging a demand, and also alleging that the defendants have duly performed all the requirements of said deed of trust and agreement on their part to be performed as a condition precedent to the sale of the land, is sufficient, as against an objection that no demand in writing is alleged. Meetz v. Mohr, 141 Cal. 667; 75 Pac. 298.

Performance of conditions of policy. An allegation, that all the conditions of said policy were duly performed and kept by the plaintiff, is sufficient (Blasingame v. Home Insurance Co., 75 Cal. 633; 17 Pac. 925); as is also an allegation that the plaintiffs have duly complied with all the terms and conditions of said insurance policy by them to be kept or performed. Richards v. Travelers Ins. Co., 89 Cal. 170; 23 Am. St. Rep. 455; 26 Pac. 762. The plaintiff is required, in his complaint, only to aver the performance of the prescribed conditions; but in case of a promissory warranty that he will do something, an averment of such stipulation, and of its performance, is required. Cowan v. Phenix Ins. Co., 78 Cal. 181; 20 Pac. 408; and see Breedlove v. Norwich Union Fire Ins. Soc., 124 Cal. 164; 56 Pac. 770; Gillon v. Northern Assurance Co., 127 Cal. 480; 59 Pac. 901. Where the policy provided for the production of a certificate of a magistrate, notary, or commissioner, stating that he has examined the circumstances attending

the loss, etc., an allegation that the plaintiff has duly fulfilled all the conditions of such insurance on his part is sufficient. Ferrer v. Home Mutual Ins. Co., 47 Cal. 416. A waiver of payment of premium is admissible, under the general allegation of performance of conditions. Berliner v. Travelers Ins. Co., 121 Cal. 451; 53 Pac. 922. In an action on a policy insuring a building while occupied as a dwelling-house, a failure to allege that the loss occurred while the building was so occupied is fatal (Allen v. Home Insurance Co., 133 Cal. 29; 65 Pac. 138): the allegation of such fact is of the essence of the right to recover, and is not merely a condition precedent. Raulet v. Northwestern National Ins. Co., 157 Cal. 213; 107 Pac. 292.

CODE COMMISSIONERS' NOTE. If the action is on an executory contract, and each party has something to perform before the other can be placed entirely in default, the party seeking to enforce it against the other must aver in his complaint a performance or tender of performance, or a readiness to perform, on his part. Barron v. Frink, 30 Cal. 486; see Mickle v. Sanchez, 1 Cal. 200. An averment that the plaintiff has fully performed, on his part, all conditions of the contract, is an allegation of performance sufficiently explicit under this section. California Steam Nav. Co. v. Wright, 6 Cal. 258; 65 Am. Dec. 511. A general allegation of the performance of conditions precedent, is sufficient in cases of contract, but, in all other cases, the facts showing a performance must be specially pleaded. If an act of the legislature prescribes conditions precedent on the performance of which title to land may be recovered, in pleading such title a performance of all the acts required under the law must be averred. People v. Jackson, 24 Cal. 630; see also, generally, Bensley v. Atwill, 12 Cal. 231; Gibbons v. Scott, 15 Cal. 284; Himmelman v. Danos, 35 Cal. 448. The performance of all conditions which are precedent to the liability of the defendant, whether founded upon a contract or a statute, must be alleged in some form, either general or special. In actions upon contracts, a general allegation of performance of conditions precedent is under this section (§ 457) of the code sufficient. But a general allegation of performance of conditions prescribed by a statute has not been so declared, and is not, therefore, sufficient. Himmelman v. Danos, 35 Cal. 448; citing the cases of Dye v. Dye, 11 Cal. 163; People v. Jackson, 24 Cal. 630.

§ 458. Statute of limitations, how pleaded. In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section —— (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Proeedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred.

Legislation § 458. Enacted March 11, 1872.

Reference to section of statute of limitations. Setting up the statute of limitations by reference to sections of this code, is a sufficient pleading of a prescriptive right. Alhambra Addition Water Co. v. Richardson, 72 Cal. 598; 14 Pac. 379; Churchill v. Louie, 135 Cal. 608; 67 Pac. 1052. The statute of limitations is sufficiently pleaded by reference, in the answer, to the sections of the code. Packard v. Johnson, 2 Cal. Unrep. 365; 4 Pac. 632; Alhambra Addition Water Co. v. Richardson, 72 Cal. 598; 14 Pac. 379; Webber v. Clarke, 74 Cal. 11; 15 Pac. 431; Allen v. Allen, 95 Cal. 184; 16 L. R. A. 646; 30 Pac. 213. The defense of the statute of limitations may, under this section, be pleaded by a mere reference to the sections pleaded: it is not necessary to state the facts. Lillis v. People's Ditch Co., 3 Cal. Unrep. 494; 29 Pac. 780; Churchill v. Woodworth, 148 Cal. 669; 113 Am. St. Rep. 324; 84 Pac. 155. By the averment that the action is barred by the provisions of a designated section of the code, the statute is sufficiently pleaded. Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192; 21 Ann. Cas. 1279; 106 Pac. 715. A plea of the statute of limitations, alleged in the form prescribed by this section, is sufficient for all purposes. Miller v. Lane, 160 Cal. 90; 116 Pac. 58. The rule established by this section was intended to simplify the form of pleading the defense of the statute of limitations, and is one which the court cannot depart from on a conjecture that the legislature intended to except from its operation cases of the kind provided for by § 361, ante; hence, pleading the bar of such section by reference to its number is sufficient. Allen v. Allen, 95 Cal. 184; 16 L. R. A. 646; 30 Pac. 213. In pleading the statute of limitations, the proper course is to plead the section establishing the time of limitation, omitting all reference to explanatory sections. Webber v. Clarke, 74 Cal. 11; 15 Pac. 431; Hagely v. Hagely, 68 Cal. 348; 9 Pac. 305. Where the section contains subdivisions, pleading the statute by reference to the section alone is insufficient: the number of the subdivision must also be given. Wolters v. Thomas, 3 Cal. Unrep. 843; 32 Pac. 565. In pleading the defense of the statute of limitations, it is not necessary to set up the section and subdivision of the statute, if the facts showing the bar of the statute are alleged. Osborn v. Hopkins, 160 Cal. 501; Ann. Cas. 1913A, 413; 117 Pac. 519. The legal effect of pleading the bar of the statute by reference to the section relied upon, by an averment that the action is barred by that section, is the same as the plea non assumpsit infra sex annos, to which the reply was assumpsit infra sex annos. Biddel v. Brizzolara, 56 Cal. 374.

Allegation of limitations. A general allegation, that the action is barred by the statute prescribing two or any other number of years as the limitation for bringing the action, is insufficient. Schroeder v. Jahns, 27 Cal. 274. An allegation, that the cause of action did not accrue within two years next "preceding the commencement of the action," is not defective, in alleging a conclusion of law; it is not necessary to allege that it was more than two years next preceding the filing of the complaint. Adams v. Patterson, 35 Cal. 122. An allegation, that every item of the said account prior to such day is barred by time, and defendant pleads and relies upon the statute of the state of California, entitled "An Act defining the time of commencing civil actions," in bar of any recovery of said action, is fatally defective. Caulfield v. Sanders, 17 Cal. 569. An averment, in an action for personal services, that the plaintiff's cause of action for compensation for said services did not accrue within the two years next before the commencement of this action, is sufficient (Osborn v. Hopkins, 160 Cal. 501; Ann. Cas. 1913A, 413; 117 Pac. 519); but a plea, not averring that the cause of action accrued, but only that the services contracted to be performed by the plaintiff were rendered, more than two years before the action was brought, is insufficient. Hartson v. Hardin, 40 Cal. 264. An allegation in the answer, that the defendant has been in the quiet and peaceable possession of the lands involved, adversely to the plaintiff, for a period of over five years, will be construed to relate to the five years next preceding the filing of the answer, and not to those preceding the commencement of the action. Table Mountain Tunnel Co. v. Stranahan, 31 Cal. 387. An allegation, that the action is barred by the statute, is not a statement of fact, but a mere conclusion of law. Schroeder v. Jahns, 27 Cal. 274; Table Mountain Tunnel Co. v. Stranahan, 31 Cal. 387. Where the defendant pleads the bar of the statute, it is not necessary for him to rebut, in advance, matter which the plaintiff might set up in avoidance. Anderson v. Fisk, 36 Cal. 625. Where the statute of limitations applying only to a particular class of cases is intended to be relied upon, it must be pleaded specially; a plea of the general statute is not sufficient. Howell v. Rogers, 47 Cal. 291. When pleading the bar of the statute, under the old rule the facts were required to be stated, and the court applied the law: it was not necessary for the defendant to plead, in separate defenses, all the statutes on which he intended to rely. Boyd v. Blankman, 29 Cal. 19; 87 Am. Dec. 146.

Burden of proof. If controverted, it devolves upon the defendant to show that a cause of action is barred. Black v. Vermont Marble Co., 1 Cal. App. 718; 82 Pac. 1060.

Waiver of manner of pleading. An objection to the manner of pleading the bar of the statute is waived by failure to urge it in the trial court. Churchill v. Woodworth, 148 Cal. 669; 113 Am. St. Rep. 324; 84 Pac. 155.

Finding as to limitations. It is not necessary to find, in direct language, that the action is barred by the statute: to find the facts which show that it is so barred is sufficient. O'Neill v. Quarnstrom, 6 Cal. App. 469, 92 Pac. 391.

CODE COMMISSIONERS' NOTE. The commissioners say, in their report, that they introduced this section, believing that a pleading under it will be more concise, and at the same time will afford to the opposite party all the information necessary to enable him to meet the defense made. The utility of the section is manifest. For instance, if the action be for the recovery of the possession of a mining claim, instead of the lengthy averments now required, the plea will be as follows: "Defendant avers that the cause of action is barred by the provisions of § 320 of the Code of Civil Procedure."

§ 459. Private statutes, how pleaded. In pleading a private statute, or an ordinance of a county or municipal corporation, or a right derived therefrom, it is sufficient to refer to such statute or ordinance by its title and the day of its passage. In pleading the performance of conditions precedent under a statute or an ordinance of a county or municipal corporation, or of a right derived therefrom, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part required thereby; if such allegations be controverted the party pleading must establish on the trial the facts showing such performance.

Legislation § 459. 1. Enacted March 11, **1872**; based on Practice Act, § 61 (New York Code, § 163), which read: "In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof." When enacted in 1872, (1) the word "shall," before "sufficient," was changed to "is," and (2) the final clause, beginning "and the court," was stricken out.

2. Amendment by Stats. **1901**, p. 135; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 707; the code commissioner saying, "The words 'or an ordinance of a county or municipal corporation' have been added in the first sentence, and the whole of the second sentence has been added, the latter

amendment being made on the suggestion of the attorney-general."

Pleading ordinances. The provision of § 765 of the Municipal Corporation Act, that it shall not be necessary to plead or to prove the existence or validity of any ordinance of a city of the fifth class, is unconstitutional, being a special statute; hence, an ordinance of a city of the fifth class is subject to the provisions of this section, and therefore pleading an ordinance as "that certain ordinance of said city, known as ordinance No. 60," is insufficient. Tulare v. Hevren, 126 Cal. 226; 58 Pac. 530. Although the various ordinances are not set out in hæc verba, nor pleaded as authorized by this section, yet, as against a general demurrer, their existence must be considered. Amestoy v. Electric etc. Transit Co., 95 Cal. 311; 30 Pac. 550.

CODE COMMISSIONERS' NOTE. See Dye v. Dye, 11 Cal. 163.

§ 460. Libel and slander, how stated in complaint. In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish on the trial that it was so published or spoken.

Libel and slander. See Civ. Code, §§ 44 et seq.

Legislation § 460. Enacted March 11, **1872**; based on Practice Act, § 62 (New York Code, § 164), which had (1) the words "shall not," instead of "is," in the first line, (2) the words "shall be," instead of "is," before "sufficient," and (3) the word "shall," instead of "must," before "establish."

Libelous words. An allegation that words were spoken of and concerning the plaintiff is sufficient, where such words are actionable per se. Rhodes v. Naglee, 66 Cal. 677; 6 Pac. 863; Hitchcock v. Caruthers, 82 Cal. 523; 23 Pac. 48. The inducement and the colloquium are dispensed with by this section; and if the words charged are libelous in themselves, the plaintiff is required to allege only that they were spoken "of and concerning the plaintiff"; if not libelous in themselves, or if they require proof to determine their meaning or to show that they are libelous, or if they are in a foreign language, it is necessary to make such allegation as will show them to be actionable; but where the words are in the English language, it will be presumed that they are understood by the person hearing them, and an allegation to that effect is not required; the statute dispenses with the innuendo and the colloquium, only so far as they show that the defamatory words applied to the plaintiff. Harris v. Zanone, 93 Cal. 59; 28 Pac. 845. The office of the innuendo is, merely, to interpret the meaning of the language used; and if the natural import of the language is not actionable, the innuendo cannot serve to introduce a broader meaning to make it so. Grand v. Dreyfus, 122 Cal. 58; 54 Pac. 389. Where it is alleged that the words were spoken of and concerning the plaintiff, and in the presence and hearing of the plaintiff and others named, an allegation that they were understood by those who heard them is unnecessary. Rhodes v. Naglee, 66 Cal. 677; 6 Pac. 863.

Libel in foreign language. A libel published in a foreign language may be pleaded by using, instead of a copy of the original, a correct translation, alleging it to be such. Stevens v. Kobayshi, 20 Cal. App. 153; 128 Pac. 419. Where the Japanese word "mekake" may be translated either "mistress" or "concubiue," the use of the word "concubine," in rendering that word into English, is immaterial, and an objection based on the use of the latter word cannot be sustained. Id.

CODE COMMISSIONERS' NOTE. Where the words complained of were not, in themselves, libelous, it should be averred what the defendant intended and understood them to mean, and what they were understood to mean by those to whom they were published. And where the complaint only averred a libelous intent and meaning on defendant's part in publishing the words, yet if there was no averment that they were so understood by those to whom they were published, the complaint is defective and demurrable. Maynard v. Fireman's Fund Ins. Co., 34 Cal. 57; 91 Am. Dec. 672, citing many authorities, and among them the following: Goodrich v. Woolcott, 3 Cow. 239; Andrews v. Woodmansee, 15 Wend. 234; Gibson v. Williams, 4 Wend. 320; Dexter v. Taber, 12 Johns. 239; Peake v. Oldham, 1 Cowp. 275; 98 Eng. Reprint, 1083. See also, generally, Bradley v. Gardner, 10 Cal. 371; Thrall v. Smiley, 9 Cal. 529; Butler v. Howes, 7 Cal. 87.

§ 461. Answer in such cases. In the actions mentioned in the last section the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

Libel and slander. See Civ. Code, §§ 44 et seq.

Legislation § 461. Enacted March 11, **1872**; re-enactment of Practice Act, § 63 (New York Code, § 165).

Justification and mitigation. To constitute a justification, the answer must aver the truth of the defamatory matter charged; without which, the facts detailed can avail only in mitigation of damages; setting up facts tending only to establish the truth of such matter is insufficient. Thrall v. Smiley, 9 Cal. 529. If, in a libel suit, the defendant pleads justification, he may also plead, with his affirmance of good faith and honest belief, all facts and circumstances in support thereof, within his knowledge at the time of the publication, even if they tend to establish the truth of the charge; and if he desires to plead justification, and also the truth or partial truth in mitigation, he must plead these facts and circumstances in mitigation. Davis v. Hearst, 160 Cal. 143; 116 Pac. 530. Only such mitigating circumstances as were within the knowledge of the defendant when he spoke the words complained of can be alleged in the answer. Barkly v. Copeland, 74 Cal. 1; 5 Am. St. Rep. 413; 15 Pac. 307. The mitigating circumstances permitted to be pleaded and proved must be such as tend to rebut the presumption of malice, or to reduce its degree; all libels are conclusively presumed to be, in some degree, malicious; but there are different degrees and phases of malice; and some actionable defamatory publications are in fact published without actual malice; it is eminently just, therefore, that the defendant, with a view to reduce the damages, should be allowed to rebut the presumption of malice by proof of what the statute terms "mitigating circumstances," that is to say, the circumstances under which the publication was made, and the real motives that induced it; but absence of actual malice cannot be shown in bar of the action. Wilson v. Fitch, 41 Cal. 363; Lick v. Owen, 47 Cal. 252. While it is ordinarily true that privilege is to be pleaded as an affirmative matter of defense to an action for libel, yet where the complaint shows on its face that the publication was privileged, the point may be raised on general demurrer. Gosewisch v. Doran, 161 Cal. 511; Ann. Cas. 1913D, 442; 119 Pac. 656.

Plea of justification in libel or slander. See note 91 Am. St. Rep. 292.

Pleading the truth in action for libel or slander. See note 21 L. R. A. 511.

Pleading truth as a defense to a civil action for libel and slander. See note 31 L. R. A. (N. S.) 138.

CODE COMMISSIONERS' NOTE. The answer must aver the truth of the defamatory matter charged, if justification is sought. Facts which only tend to establish the truth of such matter are not sufficient allegations. Without an averment of its truth, the fact detailed can only avail in mitigation of damages. Thrall v. Smiley, 9 Cal. 529. The defendant may prove the plaintiff's words immediately after defendant uttered the slanderous words. Bradley v. Gardner, 10 Cal. 371.

§ 462. Allegations not denied, when to be deemed true. When to be deemed controverted. Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party.

Cross-complaint, must be replied to. See ante, § 442.

Answers. See generally, ante, § 437.

Material allegations. Post, § 463.

Legislation § 462. Enacted March 11, **1872**; based on Practice Act, § 65 (New York Code, § 168), as amended by Stats. 1865–66, p. 703, which read: "Every material allegation of the complaint or cross-complaint not controverted by the answer thereto, shall for the purposes of the action be taken as true; the statement of matters in avoidance shall on the trial be deemed controverted by the adverse party."

Material allegations must be controverted. Immaterial allegations in a complaint need not be denied; and failure to answer them is not an admission. Racouillat v. Rene, 32 Cal. 450; Jones v. Petaluma, 36 Cal. 230. A mere denial of non-essential averments of a complaint is an admission of all that is essential to recovery. Leffingwell v. Griffing, 31 Cal. 231. Allegations in anticipation of the defense are not admitted by failure to deny them. Canfield v. Tobias, 21 Cal. 349. General denials of the allegations of a complaint do not amount to a specific denial thereof; hence, the material allegations of a verified complaint are admitted. Dewey v. Bowman, 8 Cal. 145; Hensley v. Tartar, 14 Cal. 508. An answer denying, as a whole, the conjunctive allegations of a verified complaint, is evasive, and an admission of the allegations. Fish v. Redington, 31 Cal. 185. Where the denial is in the conjunctive, and does not constitute a denial of the averments of the complaint, the averments are admitted. Nolan v. Hentig, 138 Cal. 281; 71 Pac. 440. Where the answer specifically denies only two allegations of the complaint, all the others, well pleaded, are admitted. De Ro v. Cordes, 4 Cal. 117. Where the complaint avers that work was done in consideration of a certain promise, and the answer only denies that the plaintiff did the work, no proof is required from the plaintiff as to the consideration upon which it was performed. Mathewson v. Fitch, 22

Cal. 86. Conclusion of law from facts stated do not call for a denial. Kidwell v. Ketler, 146 Cal. 12; 79 Pac. 514. Matters of evidence set up in the complaint are not admitted either by a failure to deny, or by a defective denial. Racouillat v. Rene, 32 Cal. 450. In an action for divorce, allegations of residence must be proven, whether denied or not (Bennett v. Bennett, 28 Cal. 599); and if the complaint avers the marriage of the plaintiff and the defendant, failure to deny the averment is an admission of the fact. Fox v. Fox, 25 Cal. 587. The first clause of this section applies to an allegation in an answer, in an action upon a street assessment, that a certain resolution was not "duly" passed. Pacific Paving Co. v. Diggins, 4 Cal. App. 240; 87 Pac. 415. An allegation, in a verified complaint, of an entry by the defendant and ouster by the plaintiff, is admitted by a denial in the answer, that the defendant wrongfully and unlawfully entered and dispossessed the plaintiff: such denial relates to the character, and not to the existence, of these facts. Busenius v. Coffee, 14 Cal. 91. A denial that the defendant has unlawfully, wrongfully, and in violation of the plaintiff's rights, had the possession, etc., is a mere denial of the character and not of the fact of possession, and is an admission of it, and such admission is conclusive. Burke v. Table Mountain Water Co., 12 Cal. 403. A motion for judgment on a pleading is properly granted, where the complaint is sufficient in all respects, and the answer does not deny any of the material allegations thereof, and fails to present anything by way of new matter to bar or defeat the action. San Francisco v. Staude, 92 Cal. 560; 28 Pac. 778; Felch v. Beaudry, 40 Cal. 439; Hemme v. Hays, 55 Cal. 337; Loveland v. Garner, 74 Cal. 298; 15 Pac. 844. Where the complaint alleges that an assignment of guaranty was made for a good consideration, failure to deny the allegation is an admission of the consideration. Cunningham v. Norton, 5 Cal. Unrep. 35; 40 Pac. 491. Imperfect and defective denials, if acted upon at the trial as sufficient, are in no sense admissions of the allegations of a pleading which are attempted to be denied. Loftus v. Fischer, 106 Cal. 616; 39 Pac. 1064. Objections to defective denials are waived, if not taken before the introduction of evidence. Tevis v. Hicks, 41 Cal. 123; Stockton etc. Agricultural Works v. Glens Falls Ins. Co., 121 Cal. 167; 53 Pac. 565. Where the denials were defective, and the plaintiff had gone into the evidence in relation to them without question, it is proper to refuse to instruct that certain facts were settled, for the purposes of the trial, by the admissions of the defendant in not denying them in his answer. Tynan v. Walker, 35 Cal. 634; 95 Am. Dec. 152. In passing upon a motion for a new trial, the court may properly consider admissions which follow a failure to deny material allegations of the complaint. Blodgett v. Scott, 11 Cal. App. 310; 104 Pac. 842.

When allegations in complaint deemed true. There is no issue to be tried, and the material allegations of the complaint must be taken as true, where the answer fails to put them in issue, or to confess and avoid them (Patterson v. Ely, 19 Cal. 28; Brown v. Scott, 25 Cal. 189; Fish v. Redington, 31 Cal. 185; Pomeroy v. Gregory, 66 Cal. 572, 574; 6 Pac. 492, 493; Prentice v. Miller, 82 Cal. 570; 23 Pac. 189; Ortega v. Cordero, 88 Cal. 221; 26 Pac. 80; Landers v. Bolton, 26 Cal. 393; McGowan v. McDonald, 111 Cal. 57; 52 Am. St. Rep. 149; 43 Pac. 418), and the plaintiff is entitled to judgment on the pleadings. Blodgett v. Scott, 11 Cal. App. 310; 104 Pac. 842. The failure to deny allegations of facts which create a presumption, admits the correctness of such allegations, and the presumption thus created by law operates to cast on the defendant the burden of proof, even though such presumption is one of evidence, and not one of pleading; its effect is to require a statement, in the complaint, of matters necessary to show the right to recover; but it does not compel the formal proof of matters which, being alleged, are admitted either expressly or impliedly, and such cases are subject to the general rules of procedure prescribed by this section. Oakland Bank v. Sullivan, 107 Cal. 428; 40 Pac. 546; Stockton v. Dahl, 66 Cal. 377; 5 Pac. 682. Allegations in the complaint, not controverted in the action, must, for the purposes of the action, be taken as true (Crandall v. Parks, 152 Cal. 772; 93 Pac. 1018); they become admitted facts in the case. Merguire v. O'Donnell, 103 Cal. 50; 36 Pac. 1033. Facts distinctly and clearly averred in the complaint, and not denied in the answer, are admitted; evidence in support of them is unnecessary. Hanson v. Fricker, 79 Cal. 283; 21 Pac. 751. Failure to deny a material allegation of a complaint is an admission thereof: a finding to the contrary is erroneous. Campe v. Lassen, 67 Cal. 139; 7 Pac. 430. All the material allegations of a verified petition, in the nature of a complaint, to show cause, not denied under oath, are to be taken as true: further evidence in support of them is unnecessary. California Title Ins. etc. Co. v. Consolidated Piedmont Cable Co., 117 Cal. 237; 49 Pac. 1. Failure to deny the execution of a mortgage containing a provision for the payment of attorneys' fees, where the complaint sets up the mortgage and alleges its due execution, is an admission of the right to attorneys' fees. Hubbard v. University Bank, 125 Cal. 684; 58 Pac. 297. The corporate existence of a company is admitted by a failure to deny the allegation of such fact: a finding against such

admission cannot be sustained. Moynihan v. Drobaz, 124 Cal. 212; 71 Am. St. Rep. 46; 56 Pac. 1026. Where title to property is distinctly averred in the complaint and not denied in the answer, the fact is deemed admitted; no evidence is necessary upon such point. Powell v. Oullahan, 14 Cal. 114. Where the answer fails to deny the allegation that the plaintiff succeeded to the rights of another person in land, and that he is the owner thereof, the plaintiff's ownership is admitted. White v. Costigan, 138 Cal. 564; 72 Pac. 178. Ownership alleged, and not denied, is admitted. Santa Barbara v. Eldred, 108 Cal. 294; 41 Pac. 410; McGowan v. McDonald, 111 Cal. 57; 52 Am. St. Rep. 149; 43 Pac. 418. The allegation of extra work, in an action to foreclose a mechanic's lien, is admitted by a failure to deny: this admission supports the lien. McGinty v. Morgan, 122 Cal. 103; 54 Pac. 392. The validity of proceedings under a void statute is not admitted by a failure to deny that such proceedings were duly and regularly taken. People v. Hastings, 29 Cal. 449. Where a fact is expressly alleged in the complaint, and not specifically denied in the answer, the jury should be instructed that such fact is admitted. Tevis v. Hicks, 41 Cal. 123. Where, from the whole conduct of a cause, it appears that a particular fact is admitted by the parties, the jury have the right to draw the same conclusion as to that fact as if it were proven in evidence, and to draw such conclusion as to all the issues on the record. Powell v. Oullahan, 14 Cal. 114. Where, in action for property destroyed, the complaint alleges the value of all such property, in gross, for some items of which no recovery can be had, the answer, which contained no denial of the averment of value, will not be held as admitting the value of the property for which a recovery may be had. Nunan v. San Francisco, 38 Cal. 689. An objection to an assessment, on the ground of the invalidity of the statute, is not obviated by a failure to deny an allegation that the assessment was duly and regularly made. People v. Hastings, 29 Cal. 449.

Affirmative matter in answer deemed controverted. Affirmative matter in the answer is deemed controverted (People v. De la Guerra, 24 Cal. 73; Bryan v. Maume, 28 Cal. 238; Doyle v. Franklin, 40 Cal. 106; Brooks v. Haslam, 65 Cal. 421; 4 Pac. 399; Williams v. Dennison, 94 Cal. 540; 29 Pac. 946; Haines v. Snedigar, 110 Cal. 18; 42 Pac. 462; Reed v. Johnson, 127 Cal. 538; 59 Pac. 986; Green v. Duvergey, 146 Cal. 379; 80 Pac. 234; Sarnighausen v. Scannell, 11 Cal. App. 652; 106 Pac. 117), as is also new matter (Lillis v. People's Ditch Co., 3 Cal. Unrep. 494; 29 Pac. 780; Newsom v. Woollacott, 5 Cal. App. 722; 91 Pac. 347; Burke v. Superior Court, 7 Cal. App. 178; 93 Pac. 1058), where it does not call for affirmative relief in behalf of the defendant. Melander v. Western National Bank, 21 Cal. App. 462; 132 Pac. 265. The admission of the execution and genuineness of an instrument set up in the answer is not an admission of new matter pleaded therein, or that the instrument relates to the transaction set out in the complaint. Newsom v. Woollacott, 5 Cal. App. 722; 91 Pac. 374. Affirmative matter set up in the answer, such as undue influence and unfair advantage, is deemed denied. Rankin v. Sisters of Mercy, 82 Cal. 88; 22 Pac. 1134. A contract so pleaded may be shown by the plaintiff to have been procured by fraud, menace, or duress, without any pleading on his part. Sarnighausen v. Scannell, 11 Cal. App. 652; 106 Pac. 117. A replication traversing new matter alleged in the answer is unnecessary, and has no place in our system of pleading: the plaintiff will be deemed to have pleaded any new matter in avoidance of a counterclaim or affirmative defense set up in the answer, and may give evidence of such matter in avoidance. Grangers' Business Ass'n v. Clark, 84 Cal. 201; 23 Pac. 1081. The burden of proof is on the defendant to establish affirmative matter set up in the answer. Bryan v. Maume, 28 Cal. 238; Brooks v. Haslam, 65 Cal. 421; 4 Pac. 399; Reed v. Johnson, 127 Cal. 538; 59 Pac. 986; Clarke v. Fast, 128 Cal. 422; 61 Pac. 72; Green v. Duvergey, 146 Cal. 379; 80 Pac. 234; Merced Bank v. Price, 145 Cal. 436; 78 Pac. 949; People v. De la Guerra, 24 Cal. 73. For instance, he must prove the law of a sister state, when relied on as a defense. Peck v. Noee, 154 Cal. 351; 97 Pac. 865. Where a husband conveys property to his wife, in reliance upon an oral agreement that she would, upon his death, transfer a certain portion of it to designated parties, the wife, by consenting to such arrangement, is estopped from questioning his power thus to effectuate his intention without her consent in writing; and in an action by the beneficiaries to enforce the constructive trust, allegations in the answer of the wife, setting up the community character of the property, authorize them to rely upon such estoppel, without pleading it specially. Lauricella v. Lauricella, 161 Cal. 61; 118 Pac. 430. In an action to quiet title, where the answer sets up a deed from the plaintiff to the defendant, and alleges a delivery of the deed by the plaintiff, such allegation is deemed to be controverted. Drinkwater v. Hollar, 6 Cal. App. 117; 91 Pac. 664.

Counterclaim and set-off deemed controverted. An answer, wherein is set up a counterclaim or set-off, is not a cross-complaint: no denial thereof by the plaintiff is required. Herold v. Smith, 34 Cal. 122; Jones v. Jones, 38 Cal. 584. The allegations of a pleading that are, strictly speak-

ing, of a character to be treated as a defense or counterclaim, are to be taken as denied, though the pleading is denominated an answer, counterclaim, or cross-complaint. Pfister v. Wade, 69 Cal. 133; 10 Pac. 369. No replication is required to raise an issue upon the matter of a counterclaim; its allegations are deemed denied, and the plaintiff, besides introducing evidence in denial thereof, may also prove any affirmative matter as a defense to the counterclaim, without pleading it. L. Scatena & Co. v. Van Loben Sels, 19 Cal. App. 423; 126 Pac. 187. Where the answer sets up a counterclaim barred by the statute of limitations, the plaintiff is considered to have pleaded the statute by way of replication to the counterclaim (Curtiss v. Sprague, 49 Cal. 301); but where it appears on the face of the counterclaim that it is barred, it must be demurred to on that ground, and will not be deemed controverted, under the provisions of this section, as, under §§ 443, 444, ante, the plaintiff is authorized to demur on the ground that the answer does not set up facts sufficient to constitute a counterclaim. Bliss v. Sneath, 119 Cal. 526; 51 Pac. 848. An exception to the rule that all new matter constituting a defense or counterclaim must, at the trial, be deemed controverted, is found in § 442, ante: where a cross-complaint has been served by a defendant claiming affirmative relief, the party served may demur or answer thereto as to an original complaint; but fraud or mistake, as a defense, may be shown by the plaintiff, to rebut the allegations in the answer, without any replication on his part. Moore v. Copp, 119 Cal. 429; 51 Pac. 630. The plaintiff may, in avoidance of defendant's set-off, show a countervailing indebtedness of defendant to plaintiff's assignor. Davis v. Rawhide Gold Mining Co., 15 Cal. App. 108; 113 Pac. 898.

When plea of bar of statute deemed controverted. The statute of limitations, pleaded in bar, in an answer, is deemed controverted (Fox v. Tay, 89 Cal. 339; 23 Am. St. Rep. 474; 24 Pac. 855; 26 Pac. 897; Pierce v. Southern Pacific Co., 120 Cal. 156; 40 L. R. A. 350; 47 Pac. 874; 52 Pac. 302; London etc. Bank v. Parrott, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164; Hibernia Sav. & L. Soc. v. Boland, 145 Cal. 626; 79 Pac. 365; Curtiss v. Sprague, 49 Cal. 301); and it devolves upon the defendant to establish the facts necessary to support it. Pierce v. Southern Pacific Co., 120 Cal. 156; 40 L. R. A. 350; 47 Pac. 874; 52 Pac. 302. The second clause of this section applies, where a defendant admits that it is a foreign corporation, but pleads the bar of the statute. Black v. Vermont Marble Co., 1 Cal. App. 718; 82 Pac. 1060. The statute of limitations, set up as an affirmative defense in the answer, may be controverted by the plaintiff, without pleading, by proving any facts tending to rebut it (Hibernia Sav. & L. Soc. v. Boland, 145 Cal. 626; 79 Pac. 365; Williams v. Dennison, 94 Cal. 540; 29 Pac. 946; London etc. Bank v. Parrott, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164); hence, the correct application of payments, under § 1479 of the Civil Code, may be shown for that purpose. London etc. Bank v. Parrott, 125 Cal. 472; 73 Am. St. Rep. 64; 58 Pac. 164.

CODE COMMISSIONERS' NOTE. Allegations of matters of evidence are not admitted, however, though no denial is made by the answer. Racouillat v. Rene, 32 Cal. 450. If an ultimate fact is admitted in the record, the court will not consider probative facts for the purpose of establishing, modifying, or overcoming it. Mulford v. Estudillo, 32 Cal. 131.

§ 463. A material allegation defined.

A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

Immaterial allegations need not be answered. See ante, § 462.

Legislation § 463. Enacted March 11, 1872; re-enactment of Practice Act, § 66.

What are material allegations. The test of materiality is, Can the averment be stricken from the pleading without leaving it insufficient? Thus, in an action on a note executed by two defendants, averred to be partners, the denial of the existence of the partnership, without the denial of the execution of the note, entitles the plaintiff to judgment on the pleadings, as the allegation of the partnership is immaterial. Whitwell v. Thomas, 9 Cal. 499. Allegations to intercept and cut off defenses are superfluous and immaterial in the complaint. Canfield v. Tobias, 21 Cal. 349; Sterling v. Smith, 97 Cal. 343; 32 Pac. 320. Evidence should not be alleged in the complaint; it is not only not necessary, but highly improper. Racouillat v. Rene, 32 Cal. 450. In an action for goods sold and delivered, an allegation as to the sale and delivery of the goods is a material one. Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469. Where a defendant alleges that certain representations are "false and untrue in every material respect," he should point out specifically what is material. Woodson v. Winchester, 16 Cal. App. 472; 117 Pac. 565.

CODE COMMISSIONERS' NOTE. See § 426, ante; Green v. Palmer, 15 Cal. 413; 76 Am. Dec. 492; Whitwell v. Thomas, 9 Cal. 499. In an action on a contract, an averment in the complaint that the contract was payable in a specific kind of money is a material allegation. Wallace v. Eldredge, 27 Cal. 498.

§ 464. Supplemental complaint and answer. The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer.

Amendments to pleadings. Post, §§ 472, 473.

Legislation § 464. Enacted March 11, 1872; based on last sentence of Practice Act, § 67, as amended by Stats. 1865–66, p. 703, which read: "Where circumstances occurring subsequently to the commencement of the action render it proper, the same may be presented by supplemental pleadings and issue taken thereon in the same manner as in the case of original pleadings." The first part of § 67 formed the basis of § 472; q. v., post.

When supplemental pleading proper. The right to file a supplemental complaint can be exercised only with reference to matter consistent with and in aid of the case made by the original complaint, and which occurred between the time of filing the original complaint and the trial or judgment in the action. Gleason v. Gleason, 54 Cal. 135; Jacob v. Lorenz, 98 Cal. 332; 33 Pac. 119; Gordon v. San Diego, 108 Cal. 264; 41 Pac. 301. The fact to be alleged in the amended or supplemental pleading must be material, and relate to the original case. Brown v. Valley View Mining Co., 127 Cal. 630; 60 Pac. 424; Baker v. Brickell, 102 Cal. 620; 36 Pac. 950. Changing the character of the original bill, and praying for different relief, does not render the supplemental bill defective; every additional or pertinent fact either enlarges or limits the right to relief, or affects the nature of it; but where the subject-matter is the same, the supplemental bill is proper. Baker v. Bartol, 6 Cal. 483. The plaintiff may be allowed to file a supplemental complaint setting up matter consistent with and in aid of the original cause of action, and calling for different and additional relief. Melvin v. E. B. & A. L. Stone Co., 7 Cal. App. 324; 94 Pac. 389. The office of the supplemental complaint is to bring to the notice of the court and the opposite party things which have occurred after the commencement of the action, and which do or may affect the rights asserted and the relief asked in the action as originally instituted. California Farm etc. Co. v. Schiappa-Pietra, 151 Cal. 732; 91 Pac. 593. A new and independent cause of action cannot be substituted by way of supplemental complaint. Gleason v. Gleason, 54 Cal. 135; Jacob v. Lorenz, 98 Cal. 332; 33 Pac. 119; Gordon v. San Diego, 108 Cal. 264; 41 Pac. 301. Another action, in another county, to recover the same property, by the plaintiff, against some of the defendants, may be set up in a supplemental answer. Keech v. Beatty, 127 Cal. 177; 59 Pac. 837. Facts occurring subsequently to the filing of the complaint, and which change the liabilities of the defendants, cannot be incorporated into the complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action. Van Maren v. Johnson, 15 Cal. 308. Where, during the pendency of an action to recover personal property, the defendant is required to deliver the property to another person entitled to its possession, as against both the plaintiff and the defendant, that fact should be set up by supplemental answer. Bolander v. Gentry, 36 Cal. 105; 95 Am. Dec. 162. Discharge by insolvency, after answer, may also be pleaded by way of supplemental answer (Rahm v. Minis, 40 Cal. 421); as may also title acquired after the commencement of the action (Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256; McMinn v. O'Connor, 27 Cal. 238; Thompson v. McKay, 41 Cal. 221), and the termination of the plaintiff's title after answer. Moss v. Shear, 30 Cal. 467; Barstow v. Newman, 34 Cal. 90; Hestres v. Brennan, 37 Cal. 385. A failure so to plead renders evidence of title subsequently acquired inadmissible. McMinn v. O'Connor, 27 Cal. 238; Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256. Damages accruing after the institution of an action to enjoin a threatened injury are properly set up in a supplemental complaint, being a right arising out of and consistent with such injunctive relief. Jacob v. Lorenz, 98 Cal. 332; 33 Pac. 119. Damages may be awarded in a judicial proceeding for further injuries resulting after the commencement thereof, without a supplemental pleading. Hicks v. Drew, 117 Cal. 305; 49 Pac. 189. Where the original complaint is founded on an express contract to pay a fixed sum for services for a certain period, a supplemental complaint setting up the terms of employment should not be allowed. Brown v. Valley View Mining Co., 127 Cal. 630; 60 Pac. 424. Where an insurance policy was made payable to the mortgagee, a supplemental complaint, in an action upon a new agreement, setting up the fact that such person has ceased to have any interest in the policy is proper: it does not change the cause of action. Stockton etc. Agricultural Works v. American Fire Ins. Co., 121 Cal. 182; 53 Pac. 573. Insurance-money paid by a mortgagee after the commencement of foreclosure proceedings, under provisions authorizing him to keep the property insured on the failure of the mortgagor to do so, should be set up in a supplemental complaint. Washburn v. Wilkinson, 59 Cal. 538. In an action for claim and delivery, against a sheriff, where, at the time the property was taken by him under a writ of attachment, the judgment was not barred, it is not error to refuse to permit a supplemental complaint to be filed, setting up that the

judgment obtained in such action was barred at the time of filing the amended complaint, many years after the taking, and after the sheriff had gone out of office. Paulson v. Nunan, 72 Cal. 243; 13 Pac. 626.

Effect of filing supplemental complaint. By the filing of a supplemental complaint and the issuance of a summons thereon, the original action becomes merged in the action as supplemented by the addition of parties and subject-matter. McMinn v. Whelan, 27 Cal. 300. The filing of a supplemental complaint after the death of the defendant, continuing the action against his representatives, is not the commencement of a new action so as to affect the bar of the statute of limitations. Hibernia Sav. & L. Soc. v. Wackenreuder, 99 Cal. 503; 34 Pac. 219. The action, as to the new ground set up in the supplemental complaint, must be considered as commenced when the supplemental complaint is filed. Valensin v. Valensin, 73 Cal. 106; 14 Pac. 397. Where an action is prematurely brought, the original complaint must fail, and a supplemental complaint has no place as a pleading. Morse v. Steele, 132 Cal. 456; 64 Pac. 690. Where no cause of action existed at the time of the commencement of the suit, the action cannot be maintained by filing a supplemental complaint founded on matters that subsequently occurred. Wittenbrock v. Bellmer, 57 Cal. 12; Gordon v. San Diego, 108 Cal. 264; 41 Pac. 301; Hill v. Den, 121 Cal. 42; 53 Pac. 642; Lewis v. Fox, 122 Cal. 244; 54 Pac. 823.

New or substituted parties. The representative capacity of a substituted plaintiff may be set up by way of amended complaint, and need not be pleaded by supplemental complaint, when made on the part of the plaintiff. Campbell v. West, 93 Cal. 653; 29 Pac. 219, 645. The claimants of property, brought in as new parties to a foreclosure suit, by supplemental complaint filed more than four years after the cause of action accrued against them, may plead the bar of the statute. Spaulding v. Howard, 121 Cal. 194; 53 Pac. 563. A court of equity will not allow the real holders of the title, who were not parties to a decree of foreclosure, to be made such by a supplemental complaint, where the application is made more than five years after the entry of the decree. Heyman v. Lowell, 23 Cal. 106. Where suit is brought by a female, who subsequently marries, her husband should be made a party: this should be done by a supplemental complaint, and not by an amendment to the original. Van Maren v. Johnson, 15 Cal. 308.

Right to set up judgment in another court by amendment or supplemental complaint. See note 49 L. R. A. (N. S.) 285.

CODE COMMISSIONERS' NOTE. If the defendant demurs to the complaint, the plaintiff must, on motion, be allowed leave to amend his complaint before a decision on the demurrer is rendered. Lord v. Hopkins, 30 Cal. 76.

§ 465. Pleadings subsequent to complaint must be filed and served.

All pleadings subsequent to the complaint, must be filed with the clerk, and copies thereof served upon the adverse party or his attorney.

Service of papers. Post, §§ 1011 et seq.
Amendment of pleadings, service of. Post, § 472; ante, § 432.
Extending time to serve papers. See post, § 1054.

Legislation § 465. 1. Enacted March 11, **1872.** **2.** Amended by Code Amdts. **1873–74,** p. 301, adding the words "copies thereof" before the word "served."

Pleading must be filed. A pleading prepared for the purpose of filing is not a pleading in fact until it is filed and made a part of the record. Fletcher v. Maginnis, 136 Cal. 362; 68 Pac. 1015.

Service of pleadings. An amendment to the complaint, filed as "of course," must be served upon the adverse parties, who are to be bound by the judgment, whether it materially affects them or not. Elder v. Spinks, 53 Cal. 293. A complaint amended after default must be served upon all the defendants: a party cannot be deprived of the right to answer an amended pleading, even after entry of a default against him on the original pleading; for, by amending in matter of substance, the plaintiff opens the default on the original pleading. Thompson v. Johnson, 60 Cal. 292; Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089. As the amended complaint must be served upon all adverse parties who are to be bound by the judgment, whether it materially affects them or not, no judgment can be sustained against one upon whom such amended complaint was not served (Linott v. Rowland, 119 Cal. 452; 51 Pac. 687); a defendant who answers an amended complaint waives service of a copy thereof, and he cannot object because his co-defendants were not served. McGary v. Pedroreña, 58 Cal. 91. Where the amendment is a mere matter of form, in the nature of a bill of particulars, neither republication of the summons nor service on the defendant is required. Woodward v. Brown, 119 Cal. 283; 63 Am. St. Rep. 108; 51 Pac. 2,542. The issues are not changed by striking from the title of the action the names of one or more defendants, nor is any additional answer rendered necessary: a complaint so amended is not such a one as by the law or the rules of the court is required to be served upon the defendants, or by which they are entitled to answer. Harney v. Corcoran, 60 Cal. 314. An amendment to the complaint must be served on all the defendants affected thereby, but, in the absence of a showing

to the contrary, it will be presumed, on appeal, that the amendments were properly served; and an objection to the complaint is not available to reverse the judgment, where, taken in connection with the exhibits annexed thereto, it shows a cause of action. Riverside County v. Stockman, 124 Cal. 222; 56 Pac. 1027. Where the record shows service of an amended complaint on a party for whom an attorney appeared, it must be presumed that service upon the attorney also was shown to the court, although no record of it has been preserved. Canadian etc. Trust Co. v. Clarita etc. Investment Co., 140 Cal. 672; 74 Pac. 301. Where the plaintiff gives the defendant written notice, to which is attached a copy of a supplemental complaint, that, on a certain day, he will ask leave of the court to file such complaint, and the court permits the filing thereof, the defendant should be served with a copy thereof after it is filed. Galliano v. Kilfoy, 94 Cal. 86; 29 Pac. 416. Where, in an action against several defendants, judgment is entered against a defaulting defendant, it is unnecessary to serve a copy of an amended complaint, thereafter filed, upon him: he is no longer an adverse party. Cole v. Roebling Construction Co., 156 Cal. 443; 105 Pac. 255. Where the defendant is allowed time to answer, until the plaintiff elects upon which count of the complaint he will go to trial, the plaintiff should serve a copy of the complaint, with notice of his election. Willson v. Cleaveland, 30 Cal. 192.

Acknowledgment of service. A written acknowledgment of service of a cross-complaint, indorsed thereon, and signed by the plaintiff's attorney, is sufficient proof of due service thereof. Wood v. Johnston, 8 Cal. App. 258; 96 Pac. 508.

CHAPTER VIII.

VARIANCE. MISTAKES IN PLEADINGS AND AMENDMENTS.

§ 469. Material variance, how provided for.
§ 470. Immaterial variance, how provided for.
§ 471. What not to be deemed a variance.
§ 472. Amendments of course, and effect of demurrer.
§ 473. Amendments by the court. Enlarging time to plead and relieving from judgments, etc.
§ 474. Suing a party by a fictitious name, when allowed.
§ 475. No error or defect to be regarded unless it affects substantial rights.
§ 476. Time to amend or answer, running of.

§ 469. Material variance, how provided for. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just.

Immaterial variance. Post, § 470.
Variance, and failure of proofs. Post, § 471.
Immaterial errors, generally. See post, § 475.

Legislation § 469. 1. Enacted March 11, **1872**; based on Practice Act, § 579, which read: "A variance between the proof on the trial and the allegations in a pleading, shall be disregarded as immaterial, unless the court be satisfied that the adverse party has been misled to his prejudice thereby."

2. Amended by Code Amdts. **1873–74**, p. 302, (1) changing the word "has" from "have," before "actually," (2) changing the word "appears" from "is alleged," after "Whenever it," and (3) omitting, after the word "misled," the clause, "that fact must be proved to the satisfaction of the court, and thereupon the court may order the pleading to be amended, upon such terms as may be just."

Doctrine of variance. The doctrine of variance has been greatly mitigated in its application, as well by the English statutes as by the provisions of this code; but the former operate only by providing for amendments, and the latter mainly in the same way, though also modifying the rules of evidence; otherwise the doctrine remains unaffected, and is recognized and affirmed by the curative statutes themselves; the rule, therefore, is the same, under our system of practice, as at common law, except in so far as the consequences of a variance may, under the statutes, be obviated at the trial. Higgins v. Graham, 143 Cal. 131; 76 Pac. 898. This section applies to an action by stock-brokers to recover moneys advanced upon the purchase and sale of stocks (see Pollitz v. Wickersham, 150 Cal. 238; 88 Pac. 911), and to an action to rescind a voidable contract (Maionchi v. Nicholini, 1 Cal. App. 690; 82 Pac. 1052); but it does not apply to a notice of lien. Lucas v. Rea, 10 Cal. App. 641; 102 Pac. 822. The effect of a variance between a pleading and the proof is not governed by the same rules as in the case of a variance between notice of claim of lien and the proof; the notice of claim of lien must contain a correct statement of the facts required by the statute, and unless so stated, no lien can be enforced; while a variance between the pleading and the proof is not material, unless the adverse party has been misled thereby to his prejudice. Santa Monica Lumber etc. Co. v. Hege, 119 Cal. 376; 51

Pac. 555. If facts are correctly stated in notice of lien, the full amount of the contract price with credits, or the true amount after deducting credits, need not be pleaded. Star Mill etc. Co. v. Porter, 4 Cal. App. 470; 88 Pac. 497.

Application of variance to notice of lien. See note post, § 1187.

Immaterial variances. A variance between the pleading and the proof is not material, unless the adverse party has been thereby misled to his prejudice. Barrett-Hicks Co. v. Glas, 14 Cal. App. 289; 111 Pac. 760; Wood v. James, 15 Cal. App. 253; 114 Pac. 587; Hoover v. Lester, 16 Cal. App. 151; 116 Pac. 382; California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692; 118 Pac. 103, 113; Christenson Lumber Co. v. Buckley, 17 Cal. App. 37; 118 Pac. 466; Ostrom v. Woodbury, 18 Cal. App. 142; 122 Pac. 825; Culver v. Newhart, 18 Cal. App. 614; 123 Pac. 975; Union Collection Co. v. Rogers, 18 Cal. App. 205; 122 Pac. 970; Taylor v. Morris, 163 Cal. 717; 127 Pac. 66. An immaterial variance may be disregarded (Crocker v. Garland, 7 Cal. Unrep. 275; 87 Pac. 209; Pogue v. Ball, 4 Cal. App. 406; 88 Pac. 376; Star Mill etc. Co. v. Porter, 4 Cal. App. 470; 88 Pac. 497; Foster v. Carr, 135 Cal. 83; 67 Pac. 43), where the defendant is not actually misled to his prejudice in maintaining his defense upon the merits. Abner Doble Co. v. Keystone Consol. Mining Co., 145 Cal. 490; 78 Pac. 1050; Carter v. Baldwin, 95 Cal. 475; 30 Pac. 595; Bode v. Lee, 102 Cal. 583; 36 Pac. 936; Holt v. Holt, 120 Cal. 67; 52 Pac. 119; Herman v. Hecht, 116 Cal. 553; 48 Pac. 611; California Annual Conference v. Seitz, 74 Cal. 287; 15 Pac. 839; Lyles v. Perrin, 134 Cal. 417; 66 Pac. 472; Knox v. Higby, 76 Cal. 264; 18 Pac. 381. A variance that could not possibly have misled the defendant to his prejudice must be disregarded on appeal. Nordstrom v. Corona City Water Co., 155 Cal. 206; 132 Am. St. Rep. 81; 100 Pac. 242; Bollinger v. Bollinger, 154 Cal. 695; 99 Pac. 196. Immaterial variances will be disregarded on appeal, as not affecting the substantial rights of the parties. Miller v. Ballerino, 135 Cal. 566; 67 Pac. 1046; 68 Pac. 600; Carter v. Rhodes, 135 Cal. 46; 66 Pac. 985; 21 Morr. Min. Rep. 694. A variance between the findings and the allegations, as to matters not affecting the judgment or the rights of the parties, is immaterial. Bollinger v. Bollinger, 154 Cal. 695; 99 Pac. 196. Where the variance does not go to the measure of the defendant's liability, but merely to the identity of the subject-matter upon which that liability is founded, it will be disregarded as immaterial. Clark v. Chapman, 98 Cal. 110; 32 Pac. 812; 33 Pac. 750. The misspelling of a word does not constitute a material variance (People v. Cummings, 57 Cal. 88); neither does the use of abbreviations; nor the use of words and figures, instead of figures only. Corcoran v. Doll, 32 Cal. 82. Any variance that could not have misled or surprised the defendant to his prejudice in maintaining his defense upon the merits, is immaterial (Quackenbush v. Sawyer, 54 Cal. 439); and the court must, in every stage of an action or proceeding, disregard any defect in a pleading or proceeding that does not substantially affect the rights of the parties. Miller v. Ballerino, 135 Cal. 566; 67 Pac. 1046; 68 Pac. 600; Antonelle v. Kennedy etc. Lumber Co., 140 Cal. 309; 73 Pac. 966. Where the entire contract is set up in the answer, with the special averment of the breach of an alleged condition precedent, the defendant cannot be allowed to say that he was misled by the plaintiff's failure to aver what the defendant knew, pleaded, and relied upon. Antonelle v. Kennedy etc. Lumber Co., 140 Cal. 309; 73 Pac. 966. Where it cannot be determined until after the evidence has been received, whether there is a variance between the allegations of the complaint and the evidence offered, and the defendant does not make it appear that he is in any respect misled to his prejudice, no error is committed in striking out the testimony. Moore v. Douglas, 132 Cal. 399; 64 Pac. 705. Where there is a difference between the allegations in the complaint and the proofs as to the amount of money to be paid, such difference is one only in quantity and extent, and does not constitute a legal variance, and could not have misled the plaintiff to his prejudice in maintaining his defense upon the merits to the defendant's cross-complaint, nor can it prevent the court from adjudging the relief to which the parties are entitled. Peasley v. Hart, 65 Cal. 522; 4 Pac. 537. Where the complaint alleges a joint purchase by a partnership and one of its members individually, and the evidence merely shows a sale to the partnership, the variance is not material (Redwood City Salt Co. v. Whitney, 153 Cal. 421; 95 Pac. 885); nor is the variance material, where the difference between the contract offered and received in evidence and the contract pleaded in the complaint was merely as to the price to be paid for the work (Christenson Lumber Co. v. Buckley, 17 Cal. App. 37; 118 Pac. 466); nor where the complaint alleges that goods damaged through the negligence of the defendant were in a building of the plaintiff, and the proof is that some of them were on the roof of the building (Yik Hon v. Spring Valley Water Works, 65 Cal. 619; 4 Pac. 666); nor where the complaint, in an action for damages, alleges that the defendants owned, as tenants in common, the entire block in front of which the accident occurred, and the proof is that they owned distinct parcels thereof in severalty (Gay v. Winter, 34 Cal. 153); nor where the complaint alleges a false arrest and imprisonment upon a charge of larceny, and the evidence is conflicting as to whether the arrest was upon

that ground or upon a charge of disturbing the peace. Sebring v. Harris, 20 Cal. App. 56; 128 Pac. 7. Where the complaint alleges that the defendant entered on a date subsequent to that shown by the evidence, there is a variance; but, as the defendant was not misled to his prejudice, it is immaterial. Amador Gold Mine v. Amador Gold Mine, 114 Cal. 346; 46 Pac. 80. In an action for libel, proof that the libel included others besides the plaintiff is not a variance. Robinett v. McDonald, 65 Cal. 611; 4 Pac. 651. The variance between the description in an authorization to sell land and that in the printed receipt on the back thereof, is not fatal, where both refer to an attached diagram, and all parties had reference to the same property. Melone v. Ruffino, 129 Cal. 514; 79 Am. St. Rep. 127; 62 Pac. 93. In an action for damages caused by fire, the place of the origin of the fire is not material, and the defendant could not have been misled by a variance upon the point, to its prejudice, in maintaining its defense upon the merits. Butcher v. Vaca Valley etc. Ry. Co., 2 Cal. Unrep. 427; 5 Pac. 359. Where the complaint avers generally that property was loaned to the defendant, and that he converted it to his own use, and the evidence shows that it was loaned for a special purpose, but the defendant did not use it for that purpose, but converted it to his own use, the variance is immaterial, as the adverse party was not misled to his prejudice. Hitchcock v. McElrath, 72 Cal. 565; 14 Pac. 305. Where a total failure of consideration is set up in the answer, but the proof shows a partial failure only, the variance is not an available one. Plate v. Vega, 31 Cal. 383.

Proofs under pleadings. A party making an allegation that a sale was in writing is not thereby precluded from proving that the sale was a verbal one. Patterson v. Keystone Mining Co., 30 Cal. 360. Where the complaint alleges an express promise to pay a debt, barred by the statute of limitations, it is competent to prove an acknowledgment from which a promise to pay is implied. Farrell v. Palmer, 36 Cal. 187.

How variance objected to. Variance may be taken advantage of, either by objecting to the admissibility of the evidence or by motion for nonsuit. Elmore v. Elmore, 114 Cal. 516; 46 Pac. 458. Where the cause of action shown by the evidence is somewhat, but not radically, different from that stated in the complaint, the objection of variance should be presented either by a specific objection to the evidence, or by a motion for a nonsuit on that particular ground. Eversdon v. Mayhew, 85 Cal. 1; 21 Pac. 431; 24 Pac. 382. A material variance between the contract as alleged and as proved is a ground of nonsuit, unless the plaintiff obtains leave to amend his complaint so as to make it conform to the proofs. Tomlinson v. Monroe, 41 Cal. 94. A serious variance, claimed to exist between the evidence of the plaintiff and that of his principal witness, cannot be considered on a motion for nonsuit Wassermann v. Sloss, 117 Cal. 425; 59 Am. St. Rep. 209; 38 L. R. A. 176; 49 Pac. 566. The question of variance cannot be raised for the first time on appeal (Bell v. Knowles, 45 Cal. 193; Knox v. Higby, 76 Cal. 264; 18 Pac. 381; Bode v. Lee, 102 Cal. 583; 36 Pac. 936; Baxter v. Hart, 104 Cal. 344; 37 Pac. 941; Swamp Land Dist. v. Glide, 112 Cal. 85; 44 Pac. 451; Barrell v. Lake View Land Co., 122 Cal. 129; 54 Pac. 594; Yik Hon v. Spring Valley Water Works, 65 Cal. 619; 4 Pac. 666), because the plaintiff is thereby deprived of an opportunity to amend his complaint to obviate the objection of variance. Davey v. Southern Pacific Co., 116 Cal. 325; 48 Pac. 117. Where a party desires to raise the question as to any variance shown between allegations in a pleading and the proof offered at the trial, such objection must be presented to the trial court; otherwise it is waived. California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692; 118 Pac. 103, 113; Rutz v. Obear, 15 Cal. App. 435; 115 Pac. 67.

Amendment to cure variance. Objections on the ground of variance between the allegations of the complaint and the proof offered should be made at the trial, so that, if well taken, the complaint may be amended. Knox v. Higby, 76 Cal. 264; 18 Pac. 381. Under this section, amendments of pleadings may be allowed, upon terms. Hedstrom v. Union Trust Co., 7 Cal. App. 278; 94 Pac. 386. Where the case as proved and as found is not the case made by the complaint, the judgment will be reversed on appeal, in order that the complaint may be properly amended. Bryan v. Tormey, 84 Cal. 126; 24 Pac. 319. Where the complaint is for goods sold to two defendants jointly, a judgment rendered against one will be reversed, so that the complaint may be amended; but the issue cannot be changed in the supreme court. Dobbs v. Purington, 136 Cal. 70; 68 Pac. 323. Where the complaint states a cause of action upon an unconditional contract, but the plaintiff introduces the contract in evidence, which limits the liability of the defendant to certain losses, the court may permit the complaint to be amended. Clark v. Phœnix Ins. Co., 36 Cal. 168. Under the Practice Act of 1850, where the defect did not appear on the face of the complaint, the defendant could bring it forward by his answer, and then, in certain cases, as a matter of course, and in others, on application to the court, and on such terms as were proper, the plaintiff could amend by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and, upon the amended

complaint and the answer thereto, the parties were ready to proceed to trial upon the substantial merits. Rowe v. Chandler, 1 Cal. 167.

CODE COMMISSIONERS' NOTE. The latter part of this section has been added by the commissioners. It accords with the construction placed by the courts upon the section as it originally stood. Catlin v. Gunter, 10 How. Pr. 321; Cotheal v. Talmadge, 1 E. D. Smith, 575; and see also Began v. O'Rielly, 32 Cal. 11; Plate v. Vega, 31 Cal. 383.

§ 470. Immaterial variance, how provided for. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

Variance, material. Ante, § 469.

Legislation § 470. Enacted March 11, 1872.

Finding according to evidence. If evidence, not constituting a material variance, is received at the trial, and the plaintiff does not claim that he was misled by its introduction, or in any way prevented from maintaining his cause of action upon its merits, and does not, either by motion to reopen the cause, or afterwards, upon his motion for a new trial, make it appear to the court that he was prejudiced thereby, or in any way prevented from introducing evidence, or that he was able to present any evidence that would tend to overcome the testimony, the evidence, and the findings thereon, are to be regarded as if defendant had amended his answer so as to present these issues, prior to entering upon the trial, or even prior to the introduction of any testimony: the court may properly consider, in making up its decision, any evidence, by depositions or otherwise, relevant to the issues made by an amended answer. Firebaugh v. Burbank, 121 Cal. 186; 53 Pac. 560. Where there is an immaterial variance, of such character as not to mislead the defendant, the court should admit the evidence and find the facts accordingly, or direct an amendment. Cobb v. Doggett, 142 Cal. 142; 75 Pac. 785. Although there is a variance between the allegations of the complaint and the proof, yet the court should find according to the evidence, and, if no other defense is established, should enter judgment thereon for the plaintiff, where he is entitled thereto. Herman v. Hecht, 116 Cal. 553; 48 Pac. 611. Where the variance between the allegations and the proof is such that the defendant was not misled in mistaking his defense, the court should find the fact according to the evidence, without any amendment of the complaint. Duke v. Huntington, 130 Cal. 272; 62 Pac. 510. Where a party has not been misled to his prejudice, in view of the pleadings and the evidence, the facts should be found according to the evidence. Lackmann v. Kearney, 142 Cal. 112; 75 Pac. 668. Where the variance is immaterial, the court may properly find according to the evidence. Vestal v. Young, 147 Cal. 715; 82 Pac. 381; Maionchi v. Nicholini, 1 Cal. App. 690; 82 Pac. 1052. In an action brought to enforce a special promise alleged to have been made on a certain day, the plaintiff may recover upon proof that the promise was made at any time before the commencement of the action, and need not prove that it was made on or about the time alleged in the complaint. Biven v. Bostwick, 70 Cal. 639; 11 Pac. 790.

Amendment to conform to proofs. A variance between the complaint and the evidence may be obviated by an amendment of the complaint so as to conform to the proof (Barrell v. Lake View Land Co., 122 Cal. 129; 54 Pac. 594), where the variance is not material (Hedstrom v. Union Trust Co., 7 Cal. App. 278; 94 Pac. 386; Ramboz v. Stansbury, 13 Cal. App. 649; 110 Pac. 472); but the amendment cannot go beyond the proof (McDougald v. Argonaut Land etc. Co., 117 Cal. 87; 48 Pac. 1021); and the court may permit the amendment either on its own motion or on the motion of the plaintiff (Valencia v. Couch, 32 Cal. 339; 91 Am. Dec. 589), even during the trial (Carpentier v. Small, 35 Cal. 346; Clark v. Phœnix Ins. Co., 36 Cal. 168; Farmers' Nat. Gold Bank v. Stover, 60 Cal. 387); it has a discretion to allow the plaintiff so to amend his complaint (Yordi v. Yordi, 6 Cal. App. 20; 91 Pac. 348; Doherty v. California Navigation etc. Co., 6 Cal. App. 131; 91 Pac. 419), and it is justified in allowing the amendment (Mills v. Jackson, 19 Cal. App. 695; 127 Pac. 655), even without notice to the defendant. Ramboz v. Stansbury, 13 Cal. App. 649; 110 Pac. 472. Upon discovering a variance, the court should order the pleading amended, before making its findings or judgment. Hedstrom v. Union Trust Co., 7 Cal. App. 278; 94 Pac. 386. The defendant may present, in his answer, any matter constituting a defense, and the court may permit him to amend his answer, in order to plead such matter, even after the trial has commenced. Firebaugh v. Burbank, 121 Cal. 186; 53 Pac. 560. An allegation rendered necessary by technical statutory rules may be supplied by amendment. Frost v. Witter, 132 Cal. 421; 84 Am. St. Rep. 53; 64 Pac. 705. While the variance may not be material, yet, if objection is made on that ground, good practice requires an explanation of the variance, and any errors found in an instrument set out in the complaint should be corrected by amendment. Ball v. Putnam, 123 Cal. 134; 55 Pac. 773.

Where the evidence conclusively shows the party to be entitled to relief, an amendment should be allowed or directed, in order to conform the pleadings to the facts which ought to be in issue. Connalley v. Peck, 3 Cal. 75; Ward v. Waterman, 85 Cal. 488; 24 Pac. 930. In cases coming under this section, amendments to the pleading should not only be allowed, but required, not for the purpose of framing issues for the trial, but to supply technical defects. Hedstrom v. Union Trust Co., 7 Cal. App. 278; 94 Pac. 386. The pleadings may, under this section, be amended without terms. Hedstrom v. Union Trust Co., 7 Cal. App. 278; 94 Pac. 386.

§ 471. What not to be deemed a variance. Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof.

Proof.
1. Generally. Post, §§ 1824, 1869.
2. Failure of, dismissal for. Post, § 581, subd. 5.

Legislation § 471. Enacted March 11, **1872.**

Amendment on total failure of proof. This section virtually forbids amendments, except where the allegation of the claim or defense would be changed in its general scope and meaning. Atlantic etc. Ry. Co. v. Laird, 164 U. S. 393; 41 L. Ed. 485; 17 Sup. Ct. Rep. 120. Variance between the allegations of the complaint and the proof, even if such as actually to mislead the defendant, does not necessarily constitute a failure of proof. Pollitz v. Wickersham, 150 Cal. 238; 88 Pac. 911. Where the allegations to which the proof is directed are not proved, not in some particular or particulars only, but in their general scope and meaning, it is error to allow the plaintiff to file a second amended complaint, which changes the proceeding from an action ex delicto to an action ex contractu. Hackett v. Bank of California, 57 Cal. 335. In an action for slander, the allegata and probata must substantially correspond: the plaintiff is not entitled to recover upon proof of words not set forth, or upon a failure to prove the slanderous words alleged. Haub v. Friermuth, 1 Cal. App. 556; 82 Pac. 571.

CODE COMMISSIONERS' NOTE. The allegations and proof must agree. For actions ex contractu and general matters, see Hathaway v. Ryan, 35 Cal. 188.

§ 472. Amendments of course, and effect of demurrer. Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading. A demurrer is not waived by filing an answer at the same time; and when the demurrer to a complaint is overruled and there is no answer filed, the court may, upon such terms as may be just, allow an answer to be filed. If a demurrer to the answer be overruled, the facts alleged in the answer must be considered as denied, to the extent mentioned in section four hundred and sixty-two.

Complaint, amended, filing. Ante, § 432.
Answer no waiver of demurrer. Ante, § 431.

Legislation § 472. **1.** Enacted March 11, **1872;** based on Practice Act, § 67, as amended by Stats. 1865-66, p. 703, which read: "After demurrer, and before the trial of the issue of law thereon, the pleadings demurred to may be amended as of course and without costs by filing the same as amended and serving a copy thereof on the adverse party or his attorney within ten days, who shall have ten days thereafter in which to demur or answer thereto; but a party shall not so amend more than once. A demurrer shall not be deemed waived by the filing of an answer at the same time of filing the demurrer; and when the demurrer to a complaint is overruled, and there is no answer filed, the court may upon terms allow an answer to be filed. If a demurrer to the answer be overruled, the facts alleged in the answer shall be considered as denied to the extent mentioned in section sixty-five. Where circumstances occurring subsequently to the commencement of the action render it proper, the same may be presented by supplemental pleadings and issue taken thereon in the same manner as in the case of original pleadings." The last sentence formed the basis of § 464, ante. The enactment of 1872 had (1) the word "must" instead of the words "may, upon such terms as may be just," and (2) the word "is" instead of "be," before "overruled."

2. Amended by Code Amdts. **1873–74,** p. 302.

3. Amendment by Stats. **1901,** p. 135; unconstitutional. See note ante, § 5.

Amendment as of course. The plaintiff is entitled to file the first amendment of his complaint as of course, where there has been no trial on the issue of law. Young v. Fink, 119 Cal. 107; 50 Pac. 1060; Allen v. Marshall, 34 Cal. 165. Any pleading which may be amended once as of course, and without costs, may be so amended without application to the court, or permission therefrom: it is a right conferred upon the

parties, equally with that of pleading originally, a right the court cannot take from a party to an action, and it must be exercised within the time and in the manner specified in the code; it is quite distinct from the numerous cases in which amendments to pleadings can only be made by leave of the court. Spooner v. Cady, 4 Cal. Unrep. 539; 36 Pac. 104. An amended answer cannot be filed as of course after a demurrer to the original answer has been disposed of, nor after the time within which the plaintiff might have demurred, but did not, has expired. Tingley v. Times Mirror Co., 151 Cal. 1; 89 Pac. 1097; Manha v. Union Fertilizer Co., 151 Cal. 581; 91 Pac. 393. This section is to be liberally construed, so as to confer an equal right to amend upon both parties as to all pleadings, but not so as to confer greater rights upon one, in that respect, than are accorded to the other, or to work a hardship upon either party, or to interfere with the progress of a trial after the issues of fact have been made. Tingley v. Times Mirror Co., 151 Cal. 1; 89 Pac. 1097. A defendant has not an absolute right, under this section, to file an amended answer at any time before trial (Manha v. Union Fertilizer Co., 151 Cal. 581; 91 Pac. 393); and it is not an abuse of discretion to refuse to allow further amendments, after a demurrer has been sustained to a third amended complaint. Billesbach v. Larkey, 161 Cal. 649; 120 Pac. 31. The right to amend, after the filing of a demurrer, is absolute, only when it is exercised before the demurrer is argued and submitted. Stewart v. Douglass, 148 Cal. 511; 83 Pac. 699; Manha v. Union Fertilizer Co., 151 Cal. 581; 91 Pac. 393. Upon the reversal of a judgment for the plaintiff, his right to amend the complaint is generally a matter of absolute right, and, when it is refused, the court must be able to say that the complaint cannot be amended so as to state a good cause of action. Norton v. Bassett, 158 Cal. 425; 111 Pac. 253. In general, the question whether or not the court has abused its discretion in granting or refusing permission to amend, depends upon the question whether the amendment is such a permissible one as will perfect a cause of action imperfectly pleaded. Norton v. Bassett, 158 Cal. 425; 111 Pac. 253. An amended demurrer relates to the time of the filing of the original demurrer, and may be made as of course. Pittman v. Carstenbrook, 11 Cal. App. 224; 104 Pac. 699.

Answer after demurrer overruled. When a demurrer to the complaint is overruled, and there is no answer on file, it is within the discretion of the court to grant leave to answer, or to enter final judgment, especially where the demurrer was manifestly frivolous, and confessedly put in to obtain time. Barron v. Deleval, 58 Cal. 95. The party whose demurrer is overruled ought to be required to obtain leave to answer, to satisfy the court that he has a substantial defense on the merits to the action; the allowance of leave to answer rests in the discretion of the court below, subject to review in case of its arbitrary or unreasonable exercise. Thornton v. Borland, 12 Cal. 438; Gillan v. Hutchinson, 16 Cal. 153. When a demurrer to the complaint is overruled, it is not necessary that the order fix the time within which the answer must be filed, although the court has power to fix such time as it may deem proper; but if not fixed, the defendant should answer within the same time as in case of service of a copy of the original complaint with summons. People v. Rains, 23 Cal. 127. Where the defense is invalid, it is not error to refuse to permit the defendant to amend his answer after judgment sustaining a demurrer thereto. Gillan v. Hutchinson, 16 Cal. 153. A refusal to allow an amendment cannot be reviewed on an appeal from an order denying a new trial, where the notice of intention to move for a new trial fails to set forth in what particular the court abused its discretion. Cook v. Suburban Realty Co., 20 Cal. App. 538; 129 Pac. 801.

Effect of sustaining demurrer. When a demurrer to the complaint is sustained on the ground that it does not state a cause of action, without leave to amend, the defendant is entitled to have final judgment entered in his favor. Mora v. Le Roy, 58 Cal. 8. Where the order refusing leave to amend the complaint is inserted in the order sustaining the demurrer thereto, it cannot be presumed that the plaintiff asked leave to amend in advance of the ruling on the demurrer; the order denying the right to amend is deemed excepted to by force of the statute, and the plaintiff is not required to move to vacate or modify it, in order to have the point reviewed on appeal. Schaake v. Eagle Automatic Can Co., 135 Cal. 472; 63 Pac. 1025; 67 Pac. 759. Where the demurrer to the complaint is sustained, with leave to amend, but the plaintiff declines to do so, the judgment will not be reversed on appeal, in order to allow an amendment. Sutter v. San Francisco, 36 Cal. 112. When the demurrer to the complaint is sustained, the plaintiff is entitled to amend, unless the complaint is so defective that it cannot be made good. Ridgway v. Bogan, 2 Cal. Unrep. 718; 12 Pac. 343. Where the demurrer to the complaint is sustained, and plaintiff did not ask leave to amend, he cannot raise the point on appeal. Durrell v. Dooner, 119 Cal. 411; 51 Pac. 628.

Demurrer not waived by answering. It seems to have been formerly held that the filing of an answer after the overruling of the demurrer is a waiver of the demurrer; but by this section, as amended, it is expressly enacted, that the demurrer is not waived by the filing of an answer at the same time. Curtiss v. Bachman, 84 Cal.

216; 24 Pac. 379. A demurrer for insufficiency of the complaint to state a cause of action is not waived by filing an answer at the same time, or subsequently to the filing and overruling of the demurrer, nor is the defect cured by verdict. Hurley v. Ryan, 119 Cal. 71; 51 Pac. 20. It being expressly enacted that the demurrer is not waived by the filing of the answer at the same time, a fortiori it is not waived by the filing of an answer, upon leave given by the court, subsequently to the filing and overruling of the demurrer. Curtiss v. Bachman, 84 Cal. 216; 24 Pac. 379.

Filing amended pleading as waiver of objection to sustaining or overruling of demurrer. See notes 19 Ann. Cas. 306; Ann. Cas. 1913B, 388.

Right to amend pleading after default judgment. See note Ann. Cas. 1913B, 481.

Amendment of pleading as requiring new process. See note Ann. Cas. 1913B, 831.

CODE COMMISSIONERS' NOTE. The original section (§ 67) has been changed so as to permit amendments of course before answer or demurrer. The last clause of the original section is in substance embodied in the last section of the preceding chapter. If the defendant demurs to the complaint, the plaintiff must not be denied leave to amend his complaint before the decision on the demurrer, and if the demurrer is sustained, the plaintiff must have leave to amend his complaint, unless it is so defective that it cannot be remedied by amendment. Lord v. Hopkins, 30 Cal. 76. When a demurrer is overruled, with leave to answer, the order need not fix the time within which the answer must be filed. The court has power to fix such time for answering, but where no time is fixed, the defendant should answer within the same time as in case of service of a copy of the original complaint. People v. Rains, 23 Cal. 128. Where a demurrer to a complaint is sustained, and plaintiff declines to amend, and appeals from the judgment and the order sustaining the demurrer, if the order sustaining the demurrer is affirmed, the supreme court cannot then grant plaintiff leave to amend his complaint. People v. Jackson, 24 Cal. 633. If the plaintiff amends his complaint, and the defendant obtains an order allowing his answer on file to stand as the answer to the amended complaint, the answer is to be treated as if filed when the order is made. Mulford v. Estudillo, 32 Cal. 131. The filing of a new complaint, after demurrer has been sustained, is not commencing a new action. Jones v. Frost, 28 Cal. 246. The party desiring amendment after demurrer sustained, must make his motion to the court, and if he does not so move, he cannot object on appeal that he was not permitted to amend. Smith v. Yreka Water Co., 14 Cal. 201. Where the complaint is defective, the court must sustain the demurrer, giving leave to the plaintiff to amend his complaint, and if the plaintiff then does not amend, final judgment should be given. Gallagher v. Delaney, 10 Cal. 410. The defense relied on in the answer being invalid, permission to amend after judgment sustaining a demurrer to the answer was properly refused. The allowance of the amendment was matter of discretion, for the abuse of which only could the supreme court interfere. Gillan v. Hutchinson, 16 Cal. 153. See also Thornton v. Borland, 12 Cal. 438; Seale v. McLaughlin, 28 Cal. 668. Answer cannot be struck out for failing to pay demurrer fees. People v. McClellan, 31 Cal. 101.

§ 473. Amendments by the court. Enlarging time to plead and relieving from judgments, etc. The court may in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code; and may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made, or that the value in the affidavit stated was inserted by mistake, the court shall dis-

regard the value as stated in the affidavit, and give judgment according to the right of possession of said property at the time the affidavit was made.

Relief from judgment in justice's court. See post, § 859.

Legislation § 473. 1. Enacted March 11, **1872**; based on Practice Act, § 68, as amended by Stats. 1865–66, p. 843, which read: "The court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may, upon like terms, enlarge the time for an answer or demurrer, or demurrer to an answer filed. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this act; and may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; and when, for any cause satisfactory to the court, or the judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the court, or the judge at chambers in vacation, may grant the relief upon application made within a reasonable time, not exceeding five months after the adjournment of the term. When, from any cause, the summons and a copy of the complaint in an action have not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action." When enacted in 1872, (1) the word "an" was omitted before the words "answer or demurrer," and, immediately after these words, the words "or demurrer to an answer filed" were also omitted, (2) the word "act" was changed to "code," and (3) the word "representatives" was changed to "representative."

2. Amended by Code Amdts. **1873–74**, p. 302, (1) inserting the words "allow a party to," before "amend any"; (2) changing the word "proceedings" to "proceeding," before "by adding"; (3) adding the words "in its discretion," instead of "upon affidavit showing good cause therefor"; (4) inserting the word "also" instead of the words "may, upon such terms as may be just, and upon payment of costs"; (5) after the word "legal," changing "representatives" to "representative"; (6) changing the word "cause" to "reason"; (7) changing the words "at chambers," after "judge," to "thereof"; (8) changing the words "been able" to "failed," before "to apply"; (9) changing the words "at chambers," before "in vacation," to "thereof"; (10) changing, after "exceeding," the word "five" to "six"; (11) omitting the words "and a copy of the complaint," after "summons"; (12) changing the word "have" to "has," before "not been"; (13) changing the words "six months" to "one year," before "after the rendition"; (14) adding the last sentence, beginning "When, in an action," which read as at present, except that it did not contain the words "or undertaking," after "any bond."

3. Amended by Code Amdts. **1880**, p. 2.

Application for relief, how made. An application for relief, under this section, must be by a proceeding in the cause wherein the default was taken, and not by a separate suit for relief against the judgment. Estate of Griffith, 84 Cal. 107; 23 Pac. 528; 24 Pac. 381. A motion to set aside a judgment is a direct and not a collateral attack upon such judgment; hence, errors which might be the subject of review on appeal therefrom may be considered on an appeal from an order denying the motion. People v. Greene, 74 Cal. 400; 5 Am. St. Rep. 448; 16 Pac. 197. Where judgment was entered by default, after service of summons by publication, and a motion is made to set it aside, six years after entry thereof, the attack, while it may be said to be direct, is, in a technical sense, collateral; it is a proceeding aside from or outside of the regular proceedings in the case. People v. Norris, 144 Cal. 422; 77 Pac. 998. The court may vacate a judgment entered by it, by other proceedings than by a motion for a new trial; and an error committed in vacating the judgment can be corrected on a direct appeal, but on a collateral attack the order will be deemed to have been properly made. Storke v. Storke, 111 Cal. 514; 44 Pac. 173; Butler v. Soule, 124 Cal. 69; 56 Pac. 601. A party making a collateral attack upon a judgment or order must show by the record lack of jurisdiction. Galvin v. Palmer, 134 Cal. 426; 66 Pac. 572. A motion, under this section, is usually made and determined upon affidavits alone, as authorized by § 2009, post. Guardianship of Van Loan, 142 Cal. 423; 76 Pac. 37. Upon a motion by a defendant to vacate a judgment by default, the better practice is to make, prepare, and exhibit to the court the answer he proposes or desires to make. Bailey v. Taaffe, 29 Cal. 422.

Nature and scope of relief provided. This section is remedial in its nature, and is to be liberally construed, with a view to promote justice. Palmer & Rey v. Barclay, 92 Cal. 199; 28 Pac. 226; Malone v. Big Flat Gold Mining Co., 93 Cal. 384; 28 Pac. 1063; Mitchell v. California etc. S. S. Co., 156 Cal. 576; 105 Pac. 590; Norton v. Bassett, 158 Cal. 425; 111 Pac. 253; Burr v. United Railroads, 163 Cal. 663; 126 Pac. 873; Application of Johnson, 7 Cal. App. 436; 94 Pac. 592; Lemon v. Hubbard, 10 Cal. App. 471; 102 Pac. 554; San Francisco etc. Home Bldg. Soc. v. Leonard, 17 Cal. App. 254; 119 Pac. 405; Jaques v. Owens, 18 Cal. App. 114; 122 Pac. 430. The plaintiff, as well as the defendant, may invoke its relief (Lemon v. Hubbard, 10 Cal. App. 471; 102 Pac. 554); and it is applicable to the determination of the question whether a decree as to property conforms to due process of law. Hoffman v. Superior Court, 151 Cal. 386; 90 Pac. 939.

Discretion of court in granting or refusing relief. The granting of relief, under this section, is largely within the discretion of the court (Malone v. Big Flat Gravel Mining Co., 93 Cal. 384; 28 Pac. 1063; Webster v. Somer, 159 Cal. 459; 114 Pac. 575; Link v. Jarvis, 5 Cal. Unrep.

750; 33 Pac. 206; Murphy v. Stelling, 1 Cal. App. 95; 81 Pac. 730; Pelegrinelli v. McCloud River Lumber Co., 1 Cal. App. 593; 82 Pac. 695; Freeman v. Brown, 5 Cal. App. 516; 90 Pac. 970; Doherty v. California Nav. etc. Co., 6 Cal. App. 131; 91 Pac. 419; Klokke v. Raphael, 8 Cal. App. 1; 96 Pac. 392; Lemon v. Hubbard, 10 Cal. App. 471; 102 Pac. 554); though in some cases it is without any discretion in the premises. Holiness Church v. Metropolitan Church Ass'n, 12 Cal. App. 445; 107 Pac. 633. The principal purpose of vesting the court with discretionary power is to enable it so to mold and direct its proceedings as to dispose of cases on their substantial merits, when this can be done without injustice to either party. Ward v. Clay, 82 Cal. 502; 23 Pac. 50, 227. The effect of the qualifying phrase, "on such terms as may be just," in this section, is, not to give the court power or discretion to refuse the relief when the statutory conditions, expressed and implied, are met, but merely to confer upon it the power, when it finds the defendant entitled to the relief, to consider whether or not the defendant may not have been negligent in a degree which would amount to laches, or create an estoppel, and whether or not the plaintiff, or his successor, may not have innocently, on the faith of the judgment, incurred costs or expenses which the defendant, in justice, should refund, and to impose on the defendant such terms as may be necessary to do complete justice between the parties, and to fix the time for filing the answer, and limit and define its character, so that it shall be addressed to the merits. Gray v. Lawlor, 151 Cal. 352; Boland v. All Persons, 160 Cal. 486; Osmont v. All Persons, 165 Cal. 587.

Power of appellate court under this section. An appellate court, whether this section is applicable to it or not, should, when the facts justify it, allow a transcript to be filed after the time fixed, and retain the appeal (Estate of Keating, 158 Cal. 109; 110 Pac. 109); but if rules similar to those governing applications for relief under this section are to be applied in the appellate court, the party asking relief from his default must at least show that he has consulted counsel, and has been advised by them that he has reasonable ground to expect a reversal if the appeal is heard upon its merits. Erving v. Napa Valley Brewing Co., 16 Cal. App. 41; 116 Pac. 331. An appeal is not subordinate to an application for relief, under this section. Nevin v. Gary, 12 Cal. App. 1; 106 Pac. 422. A clerical error, disclosed by the pleadings, will be corrected in the appellate court, at the appellant's cost, where no motion was made for its correction in the court below. Tryon v. Sutton, 13 Cal. 490.

Remedy provided for mistakes of law and fact. The court has power to allow an amendment correcting mistakes of law as well as of fact (Ward v. Clay, 82 Cal. 502; 23 Pac. 50, 227; Gould v. Stafford, 101 Cal. 32; 35 Pac. 429; Mitchell v. California etc. S. S. Co., 156 Cal. 576; 105 Pac. 590; Churchill v. More, 7 Cal. App. 767; 96 Pac. 108; Dent v. Superior Court, 7 Cal. App. 683; 95 Pac. 672; Amestoy Estate Co. v. Los Angeles, 5 Cal. App. 273; 90 Pac. 42), and to grant relief against a mistake in any respect; although, it may be, the court should require a stronger showing to justify relief from the effect of a mistake of law than in case of a mistake as to a matter of fact. Ward v. Clay, 82 Cal. 502; 23 Pac. 50, 227. Not all mistakes of law are to be relieved against; a sound discretion, controlled by an enlightened judgment, keeping in view public interests, and the due and orderly administration of the law, is to be exercised in granting that relief which justice between the parties requires. Douglass v. Todd, 96 Cal. 655; 31 Am. St. Rep. 247; 31 Pac. 623. Where a party has, in good faith, made an earnest effort to ascertain the condition of his case, and has availed himself of such means as would be ordinarily employed, but is misled thereby, he can justly claim that his mistake was not the result of negligence, and he cannot be deprived of the remedy provided by this section. Melde v. Reynolds, 129 Cal. 308; 61 Pac. 932. The general rule, that a party cannot be relieved from an ordinary contract, which is in its nature final, on account of a mistake of law, does not apply to proceedings in an action at law, pending and undetermined. Gould v. Stafford, 101 Cal. 32; 35 Pac. 429. Courts have power, under this section, to relieve parties from mistakes as to the legal effect of acts of their attorneys. Broderick v. Cochran, 18 Cal. App. 202; 122 Pac. 972. A mistake in the name of a party may be corrected. Nisbet v. Clio Mining Co., 2 Cal. App. 436; 83 Pac. 1077. The correction of a mistake as to the names of the assignors of a cause of action does not affect the identity of the cause of action sued upon, as respects the statute of limitations. Nellis v. Pacific Bank, 127 Cal. 166; 59 Pac. 830. A mistake as to the date upon which the service of summons was made is such a mistake as is clearly contemplated by this section, and against which the court may grant relief by vacating a judgment by default. Miller v. Carr, 116 Cal. 378; 58 Am. St. Rep. 180; 48 Pac. 324. An allegation in a cross-complaint, that, at the time an agreement was executed, both parties intended that it should include the property sued for, and that the same was omitted through a mistake, is, in the absence of a demurrer, a sufficient allegation of the mistake in the execution of the agreement. Peasley v. McFadden, 68 Cal. 611; 10 Pac. 179. Relief on the ground of a mistake of fact, not discovered within

six months after the entry of the decree, is not confined to a motion under this section (Gerig v. Loveland, 130 Cal. 512; 62 Pac. 830); but equitable relief may be had, upon the setting out, in extenso, of the facts justifying such relief, in addition to the ordinary statements of the cause of action. Brackett v. Banegas, 116 Cal. 278; 58 Am. St. Rep. 164; 48 Pac. 90.

Correction of clerical errors. The authority of the court to cause its records to be corrected in accordance with the facts, is undoubted. Kaufman v. Shain, 111 Cal. 16; 52 Am. St. Rep. 139; 43 Pac. 393. The court may, at any time, amend a judgment, where the record discloses that the entry on the minutes does not correctly state the judgment (Seamman v. Bonslett, 118 Cal. 93; 62 Am. St. Rep. 226; 50 Pac. 272); it has power, at all times, in a proper case, to direct any amendment or correction in a judgment, to the end that, as entered, it may express what was rendered, and the record thus made to speak the fact (Cosby v. Superior Court, 110 Cal. 45; 42 Pac. 460); and, while it has physical control of its records, may amend its judgment or orders, where the record furnishes the data by which to amend, and where the necessity for the amendment is apparent upon the record (Bostwick v. McEvoy, 62 Cal. 496; Dickey v. Gibson, 113 Cal. 26; 54 Am. St. Rep. 321; 45 Pac. 15; Seamman v. Bonslett, 118 Cal. 93; 62 Am. St. Rep. 226; 50 Pac. 272); and it is its duty so to amend its judgment or record as to make it conform to its actual decision (Canadian etc. Trust Co. v. Clarita etc. Investment Co., 140 Cal. 672; 74 Pac. 301; O'Brien v. O'Brien, 124 Cal. 422; 57 Pac. 225); but not to express something the court did not pronounce, even though the amendment embraces matters that ought to have been pronounced. First Nat. Bank v. Dusy, 110 Cal. 69; 42 Pac. 476. The court may amend its judgments or orders while the records are under its control, and where they furnish the data by which to amend, and the necessity for the amendment is manifest therein (Bostwick v. McEvoy, 62 Cal. 496); but the court may amend its record upon any competent legal evidence. Kaufman v. Shain, 111 Cal. 16; 52 Am. St. Rep. 139; 43 Pac. 393. Any error or defect in the record, occurring through acts of omission or commission of the clerk, that may be termed a clerical misprision, if the record affords evidence thereof, may be corrected at any time by the court, upon its own motion or upon the motion of an interested party, either with or without notice (Seamman v. Bonslett, 118 Cal. 93; 62 Am. St. Rep. 226; 50 Pac. 272; Dickey v. Gibson, 113 Cal. 26; 54 Am. St. Rep. 321; 45 Pac. 15), even after appeal and affirmance of judgment, and the issuance and service of execution (Rousset v. Boyle, 45 Cal. 64), providing the party moving proceeds with due diligence (Hegeler v. Henckell, 27 Cal. 491), and the mistake is one which does not go to the merits of the case. Fallon v. Brittan, 84 Cal. 511; 24 Pac. 381; Egan v. Egan, 90 Cal. 15; 27 Pac. 22; O'Brien v. O'Brien, 124 Cal. 422; 57 Pac. 225. Such amendments can be made after the expiration of six months from the entry of the judgment (Egan v. Egan, 90 Cal. 15; 27 Pac. 22), but they do not operate to extend the time for taking an appeal from the decree. Fallon v. Brittan, 84 Cal. 511; 24 Pac. 381. An error of description in a name, which is apparent upon the face of the record, and amounting only to a clerical error, may be corrected by the court at any time. Fallon v. Brittan, 84 Cal. 511, 24 Pac. 381. The fact that the judgment is signed by the judge does not show that the mistake is not a clerical error. Bemmerly v. Woodward, 124 Cal. 568; 57 Pac. 561. The action of the clerk in inserting in a decree of foreclosure the amount of costs as claimed by the plaintiff, before the same has been taxed or ascertained, is a mere clerical misprision, which may be amended by the court, and does not affect the validity of the decree, or the validity of the order of sale thereunder. Janes v. Bullard, 107 Cal. 130; 40 Pac. 108. If one person is named as defendant in a suit, and is served with summons, and suffers default, but by a clerical misprision a decree is entered against another, the error may be corrected at any time by the court, and its power to do so is not affected by the fact of an appeal taken in the name of the misnamed defendant. Fay v. Stubenrauch, 141 Cal. 573; 75 Pac. 174. An accident in entering judgment against two defendants instead of one, if not corrected before motion to set it aside is made, may be corrected by amendment, in the discretion of the court. Lewis v. Rigney, 21 Cal. 268. Where the court, by its decree, ordered encumbered property to be sold by the sheriff, while the order, made and entered the same day, appointed a commissioner to discharge the same duty, this is a mere oversight by the court, which may be remedied at any time on motion, by striking out the word "sheriff," wherever it occurs, and inserting "commissioner." McDermot v. Barton, 106 Cal. 194; 39 Pac. 538. Where a defendant is convicted of practicing dentistry without a license, and judgment is rendered against him, an erroneous recital in the entry of the judgment, that the defendant had been convicted of practicing "medicine" without a license, is a mere clerical mistake, which the court may amend to conform to the facts. Ex parte Hornef, 154 Cal. 355; 97 Pac. 891.

Correction of judicial errors. A judicial error can be remedied, only through motion for a new trial or on appeal (Egan v. Egan, 90 Cal. 15; 27 Pac. 22; O'Brien v. O'Brien, 124 Cal. 422; 57 Pac. 225; Canadian etc. Trust Co. v. Clarita etc. In-

vestment Co., 140 Cal. 672; 74 Pac. 301); it cannot be summarily corrected at any time. Forrester v. Lawler, 14 Cal. App. 171; 111 Pac. 284. The court has no power, after the entry of judgment, to correct judicial omissions or mistakes (First Nat. Bank v. Dusy, 110 Cal. 69; 42 Pac. 476), or to make a new order, directing a relief different from that embraced in the original order and judgment; and where the judgment is entered by the clerk exactly as ordered by the court, there is no mistake or misprision of the clerk; if any error is committed in rendering the judgment, it is a judicial error, which can be remedied only by an appeal or by a motion for a new trial. Bryne v. Hoag, 116 Cal. 1; 47 Pac. 775; Lemon v. Hubbard, 10 Cal. App. 471; 102 Pac. 554. Where judgment was entered against an administrator, substituted for a deceased plaintiff, and a blank was left for costs against the plaintiff personally, such judgment cannot, years afterwards, be amended by the record as a mere clerical misprision, so as to make the costs chargeable against the estate; and there being no record evidence to show that the judgment entered was not the correct judgment of the court, it must, if erroneous, stand as the judgment until reversed. Leonis v. Leffingwell, 126 Cal. 369; 58 Pac. 940. A record sent to the supreme court cannot be assailed by evidence of lower dignity than itself; if it is incorrect, the court below, on a proper showing by evidence, has power to alter it so as to make it speak the truth. Boyd v. Burrel, 60 Cal. 280.

Matters which may be amended. A void process cannot be amended, but an erroneous process may. Newmark v. Chapman, 53 Cal. 557. Proof of service of summons may be amended, where imperfect (Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509); as may also an insufficient affidavit of merits, on motion to change the place of trial. Palmer & Rey v. Barclay, 92 Cal. 199; 28 Pac. 226; Jaques v. Owens, 18 Cal. App. 114; 122 Pac. 430. An affidavit and undertaking on attachment, before the amendment of 1909 to § 558, post, was not amendable. Tibbet v. Tom Sue, 122 Cal. 206; 54 Pac. 741. No substantial change can be made in an allowed claim after the expiration of the time allowed for the presentation of claims (Estate of Sullenberger, 72 Cal. 549; 14 Pac. 513; Estate of Turner, 128 Cal. 388; 60 Pac. 967); and an application to amend for inadvertence or mistake cannot be made after the expiration of six months from the allowance of the claim. Estate of Turner, 128 Cal. 388; 60 Pac. 967. A claim of lien is not capable of being amended or reformed (Madera Flume etc. Co. v. Kendall, 120 Cal. 182; 65 Am. St. Rep. 177; 52 Pac. 304), but a cost-bill is. Burnham v. Hays, 3 Cal. 115; 58 Am. Dec. 389. A stipulation, entered into between attorneys in a pending action, which performs the function of a replication to the answer, may be amended or set aside, as if it were a pleading. Ward v. Clay, 82 Cal. 502; 23 Pac. 50, 227. The trial court cannot, after a judgment has been affirmed on appeal, change or modify such final judgment. Wickersham v. Crittenden, 103 Cal. 582; 37 Pac. 513.

Liberality in allowing amendments to pleadings. As experience shows that, in the attainment of justice by resort to judicial tribunals, amendments to pleadings are of ever-recurring necessity, the tendency of judicial decision is towards liberality in permitting, where it can be done without working great delay, such amendments as facilitate the production of all the facts bearing upon the questions involved. Burns v. Scooffy, 98 Cal. 271; 33 Pac. 86. The liberality required in allowing amendments to pleadings should be exercised only in the furtherance of justice (Bank of Woodland v. Heron, 122 Cal. 107; 54 Pac. 537); and such amendments should be allowed at any stage of the trial, in the furtherance of justice (Link v. Jarvis, 5 Cal. Unrep. 750; 33 Pac. 206; Hanson v. Stinehoff, 139 Cal. 169; 72 Pac. 913; Tingley v. Times Mirror Co., 151 Cal. 1; 89 Pac. 1097), where they do not seriously impair the rights of the opposite party: this rule is particularly applicable to amendments to the answer. Gould v. Stafford, 101 Cal. 32; 35 Pac. 429. It is proper to allow the pleadings to be amended so that they shall conform to the grounds upon which the case must be tried. Chalmers v. Chalmers, 81 Cal. 81; 22 Pac. 395. It is within the discretion of the court to permit the plaintiff so to amend his complaint as to correct an inconsistency between the allegations and the prayer (French v. McCarthy, 125 Cal. 508; 58 Pac. 154); and he should be permitted so to amend his complaint as to present his legal rights for the determination of the jury, otherwise the case should be dismissed. McDonald v. Bear River etc. Mining Co., 15 Cal. 145. Where the plaintiff has a good cause of action, which, by accident or mistake, he has failed to set out in his complaint, the court, on motion for judgment on the pleadings, should, on his application so to do, permit him to amend; but where he fails to make such application, the defendant is entitled to judgment on the pleadings. Kelley v. Kriess, 68 Cal. 210; 9 Pac. 129. There is no error in permitting the plaintiff so to amend his complaint as to express the cause of action originally intended, but not clearly expressed, where such intention can be gathered from the face of the pleading. Nevada County etc. Canal Co. v. Kidd, 28 Cal. 673. Permission to amend should be granted, unless it is clear to the trial court that a defective complaint cannot be amended so as to obviate objec-

tions made thereto. Payne v. Baehr, 153 Cal. 441; 95 Pac. 895. Where the amended complaint is unobjectionable, and judgment is rendered thereupon, the fact that the original complaint did not state a cause of action is immaterial. Hunter v. Bryant, 98 Cal. 247; 33 Pac. 51. Where an action was tried, on both sides, upon a wrong theory, the plaintiff will be permitted, upon reversal of the judgment, to amend his complaint so as to avail himself of any equities, where, under pleadings properly framed for that purpose, he might be entitled to a judgment for specific performance, or some other equitable relief. Fudickar v. East Riverside Irrigation Dist., 109 Cal. 29; 41 Pac. 1024. In an action to recover for services, it is error not to permit the complaint to be amended so as to state the value of the services. Cowdery v. McChesney, 124 Cal. 363; 57 Pac. 221. Where the plaintiff, in replevin, discovers, before trial, that he is not entitled to all of the property sued for, it is within the discretion of the court to permit the complaint to be so amended as to exclude therefrom the portion to which he is not entitled. Mills v. Jackson, 19 Cal. App. 695; 127 Pac. 655. It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts constituting his cause of action or his defense are not embraced within the issues, or properly presented by his pleading; this rule is especially cogent where the objection to the testimony is, not that it is then for the first time brought to the notice of the adversary, but that, by reason of the language of the pleading, it is not within the terms of the issue. Guidery v. Green, 95 Cal. 630; 30 Pac. 786; Crosby v. Clark, 132 Cal. 1; 63 Pac. 1022. Where amendments proposed to a complaint, together with the complaint, state a cause of action, the refusal to allow such amendments is error. Campbell-Kawannanakoa v. Campbell, 152 Cal. 201; 92 Pac. 184. To strike out a pleading susceptible of being amended by a statement of facts known to exist, and which constitute a cause of action or defense to the action, is a harsh proceeding, and should be resorted to only in extreme cases: to refuse permission to answer, with a valid defense in hand, can be justified only in the face of facts showing willful neglect, inexcusable carelessness, or irreparable injury to the plaintiff. Burns v. Scooffy, 98 Cal. 271; 33 Pac. 86. A defective complaint in an attachment suit may be amended without affecting the attachment lien; and an objection that the amendment stated a different cause of action from that declared on in the original complaint cannot be urged for the first time in a collateral suit on a bond given for a release of the attachment. Hammond v. Starr, 79 Cal. 556; 21 Pac. 971. Where the complaint states a cause of action, it is an abuse of discretion, apparent upon the face of the record, to sustain demurrers thereto, on any ground, without granting leave to amend; but where the fault cannot be remedied, or it is evident that there is a want of facts, further amendments should be refused. Schaake v. Eagle Automatic Can Co., 135 Cal. 472; 63 Pac. 1025; 67 Pac. 759. While it is generally a matter of absolute rule to permit the plaintiff to amend his complaint, yet permission may be refused, where the complaint cannot be so amended as to state a good cause of action (People v. Mount Shasta Mfg. Co., 107 Cal. 256; 40 Pac. 391); and where the complaint is incapable of amendment, in any radical particular, the refusal of the court to allow the plaintiff to amend is not error (San Joaquin etc. Irrigation Co. v. Stanislaus County, 155 Cal. 21; 99 Pac. 365); and where the granting of an application for leave to amend will work a continuance of the trial, the refusal is justified. Manha v. Union Fertilizer Co., 151 Cal. 581; 91 Pac. 393. A plaintiff who declines to amend his complaint, when offered the opportunity to do so, cannot afterwards be allowed to treat it as amended, where no amendment was in fact made. Carpentier v. Brenham, 50 Cal. 549; Guidery v. Green, 95 Cal. 630; 30 Pac. 786. Error of the court in striking out portions of an original complaint, is waived by filing an amended complaint subsequently. Collins v. Scott, 100 Cal. 446; 34 Pac. 1085. There is no distinction between an amendment "to" a pleading and an amendment "of" a pleading. Giddings v. 76 Land and Water Co., 109 Cal. 116; 41 Pac. 788.

Discretion as to amendments. The court always has a discretion to grant or to refuse leave to amend, under this section (Norton v. Bassett, 158 Cal. 425; 111 Pac. 253; Smith v. Riverside Groves etc. Co., 19 Cal. App. 165; 124 Pac. 870); and where it abuses or illegally exercises such discretion, its action will be corrected on appeal (Cooke v. Spears, 2 Cal. 409; 56 Am. Dec. 348); but the appellate court will not interfere with the action of the lower court, unless it is shown by the record that there has been an abuse of discretion. Stewart v. Douglass, 148 Cal. 511; 83 Pac. 699; Thornton v. Borland, 12 Cal. 438; Robinson v. Smith, 14 Cal. 254; Gillan v. Hutchinson, 16 Cal. 153; Lestrade v. Barth, 17 Cal. 285; Wixon v. Devine, 91 Cal. 477; 27 Pac. 777. The refusal of the trial court to allow amendments is not, per se, error. Emeric v. Alvarado, 90 Cal. 444; 27 Pac. 356. Where the complaint is amended at the trial, the court, in the exercise of its discretion, may determine the time within which the answer or a demurrer thereto shall be filed; and where this discretion is not abused, the

action of the lower court will not be reviewed. Schultz v. McLean, 109 Cal. 437; 42 Pac. 557. In an ordinary case of absence of averment, or of insufficient averment, it is an abuse of discretion to refuse leave to amend. Robertson v. Burrell, 110 Cal. 568; 42 Pac. 1086. In an action for damages for the death of a person, it is not error for the court, in its discretion, during the progress of the trial, and several months after the answer is filed, to refuse to allow an amendment to the answer, alleging, on information and belief, the existence of other heirs, so as to authorize the admission of evidence on that subject, where the defendant has rested until such time, without alleging the existence of other heirs, and without showing why an earlier objection was not made. Salmon v. Rathjens, 152 Cal. 290; 92 Pac. 733. Leave to file an additional answer, which raises an issue antagonistic to that made by the complaint and the defendant's original answer, is a matter resting in the sound discretion of the court, and refusal to allow the filing of such answer will not be interfered with, in the absence of anything tending to show an abuse of discretion (Harney v. Corcoran, 60 Cal. 314); but where it clearly appears that a proposed amendment is in furtherance of justice, and is seasonably presented at an opportune time, a refusal to allow it is an abuse of the discretion committed to the trial court by this section. San Francisco etc. Home Bldg. Soc. v. Leonard, 17 Cal. App. 254; 119 Pac. 405. It is not an abuse of discretion for the court to refuse to allow the filing of an answer which changes the issue already made in the case (Harney v. Corcoran, 60 Cal. 314); or to refuse leave to amend, in the absence of a specification of what amendment could be made, or which was desired to be made (Burling v. Newlands, 112 Cal. 476; 44 Pac. 810); or to refuse to allow the plaintiff to file a second amended complaint, where the transcript does not show that any proposed amendment was served or presented, or that the notice of motion pointed out the precise amendment which the plaintiff would ask leave to make or to file (Martin v. Thompson, 62 Cal. 618; 45 Am. Rep. 663); or to refuse to allow an amendment to an answer, in order to plead the statute of limitations, where the application therefor was not made until after the trial and submission of the cause (San Joaquin Valley Bank v. Dodge, 125 Cal. 77; 57 Pac. 687); or to refuse to permit the plaintiff to amend his complaint, after the trial had been in progress several days, and he had notice that the defendant considered his complaint defective, where a continuance would be the result (Hancock v. Hubbell, 71 Cal. 537; 12 Pac. 618); or to refuse to permit the defendant to file an amended answer, where the matters of amendment are sufficiently pleaded in the original answer (Heilbron v. Kings River etc. Canal Co., 76 Cal. 11; 17 Pac. 933); nor is it an abuse of discretion for the court to permit the defendant, at the close of the trial, so to amend his answer as to set up the pendency of another action, involving the same subject-matter (Coubrough v. Adams, 70 Cal. 374; 11 Pac. 634); or to allow an answer to be amended, in order to admit written evidence, well known to the plaintiff long before the trial, where he could not be surprised by its production, and where its admission is eminently just, to settle the rights of the parties upon the merits (Hart v. British etc. Ins. Co., 80 Cal. 440; 22 Pac. 302); or to allow the correction of an evident mistake, made in describing land sought to be recovered (Heilbron v. Heinlen, 72 Cal. 376; 14 Pac. 24); or to allow an amendment, in order to change an action seeking to recover on a contract to an action on quantum meruit (Cox v. McLaughlin, 76 Cal. 60; 9 Am. St. Rep. 164; 18 Pac. 100); and the court, in its discretion, may allow a motion to be renewed, which it has previously denied. Mace v. O'Reilley, 70 Cal. 231; 11 Pac. 721. Where the court allows the plaintiff at once to amend his complaint, which is done in a few lines, there is no abuse of discretion in ruling the defendant to an immediate answer, which is made at once, briefly, sufficiently, and without any inconvenience: such action cannot be construed as a surprise sprung upon the defendant. Ellen v. Lewison, 88 Cal. 253; 26 Pac. 109. After a final judgment sustaining a demurrer to a complaint, the action of the court in setting aside the judgment, and permitting the plaintiff to file an amendment so as to set up a mistake, is an abuse of discretion, where the mistake was apparent upon the face of the instrument sued on, and was known to the plaintiff months before the commencement of the action. Weisenborn v. Neumann, 60 Cal. 376.

Amendments should be in furtherance of justice. The court has power to allow amendments at any stage of the proceedings, in the advancement of justice; and this power should be liberally exercised, in order to secure a fair and speedy trial on the merits, where the adverse party will not be prejudiced. Lestrade v. Barth, 17 Cal. 285; Hayden v. Hayden, 46 Cal. 332; Walsh v. McKeen, 75 Cal. 519; 17 Pac. 673; Beronio v. Southern Pacific R. R. Co., 86 Cal. 415; 21 Am. St. Rep. 57; 24 Pac. 1093; Hibernia Sav. & L. Soc. v. Jones, 89 Cal. 507; 26 Pac. 1089; Burns v. Scooffy, 98 Cal. 271; 33 Pac. 86. Leave to amend, when addressed to the discretion of the court, should be liberally granted, in order to subserve the ends of justice (Robertson v. Burrell, 110 Cal. 568; 42 Pac. 1086; McMillan v. Dana, 18 Cal. 339; Kirby v. Superior Court, 68 Cal. 604; 10 Pac. 119),

and to secure a fair and speedy trial on the merits (Smith v. Yreka Water Co., 14 Cal. 201; Hayden v. Hayden, 46 Cal. 332; Farmers' Nat. Gold Bank v. Stover, 60 Cal. 387), where the adverse party will not be prejudiced. Kirstein v. Madden, 38 Cal. 158; Wells Fargo & Co. v. McCarthy, 5 Cal. App. 301; 90 Pac. 203. The power of the court to allow amendments to be made is granted in general terms, unqualified by anything that relates to the jurisdiction of the court; the mere fact that the matters to be amended relate to the jurisdiction of the court does not affect the power of the court to allow the amendments (Contra Costa Coal Mines R. R. Co. v. Moss, 23 Cal. 323); nor is the power of the court to allow amendments limited by the character of the mistake that calls forth its exercise: the fact that the proposed amendment is based merely upon a mistake of law is immaterial. Gould v. Stafford, 101 Cal. 32; 35 Pac. 429. The court should allow an amendment, whenever it appears that a party has committed a mistake, or error has occurred which could not have been reasonably avoided. Smith v. Brown, 5 Cal. 118. Amendments are not allowed as matter of course, but only upon good cause shown therefor. Hayden v. Hayden, 46 Cal. 332. In passing upon an application for leave to amend, the controlling principle must be, whether the amendment is in furtherance of justice; and the application should be refused where the demand is unconscionable. Daley v. Russ, 86 Cal. 114; 24 Pac. 867. The court has no power to strike out allegations that will deprive a party of an opportunity to try the question of his right to a portion of the property involved in the action. Howell v. Foster, 65 Cal. 169; 3 Pac. 647. A motion to amend the findings of fact, conclusions of law, and decree, after the decree has been entered in the case is irregular practice: the appropriate proceeding is a motion for a new trial. Pico v. Sepulveda, 66 Cal. 336; 5 Pac. 515.

Amendment in superior court of pleadings in justice's court. Upon an appeal from a judgment of a justice's court, on questions of law and fact, the superior court may allow amendments to the pleadings, where issues of fact were made in the court below (Ketchum v. Superior Court, 65 Cal. 494; 4 Pac. 492); and, also, where the action is certified from a justice's court to the superior court, the latter may permit amendments showing that the title to or the possession of real property is involved in the action, and that therefore the superior court has jurisdiction; or it may permit amendments in any other respect, to the same extent as if the action had been commenced therein. Baker v. Southern California Ry. Co., 114 Cal. 501; 46 Pac. 604.

Amendments changing parties. A party having leave to amend may bring in new parties, without special permission, where they are proper or necessary parties. Louvall v. Gridley, 70 Cal. 507; 11 Pac. 777. The court may allow the plaintiff to amend his complaint, by adding the name of another party plaintiff, where it does not affect the substantial rights of the parties (Polk v. Coffin, 9 Cal. 56; Blood v. Fairbanks, 48 Cal. 171); or by striking out the name of a party, on like conditions (Tormey v. Pierce, 49 Cal. 306); or by striking from the caption of the complaint the names of certain defendants, where the other defendants are not prejudiced thereby. Doane v. Houghton, 75 Cal. 360; 17 Pac. 426. Where an order is made by the court, striking names from the complaint, it is not necessary to file an amended complaint in the names of the remaining plaintiffs. Tormey v. Pierce, 49 Cal. 306. A complaint against a person in his representative capacity cannot be so amended as to state a cause of action against him personally: such amendment would be an entire change of the party defendant, and present a different suit. Sterrett v. Barker, 119 Cal. 492; 51 Pac. 695. The substitution of one party for another, by order of court, is not such an amendment of a pleading as is required to be made on notice, or to be engrossed otherwise than to be entered in the minutes of the court; an order of court allowing the amendment of a pleading, by adding or striking out the name of a party, is different from an order of court substituting a party: the substitution is made by the court, whereas the amendment is allowed to be made by the party; an amendment, by adding or striking out the name of a party, is allowed only at the instance of the party whose pleading is to be so amended, while the substitution may be had at the instance of either party; the addition or the striking out of the name of a party may require a different defense, but the substitution of a party necessitates no change in that regard. Kittle v. Bellegarde, 86 Cal. 556; 25 Pac. 55.

Amendment of complaint, changing cause of action. A complaint cannot be so amended as to introduce a new cause of action, particularly where such new cause of action is barred by the statute at the time of the proposed amendment (Peiser v. Griffin, 125 Cal. 9; 57 Pac. 690); nor is the plaintiff at liberty to strike out the entire substance and prayer of his complaint, and insert a new cause of action by way of amendment (Frost v. Witter, 132 Cal. 421; 84 Am. St. Rep. 53; 64 Pac. 705); but an amendment to the complaint may be allowed, where it does not change the nature of the action, or state an entirely new cause of action, although it

enlarges or adds to the property described in the original complaint. Bulwer Consol. Mining Co. v. Standard Consol. Mining Co., 83 Cal. 613; 23 Pac. 1109. The rule that a new or different cause of action cannot be introduced by an amendment must be accepted with some qualification; for the most common kinds of amendments are those where the complaint does not state facts sufficient to constitute a cause of action; therefore all that can be required is, that a wholly different cause of action shall not be introduced; or in other words, the matter of amendment must not be foreign to the original complaint. Frost v. Witter, 132 Cal. 421; 84 Am. St. Rep. 53; 64 Pac. 705. A plaintiff should not be allowed to amend his declaration so as to change the proceeding from an action ex contractu to an action ex delicto (Ramirez v. Murray, 5 Cal. 222); or an action ex delicto to an action ex contractu. Hackett v. Bank of California, 57 Cal. 335. Where a cause of action is limited to a claim presented to the administrator, and objections to the complaint cannot be met, the complaint cannot be amended so as to set up a new cause of action, upon a subsequent conditional promise. Morehouse v. Morehouse, 140 Cal. 88; 73 Pac. 738. An amendment changing only the remedy, and not the cause of action, is permissible. Frost v. Witter, 132 Cal. 421; 84 Am. St. Rep. 53; 64 Pac. 705. A cause of action at law may be so amended as to change it into a suit in equity (Walsh v. McKeen, 75 Cal. 519; 17 Pac. 673), where the claim, as presented to the executor, and upon which it is based, stated all the facts upon which the plaintiff relied. Porter v. Fillebrown, 119 Cal. 235; 51 Pac. 322. Under proper circumstances, the trial court may permit a cross-complaint in an action to be amended so as to set up fraud, even after the case has been submitted for decision. Jackson v. Jackson, 94 Cal. 446; 29 Pac. 957. In an action of replevin, it is not error for the court to grant leave to the plaintiff to amend, after the evidence is closed, or before final submission of the case, so as to transform the action virtually into one of trover, charging the defendant with converting property, and claiming damages accordingly. Henderson v. Hart, 122 Cal. 332; 54 Pac. 1110. Where actual damages are sought to be recovered, there is no change of the cause of action, if the plaintiff is permitted so to amend as to charge that the acts were willful and wanton. Esrey v. Southern Pacific Co., 103 Cal. 541; 37 Pac. 500. Where slanderous words, laid in the original complaint, are not qualified or altered in their sense or meaning by those proved to have been used by the defendant, and the former are clearly embraced in the latter, and both substantially charge to the same effect, and the plaintiff amended his complaint by inserting the words proved, the cause of action is not thereby changed. Smullen v. Phillips, 92 Cal. 408; 28 Pac. 442. The plaintiff has the right to abandon a demand made in his complaint, and to strike it therefrom by way of amendment; and if the complaint still states a cause of action, the court should compel the defendant to plead to it. St. Clair v. San Francisco etc. Ry. Co., 142 Cal. 647; 76 Pac. 485. An amendment to a complaint is properly allowed to be filed, although it omits one of the causes of action set forth in the original complaint: the defendant cannot be injured by the abandonment of a cause of action allowed against him (Concannon v. Smith, 134 Cal. 14; 66 Pac. 40); but where the amendment amounts to a discontinuance or abandonment of the action as originally brought, its allowance is improper. Hines v. Ward, 121 Cal. 115; 53 Pac. 427. The objection to an amended complaint, alleged to have been filed by leave of court, cannot be raised upon special demurrer to the complaint, but only on motion to strike out. Harvey v. Meigs, 17 Cal. App. 353; 119 Pac. 941.

Amendment after demurrer sustained. The plaintiff should be allowed to amend his complaint, where a demurrer thereto has been sustained (Lord v. Hopkins, 30 Cal. 76); but it is not error to refuse permission to amend, where it is apparent that the amendment would produce no valid cause of action or defense. Gillan v. Hutchinson, 16 Cal. 153; Levinson v. Schwartz, 22 Cal. 229; Shepard v. McNeil, 38 Cal. 72; Ferrer v. Home Mutual Ins. Co., 47 Cal. 416. An amendment of the complaint, after the filing of a demurrer, but before the hearing thereon, should be allowed, the same as though the demurrer had been sustained (Lord v. Hopkins, 30 Cal. 76; Gallagher v. Delaney, 10 Cal. 410; Thornton v. Borland, 12 Cal. 438; Smith v. Yreka Water Co., 14 Cal. 201), and without prejudice to an injunction issued on the original complaint. Barber v. Reynolds, 33 Cal. 497. After the overruling of the demurrer, an amendment of the complaint may be allowed, the same as though the demurrer had been sustained. Phelan v. Supervisors, 9 Cal. 15. On sustaining the demurrer, it is not error to fail to give leave to amend, where the party does not ask for such leave, or for any other order on the subject. Smith v. Taylor, 82 Cal. 533; 23 Pac. 217; San Francisco Paving Co. v. Fairfield, 134 Cal. 220; 66 Pac. 255; Williamson v. Joyce, 140 Cal. 669; 74 Pac. 290. An order sustaining a demurrer, without leave to amend, ordinarily disposes of the case; and, in the absence of any directions from the court, it is the duty of the clerk to enter an appropriate judgment. Le Breton v. Stanley Contracting Co., 15 Cal. App. 429; 114 Pac. 1028. Where the defense relied upon

in the answer is invalid, it is not error to refuse permission to amend, after judgment sustaining a demurrer to the answer. Gillan v. Hutchinson, 16 Cal. 153.

Time to amend. A motion to amend is always in time, where it immediately follows the objection to the sufficiency of the complaint or answer: a motion to amend the complaint does not come too late because it is not made until after the defendant's motion for a nonsuit. Valencia v. Couch, 32 Cal. 339; 91 Am. Dec. 589. The court has discretion to limit the time in which an amended complaint shall be filed: it may direct that it be filed within twenty-four hours, where the plaintiff is familiar with the facts. Schultz v. McLean, 109 Cal. 437; 42 Pac. 557. While it is not often necessary to amend a complaint after the case has been submitted, yet there is no limitation as to the time, before judgment entered, when the power of the court ceases: even after judgment the power may be exercised for the relief of a party, where the judgment results from mistake, inadvertence, surprise, or excusable neglect. Lee v. Murphy, 119 Cal. 364; 51 Pac. 549, 955. Where a defendant, upon the plaintiff's motion for judgment on the pleadings, intends to abandon his answer and substitute another in its stead, he should make application for leave before the judgment for the plaintiff is ordered. Felch v. Beaudry, 40 Cal. 439. It is proper to permit an answer to be amended after the jury is impaneled, where the plaintiff is not taken by surprise, or does not suffer any injury. Beronio v. Southern Pacific R. R. Co., 86 Cal. 415; 21 Am. St. Rep. 57; 24 Pac. 1093. After a judgment is reversed, the parties have, in the court below, the same rights which they originally had, and that court has discretion to permit any proper amendment to the pleadings. Heidt v. Minor, 113 Cal. 385; 45 Pac. 700. It is not error for the court to refuse to allow the plaintiff to amend his complaint, pending a motion for a new trial, so as to strike out an unnecessary averment. Gilliam v. Brown, 126 Cal. 160; 58 Pac. 466. The privilege of amending, after trial of the issue of law raised by the demurrer, is not one of right, but one resting in the discretion of the trial court; if the plaintiff desires to amend again, he should apply to the court below, and if refused, take his exception: it is too late to make the point for the first time on appeal, when nothing in the record shows abuse of discretion. Schaake v. Eagle Automatic Can Co., 135 Cal. 472; 63 Pac. 1025; 67 Pac. 759; Buckley v. Howe, 86 Cal. 596; 25 Pac. 132; Varni v. Devoto, 10 Cal. App. 304; 101 Pac. 934. In an action to recover personal property, no judgment can be rendered directing the return of the property to the defendant, or in his favor for its value, where it has been delivered to the plaintiff, under proceedings in the action, until the defendant asserts his formal claim for return of the property, or its value, in the answer; and there can be no reason why the record should not be rounded, and a formal claim inserted in the answer, at any time prior to the actual entry of judgment. Pico v. Pico, 56 Cal. 453. Where there is unreasonable delay in presenting an amendment to a pleading, the court may properly refuse to allow it; and where there is no intimation of excuse for delay in presenting amendments long before allowed, until the case is declared substantially closed, they must be refused when presented. Emeric v. Alvarado, 90 Cal. 444; 27 Pac. 356. The court does not err in refusing the defendant leave to file an amended answer on the eve of the trial, where the jury is in attendance, and the cause is afterwards tried as if all the matters set forth in the amended answer were pleaded. Shadburne v. Daly, 76 Cal. 355; 18 Pac. 403. Where a case has been at issue nearly two years, and the trial has commenced, a proposed amendment to the answer, tendering new issues, is properly refused. Page v. Williams, 54 Cal. 562. The court cannot allow an amendment to the complaint, when more than one year has elapsed since the rendition and entry of final judgment: such amendments are only allowed for clerical misprisions, when the means for making them, and the right to make them, are furnished by the record itself. Kirby v. Superior Court, 68 Cal. 604; 10 Pac. 119. Where a party admits, in his answer, a material allegation, and the case is tried and judgment rendered, and a new trial is granted, he should not be allowed to amend his answer by changing the admission into a denial. Spanagel v. Reay, 47 Cal. 608. Where a defendant, in his answer, virtually admits a material allegation of the complaint, and allows such admission to stand for nearly a year, and until the day of trial, before attempting to controvert it, the refusal of the court to allow a proposed amendment to the answer, which is not positive in its nature, is not an abuse of discretion. Cook v. Suburban Realty Co., 20 Cal. App. 538; 129 Pac. 801. After a motion for a change of place of trial, the court cannot entertain a motion or make an order for the amendment of the complaint in the matter of parties, any more than in the matter of substantive averments; and if, upon the case as it is then presented, the defendants are entitled to have their motion granted, they are entitled to have all judicial action in the cause determined in the superior court of their own county. Brady v. Times Mirror Co., 106 Cal. 56; 39 Pac. 209.

Amendment to answer. Amendments are allowed to the defendant with much more caution than to the plaintiff; yet, in a proper case, and with the spirit of

equity, the same indulgence will be granted to the defendant as to the plaintiff. Connalley v. Peck, 3 Cal. 75; Hooper v. Wells Fargo & Co., 27 Cal. 11; 85 Am. Dec. 211; Carpentier v. Brenham, 50 Cal. 549. The plaintiff cannot claim the right to enforce a judgment, which, through the mistake and excusable neglect of the defendant, was rendered in his favor: if the defendant has, without any fault on his part, been prevented from presenting his defense, it is but simple justice that he should have an opportunity so to do. Melde v. Reynolds, 129 Cal. 308; 61 Pac. 932. Where a defense is defectively pleaded, and the evidence thereunder is objected to, the defendant should be allowed to obviate such defect by amendment (Carpentier v. Small, 35 Cal. 346; Baker v. Southern California Ry. Co., 106 Cal. 257; 46 Am. St. Rep. 237; 39 Pac. 610); but a proposed amendment to an answer, not constituting a defense to the cause of action, nor the proper subject of a counterclaim, is properly refused. Wigmore v. Buell, 116 Cal. 94; 47 Pac. 927. Where the answer in a foreclosure suit admits the due execution and acknowledgment of the mortgage, a proposed amendment, denying such acknowledgment, is properly refused: an amendment to the answer should not be allowed so as to permit a merely legal defense which is inequitable (Bank of Woodland v. Heron, 122 Cal. 107; 54 Pac. 537), or to permit the setting up of a defense that could not be made under the original answer. Dorn v. Baker, 96 Cal. 206; 31 Pac. 37; Duff v. Duff, 101 Cal. 1; 35 Pac. 437; Ferrer v. Home Mutual Ins. Co., 47 Cal. 416; Edgar v. Stevenson, 70 Cal. 286; 11 Pac. 704. The court may, in its discretion, allow an amended answer to be filed, omitting a defense stated in the original answer, and averring an entirely different one: the defendant can generally set up as many defenses as he may have. Gould v. Stafford, 101 Cal. 32; 35 Pac. 429; Carrie v. Cloverdale Banking etc. Co., 90 Cal. 84; 27 Pac. 58. The action of the court in refusing to allow the filing of an amended answer, except to the portion of the complaint amended, is not error, where the remainder of the proposed answer does not differ, in any essential, from the answer on file. Hawthorne v. Siegel, 88 Cal. 159; 22 Am. St. Rep. 291; 25 Pac. 1114. It is proper to deny a motion to file an amendment to the answer so as to set up a judgment of a court having no jurisdiction of the subject-matter as a bar to the action. Kirsch v. Smith, 64 Cal. 13; 27 Pac. 942. Where the complaint is verified, and the answer tenders no material issue, and is evasive, not verified, nor any offer made to verify it, there is no error in refusing to allow the filing of an amended answer. Shepard v. McNeil, 38 Cal. 72. The court may allow a defendant so to amend his cross-complaint as to aver a tender to the plaintiff, before suit, and the deposit of the amount in question in court. Crosby v. Clark, 132 Cal. 1; 63 Pac. 1022. An amendment, which changes an admission into a denial, cannot be allowed; but where it is not inconsistent with the admission, but is in harmony with it, and does not negative the admission, but explains it, it may be allowed. McPherson v. Weston, 85 Cal. 90; 24 Pac. 733. The fact that new matter, proposed to be set up by amendment, was known to the defendant at the time of filing the original answer, is no good reason why the amendment should not be permitted. Pierson v. McCahill, 22 Cal. 127; Farmers' Nat. Gold Bank v. Stover, 60 Cal. 387; Sharon v. Sharon, 77 Cal. 102; 19 Pac. 230. Where, in an action for divorce, the answer does not contain any prayer for affirmative relief, the defect is cured by an amendment containing such prayer. Mayr v. Mayr, 161 Cal. 134; 118 Pac. 546. Where a judgment is reversed, and remanded for a new trial, it is not error for the court, before such trial, to permit the defendant so to amend his answer as that complete justice may be done between the parties; and it is within the discretion of the court to allow a further amendment to such answer, during the second trial, where the plaintiff is not prejudiced thereby. McPherson v. Weston, 85 Cal. 90; 24 Pac. 733. An amended answer, filed without leave of court, after issue joined, may be stricken from the files. Worley v. Spreckels Bros. Commercial Co., 163 Cal. 60; 124 Pac. 697. A defendant cannot answer an amended complaint by the allegation that it has been improperly filed: he should present an objection to such improper filing of the amendment, if an opportunity offers, or move to strike the amended pleading from the files. Wheeler v. West, 78 Cal. 95; 20 Pac. 45. The order granting leave to the defendant to amend his answer is no part of the judgment roll, and is not required to be entered thereon. Segerstrom v. Scott, 16 Cal. App. 256; 116 Pac. 690.

Amendment setting up statute of limitations. It was formerly the rule, that, where the defendant failed to plead the statute of limitations at the proper time, he could not be permitted to amend his answer, introducing such plea, except to further the ends of justice (Cooke v. Spears, 2 Cal. 409; 56 Am. Dec. 348), and that the court did not err in refusing to permit the defendant to set up the bar of the statute after he had answered to the merits. Stuart v. Lander, 16 Cal. 372; 76 Am. Dec. 538. But the statutes of limitation have become rules of property, and are favored in law. San Diego Realty Co. v. McGinn, 7 Cal. App. 264; 94 Pac. 374. Where an amended complaint, curing a defect, does not state a new or different cause of action, it is error for the court

to refuse to permit it to be filed on the ground that a new cause of action, then barred by the statute, is therein stated. Ruiz v. Santa Barbara Gas etc. Co., 164 Cal. 188; 128 Pac. 330. A new cause of action cannot be introduced into the complaint, under the guise of an amendment, so as to avoid the bar of the statute. Nellis v. Pacific Bank, 127 Cal. 166; 59 Pac. 830. Where the effect of the proposed amendment to the complaint would be, not to state a new cause of action against the original defendants, but only an original cause of action against a new defendant, the latter may effectually plead the bar of the statute. Harrison v. McCormick, 122 Cal. 651; 55 Pac. 592. It is not error to permit the defendant, in his amended answer, to plead the statute of limitations, where its consideration did not enter into the judgment. Hibernia Sav. & L. Soc. v. Jones, 89 Cal. 507; 26 Pac. 1089. The statute of limitations commences to run from the date of the filing of an amended complaint stating a new cause of action. Anderson v. Mayers, 50 Cal. 525. A failure to find upon a plea of the statute of limitations is not material, where the other facts found are sufficient to support the judgment. Richter v. Henningsan, 110 Cal. 530; 42 Pac. 1077. The question of the statute of limitations cannot be raised upon an appeal from a judgment by default, taken upon a judgment roll containing neither answer nor demurrer. Hunter v. Bryant, 98 Cal. 247; 33 Pac. 51.

Amendment to conform to proof. Amendments to pleadings, so as to enable the party to prove all the facts necessary to his cause of action or defense, are favored, subject to the right of the opposite party to a continuance in case of surprise, or subject to such other terms as may be just. Crosby v. Clark, 132 Cal. 1; 63 Pac. 1022. The court may, in furtherance of justice, permit the defendant, even after the evidence is closed, to deny, by an amended answer, certain averments to the complaint (Hibernia Sav. & L. Soc. v. Jones, 89 Cal. 507; 26 Pac. 1089), if an opportunity is afforded to meet the amendment. Anglo-California Bank v. Field, 154 Cal. 513; 98 Pac. 267. Where a complaint, praying for legal relief, states facts entitling the plaintiff to equitable relief, the court may, even during the trial, permit the prayer to be so amended as to ask for the appropriate equitable relief. Walsh v. McKeen, 75 Cal. 519; 17 Pac. 673. Where, at the close of the trial, the plaintiff declines to amend his complaint, upon opportunity offered by the court so to do, whereupon the court announced that, should it become necessary, it would, of its own motion, amend the complaint to make it conform to the case made, and the suit is decided against the plaintiff, without any amendment being made, the plaintiff cannot afterwards be allowed to treat the complaint as amended. Carpentier v. Brenham, 50 Cal. 549.

Effect of amended upon original pleading. An amended pleading supersedes the original. Barber v. Reynolds, 33 Cal. 497; Kelly v. McKibben, 54 Cal. 192; Kentfield v. Hayes, 57 Cal. 409; Thompson v. Johnson, 60 Cal. 292; Mott v. Mott, 82 Cal. 413; 22 Pac. 1140, 1142; Schneider v. Brown, 85 Cal. 205; 24 Pac. 715; La Société Française etc. v. Weidmann, 97 Cal. 507; 32 Pac. 583; Collins v. Scott, 100 Cal. 446; 34 Pac. 1085; Miles v. Woodward, 115 Cal. 308; 46 Pac. 1076; Witter v. Bachman, 117 Cal. 318; 49 Pac. 202; Linott v. Rowland, 119 Cal. 452; 51 Pac. 687; Nellis v. Pacific Bank, 127 Cal. 166; 59 Pac. 830; Welsh v. Bardshar, 137 Cal. 154; 69 Pac. 977; Rooney v. Gray, 145 Cal. 753; 79 Pac. 523. After a pleading has been amended, admissions in the original pleading cannot thereafter be introduced in evidence against the party making them. Miles v. Woodward, 115 Cal. 308; 46 Pac. 1076. Where an amended complaint has been filed, the original ceases to perform any further function as a pleading (Barber v. Reynolds, 33 Cal. 497; Kelly v. McKibben, 54 Cal. 192; Kentfield v. Hayes, 57 Cal. 409; Thompson v. Johnson, 60 Cal. 292; Schneider v. Brown, 85 Cal. 205; 24 Pac. 715; La Société Française etc. v. Weidmann, 97 Cal. 507; 32 Pac. 583; Collins v. Scott, 100 Cal. 446; 34 Pac. 1085; Miles v. Woodward, 115 Cal. 308; 46 Pac. 1076); and has the effect to vacate the default of the defendant previously entered. Kelly v. McKibben, 54 Cal. 192; Schneider v. Brown, 85 Cal. 205; 24 Pac. 715; Linott v. Rowland, 119 Cal. 452; 51 Pac. 687. Where the amendment more fully sets forth the cause of action defectively alleged in the original complaint, it merely supersedes the original, and takes its place, without affecting the identity of the original. Nellis v. Pacific Bank, 127 Cal. 166; 59 Pac. 830. An amendment to the complaint, in matter of substance, after entry of default, constitutes a new complaint, and has the effect of opening the default (Witter v. Bachman, 117 Cal. 318; 49 Pac. 202); it only supersedes the pleadings founded upon the original complaint: it does not affect a cross-complaint, or the names joined thereon, nor does the cross-complaint fall with the fall of the plaintiff's complaint. Mott v. Mott, 82 Cal. 413; 22 Pac. 1140, 1142. Where issues are joined and trial had upon a second amended complaint, errors in rulings made upon the former complaints are immaterial. Rooney v. Gray, 145 Cal. 753; 79 Pac. 523. The original complaint may be considered as a part of the record of the case, for the purpose of showing when the action was commenced, and whether or not a new or different cause of action was introduced by the amendment, and for the determination of other questions that may

arise, which often become material on appeal; it is always included in the judgment roll. Redington v. Cornwell, 90 Cal. 49; 27 Pac. 40; Collins v. Scott, 100 Cal. 446; 34 Pac. 1085. An amended complaint, stating no new cause of action, relates back to the time of the commencement of the action, for the purposes of the statute of limitations (Smullen v. Phillips, 92 Cal. 408; 28 Pac. 442; White v. Soto, 82 Cal. 654; 23 Pac. 210); it does not change the time of the running of the statute of limitations beyond the date of the filing of the original complaint, as against the original defendant; but it runs to the date of the amendment as against a grantee of the defendant, then for the first time made a party (Frost v. Witter, 132 Cal. 421; 84 Am. St. Rep. 53; 64 Pac. 705); and, though made after the expiration of the period of limitation for the action, relates back to the time of its commencement. Ruiz v. Santa Barbara Gas etc. Co., 164 Cal. 188; 128 Pac. 330. The findings need only refer to the complaint as amended. Whitehead v. Sweet, 126 Cal. 67; 58 Pac. 376. Where reference is made in a judgment to a finding, and in the finding to the complaint, which was amended, for a description of property, the reference, though inexcusably circuitous, is not ambiguous, and unmistakably refers to the amended complaint. Kelly v. McKibben, 54 Cal. 192. An error committed in overruling a demurrer to the complaint is cured by a subsequent amendment to the complaint, although an action at law is changed into a suit in equity. Walsh v. McKeen, 75 Cal. 519; 17 Pac. 673. Unless new matter inserted in an amended complaint is entirely foreign to the cause of action in the original complaint, the question will not arise, on motion to strike out, whether the amendments in the amended complaint go further than is allowed by the code: matter contained in an amended complaint is not irrelevant or redundant to a cause of action set out in the original complaint in the same action. Nevada County etc. Canal Co. v. Kidd, 28 Cal. 673. An amended complaint, not allowed to be filed, cannot be considered as any part of the showing on which a temporary injunction was granted, and can only be considered in the light of a counter-affidavit, on a motion to dissolve the injunction. Meetz v. Mohr, 141 Cal. 667; 75 Pac. 298. An amendment as to a matter of substance opens up a default, and gives the defendant in default the right to appear and answer (Thompson v. Johnson, 60 Cal. 292); but an amended complaint which brings in new parties, in which a defaulting defendant is not interested, is not an amendment in matter of substance, and does not open up the default, nor require the service of the amended complaint upon the defaulting party. San Diego Savings Bank v. Goodsell, 137 Cal. 420; 70 Pac. 299. A supplemental complaint is not an amendment to a pleading, as it leaves the former pleading intact; but an amendment to a pleading makes a substituted pleading. Giddings v. 76 Land and Water Co., 109 Cal. 116; 41 Pac. 788. An amended answer supersedes the original, and destroys its effect as a pleading (Gilman v. Cosgrove, 22 Cal. 356; Welsh v. Bardshar, 137 Cal. 154; 69 Pac. 977; Evinger v. Moran, 14 Cal. App. 328; 112 Pac. 68); and all questions in relation to the abandoned answer are waived by filing the amended answer. Kentfield v. Hayes, 57 Cal. 409. An amended answer, improperly filed, and stricken out on motion, does not supersede the original answer, nor can the court render judgment against the defendant, in such a case, because there is no pleading on file; while an amended pleading supersedes the original, yet it must be a valid, subsisting pleading, entitled to recognition as such, in the place and stead of that which it supersedes; if it is a usurper, and exists only until the court can strike it out of existence because it is void ab initio, it fills no such office, and it cannot be treated as void because filed without leave of the court. Spooner v. Cady, 4 Cal. Unrep. 539; 36 Pac. 104. Where an amended answer is filed pending a motion for judgment upon the pleadings, such motion cannot be determined upon the original answer, but must depend upon the sufficiency of the amended answer. Evinger v. Moran, 14 Cal. App. 328; 112 Pac. 68.

Correction of matters relating to bills of exceptions. Relief may be granted from a default in failing to comply with the statute in presenting a bill of exceptions (People v. Everett, 8 Cal. App. 430; 97 Pac. 175); or in failing to serve a proposed bill of exceptions within the prescribed time, where objection to the settlement is made on that ground. Dernham v. Bagley, 151 Cal. 216; 90 Pac. 543; Sauer v. Eagle Brewing Co., 3 Cal. App. 127; 84 Pac. 425; Pollitz v. Wickersham, 150 Cal. 238; 88 Pac. 911. The judge has no power to extend the time for the settlement of a bill of exceptions beyond thirty days, without the consent of the adverse party; nor can he grant an extension after the moving party has made default, where no excuse for delay is shown, or any other facts from which relief could be claimed, or any application made to obtain such relief. Cameron v. Arcata etc. R. R. Co., 129 Cal. 279; 61 Pac. 955. A mistake of one day, by the plaintiff, in giving eleven days' notice of the presentation of a bill of exceptions for settlement, after the service of proposed amendments thereto, does not make the settlement thereof erroneous, where a proper case for relief, under this section, was established by affidavits, and by all the circumstances of the case, showing that the mistake was the result of

excusable inadvertence on the part of the plaintiff's attorney. Kaltschmidt v. Weber, 145 Cal. 596; 79 Pac. 272. A bill of exceptions may be corrected (Merced Bank v. Price, 152 Cal. 697; 93 Pac. 866); but not after it is prepared and settled, pending an appeal; nor can the record be amended by the appellate court, which must review the order upon the same record upon which it was made. Baker v. Borello, 131 Cal. 615; 63 Pac. 914. An order settling a bill of exceptions on motion for a new trial may be vacated. Dounelly v. Tregaskis, 7 Cal. App. 317; 94 Pac. 383. A person convicted of a felony is not entitled to notice of a proceeding by the state to correct an error in the bill of exceptions, where the course adopted is in full accord with the practice recognized by this section, which does not require notice to be given of an application for the correction of a mistake in the record. People v. Southern, 118 Cal. 359; 50 Pac. 545. The supreme court will not attempt to control the action of the court below in refusing to settle a bill of exceptions: that is a matter within the discretion of the lower court, assuming that it has power to grant relief. Stonesifer v. Armstrong, 86 Cal. 594; 25 Pac. 50. On appeal from an order refusing to grant relief from a default, in failing to serve a proposed statement on appeal within the prescribed time, the sole question to be considered is, whether the trial court abused its discretion in making such order. Utah-Nevada Co. v. De Lamar, 9 Cal. App. 759; 100 Pac. 884.

Statement on motion for new trial or on appeal. Under § 68 of the Practice Act, the court had power to cancel the certificate settling the statement on appeal, on becoming satisfied that the statement, as settled, was erroneous, and that the certificate was made through inadvertence; provided the error was corrected, either during the term or within five months thereafter. Flynn v. Cottle, 47 Cal. 526. A statement on motion for new trial may be amended to speak the truth. Estate of Thomas, 155 Cal. 488; 101 Pac. 798. In the absence of any showing relieving a party from default in serving a statement on motion for a new trial, such statement cannot be considered on appeal. King v. Dugan, 150 Cal. 258; 88 Pac. 925.

Motion to vacate, or motion for new trial. Where a motion for a new trial was brought up ex parte by opposing counsel, and, without argument or submission by the moving party, or opportunity to his counsel to be heard, was, by the court, inadvertently and improvidently denied, without consideration of the merits, the court has power, upon an ex parte showing, by the affidavit of the moving party, of facts showing inadvertence and improvidence, to vacate the order and to restore the motion to the calendar for argument. Whitney v. Superior Court, 147 Cal. 536; 82 Pac. 37. After the court has rendered judgment in accordance with its findings, neither the findings nor the judgment can be changed, except through a motion for a new trial, or upon appeal: a subsequent modification, otherwise made, is unauthorized (Knowlton v. Mackenzie, 110 Cal. 183; 42 Pac. 580); but the superior court has jurisdiction to vacate a judgment entered by it, by other proceedings than a motion for a new trial; and if error has been committed, it can only be corrected on a direct appeal: on a collateral attack, the order vacating the judgment will be deemed to have been properly made. Storke v. Storke, 111 Cal. 514; 44 Pac. 173. A superior court can set aside its judgments, only upon application, under this section, within a reasonable time, or on motion for a new trial (Fabretti v. Superior Court, 77 Cal. 305; 19 Pac. 481); it has no power to modify an order granting a new trial, by adding conditions not therein expressed, except by proceedings under this section, or by an entry nunc pro tunc. Frost v. Los Angeles Ry. Co., 165 Cal. 365; 132 Pac. 1043. A petition for a rehearing is a proceeding unknown to the practice of the superior court. Fabretti v. Superior Court, 77 Cal. 305; 19 Pac. 481. A party cannot, under the form of a motion to amend the judgment, obtain relief, which, if proper to be granted under any circumstances, should be sought through a motion for a new trial. Egan v. Egan, 90 Cal. 15; 27 Pac. 22. An application to set aside a judgment should be by motion for a new trial, where the moving party is represented by an attorney at the trial; but it is properly made by motion, under this section, where it is founded on the facts that the moving party was not present at the trial, either in person or by attorney, and that he had no notice of the judgment until the lapse of the term at which it was rendered. McKinley v. Tuttle, 34 Cal. 235. Where a mortgagor conveys the mortgaged premises, and the mortgage is foreclosed in an action in which summons is served on the mortgagor alone, the plaintiff cannot obtain relief by bringing a new action against the mortgagor and the grantee: he must seek relief by a motion in the original action. Aldrich v. Stephens, 49 Cal. 676. Where a party moves for a new trial, it will be presumed that such motion is pending and undetermined at the time he makes a subsequent motion to vacate the decree. Johnson v. Reed, 125 Cal. 74; 57 Pac. 680.

Judgments which may be vacated. The court has power to vacate an order appointing a receiver, made before the trial, notwithstanding the pendency of a motion for a new trial (Copper Hill Mining Co. v. Spencer, 25 Cal. 11; People v. Loucks, 28 Cal. 68); and to vacate an improvident order denying a motion for a new trial, and to restore the motion to the calendar

for argument (Whitney v. Superior Court, 147 Cal. 536; 82 Pac. 37); and to vacate or modify an order setting aside a homestead, and it is its duty to hear and determine the matter when presented to it; and mandamus may issue to compel the court to hear and determine the motion upon its merits. Cahill v. Superior Court, 145 Cal. 42; 78 Pac. 467. An order admitting an alien to citizenship may be vacated, upon a proper showing made within time. Tinn v. United States District Attorney, 148 Cal. 773; 113 Am. St. Rep. 354; 84 Pac. 152.

Amendment of judgment. The superior court has power to amend a judgment, at any time, as to immaterial matters occasioned by inadvertence; but not where the amendment would materially affect the rights of litigants objecting thereto. Calkins v. Monroe, 17 Cal. App. 324; 119 Pac. 680. A judgment cannot be amended where there is no element of mistake, inadvertence, surprise, or excusable neglect. Mann v. Mann, 6 Cal. App. 610; 92 Pac. 740. To entitle a party to an order amending the judgment, order, or decree, he must establish that the entry, as made, does not conform to what the court ordered. First Nat. Bank v. Dusy, 110 Cal. 69; 42 Pac. 476. Where the defendant was sued and served and judgment entered against him under the same name, it is error for the court afterwards, without notice to the defendant, to make an order, on the motion of the plaintiff, amending the judgment, by altering the prænomen of the defendant: the action, in such case, is against one person, and the judgment against another, as, prima facie, two different names signify two different persons. McNally v. Mott, 3 Cal. 235. Where an amendment is made to a judgment in matter of substance, whereby it is made to grant relief different from that granted when it was rendered, it is absolutely void as against a party having no notice of the application to amend it; and where a proposed addition to the judgment is a mere afterthought, and forms no part of the judgment as originally intended and pronounced, it cannot be brought in by way of amendment. Scamman v. Bonslett, 118 Cal. 93; 62 Am. St. Rep. 226; 50 Pac. 272. Where the accident of entering judgment against both defendants happens to the prejudice of the plaintiff, and this error is not corrected before a motion to set aside is made, it is discretionary with the court below to grant the application of the plaintiff to correct the judgment, and its action in denying it will not be disturbed on appeal. Lewis v. Rigney, 21 Cal. 268.

Judgment nunc pro tunc. The court may, at any time, render or amend a judgment nunc pro tunc; but this power is confined to cases where the record discloses that entry on the minutes does not correctly give the exact judgment of the court. Morrison v. Dapman, 3 Cal. 255. All courts have the power to correct clerical errors, and to enter a judgment nunc pro tunc, when the record discloses the error. Swain v. Naglee, 19 Cal. 127. Where the clerk has neglected to enter the judgment for two years after its rendition, the supreme court will direct the court below to cause the judgment to be entered nunc pro tunc as of the time it should have been entered. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692; 75 Pac. 564. A judge at chambers has no power to make an order directing the clerk to enter in the minutes, nunc pro tunc, an order alleged to have been made in open court, where there is nothing in the record to show whether such order was made. Hegeler v. Henckell, 27 Cal. 491. The object of entering judgments and decrees as of some previous date is to supply matters of evidence and to rectify clerical misprisions, but not to enable the court to correct judicial errors; and where costs were not prayed for, and the judgment is silent as to them, the court cannot afterwards remedy the error by ordering an amendment, nunc pro tunc, so as to include costs. Estate of Potter, 141 Cal. 424; 75 Pac. 850.

Proof of service before default granted. The fact, and not the proof, of service gives the court jurisdiction; and lack of jurisdiction must be affirmatively shown by the record. Guardianship of Eikerenkotter, 126 Cal. 54; 58 Pac. 370. A judgment by default, rendered where the proof was imperfect, is not void, if service was in fact made; and the court may allow the proof of service to be amended and filed as of the date of the judgment. Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509; Hibernia Sav. & L. Soc. v. Matthai, 116 Cal. 424; 48 Pac. 370. Before default can be regularly taken, there must be positive and sufficient evidence in court of due service: no substantial defect in that respect can be cured by subsequent knowledge of the fact. Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089. After service, the court acquires jurisdiction, by reason of the defendant's default, to enter judgment against him: it is not necessary that a formal default should have been previously entered by the clerk, nor that the summons, with proof of service, should be then on file with the clerk; nor is jurisdiction lost by the neglect to make proof of such service a matter of record before judgment; and where the court, after judgment, amends the record, by supplying proof of service, it is as effective to support the judgment as if it had been filed before its entry. Hibernia Sav. & L. Soc. v. Matthai, 116 Cal. 424; 48 Pac. 370. Where there has been neither personal service upon nor appearance by the de-

fendant, a judgment by default is utterly void. Glidden v. Packard, 28 Cal. 649. A finding of due service is not conclusive proof, where the defendant does not answer, as against the evidence of service found in the judgment roll; and a default judgment, entered on a void certificate of service, is void, though there is a finding of service, because, where there is no answer, the summons, with proof of service, must be made a part of the judgment roll. Reinhart v. Lugo, 86 Cal. 395, 396; 21 Am. St. Rep. 52; 24 Pac. 1089. Where the affidavit of service by mail is insufficient, a default is improperly entered. Hogs Back Consol. Mining Co. v. New Basil Consol. Mining Co., 63 Cal. 121. A judgment by default, rendered upon an attempted service by publication, is void for want of jurisdiction, where the judgment roll does not contain the affidavit for publication, nor the order of court directing it. People v. Greene, 74 Cal. 400; 5 Am. St. Rep. 448; 16 Pac. 197. An affidavit of service, which does not show that the affiant was over the age of eighteen years at the time of service, is insufficient to support a judgment by default. Maynard v. MacCrellish, 57 Cal. 355; Howard v. Galloway, 60 Cal. 10. The clerk has no authority to enter the default of a defendant upon a void certificate of service: his act in doing so is a nullity. Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089.

Discretion in vacating defaults. In the matter of opening defaults, much is confided to the discretion of the court; and where the circumstances are such as to lead the court to hesitate, it is better to resolve the doubt in favor of the application, so as to secure a trial and judgment on the merits. Wolff & Co. v. Canadian Pacific Ry. Co., 123 Cal. 535; 56 Pac. 453; Merchants' Ad-Sign Co. v. Los Angeles Bill Posting Co., 128 Cal. 619; 61 Pac. 277; Petition of Tracey, 136 Cal. 385; 69 Pac. 20; Watson v. San Francisco etc. R. R. Co., 41 Cal. 17; Grady v. Donahoo, 108 Cal. 211; 41 Pac. 41; Banta v. Siller, 121 Cal. 414; 53 Pac. 935. The granting or refusing of an application to set aside a default or a default judgment will not be disturbed, unless a clear abuse of legal discretion is shown. Haight v. Green, 19 Cal. 113; Woodward v. Backus, 20 Cal. 137; Reese v. Mahoney, 21 Cal. 305; Howe v. Independence Consol. Gold etc. Mining Co., 29 Cal. 72; Bailey v. Taaffe, 29 Cal. 422; Davis v. Rock Creek Lumber etc. Mining Co., 55 Cal. 359; 36 Am. Rep. 40; Freeman v. Brown, 55 Cal. 465; Moore v. Kellogg, 58 Cal. 385; Dougherty v. Nevada Bank, 68 Cal. 275; 9 Pac. 112; Hitchcock v. McElrath, 69 Cal. 634; 11 Pac. 487; Garner v. Erlanger, 86 Cal. 60; 24 Pac. 805; Malone v. Big Flat Gravel Mining Co., 93 Cal. 384; 28 Pac. 1063; Williamson v. Cummings Rock Drill Co., 95 Cal. 652; 30 Pac. 762; Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218; Bell v. Peck, 104 Cal. 35; 37 Pac. 766; Harbaugh v. Honey Lake Valley Land etc. Co., 109 Cal. 70; 41 Pac. 792; Smith v. Smith, 113 Cal. 268; 45 Pac. 332; Rauer v. Wolf, 115 Cal. 100; 46 Pac. 902; First Nat. Bank v. Nason, 115 Cal. 626; 47 Pac. 595; McGowan v. Kreling, 117 Cal. 31; 48 Pac. 980; Morton v. Morton, 117 Cal. 443; 49 Pac. 557; Foley v. Foley, 120 Cal. 33; 65 Am. St. Rep. 147; 52 Pac. 122; Brooks v. Johnson, 122 Cal. 569; 55 Pac. 423; Brittan v. Oakland Bank, 124 Cal. 282; 71 Am. St. Rep. 58; 57 Pac. 84; San Joaquin Valley Bank v. Dodge, 125 Cal. 77; 57 Pac. 687; Nicoll v. Weldon, 130 Cal. 666; 63 Pac. 63; Winchester v. Black, 134 Cal. 125; 66 Pac. 197; Palace Hardware Co. v. Smith, 134 Cal. 381; 66 Pac. 474; Langford v. Langford, 136 Cal. 507; 69 Pac. 235; Grant v. McArthur, 137 Cal. 270; 70 Pac. 88; Moore v. Thompson, 138 Cal. 23; 70 Pac. 930; O'Brien v. Leach, 139 Cal. 220; 96 Am. St. Rep. 105; 72 Pac. 1004; Alferitz v. Cahen, 145 Cal. 397; 78 Pac. 878; Estate of Sheppard, 149 Cal. 219; 85 Pac. 312; Webster v. Somer, 159 Cal. 459; 114 Pac. 575; Jergins v. Schenck, 162 Cal. 747; 124 Pac. 426; Lang v. Lilley, 164 Cal. 294; 128 Pac. 1026; Murphy v. Stelling, 1 Cal. App. 95; 81 Pac. 730; Pelegrinelli v. McCloud River Lumber Co., 1 Cal. App. 593; 82 Pac. 695; Freeman v. Brown, 5 Cal. App. 516; 90 Pac. 970; Wells Fargo & Co. v. McCarthy, 5 Cal. App. 301; 90 Pac. 203; Yordi v. Yordi, 6 Cal. App. 20; 91 Pac. 348; Bond v. Karma-Ajax Mining Co., 15 Cal. App. 469; 115 Pac. 254; Sheehy v. Minaker, 16 Cal. App. 437; 117 Pac. 616; Blumer v. Mayhew, 17 Cal. App. 223; 119 Pac. 202; Behymer v. Superior Court, 18 Cal. App. 464; 123 Pac. 340; Redding Gold etc. Mining Co. v. National Surety Co., 18 Cal. App. 488; 123 Pac. 544; Kearney v. Palmer, 18 Cal. App. 517; 123 Pac. 611; Smith v. Riverside Groves etc. Co., 19 Cal. App. 165; 124 Pac. 870; Doherty v. California Navigation etc. Co., 6 Cal. App. 131; 91 Pac. 419; Oppenheimer v. Radke & Co., 165 Cal. 220; 131 Pac. 365. The appellate court will not interfere with the action of the trial court in making an order setting aside a default and judgment thereon, and permitting the defaulting party to answer, where there is a sufficient affidavit of merits, and there is no abuse of discretion. Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089. Great latitude is allowed the court in exercising its discretion in setting aside a default, inadvertently permitted by a party having a substantial defense. Hitchcock v. McElrath, 69 Cal. 634; 11 Pac. 487. The discretion of the court in granting or denying a motion to set aside a default or a default judgment is best exercised when it tends to bring about a judgment on the merits. Pearson v. Drobaz Fishing Co., 99 Cal. 425; 34 Pac. 76; San Joaquin Valley

Bank v. Dodge, 125 Cal. 77; 57 Pac. 687; Nicoll v. Weldon, 130 Cal. 666; 63 Pac. 63; Mitchell v. California etc. S. S. Co., 156 Cal. 576; 105 Pac. 590; McDougald v. Hulet, 132 Cal. 154; 64 Pac. 278; Andrus v. Smith, 133 Cal. 78; 65 Pac. 320. Where one of two defendants is not a party in interest, and relies upon the promise of his co-defendant to save him harmless in the action, and a default is entered as to both, there is no abuse of discretion in opening the default as to the party not in interest (Santa Barbara Live Stock etc. Co. v. Thompson, 46 Cal. 63); nor is there an abuse of discretion in setting aside a default, where a stenographer made a mistake in writing the defendant's corporate name in the title to the demurrer to the complaint, and the defendant moved promptly to have the default set aside. Will v. Lytle Creek Water Co., 100 Cal. 344; 34 Pac. 830. There may be circumstances in which it is proper for the court to grant leave to move, even a third time, to set aside a default. Hitchcock v. McElrath, 69 Cal. 634; 11 Pac. 487. The refusal of the court to vacate a judgment by default for failure to answer within the time limited, is not an abuse of discretion, in the absence of a valid stipulation from the plaintiff's attorney or of an order of the court extending the time (Wylie v. Sierra Gold Co., 120 Cal. 485; 52 Pac. 809); nor is it an abuse of discretion to refuse to set aside a default or a default judgment, where the applicant is guilty of inexcusable neglect, or the grounds upon which the relief is sought are insufficient (Grant v. White, 57 Cal. 141; Moore v. Kellogg, 58 Cal. 385; Youngman v. Tonner, 82 Cal. 611; 23 Pac. 120; O'Connor v. Ellmaker, 83 Cal. 452; 23 Pac. 531; Dusy v. Prudom, 95 Cal. 646; 30 Pac. 798; Williamson v. Cummings Rock Drill Co., 95 Cal. 652; 30 Pac. 762; Bradford v. McAvoy, 99 Cal. 324; 33 Pac. 1091; Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218; Bell v. Peck, 104 Cal. 35; 37 Pac. 766; Whitney v. Daggett, 108 Cal. 232; 41 Pac. 471; Shay v. Chicago Clock Co., 111 Cal. 549; 44 Pac. 237; Rauer v. Wolf, 115 Cal. 100; 46 Pac. 902; Wylie v. Sierra Gold Co., 120 Cal. 485; 52 Pac. 809); nor is it an abuse of discretion to render a judgment by default, or to refuse a motion to open the default, where the party is regularly served, and leaves the state without answering, and his attorneys do not answer for him. Hancock v. Pico, 40 Cal. 153. A motion to set aside a judgment upon the ground that there had been neither an appearance by the defendant nor service upon him, is not a matter of discretion in the lower court, but a matter of pure legal right, not arising under the provisions of this section. Hunter v. Bryant, 98 Cal. 247; 33 Pac. 51. It is the duty of the appellate court to reverse the action of the trial court, where it is obliged to say that, in setting aside a default and vacating a judgment, an abuse of discretion was involved. Redding Gold etc. Mining Co. v. National Surety Co., 18 Cal. App. 488; 123 Pac. 544.

When default may be set aside. The court may vacate a default judgment, obtained upon a defective complaint, and permit the plaintiff to amend the complaint. Lemon v. Hubbard, 10 Cal. App. 471; 102 Pac. 554. A default judgment should be set aside, where application is promptly made, and the plaintiff is not injured, and where there was no neglect or omission on the part of the defendant or his counsel, but, through the inadvertence and neglect of an employee of the defendant, the papers in the case were mislaid on the removal of the attorney of record, and the default judgment was rendered before the defendant knew that the case was set for trial or that the attorney had ceased to attend to it. Grady v. Donahoo, 108 Cal. 211; 41 Pac. 41. Judgment by default against a defendant should be vacated, where he was misled by incorrect information of the time of the commencement of the suit, appearing in a regularly issued publication, containing information of court proceedings, and relied upon by the business community. Watson v. San Francisco etc. R. R. Co., 41 Cal. 17. A judgment by default against a corporation is properly vacated for excusable neglect, where its agent was misled by the lawyer plaintiff, possibly unintentionally, and where there is a sufficient affidavit of merits. Craig v. San Bernardino Investment Co., 101 Cal. 122; 35 Pac. 558. Where the trial court is convinced that the plaintiff's conduct, as to agreements for continuances, after default, has deceived the defendant, it may properly set aside a judgment by default. McGowan v. Kreling, 117 Cal. 31; 48 Pac. 980. A judgment by default should be set aside, where the defendants, Misión Indians, are helpless and ignorant, and totally unacquainted with the English language and with modes of judicial proceedings, and are incapable of attending to their interests. Byrne v. Alas, 68 Cal. 479; 9 Pac. 850. Where a person claiming an interest in land moves to set aside a judgment by default, entered against it in an action to enforce an assessment, on the ground that he knew nothing of the commencement of the action, or its pendency, or of the judgment therein, until the judgment was rendered, and states facts constituting a perfect defense, the court may vacate such judgment and grant permission to the defendant to answer to the merits of the original action. Reclamation District v. Coghill, 56 Cal. 607. An application to set aside a judgment by default may be granted to enable the defendant, who was not properly served with summons, to plead the statute of limitations as a defense.

San Diego Realty Co. v. McGinn, 7 Cal. App. 264; 94 Pac. 374. Where a demurrer is still on file and undisposed of, a default entered against the defendant is premature, and should be set aside. Tregambo v. Comanche Mill etc. Co., 57 Cal. 501. A judgment by default will be reversed, where the court strikes out an answer, filed in time, though not served until two days afterwards. Lybecker v. Murray, 58 Cal. 186. Where a demurrer to the complaint was overruled, and the defendant was given time to answer, but the record does not disclose that any notice of the order overruling the demurrer was served upon the defendant, a default and judgment entered against him should be set aside, upon application made within proper time. Chamberlin v. Del Norte County, 77 Cal. 150; 19 Pac. 271. Doubt as to the granting of relief under this section should be resolved in favor of the application, so as to secure a trial upon the merits: an order granting an application to open a default will be looked upon more favorably upon appeal, than one refusing the application (Jergins v. Schenck, 162 Cal. 747; 124 Pac. 426), since, where the application is refused, the defendant may be deprived of a substantial right, whereas, nothing to the contrary being shown, it may be assumed that the plaintiff will be able, at any time, to establish his cause of action. Nicoll v. Weldon, 130 Cal. 666; 63 Pac. 63. The court may, at any time, set aside a default judgment, entered by the clerk, where it appears on the judgment roll that he had no power to enter it (Wharton v. Harlan, 68 Cal. 422; 9 Pac. 727; Willson v. Cleaveland, 30 Cal. 192), even although the judgment, if it be for money, has been satisfied. Patterson v. Keeney, 165 Cal. 465; 132 Pac. 1043. The clerk has no authority to enter a judgment by default, on notice by the defendant to the plaintiff that he will move before the court commissioner to dissolve an attachment issued in the cause (Glidden v. Packard, 28 Cal. 649); nor has he jurisdiction to hear the plaintiff's application for default and judgment based upon his affidavits (Oliphant v. Whitney, 34 Cal. 25); nor has he power to determine upon what papers or evidence the court acted (Walsh v. Hutchings, 60 Cal. 228); nor has he any means of knowing what has been done, beyond what is disclosed by his files, and the record made in the regular course of procedure; and when an answer is filed in due time, he has all that he is authorized to look to, in order to determine whether a default is due or not. Oliphant v. Whitney, 34 Cal. 25. The statutory provision that the clerk must enter judgment "immediately" after entering default is merely directory; his failure to do so does not render void a judgment subsequently entered upon such default. Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218. It is not error for the court to enter a default and judgment for the plaintiff, where a frivolous demurrer is filed, and no leave to file an answer is requested. Seale v. McLaughlin, 28 Cal. 668. A motion to set aside a judgment by default is properly denied, where the defendant was duly served, but held the summons and complaint more than ten days without examining them, believing that the suit would be tried in another county, where the cause of action arose, and when he finally left the papers with his attorney, the time for answering had expired. Garner v. Erlanger, 86 Cal. 60; 24 Pac. 805. It is not error to refuse to set aside a default for mere irregularity in the service of summons, or for a defective return. Dorente v. Sullivan, 7 Cal. 279. A clerical error, or a mere slip of the pen, is not ground for vacating a judgment by default, on the ground of irregularity in service. Alexander v. McDow, 108 Cal. 25; 41 Pac. 24. An order setting aside a default and judgment, and restoring an answer to the files, forms no part of the judgment roll. Von Schmidt v. Von Schmidt, 104 Cal. 547; 38 Pac. 361.

Who may have default set aside. The plaintiff may move to set aside a default, although such default was entered at his instance. Thompson v. Alford, 128 Cal. 227; 60 Pac. 686. Where a tenant in possession has, through neglect or by design, permitted a default to be entered against him, the landlord may, upon a proper showing, moving in the name of the tenant, have such default set aside. Dimick v. Deringer, 32 Cal. 488. The successor in interest to property involved in the action may move to set aside a default judgment entered against his grantor. People v. Mullan, 65 Cal. 396; 4 Pac. 348. Where the defendant received no notice of the order dismissing his demurrer, and the court did not refuse leave to answer, the defendant is not deprived of his right to move that the default be set aside by the lapse of the prescribed time before the entry of default. Winchester v. Black, 134 Cal. 125; 66 Pac. 197. Where the judgment against a defendant and his wife is vacated, on her motion, so far as her rights are concerned, the plaintiff may have her default set aside, and the time fixed in which to answer, where there is nothing in the record to show that her rights would, in any respect, be impaired thereby. Thompson v. Alford, 135 Cal. 52; 66 Pac. 983. This section expressly extends to the "legal representative" of a deceased defendant the right "to answer to the merits of the action." Davidson v. All Persons, 18 Cal. App. 723; 124 Pac. 570. The legal representative of a party to an action is entitled to relief, upon such terms as may be just, from a default taken against him through mistake, inadvertence, surprise, or excusable neglect. Plummer v. Brown, 64 Cal. 429; 1 Pac. 703. Where a judgment

quieting title against an administrator is rendered in favor of the holder of a tax deed, a denial of the application of the heirs to set aside the judgment and to permit them to answer will not be disturbed, where no abuse of discretion is shown. Cass v. Hutton, 155 Cal. 103; 99 Pac. 493.

When judgments vacated. Power is conferred upon courts of record, by this section, to relieve from a judgment taken through surprise, excusable neglect, etc.; and by § 859, post, the power to grant such relief is expressly given to justices' courts. Hubbard v. Superior Court, 9 Cal. App. 166; 98 Pac. 394. This section was not designed for the relief of persons not served with summons, who permit a judgment to be taken against them with their full knowledge and consent. Boland v. All Persons, 160 Cal. 486; 117 Pac. 547. A judgment entered without findings is not within the purview of this section. Savings and Loan Society v. Thorne, 67 Cal. 53; 7 Pac. 36. Courts are always inclined to be liberal in relieving parties laboring under disabilities from the effect of decrees which appear to be unjust, and which deprive them of their rights: the lower court is warranted in vacating such decrees, upon diligent application and a reasonable showing. Estate of Ross, 140 Cal. 282; 73 Pac. 976. A mere error or irregularity in making out a bill of costs does not invalidate a judgment otherwise correct. Castle v. Bader, 23 Cal. 75. Where an answer is improperly stricken out, a motion, after decree, to vacate the judgment, to reinstate the answer, and to restore the cause to the calendar for trial, should be granted. Bernheim v. Cerf, 123 Cal. 170; 55 Pac. 759. Where a motion to vacate a judgment for mistake has been denied under this section, the sole question upon an appeal from the order of denial is, whether the trial court abused its discretion. Alferitz v. Cahen, 145 Cal. 397; 78 Pac. 878. An order of the superior court, attempting to set aside its judgment affirming a judgment of a justice's court, upon an appeal on questions of law alone, upon a petition for a rehearing, is coram non judice, and void. Fabretti v. Superior Court, 77 Cal. 305; 19 Pac. 481.

Who may have judgment vacated. Only a party to the action, or his legal representative, can move to set aside a judgment. Smith v. Roberts, 1 Cal. App. 148; 81 Pac. 1026. Where a motion is made by the legal representative of a plaintiff, to set aside a judgment taken against him, on the ground of mistake, inadvertence, surprise, or excusable neglect, he must show such a state of facts as would support a similar application by the plaintiff. Corwin v. Bensley, 43 Cal. 253. One not a party, nor the legal representative of a party, to an action brought to decide conflicting claims to purchase state lands, is not entitled, though a settler on the land, to have a judgment therein set aside so as to allow him to intervene. Smith v. Roberts, 1 Cal. App. 148; 81 Pac. 1026. The purchaser of all the property involved in an action of partition is the legal representative of all the nominal parties to the action, within the meaning of this section; and, under § 385, ante, he has control of the action, and has the right to move, in the appellate court, to recall a remittitur obtained by fraud of nominal parties to the record, in taking steps adverse to his rights. Trumpler v. Trumpler, 123 Cal. 248; 55 Pac. 1008. Whether the judgment is either for or against a party, he may pray for relief, under this section. Brackett v. Banegas, 99 Cal. 623; 34 Pac. 344. Where the court orders notice to be given of a decree terminating a life estate, a party not personally served, who moves promptly, and within six months thereafter, to vacate such decree, is entitled to relief. Petition of Tracey, 136 Cal. 385; 69 Pac. 20. A judgment cannot be vacated upon the application of a defendant not affected thereby. Churchill v. More, 7 Cal. App. 767, 771; 96 Pac. 108.

Showing necessary to vacate judgment. A judgment by default cannot be vacated, under this section, without a sufficient showing (Ritter v. Braash, 11 Cal. App. 258; 104 Pac. 592); nor can a decree, valid on its face, be set aside without notice and a hearing. Andreen v. Andreen, 15 Cal. App. 728; 115 Pac. 761. Nor can a default and judgment, regularly entered against a litigant, be set aside and vacated, except upon a showing that they were taken against him through his mistake, inadvertence, surprise, or excusable neglect. Redding etc. Mining Co. v. National Surety Co., 18 Cal. App. 488; 123 Pac. 544; Harlan v. Smith, 6 Cal. 173; Chase v. Swain, 9 Cal. 130; People v. O'Connell, 23 Cal. 281; Bailey v. Taaffe, 29 Cal. 422. A motion to set aside a judgment is properly denied, where summons was personally served, and the affidavit makes no averment of mistake, surprise or inadvertence, or any attempt to account for the failure to answer within the prescribed time. Harlan v. Smith, 6 Cal. 173. Where a non-resident has not been personally served within this state, the court has power, on motion, where the return of service is shown to be false, to quash the service of summons and vacate the judgment; and any fact going to show the invalidity of the judgment may be presented at the hearing of the motion. Norton v. Atchison etc. R. R. Co., 97 Cal. 388; 33 Am. St. Rep. 198; 30 Pac. 585; 32 Pac. 452. Application to vacate an order sustaining a demurrer may be made, without any showing of mistake, inadvertence, or excusable neglect. De la Beckwith v. Superior Court, 146 Cal. 496; 80 Pac. 717. On a motion to set aside a default judg-

ment, the defendant may waive an objection for want of service of summons, and still have relief, under this section, on the ground of mistake and inadvertence. Martz v. American Bran Gold Co., 161 Cal. 531; 119 Pac. 909. From the fact that the relief to be afforded is the privilege of answering "to the merits of the original action," the condition is implied, that the defendant must have a sufficient answer to present, that is, he must have a good defense to the action on the merits: this being one of the conditions of the statute, the defendant must show that such defense exists. Gray v. Lawlor, 151 Cal. 356; 90 Pac. 691; Haub v. Leggett, 160 Cal. 491; 117 Pac. 556. There is no error in denying the defendant's motion to set aside a judgment against him, where there is an averment that gave the court jurisdiction, and the defendant was informed of the fact, made no objection, took no steps to vacate it, and did not have a meritorious defense. Seale v. McLaughlin, 28 Cal. 668. A party seeking to have a judgment set aside on the ground of accident or surprise must also show that he has been injured, and that a different result might be reached in case of another trial, should the judgment be set aside and a new trial granted. McGuire v. Drew, 83 Cal. 225; 23 Pac. 312. Where a default judgment is void because there is no proof of service, but, at the hearing of the motion to vacate, proof is made of the fact of service at the time mentioned in the void certificate of service, the court is not justified in refusing the motion. Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089. A defendant corporation is entitled to have a judgment against it vacated, upon a showing that it was rendered without actual service of summons upon any officer or agent of the corporation, and without actual knowledge, on its part, of the pendency of the action. Martz v. American Bran Gold Co., 161 Cal. 531; 119 Pac. 909. A default for failure to answer is improperly set aside, where there was no service of the moving papers, and the application was heard and decided in the absence of the plaintiff's attorney, who had no notice of the motion, and no reasonable excuse was given for the failure to answer within the proper time. Reilly v. Ruddock, 41 Cal. 312. The court will hear counter-affidavits as to an excuse for permitting the default. Douglass v. Todd, 96 Cal. 655; 31 Am. St. Rep. 247; 31 Pac. 623. The motion to set aside a default, and to fix a time for the defendant to plead, does not presumptively involve the determination of any facts presented on a motion to vacate the judgment: the two motions are separate and distinct from each other, depend upon distinct record, and seek distinct relief. Thompson v. Alford, 128 Cal. 227; 60 Pac. 686. A judgment by default, reciting the fact that the defendant was duly served, cannot be set aside on motion, where there is no evidence, either in or dehors the record, tending to rebut the recitals in the judgment. Whitney v. Daggett, 108 Cal. 232; 41 Pac. 471. An application to set aside a default judgment, which expressly refers to and makes all the papers and proceedings on file or of record part of the moving papers, and which is an amendment of a former application, will be so regarded for the purpose of determining the question of diligence. Wolff v. Canadian Pacific Ry. Co., 89 Cal. 332; 26 Pac. 825. Where there is a perfect affidavit of merits, and the default is properly excused, the judgment may be set aside, to permit the plea of discharge in insolvency or bankruptcy, where the application contains a statement of discharge in insolvency. Tuttle v. Scott, 119 Cal. 586; 51 Pac. 849. Where the motion to vacate a judgment by default is made on the ground that the court had no jurisdiction to render any judgment, by reason of failure to serve the summons, the question whether the facts stated in the application would constitute a defense to the action, is immaterial. Mott Iron Works v. West Coast Plumbing etc. Co., 113 Cal. 341; 45 Pac. 683. Where a defendant seeks relief, under this section, from a default judgment in an action to quiet title under the McEnerney Act, the affidavit on the motion, stating facts sufficient to show that the claimant had a "valid adverse interest" in the property involved in the action when it was begun, is sufficient. Davidson v. All Persons, 18 Cal. App. 723; 124 Pac. 570. Where the defendant has actual notice of the time and place of trial, and that no further postponement would be agreed to by the opposing party, and the case is tried in his absence, he is not entitled to have the judgment vacated and a new trial granted on the ground of accident and surprise. McGuire v. Drew, 83 Cal. 225; 23 Pac. 312. Where a motion for a new trial was denied on the ground that the moving affidavits were not filed in time, a subsequent motion to set aside the judgment, on the ground of excusable neglect, will also be denied, if sufficient reasons are not shown for the delay in filing the affidavits on the former motion. Heine v. Treadwell, 72 Cal. 217; 13 Pac. 503.

Affidavit of merits. An affidavit of merits is required in proceedings for relief under this section (Nevada Bank v. Dresbach, 63 Cal. 324; Quan Quock Fong v. Lyons, 20 Cal. App. 668; 130 Pac. 33); and the defendant must show that he has a good defense to the action on the merits. People v. Rains, 23 Cal. 127; Gray v. Lawlor, 151 Cal. 352; 12 Ann. Cas. 990; 90 Pac. 691. Where no affidavit of merits is made, an explanation should be given. Bailey v. Taaffe, 29 Cal. 422. In the absence of a showing of merits, relief will be denied.

Reese v. Mahoney, 21 Cal. 305; Bailey v. Taafe, 29 Cal. 422; Parrott v. Den, 34 Cal. 79. No affidavit of merits is necessary on a motion to vacate a judgment rendered upon an invalid stipulation (Toy v. Haskell, 128 Cal. 558; 79 Am. St. Rep. 70; 61 Pac. 89); nor on a motion to set aside a judgment, entered upon a fraudulent stipulation, where the record shows that there is a meritorious defense (Crescent Canal Co. v. Montgomery, 124 Cal. 134; 56 Pac. 797); nor on a motion to vacate a judgment based upon want of jurisdiction of the person (Maclay Co. v. Meads, 14 Cal. App. 363; 112 Pac. 195; 113 Pac. 364); nor on a motion to set aside a decree in a divorce suit (Cottrell v. Cottrell, 83 Cal. 457; 23 Pac. 531); nor where the judgment shows upon its face that it was improvidently made (Clarke v. Baird, 98 Cal. 642; 33 Pac. 756); nor where the judgment is void: in this class of cases the defendant is entitled to relief, independently of the statute. Norton v. Atchison etc. R. R. Co., 97 Cal. 388; 33 Am. St. Rep. 198; 30 Pac. 585; 32 Pac. 452. The court may grant leave to the defendant to amend his affidavit, and to file the same. Palmer v. Barclay, 92 Cal. 199; 28 Pac. 226. The affidavit cannot be controverted (Reclamation District v. Coghill, 56 Cal. 607); nor can counter-affidavits be received (Francis v. Cox, 33 Cal. 323; Gracier v. Weir, 45 Cal. 53); nor can the merits of the case be tried (Rauer's Law etc. Co. v. Gilleran, 138 Cal. 352; 71 Pac. 445); but where the court deems further affidavits necessary, the hearing may be continued for that purpose. Melde v. Reynolds, 129 Cal. 308; 61 Pac. 932. Where the affidavit is insufficient, the court should not set aside the judgment: it has no authority to waive a proper affidavit. Morgan v. McDonald, 70 Cal. 32; 11 Pac. 350. A verified answer is a sufficient showing of merits. Fulweiler v. Hog's Back Consol. Mining Co., 83 Cal. 126; 23 Pac. 65. The affidavit may be made by counsel, where the defendant is ignorant, and unacquainted with modes of judicial proceedings (Byrne v. Alas, 68 Cal. 479; 9 Pac. 850); and it is not objectionable because made by an attorney. Will v. Lytle Creek Water Co., 100 Cal. 344; 34 Pac. 830. A personal affidavit is not jurisdictional. Melde v. Reynolds, 129 Cal. 308; 61 Pac. 932. The affidavit must state that the defendant has fully and fairly stated the facts of the case to his counsel: a statement that he has stated the facts of his defense to counsel is insufficient (Morgan v. McDonald, 70 Cal. 32; 11 Pac. 350); and it is also insufficient, that he stated "his case" to his counsel (People v. Larue, 66 Cal. 235; 5 Pac. 127); and that he had fully and fairly stated to counsel all the facts constituting the defense (Palmer & Rey v. Barclay, 92 Cal. 199; 28 Pac. 226); and that he had fairly and fully stated "all the facts" to his counsel. Jensen v. Dorr, 9 Cal. App. 19; 98 Pac. 46. It is not essential that the affidavit disclose facts constituting a defense. Rauer's Law etc. Co. v. Gilleran, 138 Cal. 352; 71 Pac. 445; Woodward v. Backus, 20 Cal. 137; Francis v. Cox, 33 Cal. 323; Reidy v. Scott, 53 Cal. 69. The rule that a party moving to vacate a judgment by default cannot be deprived of relief because the affidavit is overcome by counter-affidavits, does not apply where no case of inadvertence or excusable neglect is shown. Bond v. Karma-Ajax Consol. Mining Co., 15 Cal. App. 469; 115 Pac. 254. Where the affidavit is materially deficient in showing that the default occurred through mistake, inadvertence, surprise, or excusable neglect, or that the defendant has a meritorious defense to the action, the judgment should not be vacated. Bailey v. Taaffe, 29 Cal. 422. An affidavit showing that the defense is of a technical character, not affecting the merits of the case, is insufficient (People v. Rains, 23 Cal. 127); as is also an affidavit stating facts that would not constitute a defense to the action upon the merits (Tuttle v. Scott, 119 Cal. 586; 51 Pac. 849); and an affidavit containing no averment of mistake, inadvertence, surprise, or any attempt to account for failure to answer within the time allowed by law, where personal service of summons was made (Harlan v. Smith, 6 Cal. 173); and an affidavit, that the affiant was fully advised of the facts and circumstances involved in the defense. Quan Quock Fong v. Lyons, 20 Cal. App. 668; 130 Pac. 33. Where the affidavit discloses a degree of negligence, carelessness, and lack of diligence, hardly to be expected of a prudent business man, the application should be denied. Coleman v. Rankin, 37 Cal. 247; Wolff & Co. v. Canadian Pacific Ry., 89 Cal. 332; 26 Pac. 825. An affidavit by the defendant's attorney, that he has examined the defendant's title, and verily believes, from such examination, that it is better than the plaintiff's, does not show a meritorious defense. Bailey v. Taaffe, 29 Cal. 422. The default should be set aside, where there is a sufficient affidavit, and the facts, if proved, would constitute a meritorious defense. Reidy v. Scott, 53 Cal. 69; Burns v. Scooffy, 98 Cal. 271; 33 Pac. 86. Where a foreign corporation failed to designate an agent in this state, and no service by publication was made, but a substituted service upon the secretary of state, a motion to vacate a judgment by default against such corporation must be denied, where there is no showing of a meritorious defense to the action, and the defendant does not ask to be allowed to come in and make such defense. Olender v. Crystalline Mining Co., 149 Cal. 482; 86 Pac. 1082. The statute of limitations is a defense on the merits, which may be set up after a default has been vacated (Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192; 21 Ann. Cas. 1279; 106 Pac. 715); and where the

bar of the statute is pleaded as a defense, that is a sufficient answer to the merits to justify the opening of a default. San Diego Realty Co. v. McGinn, 7 Cal. App. 264; 94 Pac. 374.

Mistake or neglect of attorney. Judgment by default may be set aside on account of the mistake, inadvertence, or excusable neglect of the attorney (O'Brien v. Leach, 139 Cal. 220; 96 Am. St. Rep. 105; 72 Pac. 1004); but an attorney's ignorance of the limit of the court's power to extend time is inexcusable neglect. Utah-Nevada Co. v. De Lamar, 9 Cal. App. 759; 100 Pac. 884. Ignorance of the law requiring an answer to be filed within ten days is no ground for setting aside a judgment by default. Chase v. Swain, 9 Cal. 130. Because more time was required to prepare the answer than in ordinary cases, and because the defendant's attorney was compelled to be absent during a part of the time, are not good grounds for setting aside a judgment by default. Bailey v. Taaffe, 29 Cal. 422. A judgment by default cannot be set aside upon a mere abstract allegation of the attorney's inadvertence in drafting, serving, or filing the answer: reasons, causes, and excuses for inadvertence, must be stated; and a judgment by default should not be vacated, merely on the ground of the attorney's mistake in believing that the service of notice of the overruling of the demurrer to the complaint was unauthorized by law. Shearman v. Jorgensen, 106 Cal. 483; 39 Pac. 863. There is no abuse of discretion in setting aside a judgment by default, where the attorney was mistaken, owing to an error of his clerk, as to the time the case was set for trial, and did not appear (Dougherty v. Nevada Bank, 68 Cal. 275; 9 Pac. 112); nor where the plaintiff's attorney resided at a considerable distance from the place of trial, and he had reason to believe that the case would not be tried when called. Cameron v. Carroll, 67 Cal. 500; 8 Pac. 45. Where the attorney for the plaintiff voluntarily absents himself to attend a trial in another county, not in the capacity of an attorney, but as a witness, and after having agreed to dismiss the cause, and judgment goes for the defendant, the facts are not sufficient to authorize the vacation of the judgment. Gray v. Sabin, 87 Cal. 211; 25 Pac. 422. A judgment, erroneous in substance, entered, after the sustaining of a demurrer, in the absence of the defendant's attorney, and against his express directions to the clerk, may be vacated, where the defendant, on learning of its entry, promptly moved to set it aside. City Street Improvement Co. v. Emmons, 138 Cal. 297; 71 Pac. 332. A default should be set aside, where it was occasioned by the inadvertence of the clerk of the supreme court, in failing to make an entry of the issuance of a remittitur, and in misleading the attorney of the defendant by his statements. Hogs Back Consol. etc. Mining Co. v. New Basil Consol. etc. Mining Co., 65 Cal. 22; 2 Pac. 489. Where the defendant's attorney was misled, through a misunderstanding in a conversation with an attorney for the plaintiff, into the belief that the trial would be postponed, the defendant's motion to vacate the judgment and to grant a new trial should be granted (Symons v. Bunnell, 80 Cal. 330; 22 Pac. 193); and also where it is shown the defendant and his attorney resided at a great distance from the county seat; that they were not notified that the case was set for trial, and did not hear that it had been set until it was too late to be present and answer; and that they had a good and substantial defense to the action on the merits (Buell v. Emerich, 85 Cal. 116; 24 Pac. 644); and also where it is shown that the merits were not passed upon on a first appeal; that no service of an amended complaint was made and no notice of the filing thereof given, except a copy mailed to the attorney of one of the defendants, who did not receive it until a month after mailing, and who had no knowledge of the date of mailing; and that the defendants were not guilty of any negligence in failing to demur or answer to the amended complaint. Malone v. Big Flat Gravel Mining Co., 93 Cal. 384; 28 Pac. 1063. Where the defendant's attorneys were misled, and the defendant's failure to be represented at the trial was the result, and the neglect was excusable, the refusal of the court to vacate and set aside the judgment will be reversed on appeal. Melde v. Reynolds, 129 Cal. 308; 61 Pac. 932.

Vacation of void judgments. A void judgment is not one entered through mistake, inadvertence, surprise, or excusable neglect, and is not governed by this section. Stierlen v. Stierlen, 18 Cal. App. 609; 124 Pac. 226, 228; People v. Greene, 74 Cal. 400; 5 Am. St. Rep. 448; 16 Pac. 197; Lapham v. Campbell, 61 Cal. 296; Baker v. O'Riordan, 65 Cal. 368; 4 Pac. 232. Where the judgment is in fact void, the party against whom it was rendered has an absolute right, without invoking this section, to have it vacated: he is not required to show that he has a meritorious defense to the action, as a condition to the granting of such right. German Sav. & L. Soc. v. Bien, 18 Cal. App. 267; 122 Pac. 1096. Where the judgment is not void on its face, a motion will not lie to vacate it after the time limited by statute; and in all cases, after the lapse of such time, when the attempt is made to vacate the judgment by a proceeding for that purpose, an action regularly brought is preferable, and should be required; but a judgment void on its face may be attacked at any time, directly or collaterally. People v. Harrison, 84 Cal. 607; 24 Pac. 311; People v. Blake, 84 Cal. 611; 22 Pac. 1142; 24 Pac. 313; Wharton v. Har-

lan, 68 Cal. 422; 9 Pac. 727; People v. Davis, 143 Cal. 673; 77 Pac. 651. A judgment, void on its face, may be vacated upon motion (Jacks v. Baldez, 97 Cal. 91; 31 Pac. 899), at any time after its entry (People v. Greene, 74 Cal. 400; 5 Am. St. Rep. 448; 16 Pac. 197); and this right exists independently of any statutory provision (George Frank Co. v. Leopold & Ferron Co., 13 Cal. App. 59; 108 Pac. 878); and this rule applies to a deficiency judgment in the foreclosure of a mortgage. Latta v. Tutton, 122 Cal. 279; 68 Am. St. Rep. 30; 54 Pac. 844. The power of the court to vacate a judgment or order, void upon its face, is not extinguished by lapse of time, but may be exercised whenever the matter is brought to the attention of the court; and while a motion for such action, on the part of the court, is appropriate, yet neither a motion, nor notice to the adverse party, is essential: the court has power to take such action, on its own motion, without application on the part of any one. People v. Davis, 143 Cal. 673; 77 Pac. 651. A judgment, void upon its face, and which requires only an inspection of the judgment roll to show its invalidity, will be set aside, on motion, by the court rendering it, at any time after its entry (People v. Temple, 103 Cal. 447; 37 Pac. 414); and where the moving party has succeeded to the rights of the defendant, his motion to set aside the judgment cannot be defeated by mere delay, however great. People v. Goodhue, 80 Cal. 199; 22 Pac. 66. Where a judgment by default is void because entered by the clerk without authority, there is no ground for a resort to a court of equity: the court in which such judgment was rendered can, on motion, at any time, arrest all process issued therein by its clerk. Chipman v. Bowman, 14 Cal. 157; Logan v. Hillegass, 16 Cal. 200; Bell v. Thompson, 19 Cal. 706; Sanchez v. Carriaga, 31 Cal. 170; Murdock v. De Vries, 37 Cal. 527. Judgment without personal service of summons, or authorized appearance by the defendant, is void; but it may be shown that the judgment is void only in certain ways, and the superior court cannot set aside such judgment, except on the evidence found in the judgment roll, where more than six months have elapsed since its rendition. People v. Harrison, 107 Cal. 541; 40 Pac. 956. A judgment void upon its face is one which appears to be void from an inspection of the judgment roll; and the mere absence of a paper from the roll, such as the return of the officer showing service of summons, cannot invalidate the judgment, where the judgment itself recites the fact that the defendant was duly served (People v. Harrison, 84 Cal. 607; 24 Pac. 311; Latta v. Tutton, 122 Cal. 279; 68 Am. St. Rep. 30; 54 Pac. 844; Butler v. Soule, 124 Cal. 69; 56 Pac. 601); and before the amendment of 1895 to § 670, post, neither the affidavit nor order of publication was a part of the roll, and could not be considered on a motion to vacate the judgment. People v. Temple, 103 Cal. 447; 37 Pac. 414; Jacks v. Baldez, 97 Cal. 91; 31 Pac. 899; Canadian etc. Trust Co. v. Clarita etc. Investment Co., 140 Cal. 672; 74 Pac. 301. A judgment rendered without service of summons upon the defendant, either actual or constructive, is void. People v. Harrison, 107 Cal. 541; 40 Pac. 956. A judgment rendered without personal service, and upon a publication of summons not based upon any affidavit or order of publication, is void; and the court has no power to set it aside, upon evidence not found in the judgment roll, where more than six months have elapsed since its rendition. People v. Harrison, 107 Cal. 541; 40 Pac. 956. Where proof of service of summons on the defendant is not made as required by law, the court acquires no jurisdiction of his person, and a judgment rendered against him, without such proof, is invalid and void, and may be set aside upon motion. Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089. Where defects in the return of service cannot be supplied by presumption, and the record fails to show jurisdiction, a judgment by default, upon such return, is void for want of jurisdiction. Pioneer Land Co. v. Maddux, 109 Cal. 633; 50 Am. St. Rep. 67; 42 Pac. 295. A judgment is not void because it gives relief in excess of that prayed for; and the lower court has no power to amend or modify it as to the excess, as an act done without jurisdiction. Cohen v. Cohen, 150 Cal. 99; 11 Ann. Cas. 520; 88 Pac. 267. In a foreclosure suit, where the complaint does not make a case entitling the plaintiff to a personal judgment against the defendant, and the decree does not declare any personal liability, an ex parte amendment, after the entry of the final decree, establishing the personal liability of the mortgagor, and directing the clerk to enter a deficiency judgment against him, is without jurisdiction, and void. Scamman v. Bonslett, 118 Cal. 93; 62 Am. St. Rep. 226; 50 Pac. 272. A judgment in a foreclosure suit, commenced in a county other than that where the mortgaged premises are situated, is void. Rogers v. Cady, 104 Cal. 288; 43 Am. St. Rep. 100; 38 Pac. 81.

Notice. Actual notice of the entry of an order appealed from, established by satisfactory evidence of record, starts the time running without service of written notice. Estate of Keating, 158 Cal. 109; 110 Pac. 109. The object of notice is to bring home to the attorney knowledge of a fact upon which he is called to act: where he has direct and positive knowledge, written notice is unnecessary. Bell v. Thompson, 8 Cal. App. 483; 97 Pac. 158. The notice of motion to set aside a judgment by default need not state in detail the facts upon which the relief is asked: it is sufficient if it states the grounds upon which the motion will be made. O'Brien v. Leach,

139 Cal. 220; 96 Am. St. Rep. 105; 72 Pac. 1004.

Time within which party must move. Under the Practice Act, it was necessary for a party to take initiatory steps to obtain the relief authorized, before the expiration of the term at which final judgment was rendered, in all cases, except those in which the defendant had been personally served with summons, in which cases the court could, upon such terms as might be just, allow the defendant to answer to the merits at any time within six months after the rendition of judgment (Casement v. Ringgold, 28 Cal. 335); and, after the expiration of the term, no power remained in the court to set aside a judgment or to grant a new trial (Baldwin v. Kramer, 2 Cal. 582; Morrison v. Dapman, 3 Cal. 255; Suydam v. Pitcher, 4 Cal. 280; Lattimer v. Ryan, 20 Cal. 628; People v. Greene, 74 Cal. 400; 5 Am. St. Rep. 448; 16 Pac. 197); but, since the Practice Act, the legislature has enlarged the power of the court to set aside judgments, and to relieve a party from an unjust or an improperly obtained judgment, at any time, upon good cause shown. People v. Lafarge, 3 Cal. 130. The court has the inherent right and power, at any time, to cause its acts and proceedings to be correctly set forth in its records; but it cannot, under the pretense of an amendment, revise a judgment after the right to correct it in any form has become final. Forrester v. Lawler, 14 Cal. App. 171; 111 Pac. 284. Mere clerical misprisions or omissions are subject to correction at any time, by an order entered for that purpose, but acts not within that category must be distinguished. Cosby v. Superior Court, 110 Cal. 45; 42 Pac. 460. To obtain relief under this section, application must be made within the time prescribed: the court has no power to vacate a judgment or order, not void upon its face, after the expiration of the time limited by this section. Hartman v. Olvera, 49 Cal. 101; Amestoy Estate Co. v. Los Angeles, 5 Cal. App. 273; 90 Pac. 42; Estate of Cahalan, 70 Cal. 604; 12 Pac. 427; Dunsmuir v. Coffey, 148 Cal. 137; 82 Pac. 682; Moore v. Superior Court, 86 Cal. 495; 25 Pac. 22; Tinn v. United States District Attorney, 148 Cal. 773; 113 Am. St. Rep. 354; 84 Pac. 152; Estate of Dunsmuir, 149 Cal. 67; 84 Pac. 657; Steen v. Santa Clara Valley Mill etc. Co., 4 Cal. App. 448; 88 Pac. 499. Jurisdiction to modify or vacate a default, decree, or judgment is lost, where the time for the proceeding has expired. Reed v. Reed, 9 Cal. App. 748; 100 Pac. 897; Steen v. Santa Clara Valley etc. Co., 4 Cal. App. 448; 88 Pac. 499; Andreen v. Andreen, 15 Cal. App. 728; 115 Pac. 761; Boland v. All Persons, 160 Cal 486; 117 Pac. 547. A judgment will not be vacated upon motion, made after the lapse of the prescribed period, unless it is void upon its face; which is quite consistent with the proposition, that a motion made within the statutory period may be granted as well when the defendant is wholly without fault as when he has been guilty of a mistake, inadvertence, surprise, or excusable neglect. Norton v. Atchison etc. R. R. Co., 97 Cal. 388; 33 Am. St. Rep. 198; 30 Pac. 585; 32 Pac. 452. Where a judgment was vacated for inadvertence, and the time to appeal from an order vacating it had expired, without any appeal therefrom or modification thereof, and there is a second judgment or decree, not void upon its face, which it is sought to vacate and set aside, the notice of motion therefor, if served and filed nearly ten months after the entry of decree, comes too late. Butler v. Soule, 124 Cal. 69; 56 Pac. 601. An action to cancel and set aside a judgment, brought more than five years after the entry of judgment, is barred by laches and gross carelessness affirmatively appearing in the complaint. Hildreth v. James, 109 Cal. 301; 41 Pac. 1039. A judgment, not void on its face, cannot be vacated on a mere motion, made years after its rendition (People v. Harrison, 84 Cal. 607; 24 Pac. 311; People v. Blake, 84 Cal. 611; 22 Pac. 1142; 24 Pac. 313); but resort should be had to an action, and all parties interested should be notified and have an opportunity to be heard (People v. Temple, 103 Cal. 447; 37 Pac. 414); nor can the judgment be vacated, on a mere motion, after the lapse of twenty-three years, where the moving party's grantor was personally served five months prior to the entry of the judgment. People v. Goodhue, 80 Cal. 199; 22 Pac. 66. A mere error of the court cannot be taken advantage of on motion to set aside a default judgment, where such motion is made nearly five years after the rendition of the judgment. People v. Wrin, 143 Cal. 11; 76 Pac. 646. A judgment, not void on its face, reciting that the defendant was duly served with process, cannot be set aside, on motion made sixteen years after the judgment was entered, on the ground that the summons was not personally served on the defendant, and was published without an affidavit, where the deputy clerk and the district attorney at the time the action was pending testified that no affidavit for publication had been filed, and there was no such filing on the register of actions. People v. Harrison, 84 Cal. 607; 24 Pac. 311. A motion to set aside a judgment, upon the ground that it appears upon its face that the court had no jurisdiction of the person of the defendant, is a direct attack upon the judgment, and is not barred by the mere lapse of time. Rue v. Quinn, 137 Cal. 651; 66 Pac. 216; 70 Pac. 732. The court may, at any time, set aside a judgment by default, entered by the clerk, where it appears from the judgment roll that he had no power to enter it. Young v. Fink, 119 Cal. 107; 50 Pac. 1060. The time within

which a judgment, the invalidity of which does not appear upon its face, may be set aside upon motion, seems not to have been definitely determined, further than that it may be done within the time limited by this section. People v. Thomas, 101 Cal. 571; 36 Pac. 9. Where a judgment is regular on its face, with no question as to the jurisdiction of the court, a motion to set it aside, not made within the prescribed time, should be denied. Young v. Fink, 119 Cal. 107; 50 Pac. 1060. An erroneous judgment is not void; hence, it cannot be set aside on motion after the expiration of the time limited by this section. Blondeau v. Snyder, 95 Cal. 521; 31 Pac. 591; and see Estate of Dunsmuir, 149 Cal. 67; 84 Pac. 657. The limitation of time prescribed by this section is a limitation of the time within which the application must be made, and not of the time within which it must be heard or determined. Wolff v. Canadian Pacific Ry. Co., 89 Cal. 332; 26 Pac. 825. The superior court has no power or authority to vacate or modify its judgment, on account of judicial error, after the time therefor has expired, no matter how apparent such error may be on the face of the record: its power thereafter is limited to the correction of mere clerical misprisions on the record, or to the excision of such parts of the record as appear or can be shown to be void for lack of jurisdiction or power (Grannis v. Superior Court, 146 Cal. 245; 106 Am. St. Rep. 23; 79 Pac. 891); nor has the superior court jurisdiction to entertain, after the time specified in this section, a petition to set aside a decree for fraud, or because the court was imposed upon by false testimony: a court of equity can grant the proper relief. Estate of Hudson, 63 Cal. 454. While an appeal from a judgment is pending, the court in which the judgment was rendered has no power to correct or amend it. Shay v. Chicago Clock Co., 111 Cal. 549; 44 Pac. 237; Kirby v. Superior Court, 68 Cal. 604; 10 Pac. 119. An order vacating and setting aside a judgment and granting a new trial will be reversed, when the time in which the motion might have been made for a new trial had passed, and the right to move therefor gone. Hegeler v. Henckell, 27 Cal. 491. The court has power to allow amendments to judgments, regardless of the lapse of time, where the record, as entered by the clerk, fails to conform to the judgment rendered by the court. Forrester v. Lawler, 14 Cal. App. 171; 111 Pac. 284; Erickson v. Stockton etc. R. R. Co., 148 Cal. 206; 82 Pac. 961; San Francisco v. Brown, 153 Cal. 644; 96 Pac. 281. An application to amend or correct a bill of exceptions, or statement of the case, after settlement, is governed by the time limitation of this section. Sprigg v. Barber, 118 Cal. 591; 50 Pac. 682; Donnelly v. Tregaskis, 7 Cal. App. 317; 94 Pac. 383; Merced Bank v. Price, 152 Cal. 697; 93 Pac. 866; Estate of Thomas, 155 Cal. 488; 101 Pac. 798. The same rule applies to bills of exceptions as to statements on motion for a new trial, in the respect that the party moving for a new trial must prepare and serve his bill of exceptions within the time allowed by law, or it cannot be settled, either at the hearing of the motion or on appeal. Stonesifer v. Armstrong, 86 Cal. 594; 25 Pac. 50. The court has power, and has a large discretion, to settle a statement on motion for a new trial, on the ground of inadvertence, surprise, or excusable neglect, though not presented within the time allowed by law (Banta v. Siller, 121 Cal. 414; 53 Pac. 935); or to allow a bill of exceptions to be settled, for use on the motion for a new trial, after the time limited, upon a showing of sufficient excuse. Mattern v. Alderson, 18 Cal. App. 590; 123 Pac. 972. Any relief from a failure to file the required notice of appeal within the prescribed time, if it can be given at all, must be sought in the lower court. Estate of Keating, 158 Cal. 109; 110 Pac. 109. The grounds for contesting a will, after its admission to probate, cannot be amended after the lapse of the year limited for the institution of the contest, so as to add an independent cause of contest; but an amplification of the original ground may properly be considered as a more definite statement of what was formerly averred, after the expiration of the year. Estate of Wilson, 117 Cal. 262; 49 Pac. 172, 711. The trial court is without power, under this section, to relieve a party from the consequences of his failure to serve and file his notice of motion for a new trial within the time allowed by law. Union Collection Co. v. Oliver, 162 Cal. 755; 124 Pac. 435.

Limitation of six months. The extreme limit of time within which an application may be made to vacate a judgment, under this section, is six months. Wharton v. Harlan, 68 Cal. 422; 9 Pac. 727; Wolff v. Canadian Pacific Ry. Co., 89 Cal. 332; 26 Pac. 825; Hill v. Beatty, 61 Cal. 292. Where the judgment is unauthorized, the court may set it aside at any time within six months after its entry, even upon its own motion, and without any request therefor. Kaufman v. Shain, 111 Cal. 16; 52 Am. St. Rep. 139; 43 Pac. 393. A judgment, not void on its face, nor fraudulent, cannot be set aside on mere motion, unless made within the six months' limitation of this section. People v. Goodhue, 80 Cal. 199; 22 Pac. 66; People v. Harrison, 84 Cal. 607; 24 Pac. 311; People v. Blake, 84 Cal. 611; 22 Pac. 1142; 24 Pac. 313; Moore v. Superior Court, 86 Cal. 495; 25 Pac. 22; Jacks v. Baldez, 97 Cal. 91; 31 Pac. 899; Norton v. Atchison etc. R. R. Co., 97 Cal. 388; 33 Am. St. Rep. 198; 30 Pac. 585; 32 Pac. 452; Brackett v. Banegas, 99

Cal. 623; 34 Pac. 344; People v. Temple, 103 Cal. 447; 37 Pac. 414; People v. Dodge, 104 Cal. 487; 38 Pac. 203; Butler v. Soule, 124 Cal. 69; 56 Pac. 601; Estate of Eikerenkotter, 126 Cal. 54; 58 Pac. 370; May v. Hatcher, 130 Cal. 627; 63 Pac. 33. A judgment against a dead corporation may be vacated within six months after its entry. Crossman v. Vivienda Water Co., 150 Cal. 575; 89 Pac. 335. Where the parties entered into a stipulation as to the judgment, but it was erroneously rendered in excess of such stipulation, a motion, made more than six months thereafter, to obtain relief therefrom, cannot be granted. Dyerville Mfg. Co. v. Heller, 102 Cal. 615; 36 Pac. 928. Where delay was assented to by the opposing party, or does not appear to have been injurious to his rights, the six months' limitation should be considered as the only limit of reasonable time. Wolff v. Canadian Pacific Ry. Co., 89 Cal. 332; 26 Pac. 825. A motion to vacate the judgment for want of findings is not limited to six months from the time of the entry of judgment (Mace v. O'Reilley, 70 Cal. 231; 11 Pac. 721); and where findings are necessary, a judgment entered without them may properly be set aside after a lapse of more than six months, this section not being applicable. Savings and Loan Society v. Thorne, 67 Cal. 53; 7 Pac. 36. A bill of exceptions or statement, settled after an appeal taken, may be corrected by proper proceedings, if commenced within six months after settlement: in such cases the court is empowered to settle the bill or statement, that is, to complete the record, after and for the purposes of the appeal taken. Baker v. Borello, 131 Cal. 615; 63 Pac. 914. An application to amend or correct a bill of exceptions or statement, made more than six months from the date of the certification, is too late. Merced Bank v. Price, 152 Cal. 697; 93 Pac. 866; Sprigg v. Barber, 118 Cal. 591; 50 Pac. 682. No relief can be granted to a party, after service of the proposed bill of exceptions and amendments, where the prescribed six months in which such relief might be granted has long since passed. Moultrie v. Tarpio, 147 Cal. 376; 81 Pac. 1112. The taking and entering of a default by the clerk or by the court, at the instance of the adverse party, fixes the beginning of the period of six months within which the motion to set aside the default must be made. Title Insurance etc. Co. v. King Land etc. Co., 162 Cal. 44; 120 Pac. 1066. Application to set aside a judgment must be made within six months after the entry thereof, even though the mistake, inadvertence, surprise, or excusable neglect has been caused or brought about by fraud practiced by the party in whose favor the judgment or proceeding was taken: after that period, the question of mistake, etc., whatever the remedy in equity may be, cannot be tried by affidavit on motion for summary relief. Wharton v. Harlan, 68 Cal. 422; 9 Pac. 727; Dyerville Mfg. Co. v. Heller, 102 Cal. 615; 36 Pac. 928. Where the proposed statement on motion for a new trial embodies the evidence, but does not contain a specification of the particulars wherein it is alleged to be insufficient to sustain the verdict, prior to its settlement by the judge, it may be amended by the insertion of such specifications, at any reasonable time after its proposal: the six months' limitation, as provided by this section, does not apply. Smith v. Stockton, 73 Cal. 204; 14 Pac. 675. Where, after a judgment by default, the defendant appeals on the ground of defective service by publication, the judgment will not be disturbed: the remedy is by motion in the court below, within six months after the judgment. Guy v. Ide, 6 Cal. 99; 65 Am. Dec. 490. The mere serving and filing of a notice of motion, before the expiration of the six months, that an application for relief from a judgment will be made, is not the making of the application within six months (Thomas v. Superior Court, 6 Cal. App. 629; 92 Pac. 739): a motion is an application for an order; and the application is that which is to be made within the six months. Brownell v. Superior Court, 157 Cal. 703; 109 Pac. 91. The rule of diligence required in making the application does not control the subsequent proceedings, nor is six months necessarily a measure of reasonable time for the subsequent diligence: if the application is made within six months, the court is free to dispose of it as the exigencies of business and the circumstances of the case permit. Wolff v. Canadian Pacific Ry. Co., 123 Cal. 535; 56 Pac. 453. If a sufficient application is made within six months, the matter may be determined after that time. Brownell v. Superior Court, 157 Cal. 703; 109 Pac. 91. A second application for relief will not be entertained, unless made within six months. Thomas v. Superior Court, 6 Cal. App. 629; 92 Pac. 739. Where the record does not show error, and resort must be had to evidence aliunde, notice must be given, of a motion to amend the judgment, to the parties to be affected thereby, and this motion must be made within six months, except where personal service has not been had, in which case the court may grant relief within one year after entry of judgment. Scamman v. Bonslett, 118 Cal. 93; 62 Am. St. Rep. 226; 50 Pac. 272. An equitable action to set aside a judgment, on the ground of fraud in its procurement, may be made after the expiration of six months. Estate of Hudson, 63 Cal. 454; California Beet Sugar Co. v. Porter, 68 Cal. 369; 9 Pac. 313; Ex-Mission Land etc. Co. v. Flash, 97 Cal. 610; 32 Pac. 600. A judgment of the

former probate court, procured by fraud, could not be reached by a mere motion, under this section, unless it was made within six months after the rendition of judgment: the only remedy of the party aggrieved was by an independent suit in equity, and the issuing and serving of summons thereon, the matter having passed beyond the jurisdiction of the superior court as a court of probate. Dean v. Superior Court, 63 Cal. 473. A judgment, regular on its face, cannot be set aside, on motion, after six months from the entry of judgment, on the ground of mistake, inadvertence, or excusable neglect, in not answering, or on the ground that it was procured by fraud and without notice, where the amended complaint in the case, in pursuance of a verbal agreement, was not personally served. Young v. Fink, 119 Cal. 107; 50 Pac. 1060. The court has no power to set aside the default of a defendant, who has been personally served, unless the application therefor is made within six months after the default was entered. Title Insurance etc. Co. v. King Land etc. Co., 162 Cal. 44; 120 Pac. 1066. A judgment by default cannot be set aside, after the expiration of the prescribed time, unless it is void; and where the court has jurisdiction, and the affidavit of publication of summons, though defective, shows some diligence, and the order therefor is valid, the judgment is also valid. People v. Wrin, 143 Cal. 11; 76 Pac. 646.

Reasonable time. Terms of court are now abolished; but the relief that formerly could be had during a term may be sought within a reasonable time, which is defined to be six months, except where personal service has not been had, in which case the court may grant relief within one year. People v. Greene, 74 Cal. 400; 5 Am. St. Rep. 448; 16 Pac. 197; Wiggin v. Superior Court, 68 Cal. 398; 9 Pac. 646; Canadian etc. Trust Co. v. Clarita Investment Co., 140 Cal. 672; 74 Pac. 301; People v. Davis, 143 Cal. 673; 77 Pac. 651. Where an application to vacate a judgment by default is made immediately after the default, and so soon that no considerable delay or injury is occasioned to the plaintiff, the defendant should be given an opportunity to defend upon the merits. Grady v. Donahoo, 108 Cal. 211; 41 Pac. 41. A motion to vacate a judgment on the ground that it is void on its face, is not a collateral but a direct attack, and such motion may be made within a reasonable time after the expiration of the time limited by this section. Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089; People v. Thomas, 101 Cal. 571; 36 Pac. 9; People v. Temple, 103 Cal. 447; 37 Pac. 414; People v. Dodge, 104 Cal. 487; 38 Pac. 203; People v. Harrison, 107 Cal. 541; 40 Pac. 956. The superior court, in setting aside an order or judgment made inadvertently or through mistake, must exercise its jurisdiction within a reasonable time. Fabretti v. Superior Court, 77 Cal. 305; 19 Pac. 481. What is a reasonable time, short of the extreme limit of six months, within which a motion may be made to set aside a judgment, not void upon its face, must depend somewhat on the circumstances of each particular case, all of which should be considered by the court, and is not definitely determined, further than that it will not extend beyond the limit fixed by this section. People v. Temple, 103 Cal. 447; 37 Pac. 414; Wolff v. Canadian Pacific Ry. Co., 89 Cal. 332; 26 Pac. 825; Smith v. Pelton Water Wheel Co., 151 Cal. 394; 90 Pac. 932, 1135. The question is one largely within the discretion of the trial court. George Frank Co. v. Leopold & Ferron Co., 13 Cal. App. 59; 108 Pac. 878. Twelve years from the rendition of the judgment is not a reasonable time. People v. Temple, 103 Cal. 447; 37 Pac. 414. If, under this section, a defendant may be relieved, on motion, from a default judgment taken against him through his mistake or excusable neglect, provided his motion is made within a reasonable time, not exceeding six months, a fortiori he should be relieved, on motion made, within the same time, when he is not guilty of any neglect. Norton v. Atchison etc. R. R. Co., 97 Cal. 388; 33 Am. St. Rep. 198; 30 Pac. 585; 32 Pac. 452. Where the complaint is unverified, and the court inadvertently strikes out the answer on motion of the plaintiff, the defendant not having appeared, and judgment goes for the plaintiff, and he moves promptly to vacate the judgment on discovery of the error, the allowance of the motion does not prejudice any of the defendant's rights. Bernheim v. Cerf, 123 Cal. 170; 55 Pac. 759; Whitney v. Superior Court, 147 Cal. 536; 82 Pac. 37.

Limitation one year, in absence of personal service. One who has only constructive notice of a suit brought against him may invoke the benefit of this section, and defend upon the merits (Zobel v. Zobel, 151 Cal. 98; 90 Pac. 191); and the judgment may be vacated, within the time prescribed, though the proceedings by publication were regular and the judgment is valid upon its face. Fox v. Townsend, 149 Cal. 659; 87 Pac. 82. The one-year clause of this section applies to cases where service was by publication, and may possibly apply where personal service was of such character as to be equivalent to no service at all; but it does not apply where the summons was personally served. Young v. Fink, 119 Cal. 107; 50 Pac. 1060. Service by publication, under the order of court, has the same effect as service by either of the other statutory modes, except that, where service is by publication alone, the defendant, on a proper showing, may be allowed to answer to the merits at any time within one year after the

rendition of judgment. Dunlap v. Steere, 92 Cal. 344; 27 Am. St. Rep. 143; 16 L. R. A. 361; 28 Pac. 563. A judgment by default should be set aside, as inadvertently entered, on motion made within one year after the entry thereof, where service was by publication, but no copy of the summons, by mail or otherwise, was served on the defendants, who were non-residents and whose residence was known, and the order for publication required copies of the summons to be mailed to each of them. Schart v. Schart, 116 Cal. 91; 47 Pac. 927. A judgment by default, not void on its face, where service was by publication, cannot be set aside on motion made more than one year after the entry of judgment. Howard v. McChesney, 103 Cal. 536; 37 Pac. 523. A judgment by default cannot be set aside on motion, not made within a year after the entry thereof, where the ground of the motion is, not that summons was not duly served on the defendant, but that the record does not show service, and there is no showing of any defense to the action or injury to the mover. Whitney v. Daggett, 108 Cal. 232; 41 Pac. 471. A defendant, not served with summons, against whom a false return of service thereof was made, has the absolute right, upon application within six months after the entry of judgment, and upon proof of the facts, to have the judgment vacated for want of jurisdiction, and the service of summons quashed, without condition: such application is not within this section. Waller v. Weston, 125 Cal. 201; 57 Pac. 892. A judgment upon a fraudulent claim, entered upon the defendant's default, after publication of summons, is not void, and cannot be set aside upon motion not made within one year. Dunlap v. Steere, 92 Cal. 344; 27 Am. St. Rep. 143; 16 L. R. A. 361; 28 Pac. 563. Where an amended complaint was not served upon the defendant a judgment entered thereon is void, and may be vacated, upon motion, within one year after its entry. Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089. A motion to vacate a judgment cannot be made after the expiration of six months, or with respect to one ground for setting aside the default, after one year, unless it is void on its face. Norton v. Atchison etc. R. R. Co., 97 Cal. 388; 33 Am. St. Rep. 198; 30 Pac. 585; 32 Pac. 452. This section is wholly independent of the remedy by appeal, and the year's limitation prescribed is not affected by the shortening of the time for appeal. Fox v. Townsend, 2 Cal. App. 193; 83 Pac. 272.

Constructive service of process. Service of summons by mailing, pursuant to an order for its publication, is not personal service; and a defendant so served is entitled to have his default set aside, without any showing of mistake, inadvertence, surprise, or excusable neglect (Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192; 21 Ann. Cas. 1279; 106 Pac. 715); nor is service of summons upon a foreign corporation personal, and the court must, upon application made in due time, relieve the defendant from a judgment entered against it: in such a case the court has no discretion. Holiness Church v. Metropolitan Church Ass'n, 12 Cal. App. 445; 107 Pac. 633. A motion to vacate a judgment by default, based upon constructive service by publication, may be made, even after the expiration of ten years or more after its entry, where no jurisdiction was ever acquired, and the judgment is erroneous and void. People v. Pearson, 76 Cal. 400; 18 Pac. 424.

Vacation of judgment of dismissal. A judgment of dismissal, sending plaintiff out of court without the relief to which he is entitled, is a judgment against him, and in favor of the defendant; and if he consents to the dismissal to his injury, under an excusable mistake of fact, he is not barred of relief. Palace Hardware Co. v. Smith, 134 Cal. 381; 66 Pac. 474. Even if § 581, post, which authorizes a dismissal when the plaintiff abandons the case, were mandatory, the party in default may apply for relief under this section, where his neglect is excusable. Rosenthal v. McMann, 93 Cal. 505; 29 Pac. 121. Where an action is dismissed upon the plaintiff s direction, it is within the discretion of the court to vacate such dismissal, although entered by the clerk. Wolters v. Rossi, 126 Cal. 644; 59 Pac. 143. A stipulation for the dismissal of an action, signed only by the plaintiff, and not by his attorney of record, and made without his consent, is invalid, and the court should correct its erroneous judgment of dismissal, based upon such stipulation, by setting the judgment aside, upon motion properly made to that effect by plaintiff, through his attorney. Toy v. Haskell, 128 Cal. 558; 79 Am. St. Rep. 70; 61 Pac. 89. A motion to dismiss an action for want of prosecution is one resting largely in the discretion of the court, and an order granting it will not be interfered with on appeal, unless such discretion is abused. Moore v. Thompson, 138 Cal. 23; 70 Pac. 930. There is no error in refusing to set aside a judgment dismissing an action for failure to file an amended complaint within the time allowed, where the affidavits and counter-affidavits upon the application do not show an abuse of discretion. Rauer v. Wolf, 115 Cal. 100; 46 Pac. 902.

Decree in divorce proceedings. The superior court has jurisdiction to vacate a judgment of divorce by other proceedings than a motion for a new trial. Storke v. Storke, 111 Cal. 514; 44 Pac. 173. A final decree of divorce, entered without a previous interlocutory decree, is wholly void as a final judgment granting an immediate divorce, and it is within the power

of the superior court, at any time, on the motion of either party, or of its own motion, to declare it null in so far as it purports to be of such effect; but such decree may be vacated, under this section, so far as it purports to award an absolute divorce, leaving the judgment, in so far as it may determine that the plaintiff is entitled to a divorce, neither modified nor affected by an order vacating such decree. Grannis v. Superior Court, 146 Cal. 245; 106 Am. St. Rep. 23; 79 Pac. 891. It may nevertheless stand as a valid interlocutory decree, if, in form, it is sufficient therefor. Claudius v. Melvin, 146 Cal. 257; 79 Pac. 897. The authority of the court to vacate a judgment of divorce, on mere motion, is limited, by this section, to six months after its entry. Storke v. Storke, 116 Cal. 47; 47 Pac. 869; 48 Pac. 121. Within six months after the rendition of a decree of divorce, the trial court may relieve the party against whom judgment was rendered, on the ground of mistake, inadvertence, surprise, or excusable neglect. Deyoe v. Superior Court, 140 Cal. 476; 98 Am. St. Rep. 73; 74 Pac. 28; Estate of Wood, 137 Cal. 129; 69 Pac. 900. After the court has rendered and entered judgment on an issue presented in an action for divorce, the judgment cannot be vacated, except by such proceedings as would authorize the court to vacate a judgment in any other action. Storke v. Storke, 116 Cal. 47; 47 Pac. 869; 48 Pac. 121. If the defendant, in an action for divorce, is served by publication, he may apply for relief, under this section, at any time within one year from the entry of the interlocutory decree: after that time, the final decree must stand. Andreen v. Andreen, 15 Cal. App. 728; 115 Pac. 761. The court should be very liberal in granting applications to set aside defaults in divorce actions, where it appears at all probable that there was no service, either personal or by publication. McBlain v. McBlain, 77 Cal. 507; 20 Pac. 61; Cottrell v. Cottrell, 83 Cal. 457; 23 Pac. 531. There is no abuse of discretion in denying a motion to set aside a judgment by default in a divorce case, where the evidence adduced thereupon is conflicting. Morton v. Morton, 117 Cal. 443; 49 Pac. 557. An action to procure a judgment of divorce is a purely personal action, which cannot survive the death of either party; and where the plaintiff in such an action dies subsequently to the entry of a judgment decreeing a divorce in her favor, the court is deprived of all power to review its action and determine her right to a divorce. Kirschner v. Dietrich, 110 Cal. 502; 42 Pac. 1064. Where a child is adopted subsequently to a decree of divorce, the superior court thereby loses jurisdiction to modify the decree relating to the child's custody. Younger v. Younger, 106 Cal. 377; 39 Pac. 779. In an action of divorce, where service is by publication, but the defendant, prior to the beginning of the action, leaves the state with the children of the marriage, and the court grants a decree, it has no jurisdiction to provide therein for alimony or support of the plaintiff, or for the support, custody, or control of the children, if they are in a foreign jurisdiction, and the judgment may be vacated upon defendant's motion, without reference to this section. De la Montanya v. De la Montanya, 112 Cal. 101; 53 Am. St. Rep. 165; 32 L. R. A. 82; 44 Pac. 345. Upon a wife's motion to vacate a decree of divorce, where the petition states that she obtained an order for the payment of counsel fees upon the motion, but does not state the grounds of her motion, nor the facts on which she relied for support, all presumptions are in favor of the jurisdiction of the court; and if the period of six months allowed by this section has not elapsed, it will be presumed that she attempted to make a motion for relief under this section. Grannis v. Superior Court, 143 Cal. 630; 77 Pac. 647. Pending a decision in an action for divorce, where the parties enter into a stipulation fixing their property rights, but the court declines to incorporate such stipulation in the judgment, the court has no jurisdiction, under this section, upon a motion made more than six months after the entry of the judgment, to order it to be amended by incorporating such stipulation therein. Egan v. Egan, 90 Cal. 15; 27 Pac. 22. A decree for the permanent maintenance of a wife and child when living together, may be modified by the court, but the modified decree cannot be attacked by a petition for a new modification thereof, for matters occurring before its rendition, on a mere affidavit which shows no circumstance of mistake, inadvertence, surprise, or excusable neglect. Smith v. Smith, 113 Cal. 268; 45 Pac. 332. A judgment by default, in an action for divorce on the ground of the adultery of the wife, assigning to the husband all the community property, and awarding to him the four minor children, three of whom are girls, the eldest only eight years of age, is a harsh judgment, and, upon motion to vacate it, the court should be prompt to set it aside, and allow the defendant to answer, so that the case may be heard and determined on the merits. Mulkey v. Mulkey, 100 Cal. 91; 34 Pac. 621. In an action for divorce, as in any other, where the defendant makes default, and suffers judgment upon a mere ex parte showing, his remedy, in seeking relief, is under this section, and not by motion for a new trial (Foley v. Foley, 120 Cal. 33; 65 Am. St. Rep. 147; 52 Pac. 122); and where the question of alimony is at issue, and there is no finding and the decree is silent on the subject, the court, after entry of judg-

ment, has no further jurisdiction over the parties or the subject-matter; and the appearance of the defendant in the subsequent matter of a motion for permanent alimony does not have the effect of reopening the judgment or authorizing its amendment by motion. O'Brien v. O'Brien, 124 Cal. 422; 57 Pac. 225. In order to set aside a judgment by default in an action of divorce, no affidavit of merits is required (McBlain v. McBlain, 77 Cal. 507; 20 Pac. 61; Mulkey v. Mulkey, 100 Cal. 91; 34 Pac. 621); and there is no statutory provision requiring that proof of any other fact shall be made by affidavit, nor is there any decision of the supreme court to that effect. Cottrell v. Cottrell, 83 Cal. 457; 23 Pac. 531.

Appointment of guardians. Upon a motion, by a person entitled to letters of guardianship of the person of a minor, to set aside an order granting letters to another person, made without the knowledge or consent of the moving party, no further affidavit of merits is necessary than the showing that she is a competent and fit person to have the care, control, and custody of such minor. Guardianship of Van Loan, 142 Cal. 423; 76 Pac. 37. Where the record discloses that the court had no power to make the order appointing a guardian, such order is void upon its face, and it can be attacked at any time. Guardianship of Eikerenkotter, 126 Cal. 54; 58 Pac. 370.

Orders in probate. Relief may be had in probate matters, under this section (Levy v. Superior Court, 139 Cal. 590; 73 Pac. 417), which contemplates a motion in the cause in which the default was taken, and not a separate suit with separate pleadings. Estate of Griffith, 84 Cal. 107; 23 Pac. 528; 24 Pac. 381. A probate order is not "taken," within the meaning of this section, until the formal order is signed and filed. Brownell v. Superior Court, 157 Cal. 703; 109 Pac. 91. No relief can be granted to the heirs, upon the ground that they had no notice or knowledge of proceedings for the sale of the real property of the decedent, where the facts show that they did have notice, and where the statutory mode of acquiring jurisdiction was followed. Estate of Leonis, 138 Cal. 194; 71 Pac. 171. The probate court has not power to revoke its decree, after it has become final by the lapse of time to appeal therefrom (Estate of Nolan, 145 Cal. 559; 79 Pac. 428); nor has it power to vacate an order of sale of real property, made on constructive notice, where it is supported by an unassailed finding that the sale was for the best interests of the estate (Estate of Leonis, 138 Cal. 194; 71 Pac. 171); but it has power to grant the motion of a minor heir to set aside the confirmation of a sale, on the ground he has been defrauded (Application of Johnson, 7 Cal. App. 436; 94 Pac. 592); and to vacate a decree of distribution, upon a proper showing (Pedroreña v. Superior Court, 80 Cal. 144; 22 Pac. 71); and to relieve the pretermitted minor grandchild of a deceased testator from the effects of a decree of distribution, under the terms of the will, on the ground of inadvertence and excusable neglect (Estate of Ross, 140 Cal. 282; 73 Pac. 976); and to set aside a decree of final discharge of an administrator, made and entered inadvertently and ex parte (Wiggin v. Superior Court, 68 Cal. 398; 9 Pac. 646); and to vacate and set aside an order settling the final account of the administrator and distributing the estate, upon application of the minor heirs, made within the time prescribed (Estate of Hickey, 129 Cal. 14; 61 Pac. 475); and to vacate an order setting aside a homestead, on application of the executors and an heir, made within six months, on the ground of inadvertence, surprise, and excusable neglect. Levy v. Superior Court, 139 Cal. 590; 73 Pac. 417. The superior court, in an equitable proceeding, may set aside a decree of a probate court, obtained by fraud, and without notice to the party against whom it was rendered: such a decree is void, and the plaintiff is entitled to relief beyond any which the court could give him under this section, and to have the judgment set aside and annulled absolutely. Baker v. O'Riordan, 65 Cal. 368; 4 Pac. 232.

Relief against judgments on stipulations. A motion to set aside a judgment rendered on an invalid stipulation need not be in accordance with this section. Toy v. Haskell, 128 Cal. 558; 79 Am. St. Rep. 70; 61 Pac. 89. The court has power to relieve parties from the effects of a stipulation which admits as a fact that which is not true, if the application therefor is made in time. Ward v. Clay, 82 Cal. 502; 23 Pac. 50, 227. Where there is matter of record by which an amendment can be made, it is within the power of the court to make it, notwithstanding the rule as to time laid down in this section, and this applies to clerical misprisions; but a judgment in excess of a stipulation is erroneous, and the error being one of law committed at the trial, the remedy is either by motion for a new trial or by appeal, and not by a motion under this section. Dyerville Mfg. Co. v. Heller, 102 Cal. 615; 36 Pac. 928. Where judgment is rendered in an action involving title to real property, in which the defendant has transferred his interest, and entered into a fraudulent stipulation with the plaintiff for the entry of judgment in his favor, the motion of the successor in interest of the defendant, to set aside and vacate such judgment, is properly granted. Crescent Canal Co. v. Montgomery, 124 Cal. 134; 56 Pac. 797.

Imposition of terms as condition for granting relief. The payment of costs

was formerly required as a condition precedent to granting an application to set aside a judgment by default (Roland v. Kreyenhagen, 18 Cal. 455; People v. O'Connell, 23 Cal. 281; Bailey v. Taaffe, 29 Cal. 422; Leet v. Grants, 36 Cal. 288; Watson v. San Francisco etc. R. R. Co., 41 Cal. 17; Swift v. Canovan, 47 Cal. 86; Heermanr v. Sawyer, 48 Cal. 562; Ryan v. Mooney, 49 Cal. 33; Clune v. Sullivan, 56 Cal. 249); and judgment, vacated upon the payment of costs, remained in force until the costs were paid. Gregory v. Haynes, 21 Cal. 443. A complaint might have been amended by striking out the names of some of the plaintiffs therefrom, without the payment of costs (Tormey v. Pierce, 49 Cal. 306); but the payment of costs is no longer required. Cottrell v. Cottrell, 83 Cal. 457; 23 Pac. 531. Conditions may be imposed in granting relief under this section (McCarty v. Wilson, 2 Cal. App. 154; 83 Pac. 170); but the court has no power to impose costs as a condition to the vacation of the judgment. Waller v. Weston, 125 Cal. 201; 57 Pac. 892. The allowance of the application to set aside a judgment by default should be upon such terms and conditions as the circumstances may warrant. Pearson v. Drobaz Fishing Co., 99 Cal. 425; 34 Pac. 76. It is not an abuse of discretion for the court to impose terms upon which the defendant may be allowed to amend his answer, where there was a delay of two years, and the plaintiff and his counsel come a considerable distance to the place of trial, and a further continuance is necessary. Culverhouse v. Crosan, 94 Cal. 544; 29 Pac. 1100. Where the circumstances justify it, the court does not abuse its discretion in vacating a judgment by default without imposing terms as a condition. Robinson v. Merrill, 80 Cal. 415; 22 Pac. 260. Where a party is subjected to delay or inconvenience in having a default set aside, he can be compensated therefor by the terms which the court will impose as a condition of granting the motion (Nicoll v. Weldon, 130 Cal. 666; 63 Pac. 63); and if the delay is satisfactorily explained, the court has power, upon terms, to accept such explanation, and to make a final order granting the motion. Wolff v. Canadian Pacific Ry. Co., 123 Cal. 535; 56 Pac. 453. An amendment may be permitted, upon such terms as may be just (Williams v. Myer, 150 Cal. 714; 89 Pac. 972), on the trial of a case within the original jurisdiction of the superior court; it is also allowable on a trial de novo within its appellate jurisdiction. Ketchum v. Superior Court, 65 Cal. 494; 4 Pac. 492. The phrase, "on such terms as may be just," does not authorize the refusal of the relief sought, when the statutory conditions are met; but it does authorize the imposition of such terms as may be necessary to do complete justice between the parties. Gray v. Lawlor, 151 Cal. 352; 12 Ann. Cas. 990; 90 Pac. 691. No error is committed in permitting an amendment of the complaint, upon terms, where it does not operate as a surprise to the defendant, nor work any hardship upon him. Riverside Land etc. Co. v. Jensen, 73 Cal. 550; 15 Pac. 131; Bean v. Stoneman, 104 Cal. 49; 37 Pac. 777; 38 Pac. 39. After a motion for a nonsuit, the court may, upon terms, allow an amendment of the declaration, where it will not operate as a surprise upon the defendants; but if this is not done, the plaintiff cannot recover. Farmer v. Cram, 7 Cal. 135. In setting aside a default judgment, it is proper to impose terms which will leave the plaintiff secure in his right to subject certain property of the defendant to satisfaction of any judgment he may obtain. Douglass v. Todd, 96 Cal. 655; 31 Am. St. Rep. 247; 31 Pac. 623. Where the court allows the proposed amendment of the complaint, upon a condition which is not accepted, the plaintiff cannot afterwards complain of the denial of his application, where the court does not abuse its discretion. Wise v. Wakefield, 118 Cal. 107; 50 Pac. 310; Eltzroth v. Ryan, 91 Cal. 584; 27 Pac. 932. Where, by reason of the defendant's proposed amendments to his answer, the court is satisfied that the plaintiff is taken by surprise, and that he requires further time to meet the defense, it can continue the case, and impose such terms as will compensate the plaintiff for the expense and delay caused thereby. Guidery v. Green, 95 Cal. 630; 30 Pac. 786. Where a judgment is reversed on appeal, with leave to the plaintiff to amend, the lower court has no power to make a conditional order requiring the plaintiff to pay the costs of the appeal, with its accruing costs, as a condition. Dixon v. Risley, 114 Cal. 204; 46 Pac. 5.

Waiver of objections and of relief. A party may waive and abandon his right to relief under this section, by not pressing his motion to a ruling by the court. Johnson v. German American Ins. Co., 150 Cal. 336; 88 Pac. 985; King v. Dugan, 150 Cal. 258; 88 Pac. 925. Where counsel for both sides are present at the hearing of the motion to vacate a judgment, and contest the same, there is a waiver of written notice. Acock v. Halsey, 90 Cal. 215; 27 Pac. 193; Toy v. Haskell, 128 Cal. 558; 79 Am. St. Rep. 70; 61 Pac. 89. A default is waived, where the party subsequently appears, files pleadings, and goes to trial upon the merits. Sawtelle v. Muncy, 116 Cal. 435; 48 Pac. 387. A party defendant, by making a motion to vacate a judgment against it, on the ground that the affidavit of publication of summons was insufficient, and that the complaint did not state facts sufficient to constitute a cause of action, thereby puts in a general appearance, instead of a special one, and

waives all objection to the judgment for want of jurisdiction of his person. Security Loan etc. Co. v. Boston etc. Fruit Co., 126 Cal. 418; 58 Pac. 941; 59 Pac. 296.

Presumptions as to judgment. Every presumption will be indulged in favor of the validity of a judgment: any condition of facts consistent with its validity will be presumed to have existed, rather than one that will defeat it. Canadian etc. Trust Co. v. Clarita etc. Investment Co., 140 Cal. 672; 74 Pac. 301. Recitals in a decree of foreclosure must be deemed to be true, and to import absolute verity, where there is nothing in the judgment roll to contradict or impeach them: they are conclusive as to a tenant in possession under the mortgagor, who moves to vacate the decree for want of jurisdiction over the person or the subject-matter. Butler v. Soule, 124 Cal. 69; 56 Pac. 601. Where the plaintiff, in an action to quiet title under the McEnerney Act, makes the required affidavit as to persons claiming any interest in the property adversely to him, the findings and decree are not conclusive of the truth of such affidavit, if shown to be false and fraudulent as against a party not served with summons, who asks relief under this section, and directly and unequivocally states that the plaintiff knew, at the commencement of the action, and when he took his decree, that the claimant had an interest in the property. Davidson v. All Persons, 18 Cal. App. 723; 124 Pac. 570. Where there is nothing in the record to show the character of a proposed amendment, it will be presumed that the action of the court in refusing the application to amend is correct. Jessup v. King, 4 Cal. 331. Where an amended answer, filed in the name of a deceased defendant, on the day when the executors were substituted, recites that it was filed by leave of the court, and is found among the pleadings, and it appears that the cause was tried without objection, it must be presumed, upon appeal, that it was treated as a pleading in the case, although filed after the defendant's death, and no order of the court allowing the amendment appears in the record. Frazier v. Murphy, 133 Cal. 91; 65 Pac. 326. Where a judgment by default is rendered against the defendant, and an appeal is taken from an order denying his motion to set aside the default and to be allowed to answer, and where there is nothing in the judgment roll inconsistent with the finding of due service of summons, and where nothing further is shown on the subject, it will be presumed, in support of the judgment, that the finding was based upon service made in pursuance of the statute. La Fetra v. Gleason, 101 Cal. 246; 35 Pac. 765. If any matters could have been presented to the court below which would have authorized an amended judgment, it must be presumed, upon appeal, that such matters were so presented, and that the judgment was rendered in accordance therewith. Canadian etc. Trust Co. v. Clarita etc. Investment Co., 140 Cal. 672; 74 Pac. 301. Where a judgment is claimed to be void because it is a second judgment, the former one having been set aside by the court, and it is claimed that the order setting aside the former judgment is void, it will be presumed that the order vacating the first judgment was properly made, and that the court had jurisdiction to enter the second judgment. Butler v. Soule, 124 Cal. 69; 56 Pac. 601.

Appealable orders. An order denying relief under this section is appealable. Freeman v. Brown, 4 Cal. App. 108; 87 Pac. 204. As to the right of appeal, there is no distinction between judgments by default and judgments after issue joined and a trial. Hallock v. Jaudin, 34 Cal. 167. An order entering a default is not appealable; but one made after final judgment, denying the plaintiff's motion to set aside a judgment by default, previously entered, and to fix a time for the defendant to plead, is appealable (Thompson v. Alford, 128 Cal. 227; 60 Pac. 686); and, unless the appeal is taken within sixty days, it must be dismissed (Doyle v. Republic Life Ins. Co., 125 Cal. 15; 57 Pac. 667); and an order refusing to set aside a judgment on a motion is appealable. De la Montanya v. De la Montanya, 112 Cal. 101; 53 Am. St. Rep. 165; 32 L. R. A. 82; 44 Pac. 345. Where a judgment is voidable, but not void on its face, it can be corrected only on appeal, or on motion to set it aside, in the court where rendered, within six months after the rendition thereof; and if the motion is denied, an appeal lies from the order of denial. People v. Dodge, 104 Cal. 487; 38 Pac. 203. If a judgment is not void on its face, an order purporting to set it aside is an absolute nullity, and it is not necessary for the plaintiff to appeal therefrom: the court may, of its own motion, set aside such order at any time. People v. Davis, 143 Cal. 673; 77 Pac. 651. Where a judgment is taken against a defendant, either through mistake, inadvertence, surprise, or excusable neglect, relief should be sought in the court below: an appeal should not be taken on the judgment roll alone, where no defect is disclosed in the record. Johnston v. Callahan, 146 Cal. 212; 79 Pac. 870. Where the court adds the costs to the amount of the judgment, after the time for filing the memorandum has expired, and after an appeal has been perfected, the error can be corrected only on an appeal from such order. Jones v. Frost, 28 Cal. 245.

Disposition of appeal. The question of the service of summons is one of fact; and if the evidence is conflicting, and the court finds that service was made, and there is sufficient evidence to support the

finding, the judgment will not be disturbed on appeal. Hunter v. Bryant, 98 Cal. 247; 33 Pac. 51; Mott v. West Coast Plumbing etc. Co., 113 Cal. 341; 45 Pac. 683. The trial court has a wide discretion, under this section, and its action will not be disturbed on appeal, unless it clearly appears there has been an abuse of discretion. Hole v. Takekawa, 165 Cal. 372; 132 Pac. 445. On an appeal from an order refusing to vacate a judgment by default, all presumptions are in favor of the order of the lower court; where the evidence is conflicting, the judgment will be affirmed. Security Loan etc. Co. v. Estudillo, 134 Cal. 166; 66 Pac. 257. An order vacating a judgment, setting aside a default, and giving leave to answer, will be affirmed on appeal, although the clerk certified to the transcript, where there was no bill of exceptions, or certificate of the judge identifying the papers. Walsh v. Hutchings, 60 Cal. 228. The use of the word "executor," instead of "executors," in a notice of appeal, is evidently one of the scrivener, and could not be misleading, and will be disregarded on appeal. Estate of Nelson, 128 Cal. 242; 60 Pac. 772. Where the court grants leave to file an amended complaint, and only amendments to the complaint were filed, and there is nothing in the record to show that counsel for the defendant was not present and consenting, the appellate court will not disregard such amendments: that leave was granted to file an amended complaint, while only amendments to the complaint were filed, will be regarded as an error of the clerk. Reynolds v. Hosmer, 45 Cal. 616. A mistake will be disregarded upon appeal, where its amendment, if it had been moved for, would have followed as a matter of course. Estate of Nelson, 128 Cal. 242; 60 Pac. 772. Where a bill of exceptions, used on the motion for a new trial, was not served in time, and the record shows no relief from the default, the bill cannot be considered on appeal. King v. Dugan, 150 Cal. 258; 88 Pac. 925. Where a demurrer to the complaint is sustained, and the plaintiff declines to amend, and appeals from the judgment and the order sustaining the demurrer, the supreme court cannot so modify the judgment as to grant him leave to amend his complaint. People v. Jackson, 24 Cal. 630. Where a defendant supposed he had, in his answer, denied the material allegations of the complaint, and the court sustained his view of the answer, the appellate court, when it reverses the judgment may allow the court below to exercise its discretion in permitting the answer to be amended. Fish v. Redington, 31 Cal. 185.

When equity will grant relief. After adjournment of a term, a party who sought to set aside a judgment on the ground of fraud or surprise had, under the old law, to proceed by bill in equity. Robb v. Robb, 6 Cal. 21. A party was not confined to his remedy by statute, but could resort to a court of equity for relief against a judgment obtained through fraud or surprise. Carpentier v. Hart, 5 Cal. 406. Even now, a party against whom an unjust judgment has been obtained, through accident, mistake, or fraud, may, in certain cases, maintain a suit in equity to set aside a judgment. Sullivan v. Lumsden, 118 Cal. 664; 50 Pac. 777; Fox v. Townsend, 2 Cal. App. 193; 83 Pac. 272; Rauer's Law etc. Co. v. Standley, 3 Cal. App. 44; 84 Pac. 214. Courts of equity, in granting relief against a judgment, are not confined to cases of fraud, actual or constructive (Herd v. Tuohy, 133 Cal. 55; 65 Pac. 139); but have jurisdiction, in proper cases, which are not very numerous, to set aside judgments rendered in other actions, and to grant new trials thereof; but it must be made to appear with reasonable certainty that the new trial would result in a judgment more favorable to the party asking it than that sought to be set aside. Painter v. J. B. Painter Co., 133 Cal. 129; 65 Pac. 311. A court of equity will not interfere and set aside a judgment at law, except where it has been obtained through fraud, or through some accident or mistake, without laches on the part of the party complaining, and after all remedy at law has been lost (Mastick v. Thorp, 29 Cal. 444); nor will a court of equity, in an independent proceeding, set aside the judgment of another court, except upon a very clear and satisfactory showing. Reay v. Treadwell, 140 Cal. 412; 73 Pac. 1078; 74 Pac. 352. Though an application to set aside a judgment is made under this section, that fact alone should not deprive the applicant of relief outside of this section, if the showing made entitles him to it. Young v. Fink, 119 Cal. 107; 50 Pac. 1060. The remedy by motion, under this section, to be relieved from a judgment, does not exclude or displace the remedy in equity, nor is it an adequate substitute therefor. Bacon v. Bacon, 150 Cal. 477; 89 Pac. 317. The denial of a motion, made under this section, to vacate a decree, does not bar relief, in equity, for fraud. Estudillo v. Security Loan etc. Co., 149 Cal. 556; 87 Pac. 19. The rule under which a court of equity declines to interfere to give relief against a judgment fraudulently obtained, until after such application has been made to the court in which such judgment was rendered, has no application, where relief has been sought and denied in that court: the denial of that court to grant relief gives to a court of equity the same authority to interfere as if the other court were powerless to render aid. Merriman v. Walton, 105 Cal. 403; 45 Am. St. Rep. 50; 30 L. R. A. 786; 38 Pac. 1108. To entitle a defendant to relief against a judgment or decree on the ground

of fraud, it must appear that he had good defense on its merits, and that such defense has been lost to him without any fault on his part. Collins v. Scott, 100 Cal. 446; 34 Pac. 1085; Eldred v. White, 102 Cal. 600; 36 Pac. 944. Equity has power to grant relief against a fraudulent judgment, establishing right to property, as against parties who purchased such property with notice. Hayden v. Hayden, 46 Cal. 332. Where a party, by the wrongful acts of the other party, is placed in a position from which he can only be relieved by a court of equity, he may obtain relief by an independent action instituted for that purpose. Kelley v. Kreiss, 68 Cal. 210; 9 Pac. 129. The fraudulent conduct of the attorney of a party recovering a judgment may afford sufficient ground for enjoining the judgment. Thompson v. Laughlin, 91 Cal. 313; 27 Pac. 752. Upon an application to vacate a judgment, there may be some reason for sending a defendant into a court of equity, which does not apply where the judgment is void for defects appearing on the roll, and which thus bears on its face the evidence of its invalidity (Wharton v. Harlan, 68 Cal. 422; 9 Pac. 727; Young v. Fink, 119 Cal. 107; 50 Pac. 1060); and the rule is, and should be, that, where the judgment does not show on its face that it is void, and the motion is not made under nor within the time prescribed by this section, the party should be remitted to his equitable action. Young v. Fink, 119 Cal. 107; 50 Pac. 1060. Unless the invalidity of a judgment is apparent from the judgment roll, the court rendering it has no power, in the absence of an application made within the time specified in this section, to make an order vacating or setting aside such judgment: the sole remedy of the aggrieved party, who may not in fact have been served, is to be found in a new action on the equity side of the court. People v. Davis, 143 Cal. 673; 77 Pac. 651. Where a judgment does not appear, on the face of the judgment roll, to be invalid, all who purchase, after its entry, in good faith, for a valuable consideration, and without notice, will be protected by it. Hayden v. Hayden, 46 Cal. 332. A judgment taken by fraud, without notice to the injured party, is absolutely void; it is not taken through mistake, inadvertence, surprise, or excusable neglect; and the party against whom it is taken has a right to an original action to have it annulled by a court of equity. California Beet Sugar Co. v. Porter, 68 Cal. 369; 9 Pac. 313. While a judgment, void in fact for want of jurisdiction over the person of the defendant, may be vacated on motion, yet the more appropriate remedy is an equitable action to vacate the judgment. People v. Thomas, 101 Cal. 571; 36 Pac. 9. Where a justice of the peace enters a judgment according to law, he has no right to alter it afterwards, without notice to the defendant, so as to make it an illegal or improper judgment, and equity has jurisdiction to vacate the judgment thus altered. Chester v. Miller, 13 Cal. 558. Where a justice's judgment has been procured by fraud, and, on motion, the justice grants an order opening the judgment, but afterwards, without notice, vacates the order, his action in vacating the order is equivalent to a denial of the motion, and there is no appeal to the superior court from this order: a court of equity will give relief against the judgment. Merriman v. Walton, 105 Cal. 403; 45 Am. St. Rep. 50; 30 L. R. A. 786; 38 Pac. 1108. The correct procedure to obtain relief from a judgment obtained through fraud is by a motion to vacate the judgment, which, if granted, will afford the most expeditious mode of relief; but, where the motion is unsuccessful, the injured party is entitled to a regular trial in equity, upon the issue of fraud in the procurement of the judgment. Estudillo v. Security Loan etc. Co., 149 Cal. 556; 87 Pac. 19. A complaint in equity to vacate a judgment at law does not authorize the interposition of the court, where such complaint contains no allegation of fraudulent intent, nor a mistake in obtaining the judgment in the original action. Le Mesnager v. Variel, 144 Cal. 463; 103 Am. St. Rep. 91; 77 Pac. 988. In an action to set aside a judgment alleged to have been procured by fraud, the facts and circumstances constituting the alleged fraud must be averred: it is not sufficient to make the averment, in general terms, that the judgment was fraudulent. Castle v. Bader, 23 Cal. 75. A plaintiff's action to set aside a decree, based upon the ground of fraud, accident, or mistake, must not only aver the facts constituting his case, but, if they are denied, prove them also. Eichoff v. Eichoff, 107 Cal. 42; 48 Am. St. Rep. 110; 40 Pac. 24.

Equity will not take jurisdiction, where there is legal remedy. Equity will not give its aid to relieve a party from the effect of a judgment, where there is an ample remedy at law. Imlay v. Carpentier, 14 Cal. 173; Borland v. Thornton, 12 Cal. 440; Ede v. Hazen, 61 Cal. 360; Ketchum v. Crippen, 37 Cal. 223; California Beet Sugar Co. v. Porter, 68 Cal. 369; 9 Pac. 313; Heller v. Dyerville Mfg. Co., 116 Cal. 127; 47 Pac. 1016. Where courts of law and equity have concurrent jurisdiction, and a court of law has first acquired jurisdiction and decided a case, a court of equity will not interfere to set aside the judgment, unless the party has been prevented, through fraud or accident, from availing himself of the defense at law (Dutil v. Pacheco, 21 Cal. 438; 82 Am. Dec. 749); nor can the assistance of equity to set aside a judgment be invoked, in a distinct action, so long as the remedy by

motion in the original case exists (Bibend v. Kreutz, 20 Cal. 109; Merriman v. Walton, 105 Cal. 403; 45 Am. St. Rep. 50; 30 L. R. A. 786; 38 Pac. 1108); but this rule does not apply, where a judgment is fraudulently taken against an injured party, and executed by a sale of his real property (California Beet Sugar Co. v. Porter, 68 Cal. 369; 9 Pac. 313); and when the time within which the motion may be made has expired, and there has been no laches or want of diligence on the part of the party asking relief, there is nothing in reason or propriety to prevent the interference of equity. Brackett v. Banegas, 116 Cal. 278; 58 Am. St. Rep. 164; 48 Pac. 90; Bibend v. Kreutz, 20 Cal. 109; People v. Lafarge, 3 Cal. 130; Carpentier v. Hart, 5 Cal. 406; Robb v. Robb, 6 Cal. 21; Pico v. Carillo, 7 Cal. 30. The statutory remedy by motion to obtain relief against an unjust judgment, before the court rendering it, was formerly available only during the term at which the judgment was rendered; but this remedy was held not to be exclusive, as it would often result in a denial of obvious justice. Bibend v. Kreutz, 20 Cal. 109. Where judgment is rendered against a defendant after his discharge in insolvency, in a suit previously instituted, he has a complete remedy at law, and is not entitled to relief in equity, by means of an injunction to restrain the enforcement of the judgment. Rahm v. Minis, 40 Cal. 421. Where there has been no service on the defendant, it is not necessary to file a bill in chancery to vacate a judgment by default: it may be set aside or reopened on motion, within the time allowed by law. Pico v. Carillo, 7 Cal. 30. A defendant is not bound to resort to a remedy by motion to set aside a judgment taken against him, where there was no service of summons upon him, or the affidavit of service is false. Lapham v. Campbell, 61 Cal. 296. A judgment taken against a corporation, through the fraud of its directors, may be set aside, either before or after the expiration of six months; but the remedy by motion on the ground of fraud is not exclusive of the remedy by a suit in equity, unless such remedy by motion is perfectly adequate. Ex-Mission Land etc. Co. v. Flash, 97 Cal. 610; 32 Pac. 600. The remedy against an execution issued on a judgment claimed to have been discharged by a decree in insolvency is by motion, and not by a bill in equity for an injunction. Green v. Thomas, 17 Cal. 86.

Equity will not interfere to correct errors. A court of equity will never set aside a judgment for mere error, whether of law or of fact, committed in the rendition of the judgment (Wickersham v. Comerford, 104 Cal. 494; 38 Pac. 101; Estate of Griffith, 84 Cal. 107; 24 Pac. 381); nor will it intervene to correct mere clerical errors: it has no jurisdiction to amend a judgment to insert an omitted contract therein (Hull v. Calkins, 137 Cal. 84; 69 Pac. 838); it will, however, correct a mistake of law; but, wherever inadvertence or mistake is held to be ground for setting aside a judgment, it will be noticed that it is not a mistake of law, or an inadvertent conclusion as to what the law is, but a mistake or an inadvertence in doing something not intended to be done. Sullivan v. Lumsden, 118 Cal. 664; 50 Pac. 777. A mere naked mistake of law, unattended with any special circumstances, such as misrepresentation, undue influence, or misplaced confidence, constitutes no ground for relief in a court of equity (Goodenow v. Ewer, 16 Cal. 461; 76 Am. Dec. 540), save in exceptional cases; but relief will be granted in the original action, upon motion or supplemental bill. Brackett v. Banegas, 116 Cal. 278; 58 Am. St. Rep. 164; 48 Pac. 90. Though a judgment will not be interfered with for mere error, yet want of notice to the defendant, and his consequent inability to be heard, may be a sufficient ground for relief in equity, even where the failure to defend is not chargeable to the plaintiff, and a fortiori where it is so chargeable. Herd v. Tuohy, 133 Cal. 55; 65 Pac. 139. The dismissal of an appeal, for inadvertently omitting to file the undertaking thereon within the statutory time, is not a ground for relief in equity. Daly v. Pennie, 86 Cal. 552; 21 Am. St. Rep. 61; 25 Pac. 67.

Fraud must be extrinsic or collateral. To authorize a court of equity to set aside and annul a judgment, on the ground of fraud in its procurement, the fraud must be extrinsic or collateral to the questions examined and determined in the action, and must have prevented a fair submission of the controversy (Pico v. Cohn, 91 Cal. 129; 25 Am. St. Rep. 159; 13 L. R. A. 336; 25 Pac. 270; 27 Pac. 537; Hanley v. Hanley, 114 Cal. 690; 46 Pac. 736; Steen v. March, 132 Cal. 616; 64 Pac. 994); and a court of equity will not grant relief for fraud involved in any matter upon which the decree was rendered. Fealey v. Fealey, 104 Cal. 354; 43 Am. St. Rep. 111; 38 Pac. 49; Estate of Griffith, 84 Cal. 107; 23 Pac. 528; 24 Pac. 381. In applications for relief under this section, no distinction is made between extrinsic or other fraud. Application of Johnson, 7 Cal. App. 436; 94 Pac. 592. When an equitable action is brought to set aside a judgment at law, the attack, although not collateral, is always indirect. Le Mesnager v. Variel, 144 Cal. 463; 103 Am. St. Rep. 91; 77 Pac. 988. An attack upon a judgment, for fraud in its procurement, is a direct attack, since the establishment of fraud shows that no judgment was rendered; but the fraud from which relief may be had does not include a judgment regularly obtained upon a fraudulent claim or by

false testimony: it is limited to the fraud in procuring the judgment. Parsons v. Weis, 144 Cal. 410; 77 Pac. 1007. The rule that fraud relating to the merits of the controversy is concluded by the judgment, does not apply, where the defendant had no knowledge of the pendency of the action. Dunlap v. Steere, 92 Cal. 344; 27 Am. St. Rep. 143; 16 L. R. A. 361; 28 Pac. 563. The failure of a party to introduce evidence, known by him to exist, tending to overthrow his case, is not ground for a suit to set aside the judgment: it is not a fraud extrinsic or collateral to the matter examined in the first suit. Estate of Griffith, 84 Cal. 107; 23 Pac. 528; 24 Pac. 381. The judgment will not be vacated, merely because it was obtained by forged documents or perjured testimony, or by the bribing of a witness to swear falsely. Pico v. Cohn, 91 Cal. 129; 25 Am. St. Rep. 159; 13 L. R. A. 336; 25 Pac. 270; 27 Pac. 537.

Diligence and absence of negligence. A party against whom an alleged fraudulent judgment has been obtained, and who seeks to have it set aside on the ground of fraud, should show that he had made a motion to have it set aside when he had an opportunity to do so; otherwise it would appear that he had not used due and proper diligence to avoid its effect. Chielovich v. Krauss, 2 Cal. Unrep. 643; 9 Pac. 945. A court of equity will not grant relief from a judgment obtained by fraud, unless the party seeking relief has been free from negligence: where the judgment was the result of his carelessness, he is not entitled to relief (Quinn v. Wetherbee, 41 Cal. 247; Champion v. Woods, 79 Cal. 17; 12 Am. St. Rep. 126; 21 Pac. 534); nor will a court of equity annul a judgment at law, after the lapse of thirteen months, where to do so would be unjust and inequitable, and where the effect would be to allow the applicant to avoid the payment of his just debts by pleading the statute of limitations in a subsequent action. Eldred v. White, 102 Cal. 600; 36 Pac. 944. A party may obtain relief against an unjust judgment, by equitable action to set it aside, where no want of diligence is imputable to him in seeking relief. Bibend v. Kreutz, 20 Cal. 109. A judgment will be set aside on the ground of fraud, only where the fraud was practiced in obtaining the judgment, and the party against whom it was rendered, and his counsel, are free from negligence: equity will be concluded by the judgment at law, where fraud is equally a defense as in equity. Zellerbach v. Allenberg, 67 Cal. 296; 7 Pac. 908. The plaintiff cannot attack the settlement and dismissal of an action, upon an insufficient showing of fraud, where there is a delay of fourteen years in asserting the facts. Truett v. Onderdonk, 120 Cal. 581; 53 Pac. 26.

Evidence. On a motion to set aside a judgment, the true facts may be shown by any competent evidence. McKinley v. Tuttle, 34 Cal. 235. Where a judgment by default was taken after service by publication, and motion is made, six years after entry thereof, to vacate, no evidence in the record is admissible to impeach it: the rule is otherwise, where a direct attack is made on the judgment, by appeal or motion within the time prescribed. People v. Norris, 144 Cal. 422; 77 Pac. 998.

Definition of words and phrases. A default occurs when the defendant fails to answer or demur, as prescribed in §§ 850, 871 et seq., post. Weimmer v. Sutherland, 74 Cal. 341; 15 Pac. 849. A motion is an application for an order. Brownell v. Superior Court, 157 Cal. 703; 109 Pac. 91. The settlement of a bill of exceptions is a "proceeding" (People v. Everett, 8 Cal. App. 430; 97 Pac. 175; Dernham v. Bagley, 151 Cal. 216; 90 Pac. 543; Freeman v. Brown, 5 Cal. App. 516; 90 Pac. 970; Stonesifer v. Kilburn, 94 Cal. 33; 29 Pac. 332); as is also the settlement of a statement on motion for a new trial (Banta v. Siller, 121 Cal. 414; 53 Pac. 935); there being no substantial difference between a bill of exceptions and a statement (Sauer v. Eagle Brewing Co., 3 Cal. App. 127; 84 Pac. 425); but the mere reservation of an objection to the service of a proposed bill of exceptions does not constitute a "proceeding," within the meaning of this section. Pollitz v. Wickersham, 150 Cal. 238; 88 Pac. 911. A mere memorandum entered in the rough minutes of the clerk is not an order. Brownell v. Superior Court, 157 Cal. 703; 109 Pac. 91. Where findings are required, there is no "rendition" of the judgment, until they are filed with the clerk; if none are required, there is no "rendition" of the judgment until the decision is entered in the official minutes of the court. Id. The word "taken," as used in this section, is equivalent to "rendition." Id. The "surprise" contemplated by this section is "some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against." Porter v. Anderson, 14 Cal. App. 716; 113 Pac. 345.

How far amendments altering or varying cause of action are allowed. See note 34 Am. Dec. 158.

Amendments stating new cause of action. See note 51 Am. St. Rep. 414.

Amendment of pleadings on trial. See note 5 Ann. Cas. 674.

Amendment of pleading by changing character in which defendant is sued as bringing in new parties. See note 10 Ann. Cas. 150.

Amendment of pleading in respect to description of land in controversy. See note 14 Ann. Cas. 455.

Right to amend pleading after default judgment. See note Ann. Cas. 1913B, 481.

Right to amend complaint by adding or substituting new plaintiff suing for use of original plaintiff. See note Ann. Cas. 1913B, 110.

Amendment to cure defect for which motion in arrest of judgment has been made. See note 67 L. R. A. (N. S.) 179.

Relation of new pleadings to statutes of limitations. See notes 3 L. R. A. (N. S.) 260; 33 L. R. A. (N. S.) 196.

Right to amend pleadings after final decision on appeal. See note 18 L. R. A. (N. S.) 263.

CODE COMMISSIONERS' NOTE. 1. Adding or striking out parties. If plaintiff's testimony on trial shows that there is a non-joinder of persons who should have been plaintiffs, and a motion for a nonsuit is made on this ground, the court may allow an amendment by adding the name of a co-plaintiff. Acquital v. Crowell, 1 Cal. 191; Heath v. Lent, 1 Cal. 412. After ordering defendants, against whom no proof is adduced, to be stricken from the pleadings, can they be reinstated during the progress of the trial? Beach v. Covillaud, 2 Cal. 237. After the close of plaintiff's evidence, the complaint may be amended, by adding the name of another party plaintiff, if it does not affect the substantial rights of the parties. Polk v. Coffin, 9 Cal. 56. If judgment is entered against "the defendants," and a portion of them were not sued, though their names appeared as defendants, by a mistake of the clerk in entitling the cause, the error may be corrected. Browner v. Davis, 15 Cal. 9. If a court alters a judgment, without notice, so as to include a party not served with process, if not void it is voidable at the election of the party. Chester v. Miller, 13 Cal. 558. If a judgment entered embraces more parties than the testimony justifies, the proper practice is to move to correct the judgment in the court below. Mulliken v. Hull, 5 Cal. 245. A court may order judgment creditors, as subsequent encumbrancers, to be made parties to an action by an amendment of the complaint. Horn v. Volcano Water Co., 13 Cal. 70; 73 Am. Dec. 569. Motions to add or strike out parties, etc., see Rowe v. Chandler, 1 Cal. 175.

2. Extending time for answer or demurrer. This can be done whenever the ends of justice seem to require it. Wood v. Fobes, 5 Cal. 62; Drum v. Whiting, 9 Cal. 422; Thornton v. Borland, 12 Cal. 438.

3. Amending complaint. If the proof does not sustain the allegations of the complaint, but the proof is sufficient to entitle the plaintiff to relief in a court of equity, under properly framed pleadings, an amendment should be allowed conforming the pleadings to the facts which should be in issue. Connalley v. Peck, 3 Cal. 75; McDonald v. Bear River etc. Mining Co., 15 Cal. 145; Nevada County etc. Canal Co. v. Kidd, 28 Cal. 673. The plaintiff brought action in assumpsit to recover rent for premises, the possession of which he had previously recovered by ejectment against the defendant. After the trial and verdict, which was set aside by the court, he amended his complaint to make it in form an action of trespass for mesne profits. This should not have been permitted. Such an amendment would virtually change an action ex contractu into an action ex delicto. Ramirez v. Murray, 5 Cal. 222. Facts which occur subsequent to the filing of the original complaint, and which change the liabilities of the defendants, and, in consequence, the character of the judgment which is sought, cannot be incorporated into the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action. Van Maren v. Johnson, 15 Cal. 308. Refusing to allow a plaintiff to strike out a claim for damages, without regard to the purpose which may influence him, is error. Grass Valley Quartz Mining Co. v. Stackhouse, 6 Cal. 413. The wife is a proper party defendant in a suit for the foreclosure of a mortgage executed upon premises claimed as a homestead. When not made a party, she may intervene, or, by permission of the court, be allowed to file a separate answer, the plaintiff having the liberty to amend his complaint, if any matters are set up in the answer which he might wish to anticipate by further allegations. Moss v. Warner, 10 Cal. 296. If the complaint avers the ownership of land in the bed of and on the banks of a stream, and work done thereon to dig a canal and build a dam to use the waters of the stream, and is framed for a judgment to recover possession of the property from one who is averred to have ousted plaintiff, the plaintiff should, on motion to that effect, be allowed to amend his complaint by inserting therein averments of his prior appropriation of water and a diversion by defendant, with prayer for an injunction. Nevada County etc. Canal Co. v. Kidd, 28 Cal. 673. A complaint cannot be amended in the supreme court so as to make it correspond with the verdict. The district court, in a proper case, before judgment, may direct the complaint to be so amended. Hooper v. Wells Fargo & Co., 27 Cal. 35; 85 Am. Dec. 211. Plaintiff may amend his complaint at any time before issuance of summons without leave of the court, if there has been no appearance of defendant. Allen v. Marshall, 34 Cal. 165.

4. Amendment to answer. A joint claim by two persons cannot be pleaded as a counterclaim by one defendant; but he may amend, and aver that the whole interest therein has been transferred to him. Stearns v. Martin, 4 Cal. 229. Because new matter set up by an amendment was well known to the defendant at the time he filed his original answer, is no good reason for declining to permit amendment. Pierson v. McCahill, 22 Cal. 127. An amended answer supersedes the original, and destroys its effect as a pleading. Gilman v. Cosgrove, 22 Cal. 356; Jones v. Frost, 28 Cal. 246.

5. Setting aside judgment by default. Bailey v. Taaffe, 29 Cal. 422. A judgment by default may be set aside on the ground of fraud or surprise. Bidleman v. Kewen, 2 Cal. 250. An order of court setting aside a default and judgment entered during vacation is regular and correct, where there has been no service of summons upon the defendants. Pico v. Carrillo, 7 Cal. 30. In an action of ejectment against two defendants, one who was served with summons and made default, and without any service being made upon the other, a judgment was entered against both for possession of the premises and costs. On application of the defendant not served, an order made at a subsequent term of the court, setting aside the entire judgment as to both defendants, with leave to the defendant not served to answer, was not error. The effect of such an order is, not to set aside the default of the defendant who had been served, as to permit his co-defendant to defend for both. A new judgment may be at once entered by the plaintiff against the defaulting defendant. Lewis v. Rigney, 21 Cal. 268. A defendant who, having suffered a default, has obtained from the plaintiff a stipulation that the default may be set aside, must use reasonable diligence in applying to the court therefor, or his right to it will be lost. Reese v. Mahoney, 21 Cal. 305. A motion may be made to set aside a default entered by a clerk at any time before final judgment is rendered in the action, notwithstanding the court has adjourned for the term at which the default was entered, and before the motion is made to vacate it. The court does not lose jurisdiction to vacate a default because the term at which it was entered has adjourned, unless final judgment has been entered in the action. Willson v. Cleaveland, 30 Cal. 192. Where the defendant moves to compel the plaintiff to elect which count of the complaint he will go to trial on, and the court makes an order extending the time to answer until the decision of the motion, and the motion is sustained, a default of the defendant, entered by the clerk in less than ten days after the plaintiff serves notice of his election, is void, and the court may set it aside upon suggestion, without any affidavit of merits. Willson v. Cleaveland, 30 Cal. 192. If the tenant sued in ejectment has, by neglect or design, suffered a default, the landlord may, upon a proper showing and motion in the name of the tenant, have the default set aside. Dimick v.

Deringer, 32 Cal. 488. A judgment by default will not be opened unless it be shown that the judgment, as it stands, is unjust, and an affidavit as to merits is necessary. Parrott v. Den, 34 Cal. 79. Where a case in the twelfth district was set for trial on a particular day, with the knowledge and consent of defendant's attorney, and he then, two or three days before the day of trial, goes into Alameda County to try another cause there, without making any arrangement in respect to the first case, in which, on the day fixed, plaintiff had judgment, no one appearing for defendant, except to state the fact of the attorney's absence, and to ask a postponement, which was denied. It was held that the supreme court would not review the action of the court below in refusing to set aside the judgment because of the absence of said attorney. Haight v. Green, 19 Cal. 113. A judgment by default should not be set aside by the court, unless the defendant shows by competent proof that the judgment was entered through mistake, inadvertence, surprise, or excusable neglect on his part; and the payment of the costs should be imposed as a condition of setting aside the judgment by default. People v. O'Connell, 23 Cal. 281; Bailey v. Taaffe, 29 Cal. 422.

6. **What must be shown to authorize the setting aside of a judgment.** No particular form is required by the code in which application shall be made for setting aside judgment. All that is required is that the facts shall be set forth, and if they show a case coming within the rule, it is sufficient. People v. Lafarge, 3 Cal. 130. An affidavit to the effect that an instrument has been materially altered, without showing in any manner in what the alteration consists, furnishes insufficient grounds upon which to base a motion to set aside a judgment. Taylor v. Randall, 5 Cal. 79. An affidavit of merits, without any averment of mistake, surprise, or excusable neglect, is not sufficient to warrant the opening a default, where personal service of summons was made. Harlan v. Smith, 6 Cal. 173. An affidavit by defendant that he was under the impression, when he retained counsel in a cause, that the time to answer had not expired, that he did not recollect the precise day upon which the summons and complaint were served, that he was quite ill at the time, and did not as carefully note the time as he otherwise would, is not sufficient to set aside a judgment by default. Elliott v. Shaw, 16 Cal. 377; see also People v. Rains, 23 Cal. 128; Bailey v. Taaffe, 29 Cal. 422. An order opening a default will not be granted, unless there is an affidavit of merits. Parrott v. Den, 34 Cal. 79; Reese v. Mahoney, 21 Cal. 305; see also Bailey v. Taaffe, 29 Cal. 422; Woodward v. Backus, 20 Cal. 137; Francis v. Cox, 33 Cal. 323.

7. **Setting aside judgment by default.** Judgment by default may be set aside on the ground of surprise. Bidleman v. Kewen, 2 Cal. 248. It is no ground for setting aside a judgment by default that the defendant did not know that the law required him to answer in ten days. Chase v. Swain, 9 Cal. 130. The court may set aside a default and judgment entered during vacation, when there has been no service of summons upon the defendants. Pico v. Carrillo, 7 Cal. 32. Where two defendants are jointly sued, and service had on both, the clerk of the court cannot enter judgment by default against one, and his act in so doing is without color of law and void, and may be disregarded or set aside. Stearns v. Aguirre, 7 Cal. 443; see Glidden v. Packard, 28 Cal. 651; Welsh v. Kirkpatrick, 30 Cal. 205; 89 Am. Dec. 85; Willson v. Cleaveland, 30 Cal. 198; Bond v. Pacheco, 30 Cal. 530.

8. **Setting aside judgment on ground of mistake.** A judgment will not be set aside on the application of a creditor of the judgment debtor, upon the ground that the judgment was taken for more than was actually due upon the note, when it appears that a mistake of but a very small amount only was made in calculating the interest due upon the note. Ziel v. Dukes, 12 Cal. 482.

9. **Amendment made nunc pro tunc.** A court may at any time render or amend a judgment nunc pro tunc, when the record shows that the entry on the minutes does not correctly give what was the judgment of the court. Morrison v. Dapman, 3 Cal. 255. But after adjournment of the term the court cannot direct the clerk to enter in the minutes nunc pro tunc, an order made at the adjourned term, if there is nothing in the record disclosing the fact that any such order had ever been made. Hegeler v. Henckell, 27 Cal. 491; Branger v. Chevalier, 9 Cal. 172. Entering judgments nunc pro tunc on death of appellant. Black v. Shaw, 20 Cal. 68; see Swain v. Naglee, 19 Cal. 127.

10. **Judgment, when vacated.** This section of the code applies not only to cases where a judgment has been taken regularly without personal service, as upon publication of summons, but also to cases of judgments entered erroneously without any service of summons or appearance of defendant. Lewis v. Rigney, 21 Cal. 268. Where a judgment is taken by plaintiffs, in the absence of defendants and their counsel, and this absence results from a mutual and honest mistake between them as to the retainer of the latter, the judgment will be set aside. McKinley v. Tuttle, 34 Cal. 235. After a conditional order to set aside a judgment, the court, in deciding a motion to place the cause on the calendar for trial, "orders that said motion be and the same is hereby denied, and the judgment will remain." Held: that this was a distinct adjudication that the previous order had not taken effect; and held further, that this order directing the judgment remain, being the last in the case, and not having been appealed from, it took the place of any previous order in reference to vacating the judgment. Gregory v. Haynes, 21 Cal. 443. If an appeal is taken from a judgment rendered, the court below loses all control over the judgment and cannot amend it. Bryan v. Berry, 8 Cal. 134.

11. **When defendant is permitted to verify answer.** Where the complaint is verified, the defendant may be allowed to verify his answer before trial, unless it is shown that the plaintiff is thereby taken by surprise. Angier v. Masterson, 6 Cal. 61; see also Lattimer v. Ryan, 20 Cal. 628.

12. **Amendment after reversal of judgment.** When a final judgment, sustaining demurrer to the complaint, was reversed, the plaintiff had the right to amend, on application to the court below. Williamson v. Blattan, 9 Cal. 500; see also McDonald v. Bear River etc. Mining Co., 15 Cal. 149; Fish v. Reddington, 31 Cal. 186.

13. **Amendments to findings. Amending bill of costs.** A judge cannot change his findings of facts after the entry of judgment on the findings and adjournment of the term. Carpentier v. Gardiner, 29 Cal. 160; Kimball v. Lohmas, 31 Cal. 154. Under this section of the code, the court may, in the exercise of its discretion, allow the amendment of a bill of costs, and the affidavit accompanying it. Burnham v. Hays, 3 Cal. 115; 58 Am. Dec. 389.

14. **Amending return of sheriff.** A sheriff cannot, after making a return, amend it so as to affect rights which had already vested in third parties. Newhall v. Provost, 6 Cal. 87; Webster v. Haworth, 8 Cal. 25; 68 Am. Dec. 287. But sheriffs should be allowed to amend their returns so as to make them conform to the true state of facts, and to correct errors and mistakes. Gavitt v. Doub, 23 Cal. 78.

15. **Amendment on discovery of fraud.** Fraud discovered after suit brought will entitle the party to amend his action so as to include it. Truebody v. Jacobson, 2 Cal. 269; Matoon v. Eder, 6 Cal. 61; Davis v. Robinson, 10 Cal. 412.

16. **Pleading statute of limitations by way of amendment.** The plea of the statute of limitations is not favored, unless in aid of justice; but it should be permitted to be pleaded at any time, when justice will be attained thereby. Cooke v. Spears, 2 Cal. 409; 56 Am. Dec. 348; Stuart v. Lander, 16 Cal. 372; 76 Am. Dec. 538. Two defendants filed a joint plea of the statute of limitations, and the plea being held bad as to one defendant, the court, on the trial, permitted the

other defendant to amend and file a separate plea of the statute. This was held not to be error. Robinson v. Smith, 14 Cal. 254.

17. Referees cannot permit amendments. Referees cannot allow parties to alter or amend pleadings, after a case has been referred to them. De la Riva v. Berreyesa, 2 Cal. 195.

18. Substitution of papers or pleadings. The substitution of papers (or pleadings in a case) is always within the discretion of the court, and no notice of the motion to apply for it need be given, when the notice of it can be of no use. Benedict v. Cozzens, 4 Cal. 381. But where a pleading in a pending action is lost, its place can only be supplied by motion based on affidavits, showing what the lost pleading contained, and a service of personal notice upon the opposite party, which notice must be sufficiently explicit to advise him of what is intended, as well as to enable him to controvert the affidavits submitted. People v. Cazalis, 27 Cal. 522.

19. Amendments should be readily and freely allowed. The greatest latitude and liberality should be exercised in permitting amendments to pleading, so that delays may be avoided and justice promoted. Butler v. King, 10 Cal. 342; Roland v. Kreyenhagen, 18 Cal. 455; McMillan v. Dana, 18 Cal. 339; Smith v. Yreka Water Co., 14 Cal. 201.

20. Amendments during progress of trial. The court may allow pleadings to be amended so as to supply a defect or omission, even after the commencement of a trial. Gavitt v. Doub, 23 Cal. 78. A court may permit a plaintiff, after the defendants have closed their case and before the case is submitted, to supply an omission in the testimony occasioned by mistake or inadvertence; such action is no ground for reversal, unless it appear that injustice has been done by an abuse of discretion. Priest v. Union Canal Co., 6 Cal. 170. After the motion for a nonsuit, the court may, upon terms, permit an amendment of the complaint, if it would not operate as a surprise upon the defendant; but if this is not done, the plaintiff cannot recover. Farmer v. Cram, 7 Cal. 135. The court may permit, after the close of plaintiff's evidence, the complaint to be amended by the addition of the name of another party plaintiff, if it does not affect the substantial rights of the parties. Polk v. Coffin, 9 Cal. 56. If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending the litigation, and has not pleaded such title in a supplemental answer, and for that reason his proof of such title is excluded by the court, it is not an abuse of discretion of the court to deny his application made during the trial for permission to amend his answer so as to obviate the objection. McMinn v. O'Connor, 27 Cal. 248. If testimony offered by the defendant is rejected by the court because an averment of the complaint to which it relates is not properly denied in the answer, the defendant should be allowed to amend his denial if he asks to do so. When it is discovered, during the progress of the trial, the pleadings are so defective that the real subject of dispute cannot be finally determined, the court, if an application is made therefor, should allow amendments on such terms as may be just. Stringer v. Davis, 30 Cal. 318. The answer may be verified even after the close of the case on the part of the plaintiff. Arrington v. Tupper, 10 Cal. 464. Two defendants filed a joint plea of the statute of limitations, and the plea being held bad as to one defendant, the court, on the trial, permitted the other defendant to file a separate plea of the statute. This was not such a gross abuse of discretion as to enable the supreme court to revise it. Robinson v. Smith, 14 Cal. 254. The court below has power to grant amendments whenever, at any stage of the trial, they will assist the purposes of justice, and this power should be liberally exercised to secure a fair and speedy trial on the merits. Lestrade v. Barth, 17 Cal. 285; see Peters v. Foss, 16 Cal. 357. When it appears by the plaintiff's testimony that there is a misjoinder of persons who should have been made plaintiffs, and a motion for a nonsuit is made on this ground, the court may allow an amendment by adding the name of a co-plaintiff. Acquital v. Crowell, 1 Cal. 192. A motion to amend a complaint is not too late because made after the plaintiff has closed his testimony and the defendant has moved for a nonsuit. A motion to amend is always in time when it immediately follows an objection to the complaint or answer. Valencia v. Couch, 32 Cal. 340; 91 Am. Dec. 589.

21. Amendments, where made. Amendments correcting mistakes, etc., should be made by motion in the court below, not in the supreme court. Whitney v. Buckman, 13 Cal. 536; Anderson v. Parker, 6 Cal. 197; Guy v. Ide, 6 Cal. 99; 65 Am. Dec. 490;

22. Supplemental complaint as amendment. Facts which occur subsequent to the filing of the original complaint, and which change the liabilities of the defendant, and in consequence, the character of the judgment which is sought, cannot be incorporated with the original complaint by an amendment without presenting averments inconsistent with the date of the action. They must be presented in the form of a supplemental complaint. Van Maren v. Johnson, 15 Cal. 311.

§ 474. Suing a party by a fictitious name, when allowed. When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly.

Legislation § 474. Enacted March 11, **1872**; based on Practice Act, § 69 (New York Code, § 175), which (1) did not have the words "he must state that fact in the complaint, and," and (2) had the word "may" instead of "must," before "be amended."

Suing under fictitious name. The defendant may be sued under a fictitious name, only when the plaintiff does not know his true name; and although the individual who is served under such fictitious name may be substituted as a defendant, yet, until such substitution is made, the rights of other parties to the action will not be affected by such service nor by his appearance. Bachman v. Cathry, 113 Cal. 498; 45 Pac. 814.

Effect on limitations. A defendant, sued and served under a fictitious name, where the plaintiff did not know his true name, is a party to the action from its commencement; and this date must control for the purposes of the statute of limitations. Hoffman v. Keeton, 132 Cal. 195; 64 Pac. 264.

Ignorance of true name must be real. The plaintiff's ignorance of the true name of the defendant must be real, and not feigned; it must not be "willful" ignorance, or such as might be removed by mere inquiry, or a resort to means of information easily accessible. Rosencrantz v. Rogers, 40 Cal. 489; Bachman v. Cathry,

113 Cal. 498; 45 Pac. 814. A party sued under a fictitious name is entitled to have the service of summons set aside and the action dismissed, upon a showing that the plaintiff could have ascertained his true name by examining the records of the county. Irving v. Carpentier, 70 Cal. 23; 11 Pac. 391.

Allegation of ignorance of defendant's true name. A party, sued and served with summons under a fictitious name, though not named as a defendant, is entitled to have such service set aside and to have the action dismissed, as against him, where there is no averment that the plaintiff did not know the true name of the person intended to be made a defendant, which might easily have been learned. Rosencrantz v. Rogers, 40 Cal. 489. Parties sued under fictitious names, where the complaint does not show who are intended to be sued, are not affected by the judgment. Ford v. Doyle, 37 Cal. 346; People v. Herman, 45 Cal. 689. In an action to annul a certificate of purchase of state lands, where there is no allegation that the name of the holder is unknown, there is no foundation for bringing an action against a fictitious person, and no authority to make service of summons by publication. People v. Herman, 45 Cal. 689. Where the fact that the true name of a defendant, sued under a fictitious name, was unknown, is alleged in the complaint, followed by a prayer that, when discovered, the complaint might be amended to allege his true name, and an injunction followed the complaint, directed to and served upon the defendant under a fictitious name, and in the affidavit for a writ of attachment the defendant was described as the person served with the injunction, and at the hearing the court found the true name of the defendant, and so stated it in the judgment, this is sufficient. Ex parte Ah Men, 77 Cal. 198; 11 Am. St. Rep. 263; 19 Pac. 380. A plaintiff's allegation, that he is ignorant of the name of a defendant sued under a fictitious name, is not traversable, either by the answer or in any other mode. Irving v. Carpentier, 70 Cal. 23; 11 Pac. 391.

Amendment of complaint. By § 39 of the Practice Act it was provided that the complaint should contain the names of the parties to the action, plaintiff and defendant; and it was held that there was no conflict between § 39 and § 69: the former gave the general rule, and the latter provided an exception to it. Rosencrantz v. Rogers, 40 Cal. 489. By § 69 of the Practice Act it was provided that when the true name of the defendant was discovered the pleading might be amended, where it was intended that the judgment should bind persons sued by fictitious names: there is as little room for question that such was the proper course as there would be where the plaintiff discovers that, by mistake, he has sued the defendant by a wrong name. McKinlay v. Tuttle, 42 Cal. 570. No judgment can be taken and enforced against a party, sued under a fictitious name, where the complaint is not amended by inserting his true name when ascertained. Farris v. Merritt, 63 Cal. 118. The complaint must be amended by inserting the true names, when ascertained, of parties sued under fictitious names, either before or after service of process, so as to allege that they are the persons to be bound by the judgment. McKinlay v. Tuttle, 42 Cal. 570; Campbell v. Adams, 50 Cal. 203; Baldwin v. Morgan, 50 Cal. 585; Farris v. Merritt, 63 Cal. 118. A defendant, sued and served under a fictitious name, who appears and answers, does not thereby waive an amendment to the complaint, describing him by his true name. McKinlay v. Tuttle, 42 Cal. 570. An amendment of the complaint, inserting the defendant's true name, when sued under a fictitious name, does not change the cause of action. Farris v. Merritt, 63 Cal. 118.

Service of amended complaint. Where the complaint is amended when the case comes up for trial, by inserting the true name of a defendant sued under a fictitious name, service of the amended complaint is not required to be made on him, nor is he entitled to ten days in which to answer. Brock v. Martinovich, 55 Cal. 516.

Validity of judgment, where name is fictitious. A judgment by default, against a defendant sued under a wrong name, is not void, where he was served with process. Welsh v. Kirkpatrick, 30 Cal. 202; 89 Am. Dec. 85. Where a party, sued and served under a fictitious name, answers, the judgment against him is not void, and cannot be attacked collaterally, though the complaint was not amended by inserting his true name. Campbell v. Adams, 50 Cal. 203; Baldwin v. Morgan, 50 Cal. 585. Where a company, sued under a wrong name, answers, and judgment is rendered against it under its true name, the supreme court will, on appeal, direct the complaint to be amended, as of a date anterior to the judgment, by substituting the true name. Mahon v. San Rafael Turnpike Road Co., 49 Cal. 269. A judgment against a party sued under a fictitious name will not be reversed on appeal, but, in order to support the judgment, the lower court will be directed to amend the complaint as of a date prior to the judgment (Alameda County v. Crocker, 125 Cal. 101; 57 Pac. 766; Baldwin v. Bornheimer, 48 Cal. 433; Blackburn v. Bucksport etc. R. R. Co., 7 Cal. App. 649; 95 Pac. 668); but such a judgment was reversed in McKinlay v. Tuttle, 42 Cal. 570; San Francisco v. Burr, 4 Cal. Unrep. 631; 36 Pac. 771. Where a defendant is sued under a fictitious name, but is served under his true name, the omission to amend the complaint by sub-

stituting his true name is an irregularity for which the decree will be reversed; but the judgment is not void, nor can it be attacked collaterally. Baldwin v. Morgan, 50 Cal. 585. Where a party defendant is sued and answers under a wrong name, and judgment is entered against him accordingly, no advantage can be taken of the misnomer. McCreery v. Everding, 54 Cal. 168.

Method of pleading misnomer. A plea in abatement was formerly the proper way to raise the objection of misnomer; and the question whether a defendant has been sued under his proper name is probably nothing more than matter in abatement, and is analogous to the case of a misnomer, which never renders a judgment void. Welsh v. Kirkpatrick, 30 Cal. 202; 89 Am. Dec. 85.

CODE COMMISSIONERS' NOTE. The words, "he must state that fact in the complaint," are added to the original section, so that it may appear upon the face of the proceedings that the name is a fictitious one. See, generally, Rosencrantz v. Rogers, 40 Cal. 491; Morgan v. Thrift, 2 Cal. 562.

§ 475. No error or defect to be regarded unless it affects substantial rights. The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown.

Similar provision. Pen. Code, §§ 1258, 1404.

Legislation § 475. 1. Enacted March 11, **1872**; based on Practice Act, § 71 (New York Code, § 176), which read: "The court shall, in every stage of an action, disregard any error or defect in the pleadings, or proceedings, which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect." When enacted in 1872, (1) the word "shall," after "The court," was changed to "must," and (2) the same word, before "not affect," was changed to "does."

2. Amended by Stats. **1897**, p. 44.

Construction of section. This section applies to immaterial errors or defects in the statement of an election contest (Chatham v. Mansfield, 1 Cal. App. 298; 82 Pac. 343), and also to those in the form of a judgment (Sherwood v. Wallin, 1 Cal. App. 532; 82 Pac. 566), and to those in rendering a judgment against a wife alone, in a joint action against her and her husband (McKee v. Cunningham, 2 Cal. App. 684; 84 Pac. 260), and to those in holding a decree to be valid. Fogg v. Perris Irrigation Dist., 154 Cal. 209; 97 Pac. 316.

Substantial injury necessary. A judgment will not be reversed, unless the complaining party has suffered substantial injury. Bird v. Utica Gold Mining Co., 2 Cal. App. 674; 84 Pac. 256; Block v. Kearney, 6 Cal. Unrep. 660; 64 Pac. 267; Bollinger v. Bollinger, 154 Cal. 695; 99 Pac. 196; Compressed Air etc. Co. v. West San Pablo Land etc. Co., 9 Cal. App. 361; 99 Pac. 531; Preston v. Central California etc. Irrigation Co., 11 Cal. App. 190; 104 Pac 462; Bradley v. Bush, 11 Cal. App. 287; 104 Pac. 845; Peters v. Peters, 156 Cal. 32; 23 L. R. A. (N. S.) 699; 103 Pac. 219; Fogg v. Perris Irrigation Dist., 154 Cal. 209; 97 Pac. 316; Dennis v. Crocker-Huffman Land etc. Co., 6 Cal. App. 58; 91 Pac. 425. Error without prejudice is not a ground for reversal. Reynolds v. Lincoln, 71 Cal. 183; 9 Pac. 176; 12 Pac. 449; Allen v. McKay, 139 Cal. 94; 72 Pac. 713. A judgment will not be reversed for a mere technical error of law, which, after the case has been tried, is of too little consequence to be, in any substantial sense, a prejudicial error: such error, unaccompanied by injury, will be disregarded on appeal. Sloane v. Southern California Ry. Co., 111 Cal. 668; 32 L. R. A. 193; 44 Pac. 320; Baker v. Southern California Ry. Co., 114 Cal. 501; 46 Pac. 604; Smith v. Smith, 119 Cal. 183; 48 Pac. 730, 51 Pac. 183; Hirshfeld v. Weill, 121 Cal. 13; 53 Pac. 402; Holland v. McDade, 125 Cal. 353; 58 Pac. 9; Stephenson v. Deuel, 125 Cal 656; 58 Pac. 258; Foerst v. Kelso, 131 Cal. 376; 63 Pac. 681. Errors not affecting the substantial rights of the parties may be disregarded (Gassen v. Bower, 72 Cal. 555; 14 Pac. 206); they are unavailing on appeal, even when the subject of exception, and much less so when permitted without exception. Paige v. O'Neal, 12 Cal. 483. When a case has been tried and judgment rendered on the facts, it must appear that some substantial right of a party has been affected, or some prejudicial error, as distinguished from an abstract error, suffered by him, in order to warrant a reversal. Rooney v. Gray Bros., 145 Cal. 753; 79

Pac. 523. A misnomer in entitling the name of the court, on the face of the complaint only, is a defect not affecting the substantial rights of the defendant. Ex parte Fil Ki, 79 Cal. 584; 21 Pac. 974. Where the substantial rights of the parties have not been affected by a misjoinder of causes of action, a judgment, rendered after the trial of the case upon its merits, should not be reversed because the court overruled the demurrer for such misjoinder. Reynolds v. Lincoln, 71 Cal. 183; 9 Pac. 176; 12 Pac. 449; Asevado v. Orr, 100 Cal. 293; 34 Pac. 777; Hirshfeld v. Weill, 121 Cal. 13; 53 Pac. 402. A judgment should not be reversed because of an alleged error or defect in the summons, which is claimed not to state the cause and general nature of the action, where such error or defect is more technical than real. King v. Blood, 41 Cal. 314. A judgment, otherwise valid, will not be reversed, merely because the action is brought in the name of a reclamation district, instead of in the name of the people; the real party in interest being the reclamation district. Reclamation District v. Hagar, 66 Cal. 54; 4 Pac. 945. An error of the superior court in vacating a void order made by a justice of the peace, is a harmless error. Baird v. Justice's Court, 11 Cal. App. 439; 105 Pac. 259. Where the complaint alleged that the defendant was indebted to the plaintiff therein in the sums "hereinbefore" stated, but in the copy of the complaint served on the defendant with the copy of the summons the word "hereinbefore" was written "hereinafter," the variance is immaterial: it could not have misled the defendant nor have affected his substantial rights. Fraser v. Oakdale Lumber etc. Co., 73 Cal. 187; 14 Pac. 829. Harmless error in giving instructions is no ground for reversal of judgment. Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461; 37 Pac. 375; Chapell v. Schmidt, 104 Cal. 511; 38 Pac. 892; People v. Stanton, 106 Cal. 139; 39 Pac. 525; Baker v. Borello, 131 Cal. 615; 63 Pac. 914; Dunlap v. Plummer, 1 Cal. App. 426; 82 Pac. 445. Where dates in the complaint and in the finding are erroneous, they should be corrected by amendment; but where they are harmless, the judgment will not be reversed because thereof. Thomas v. Jameson, 77 Cal. 91; 19 Pac. 177. Where, before judgment, delivery of property sought to be recovered is made to the plaintiff, a judgment in favor of the plaintiff for its possession is not void or erroneous because not in the alternative, and cannot be reversed. Claudius v. Aguirre, 89 Cal. 501; 26 Pac. 1077. The sufficiency of a notice is not impaired by its being directed to the attorneys for the "executor," where there were three executors; the amendment, in such case, follows as a matter of course. Estate of Nelson, 128 Cal. 242; 60 Pac. 772. Where an amended decree, rendered at the same time as the final decree, is simply what the original decree should have been, and does no injustice to the defendant, it will not be disturbed on appeal on account of an alleged irregularity not affecting the merits. Gronfier v. Minturn, 5 Cal. 492. The order in which motions are overruled does not in any way affect the substantial rights of the parties: this is a harmless irregularity, and will be disregarded on appeal. Pennie v. Visher, 94 Cal. 323; 29 Pac. 711.

Error must change result. No judgment will be reversed for error, unless a different result would have been probable but for the error. Estate of Morcy, 147 Cal. 495; 82 Pac. 57. To reverse the judgment of the court below, and send the case back for a new trial, when the only result would be a judgment the same as that appealed from, would be an unjust hardship on the party, and a sacrifice of substance to form. First Nat. Bank v. Henderson, 101 Cal. 307; 35 Pac. 899. A judgment, otherwise properly rendered, will not be reversed because of an immaterial error in apportioning costs, which, if corrected, would not benefit the appellant. George v. Silva, 68 Cal. 272; 9 Pac. 257. Where the complaint, on its face, shows that the plaintiff could not, in any event, recover upon the cause of action set forth therein, and no amendment could cure it, no erroneous ruling at the trial will justify a reversal of the judgment against him. Peters v. Peters, 156 Cal. 32; 23 L. R. A. (N. S.) 699; 103 Pac. 219. The mere failure to include in the judgment a clause which could not have any operative effect, or confer any right or protection upon either the plaintiff or the defendant, does not affect the substantial rights of either party, and is not a sufficient ground for reversal of the judgment. Claudius v. Aguirre, 89 Cal. 501; 26 Pac. 1077. An objection, by demurrer, that the plaintiff improperly joined causes of action, becomes immaterial, where judgment was given for only one of the causes of action. Harris v. Smith, 132 Cal. 316; 64 Pac. 409.

Injury must be to appellant. This section applies in case of immaterial errors or defects in a judgment in favor of a defendant, in whose interests the plaintiff has no concern. People v. Rea, 2 Cal. App. 109; 83 Pac. 165. A judgment or order will not be reversed for any error that does not injure the appellant. Peters v. Peters, 156 Cal. 32; 23 L. R. A. (N. S.) 699; 103 Pac. 219. Where an appellant has no interest in the subject-matter of the decree, and he is in no way aggrieved thereby, the action of the court, conceding that it erred, will not be reviewed on appeal. Foster v. Bowles, 138 Cal. 449; 71 Pac. 495. A decree declaring the plaintiff the owner of land, and quieting his title thereto, although it might have been drawn for

a reconveyance, or might have ordered a cancellation of the deeds, cannot injure a defendant who has no beneficial interest in the land. Jones v. Jones, 140 Cal. 587; 74 Pac. 143. Upon appeal by one defendant from a several judgment against him, which is supported by the complaint, it does not concern him that there is no separate finding upon the issue made by the separate answer of a co-defendant not appealing. Dobbs v. Purington, 136 Cal. 70; 68 Pac. 323. The failure of the court to find upon a plea of the statute of limitations, set up by the respondent, is entirely immaterial to the appellant. Merrill v. Clark, 103 Cal. 367; 37 Pac. 238. Where, in an action against two defendants, the jury rendered a verdict for the "defendant," the defect is immaterial, and no substantial rights of the plaintiff are affected. Willard v. Archer, 63 Cal. 33.

Matters of discretion. Judgment will not be reversed because of the action of the court in matters as to which it has discretion, where such discretion is not abused. Lee v. Southern Pacific R. R. Co., 101 Cal. 118; 35 Pac. 572; Wolff v. Wolff, 102 Cal. 433; 36 Pac. 767, 1037; Stockton etc. Agricultural Works v. Houser, 103 Cal. 377; 37 Pac. 179. The action of the trial court in refusing to reopen the case, after the close of the trial, to allow the introduction of additional evidence, is not an abuse of discretion, where there was no excuse for not having produced the evidence at the trial. Consolidated Nat. Bank v. Pacific Coast S. S. Co., 95 Cal. 1; 29 Am. St. Rep. 85; 30 Pac. 96. Where two defendants filed a joint plea of the statute of limitations, and the plea was held bad as to one, and the other was permitted to file a separate plea, there is not such a gross abuse of discretion as to enable the appellate court to revise it. Robinson v. Smith, 14 Cal. 254. An order granting a new trial will not be reversed on the ground of surprise, unless there has been an abuse of discretion in the court below. Nooney v. Mahoney, 30 Cal. 226. Where the defendant asks leave, at the trial, to verify his answer, pending the motion of the plaintiff to strike it out, the refusal of the court to allow the defendant to do so is such abuse of discretion as amounts to error. Lattimer v. Ryan, 20 Cal. 628. Where the defendant filed a copy of the original verified answer by mistake, which was not discovered until after the case was opened to the jury, the refusal of the court to allow the defendant to correct the error was an abuse of discretion requiring the reversal of the judgment and the granting of a new trial. Arrington v. Tupper, 10 Cal. 464.

Record must show error. A judgment rendered upon a complaint, after a demurrer thereto has been improperly overruled, must be reversed upon appeal, unless it clearly appears that no injury to the defendant resulted therefrom. Thelin v. Stewart, 100 Cal. 372; 34 Pac. 861. The ruling of the trial court in excluding depositions in behalf of the plaintiff cannot be deemed prejudicial, where the transcript does not show their contents or materiality. Glenmore Distilling Co. v. Craig, 128 Cal. 264; 60 Pac. 858. Where an action upon a lost note was unsuccessfully defended after tender of an indemnity bond in the complaint, and the record on appeal does not show what costs had accrued at the time the bond was filed, or when it was tendered, the judgment for costs will not be disturbed on appeal. Farmers' Exchange Bank v. Altura Gold Mill etc. Co., 129 Cal. 263; 61 Pac. 1077.

Immaterial defects in complaint. This section applies in case of immaterial errors or defects in a complaint. Pettit v. Forsyth, 15 Cal. App. 149; 113 Pac. 892. Although a pleading is subject to criticism for ambiguity, yet a reversal of the judgment is not justified therefor, unless it is radically defective. Gassen v. Bower, 72 Cal. 555; 14 Pac. 206. Where the averments of a complaint are simply uncertain and defective, but are sufficient when tested only by a general demurrer, and substantially state a cause of action, a reversal of the judgment is not justified. Grant v. Sheerin, 84 Cal. 197; 23 Pac. 1094. A judgment will not be reversed for uncertainty of the complaint alone, where the answer and trial show that the defendant was not misled to his injury. Williams v. Casebeer, 126 Cal. 77; 58 Pac. 380. A complaint, defective in form, but not in substance, can be reached only by special demurrer that it is ambiguous or uncertain; but such defect, not affecting the substantial rights of the parties, will be disregarded on appeal. Eachus v. Los Angeles, 130 Cal. 492; 80 Pac. 147. Absurd and inconsistent allegations in a complaint, the truth of which is impossible, may be disregarded as surplusage. Board of Supervisors v. Bird, 31 Cal. 66. A complaint stating facts sufficient to sustain a judgment for damages, but not containing a formal allegation of the amount of damages sustained, but concluding with a prayer for judgment for the sum stated, is sufficient: errors or defects will be disregarded on appeal. Riser v. Walton, 78 Cal. 490; 21 Pac. 362. An objection to the complaint, for lack of direct, positive allegations, will be disregarded on appeal, where there was an attempt to allege what should have been alleged in plain, direct, and positive language: the failure so to do constitutes a defect, which does not affect the substantial rights of the parties. Maggini v. Pezzoni, 76 Cal. 631; 18 Pac. 687. Although the prayer of a bill is inartificially framed, under the general prayer for relief, yet the court may disregard the mistakes, and treat them as surplusage, and grant such relief as will conform to the

bill. Truebody v. Jacobson, 2 Cal. 269. An action does not fail because the plaintiff makes a mistake as to the form of his remedy: he can be sent out of court upon his facts, only when he is not entitled to relief either at law or in equity. Bedolla v. Williams, 15 Cal. App. 738; 115 Pac. 747. Where only one cause of action is stated in the complaint, but one portion thereof is introduced with the words, "For a separate and second cause of action, plaintiff avers," etc., this mistaken designation will be disregarded as an error not affecting the substantial rights of the parties. Murray v. Murray, 115 Cal. 266; 56 Am. St. Rep. 97; 37 L. R. A. 626; 47 Pac. 37.

Answer curing defective complaint. A defective averment in a complaint is immaterial, where it is cured by the answer. Burns v. Cushing, 96 Cal. 669; 31 Pac. 1124; Shively v. Semi-Tropic Land etc. Co., 99 Cal. 259; 33 Pac. 848; Walkerley v. Greene, 104 Cal. 208; 37 Pac. 890; Daggett v. Gray, 110 Cal. 169; 42 Pac. 568; Vance v. Anderson, 113 Cal. 532; 45 Pac. 816. The failure of the complaint to state sufficient facts is cured by the statement of the omitted facts in the other pleadings: the fact that there is a demurrer does not take it out of the rule of express aider. Cohen v. Knox, 90 Cal. 266; 13 L. R. A. 711; 27 Pac. 215. The omission of an allegation in the complaint may be so aided by an averment of that fact in the answer as to uphold the judgment. Daggett v. Gray, 110 Cal. 169; 42 Pac. 568. The failure of the complaint to set forth material facts, so that no cause of action is stated, is immaterial, where the answer avers such facts, and the defect is cured. Shively v. Semi-Tropic Land etc. Co., 99 Cal. 259; 33 Pac. 848. The objection that the complaint does not aver that any motion was made in the suit, is not tenable, where the defect, if any, is cured by the answer, which sets out the motion, with the affidavit on which it was made, and the order of the court denying the same. Herd v. Touhy, 133 Cal. 55; 65 Pac. 139. Where the petition for an alternative writ of mandate is defective, the supreme court will not sustain a demurrer to the petition to quash the writ, where matters set out in the answer are of such a nature as to cure the defects in the petition. Walkerley v. Greene, 104 Cal. 208; 37 Pac. 890. The failure to aver non-payment is not fatal, nor ground for a reversal of the judgment, where the pleadings of the opposite party show non-payment. Abner Doble Co. v. Keystone Consol. Mining Co., 145 Cal. 490; 78 Pac. 1050. Where the complaint alleges that the plaintiff was in the possession of the property, and entitled thereto, on the day before the commencement of the action, whatever defect there may be in such allegation is cured by an answer that denies the plaintiff's right of possession on the day named. Flinn v. Ferry, 127 Cal. 648; 60 Pac. 434. Where there is a failure, in the complaint, to aver the ultimate fact that the plaintiff was the owner and entitled to the possession of the property when the action was commenced, the defect is not cured by a mere denial, in the answer, that the plaintiff was the owner or entitled to the possession of the goods at the time alleged, "or at any other time": an insufficient complaint is cured by the answer, only where the material facts omitted are supplied by the averments of the answer. Vanalstine v. Whelan, 135 Cal. 232; 67 Pac. 125.

Allowance or refusal of amendments. Where all the matters averred in a proposed amended answer might have been proved under the original answer, the judgment will not be reversed because of the refusal of the court to allow the filing of such amended answer (Edgar v. Stevenson, 70 Cal. 286; 11 Pac. 704); nor because the court refused to allow the defendant to amend his answer, where both parties introduced evidence just as if the answer were perfect in the particulars sought to be amended. Southern Pacific R. R. Co. v. Purcell, 77 Cal. 69; 18 Pac. 886. The failure to make an amendment, allowed formally upon the record, does not necessitate a reversal of the judgment: the record will be ordered corrected to conform with the order permitting the amendment. French v. McCarthy, 125 Cal. 508; 58 Pac. 154. An error committed by the court in refusing to allow an amendment, is cured by receiving the evidence and making a finding upon the very matter to which the amendment was directed; and, where no objection was made to the evidence in support of the finding at the trial, it cannot be contended that such finding was not within the issues. McDougald v. Hulet, 132 Cal. 154; 64 Pac. 278. Where the record fails to show any request for leave to amend the complaint, a reversal of judgment cannot be had upon that ground on appeal. Prince v. Lamb, 128 Cal. 120; 60 Pac. 689. Where the gist of the action, as stated in the original complaint, is the same as that contained in the complaint upon which the trial was had, and the amended complaint was filed upon terms with which the plaintiff complied, there is nothing to work any hardship or surprise upon the defendant, nor is there any error therein. Riverside etc. Irrigation Co. v. Jensen, 73 Cal. 550; 15 Pac. 131. Where a defendant, without leave of court, filed an amended answer, which is stricken out at the trial, on motion, but is allowed to be filed on request, the error, if any, in striking out the answer in the presence of the jury, is cured by the request. Risdon v. Yates, 145 Cal. 210; 78 Pac. 641. Where the plaintiff is permitted at the trial to amend the statement of his cause of action, and the amendment is not made and filed until after the verdict and the entry of

judgment, but the case is tried with reference to it, the defendant is not prejudiced. Stark v. Wellman, 96 Cal. 400; 31 Pac. 259. Where the court allows an attorney to insert an omitted signature to a complaint, to which an answer has been filed, and the court overrules an objection of the defendant thereto, and denies his motion to answer or demur to the complaint as signed, but an amended answer is in fact filed after the close of the plaintiff's evidence, no substantial rights of the defendant are affected. Smith v. Dorn, 96 Cal. 73; 30 Pac. 1024. The defendant is not prejudiced by the court's refusal to allow him to amend his answer, where he is afterwards allowed to file an amended answer, after all the amendments to the complaint are filed, and in which he substantially denies all the material averments of the complaint as amended. Frey v. Vignier, 145 Cal. 251; 78 Pac. 733. Where, on appeal, the defendant appears to have lost his case for want of evidence, and not by reason of any defect in his answer, he is not prejudiced or injured by the refusal of the court to permit him to amend his answer to conform to the proof. Green v. Burr, 131 Cal. 236; 63 Pac. 360. Refusal of the court to permit the plaintiff to strike out a claim for damages is error: he has a right to waive a recovery, without regard to the purpose which may influence him. Grass Valley Quartz Mining Co. v. Stackhouse, 6 Cal. 413. Where a defendant obtrudes himself into an action, without opposition, but the complaint is not amended by adding his name, as it might be, and he avails himself of all the rights and privileges of a defendant, his substantial rights are not affected by the failure to amend, nor is the judgment affected by reason of the defect. Tyrrell v. Baldwin, 67 Cal. 1; 6 Pac. 867. Notice should be given of a motion for leave to file an amended complaint; but where the motion should be granted were due notice given, the granting of leave to amend, without notice, is without prejudice. Baker v. Southern California Ry. Co., 114 Cal. 501; 46 Pac. 604. The amendment of the complaint to conform to the proof does not change the cause of action, nor can it operate to the prejudice of the defendant. Blankenship v. Whaley, 142 Cal. 566; 76 Pac. 235. Where the verdict is for actual damage in excess of that alleged in the complaint, and the evidence was not sufficient to warrant the excess, it is error to allow an amendment of the complaint, after verdict, in order to sustain the verdict; and on appeal, while the judgment will not be reversed, the court will be directed to modify it by reducing it to the extent of the excess. Clark v. San Francisco etc. Ry. Co., 142 Cal. 614; 76 Pac. 507.

Striking out pleadings. Error of the court in refusing to strike out portions of the complaint, if harmless, will be disregarded on appeal. Hunt v. Davis, 135 Cal. 31; 66 Pac. 957. An error in striking out or in refusing to strike out the allegations in a complaint or denials in an answer, will not justify a reversal, where such rulings are without prejudice. Sloane v. Southern California Ry. Co., 111 Cal. 668; 32 L. R. A. 193; 44 Pac. 320. There is no prejudicial error in striking out a part of the defendant's answer, where every material issue is before the court after the objectionable part is stricken out. Santa Ana v. Brunner, 132 Cal. 234; 64 Pac. 287. Striking from the answer the denial of the corporate existence of the plaintiff is not reversible error, where the plaintiff is afterwards permitted to put in evidence the certificate of incorporation. People v. Hagar, 52 Cal. 171.

Variance. Immaterial variances are to be disregarded on the trial, or whenever the question may be presented: this is a most beneficial statutory provision, and should be liberally construed and carried out. Began v. O'Reilly, 32 Cal. 11. The judgment will not be reversed because of immaterial variance (Houghton v. Trumbo, 103 Cal. 239; 37 Pac. 152; Bancroft Co. v. Haslett, 106 Cal. 151; 39 Pac. 602); nor on the ground of variance between the pleadings and the proof, where such variance has not misled the appellant to his prejudice (Began v. O'Reilly, 32 Cal. 11; Ah Goon v. Tarpey, 2 Cal. Unrep. 483; 7 Pac. 188); nor because of a variance between the proof and the averments of the complaint, where the defendant makes no objection on that ground (Marshall v. Ferguson, 23 Cal. 65); nor because of a technical variance between the evidence and finding of facts and the pleading, where no objection was made thereto at the trial (Dikeman v. Norrie, 36 Cal. 94); nor where there is a variance in the contract between the parties as stipulated at the trial and that alleged in the complaint, and no objection is made on this ground, at any stage of the proceedings (Colfax etc. Fruit Co. v. Southern Pacific Co., 118 Cal. 648; 40 L. R. A. 78; 50 Pac. 775); nor, in an action for conversion, because of a variance between the date of the conversion alleged in the complaint and that established by the proof, if prior to the commencement of the action (Bancroft Co. v. Haslett, 106 Cal. 151; 39 Pac. 602); nor, in an action on a bond, where it is alleged in the complaint that it was executed by certain persons, and the proof is, that it was executed by only some of such persons (Kurtz v. Forguer, 94 Cal. 91; 29 Pac. 413); nor, where the complaint is sufficient as against a general demurrer, and sustains the judgment, because of a variance between the proof and the allegations (Carter v. Rhodes, 135 Cal. 46; 66 Pac. 985; Miller v. Ballerino, 135 Cal. 566; 67 Pac. 1046; 68 Pac. 600); nor where the

averment in the complaint is, that the contract price of materials was what they were reasonably worth, and the notice of lien provides that they were to be paid for at current market prices. Santa Monica Lumber etc. Co. v. Hege, 119 Cal. 376; 51 Pac. 555. Where the proof is at variance with the allegation of the complaint as to the sale of property for a specified amount, a finding that the amount of the sale is as alleged is not sustained by the evidence, and the judgment should be reversed. Pettinger v. Fast, 87 Cal. 461; 25 Pac. 680. A defense not pleaded cannot be considered, though shown by the evidence: the rule as to curing defects by litigating a question without objection, applies only where the pleading is defective, and not where there is a total absence of averment. Wilson v. White, 84 Cal. 239; 24 Pac. 114.

Variance between complaint and exhibit. Any variance between the terms of a contract as alleged in the complaint, and those of a copy attached thereto, is only an ambiguity or uncertainty, which is removed by the finding of the court that the copy as set forth in the complaint is the contract into which the parties entered. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692; 75 Pac. 564.

Misnomer. The mere error of one letter in a defendant's christian name, as "Dellie," instead of "Dollie," is immaterial, where she is the person the plaintiff seeks to bind by the action. Thompson v. Alford, 135 Cal. 52; 66 Pac. 983. Where the relief granted in a case is limited to an injunction, the fact that a party, necessary only to a different branch of the case, is sued by a wrong name, does not prejudice the defendant: the misnomer is immaterial. Parrott v. Byers, 40 Cal. 614. The middle initial is a material part of a name; and where the parties sued and served appear to be two different persons, from a variance in the middle initial, and there is no proof, in the record, of the service of summons on the defendant sued, a judgment rendered against him by default will be reversed on appeal. Houghton v. Tibbets, 126 Cal. 57; 58 Pac. 318.

Misjoinder of parties. A judgment, after trial upon the merits, will not be reversed because the court improperly overruled a demurrer upon the ground of misjoinder of parties, where no substantial right of the parties was affected thereby. Woollacott v. Meekin, 151 Cal. 701; 91 Pac. 612. Where an action is brought against a city and the city treasurer, the city, being alone liable, cannot complain of error as to the misjoinder. Madary v. Fresno, 20 Cal. App. 91; 128 Pac. 340.

Rulings on demurrer. This section applies to cases of immaterial errors or defects in rulings on demurrers. Pettit v. Forsyth, 15 Cal. App. 149; 113 Pac. 892; Hentig v. Johnson, 8 Cal. App. 221; 96 Pac. 390. Where there is no substantial injury, the improper overruling of a demurrer to the complaint for uncertainty or ambiguity is not ground for reversal. Holland v. McDade, 125 Cal. 353; 58 Pac. 9; Stephenson v. Deuel, 125 Cal. 656; 58 Pac. 258; Foerst v. Kelso, 131 Cal. 376; 63 Pac. 681. A corporation debtor cannot be prejudiced by the overruling of its demurrers, where the record shows that all of its interests have passed to the purchaser at a receiver's sale, who appeared in the action adversely to the appellant, and is recognized in the decree as its successor in interest. Citizens' Bank of Los Angeles v. Los Angeles Iron etc. Co., 131 Cal. 187; 82 Am. St. Rep. 341; 63 Pac. 462. Where a complaint contains two counts, the action of the court in overruling a demurrer thereto on the ground of misjoinder of causes of action, if error, is without injury, where one count is wholly abandoned at the trial, and the verdict is for a smaller sum than that claimed in the other count. Gillaspie v. Hagans, 90 Cal. 90; 27 Pac. 34. Where two counts in a complaint are evidently intended to represent the same cause of action, it is not prejudicial error to sustain a demurrer to the first, where the plaintiff is not injured thereby. Consolidated Nat. Bank v. Pacific Coast S. S. Co., 95 Cal. 1; 29 Am. St. Rep. 85; 30 Pac. 96. Where there is enough matter in the answer, well pleaded, to constitute a good defense to the action, the overruling of a demurrer to the answer does not affect any substantial right of the plaintiff, and the judgment will be affirmed. Younglove v. Nixon, 61 Cal. 301. The overruling of a demurrer, before the overruling of an improper motion for a change of venue, is a harmless irregularity, in no way affecting the substantial rights of the parties, which will be disregarded on appeal. Pennie v. Visher, 94 Cal. 323; 29 Pac. 711.

Rulings on evidence. The erroneous exclusion or rejection of evidence, not affecting the substantial rights of the appellant, is not ground for a reversal of the judgment (Alexander v. Central Lumber etc. Co., 104 Cal. 532; 38 Pac. 410; Hoult v. Ramsbottom, 127 Cal. 171; 59 Pac. 587; Glenmore Distilling Co. v. Craig, 128 Cal. 264; 60 Pac. 858; St. Vincent's Institution v. Davis, 129 Cal. 17; 61 Pac. 476; Hudson v. Hudson, 129 Cal. 141; 61 Pac. 773; Bosqui v. Sutro R. R. Co., 131 Cal. 390; 63 Pac. 682; Carpy v. Dowdell, 131 Cal. 499; 63 Pac. 780; People v. Harlan, 133 Cal. 16; 65 Pac. 9; Hunter v. Milam, 133 Cal. 601; 65 Pac. 1079; Harp v. Harp, 136 Cal. 421; 69 Pac. 28; McMullin v. McMullin, 140 Cal. 112; 73 Pac. 808); neither is the erroneous admission of evidence, where the substantial rights of the appellant are not affected (People v.

Daniels, 105 Cal. 262; 38 Pac. 720; People v. Clark, 106 Cal. 32; 39 Pac. 53; Hewes v. Germain Fruit Co., 106 Cal. 441; 39 Pac. 853; People v. Maroney, 109 Cal. 277; 41 Pac. 1097; Simmons v. McCarthy, 128 Cal. 455; 60 Pac. 1037; Coonan v. Lowenthal, 129 Cal. 197; 61 Pac. 940; Hunter v. Milam, 133 Cal. 601; 65 Pac. 1079; Rowe v. Hibernia Sav. & L. Soc., 134 Cal. 403; 66 Pac. 569; Bacon v. Kearney Vineyard Syndicate, 1 Cal. App. 275; 82 Pac. 84; Bird v. Utica Gold Mining Co., 2 Cal. App. 674; 84 Pac. 256; Stone v. San Francisco Brick Co., 13 Cal. App. 203; 109 Pac. 103; Higgins v. Los Angeles Ry. Co., 5 Cal. App. 748; 91 Pac. 344); nor are erroneous or unimportant rulings upon the evidence, which do not materially injure the appellant. Duffy v. Duffy, 104 Cal. 602; 38 Pac. 443; People v. Worthington, 115 Cal. 242; 46 Pac. 1061; People v. Barthleman, 120 Cal. 7; 52 Pac. 112; Hudson v. Hudson, 129 Cal. 141; 61 Pac. 773; People v. Wynn, 133 Cal. 72; 65 Pac. 126. The admission of immaterial evidence is harmless, and will be disregarded on appeal, where it did not and could not affect the question at issue, nor prejudicially affect the appellant. Redfield v. Oakland Consol. etc. Ry. Co., 112 Cal. 220; 43 Pac. 1117; People v. Helm, 152 Cal. 532; 93 Pac. 99. An error in the admission of immaterial evidence is cured by the subsequent amendment of the complaint, before the close of the trial, making the evidence material. Curtiss v. Ætna Life Ins. Co., 90 Cal. 245; 25 Am. St. Rep. 114; 27 Pac. 211. There is no prejudicial error in sustaining an objection to questions asked of a witness, where he is afterwards permitted to and does fully answer them. Consolidated Nat. Bank v. Pacific Coast S. S. Co., 95 Cal. 1; 29 Am. St. Rep. 85; 30 Pac. 96. Where a special contract for the performance of work was proved, the judgment will not be reversed because of the admission of testimony of the value of the plaintiff's services, the action being brought upon quantum meruit. De Boom v. Priestly, 1 Cal. 206.

Failure to rule on objection. Where no possible injury could have resulted to the appellant by reason of the court's failure to rule upon a demurrer, the judgment should not be reversed. Ferrier v. Ferrier, 64 Cal. 23; 27 Pac. 960. The failure of the court to rule upon objections made to evidence offered in support of the defense is immaterial error, where the defense is not so pleaded as to be available. California Raisin Growers' Ass'n v. Abbott, 160 Cal. 601; 117 Pac. 767.

Verdict curing error. The general rule as to the effect of a verdict upon defects in pleading is, that, wherever facts are not expressly stated, which are so essential to a recovery that, without proof of them on the trial, a verdict could not have been rendered under the direction of the court, there the want of the express statement is cured by verdict, provided the complaint contains terms sufficiently general to comprehend the facts in fair and reasonable intendment. Garner v. Marshall, 9 Cal. 268. The expression, "cured by verdict," signifies that the court will, after verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings was duly proved at the trial. Treanor v. Houghton, 103 Cal. 53; 36 Pac. 1081. Defective allegations in the complaint are cured by a verdict, and all intendments will be made in support of the judgment thereon. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692; 75 Pac. 564. Where the complaint contains the substantial averments of a cause of action though defective in form and certainty, the defect is cured by a verdict or default (People v. Rains, 23 Cal. 127); but where there is an entire absence of a material allegation, the rule that a defective pleading may be corrected by verdict has no application. Richards v. Travelers Ins. Co., 80 Cal. 505; 22 Pac. 939. Where a cause was tried without any objection to the sufficiency of the complaint to present the issue, it must be held, after verdict, that the issue was sufficiently presented. Cortelyou v. Jones, 132 Cal. 131; 64 Pac. 119.

Judgment curing findings. Where the verdict is manifestly erroneous, the judgment, modified by the court, with the assent of the plaintiff, is without prejudice to the defendant, and will be affirmed. Pettit v. Forsyth, 15 Cal. App. 149; 113 Pac. 892. An erroneous finding, if disregarded by the judgment, is without prejudice. Pugh v. Moxley, 164 Cal. 374; 128 Pac. 1037. Where a cause is properly decided upon the issues raised by special defenses, and the decision does not necessarily rest upon the allegations of the complaint, the latter become immaterial; whether the finding, as to them, was or was not contrary to the evidence is of no consequence. Rauer v. Fay, 128 Cal. 523; 61 Pac. 90. A determination by the court as to whether its findings as signed and filed have been surreptitiously altered will rarely be disturbed on appeal. Morrison v. McCue, 45 Cal. 118.

Conclusions of law. The words, "Let judgment and decree be entered accordingly," added to the findings of fact, must be held, on appeal, to be a sufficient statement of the conclusions of law, where it is evident that any more specific conclusions of law must have been in favor of the party for whom judgment was ordered: the absence of more specific conclusions is not an error or defect affecting any substantial right for which the judgment should be reversed. Rea v. Haffenden, 116 Cal. 596; 48 Pac. 716.

Clerical errors. A clerical mistake in the finding of a probative fact is immaterial,

where other facts support the judgment. Welsh v. Bardshar, 137 Cal. 154; 69 Pac. 977. The action of the clerk in entering judgment for an amount in excess of that specified in the summons, is not ground for reversing the judgment, but the superior court will be directed to order its clerk to modify its judgment properly. Alexander v. McDow, 108 Cal. 25; 41 Pac. 24. A judgment against a defendant, otherwise properly rendered, will not be reversed, merely because the amount of the costs of one plaintiff, instead of being entered in his favor, is erroneously included in the judgment in favor of the other. George v. Silva, 68 Cal. 272; 9 Pac. 257. Where the court orders the true name of a defendant, sued and served under a fictitious name, to be inserted in the complaint, in place of the fictitious name, the order is a sufficient amendment, and a finding that such amendment was made is correct, though it was not in fact made; the error, if any, being merely clerical, may be corrected by the court at any time, and will be disregarded on appeal as immaterial. Hoffman v. Keeton, 132 Cal. 195; 64 Pac. 264. A decree of foreclosure, erroneous because of the entry of costs by the clerk before taxation, is amendable, and the subsequent action of the court in taxing costs is an amendment curing the error. Janes v. Bullard, 107 Cal. 130; 40 Pac. 108.

Omitted findings. The judgment will not be reversed because of the want of a finding on a particular issue, which is not prejudicial to the appellant (McCourtney v. Fortune, 57 Cal. 617; Winslow v. Gohransen, 88 Cal. 450; 26 Pac. 504); nor because of the failure to find on an affirmative defense (Mushet v. Fox, 6 Cal. App. 77; 91 Pac. 534); nor because of the failure to find on issues, where finding thereon could not have changed the judgment (Fogg v. Perris Irr. District, 154 Cal. 209; 97 Pac. 316), or where the finding thereon would have been adverse to the appellant. Winslow v. Gohransen, 88 Cal. 450; 26 Pac. 504. After judgment has been entered upon the findings, the court cannot cause to be filed an omitted finding; and the judgment should not be reversed on that ground, where a finding upon that issue is but a conclusion of law from the other facts found. Richter v. Henningsan, 110 Cal. 530; 42 Pac. 1077.

Conflicting findings. The court should not strain the language of the finding to make out a case of conflict: the finding should be reconciled, if it can be reasonably done. Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 606; 14 Pac. 379; Heaton-Hobson etc. Law Offices v. Arper, 145 Cal. 282; 78 Pac. 721. A finding, by the court, of evidence of title, rather than of the ultimate fact of title, in an action for the wrongful seizure of property, is an error or defect not affecting the substantial rights of the parties, and should be disregarded on appeal, where the court had found that the plaintiff was the owner and entitled to the possession of the property at the time of the commencement of the action. Averett v. Sobrunes, 79 Cal. 207; 21 Pac. 739.

Errors in description. Errors in description, which could not and which do not mislead the opposite party, will be disregarded on appeal. Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074. The judgment will not be reversed because of uncertainty of description, which might prevent the judgment from being executed, unless the defendant may be prejudiced by the defective description. Asbill v. Standley, 3 Cal. Unrep. 665; 31 Pac. 738. Where the judgment refers to the finding, and the finding refers to the complaint, for a description, the reference is inexcusably circuitous, but not ambiguous, where there is but one complaint: the judgment may be modified so as to make the description certain. Kelly v. McKibben, 54 Cal. 192.

Waiver of defects, errors, and objections. An error in overruling a demurrer to a separate defense in the answer, is without prejudice to the plaintiff, and is waived by the defendant, where he subsequently abandons the defense. Burroughs v. De Couts, 70 Cal. 361; 11 Pac. 734. Where the plaintiff could not file a sufficient bill, and did not ask leave to amend, error will not be presumed. Robertson v. Burrell, 110 Cal. 568; 42 Pac. 1086. Where a party withholds an objection founded upon a defect, so as to induce his opponent to rely on his pleading as sufficient until too late to correct it, there is a fraud upon justice, preventing a fair trial, which will not be tolerated. Greiss v. State Investment etc. Co., 98 Cal. 241; 33 Pac. 195; Abner Doble Co. v. Keystone Consol. Min. Co., 145 Cal. 490; 78 Pac. 1050. The filing of an amended complaint supersedes any other complaint, and is a waiver of any error of the court in rulings made in any previous complaint. Brittan v. Oakland Bank of Savings, 112 Cal. 1; 44 Pac. 339; Collins v. Scott, 100 Cal. 446; 34 Pac. 1085; Ganceart v. Henry, 98 Cal. 281; 33 Pac. 92. By answering an amended complaint, the defendant waives the objection that it alleges a new cause of action arising after the institution of the suit. Witkowski v. Hern, 82 Cal. 604; 23 Pac. 132. All questions in relation to an amended answer are waived by the filing of an amended answer, upon which the defendant goes to trial. Kentfield v. Hayes, 57 Cal. 409. Where separate defenses are set up in the answer, and a demurrer is sustained to one or more of them, an amended answer, subsequently filed, operates as a waiver of error as to such defenses as are pleaded anew, but not as to defenses to which the demurrer was sustained, and which are not again pleaded. Hagely v. Hagely, 68 Cal. 348; 9 Pac. 305. An objection to a pleading is waived, if not taken at or before the trial: it cannot

be urged for the first time on appeal. Baxter v. Hart, 104 Cal. 344; 37 Pac. 941. Where there is no objection to the pleadings, or to the sufficiency of the evidence to support the findings, all errors and omissions are cured by the verdict, and waived, and cannot be urged for the first time on appeal. Treanor v. Houghton, 103 Cal. 53; 36 Pac. 1081. Where there was no special demurrer to the complaint, any grounds thereof must be deemed waived. Cuttting Fruit Packing Co. v. Canty, 141 Cal. 692; 75 Pac. 564. Objections are waived, where the demurrer is general, and no special grounds are specified therein. Daggett v. Gray, 110 Cal. 169; 42 Pac. 568. Where a party was in court when a motion was made, he cannot object that he had no notice of the proceeding: his presence constituted a waiver of notice. Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509. Where no exception was taken to the order of the court below, in overruling a motion to set aside the judgment and quash the execution, the question cannot be reviewed on appeal. Smith v. Curtis, 7 Cal. 584. Where, at the close of the testimony in a criminal trial, one judge took the place of another, and heard the argument and received the verdict, and the judge who first sat in the case afterwards resumed his seat, and passed, without objection, on the motion for a new trial, the defendant waived any further control of the proceedings and the passing of sentence. People v. Henderson, 28 Cal. 465. Where judgment is entered on a verdict, without any special findings of fact, there is a waiver of such findings, and the irregularity must be disregarded, where it does not affect the substantial rights of the parties. King v. Ponton, 82 Cal. 420; 22 Pac. 1087. Where the parties to an action agree upon the facts, subject to all legal objections, and the agreed statement of facts is admitted in evidence without objection, neither party, upon appeal, can raise the point that some of the admitted facts were not admissible in evidence under the pleadings. Hess v. Bolinger, 48 Cal. 349. Where a cause is tried as if the complaint were in all respects sufficient, and no error or defect in the record is found which affects the substantial rights of the parties, the judgment will not be reversed. People v. Reis, 76 Cal. 269; 18 Pac. 309. Where the plaintiff amends his complaint, making two counts instead of one, he cannot complain of error of the court in sustaining the demurrer to the original complaint. Gale v. Tuolumne Water Co., 14 Cal. 25. Where a public corporation and its board of directors are made defendants, and disclaim all personal interest in the controversy, and judgment is rendered against the corporation, but all the defendants join in a motion for a new trial, the plaintiff is not injured by the joinder of such defendants in the motion. Boehmer v. Big Rock Irrigation Dist., 117 Cal. 19; 48 Pac. 908. Where a trial is had without objection that a stipulated prayer was not formally added to the complaint, the defendant suffers no substantial injury. Murphy v. Stelling, 8 Cal. App. 702; 97 Pac. 672. Where the denial of an allegation of the complaint was treated as sufficient to raise an issue, the question of its sufficiency will be disregarded on appeal, after judgment against the plaintiff. Rowland v. Madden, 72 Cal. 17; 12 Pac. 226, 870. The judgment will not be reversed upon an objection, in the nature of a demurrer to the answer, on the ground that the facts stated are insufficient to constitute a defense, when made on appeal for the first time, and the point was fully litigated on the trial. Lee v. Figg, 37 Cal. 328; 99 Am. Dec. 271. Where the respondent excepted to the sufficiency of the sureties within five days after the filing of an undertaking on appeal, he is not injured by the failure of the appellant to serve notice of appeal on the day the undertaking was filed. Mokelumne Hill etc. Mining Co. v. Woodbury, 10 Cal. 185. Where a ruling striking out some of the denials of an answer has been obviated by an amended pleading, and the defendant has been able to present to the court his entire cause of action or defense, the ruling is without prejudice, and will be disregarded on appeal. Sloane v. Southern California Ry. Co., 111 Cal. 668; 32 L. R. A. 193; 44 Pac. 320.

CODE COMMISSIONERS' NOTE. Began v. O'Reilly, 32 Cal. 12; Peters v. Foss, 20 Cal. 586; Stout v. Coffin, 28 Cal. 65; Zeigler v. Wells Fargo & Co., 28 Cal. 263; Mendocino County v. Morris, 32 Cal. 145; Plate v. Vega, 31 Cal. 383.

§ 476. Time to amend or answer, running of. When a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order.

Time to answer. Ante, §§ 432, 472, 473.
Notice, service of. Post, §§ 1010 et seq.

Legislation § 476. 1. Added by Code Amdts. **1873–74,** p. 304.
2. Amendment by Stats. **1901,** p. 135; unconstitutional. See note ante, § 5.

Time to amend or answer after demurrer. This section relates only to the right to amend or answer, and does not affect the right to move for a dismissal. San José Land etc. Co. v. Allen, 129 Cal. 247; 61 Pac. 1083. Where a demurrer is overruled, and time is given to answer, if the notice required by this section is not given or waived, the time to answer does not run, and judgment by default cannot be entered; but, if notice of a decision on demurrer is given or waived, the appellant should make that fact appear in the record. Chamberlin v. Del Norte County, 77 Cal. 150; 19 Pac. 271. Written notice of the

overruling of a demurrer is waived by the presence in court of the attorney for the demurring party, at the time of the ruling: the time to amend or answer runs, in such case, from the time the ruling is made. Wall v. Heald, 95 Cal. 364; 30 Pac. 551. The time of the default runs from the date of the filing of the pleading, and not from the date of service. Billings v. Palmer, 2 Cal. App. 432; 83 Pac. 1077. Where the judgment recites that the time for answering had expired, and the record is silent as to the time allowed therefor, as well as to the giving of notice of the overruling of the demurrer, it will be presumed that the court had satisfactory evidence that the time for answering had expired. Catanich v. Hayes, 52 Cal. 338.

TITLE VII.

PROVISIONAL REMEDIES IN CIVIL ACTIONS.

Chapter I. Arrest and Bail. §§ 478–504.
II. Claim and Delivery of Personal Property. §§ 509–521.
III. Injunction. §§ 525–533.
IV. Attachment. §§ 537–560.
V. Receivers. §§ 564–570.
VI. Deposit in Court. §§ 572–574.

CHAPTER I.

ARREST AND BAIL.

§ 478. No person to be arrested except as prescribed by this code.
§ 479. Cases in which defendant may be arrested.
§ 480. Order for arrest, by whom made.
§ 481. Affidavit to obtain order, what to contain.
§ 482. Security by plaintiff before order of arrest.
§ 483. Order, when made, and its form.
§ 484. Affidavit and order to be delivered to the sheriff, and copy to defendant.
§ 485. Arrest, how made.
§ 486. Defendant to be discharged on bail or deposit.
§ 487. Bail, how given.
§ 488. Surrender of defendant.
§ 489. Same.
§ 490. Bail, how proceeded against.
§ 491. Bail, how exonerated.
§ 492. Delivery of undertaking to plaintiff, and its acceptance or rejection by him.
§ 493. Notice of justification. New undertaking, if other bail.
§ 494. Qualifications of bail.
§ 495. Justification of bail.
§ 496. Allowance of bail.
§ 497. Deposit of money with sheriff.
§ 498. Payment of money into court by sheriff.
§ 499. Substituting bail for deposit.
§ 500. Money deposited, how applied or disposed of.
§ 501. Sheriff, when liable as bail, and his discharge from liability.
§ 502. Proceedings on judgment against sheriff.
§ 503. Motion to vacate order of arrest or reduce bail. Affidavits on motion.
§ 504. When the order vacated or bail reduced.

§ 478. No person to be arrested except as prescribed by this code. No person can be arrested in a civil action, except as prescribed in this code.

Legislation § 478. Enacted March 11, 1872; based on Practice Act, § 72 (New York Code, § 179), which had (1) "shall" for "can," (2) "by" for "in," and (3) "act" for "code."

Civil action, what is. A proceeding for the settlement of the estate of a deceased person is not a civil action, within the provision of the constitution prohibiting imprisonment for debt. Ex parte Smith, 53 Cal. 204; Carpenter v. Superior Court, 75 Cal. 596; 19 Pac. 174.

Who exempt from arrest. Attendance upon any court as a witness, juror, or party, only exempts the person so in attendance from arrest in a civil action, but not from obeying an ordinary process of the court. Page v. Randall, 6 Cal. 32.

CODE COMMISSIONERS' NOTE. Benninghoff v. Oswell, 37 How. Pr. 235; Williams v. Bacon, 10 Wend. (N. Y.) 636.

§ 479. Cases in which defendant may be arrested. The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors.

2. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office, or in a professional employment, or for a willful violation of duty.

3. In an action to recover the possession of personal property unjustly detained, when the property or any part thereof, has been concealed, removed, or disposed of, to prevent its being found or taken by the sheriff.

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing

or disposing of the property for the taking, detention, or conversion of which the action is brought.

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

Arrest.

1. Of witness. See post, §§ 1993, 1994, 2067–2070.

2. Of person suspected of embezzlement from or concealment of papers of an estate. See post, § 1460.

3. Of debtor, when ordered in supplementary proceedings. See post, § 715.

4. Of witness disobeying subpœna. See § 1993.

5. Of executor, to compel attendance. See post, § 1440.

6. For disobedience of order to produce will. See post, § 1302.

7. When ordered in action for forcible entry and detainer. See post, § 1168.

Executor, attachment of, for failure to account. See post, §§ 1627, 1628.

Legislation § 479. 1. Enacted March 11, **1872;** based on Practice Act, § 73 (New York Code, § 179), which (1) had, in the introductory paragraph, after the word "cases," the words "arising after the passage of this act," (2) in subd. 1, after the words "his creditors," had the clause, "or when the action is for willful injury to person, to character, or to property, knowing the property to belong to another," and (3) in subd. 8, instead of the words "to prevent its being," had "so that it cannot be." When enacted in 1872, § 479 contained only two additions to the Practice Act; (1) in subd. 2, the word "fraudulent" was added before "misconduct," and (2) in subd. 3, the word "fraudulently" was added before "concealed."

2. Amended by Code Amdts. **1873–74,** p. 304.

Scope of section. There are many cases within the provisions of this section, in which the acts justifying the arrest may be committed after the action is commenced. Ex parte Howitz, 2 Cal. App. 752; 84 Pac. 229. This code prescribes the writs by which, and the proceedings upon which, a defendant may be arrested in a civil action: the writ of ne exeat not being among the number, the superior court has no power to issue it. Ex parte Harker, 49 Cal. 465.

Agency of defendant. Where the defendant received money as agent, he cannot be arrested without a showing of some fraudulent conduct on his part, or a demand on him by the principal, and a refusal to pay. In re Holdforth, 1 Cal. 438. Averments that the defendant received personal property in a fiduciary capacity, as the agent of the plaintiff, and that he was guilty of fraud in receiving and converting it to his own use, are not sufficient to warrant a judgment for the imprisonment of the defendant on the ground of fraud. Payne v. Elliot, 54 Cal. 339; 35 Am. Rep. 80.

Fraudulent transfer of property. The transfer of property, with intent to hinder, delay, and defraud creditors, does not make the party receiving such property liable to arrest on either mesne or final process: such a case does not fall within the provisions of the code or of the constitution, where an arrest may be had in a civil action. Cooper v. Nolan, 138 Cal. 248; 71 Pac. 179. Where a debt is fraudulently contracted by one member of a copartnership, the others being ignorant of the fraud, the liability to an action for the fraud is limited to the partner committing the same, unless the others assent thereto, or ratify it by adopting the fraudulent act, or retaining its fruits with knowledge thereof. Stewart v. Levy, 36 Cal. 159.

Pleadings. Matters pleaded to show fraud, which show no connection with the conversion complained of, and no relation between the plaintiff and the defendant setting forth fraud on the plaintiff's rights, are too general and indefinite, and are insufficient. Kullmann v. Greenebaum, 84 Cal. 98; 24 Pac. 49. Alternative or disjunctive pleadings are not permitted: to charge a defendant with receiving or collecting money as the agent, or attorney in fact, of the plaintiff, is insufficient. Porter v. Hermann, 8 Cal. 619. Where the character or capacity in which a party is alleged to have acted is essential to the charge of fraud, that character or capacity must be averred in direct and positive terms, or the charge must fall. Porter v. Hermann, 8 Cal. 619.

Proof of fraud. Fraud on the part of the defendant is necessary, in order that he may be arrested in a civil action for debt. In re Holdforth, 1 Cal. 438. The fraudulent intent to procure goods without payment is consummated when the possession of the goods is obtained without payment, according to the terms of sale: the debt is, under such circumstances, fraudulently contracted; and though payment after this might satisfy the debt, yet it would not remove the taint of fraud. Stewart v. Levy, 36 Cal. 159. To sustain allegations of fraud and deceit in contracting a debt, it is necessary to prove that the representations alleged to have been fraudulent and deceitful were not true. Belden v. Henriques, 8 Cal. 87.

Form of verdict. A special verdict, that the defendant was not guilty of fraud, is not inconsistent with a general verdict giving judgment against him for funds in his hands belonging to the plaintiff. Portland Cracker Co. v. Murphy, 130 Cal. 649; 63 Pac. 70. Where the defendant denies the indebtedness, and also denies the commission of the alleged fraud, a general verdict in favor of the plaintiff does not amount to a finding against the defendant upon the issue joined as to fraud in contracting the debt. Merritt v. Wilcox, 52 Cal. 238.

Arrest on final process. The liberty of the citizen is not to be imperiled by the presumption that a process has been issued

in a proper case: under such a presumption, there is not a single case in which a party might not be arrested and imprisoned on final process, although fraud never entered into the elements of the original suit or controversy. Matoon v. Eder, 6 Cal. 57. While the arrest of a defendant on final process is not expressly authorized by statute, yet, as the issue of fraud may be framed and tried, and the defendant adjudged guilty upon proper proof, and as the constitution does not prohibit, but by implication authorizes, imprisonment for fraud, the courts may order execution against the person of a defendant adjudged guilty of fraud. Stewart v. Levy, 36 Cal. 159. An execution against a person can issue only under the direction of the court, based upon the special facts found, and such facts cannot be considered by the jury, unless averred in the pleadings; it must be warranted by the judgment, and it has no validity if in excess thereof; to authorize an arrest on execution, the fraud must be stated in the judgment; the facts upon which the charge is based must be specifically alleged in the complaint, in order to authorize the judgment convicting the defendant of fraud; the judgment is the determination of the rights of the parties upon the facts pleaded, for the judgment cannot, in any event, exceed the relief warranted by the case stated in the complaint. Davis v. Robinson, 10 Cal. 411. The courts have power to pronounce such judgment as the exigencies of the case require, by virtue of their organization and common-law powers, except when limited by statute; and it would be an absurd provision of law to authorize the arrest of a party accused of a fraudulent act, and to require his discharge upon his being found guilty. Stewart v. Levy, 36 Cal. 159. A party cannot be imprisoned under a judgment in a civil action for assault and battery: such judgment is as much a debt as though recorded in an action of assumpsit. Ex parte Prader, 6 Cal. 239. A defendant in custody under civil process will be delivered over to the agent of another state upon the proper requisition in a criminal action; the interests of a private suitor being subordinate to those of the people. Ex parte Rosenblat, 51 Cal. 285.

Right to jury trial. The question of fraud must be submitted to the jury, except so far as may be necessary to authorize the arrest of a pending action; to justify execution against the person, which may be followed by imprisonment, an issue must be framed, and determined like issues of fact raised upon the pleadings; fraud is an offense involving moral turpitude, and is followed by imprisonment, not merely as a means of enforcing payment, but also as a punishment, and the right to submit the question of indebtedness to the jury being inviolate, it would be strange to deny a jury trial upon a question involving loss of character and liberty. Davis v. Robinson, 10 Cal. 411. Imprisonment for debt, except in cases of fraud, is prohibited by the constitution; consequently, every intendment must be in favor of the liberty of the subject, and his right to trial by jury, which is likewise secured. Matoon v. Eder, 6 Cal. 57.

Arrest under civil process for breach of warranty. See note 20 L. R. A. (N. S.) 844.

Right to arrest in breach of promise case. See note 59 L. R. A. 957.

Right to arrest partner in civil action or proceeding. See note 4 L. R. A. (N. S.) 130.

CODE COMMISSIONERS' NOTE. 1. **Injury to persons.** Subd. 1. The first subdivision of the section (73) of the Practice Act, for which this is a substitute, provided that "the defendant may be arrested, where the action is for willful injury to person or character." It was held, that this provision was in conflict with § 15 of article I of the constitution. Southworth v. Resing, 3 Cal. 378; Ex parte Prader, 6 Cal. 239; see also In re Holdforth, 1 Cal. 438.

2. **Actions not arising out of contract.** The defendant may be arrested in an action to recover from an innkeeper for baggage lost at his hotel. People v. Willett, 26 Barb. 78. So in an action for a false warranty. Fowler v. Abrams, 3 E. D. Smith, 1, 13. So in an action for fraudulent misrepresentations as to the responsibility of a party, whereby credit was given. Sherman v. Brantley, 7 Rob. (N. Y.) 55.

3. **Agents.** Subd. 2. In an action to recover money received by a person as agent, he cannot be arrested without showing some fraudulent conduct on his part, or a demand on him by the principal and a refusal by him to pay. In re Holdforth, 1 Cal. 438. A, being the owner of an invoice of goods in the city of New York, sold one half-interest therein to B with an arrangement that the latter should proceed to San Francisco and there dispose of the same on joint account. Held, that this constituted a partnership between them, and that B was not an agent, and not subject to arrest in an action by A to recover a part of the proceeds of the sales. Soule v. Hayward, 1 Cal. 345.

4. **Fraudulent intent.** Subd. 3. Pike v. Lent, 4 Sandf. 650; Roberts v. Randel, 3 Sandf. 710; Watson v. McGuire, 33 How. Pr. 87; Sherlock v. Sherlock, 7 Abb. Pr. (N. S.) 22; Merrick v. Suydam, 1 Code Rep. (N. S.) 212.

5. **Obligation. Debt.** Subd. 4. The alleged fraud must be directly connected with the debt or obligation. Oatley v. Lewin, 47 Barb. 18. "Debt" and "obligation" have the same meaning: both import a contract liability. McGovern v. Payn, 32 Barb. 83; Smith v. Corbiere, 3 Bosw. 634; Ely v. Steigler, 9 Abb. Pr. (N. S.) 35. But in Crandall v. Bryan, 15 How. Pr. 48, it was held that the term "obligation" was intended to include those cases where the action would not sound in contract.

6. **Allegations of fraud.** The allegations in the application must satisfy the judge judicially, but the material facts may be stated upon information and belief, if accompanied by statements of the nature and sources of the information. Crandall v. Bryan, 15 How. Pr. 48; 5 Abb. Pr. 162. A defendant cannot be arrested for fraudulent misrepresentations in obtaining money, when the representations were made after the money was obtained. Snow v. Halstead, 1 Cal. 361.

7. **Evidence.** To sustain the allegations of fraud and deceit in contracting a debt, it is necessary to prove that the representations alleged to have been fraudulent and deceitful were not true. Belden v. Henriques, 8 Cal. 87.

8. **Fraudulent intent.** Subd. 5. Proof of an actual intent to defraud is necessary. Pacific Mutual Ins. Co. v. Machado, 16 Abb. Pr. 451; Caldwell's Case, 13 Abb. Pr. 405; Krauth v. Vial, 10 Abb. Pr. 139.

§ 480. Order for arrest, by whom made. An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought.

Legislation § 480. 1. Enacted March 11, **1872**; based on Practice Act, § 74 (New York Code, § 180), which had the word "shall," instead of "must."

2. Amended by Code Amdts. **1880**, p. 3, omitting from the end of the section, after "brought," the words "or from a county judge."

CODE COMMISSIONERS' NOTE. Granting an order of arrest is discretionary with the judge. Knickerbocker Life Ins. Co. v. Ecclesine, 6 Abb. Pr. (N. S.) 9; Davis v. Scott, 15 Abb. Pr. 127; Lapeous v. Hart, 9 How. Pr. 541.

§ 481. Affidavit to obtain order, what to contain. The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section four hundred and seventy-nine. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit must be filed with the clerk of the court.

Legislation § 481. 1. Enacted March 11, **1872**; based on Practice Act, § 75 (New York Code, § 181), which had (1) the words "shall appear" instead of "appears," and (2) the word "shall" instead of "must" wherever these words appear.

2. Amended by Code Amdts. **1873–74**, p. 305, changing, at the end of the section, the word "court" from "county."

Sufficiency of affidavit. That it may "appear" to the judge, it is necessary that the facts shall be stated by competent evidence; but it is competent to present them by affidavit. Neves v. Costa, 5 Cal. App. 111; 89 Pac. 860. The arrest upon affidavit is intended merely to secure the presence of the defendant until final judgment; and in order to detain and imprison his person afterwards, the fraud must be alleged in the complaint, be passed upon by the jury, and be stated in the judgment. Davis v. Robinson, 10 Cal. 411. The jurisdiction to issue an order of arrest depends upon the affidavit required by this section (Ex parte Howitz, 2 Cal. App. 752; 84 Pac. 229; Neves v. Costa, 5 Cal. App. 111; 89 Pac. 860); and an insufficient affidavit makes the order of arrest void: a warrant issued thereunder does not authorize the detention of the defendant. Ex parte Fkumoto, 120 Cal. 316; 52 Pac. 726. The affidavit must disclose that a sufficient cause of action exists, and that the case is one of those for which the remedy of arrest is provided (McGilvery v. Morehead, 2 Cal. 607); and that the case is one mentioned in § 479, ante (Neves v. Costa, 5 Cal. App. 111; 89 Pac. 860); and the power of the court is limited to the facts and conditions which are made to appear therein. Lay v. Superior Court, 11 Cal. App. 558; 105 Pac. 775. A party is entitled to an order of arrest, where the circumstances detailed would induce in a reasonable mind the belief that a fraud was intended to be perpetrated: it is not necessary that he should show positively the commission of a fraud (Southworth v. Resing, 3 Cal. 377); but circumstances must be disclosed from which an inference can be drawn that the defendant was guilty of fraud either in procuring the property involved in the action, or in withholding the purchase-money received from the sale thereof, as the agent for the plaintiff. In re Holdforth, 1 Cal. 438. As a matter of practice, it is safest to order an arrest, even in cases of doubt, because the defendant is protected against abuse of the process by the undertaking of the plaintiff, while, on the other hand, frauds are proverbially concocted with so much artfulness and ingenuity as to render them at all times difficult to be exposed; and when a case actually exists, the plaintiff is remediless without process of arrest: a different rule would almost, if not certainly, destroy its efficiency as a legal remedy. Southworth v. Resing, 3 Cal. 377. The facts necessary to be shown must appear by the positive averments of the affidavit: a reference to the complaint, or to any other paper, to show what the affidavit itself should disclose, although it is positively averred that such complaint or paper is true, is insufficient. McGilvery v. Morehead, 2 Cal. 607; Ex parte Fkumoto, 120 Cal. 316; 52 Pac. 726. It is not enough to assert a fraudulent intent in general terms: the specific facts must be shown, that the court itself may deduce the fraud, and the question of sufficiency not left to be passed upon by the party. Ex parte Fkumoto, 120 Cal. 316; 52 Pac. 726. The affidavit may be based on information and belief (Matoon v. Eder, 6 Cal. 57); but statements of fact, made upon information and belief, or which are of such a character that they could only be so made, without stating the facts upon which such information and belief are founded, are fatally defective. Ex parte Fkumoto, 120 Cal. 316; 52 Pac. 726. The court has no jurisdiction to make an order for arrest, where the affidavit does not aver that the indebtedness sued for, or any other cause of action, exists: such an affidavit is fatally defective (In re Vinich, 86 Cal. 70; 26 Pac. 528); and where there

is a total defect of evidence as to any essential fact in the affidavit, the court acts without any jurisdiction, and the act is void; but where the court has jurisdiction, and makes a mistake concerning the just weight and importance of the evidence, the act is merely erroneous, and is good until reversed. Dusy v. Helm, 59 Cal. 188. The presentation of such evidence, as, alone, would be receivable upon the trial of an action to justify an ordinary judgment for money, is required of a plaintiff who desires, in a civil action, to enforce his claim, at the outset, by the arrest and imprisonment of the defendant, that is, to have execution before obtaining judgment. Ex parte Fkumoto, 120 Cal. 316; 52 Pac. 726. Where the judge has no jurisdiction to act, his order of arrest is void; and whether he has jurisdiction, must be determined from the affidavit itself, and not from what the judge thinks it authorizes him to do; the court cannot confer jurisdiction by merely assuming it, nor can its determination that it has jurisdiction confer it; and the plaintiff must see to it that he is clothed with actual, not merely apparent, authority, before he can deprive the defendant of his liberty. Fkumoto v. Marsh, 130 Cal. 66; 80 Am. St. Rep. 73; 62 Pac. 303, 509. An averment that goods were carried away in an express wagon, to a place unknown to the plaintiff, is not sufficient to show a fraudulent purpose: they may have been thus taken for sale or storage, in perfect good faith. Ex parte Fkumoto, 120 Cal. 316; 52 Pac. 726. That the defendant "will escape from the state," etc., is a mere statement of the conclusion or belief of the affiant, and, without the statement of the facts from which such conclusion is drawn, or upon which such belief is founded, is not evidence upon which the court is at liberty to act. Id. That the defendant "will escape from the state," and thus "defraud and cheat the plaintiff," is not the equivalent of the statutory requirement, "that he is about to depart from the state, with intent to defraud his creditors": when the language of such a statute is departed from, the party must, at his peril, employ words of equivalent import, and a failure in this respect is fatal. Id.

New affidavits. Where a party is once arrested and discharged, he cannot be arrested again in the same action; and it being always presumed that the plaintiff, in his affidavit for arrest, states his case as fully as he can to effect his object, new or different affidavits cannot be allowed at pleasure: a different rule would lead to harassing arrests, and open a wide door to perjury. McGilvery v. Morehead, 2 Cal. 607.

Objection to affidavit. Objection to the insufficiency of the affidavit cannot be set up by third parties, nor even by the defendant himself after judgment: by putting in bail and neglecting to move to be discharged, he consents to process, and waives all irregularities. Matoon v. Eder, 6 Cal. 57.

CODE COMMISSIONERS' NOTE. 1. Affidavit. The affidavit must show the facts relied upon by positive averment; and it is not sufficient to refer to the complaint, or to any other paper, to show what the affidavit ought itself to disclose. McGilvery v. Morehead, 2 Cal. 607. To entitle a party to the remedy of arrest, it is not necessary to show positively the commission of a fraud. It is sufficient if the circumstances detailed would induce a reasonable belief that a fraud was intended. Southworth v. Resing, 3 Cal. 377. An affidavit for arrest, made on information and belief, that the defendant has been guilty of fraud in contracting the debt, or in endeavoring to prevent its collection, in the terms required by statute, and followed by an averment of the facts on which the belief is founded, also stated on information and belief, is sufficient. Matoon v. Eder, 6 Cal. 57; City Bank v. Lumley, 28 How. Pr. 397; Blason v. Bruno, 21 How. Pr. 112; 12 Abb. Pr. 265; 33 Barb. 520; Cook v. Roach, 21 How. Pr. 152; Peel v. Elliott, 16 How. Pr. 481. Insufficiency of the affidavit on which the writ of arrest issues cannot be set up in defense by third parties, nor by the defendant himself after judgment. Matoon v. Eder, 6 Cal. 57.

2. Order of arrest. The order of arrest is only an intermediate remedy or process to secure the presence of the party until final judgment, and the facts on which it is based must be affirmatively found, and the fraud stated in the judgment, in order to authorize an arrest on final process. Matoon v. Eder, 6 Cal. 57. It is best to award an arrest even in cases of doubt, for the defendant is protected by his bond from abuse by the process, without which process the plaintiff may be remediless. Southworth v. Resing, 3 Cal. 377; see also Davis v. Robinson, 10 Cal. 411.

§ 482. Security by plaintiff before order of arrest. Before making the order, the judge must require a written undertaking on the part of the plaintiff, with sureties in an amount to be fixed by the judge, which must be at least five hundred dollars, to the effect that the plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking. The undertaking must be filed with the clerk of the court.

Undertakings.

1. **Generally.** Post, § 1056.
2. **Court commissioner's power to take.** Ante, § 259.

Legislation § 482. 1. Enacted March 11, **1872**; based on Practice Act, § 76 (New York Code, § 182), which read: "Before making the order, the judge shall require a written undertaking on the part of the plaintiff, with sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least five hundred dollars.

Each of the sureties shall annex to the undertaking an affidavit that he is a resident and householder, or freeholder, within the state, and worth double the sum specified in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution. The undertaking shall be filed with the clerk of the court." When enacted in 1872, (1) the word "shall" was changed to "must," wherever it occurs, and (2) the sentence beginning "Each of the sureties" was omitted.

2. Amended by Code Amdts. 1873–74, p. 305.

Damages for wrongfully procuring arrest. Damages for wrongfully securing the arrest of a defendant should not be imposed on the party applying for the order, where the judge to whom the application was made had jurisdiction to pass upon the sufficiency of the evidence disclosed by the affidavit, unless there was an entire lack of evidence of some essential fact which the law requires to be shown. Dusy v. Helm, 59 Cal. 188.

Action on undertaking in justice's court. A defendant, arrested in an action in a justice's court, and subsequently discharged, cannot maintain an action on the undertaking given to procure his arrest, pending an appeal by the plaintiff to the superior court from the judgment of the justice. Steehhan v. Roraback, 67 Cal. 29; 7 Pac. 7.

CODE COMMISSIONERS' NOTE. The form of affidavit of the sureties is omitted. Section 1057 of this code prescribes the form to be used whenever an undertaking is required. The undertaking may be executed by any person, at the instance of the plaintiff, who will undertake unqualifiedly that the plaintiff will indemnify the defendant for all damages he may sustain. Leffingwell v. Chave, 19 How. Pr. 54; 10 Abb. Pr. 472; 5 Bosw. 703; Bellinger v. Gardner, 2 Abb. Pr. 441; Askins v. Hearns, 3 Abb. Pr. 184. Per contra, Richardson v. Craig, 1 Duer, 666. If a foreign state is plaintiff, the undertaking may be signed by the resident minister. Republic of Mexico v. Arangoiz, 5 Duer, 634. The obligations of sureties are assumed with reference to the law, which becomes part of their contract. Matoon v. Eder, 6 Cal. 57.

§ 483. Order, when made, and its form.

The order may be made at the time of the issuing of the summons, or any time afterwards before judgment. It must require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned, to the clerk of the court in which the action is pending.

Legislation § 483. Enacted March 11, 1872; based on Practice Act, § 77 (New York Code, § 183), which had (1) the words "to accompany" instead of "at the time of the issuing of," and (2) the word "shall" instead of "must" before "require."

Order before action commenced. Until suit is instituted, there can be no defendant, and consequently no authority to issue an order of arrest; such an order, issued before action commenced, is void for want of jurisdiction. Ex parte Cohen, 6 Cal. 318.

Arrest on final process. See note ante, § 479.

CODE COMMISSIONERS' NOTE. 1. "Before judgment." These terms mean "the final determination of the rights of the parties in the action." Although a judgment by default has been taken, founded upon allegations of fraud, and the defendant let in to defend the judgment standing as security, yet he may be arrested and held to bail in the action. Union Bank v. Mott, 8 Abb. Pr. 150; Mott v. Union Bank, 35 How. Pr. 332; 38 N. Y. 18; 4 Abb. Pr. (N. S.) 270.

2. **Form of order.** There is but one form under the code, and every order must require the officer to arrest the defendant, and hold him to bail in a specified sum. Tracy v. Veeder, 35 How. Pr. 209; but see Elston v. Potter, 9 Bosw. 635; Sherlock v. Sherlock, 7 Abb. Pr. (N. S.) 22.

3. **Return.** If the order direct the return within "five days after the arrest of the defendant," it is sufficient. Continental Bank v. De Mott, 8 Bosw. 696. If the order is made returnable on Sunday, the irregularity may be remedied either by waiver, as the putting in of bail (Wright v. Jeffrey, 5 Cow. 15), or by amendment. Stone v. Martin, 2 Denio, 185.

§ 484. Affidavit and order to be delivered to the sheriff, and copy to defendant.

The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy of the affidavit, and also, if desired, a copy of the order of arrest.

To excuse omission of duty by sheriff, direction by party or attorney must be in writing. Pol. Code, § 4166.

Legislation § 484. Enacted March 11, 1872; based on Practice Act, § 78 (New York Code, § 184), which had (1) the word "shall" instead of "must," in both instances, and (2) the word "the" instead of "a," after the words "deliver to him."

CODE COMMISSIONERS' NOTE. If the copies are not delivered by the sheriff, upon making the arrest, it is an irregularity only, and will not entitle the defendant to a discharge. Barker v. Cook, 25 How. Pr. 190; 16 Abb. Pr. 83; Courter v. McNamara, 9 How. Pr. 255; Keeler v. Belts, 3 Code Rep. 183. An omission, in the copy of the affidavit served, of the jurat and signature of the party, does not affect the validity of the order. Barker v. Cook, 25 How. Pr. 190; 16 Abb. Pr. 83; 40 Barb. 254.

§ 485. Arrest, how made.

The sheriff must execute the order by arresting the defendant and keeping him in custody until discharged by law.

Production of process upon request. Pol. Code, § 4169.

Legislation § 485. Enacted March 11, 1872; based on Practice Act, § 79 (New York Code,

§ 185), which had the word "shall" instead of "must."

No second arrest in same action. Where a party is once arrested and discharged, he cannot be arrested again in the same action. McGilvery v. Morehead, 2 Cal. 607.

Place where order of arrest in civil action may be executed. See note Ann. Cas. 1912B, 1376.

§ 486. Defendant to be discharged on bail or deposit. The defendant, at any time before execution, must be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest.

Legislation § 486. Enacted March 11, **1872**; based on Practice Act, § 80 (New York Code, § 186), which had (1) the word "shall" instead of "must," and (2) at the end of the section, after "arrest," the words "as provided in this chapter."

Discharge of defendant. A party arrested may be relieved therefrom by deposit or bail, or by moving upon affidavit to be discharged; and should the court refuse to discharge him, or should he neglect to apply for such discharge, he does not waive all right and confess such fraud. Matoon v. Eder, 6 Cal. 57.

Plaintiff's failure to provide for prisoner's support. The failure of the plaintiff to advance funds for the support of the defendant in jail, under arrest in a civil action, does not, per se, operate to discharge the defendant; the latter's interest being, merely, that he be furnished with proper support while in custody, whether paid for by the plaintiff or not. Ex parte Lamson, 50 Cal. 306.

CODE COMMISSIONERS' NOTE. 1. Release. The attorney for plaintiff may consent to the release of the defendant; but such a release will not discharge the order, and the defendant may thereafter be arrested on final process. Meech v. Loomis, 28 How. Pr. 209; 14 Abb. Pr. 428.

2. Sheriff must accept bail. The defendant is entitled to his discharge upon tendering bond, with sufficient sureties. A refusal to accept such bond renders the sheriff liable to an action. Richards v. Porter, 7 Johns. 137; Posterne v. Hanson, 2 Saund. 59; 85 Eng. Reprint, 658; Smith v. Hall, 2 Mod. 32; 86 Eng. Reprint, 925.

§ 487. Bail, how given. The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, to the effect that they are bound in the amount mentioned in the order of arrest, that the defendant will at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

Bail, qualifications of. Post, §§ 494, 1057.

Legislation § 487. Enacted March 11, **1872**; based on Practice Act, § 81 (New York Code, § 187), which had (1) the words "stating their places of residence and occupations," after the word "sureties," and (2) the word "shall" instead of "will," before "at all times."

Defense to action on bond. The insufficiency of the affidavit upon which the writ of arrest issues, cannot be set up in defense by third parties, in an action upon the bail bond, nor even by the defendant himself after judgment. Matoon v. Eder, 6 Cal. 57.

CODE COMMISSIONERS' NOTE. An officer making the arrest can take only the security prescribed by statute; but the party at whose suit the arrest is made may take any security he pleases. Winter v. Kinney, 1 N. Y. 365; Decker v. Judson, 16 N. Y. 439.

§ 488. Surrender of defendant. At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration; or he may surrender himself to the sheriff of the county where he was arrested.

Legislation § 488. Enacted March 11, **1872**; re-enactment of Practice Act, § 82 (New York Code, § 188).

Writ of ne exeat not preserved. The procedure by which jurisdiction is to be exercised may be prescribed by the legislature, except where it would impair the constitutional powers of the court, or practically defeat their exercise, and the procedure established by the legislature does not include the writ of ne exeat. Ex parte Harker, 49 Cal. 465.

CODE COMMISSIONERS' NOTE. Sureties on the bail bond of a defendant, arrested in a civil action, are not bound to surrender the defendant within ten days after judgment, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody. Allen v. Breslauer, 8 Cal. 552. A surrender, within ten days after execution, is a compliance with the statute. Id. A portion of the bail may make the surrender. In re Taylor, 7 How. Pr. 212. The offer of a party to surrender himself in discharge of his sureties, was held to be a good surrender. Babb v. Oakley, 5 Cal. 93. Where the judgment will not warrant a writ of ca. sa. to be issued under it, the bail will not be charged for neglecting to surrender the judgment debtor. Matoon v. Eder, 6 Cal. 57.

§ 489. Same. For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest, or,

by a written authority indorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail are exonerated, if such arrest, delivery, or surrender take place before the expiration of ten days after judgment; but if such arrest, delivery, or surrender be not made within ten days after judgment, the bail are finally charged on their undertaking, and bound to pay the amount of the judgment within ten days thereafter.

Legislation § 489. Enacted March 11, **1872**; based on Practice Act, § 83 (New York Code, § 189), which had (1) the word "him" after "themselves arrest," (2) the word "the" instead of "arrest of," (3) the words "shall be" instead of "are," before "exonerated," (4) the word "Provided" instead of "if," before "such arrest," (5) the words "shall be" instead of "are," before "finally charged," and (6) the word "be" before "bound to pay."

Exoneration of sureties. The sureties on a bail bond are exonerated when the defendant is taken into the custody of the sheriff under an order of the court; and the vacation of such order does not, by operation of law, restore the defendant to the custody of the sureties, notwithstanding the fact that the sheriff might have had the defendant in his custody, under such order, only a short time. People v. McReynolds, 102 Cal. 308; 36 Pac. 590; Babb v. Oakley, 5 Cal. 93.

Writ of capias ad satisfaciendum. Where the judgment is not such as will warrant a writ of ca. sa. to be issued under it, the bail will not be charged for neglecting to surrender the judgment debtor. Matoon v. Eder, 6 Cal. 57.

CODE COMMISSIONERS' NOTE. It was in Seaver v. Genner, 10 Abb. Pr. 256, held, that where the sureties failed to justify, but the defendant had been released, the sheriff became bail, and might surrender the defendant by rearresting him. See also Sartos v. Merceques, 9 How. Pr. 188.

§ 490. Bail, how proceeded against. If the bail neglect or refuse to pay the judgment within ten days after they are finally charged, an action may be commenced against such bail for the amount of the original judgment.

Legislation § 490. Enacted March 11, **1872**; based on Practice Act, § 84 (New York Code, § 190), as amended by Stats. 1854, Redding ed. p. 60, Kerr ed. p. 86, which had the word "such" instead of "the," before "original judgment."

CODE COMMISSIONERS' NOTE. Matoon v. Eder, 6 Cal. 57; Otis v. Wakeman, 1 Hill, 604. In an action against bail whose liability is fixed, they cannot show either in bar or mitigation that before the recovery of judgment against their principal he was and since has been insolvent. Levy v. Nicholas, 19 Abb. Pr. 282; 1 Rob. 614; Metcalf v. Stryker, 10 Abb. Pr. 12; 31 Barb. 62.

§ 491. Bail, how exonerated. The bail are exonerated by the death of the defendant or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process.

Legislation § 491. Enacted March 11, **1872**; based on Practice Act, § 85 (New York Code, § 191), which had the words "shall also be" instead of "are," after "The bail."

CODE COMMISSIONERS' NOTE. 1. Death. Bail are exonerated by the death of the principal. Merritt v. Thompson, 1 Hilt. 550; Olcott v. Lilly, 4 Johns. 407; Hayes v. Carrington, 12 Abb. Pr. 179; 21 How. Pr. 143.

2. **Legal discharge.** The final termination, only, of the action in favor of the defendant operates as a legal discharge. Von Gerhard v. Lighte, 13 Abb. Pr. 101.

§ 492. Delivery of undertaking to plaintiff, and its acceptance or rejection by him. Within the time limited for that purpose, the sheriff must file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he must retain in his possession until filed, as herein provided. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court.

Legislation § 492. Enacted March 11, **1872**; based on Practice Act, § 86 (New York Code, § 192), which had (1) the word "shall" instead of "must," wherever this word occurs, and (2) the words "shall be" instead of "is" before "deemed" and before "exonerated."

§ 493. Notice of justification. New undertaking, if other bail. Within five days after the receipt of notice, the sheriff or defendant may give to the

plaintiff or his attorney notice of the justification of the same, or other bail (specifying the places of residence and occupations of the latter), before a judge of the court or county clerk, at a specified time and place; the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there must be a new undertaking.

Justification of bail. See post, § 495.

Legislation § 493. 1. Enacted March 11, **1872**; based on Practice Act, § 87 (New York Code, § 193), which had the word "shall" instead of "must," before the words "be a new undertaking."
2. Amended by Code Amdts. **1880**, p. 3, omitting the words "or county judge" after "judge of the court."

CODE COMMISSIONERS' NOTE. Leave to except may, on motion, be granted after the time has expired, but on terms and without prejudice to any right of the sheriff. Zimm v. Ritterman, 5 Rob. (N. Y.) 618.

§ 494. **Qualifications of bail.** The qualifications of bail are as follows:

1. Each of them must be a resident and householder, or freeholder, within the state.

2. Each must be worth the amount specified in the order of the arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge or county clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

Qualifications of bail. Post, § 1057.

Legislation § 494. 1. Enacted March 11, **1872**; based on Practice Act, § 88 (New York Code, § 194), which had (1) the words "shall be" instead of "are," in the introductory paragraph, and (2) also the words "shall be" instead of "must," in first line of subd. 2.
2. Amended by Code Amdts. **1873–74**, p. 306, (1) changing, in subd. 1, (a) the words "shall be" to "must," and (b) the word "county" to "state"; (2) adding, in subd. 2, the word "the" before "arrest."

CODE COMMISSIONERS' NOTE. See § 1057 of this code.

Householder. A party who rents and occupies part of a building for an office is a householder, within the meaning of this section. Somerset etc. Savings Bank v. Huyck, 33 How. Pr. 323.

§ 495. **Justification of bail.** For the purpose of justification, each of the bail must attend before the judge or county clerk, at the time and place mentioned in the notice, and may be examined on oath on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk, in his discretion, may think proper. The examination must be reduced to writing, and subscribed by the bail, if required by the plaintiff.

Justification before court commissioner. Ante, § 259, subd. 3.

Legislation § 495. Enacted March 11, **1872**; based on Practice Act, § 89 (New York Code, § 195), which had (1) the word "shall" instead of "must," before "attend" and before "be reduced," and (2) the word "county" before "clerk, in his."

Failure of sureties to justify. Where sureties refuse to answer pertinent questions, and to disclose the names of makers of negotiable promissory notes, and the evidence tends to show that these notes were made to enable the sureties to justify, there is a failure to justify. Mokelumne Hill etc. Mining Co. v. Woodbury, 10 Cal. 188.

CODE COMMISSIONERS' NOTE. This kind of property is immaterial (1 Till. & Shear. Prac. 586); but it must be in the party's own right. 2 Chit. 97.

§ 496. **Allowance of bail.** If the judge or clerk find the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the sheriff is thereupon exonerated from liability.

Court commissioners, powers of, as to bail. Ante, § 259, subd. 3.

Legislation § 496. Enacted March 11, **1872**; based on Practice Act, § 90 (New York Code, § 196), which had (1) the word "shall" instead of "must," before "annex," (2) the word "shall" instead of "is," after "sheriff," and (3) the word "be" before "exonerated."

CODE COMMISSIONERS' NOTE. 1. Justification. The justification is not complete until the judge has indorsed his allowance on the undertaking, and caused it to be filed. O'Neil v. Durkee, 12 How. Pr. 94; Overill v. Durkee, 2 Abb. Pr. 383.

2. **Fraud in justification.** In Brown v. Gillies, 1 Chit. 372, an order for the allowance of bail was discharged, upon it appearing that the bail had perjured himself on his justification. See also Gould v. Berry, 1 Chit. 143.

§ 497. Deposit of money with sheriff. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of the bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case the sheriff must give the defendant a certificate of the deposit made, and the defendant must be discharged from custody.

Legislation § 497. Enacted March 11, **1872**; based on Practice Act, § 91 (New York Code, § 197), which had (1) the word "shall" instead of "must," in both instances, and (2) the words "out of" instead of "from," before "custody."

CODE COMMISSIONERS' NOTE. Money deposited is in the custody of the law, and, as between the plaintiff and the defendant, is considered the property of the latter. Hermann v. Aaronson, 3 Abb. Pr. (N. S.) 389; 34 How. Pr. 272; 8 Abb. Pr. (N. S.) 155. Money deposited by a third party becomes the property of the defendant. Salter v. Weiner, 6 Abb. Pr. 191.

§ 498. Payment of money into court by sheriff. The sheriff must, immediately after the deposit, pay the same into court, and take from the clerk receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff's attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

Sheriff. Penalty for non-payment. Pol. Code, § 4161.

Legislation § 498. Enacted March 11, **1872**; based on Practice Act, § 92 (New York Code, § 198), which had (1) the word "shall" instead of "must," in the first line, and (2) the words "deliver or transmit to the plaintiff or his attorney" instead of "deliver to the plaintiff's attorney."

§ 499. Substituting bail for deposit. If money is deposited, as provided in the two last sections, bail may be given and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited must be refunded to the defendant.

Legislation § 499. Enacted March 11, **1872**; based on Practice Act, § 93 (New York Code, § 199), which had (1) the word "be" instead of "is," in the first line, and (2) the words "shall be refunded by such clerk to the defendant" instead of "must be refunded to the defendant."

CODE COMMISSIONERS' NOTE. Hermann v. Aaronson, 34 How. Pr. 272; 3 Abb. Pr. (N. S.) 389; 8 Abb. Pr. (N. S.) 155; Salter v. Weiner, 6 Abb. Pr. 191.

§ 500. Money deposited, how applied or disposed of. Where money has been deposited, if it remain on deposit at the time of the recovery of a judgment in favor of the plaintiff, the clerk must, under the direction of the court, apply the same in satisfaction thereof; and after satisfying the judgment, refund the surplus, if any, to the defendant. If the judgment is in favor of the defendant, the clerk must, under like direction of the court, refund to him the whole sum deposited and remaining unapplied.

Legislation § 500. Enacted March 11, **1872**; based on Practice Act, § 94 (New York Code, § 200), which had (1) the words "shall have" instead of "has," in the first line, (2) the word "shall" instead of "must," after "the clerk," in both instances, (3) the word "shall" before "refund," and (4) the word "be" instead of "is," after "If the judgment."

CODE COMMISSIONERS' NOTE. The plaintiff is entitled to have the money deposited applied on any judgment he may obtain. Hermann v. Aaronson, 3 Abb. Pr. (N. S.) 389; 34 How. Pr. 272; 8 Abb. Pr. (N. S.) 155. If the money deposited is lost, stolen, or embezzled, without any act of the plaintiff contributing to that result, the loss is that of the depositor, as between him and the plaintiff. Parsons v. Travis, 5 Duer, 650. See also De Peyster v. Clarkson, 2 Wend. 77.

§ 501. Sheriff, when liable as bail, and his discharge from liability. If, after being arrested, the defendant escape or is rescued, the sheriff is liable as bail; but he may discharge himself from such liability by the giving [of] bail at any time before judgment.

Liability of sheriff permitting—
1. **Rescue.** See Pol. Code, §§ 4164, 4165.
2. **Escape.** See Pol. Code, §§ 4163, 4165.

Legislation § 501. Enacted March 11, **1872**; based on Practice Act, § 95 (New York Code, § 201), which had (1) the word "be" instead of

"is," before "rescued," (2) the words "shall himself be" instead of "is," before "liable as bail," and (3) the words "and justification of" before "bail at any time."

CODE COMMISSIONERS' NOTE. The amount of the judgment in the original action is the measure of damages in an action against the sheriff. His liability is that of bail who have justified. Gallarati v. Orser, 4 Bosw. 94; 27 N. Y. 324.

§ 502. Proceedings on judgment against sheriff. If a judgment is recovered against the sheriff upon his liability as bail, and an execution thereon is returned unsatisfied in whole or in part, the same proceedings may be had on his official bond, for the recovery of the whole or any deficiency, as in other cases of delinquency.

Legislation § 502. Enacted March 11, **1872**; based on Practice Act, § 96 (New York Code, § 202), which had the word "be" instead of "is," in both instances.

CODE COMMISSIONERS' NOTE. The sureties on the official bond of the sheriff are liable for any default of the sheriff as bail. People v. Dikeman, 4 Keyes, 93.

§ 503. Motion to vacate order of arrest or reduce bail. Affidavits on motion. A defendant arrested may, at any time before the trial of the action, or if there be no trial, before the entry of judgment, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.

Legislation § 503. **1.** Enacted March 11, **1872**; based on Practice Act, § 97 (New York Code, §§ 204, 205), which had the words "to the plaintiff" after "reasonable notice."

2. Amended by Code Amdts. **1873–74**, p. 306, (1) substituting for "justification of bail" the words "trial of the action, or if there be no trial, before the entry of judgment," and (2) changing "is" to "be," after "If the application," this latter being a restoration to the original.

Motion to vacate. A motion to vacate an arrest is tried like any other fact, and must be decided by the weight of testimony. Southworth v. Resing, 3 Cal. 377.

CODE COMMISSIONERS' NOTE. A party, once arrested and discharged, cannot again be arrested in the same action. McGilvery v. Morehead, 2 Cal. 607. If the process, though proper in form, has been issued in an improper case, the party will be discharged. Soule v. Hayward, 1 Cal. 345. On an order to show cause why the arrest of a party, made on an allegation of fraud, should not be vacated, the question of fact involved must be decided, like any other question of fact, upon the preponderance of the evidence. Southworth v. Resing, 3 Cal. 378. The defendant, by putting in bail and neglecting to move his discharge, waives all previous irregularities. Matoon v. Eder, 6 Cal. 57.

§ 504. When the order vacated or bail reduced. If, upon such application, it appears that there was not sufficient cause for the arrest, the order must be vacated; or if it appears that the bail was fixed too high, the amount must be reduced.

Legislation § 504. Enacted March 11, **1872**; based on Practice Act, § 98, which read: "If upon such application it shall satisfactorily appear that there was not sufficient cause for the arrest, the order shall be vacated; or if it satisfactorily appear that the bail was fixed too high, the amount shall be reduced."

Second arrest prohibited. Where a party has once been arrested and discharged, he cannot be arrested again in the same action. McGilvery v. Morehead, 2 Cal. 607.

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 509. Delivery of personal property, when it may be claimed.
§ 510. Affidavit and its requisites.
§ 511. Requisition to sheriff to take and deliver the property.
§ 512. Security on the part of the plaintiff, and proceedings in serving the order.
§ 513. Exception to sureties and proceedings thereon, or on failure to except.
§ 514. Defendant, when entitled to redelivery.
§ 515. Justification of defendant's sureties.
§ 516. Qualification of sureties.
§ 517. Property, how taken when concealed in building or inclosure.
§ 518. Property, how kept.
§ 519. Claim of property by third person.
§ 520. Notice and affidavit, when and where to be filed.
§ 521. Protection of plaintiff in possession of property.

§ 509. Delivery of personal property, when it may be claimed. The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him as provided in this chapter.

Judgment. Post, §§ 627, 667.
Verdict, in actions for recovery of specific personalty. Post, § 627.
Sections made applicable to justice's court. Post, § 869.

Legislation § 509. Enacted March 11, 1872; re-enactment of Practice Act, § 99 (New York Code, § 206).

Nature and elements of remedy. This chapter provides only an auxiliary remedy, where the plaintiff claims immediate delivery of the property at the time of the commencement of the action: it has no application in the ordinary action to recover personal property, or its value, where the auxiliary remedy is not invoked. Faulkner v. First Nat. Bank, 130 Cal. 258; 62 Pac. 463. Claim and delivery is a possessory action: it is the lineal descendant of the common-law action of replevin, with the scope of its application greatly enlarged, but the essential object of the action remains the same, namely, to enforce the plaintiff's right to the present possession of chattels, as against a defendant who unlawfully detains them, and to recover their value if possession cannot be had, together with damages for the detention. Hall v. Susskind, 109 Cal. 203; 41 Pac. 1012. While the proceedings in claim and delivery are in some respects analogous to those in replevin, yet certain features which distinguished the practice in replevin have not survived; thus, in replevin the denial or general issue was non cepit, which simply denied the taking, and admitted title in the plaintiff; so, non detinet put in issue only the detention; a justification was where the defendant was enabled to show that the plaintiff had no property in the goods, and that they were the property of the defendant or some third person; there was a supposed technical necessity to allege property in the defendant or a third person, since the general issue did not question the title of the plaintiff; but, by our system of pleading, the defendant may fully justify under the general denial, and if he cannot deny the plaintiff's property without affirmatively asserting property in himself or some third person, there can be no general denial of the averments of the complaint in this class of cases, although this code expressly provides there may be; and, also under our system, the general denial puts in issue the plaintiff's right to the possession of the property; and if he was not entitled to possession when he commenced his action, but it has been delivered to him by means of an ancillary writ, it should be restored to the defendant, from whom it was taken. Pico v. Pico, 56 Cal. 453. There is no action of "claim and delivery": under our system, there is only one form of action, which has no name; so that an action cannot be here defeated, as it could have been at common law, because not properly named. Faulkner v. First Nat. Bank, 130 Cal. 258; 62 Pac. 463. Claim and delivery has two aspects: one is a suit to recover specific personal property; the other is a suit to recover a money demand. J. Dewing Co. v. Thompson, 19 Cal. App. 85; 124 Pac. 1035. The issue and sole question in claim and delivery is the right to the possession at the time of the commencement of the action (Tuohy v. Linder, 144 Cal. 790; 78 Pac. 233), and the suit determines only the right of possession. Liver v. Mills, 155 Cal. 459; 101 Pac. 299. Claim and delivery is a statutory remedy provided to enable one to recover the possession of personal property wrongfully detained, with an alternative remedy if possession cannot be had (Riciotto v. Clement, 94 Cal. 105; 29 Pac. 414); and, considered as a remedy, it is at least commensurate with the action of detinue at common law. McLaughlin v. Piatti, 27 Cal. 451. The right to the immediate and exclusive possession of specific property is the gist of the action, and the plea of another action pending, for the price of the same property, is not a bar (McCormick v. Gross, 135 Cal. 302; 67 Pac. 766; Parke & Lacy Co. v. White River Lumber Co., 101 Cal. 37; 35 Pac. 442; Holt Mfg. Co. v. Ewing, 109 Cal. 353; 42 Pac. 435); and the plaintiff may or may not, at his election, seek the immediate delivery of the property. Wellman v. English, 38 Cal. 583. The investigation is confined to the property mentioned in the complaint; other property cannot be brought into controversy by the answer (Hall v. Susskind, 109 Cal. 203; 41 Pac. 1012); nor can the defendant, in his answer, allege that the plaintiff has taken from him other property than that mentioned in the complaint, and ask or obtain judgment for its return. Lovensohn v. Ward, 45 Cal. 8. In replevin, the property remains in the custody of the law, and all parties must take notice; the unsuccessful party may deliver the property, and discharge himself from so much of the judgment as is made up by the assessed value, because the suit is about that specific property, and because the title is not affected by the replevin bond. Hunt v. Robinson, 11 Cal. 262. Where the plaintiff's claim is based upon the possession and the right to the possession, by the mutual contract of the parties, and a wrongful taking of the property from him by the defendant, the question of the contract, being one in restraint of trade, will not be considered: such question cannot arise in restoring the parties to the position in which they had, by their contract, placed themselves. California Cured Fruit Ass'n v. Stelling, 141 Cal. 713; 75 Pac. 320. Proceedings in claim and delivery cannot be made the means of determining the right to the possession of or to purchase public lands

Page v. Fowler, 28 Cal. 605. The plaintiff cannot treat the defendant as if in possession of property, and then, on the trial, recover judgment against him on the ground that he was not in possession of the property. Hawkins v. Roberts, 45 Cal. 38. A person having an interest in property may intervene in an action already instituted to recover the same. Joshua Hendy Machine Works v. Dillon, 135 Cal. 9; 66 Pac. 960. An answer praying for the return of property replevied seeks affirmative relief, and prevents a dismissal by the plaintiff. Acock v. Halsey, 90 Cal. 215; 27 Pac. 193.

Claim and delivery, and trover, distinguished. The distinction between proceedings in claim and delivery to recover possession of property or the value thereof in case delivery cannot be had, and actions to recover damages for the wrongful conversion of property, is just as broad as that between the common-law actions of detinue and trover: one lies for the recovery of the property itself, with damages for wrongful detention; the other, for the recovery of damages for the wrongful conversion of it. Richards v. Morey, 133 Cal. 437; 65 Pac. 886; Kelly v. McKibben, 54 Cal. 192. The action for damages for the conversion of property and that for the recovery of specific property are distinct: the relief sought in claim and delivery cannot be had from the defendant, unless he is then possessed of the property, which fact constitutes an essential element in the plaintiff's cause of action. Riciotto v. Clement, 94 Cal. 105; 29 Pac. 414.

Personalty, what is. By the severance and removal of fixtures, they are converted into personalty, and thereby made subject to replevin. McNally v. Connolly, 70 Cal. 3; 11 Pac. 320.

Property severed from freehold. Wood cut from the plaintiff's land, by one in possession without color of title, may be recovered by proceedings in claim and delivery: the title to the property is not affected by severance from the freehold. Kimball v. Lohmas, 31 Cal. 154. The rule that crops cut from land held in adverse possession cannot be recovered in replevin does not apply to a mere trespasser who casually or temporarily enters for the purpose of severing or removing the property attached to and forming a part of the realty: such trespasser does not hold adversely. Page v. Fowler, 28 Cal. 605. Crops raised upon land, by one holding by adverse possession, cannot be recovered in proceedings in claim and delivery by the true owner of the land. Pennybecker v. McDougal, 46 Cal. 661. A trespasser or mere intruder entering the premises and removing the crops cannot raise the question of title with the owner so as to defeat proceedings in replevin for the crops. Halleck v. Mixer, 16 Cal. 574. An action by a prior possessor will not lie for hay cut from public land by one in possession thereof, claiming title as against all but the United States, and proceeding and endeavoring to perfect his pre-emption claim thereto. Page v. Fowler, 28 Cal. 605. Crops raised by one in possession of realty as surviving partner, under a null and void agreement with the deceased partner that a patent was to be procured and held for the benefit of the copartnership, cannot be recovered in proceedings in claim and delivery by the heirs of the deceased partner. Groome v. Almstead, 101 Cal. 425; 35 Pac. 1021. A plaintiff, out of possession of real property, cannot sue for timber severed from the freehold, when the defendant is in possession of the premises from which the property was severed, holding them adversely, in good faith, under claim and color of title: the personal action cannot be made the means of litigating and determining the title to real property as between conflicting claimants; but this rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is upon such proof that the right of recovery rests; it is because the plaintiff owns the premises, or has the right to their possession, that he is entitled to the chattel which is severed, and that must be, in the first instance, established. Halleck v. Mixer, 16 Cal. 574. Where the defendant is in the actual possession of land, in good faith claiming title thereto, the plaintiff, claiming to be the true owner thereof, cannot, by proceedings in claim and delivery, secure the possession of property severed by the defendant from the land: title to land cannot be litigated in such proceedings. Hines v. Good, 128 Cal. 38; 79 Am. St. Rep. 22; 60 Pac. 527. Where the property sued for in claim and delivery was severed from the plaintiff's land, he can show his ownership of the property by proving ownership of the land, unless the defendant has, and had when the property was severed from the freehold, adverse possession of the land, claiming title thereto. Martin v. Thompson, 62 Cal. 618; 45 Am. Rep. 663; Hines v. Good, 128 Cal. 38; 79 Am. St. Rep. 22; 60 Pac. 527.

Title or right to possession of plaintiff. The plaintiff, in claim and delivery, cannot recover, if he is not and never has been the owner or entitled to the possession of the property sought to be recovered (Cardinell v. Bennett, 52 Cal. 476; Fredericks v. Tracy, 98 Cal. 658; 33 Pac. 750; Keech v. Beatty, 127 Cal. 177; 59 Pac. 837): he must be entitled, at the time the action is commenced, to the immediate and exclusive possession of the property (People's Sav. Bank v. Jones, 114 Cal. 422; 46 Pac. 278), through some general or special property therein; but actual

prior possession is not essential. Garcia v. Gunn, 119 Cal. 315; 51 Pac. 684. Replevin lies for all goods and chattels unlawfully taken or detained, and may be brought whenever one person claims personal property in the possession of another, whether the claimant ever had possession or not, and whether his property in the goods is absolute or qualified, provided he has the right to the possession. Lazard v. Wheeler, 22 Cal. 139. Mere possession is sufficient, as against a trespasser, to give the right of action. Laughlin v. Thompson, 76 Cal. 287; 18 Pac. 330. An after-acquired title is not sufficient. People's Sav. Bank v. Jones, 114 Cal. 422; 46 Pac. 278. Executors can institute proceedings in replevin, to recover property of the estate, under the general authority conferred upon them by statute. Halleck v. Mixer, 16 Cal. 574. A receiver cannot maintain the action, to recover property, which has not come into his possession, from a party to whom it has been transferred by the debtor, of whose property he takes charge, or from the sheriff holding it under process. Tibbets v. Cohn, 116 Cal. 365; 48 Pac. 372; Bishop v. McKillican, 124 Cal. 321; 71 Am. St. Rep. 68; 57 Pac. 76. An owner of land, who, under a contract with his tenant, is to receive a portion of the crop, and to retain sufficient of the remainder as security for his unpaid claims against the tenant, may recover in claim and delivery against a mortgagee of the tenant, who removes the crop without paying or tendering the amount due the owner. Tuohy v. Linder, 144 Cal. 790; 78 Pac. 233. Crops raised upon land by one in possession of the realty as a surviving partner, under a null and void agreement with the deceased partner, cannot be recovered, in claim and delivery, by the heirs of the deceased partner. Groome v. Almstead, 101 Cal. 425; 35 Pac. 1021. A crop of fruit, delivered to an agent, under a contract for the possession thereof for the purposes of inspection, packing, and sale, may be recovered by the agent in this form of action, where it was wrongfully retaken by the principal. California Cured Fruit Ass'n v. Stelling, 141 Cal. 713; 75 Pac. 320. Upon the abandonment of a building contract, the owner of materials furnished may recover them, or their value. Steiger etc. Pottery Works v. Sonoma, 9 Cal. App. 698; 100 Pac. 714. Where goods are to be paid for upon their delivery by a common carrier, and they are delivered but are not paid for, the carrier has the right at once to remove them, and if prevented, may sue in claim and delivery. Martland v. Bekins Van etc. Co., 19 Cal. App. 283; 125 Pac. 759. The allegation that the plaintiffs were the joint owners of the property sued for is sustained by proof that the plaintiffs owned the property as partners, part-owners, or as tenants in common, and that their respective interests therein were very unequal. Pelberg v. Gorham, 23 Cal. 349. Claim and delivery lies by a purchaser at an execution sale, against one who acquired the property from the plaintiff by fraud, and who therefore took no title. Sargent v. Sturm, 23 Cal. 359; 83 Am. Dec. 118.

Tenants in common. A tenant in common of personal property may recover against his co-tenant, who takes possession of all the common property and converts it to his own use, in an action in the form of replevin, but in which the complaint contains all the allegations essential in trover. Schwartz v. Skinner, 47 Cal. 3. One tenant in common cannot maintain replevin against his co-tenant for part of the common property. Hewlett v. Owens, 50 Cal. 474.

Copartners. One partner cannot maintain claim and delivery against his copartner for partnership property, where the right of possession is equal. Buckley v. Carlisle, 2 Cal. 420; Niroad v. Farnell, 11 Cal. App. 767; 106 Pac. 252.

Allegations of title or right to possession. The allegation of ownership or right to the possession at the time of the commencement of the action is a necessary and essential averment of the complaint in claim and delivery: the mere allegation that the plaintiff was the owner and entitled to the possession of the goods at a time prior to the commencement of the suit, with no averment of the ultimate fact that he was the owner and entitled to the possession when the action was commenced, is insufficient (Vanalstine v. Whelan, 135 Cal. 232; 67 Pac. 125; Afferbach v. McGovern, 79 Cal. 268; 21 Pac. 837; Fredericks v. Tracy, 98 Cal. 658; 33 Pac. 750; Holly v. Heiskell, 112 Cal. 174; 44 Pac. 466; Truman v. Young, 121 Cal. 490; 53 Pac. 1073; Bane v. Peerman, 125 Cal. 220; 57 Pac. 885); but an allegation, that, on a day named, prior to the commencement of the action, the plaintiff was the owner and in the possession of the property, and that the defendant, on that day, without the plaintiff's consent, and against his will, wrongfully and unlawfully, and by force, came into possession of said property, and, in effect, that it was thus taken from his possession, is sufficient: the obligation to restore, created by the wrongful act, continues until it is affirmatively shown to have been extinguished. Harris v. Smith, 132 Cal. 316; 64 Pac. 409. The allegation of ownership and the right to possession is sufficient: an allegation of the means by which possession was had is mere surplusage. Conner v. Bludworth, 54 Cal. 635. An allegation of the particular facts entitling the plaintiff to the possession of the property, is sufficient, although there is no

general allegation that the plaintiff is the owner and entitled to the possession of the property. Visher v. Smith, 91 Cal. 260; 27 Pac. 650. The facts constituting the plaintiff's cause of action are those which show that he is entitled to the possession, and that the defendant wrongfully withholds the property from him. Riciotto v. Clement, 94 Cal. 105; 29 Pac. 414.

Surplusage. The allegation of the place where the property was taken is mere surplusage: the issue formed upon it is immaterial. Lay v. Neville, 25 Cal. 545. An allegation of the means by which the plaintiff obtained possession is surplusage. Conner v. Bludworth, 54 Cal. 635. The averment, "unlawful and wrongful," as applied to the entry upon the premises and the taking of the property, may be stricken out as surplusage (Halleck v. Mixer, 16 Cal. 574); but the allegation that the defendant is in possession of the property is material and essential. Riciotto v. Clement, 94 Cal. 105; 29 Pac. 414. Where the facts alleged in the complaint are sufficient to show conversion, an additional averment, that the defendant "unlawfully withholds and detains the property," does not invalidate the judgment. Faulkner v. First Nat. Bank, 130 Cal. 258; 62 Pac. 463; Dennison v. Chapman, 105 Cal. 447; 39 Pac. 61. The return of the sheriff is proper evidence of the possession of the plaintiff, and, being of record, the court may avail itself of it in determining that fact, or if the fact has not been found, in determining the right of the defendant, as a matter of law, to a judgment for its return. Hollenbach v. Schnabel, 101 Cal. 312; 40 Am. St. Rep. 57; 35 Pac. 872.

Necessity for demand. Demand is not necessary, where the plaintiff sets up title or adverse claim to the property sought to be recovered. California Cured Fruit Ass'n v. Stelling, 141 Cal. 713; 75 Pac. 320. Where possession of the property is originally acquired by a tort, no demand, previous to the institution of the suit for its recovery, is necessary: demand is only required where the original possession is lawful, and the action relies upon unlawful detention. Paige v. O'Neal, 12 Cal. 483; Sargent v. Sturm, 23 Cal. 359; 83 Am. Dec. 118. Thus, no demand is necessary before an action to recover fixtures wrongfully severed and removed (McNally v. Connolly, 70 Cal. 3; 11 Pac. 320); or to recover goods wrongfully levied upon by a sheriff (Ledley v. Hays, 1 Cal. 160; Moore v. Murdock, 26 Cal. 514; Boulware v. Craddock, 30 Cal. 190; Wellman v. English, 38 Cal. 583); or to recover money seized by a sheriff as the property of another. Sharon v. Nunan, 63 Cal. 234.

Pleading demand. Demand and refusal to deliver possession must be averred and proved, where the property came lawfully into the hands of the defendant. Sargent v. Sturm, 23 Cal. 359; 83 Am. Dec. 118; Campbell v. Jones, 38 Cal. 507; Bacon v. Robson, 53 Cal. 399. A general allegation of demand is sufficient, in an action against an officer for wrongfully taking property under process; and if the form of the demand does not comply with § 689, post, the defendant may traverse the allegations in his answer, and object to the proof when offered at the trial: the provisions of that section being intended for the benefit of the officer, a failure to comply therewith is a matter of defense to be pleaded by him. Brenot v. Robinson, 108 Cal. 143; 41 Pac. 37.

Proof of demand. Proof of demand is excused by proof of any circumstance which would satisfy a jury that the demand would have been unavailing; as, a refusal by the defendant to listen to one, or a statement, in advance, that he will not deliver; and where the property has come rightfully into the hands of the defendant, a demand for it, and a refusal to deliver, are evidence of conversion. Wood v. McDonald, 66 Cal. 546; 6 Pac. 452. Demand and refusal to deliver possession must be averred and proved, where the property came lawfully into the hands of the defendant. Sargent v. Sturm, 23 Cal. 359; 83 Am. Dec. 118; Bacon v. Robson, 53 Cal. 399. Want of demand need not be specially pleaded by the defendant: the onus is on the plaintiff to show affirmatively the proper demand, where demand is necessary. Killey v. Scannell, 12 Cal. 73 Proof of a demand is unnecessary, where the defendant avers, in his answer, that had one been made, he would have refused to deliver the possession. Wood v. McDonald, 66 Cal. 546; 6 Pac. 452. An instruction that the plaintiff cannot recover without proving a demand on the defendant, is erroneous, where the demand is admitted by the answer. Jones v. Spears, 47 Cal. 20.

Possession of defendant. The plaintiff cannot, for the purpose of enabling him to sue in replevin, aver that the defendant is in possession of the property, and, on the trial, recover judgment against him on the ground that he was not in possession (Hawkins v. Roberts, 45 Cal. 38); nor can the plaintiff recover, where the defendant did not have possession at the time of the commencement of the action. Keech v. Beatty, 127 Cal. 177; 59 Pac. 837. An action to recover possession of personal property will not lie, where, at the time the action is commenced, the defendant has not the possession, nor the power to deliver it in satisfaction of a judgment for its possession. Richards v. Morey, 133 Cal. 437; 65 Pac. 886. The assignee of an insolvent cannot maintain claim and delivery against his assignor for property which the latter never owned,

nor had possession of, nor refused to deliver. Martin v. Porter, 84 Cal. 476; 24 Pac. 109. A bailee is liable in an action of detinue, or claim and delivery, even though he parted with possession of the property before demand and suit for its recovery. Faulkner v. First Nat. Bank, 130 Cal. 258; 62 Pac. 463. Claim and delivery does not lie against one in the actual possession of property, having a lien thereon dependent upon possession: the owner must redeem from the lien, or bring an action for that purpose. Sutton v. Stephan, 101 Cal. 545; 36 Pac. 706. Where the defendant has possession of the property at the time the action is commenced, he cannot, by subsequent transfer or destruction of the property, wholly deprive the plaintiff of relief; an alternative judgment for the value of the property will be granted. Richards v. Morey, 133 Cal. 437; 65 Pac. 886. Where the defendant had the right to the possession at the time suit was commenced, but it passed to the plaintiff before the trial, the court should not decree the return of the property to the defendant, merely that it might be again replevied by the plaintiff. Bolander v. Gentry, 36 Cal. 105; 95 Am. Dec. 162; Pico v. Pico, 56 Cal. 453; Flinn v. Ferry, 127 Cal. 648; 60 Pac. 434. The possession of property by the defendant, a warehouseman, is sufficiently shown by setting out the warehouse-receipt issued by him, with the allegation of demand and refusal to deliver the property. Visher v. Smith, 91 Cal. 260; 27 Pac. 650. In replevin, where the plaintiff takes the property at the commencement of the action, and the defendant prays a return of it, and is entitled to the possession at the commencement of the action, but his right has ceased, and vested in the plaintiff before trial, the judgment should leave the property in the plaintiff's possession, but award costs to the defendant. O'Connor v. Blake, 29 Cal. 312. In claim and delivery against an alleged receiver, it may be shown that he wrongfully seized possession under a void order of appointment. Bibby v. Dieter, 15 Cal. App. 45; 113 Pac. 874. Replevin lies against a sheriff for money taken by him from a safe, where the same was segregated from other moneys in the safe at the time of the levy, and then claimed by the plaintiff. Griffith v. Bogardus, 14 Cal. 410. Where the plaintiff in replevin established title by possession, but introduced no bill of sale, nor any evidence tending to establish a sale, it is competent for the defendant, on cross-examination of a witness for the plaintiff, to ask in whose possession the chattels were at a certain period anterior to the possession proved by the plaintiff, in order to draw from him, if possible, the fact that plaintiff's possession was a fraud to hide a debtor's property. Thornburgh v. Hand, 7 Cal. 554.

Disposal of property before suit. The amendment of the complaint, so as to convert an action of replevin into one of conversion, may be allowed, where possession cannot be recovered because the property had been disposed of before the action was commenced, and the plaintiff did not know of such disposal. Henderson v. Hart, 122 Cal. 332; 54 Pac. 1110; Riciotto v. Clement, 94 Cal. 105; 29 Pac. 414.

Rights of vendor under conditional sale. The vendee in a conditional sale can confer no greater rights upon a purchaser or a mortgagee than he himself has; and therefore replevin lies by the vendor, in such sale, against the purchaser or the mortgagee of the vendee. Lundy Furniture Co. v. White, 128 Cal. 170; 79 Am. St. Rep. 41; 60 Pac. 759. An action lies against the second vendee of a conditional sale for a breach of the condition, where possession is given by the vendor to the vendee with the express stipulation that title shall not pass until the conditions are performed. Putnam v. Lamphier, 36 Cal. 151. A vendor may maintain replevin against a sheriff holding property under attachment against the vendee, where the vendor retains title under a conditional sale, and at the time of the attachment was entitled to immediate possession. Kellogg v. Burr, 126 Cal. 38; 58 Pac. 306; Rodgers v. Bachman, 109 Cal. 552; 42 Pac. 448.

Answer. An answer denying that the defendant ever owned or had possession of the property, or even withheld or refused to deliver it, raises material issues, sufficient to defeat a motion for judgment on the pleadings. Martin v. Porter, 84 Cal. 476; 24 Pac. 109. The plaintiff is entitled to a verdict upon the complaint, under the instructions of the court, where the answer makes no issue but by confession and avoidance and the defendant offers no evidence in support of such defense. Kuhland v. Sedgwick, 17 Cal. 123. Where the complaint avers that the plaintiff was the owner and entitled to the possession of the property at the time of the taking by the defendant, an answer which denies this averment, and avers that at that time the property was owned and possessed by a third person, does not set up new matter; this averment is only a form of denial of the plaintiff's ownership and rights of possession. Woodworth v. Knowlton, 22 Cal. 164. A denial that the plaintiff is the owner of the property described in the complaint, and an allegation that the defendant has not sufficient information or belief to enable him to answer the allegation of the plaintiff that he is entitled to the possession of the property, and on that ground he denies the same, are sufficient to put in issue the allegation of the plaintiff. Cunningham v. Skinner, 65 Cal. 385; 4 Pac. 373. An averment in a cross-complaint by a chattel mortgagee, sued in

replevin to recover a crop, claiming the ownership thereof, and in another count alleging his rights as a chattel mortgagee, is not a waiver of the mortgage claim: the defendant has the right to plead inconsistent defenses. Summerville v. Stockton Milling Co., 142 Cal. 529; 76 Pac. 243. Conjunctive denials of the allegations of a complaint in claim and delivery are insufficient to raise an issue. Richardson v. Smith, 29 Cal. 529. A denial that on the day specified in the complaint the plaintiff was the owner and lawfully in possession of the property is conjunctive, evasive, and raises an immaterial issue as to time, but no issue as to possession, except in conjunction with ownership. Kuhland v. Sedgwick, 17 Cal. 123. A denial of ownership of property by the plaintiff joins a material issue. Carman v. Ross, 64 Cal. 249; 29 Pac. 510. A denial that the defendant, at any time, unlawfully took and carried away the property, is a mere denial that those acts were wrongfully done (Lay v. Neville, 25 Cal. 545); as is also a denial that the defendant wrongfully and unlawfully seized, took, or carried away the property. Woodworth v. Knowlton, 22 Cal. 164. An allegation of ownership and right to possession of chattels is put in issue by an admission in the answer that the defendant is in possession, coupled with an allegation that he is the owner. Miller v. Brigham, 50 Cal. 615.

Justification of officer under writ. Where an officer is sued for seizing or selling property of one under an execution against another, he must, in order to show that the transfer of property by the execution debtor was fraudulent and void as to the execution creditor, prove not only the issuance of the execution, the levy, and that he was a creditor, but also the rendition of a judgment upon his debt, and that the execution was issued upon such judgment. Kane v. Desmond, 63 Cal. 464. An officer who seizes property in the hands of a debtor may justify under the execution or process; but where he takes property from a third person, who claims to be the owner thereof, if on execution, he must show the judgment and execution; if on attachment, the writ of attachment, and the proceedings on which it is based. Thornburgh v. Hand, 7 Cal. 554. Irregularities in the proceedings leading up to the writ of execution, not appearing on the face of the writ, do not prevent the sheriff from justifying under an execution valid on its face. Norcross v. Nunan, 61 Cal. 640. The plea of justification by the sheriff, in claim and delivery, should clearly show that when he took the property from the plaintiff he was armed with an affidavit containing, substantially, the matters required by law to be stated in it, and with a sufficient order and undertaking. Laughlin v. Thompson, 76 Cal. 287; 18 Pac. 330. Where there is no affidavit on which the plaintiff or his attorney might have indorsed the direction to the constable to take the property in question, and the property was not turned over to the plaintiff by the constable, there is not a sufficient showing to connect the plaintiff in a replevin suit, or the defendant in a subsequent suit, with the taking of the property by the officer. Martin v. Barry, 145 Cal. 540; 79 Pac. 66. It is error to strike from a complaint, and from the answer thereto, all reference to a part of the property sued for, where the defendant alleges that the plaintiff has, by ancillary process, taken from him the possession of the property: the court has no power to strike out allegations which will deprive a party of an opportunity to try the question of his right to a portion of the property involved in the action. Howell v. Foster, 65 Cal. 169; 3 Pac. 647. Contempt of court may be committed by using the process of the court, in claim and delivery, in bad faith, to obtain possession of the property of the defendant in an improper manner, without trial, and to fraudulently procure the same after it has been replevied by the sheriff, and while in his custody. Ex parte Acock, 84 Cal. 50; 23 Pac. 1029. A right of action for the wrongful taking and conversion of personal property is assignable, and the assignee can recover upon the same in his own name. Lazard v. Wheeler, 22 Cal. 139.

Waiver of jury. A jury trial is waived, in claim and delivery, by the failure of the defendant to appear at the trial (Waltham v. Carson, 10 Cal. 178); but a jury trial of issues of law presented by the complaint in replevin is not waived, where defendant sets up an equitable defense. Swasey v. Adair, 88 Cal. 179; 25 Pac. 1119.

Judgment, and effect of. Judgment in an action of replevin is, as between the parties, conclusive evidence of the title to the property, in a subsequent action for its conversion; damages for the detention of property may be recovered in the subsequent action, where none were recovered in the replevin suit, and the finding of value is necessary to enable the plaintiff to recover against the sureties on the forthcoming bond, but failure so to find does not affect his right to recover from the defendant for conversion of the property; judgment in replevin, except when it has been satisfied, does not bar an action in trover; and, while the cause of action is in both cases the same, the object is essentially different: in the one case, the plaintiff seeks to recover a specific chattel; in the other, the value of such chattel, when, owing to the acts of the defendant, it was not in his power to procure a return. Nickerson v. California Stage Co., 10 Cal. 520. Where the property in claim and delivery has been destroyed, so that a judgment for its delivery would be necessarily unavailing, the failure to render judgment for its possession would be merely a tech-

nical error or an omission, for which the judgment would not be reversed. Brown v. Johnson, 45 Cal. 76; Thomas v. Witherby, 61 Cal. 92; 44 Am. Rep. 542. Where a mortgagor replevies the property from the mortgagee, and the latter was entitled to the possession thereof, but, pending the suit, the mortgagor tenders the full amount of the mortgaged debt, the judgment should be for the defendant for costs, but not for the return of the property. Wildman v. Radenaker, 20 Cal. 615. Judgment against a plaintiff, and in favor of some of the defendants, in another action, to recover the same property, is res adjudicata, and is a good plea in bar, whether erroneous or not. Keech v. Beatty, 127 Cal. 177; 59 Pac. 837. Matters alleged in a special defense, following denials of the allegations of the complaint, cannot be availed of by the plaintiff, on a motion for judgment on the pleadings. Nudd v. Thompson, 34 Cal. 39.

Damages, action for, and measure thereof. When the recovery of the property is the primary object of the suit, and damages will not compensate the plaintiff, the injured party should frame his bill in equity, specifying the reasons for seeking the recovery of the property itself, and the decree can then be so framed as to compel a specific delivery. Nickerson v. Chatterton, 7 Cal. 568. The measure of damages, where delivery cannot be had, and only detention of property is complained of, is its value at the place of detention when the action was commenced. Hisler v. Carr, 34 Cal. 641. The dismissal of a suit, after obtaining possession of the goods, is not a bar to the claim of the person from whose custody they were replevied; while plaintiff's acts amount to a breach of condition of his undertaking, and give the defendant a cause of action thereon for such damages as he sustained, yet that remedy is not exclusive, and he is not compelled to sue on the undertaking. Tapscott v. Lyon, 103 Cal. 297; 37 Pac. 225.

Replevin. See note 80 Am. St. Rep. 741.

Replevin of property levied upon under execution. See note 9 Am. Dec. 105.

Replevin for property in custody of the law. See note 8 L. R. A. (N. S.) 216.

Right to maintain replevin for goods seized under process against another. See note 7 Ann. Cas. 907; 11 Ann. Cas. 302.

Replevin for property taken by levy under void or voidable judgment. See note 55 L. R. A. 280.

General rules as to parties in and title necessary to support replevin. See note 1 Ann. Cas. 984.

Replevin for possession of deed. See notes 17 Ann. Cas. 1018; 20 L. R. A. (N. S.) 507.

Replevin to recover produce of trees unlawfully cut from land. See note 19 L. R. A. 654.

Replevin for dogs. See note 40 L. R. A. 507.

Right to maintain replevin by or against one in adverse possession of land for things severed. See note 69 L. R. A. 732.

Right to maintain action to recover property in specie against one not in possession. See note 18 L. R. A. (N. S.) 1205.

Replevin for undivided interest in personal property. See note 37 L. R. A. (N. S.) 267.

CODE COMMISSIONERS' NOTE. 1. Generally. The common-law action of replevin is abolished, and the provisions of this chapter take its place. Roberts v. Randel, 3 Sandf. 707; 5 How. Pr. 327; Nichols v. Michael, 23 N. Y. 269; 80 Am. Dec. 259; Rockwell v. Saunders, 19 Barb. 481. The action for the "claim and delivery of personal property," under our code, is commensurate with the action of detinue at common law. McLaughlin v. Piatti, 27 Cal. 464. In that action, the manner of laying the possession of the property has always been held to be inducement. It is usual to aver a bailment or finding. Otero v. Bullard, 3 Cal. 188. In this action, under the code the plaintiff may or may not, at his election, seek its immediate delivery. Wellman v. English, 38 Cal. 583.

2. **Right of action may be assigned.** Robinson v. Weeks, 6 How. Pr. 161; McKee v. Judd, 12 N. Y. 622; 64 Am. Dec. 515; People v. Tioga Common Pleas, 19 Wend. 75.

3. **Bill in equity.** If the recovery of the property is the primary object, and damages would not compensate, a bill will lie. Nickerson v. Chatterton, 7 Cal. 570.

4. **Fixtures.** Fixtures wrongfully served from the premises become personal property, and may be recovered in this action. Sands v. Pfeiffer, 10 Cal. 258.

5. **When the action can be maintained.** The plaintiff must either have the possession, or the immediate right to the possession, of the property. Middlesworth v. Sedgwick, 10 Cal. 392. A safe in the possession of McC., belonging to W. F. & Co., for whom, as also for plaintiff, he was agent, contained six thousand dollars in coin. Of this sum, four hundred dollars belonged to W. F. & Co., the balance to plaintiff. The sheriff, under a writ against McC., seized eighteen hundred dollars of the money in the safe as his property, and put it in a bag. Plaintiff then claimed the money as his, McC. being present and not objecting. It was held that this amounted to a segregation of eighteen hundred dollars from the mass of coin in the safe, so as to sustain the action by plaintiff. Griffith v. Bogardus, 14 Cal. 410. To render the defendant liable, he must have converted the property to his own use, and if not, then any other act, to amount to a conversion, must be done with a wrongful intent, either express or implied. Rogers v. Huie, 2 Cal. 571; 56 Am. Dec. 363. This action lies for all goods and chattels unlawfully taken or detained, and may be brought whenever one person claims personal property in the possession of another, and this whether the claimant had ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right to the possession. Lazard v. Wheeler, 22 Cal. 139. Where the defendant is in the adverse possession of land as a trespasser, without color of title, he is not in the position, before the statute of limitations has run, to contest the title of the true owner in such a sense as to defeat a personal action brought by such owner to recover wood cut by him on the land. Kimball v. Lohmas, 31 Cal. 156; Halleck v. Mixer, 16 Cal. 579. An agreement between two or more persons to convert the property of another, not followed by acts to that end, does not give a right of action against such persons. Herron v. Hughes, 25 Cal. 555. A bill of sale of a given number of cattle out of a herd running at large, which gives the purchaser the right to select and take at once the number sold, is sufficient to entitle the purchaser, after demand and refusal, to maintain an action for the recovery of the entire herd, out of which he may make his selection, and return the residue to the vendor. McLaughlin v. Piatti, 27 Cal. 464. If a chose in action has been pledged to secure a debt, and payment has been tendered and demand made for its return, this action will lie. Luckey v. Gannon, 37 How. Pr. 134; 6 Abb. Pr. (N. S.) 209.

6. **When the action cannot be maintained.** One partner cannot sustain an action against another partner for the delivery of personal property belonging to the partnership. Buckley v. Carlisle, 2 Cal. 420. If an officer, by his misconduct, in-

duces a sale of property for less than it would otherwise have brought, the remedy must be an action for damages resulting from his acts, and not an action to recover the property. Foster v. Coronel, 1 Cal. Unrep. 402. Replevin for hay cut on public lands cannot be maintained by a prior possessor against one who was in adverse possession, claiming a pre-emption right entered when he cut the hay. Page v. Fowler, 28 Cal. 605. In an action brought against the sheriff, who seized the property by virtue of an attachment, it is a good defense to show that the defendant in the attachment, when insolvent, sold the property to the plaintiff to defraud his creditors; that the plaintiff had knowledge of these facts; and that the defendant has since been declared a bankrupt, and the sheriff has, on the demand of the assignee in bankruptcy, delivered him the goods. Bolander v. Gentry, 36 Cal. 105; 95 Am. Dec. 162. If, during the pendency and before the trial of the action, the defendant has been required to and has delivered the property to another person, entitled to its possession as against both parties to the action, that fact may be set up to defeat the action. Bolander v. Gentry, 36 Cal. 105; 95 Am. Dec. 162. If the property was seized by virtue of a warrant for a tax under an act of Congress, it cannot be replevied. O'Reilly v. Good, 42 Barb. 521; 18 Abb. Pr. 106.

7. Demand. Where personal property is wrongfully detained, a demand is necessary before the action is commenced for its recovery. Sluyter v. Williams, 37 How. Pr. 109; 1 Sweeny, 215. A demand is not necessary before suing a sheriff for property tortiously taken by him. Wellman v. English, 38 Cal. 583; Moore v. Murdock, 26 Cal. 524; Boulware v. Craddock, 30 Cal. 190. The general rule is, that when the possession of property is originally acquired by a tort, no demand previous to the institution of suit for its recovery is necessary. It is only when the original possession is lawful, and the action rests upon the unlawful detention, that a demand is required. Paige v. O'Neal, 12 Cal. 483; Ledley v. Hays, 1 Cal. 160; Sargent v. Sturm, 23 Cal. 359; 83 Am. Dec. 118. Where the taking is by an officer upon proper legal authority, a demand is necessary, in order to make him liable in damages. Daumiel v. Gorham, 6 Cal. 43; Taylor v. Seymour, 6 Cal. 512; Killey v. Scannell, 12 Cal. 73; but see Wellman v. English, 38 Cal. 583. Where certain personal property owned by plaintiff, but which had been used by A. & G., under a contract of hire, was taken by the officer from the possession of the plaintiff, by virtue of an attachment against G. subsequent to which plaintiff, having made a demand for the property upon the sheriff, but not upon A. & G., commenced this action against the former for its recovery. Held, that the demand, if necessary at all, was properly made upon the defendant in whose possession the property was at the time. Woodworth v. Knowlton, 22 Cal. 164.

8. Evidence. Where the vendee replevied the goods from the attaching creditor, and only established title by proving a possession of several months, it was competent for the defendant, on cross-examination of plaintiff's witness, to ask in whose possession the chattels were at a period anterior to the possession proved by plaintiff, to draw from the witness, if possible, the fact that plaintiff's possession was a fraud to hide the debtor's property. Thornburgh v. Hand, 7 Cal. 554. The declarations of a vendor of personal property, after the sale, are not admissible to impeach the title of the vendee. Visher v. Webster, 8 Cal. 109. In an action to recover specific personal property, plaintiff relied exclusively upon his possession at the time of the taking by defendant; and defendant first established a prima facie title sufficient to destroy the presumption of title in plaintiff arising from his possession, and then went further and showed, plaintiff excepting, that plaintiff obtained the property by proceedings under a void judgment. Held, that the introduction of this further evidence by defendant showing the invalidity of the judgment, was of no advantage to him, as he had already rebutted plaintiff's case, based solely on possession, and that it did not prejudice plaintiff, and is no ground of error. Lafontaine v. Green, 17 Cal. 294. When property is taken from the defendant by the officer, it is sufficient to introduce in evidence the writ under which the levy is made; but when the property is taken from the possession of a stranger to the writ, it is necessary to show a judgment or prove the debt. Sexey v. Adkinson, 34 Cal. 346; 91 Am. Dec. 698. Evidence may be admitted of the highest market value of the property between the time of conversion and trial. Tully v. Harloe, 35 Cal. 302; 95 Am. Dec. 102; but see Page v. Fowler, 39 Cal. 412; 2 Am. Rep. 462; cited in the note under subd. 9.

9. Damages. In actions for the recovery of personal property of fluctuating value, the measure of damages is the highest market value within a reasonable time after the property was taken, with interest from the time the value was estimated. Page v. Fowler, 39 Cal. 412; 2 Am. Rep. 462; see also Dorsey v. Manlove, 14 Cal. 553; Phelps v. Owens, 11 Cal. 22; Pelberg v. Gorham, 23 Cal. 349.

10. Judgment. In this action the judgment may be for more than the value as alleged in the complaint, if it be within the ad damnum of the writ. The value of the property is only one predicate of the recovery. Coghill v. Boring, 15 Cal. 215. Where the defendant has required the return of the property, and given an undertaking for such purpose, a judgment for plaintiff, in order to hold the sureties on the undertaking, must be in the alternative, as required by §§ 104, 177, and 210 of the Practice Act (§§ 514, 627, and 682 of this code). Nickerson v. Chatterton, 7 Cal. 569; Dorsey v. Manlove, 14 Cal. 555. Where a partner, in good faith, sells partnership property to satisfy his individual indebtedness, and the purchaser brings replevin against a creditor of the firm who has attached the property, it was held that the court properly rendered a judgment in favor of the purchaser, it being presumed in support of the judgment that the court below found it as fact that the other partner consented to and authorized the sale. Stokes v. Stevens, 40 Cal. 391. The omission to specify in the judgment the property of which restitution is to be made is error. Campbell v. Jones, 38 Cal. 507. A defendant who recovers judgment, the jury failing to find the value of the property to exceed two hundred dollars, is entitled to his costs, where the plaintiff's complaint states its value at a sum exceeding that amount. Edgar v. Gray, 5 Cal. 267. If the action is improperly commenced, the party bringing it, having obtained the benefit, cannot avoid the undertaking he has given by pleading his own misfeasance. Turner v. Billagram, 2 Cal. 522. If the plaintiff take the property at the commencement of the action, and the defendant prays the return of it, and the defendant was entitled to the property at the commencement of the action, but his right has ceased and vested in the plaintiff before trial, the judgment ought to leave the property in plaintiff's possession, but award costs to defendant. O'Conner v. Blake, 29 Cal. 312. In an action by the pledgee against a stranger for the conversion of goods, the plaintiff is entitled to recover the full value of the goods; but if the goods have been converted by the owner, or by any one acting in privity with him, the pledgee can recover only the value of his special interest in the pledge. Treadwell v. Davis, 34 Cal. 601; 94 Am. Dec. 770.

11. New matter in answer. Where the action is replevin, it is not competent for the defendant, in his answer, to introduce a new and distinct subject-matter of litigation, claiming of the plaintiff the return of other property. Lovensohn v. Ward, 45 Cal. 8.

§ 510. Affidavit and its requisites. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing:

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof;

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;

4. That it has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized, under an execution or an attachment against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure;

5. The actual value of the property.

Subd. 5. **Value, incorrectly stated in affidavit.** Ante, § 473.

Legislation § 510. Enacted March 11, **1872**; based on Practice Act, § 100 (New York Code, § 207), which had, (1) in the introductory paragraph, the word "shall" instead of "must," (2) in subd. 1, the word "lawfully" before "entitled," (3) in subd. 4, (a) the words "the same" instead of "it," before "has not been," and (b) the word "and" after "seizure."

Necessity of affidavit. A constable is not justified in taking property, in claim and delivery, from the possession of the defendant, upon a direction so to do by the plaintiff, unless he receives from him an affidavit, order, and undertaking substantially complying with this section and §§ 511, 512, post. Laughlin v. Thompson, 76 Cal. 287; 18 Pac. 330.

Description of property. Property sought to be recovered must be described with a reasonable degree of certainty, to enable the defendant to make return thereof. Hawley v. Kocher, 123 Cal. 77; 55 Pac. 696.

Sufficiency of description of property in complaint for replevin. See note 48 Am. Dec. 698.

Necessity and sufficiency of allegation as to ownership or right to possession in complaint in replevin. See note Ann. Cas. 1912A, 333.

CODE COMMISSIONERS' NOTE. 1. Ownership. If the plaintiff claims as owner, his affidavit need not set up facts proving such ownership; his affidavit "that he is the owner" is, in this respect, sufficient. Burns v. Robbins, 1 Code Rep. 62; Vandenburg v. Van Valkenburg, 8 Barb. 217. But if the property is claimed as exempt from execution, the facts constituting the exemption must appear in the affidavit. Spalding v. Spalding, 3 How. Pr. 297; 1 Code Rep. 64; see also Roberts v. Willard, 1 Code Rep. 100. If the property is claimed by virtue of a special property therein, the affidavits must show the facts in respect to such special property, to the end that the court may see upon what facts a special property and right of possession is made out. Depew v. Leal, 2 Abb. Pr. 131.

2. **Additional affidavits.** The court may allow additional affidavits to be read, or the plaintiff may file a supplemental affidavit to supply a defect. Depew v. Leal, 2 Abb. Pr. 131.

3. **Amendments.** Where the affidavit is objected to for insufficiency, the court will permit an amendment of course. Spalding v. Spalding, 3 How. Pr. 297; 1 Code Rep. 64.

4. **Opposing affidavits.** In O'Reilly v. Good, 18 Abb. Pr. 106, 42 Barb. 521, it was held that the affidavit of the defendant and of a collector, that the goods were taken for a tax, was sufficient to set aside proceedings under this section. See also Stockwell v. Vietch, 15 Abb. Pr. 412.

5. **Waiver.** A general appearance in the action waives all irregularities in the affidavit. Wisconsin M. & F. Ins. Co. Bank v. Hobbs, 22 How. Pr. 494; Hyde v. Patterson, 1 Abb. Pr. 248.

§ 511. Requisition to sheriff to take and deliver the property. The plaintiff or his attorney may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant.

Legislation § 511. Enacted March 11, **1872**; re-enactment of Practice Act, § 101 (New York Code, § 208), as amended by Stats. 1854, Redding ed. p. 60, Kerr ed. p. 86.

Sheriff's authority. A mere direction to a sheriff or constable, by the plaintiff in claim and delivery, to take property from the defendant, confers no color of authority upon him, and the defendant may sue the officer to recover its possession. Halleck v. Mixer, 16 Cal. 574; Laughlin v. Thompson, 76 Cal. 287; 18 Pac. 330.

CODE COMMISSIONERS' NOTE. Rhodes v. Patterson, 3 Cal. 469; Smith v. Orser, 43 Barb. 187; Barry v. Fisher, 8 Abb. Pr. (N. S.) 369.

§ 512. Security on the part of the plaintiff, and proceedings in serving the order. Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendants, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and

retain it in his custody. He must, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or, if neither have any known place of abode, by putting them in the nearest post-office, directed to the defendant.

Sheriff's duties. Pol. Code, §§ 4185, 4188; and, generally, §§ 4175–4193.
Qualifications of sureties. Ante, § 494; post, § 1057.
Return of property to defendant.
1. Verdict for. Post, § 627.
2. Judgment for. Post, § 667.
Dismissal of action. Clerk to hand undertaking to defendant. Post, § 581, subd. 1.
Officer executing process must produce same on request. Pol. Code, § 4169.
Value stated in affidavit is not conclusive evidence against sheriff or sureties. Ante, § 473.

Legislation § 512. 1. Enacted March 11, **1872**; based on Practice Act, § 102 (New York Code, § 209), as amended by Stats. 1854, Redding ed. p. 61, Kerr ed. p. 86, which had (1) the word "shall" instead of "must," before "forthwith take," and (2) the words "shall also" instead of "must," before "without delay."
2. Amendment by Stats. **1901**, p. 135; unconstitutional. See note ante, § 5.

Effect of bond. The effect of a replevin bond is, simply, to give the party the possession of the property, pending the litigation; the title is not changed; no sale made by the party in possession, and who afterwards turns out to have no right to the property, can convey any title to the purchaser; and if the title would not vest in the unsuccessful party until the judgment in the replevin suit, of course it would not vest in him upon delivery of the replevin bond; and although the title vests upon the rendition of the judgment, yet the property is still subject to be taken by the successful party, until he makes his election to sue upon the undertaking in replevin; he may sue without issuing execution; but, at any time before suit is brought, the successful party may take the property if it can be found, and so, too, the unsuccessful party may return it; and that the effect of the replevin bond, under our statute, is, not to divest either the title or the lien of the other party, is clear: the contest is as to specific personal property; the recovery of the thing itself, and not damages in lieu thereof, is the primary object of the suit; the value is recovered only as an alternative, when delivery of the specific property cannot be had, and if the title could be divested by delivery of the replevin bond, the primary object of the suit could be defeated; the unsuccessful party could always make his election to keep the property or pay its value; but this advantage was never intended to be given by the statute, to the party confessedly in the wrong. Hunt v. Robinson, 11 Cal. 262; Nickerson v. Chatterton, 7 Cal. 568.

Liability of sureties. The complaint in an action on a replevin bond must contain an averment that the value was found by the jury or the court: an allegation that neither the property had been delivered, nor the mere value as alleged in the original complaint had been paid, is not sufficient; if judgment is taken in the alternative, and the defendant fails to discharge the judgment, the sureties can only be required to pay the value of the property, and the amount of damages and costs awarded; the plaintiff, in a suit against the sureties, cannot recover damages for detention of his property, his damages being the legal interest upon the amount of judgment; and where a suit against the sureties is not for the recovery of the property, they, not being in possession, cannot be held responsible for its use or usable value; and the plaintiff, having already had judgment for the delivery of the property, upon which he can issue his execution, and under which the sheriff can take the property itself, has no cause to sue the defendants to regain possession of the property, but only for the amount of the judgment. Nickerson v. Chatterton, 7 Cal. 568. The surety, in an action upon a replevin bond, is liable to pay a judgment, in favor of the defendant against the plaintiff, for the value of the property. Donovan v. Ætna Indemnity Co., 10 Cal. App. 723; 103 Pac. 365.

Alternative judgment. The alternative judgment must be entered in the original action, in order to determine the amount to be recovered from the sureties. Claudius v. Aguirre, 89 Cal. 501; 26 Pac. 1077. The requirement of the alternative judgment for value applies only to cases which have been submitted to and passed upon by the jury, and not to a judgment of nonsuit, or for the defendant upon the sustaining of the demurrer; therefore the defendant may, in such case, recover the value of the property from the sureties on the replevin bond, where a delivery cannot be had, without a finding of value in the original action. Ginaca v. Atwood, 8 Cal. 446. The sureties are only bound for lawful judgment against their principal, and such judgment must be in the alternative, that the successful party may have delivery of the property, or if that cannot be had, that he recover the value as found by the jury and stated in the judgment, with his damages and costs. Nickerson v. Chatterton, 7 Cal. 568; Ginaca v. Atwood, 8 Cal. 446; Clary v. Rolland, 24 Cal. 147. The judgment in the original case fixes the value of the property, and

the amount of damages and costs: these constitute the limit and extent of the liability of the sureties; and where the plaintiff can be compensated in damages, he must take his judgment in the alternative, and if he can find the property, he can take it; if not, he must take its value, and he can only ask the sureties to make good the judgment: they cannot be held to do more than their principal is required to do. Nickerson v. Chatterton, 7 Cal. 568. Where property taken on the replevin bond from the defendant cannot be returned, a judgment for its value, without the alternative, is proper. Donovan v. Ætna Indemnity Co., 10 Cal. App. 723; 103 Pac. 365. The sureties on the replevin bond are not released from liability, merely because the judgment entered was not in the alternative, and did not direct a return of the property taken on the bond. Donovan v. Ætna Indemnity Co., 10 Cal. App. 723; 103 Pac. 365.

Complaint. Material parts of the undertaking should be alleged in the complaint, either literally or according to their legal effect; and a description of the undertaking, merely that it corresponds with the provisions of a certain statute, is insufficient; but, as the defect is rather of form than of substance, the objection must be taken by demurrer. Mills v. Gleason, 21 Cal. 274. The complaint on an undertaking, where there has been a trial and judgment, must show the value found by the jury, and that an alternative judgment was entered as provided by § 177 of the Practice Act (§ 627, post). Clary v. Rolland, 24 Cal. 147.

Costs. In claim and delivery, the charge of a surety company for a replevin bond is not a proper item in a cost-bill. Williams v. Atchison etc. Ry. Co., 156 Cal. 140; 134 Am. St. Rep. 117; 19 Ann. Cas. 1260; 103 Pac. 885.

Right to recover value of property in action on replevin bond for breach of condition to prosecute action. See note 4 Ann. Cas. 1135.

Recitals in replevin bond as evidence of value in action on bond. See note 18 Ann. Cas. 113.

Plaintiff's undertaking in replevin as inuring to benefit of third person adjudged to be entitled to property. See note Ann. Cas. 1913D, 1106.

Penalty as limit of recovery on replevin bond. See note 55 L. R. A. 390.

Defects or irregularities affecting bond as a defense to action on replevin bond which has served its purpose. See note 29 L. R. A. (N. S.) 747.

Effect upon surety on replevin bond of judgment against principal. See note 40 L. R. A. (N. S.) 744.

CODE COMMISSIONERS' NOTE. 1. **Substantial compliance.** A substantial compliance with the provisions of this section is sufficient. Wingate v. Brooks, 3 Cal. 112. The undertaking is not vitiated by a misrecital, in the undertaking, of the date on which the affidavit was filed. Hyde v. Patterson, 1 Abb. Pr. 248.

2. **Generally.** The fact that defendant brought his action before an incompetent tribunal is no defense to an action upon the undertaking, and the plea that the title of property so replevied is in him, is bad. McDermott v. Isbell, 4 Cal. 113. Where the defendant, in a replevin suit, failed to claim the return of the property in his answer, and on the trial the jury found a verdict for the defendant, on which the court rendered judgment against plaintiffs for costs, which was paid, it was held that the payment of the judgment was a complete discharge of plaintiffs' sureties on the undertaking. Chambers v. Waters, 7 Cal. 390. A recovery cannot be had on a bond purporting to be a joint bond of the principal and sureties, but signed by the latter only; but it is otherwise as to undertakings under our system. They are original and independent contracts on the part of the sureties, and the signature of the principal is not required. Sacramento v. Dunlap, 14 Cal. 421. Where the plaintiff gives the statutory undertaking, and takes possession of the property, and is afterwards nonsuited, and judgment entered against him for the return of the property and for costs, his sureties are liable for damages sustained by defendant by reason of a failure to return the goods, but not for damages for the original taking and detention, the value of the goods not having been found by the jury. Ginaca v. Atwood, 8 Cal. 446. T. commenced an action against J., by attachment; the writ was levied upon certain personal property by the plaintiff, H., as sheriff. M. J., wife of J., claimed the property as sole trader, and brought her action of replevin for the property, and obtained possession of the same by the delivery of an undertaking. The undertaking was executed by defendants R. and S. The replevin suit was decided in February 5, 1855, in favor of H. T. obtained judgment in the attachment suit against J., November 30, 1854. On the 18th of February, 1855, execution in favor of other creditors of J. coming into the hands of H., as sheriff, he levied them on the same property, and subsequently sold the property and paid the proceeds into court. H. then brought this suit against the sureties in the replevin bond. Held, that the lien of T.'s attachment continued after the replevy of the goods by M. J.; that the possession obtained by the plaintiff in replevin is only temporary, and does not divest the title or discharge the lien. Hunt v. Robinson, 11 Cal. 262. In an action upon the undertaking, the defendant's liability is limited to the damage sustained by a failure to return the property; therefore, when the same property comes into the hands of H., as sheriff, the condition of the replevin bond to return the property is fulfilled. Id. Where the action is dismissed before trial, the liability of the sureties on the undertaking for a return of the property is not affected by the fact that before the dismissal an answer had been filed in which no return of the property was claimed. Mills v. Gleason, 21 Cal. 274. The dismissal of the action by the plaintiff before trial leaves the parties to settle in an action upon the undertaking those matters, including the right of defendant to a return of the property, which, had the original suit been prosecuted, must have been determined therein in the first instance. The opportunity to obtain a judgment for the return having been taken away by the failure to prosecute, defendant is entitled to recover in an action on the undertaking. Id.

3. **New undertaking.** If the undertaking is defective, the court will allow a new one to be given nunc pro tunc. Newland v. Willetts, 1 Barb. 20.

§ 513. Exception to sureties and proceedings thereon, or on failure to except. The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have

waived all objections to them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

Justification of sureties. See ante, §§ 494, 495; post, § 1057.

Legislation § 513. Enacted March 11, **1872**; based on Practice Act, § 103 (New York Code, § 210), which had (1) the words "shall be" instead of "is," before "deemed to have," (2) "objection" instead of "objections," before "to them," (3) "shall" instead of "must," before "justify on notice," (4) "shall be" instead of "is," before "responsible," (5) the words "as above provided" before "or until they justify."

CODE COMMISSIONERS' NOTE. Mere formal defects in an undertaking may be cured upon an exception thereto. De Reguie v. Lewis, 3 Rob. 708.

§ 514. Defendant, when entitled to redelivery. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in section five hundred and nineteen.

Sureties, qualifications of. Ante, §§ 494, 495; post, § 1057.

Legislation § 514. Enacted March 11, **1872**; based on Practice Act, § 104 (New York Code, § 211), which had the words "shall be" instead of "must," before "be delivered."

Redelivery. In an action against the sureties on the replevin bond, it is necessary to prove that the property was delivered to the party requiring it, and for whom the bond was given. Nickerson v. Chatterton, 7 Cal. 568. A defendant in claim and delivery, after the taking of the property from him by the sheriff, and before the delivery to the plaintiff, sued the sheriff in claim and delivery, and had the property taken from him by an elisor appointed by the court, whereupon the sheriff, as defendant, gave a redelivery bond, and upon obtaining the property thereunder, delivered it to the plaintiff in the original suit, in which nonsuit, and judgment for the defendant for costs, were afterwards granted; under this state of facts, the defendant in the original suit not being able to recover the property from the sheriff, as he had not given the bond provided for in this section, which alone would have authorized him to demand the return of the property taken by the officer, commenced an independent action, but, as the taking by the sheriff was not wrongful or unlawful, but in obedience to the process of the court, no cause of action existed against him when the suit was commenced; and even if the judgment of nonsuit could be construed to be a judgment that the defendant was entitled to a return of the property in the original suit, the judgment against the sheriff could not be upheld, as, prior to the rendition of the judgment of nonsuit, he had, in strict accordance with the law and his duty, delivered the property to the plaintiff in the original suit; hence, the judgment therein should command the plaintiff, and not the sheriff, to return the property or pay its value. Fleming v. Wells, 65 Cal. 336; 4 Pac. 197. Claim and delivery, where the sheriff has taken and is withholding the possession of property, is the proper remedy, as against a threatened sale by a constable, from whose possession it was taken by the sheriff. Richards v. Kirkpatrick, 53 Cal. 433.

CODE COMMISSIONERS' NOTE. This bond may be assigned by the sheriff. Wingate v. Brooks, 3 Cal. 112. In an action on this bond, it must be alleged that the defendant neither redelivered the property nor paid the value thereof. Nickerson v. Chatterton, 7 Cal. 568; Chambers v. Waters, 7 Cal. 390. In an action on an undertaking, the defendant's liability is limited to the damages sustained by a failure to return the property. Hunt v. Robinson, 11 Cal. 262. The sureties only bind themselves to make good any judgment that plaintiff may lawfully obtain against defendant; and the liability of the sureties cannot be more than the value of the property fixed by the judgment in the original suit. Nickerson v. Chatterton, 7 Cal. 568. In an action against the sureties on the undertaking, it is necessary to allege and prove that the property was delivered to the party requiring it, and for whom the bond was given. Nickerson v. Chatterton, 7 Cal. 570. An undertaking ran to the sheriff, instead of to the party to be protected by it, by mistake, and then corrected; this did not invalidate the bond. Turner v. Billagram, 2 Cal. 522.

§ 515. Justification of defendant's sureties. The defendant's sureties, upon notice to the plaintiff of not less than two or more than five days, must justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time. If they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff.

Legislation § 515. Enacted March 11, **1872**; based on Practice Act, § 105 (New York Code, § 202), which had (1) the word "shall" instead of "must," in all instances, (2) the words "shall be" instead of "is," before "responsible," and (3) the word "expressly" before "waived."

CODE COMMISSIONERS' NOTE. Manner of justification. Graham v. Wells, 18 How. Pr. 376. Liability of officer. McKenzie v. Smith, 27 How. Pr. 20; Gallarati v. Orser, 27 N. Y. 324.

§ 516. Qualification of sureties. The qualification of sureties must be such as are prescribed by this code, in respect to bail upon an order of arrest.

Sureties, qualifications of. Post, § 1057; ante, §§ 494, 495.

Legislation § 516. Enacted March 11, **1872**; based on Practice Act, § 106 (New York Code, § 213), which had (1) the words "and their justification shall" instead of "must," after "sureties," this change accounting for "qualification . . . are" of the present section, and (2) the word "act" instead of "code."

§ 517. Property, how taken when concealed in building or inclosure. If the property, or any part thereof, be concealed in a building or inclosure, the sheriff must publicly demand its delivery. If it be not delivered, he must cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

Duties of sheriff. See Pol. Code, §§ 4175 et seq.

Legislation § 517. Enacted March 11, **1872**; based on Practice Act, § 107 (New York Code, § 214), which had the word "shall" instead of "must," in both instances.

§ 518. Property, how kept. When the sheriff has taken property, as in this chapter provided, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same.

Legislation § 518. Enacted March 11, **1872**; based on Practice Act, § 108 (New York Code, § 215), which had (1) the words "shall have" instead of "has," after "sheriff," (2) the word "shall" instead of "must," before "keep," and (3) the word "lawful" before "fees for taking."

Return as evidence of delivery. An affidavit and undertaking, together with the sheriff's return thereon, being filed and of record, may be treated as evidence, and show conclusive delivery of the property. Hollenbach v. Schnabel, 101 Cal. 312; 40 Am. St. Rep. 57; 35 Pac. 872.

CODE COMMISSIONERS' NOTE. The sheriff must use more than ordinary diligence in the care of property. Moore v. Westervelt, 21 N. Y. 103; 27 N. Y. 239; 9 Bosw. 558; Edwards on Bailments, p. 59.

§ 519. Claim of property by third person. If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff is not bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim, by an undertaking by two sufficient sureties; and no claim to such property by any other person than the defendant or his agent is valid against the sheriff unless so made.

Legislation § 519. **1.** Enacted March 11, **1872;** based on Practice Act, § 109 (New York Code, § 216), which had (1) no "the" before "possession thereof," (2) the words "shall not be" instead of "is not," before "bound to keep," (3) after the words "sufficient sureties," the clause, "accompanied by their affidavits that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders, or householders in the county"; and (4) the words "shall be" instead of "is," before "valid against."

2. Amendment by Stats. **1901,** p. 136; unconstitutional. See note ante, § 5.

Plaintiff's bond on third-party claim. A sheriff must first pay the judgment against him, before he can maintain an action on an undertaking given under this section. Lott v. Mitchell, 32 Cal. 23.

CODE COMMISSIONERS' NOTE. This section applies only when the property has been taken by the officer in the discharge of his duty. King v. Orser, 4 Duer, 431. If the officer takes the property from the defendant or his agent, the process is a complete justification, and no action lies against him. Shipman v. Clark, 4 Denio, 446; 47 Am. Dec. 264; Foster v. Pettibone, 29 Barb. 350; State v. Jennings, 14 Ohio St. 73; Willard v. Kimball, 10 Allen, 211; 87 Am. Dec. 632. But if he takes the property of a person, not a defendant in the writ, from the true owner, an action lies. King v. Orser, 4 Duer, 431; Stimpson v. Reynolds, 14 Barb. 506. If the officer's proceedings are regular, the mode prescribed by this section is the only mode of making a valid claim by a third person. Edgerton v. Ross, 6 Abb. Pr. 189. If in an undertaking to indemnify a sheriff for replevying property claimed by a person other than defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments, and executions that may come or be brought against him, the sheriff cannot maintain an action on the bond because a judgment has been recovered against him, unless he first pay the judgment. Lott v. Mitchell, 32 Cal. 23.

§ 520. Notice and affidavit, when and where to be filed. The sheriff must file the notice, undertaking, and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

Legislation § 520. Enacted March 11, **1872;** based on Practice Act, § 110 (New York Code, § 217), as amended by Stats. 1854, Redding ed. p. 61, Kerr ed. p. 87, which had the word "shall" instead of "must," after "sheriff."

Return as evidence. The return of the sheriff is proper evidence of the possession of the plaintiff, and, being of record, the court may avail itself of it in determining that fact; or if the fact has not been found, in determining the right of the defendant, as a question of law, to a judgment for its return. Hollenbach v. Schnabel, 101 Cal. 312; 40 Am. St. Rep. 57; 35 Pac. 872.

§ 521. Protection of plaintiff in possession of property. After the property has been delivered to the plaintiff as in this chapter provided, the court shall, by appropriate order, protect the plaintiff in the possession of said property until the final determination of the action.

Legislation § 521. Added by Stats. **1913,** p. 555.

The original code § 521 related to actions on undertakings, and was repealed by Code Amdts. 1873–74, p. 306.

CHAPTER III.

INJUNCTION.

§ 525. Injunction, what is, and who may grant it.
§ 526. When it may be granted.
§ 526a. Actions by taxpayers to enjoin illegal expenditure or waste by public officers.
§ 527. Injunction. Notice. Party obtaining order must be ready. Defendant entitled to continuance. Precedence.
§ 528. Injunction after answer.
§ 529. Security upon injunction.
§ 530. When injunction for use of water may be refused upon defendant giving bond.
§ 531. Injunction to suspend business of a corporation, how and by whom granted.
§ 532. Motion to vacate or modify injunction. Bond on modification.
§ 533. When to be vacated or modified.

§ 525. Injunction, what is, and who may grant it. An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof; and when granted by a judge, it may be enforced as an order of the court.

Injunction.
1. Disobedience to, is contempt. Post, §§ 1209, 1210.
2. Limitations, how affected by. Ante, § 356.
3. Proceedings to obtain. Post, §§ 527–531.
4. Vacating or modifying. Ante, §§ 532, 533.
5. Seal necessary to writ of. Ante, § 153, subd. 1.
6. Courts and judges have power to grant, on any day. Ante, §§ 76, 134. At chambers. Ante, § 166.
7. Court commissioners have no power to issue. Ante, § 259, subd. 1.

Legislation § 525. **1.** Enacted March 11, **1872;** based on Practice Act, § 111 (New York Code, § 218), which had (1) the words "The order or writ" instead of "It," before "may be granted," and (2) did not have the word "it" before "may be enforced."

2. Amended by Code Amdts. **1880,** p. 3, (1) omitting the words "or by a county judge" after

"judge thereof," and (2) changing the word "the" to "an," before "order."

3. Amendment by Stats. **1901**, p. 136; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 340, changing the word "made" to "granted," before "by a judge."

Jurisdiction. Superior courts possess the same equity jurisdiction as was possessed by the English chancery courts. Pasadena v. Superior Court, 157 Cal. 781; 21 Ann. Cas. 1355; 109 Pac. 620. A state court has concurrent jurisdiction with a Federal court to restrain the removal of a wharf in navigable waters, the action being in personam. Crescent City Wharf etc. Co. v. Simpson, 77 Cal. 286; 19 Pac. 426.

Injunction preventive, not mandatory. The mandatory ingredient found in nearly all the definitions of the term "injunction," by text-writers, is entirely omitted from the definition of that term in this section. Gardner v. Stroever, 81 Cal. 148; 6 L. R. A. 90; 22 Pac. 483. An injunction, though restrictive in form, if it has the effect of compelling the performance of a substantive act, is mandatory, and necessarily contemplates a change in the relative positions or rights of the parties from those existing at the time the injunction is granted or the decree is entered. Stewart v. Superior Court, 100 Cal. 543; 35 Pac. 156. The duty of the court is to protect a party in the enjoyment of his private property, not to license a trespass thereupon, nor to compel the owner to exchange the same for other property to answer private purposes or interests. Gregory v. Nelson, 41 Cal. 278. The court cannot, by mandatory injunction, require of the defendant an act which he could not do without making himself liable to others, not parties to the suit, and over whom it has no jurisdiction: the injunction, in such case, should be prohibitory only. Dewey v. Superior Court, 81 Cal. 64; 22 Pac. 333. The issuance and service of an injunction restraining a party from moving certain fixtures from land, which he had a right to move, even though such injunction was afterwards dissolved, is not, in itself, conversion of such property. Lacey v. Beaudry, 53 Cal. 693.

Distinction between law and equity preserved. The distinction between law and equity is as naked and broad as ever: the provision, that "there should be but one form of civil action," extends only to the form of action; and the plaintiff need only state his cause of action in ordinary and concise language, without regard to ancient forms. De Witt v. Hays, 2 Cal. 463; 56 Am. Dec. 352. The writ of injunction belongs to the court of chancery exclusively; and although, in this state, there is no separate forum for the adjudication of chancery cases, yet in our courts, having chancery jurisdiction, the rules and principles of equity practice remain unaltered and the writ of injunction can only be issued where the case is one of equity jurisdiction. Minturn v. Hays, 2 Cal. 590; 56 Am. Dec. 366.

Order by judge act of court. An ex parte order granting an injunction, made by a judge at chambers, is virtually the act of the court, and may be enforced in the same way as if made upon notice. Sullivan v. Triunfo etc. Mining Co., 33 Cal. 385.

Form not essential. No particular form is requisite to a writ of injunction: the substantial thing is an authentic notification to the defendants of the mandate of the judge, which they must obey. Summers v. Farish, 10 Cal. 347.

CODE COMMISSIONERS' NOTE. 1. Form. No particular form required. It is sufficient if the defendant receive authentic notice of the mandate of the judge. Summers v. Farish, 10 Cal. 347.

2. **By a judge at chambers.** An injunction, granted ex parte by the judge at chambers, becomes the act of the court, and may be enforced in the same way. Sullivan v. Triunfo G. & S. M. Co., 33 Cal. 385.

3. **County judge may grant.** The constitutionality of the power conferred upon county judges considered and affirmed. Thompson v. Williams, 6 Cal. 88. County judges, in granting injunctions upon bills filed in the district court, act as injunction masters, and are exercising a power auxiliary to the jurisdiction of the district court. The effect of such an order is the same as if made by the district court, and the injunction is subject to be controlled, modified, or dissolved by the district judge, the same as if ordered by him in the first instance. Borland v. Thornton, 12 Cal. 440; Crandall v. Woods, 6 Cal. 449; see Ward v. Preston, 23 Cal. 468. An injunction granted by a county judge may be dissolved or modified by him. Creanor v. Nelson, 23 Cal. 464.

4. **When a court or judge cannot grant an injunction.** One district court cannot grant an injunction to restrain the execution of the orders, or decrees, or judgments of another court of coordinate jurisdiction. Rickett v. Johnson, 8 Cal. 34; Revalk v. Kraemer, 8 Cal. 66; 68 Am. Dec. 304; Chipman v. Hibbard, 8 Cal. 268; Phelan v. Smith, 8 Cal. 520; Gorham v. Toomey, 9 Cal. 77; Anthony v. Dunlap, 8 Cal. 26. An exception to the rule is, where the court in which the action or proceeding is pending is unable, by reason of its jurisdiction, to afford the relief sought, as, for instance, where several fraudulent judgments are confessed in several courts, it would not be necessary for a creditor to bring a different suit in each different court. Or, where the provisions of the code require the action to be tried in a particular county, there would be an exception, as the positive provision of the statute must be carried out. Uhlfelder v. Levy, 9 Cal. 697; Anthony v. Dunlap, 8 Cal. 26. The supreme court cannot grant an injunction, pending an appeal. Hicks v. Michael, 15 Cal. 107. A state court cannot enjoin the proceedings of a United States court. Phelan v. Smith, 8 Cal. 520.

5. **Generally.** It is not necessary that the plaintiff should first establish his title at law before he can obtain an injunction. Tuolumne Water Co. v. Chapman, 8 Cal. 392. Whether a taxpayer can, by injunction to restrain the performance of a ministerial duty cast upon public officers, merely upon the ground that the effect, at some future time, if certain other things be done, might be to subject his property to taxation, was suggested, but not decided, in Pattison v. Board of Supervisors, 13 Cal. 175; Duff v. Fisher, 15 Cal. 375. To authorize a court of equity to enjoin a judgment at law, on the ground of newly discovered facts, the proceeding must be taken by the defendant in the judgment at law. Mulford v. Cohn, 18 Cal. 42. An action on the case will not lie for improperly suing out an injunction, unless it is charged in the complaint as an abuse of the process of court, through malice, and without probable cause. Robinson v. Kellum, 6 Cal. 399. If the act complained of is

destitute of these elements, the remedy of the injured party is on the undertaking. Id.

6. Not retroactive. The order is never retroactive: it cannot make an act already performed unlawful, or treat such an act a disobedience of its provisions. People v. Albany etc. R. R. Co., 12 Abb. Pr. 171; 20 How. Pr. 358.

§ 526. When it may be granted. An injunction may be granted in the following cases:

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

2. When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action;

3. When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual;

4. When pecuniary compensation would not afford adequate relief;

5. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;

6. Where the restraint is necessary to prevent a multiplicity of judicial proceedings;

7. Where the obligation arises from a trust.

An injunction cannot be granted:

1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings;

2. To stay proceedings in a court of the United States;

3. To stay proceedings in another state upon a judgment of a court of that state;

4. To prevent the execution of a public statute by officers of the law for the public benefit;

5. To prevent the breach of a contract, the performance of which would not be specifically enforced;

6. To prevent the exercise of a public or private office, in a lawful manner, by the person in possession;

7. To prevent a legislative act by a municipal corporation.

When granted, generally. Civ. Code, §§ 3422 et seq.

Where obligation arises from trust. Civ. Code, § 3422.

Illegal payments by county, enjoining. See Pol. Code, § 4005b.

Enjoining nuisance. Post, § 731.

Trade-mark, use of, enjoined. Pol. Code, § 3199.

Mortgage, injunction to restrain party in possession from waste during foreclosure of. Post, § 745.

Disobeying order or process, contempt, etc. Post, §§ 1209, 1210.

Restraining injurious acts of executors, pending proceeding to prove lost or destroyed will. See post, § 1341.

Legislation § 526. 1. Enacted March 11, **1872**; based on Practice Act, § 112 (New York Code, § 219), which read: "An injunction may be granted in the following cases: 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; 2. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce great or irreparable injury to the plaintiff; 3. When it shall appear during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual." When enacted in 1872, (1) in subds. 1, 2, 3, the words "shall appear" were changed to "appears," and (2) in subd. 2, the word "waste" was added after "produce."

2. Amendment by Stats. **1901**, p. 136; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 341; the code commissioner saying, "Subdivisions 2 and 3 have been amended so as to permit the application for an injunction to be made by parties to the action other than plaintiff, and the provisions of §§ 3422 and 3423 of the Civil Code have been added to the section."

No strict rule governing granting of injunctions. Courts of equity decline to lay down any rule which will limit their power and discretion as to the particular cases in which injunctions shall be granted or withheld: it is impossible to foresee all the exigencies of society, which may require their aid and assistance to protect rights and redress wrongs. Merced Mining Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262. Where an injunction is justifiable, the issuing of the writ is, in a large degree, a matter of discretion, which should be exercised in favor of the party most likely to be injured (Raisch v. Warren, 18 Cal. App. 655; 124 Pac. 95); but rules of law cannot be relaxed, in order to relieve isolated instances of hardship. Collins v. Butler, 14 Cal. 223.

Complainant must have clean hands. A person coming into a court of equity for an injunction must come with clean hands and without any lack of truth in his own case: he cannot be granted relief upon a claim which contains a false representation calculated to deceive. Joseph v. Macowsky, 96 Cal. 518; 19 L. R. A. 53; 31 Pac. 914.

Injunction does not stay time. While the acts of the parties are restrained by the injunction, yet it does not stay the running of time, nor can it extend the time for making a motion for a new trial. Elliott v. Osborne, 1 Cal. 396.

Acquiescence of plaintiff as bar. The statute of limitations is directly applicable to a suit in equity; and a court of chancery may properly refuse to grant relief by injunction, where the plaintiff has assented to the acts complained of, and their consequences; and such assent may be inferred from the plaintiff's acquiescence with full knowledge of all the facts; and further, acquiescence, proving assent, may bar relief in equity, although not accompanied by all the circumstances which would make it an estoppel at law; the acquiescence which will bar a complainant from the exercise, in his favor, of the discretionary jurisdiction by injunction must be such as proves his assent to the acts of the defendant, and to the injuries to himself which have flowed, or can reasonably be expected to flow, from those acts. Lux v. Haggin, 69 Cal. 255; 4 Pac. 919; 10 Pac. 674.

Distinction between supersedeas and injunction. A writ of supersedeas, or order for the stay of proceedings pending an appeal, is limited to restraining any action upon the judgment appealed from, and cannot be used to perform the functions of an injunction against the parties to the action, restraining them from any act in the assertion of their rights, other than to prevent them from using the process of the trial court to enforce the judgment; nor can the writ be employed for any purpose, upon persons not parties to the judgment. Dulin v. Pacific Wood etc. Co., 98 Cal. 305; 33 Pac. 123.

Effect of appeal on injunction. The distinction between the effect of an appeal from a judgment in staying further proceedings thereon, and its effect in depriving the judgment itself of any efficacy as evidence of the fact determined, is, that the appeal suspends the force of the judgment as a conclusive determination of the rights of the parties, while the stay of proceedings consequent upon the appeal is limited to the enforcement of the judgment, and does not destroy or impair its character. Dulin v. Pacific Wood etc. Co., 98 Cal. 304; 33 Pac. 123. The purpose of the injunction is to hold the subject of litigation in statu quo until a final determination; but the judgment may command or permit some act to be done, in which case a stay of proceedings will be had, although, as a general rule, the injunction is not dissolved or suspended by the appeal. Stewart v. Superior Court, 100 Cal. 543; 35 Pac. 156, 563. An injunction restraining interference with a person's right to act as a director of a corporation, which is but ancillary and incidental to a judgment determining that he had such right, although preventive in form, is in effect mandatory, as it requires the other directors to recognize him as one of their number, and to refuse to recognize a third party, and as that portion of the judgment declaring the party elected is suspended by the appeal, the injunctive portion of the judgment, being merely incidental, is also suspended, and the power of the court to enforce any part of its judgment, by inflicting punishment for its violation, is stayed: an enforcement of this portion of the judgment would operate to carry the decree into effect, and would change the relative position of the parties from those existing at the time the decree was entered, and might render a reversal of the judgment ineffectual. Foster v. Superior Court, 115 Cal. 279; 47 Pac. 58; and see Stewart v. Superior Court, 100 Cal. 543; 35 Pac. 156, 563. The office of the writ of injunction is peculiarly preventive, and not remedial; to restrain the wrong-doer, not to punish him after the wrong has been done, or to compel him to undo it; and if the injunction, though restrictive in form, has the effect of compelling the performance of a substantive act, it is mandatory, and necessarily contemplates a change in the relative positions or rights of the parties from those existing at the time the injunction was granted or the decree was entered. Stewart v. Superior Court, 100 Cal. 543; 35 Pac. 156, 563. The appellate court will not suspend the operation of a judgment granting a perpetual injunction, pending an appeal. Swift v. Shepard, 64 Cal. 423; 1 Pac. 493; and see Merced Mining Co. v. Fremont, 7 Cal. 130. Where a board of

education was restrained from using certain text-books, and required to use certain others, the board, pending an appeal from the judgment, should merely be required to remain passive and take no action in favor of or against either system of text-books. Mark v. Superior Court, 129 Cal. 1; 61 Pac. 436. Where an injunction was granted, ordering the removal of trade-signs, and prohibiting the use of a trade name thereon, a perfected appeal stays proceedings as to the mandatory portion of the injunction, but has no such effect upon that part of the injunction which is merely prohibitory. Schwarz v. Superior Court, 111 Cal. 106; 43 Pac. 580. The court, after judgment for the defendant, denying an injunction, may issue an order restraining him, pending the determination of a motion for a new trial. Pasadena v. Superior Court, 157 Cal. 781; 21 Ann. Cas. 1355; 109 Pac. 620; Pierce v. Los Angeles, 159 Cal. 516; 114 Pac. 818. Many judgments are self-executing or have an intrinsic effect, upon which there are no proceedings to be stayed, and which, therefore, would not be affected by an appeal; such as judgments granting or dissolving an injunction, or granting or denying a divorce. Dulin v. Pacific Wood etc. Co., 98 Cal. 304; 33 Pac. 123. Where the plaintiff is entitled to and obtains an injunction before trial in the lower court, he is entitled to retain it upon the cause being remanded for a new trial. Hess v. Winder, 34 Cal. 270. The operation of a restraining order is not extended by an appeal from the order denying the injunction: where the injunction is refused, there is nothing operative, and the appeal cannot operate to create an injunction, under any circumstances. Hicks v. Michael, 15 Cal. 107. A process, once discharged and dead, is gone forever, and it never can be revived, except by a new exertion of judicial power: it cannot be revived by any act of the party, nor by the taking of an appeal. Hicks v. Michael, 15 Cal. 107. The superior court has no jurisdiction to punish for disobedience of a mandatory injunction, pending an appeal, though it may punish for the violation of a prohibitory injunction. Dewey v. Superior Court, 81 Cal. 64; 22 Pac. 333.

Preservation of status quo. The code provisions regulating injunctions do not curtail the general grant of equity power vested in the superior courts by the constitution, nor affect their general chancery power to preserve the status quo of the subject-matter of the litigation, pending an appeal. Pasadena v. Superior Court, 157 Cal. 781; 21 Ann. Cas. 1355; 109 Pac. 620. A prohibitory injunction remains in full force, pending an appeal, and the court may enforce obedience thereto; but a mandatory injunction is stayed by the operation of the appeal: the object of the rule, in both cases, is to preserve the status quo; otherwise the result of the final adjudication might often be a barren victory. Dewey v. Superior Court, 81 Cal. 64; 22 Pac. 333. A complaint in an action for a partnership accounting, which shows that a deceased partner was indebted to the partnership, but had caused his shares of stock in a corporation defendant and in another corporation, both of which were used as instrumentalities of the partnership, to be transferred to his heirs as a gift causa mortis, states a ground for relief in equity against the administrator and the heirs, who may be restrained from disposing of such stock, pending the settlement of the partnership accounts. Raisch v. Warren, 18 Cal. App. 655; 124 Pac. 95. The superior court has jurisdiction to issue an injunction in a divorce proceeding, restraining the husband from alienating his property, pending suit. In re White, 113 Cal. 282; 45 Pac. 323. Where the defendant selected public lands under a contract to secure them for the plaintiff, the latter is entitled to a preliminary injunction, in a suit brought by him to restrain the defendant from conveying such lands to another party. Farnum v. Clarke, 148 Cal. 610; 84 Pac. 166.

To prevent waste. A court of equity is always more ready to listen to an application for an injunction on the ground of waste, than on the ground of trespass; the old rule was, that an injunction to prevent waste, or trespasses in the nature of waste, could only be granted when the parties stood in the relation of landlord and tenant, and not where the party doing the act complained of was a mere stranger; but, upon sound principles, this rule has been relaxed; for in many cases irremediable mischief might be done to the inheritance if an injunction were refused. Hicks v. Michael, 15 Cal. 107. The distinction between waste and trespass, so far as regards the power of the court to grant an injunction, has been set aside; and an injunction is now granted in all cases of timber, coal, ores, and quarries, where the party is a mere trespasser, or where he exceeds the limited rights with which he is clothed, on the ground that the acts are or may be irreparable damage to the particular species of property. Merced Mining Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262. At common law, a tenant had no redress for acts of admitted waste committed by his co-tenant; but under our statute, a tenant may now recover damages from his co-tenant in every case of waste; but where the acts complained of are not wanton and destructive, no injunction lies. McCord v. Oakland etc. Mining Co., 64 Cal. 134; 49 Am. Rep. 686; 27 Pac. 863. Where the effect of the act complained of would be to impair or destroy the substance of the estate, by taking from it something which cannot be replaced, it may be enjoined, irrespective

of the ability of the defendant to respond in damages. Kellogg v. King, 114 Cal. 378; 55 Am. St. Rep. 74; 46 Pac. 166. The remedy for waste is ordinarily at law; but where the relief sought is for the purpose of preserving the security of a mortgage, equity will interpose by injunction to prevent future waste, and, in the same action, an accounting will be decreed and compensation given for past waste. Mitchell v. Amador Canal etc. Co., 75 Cal. 464; 17 Pac. 246. A trespass in the nature of waste, which goes to deprive a party of part of his inheritance, should be restrained by injunction: the defendant might be able to pay for the mischief done, if it could ultimately be proved that his acts were tortious; but if anything is to be abstracted which cannot be restored in specie, no man should be liable to have that taken away which cannot be replaced, merely because he may possibly recover what others may deem an equivalent in money. Hicks v. Michael, 15 Cal. 107. A mortgagee may stay the commission of waste on the mortgaged premises, upon a showing that the commission of the threatened acts will materially impair the value of his security (Robinson v. Russell, 24 Cal. 467; Buckout v. Swift, 27 Cal. 433; 87 Am. Dec. 90; Miller v. Waddingham, 91 Cal. 377; 13 L. R. A. 680; 27 Pac. 750); and he has concurrent remedies, where the mortgagor commits waste upon the mortgaged premises so as to impair the security, by an action at law for damages, or by a suit in equity for an injunction to prevent threatened damages (Lavenson v. Standard Soap Co., 80 Cal. 245; 13 Am. St. Rep. 147; 22 Pac. 184); but he cannot maintain a suit in equity to restrain waste, without a showing that thereby his security will be impaired. Miller v. Waddingham, 91 Cal. 377; 13 L. R. A. 680; 27 Pac. 750; Stowell v. Waddingham, 100 Cal. 7; 34 Pac. 436. An averment of acts which impair the value of the security for the rent, in a suit to restrain such acts, is not sufficient, where the only showing is that the security will be lessened in value: it must be shown that such security will be left inadequate to secure the rent. Perrine v. Marsden, 34 Cal. 14; and see Buckout v. Swift, 27 Cal. 433; 87 Am. Dec. 90. Although not a technical waste, a party is entitled to an injunction against the removal, beyond his reach, of a building on which he has a lien: such removal would destroy his statutory right, and deprive him of his lien. Barber v. Reynolds, 33 Cal. 497. An injunction cannot issue to prevent waste, where the waste had already been committed: an injunction cannot issue to restrain the removal of buildings from land, after the buildings have been removed, and are in the middle of a public highway. Stowell v. Waddingham, 100 Cal. 7; 34 Pac. 436. An entry upon land, and the digging up and removal of fruit-trees growing thereon, is waste, and an injury to the inheritance, which a court of equity may enjoin. Silva v. Garcia, 65 Cal. 591; 4 Pac. 628. Where the defendants enter upon the plaintiff's property, and dig up and destroy fruit-trees and ornamental shrubbery, and threaten to continue such trespasses, the mere fact that they are willing to pay for the property is immaterial, in view of the fact that, from the nature of such property, it would be impossible to determine its value in money. Daubenspeck v. Grear, 18 Cal. 443. The removal of pendent fruit and growing nursery stock, by a mortgagor in possession, is not an act from which irreparable injury will result: full and adequate damages can be recovered in an action for trespass; and the doing of such acts does not materially impair the value of the inheritance, the substance of the realty. Robinson v. Russell, 24 Cal. 467.

Prevention of trespass. A naked trespass merely, where no waste is committed, does not present a case for injunction. Nevada County etc. Canal Co. v. Kidd, 37 Cal. 282. An ancient rule in cases of trespass was, that a court of equity would not interfere by injunction, but left the party to his remedy at law; in modern times, this doctrine has been much relaxed, and although the general rule remains, yet there are exceptional cases where equity does and will interpose, but only where a strong case is made; thus, it will interfere to quiet possession or to prevent a multiplicity of actions, or where the value of the inheritance is put in jeopardy, or where irreparable mischief is threatened in relation to mines, quarries, or woodland, whether the same results from the nature of the injury itself or from the insolvency of the party committing it. Leach v. Day, 27 Cal. 643. Equity will not interpose to restrain a trespasser, simply because he is a trespasser and is insolvent: other facts and circumstances must be shown. Mechanics' Foundry v. Ryall, 75 Cal. 601; 17 Pac. 703; California Navigation Co. v. Union Transportation Co., 122 Cal. 641; 55 Pac. 591; California Navigation etc. Co. v. Union Transportation Co., 126 Cal. 433; 46 L. R. A. 825; 58 Pac. 936. A trespass about to be committed by a defendant cannot be restrained by an injunction, unless the injury would be irreparable, which could only be upon a clear showing of the plaintiff's right and of the defendant's insolvency. More v. Ord, 15 Cal. 204. An injunction ought not to be granted in aid of an action of trespass, unless it appears that the injury will be irreparable, and cannot be compensated in damages (Waldron v. Marsh, 5 Cal. 119); it is not sufficient simply to allege the fact that the injury will be irreparable: it must be shown how and why it will be so. Ran-

dall v. Freed, 154 Cal. 299; 97 Pac. 669. Where a trespass already committed would probably be repeated indefinitely, an injunction may be granted, to avoid a multiplicity of actions. Smithers v. Fitch, 82 Cal. 153; 22 Pac. 935. A bona fide possession of the invaded premises, under claim and color of right, is sufficient to warrant an injunction against a trespasser. Kellogg v. King, 114 Cal. 378; 55 Am. St. Rep. 74; 46 Pac. 166. An injunction will issue to prevent acts interfering with complainant's ingress to and egress from his dwelling, such as the nailing up and closing of gates, and the cutting and obstructing of water-pipes. Zierath v. McCann, 20 Cal. App. 561; 129 Pac. 808. The owner of a private wharf, in possession thereof, is entitled to a perpetual injunction restraining the construction of another wharf in front of his, which will cut his wharf off from the navigable waters of the bay, unless the person constructing the same shows a lawful right, derived from competent authority, to do so. Cowell v. Martin, 43 Cal. 605. A trespasser on the premises of another, who also assumes control over his business, and intercepts money due to him, and holds himself out to the public as a partner having the right to do these things, may be restrained: bodily ejectment from the premises would not necessarily prevent the continuance of such injuries; nor would an action for damages afford adequate relief, because of the difficulty of ascertaining, in pecuniary terms, the amount of damages, and because of the insolvency of the trespasser. De Groot v. Peters, 124 Cal. 406; 71 Am. St. Rep. 91; 57 Pac. 209. A complaint alleging that the trespass was committed under a pretended claim of right of way over the plaintiff's land, by virtue of a pretended order of a board of supervisors opening and establishing a private road for the defendant's use, and that the defendant threatens to tear down the plaintiff's fences as often as the plaintiff erects the same, is not sufficient to warrant an injunction, where no reasons are given why the plaintiff has not an adequate and complete remedy at law. Leach v. Day, 27 Cal. 643. An injunction will lie against a trespasser to restrain the raising of the level of a street, in the absence of anything to show that the defendant was proceeding under legal authority; and the fact that the defendant is solvent does not defeat the plaintiff's right, as the acts complained of constitute such an obstruction of the plaintiff's easement in the street as to constitute a permanent injury to the inheritance, and would ripen into a right if permitted. Schaufele v. Doyle, 86 Cal. 107; 24 Pac. 834. An injunction will not lie for a trespass committed on land, where the plaintiff is wholly disseised, and the defendant is in adverse possession. Raffetto v. Fiori, 50 Cal. 363; Felton v. Justice, 51 Cal. 529. Although the wild game of the state belongs to the people in their sovereign capacity, and is subject to private dominion only by authority of the legislature, yet, within the provisions of the statute prescribing in what cases individual proprietorship therein may exist, the individual owner is as much to be protected in the enjoyment of his rights in this species of property as in any other, under the law: any person violating such rights is a trespasser, and may be enjoined. Kellogg v. King, 114 Cal. 378; 55 Am. St. Rep. 74; 46 Pac. 166. The payment of damages is a condition precedent to the creation of the right of a city to change a natural watercourse, to the damage of the plaintiff's property: without such payment, the city is a mere trespasser, and injunction is the plain, ordinary, and best remedy. Geurkink v. Petaluma, 112 Cal. 306; 44 Pac. 570. A technical trespass, committed by the business agent of a labor council, in entering upon the premises of the plaintiff, for the purpose of calling the men out on a lawful strike, is, in the absence of any threatened repetition of the act, not a ground for an injunction. Parkinson Co. v. Building Trades Council, 154 Cal. 581; 21 L. R. A. (N. S.) 550; 16 Ann. Cas. 1165; 98 Pac. 1027.

Nuisances. An injunction may be granted to prohibit the defendant from permitting his premises to be occupied as a house of prostitution. Farmer v. Behmer, 9 Cal. App. 773; 100 Pac. 901. In order to obtain an injunction to restrain obstructions of public highways, the injury complained of must be special in character, and not merely greater in degree than that of the general public. Bigley v. Nunan, 53 Cal. 403; Payne v. McKinley, 54 Cal. 532; Crowley v. Davis, 63 Cal. 460. Where the court finds that a nuisance exists and is continuous, the issuance of an injunction is justified, although not specifically prayed for in the complaint. Sullivan v. Royer, 72 Cal. 248; 1 Am. St. Rep. 51; 13 Pac. 655.

To prevent irreparable injuries. An injunction is never granted, unless the bill shows some vested right in the plaintiff, which is likely to suffer great or irreparable injury from the act complained of; the mere allegation of such injury is insufficient: the facts stated must satisfy the court that such apprehension is well founded. Branch Turnpike Co. v. Board of Supervisors, 13 Cal. 190. Not every case in which a property-owner deems himself liable to be injured will justify the issuance of an injunction; and courts will not grant a preliminary restraining order or injunction, unless it is made to appear that damages might result. Geurkink v. Petaluma, 112 Cal. 306; 44 Pac. 570. Where the plaintiff has a right of way for a ditch upon the surface and the defendant has a right to mine in the bowels of a mountain, such rights are not necessarily incompatible, and the defendant will not

be enjoined from so mining, even though the destruction of the plaintiff's ditch is threatened. Clark v. Willett, 35 Cal. 534. A riparian owner is entitled to have the water of the stream flow over his land in its usual volume, and also in its natural purity; and the pollution of the stream by the defendant so as substantially to impair its value for the ordinary purposes of life, and render it measurably unfit for domestic purposes, is an actionable nuisance; and the fact that the defendant is a municipal corporation does not enhance its rights nor palliate its wrongs in this respect. Peterson v. Santa Rosa, 119 Cal. 387; 51 Pac. 557. An action by the owner of land, in possession thereof, to enjoin the removal of machinery, engines, derricks, and tramways, attached to the soil, will be sustained, upon the presumption of ownership arising from the possession thereof, even if the property be considered as personal property, in the absence of proof of other ownership thereof. Nolan v. Rostler, 135 Cal. 264; 67 Pac. 127. Where a defendant, pending negotiations of his employer for a renewal of the lease of the premises occupied by him for business purposes, uses his knowledge of his employer's business, and secretly, with another, secures a lease of such premises for himself and such other, the plaintiff employer, in an action to compel the transfer of the lease, is entitled to an injunction, pendente lite, to restrain the defendant from proceeding to recover the premises. Gower v. Andrew, 59 Cal. 119; 43 Am. Rep. 242. A creditor holding a certificate of stock as collateral security has no right to enjoin the sale thereof under execution, after attachment and judgment, where he did not have such stock transferred on the books of the company. Farmers' Nat. Bank v. Wilson, 58 Cal. 600. An injunction will issue to prohibit the continuance of a use that obstructs one in the free use and enjoyment of his land, where such use, if continued, will ripen into an easement. Vestal v. Young, 147 Cal. 715; 82 Pac. 381. The plaintiff is entitled to an injunction upon the pleadings, where an alteration in the mode and manner of using an easement is so substantial as to result in the creation and substitution of a different servitude from that which previously existed; and it is immaterial that a benefit to the plaintiff will accrue by reason of the acts complained of. Allen v. San José Land etc. Co., 92 Cal. 138; 15 L. R. A. 93; 28 Pac. 215. Where the injury threatened is irreparable, and goes to the substance of the inheritance, it is a matter of indifference whether the plaintiff is in or out of possession. More v. Massini, 32 Cal. 590.

Where remedy at law inadequate. An adequate remedy at law existing by motion, and having been pursued, a court of equity will not grant an injunction to restrain the collection of the judgment. Reagan v. Fitzgerald, 75 Cal. 230; 17 Pac. 198. The assistance of equity cannot be invoked, so long as the remedy by motion exists; but when the time within which a motion may be made has expired, and no laches or want of diligence is imputable to the party asking relief, there is nothing in reason or propriety to prevent the interference of equity. Bibend v. Kreutz, 20 Cal. 109; Ede v. Hazen, 61 Cal. 360. Courts of equity interfere to do justice, only when common-law tribunals are incapable of rendering it, and seldom or never interfere to give effect to a mere technical right: there must be substantial merit. Gregory v. Ford, 14 Cal. 138; 73 Am. Dec. 639. Where the efforts of the defendant to redress the injury complained of were thwarted by the conduct of the plaintiff, and no sufficient reason appears why the remedy offered was not accepted, which was plain, speedy, and adequate, an injunction is properly refused to prevent the wrong, which is otherwise irremediable. Richardson v. Eureka, 110 Cal. 441; 42 Pac. 965. Where the judgment of a justice's court is void on its face for want of jurisdiction, an adequate remedy exists by motion in that court to arrest execution and stay further process on the judgment, and an injunction to restrain an execution on such judgment will be denied. Gates v. Lane, 49 Cal. 266. Only in equity, and by means of an injunction, can relief be had from continuous wrongful acts and consequent infringement of rights; and it is not necessary to prove damages. Moore v. Clear Lake Water-Works, 68 Cal. 146; 8 Pac. 816. A court of law has ample power to afford speedy and adequate relief, where judgment and execution are void on their face; and the court has entire control over process, and can arrest it, and also, upon proper application, has authority to order suspension of the execution of the writ until a motion before the court to recall or quash it can be heard. Sanchez v. Carriaja, 31 Cal. 170. A perpetual injunction against a judgment will not be allowed on grounds which could have been set up as a legal defense in the action at law. Agard v. Valencia, 39 Cal. 292. Plaintiffs, for their laches in not taking advantage of their adequate and speedy legal remedy by motion to recall the execution on judgment, are not entitled to an injunction restraining an execution on the judgment; a formal action is unnecessary, as well as expensive and dilatory, where a motion in court would reach the same end: where the injured party has an adequate and speedy remedy at law, he is not entitled to the assistance of a court of equity. Moulton v. Knapp, 85 Cal. 385; 24 Pac. 803. Where the rights of a lienholder to have the premises sold to satisfy his lien were directly adjudicated against the plaintiff, he cannot avail himself of any matter which he might have pleaded in defense of the action to foreclose the lien, and cannot en-

join the sheriff from making the sale, on the ground that at the time of the commencement of the action the premises were his homestead, to the prejudice of the plaintiff in the former suit, who is not a party to the action for the injunction. Rucker v. Langford, 138 Cal. 611; 71 Pac. 1123. Where no reason is given why a plaintiff could not obtain all the relief to which he is entitled in a pending action, an injunction does not lie. Richards v. Kirkpatrick, 53 Cal. 433; and see Leach v. Day, 27 Cal. 643; Rahm v. Minis, 40 Cal. 421. The remedy by injunction to restrain the enforcement of a satisfied judgment is proper, notwithstanding the court in which the judgment was rendered may have the power to grant the same relief, upon motion to stay the execution. Thompson v. Laughlin, 91 Cal. 313; 27 Pac. 752. The mere fact that one has a right of action at law does not prevent his right to equitable relief by way of injunction against a threatened trespass, if, under the circumstances, the legal remedy would fail of affording adequate relief against the impending wrong: the remedy by injunction may be invoked to restrain acts, or threatened acts, of trespass in any instance, where such acts are or may be an irreparable damage to the particular species of property involved; and in such case, the solvency or insolvency of the wrong-doer is immaterial: the nature of the injury, and not the incapacity of the party to respond in damages, determines the right. Kellogg v. King, 114 Cal. 378; 55 Am. St. Rep. 74; 46 Pac. 166.

Inadequacy of pecuniary relief. In determining the right of a party to an injunction after a verdict in his favor by a court of law, the court will consider the relative loss to either party, the character of the property for which protection is sought, the character of the locality in which the nuisance exists, and whether the injury is properly compensable in damages. Peterson v. Santa Rosa, 119 Cal. 387; 51 Pac. 557. Where a judgment was obtained after a declaration of homestead, and an attachment was levied upon the premises before the filing of the declaration, such judgment, not being founded upon a debt secured by a mortgage or other lien, cannot be enforced, and an injunction lies to restrain a threatened execution sale thereunder. McCracken v. Harris, 54 Cal. 81. A perpetual injunction, issued under a void statute, against the condemnation of property, where no notice was given the owners, or compensation tendered, is not operative when the proper steps are taken and the right is secured. Curran v. Shattuck, 24 Cal. 427. An injury to a right in land results, where a person wrongfully causes water to flow upon the land, over which it would not flow naturally; and such injury cannot be continued because other persons have a low estimate of the damages which it causes: the right to an injunction, in such case, does not depend upon the extent of the damage, measured by a money standard. Learned v. Castle, 78 Cal. 454; 18 Pac. 872; and see Richards v. Dower, 64 Cal. 62; 28 Pac. 113; Moore v. Clear Lake Water-Works, 68 Cal. 146; 8 Pac. 816; Lux v. Haggin, 69 Cal. 255; 10 Pac. 674; Walker v. Emerson, 89 Cal. 456; 26 Pac. 968. The owner of lower land is entitled to an injunction restraining the wrongful acts of an upper landowner, in flooding the lower land, notwithstanding the absence of evidence of any specific monetary damage occasioned thereby. Galbreath v. Hopkins, 159 Cal. 297; 113 Pac. 174.

Amount of injury immaterial. Because the injury is incapable of ascertainment, or of being computed in damages, so that only nominal damages can be recovered, it does not follow that such injury is trifling or inconsiderable: that the injury is unascertainable, and in that sense inappreciable, may be a good reason why an injunction should issue. Heilbron v. Fowler Switch Canal Co., 75 Cal. 426; 7 Am. St. Rep. 183; 17 Pac. 535. Where the injury is only occasional and the damage small, and accidental, rather than a probable and necessary consequence of the acts complained of, an injunction will be denied: each case must be governed by the circumstances that surround it, and by relative equities. Peterson v. Santa Rosa, 119 Cal. 387; 51 Pac. 557. Where a city has, at great expense, developed water, a great portion of which it had the right to take, and the plaintiff knew of such expense, and that some of its water might be drained, and the amount so drained is comparatively small, the judgment should, in equity, make that amount good by a restoration of it, either by mandatory injunction or in some equitable manner, rather than prohibitively to enjoin the city from taking any water. Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578; 77 Pac. 1113. In granting an injunction, the court must consider the amount of injury which may be thereby inflicted on strangers to the suit and third parties. Santa Cruz Fair etc. Ass'n v. Grant, 104 Cal. 306; 37 Pac. 1034.

Statement of irreparable injury. The simple allegation of irreparable injury is not sufficient to obtain an injunction: it should appear from the facts set forth in the bill (De Witt v. Hays, 2 Cal. 463; 56 Am. Dec. 352); nor is the mere allegation that irreparable injury will result sufficient: it must be shown how and why it will be so (Mechanics' Foundry v. Ryall, 75 Cal. 601; 17 Pac. 703); nor is a general averment as to the injury caused or to be caused by the acts of the defendant sufficient, without setting out the facts showing how or why the supposed injury will be irreparable. California Navigation Co.

v. Union Transportation Co., 122 Cal. 641; 55 Pac. 591. An averment that the defendant is doing, and threatening to continue, acts which will destroy the plaintiff's growing crops, and will render valueless ten acres of valuable land, shows a case of irreparable injury, and an injunction should issue. Schneider v. Brown, 85 Cal. 205; 24 Pac. 715. While the rule is, that facts must be stated to justify the conclusion of irreparable injury, yet in the case of mines, timber, and quarries, the statement of the injury is sufficient; in such cases, all the party could well state would be the destruction of the timber or the taking away of the minerals; the taking away of minerals is itself an injury that is irreparable, because it is a taking away of the substance of the estate. Merced Mining Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262. The allegations of the complaint must show that the injury to be sustained cannot be adequately compensated by damages, or that it is irremediable, or that it will lead to irremediable injury, to entitle a party to an injunction in a case of nuisance (Middleton v. Franklin, 3 Cal. 238); and the complaint must show special damage to the plaintiff; and facts must be stated to show that the apprehension of injury is well founded (Payne v. McKinley, 54 Cal. 532; Crowley v. Davis, 63 Cal. 460); and some vested right in the plaintiff, which is likely to suffer great or irreparable injury. Branch Turnpike Co. v. Board of Supervisors, 13 Cal. 190. A party seeking to enjoin a public officer from the performance of an official duty should show by distinct averments that the threatened acts of the officer will interfere with his rights to such an extent as to cause him some irreparable injury. Santa Cruz Fair Bldg. Ass'n v. Grant, 104 Cal. 306; 37 Pac. 1034. An allegation, that the effect of preparing a levee will be to dam up the waters and increase the same in volume, until the levee will break and permit the waters to flow down to and upon plaintiff's land and destroy the fences and trees thereon, is simply an expression of opinion, and affords no reason in law for arresting the work by injunction. Hoke v. Perdue, 62 Cal. 545. A general averment, that the defendant, by its acts, "has caused and does cause to the plaintiff continuous and daily damage," being insufficient to show any irreparable injury whatever, cannot be in any way aided or helped out by a further averment, that to recover the amount of such damages "will require a multiplicity of judicial proceedings." California Navigation Co. v. Union Transportation Co., 122 Cal. 641; 55 Pac. 591. Where the complaint alleged that the defendant dug a mining-ditch above one previously constructed by the plaintiff, and had thereby diverted the water of the stream from the plaintiff's ditch, but did not aver that the injury was continuing, or threatened to be continued, or likely to be continued, sufficient is alleged for the recovery of damages, but not to sustain an injunction: the writ of injunction, though remedial, must be based upon some equitable circumstances. Coker v. Simpson, 7 Cal. 340; and see Ball v. Kehl, 87 Cal. 505; 25 Pac. 679.

Insolvency of defendant. Where there is no averment in the complaint that the defendant is insolvent, and no showing that the wrongs complained of are irreparable, or destructive of the plaintiff's estate in its nature and substance, nor that they are not susceptible of adequate compensation in damages, facts sufficient to warrant the interposition of a court of equity are not stated. Mechanics' Foundry v. Ryall, 62 Cal. 416. Where the case made by the bill for an injunction to restrain the defendant from taking possession of real estate does not show irreparable damages, nor allege insolvency of the defendant, nor any trespass, but only the fear of it, nor show that there was no adequate remedy at law, but averred plaintiff's title to the property and his possession, the remedy of injunction cannot be properly invoked and maintained. Tomlinson v. Rubio, 16 Cal. 202. The fact that the work sought to be enjoined is of a public nature, affecting the public convenience, and that there is no doubt of the defendant's ability to respond in damages, are important matters in determining the right to an injunction. Bigelow v. Los Angeles, 85 Cal. 614; 24 Pac. 778. The rule established under a system which permitted imprisonment for debt, and therefore gave more efficiency to the remedy at law, should be received with some modifications under our system; the reason of the rule being modified, the rule itself should receive corresponding qualification; in practice, it is generally difficult to prove insolvency, except after the return of an officer upon execution; practical men hesitate to rely upon the personal responsibility of the individual for compensation for serious injuries, and it comports more with substantial justice to both parties to restrain the trespass, rather than to leave the plaintiff to pursue his remedy at law. Merced Mining Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262. Where the plaintiff alleges and proves that the title to a growing crop is in himself, and that the defendant is insolvent, he is entitled to an injunction to restrain the defendant from harvesting and removing it. West v. Smith, 52 Cal. 322. In order to sustain an injunction to prevent the removal of a crop, it is sufficient to show the inability of the defendant to respond in damages: absolute and complete insolvency need not be shown. Paige v. Akins, 112 Cal. 401; 44 Pac. 666. The rule that trespass upon real estate cannot be enjoined,

because a purely legal remedy suffices for the plaintiff's redress, does not apply where the trespasser is insolvent, and takes hay belonging to the plaintiff and feeds the same to live-stock: replevin would be an insufficient remedy, because a portion of the hay would be consumed before the writ could be served, and the insolvency of the defendant would make a judgment for its value worthless. Rohrer v. Babcock, 114 Cal. 124; 45 Pac. 1054. Where it is merely alleged that the plaintiff will be damaged in the sum of five thousand dollars, and there is no allegation that the defendant is not responsible for that sum, nor that there will be any extraordinary impediment in the way of recovering that sum by an action at law, there is no ground stated for an injunction. Gardner v. Stroever, 81 Cal. 148; 6 L. R. A. 90; 22 Pac. 483. The insolvency of the defendant need not be alleged, where the gravamen of the complaint is a threatened trespass upon land, in the nature of waste, which will be committed unless the defendant is restrained, and if permitted, the plaintiff will be deprived of a part of his inheritance, which could not be specifically replaced. More v. Massini, 32 Cal. 590. The solvency of the defendant is an immaterial circumstance, where the injury is irreparable; and a finding that the injury would not be irreparable is inconsistent with a finding showing the permanent character of the work. Richards v. Dower, 64 Cal. 62; 28 Pac. 113. Where an injunction is sought to restrain irreparable injury to the inheritance, from a trespass in the nature of waste, the complaint need not allege the insolvency of the defendant. Crescent City Wharf etc. Co. v. Simpson, 77 Cal. 286; 19 Pac. 426. The allegation of insolvency is not necessary to procure an injunction in cases of trespass upon mines, timber, and quarries: the right to the remedy is based upon the nature of the injury, and not upon the incapacity of the party to respond in damages. Merced Mining Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262. Where the defendant was removing a crop, with intent to defraud the plaintiff of his share, due for rent, a bill of complaint that does not aver either the insolvency of the defendant or that he is without any tangible property which could be made the subject of execution, is too defective to sustain an order for an injunction. Gregory v. Hay, 3 Cal. 332. Where a judgment creditor brings a bill to reach equitable assets, he must aver insolvency, or, what is equivalent to it, an execution returned nulla bona: insolvency, in such cases, is, per se, a condition of relief, a fact without which a court of equity can have no jurisdiction to act in the given instance, an ultimate fact to be proved; hence the necessity that it be averred. Hager v. Shindler, 29 Cal. 47; and see Harris v. Taylor, 15 Cal. 348.

Interference with water rights. An injunction lies to restrain a threatened permanent interference with water rights, whether percolating or riparian. Bonetti v. Ruiz, 15 Cal. App. 7; 113 Pac. 118. The diversion, by a mere intruder, of the waters of a canal, by means of a ditch constructed across the land of the owner of the canal, may be enjoined by the owner as an injury to his right: the right to an injunction does not depend upon the extent of the damage, measured by a money standard, and is not defeated by a finding that the plaintiff has not been actually damaged by the water taken. Walker v. Emerson, 89 Cal. 456; 26 Pac. 968. The right to the use and enjoyment of property is sufficient to have the right protected against invasion by another, and the ownership of property carries with it the right to any lawful enjoyment thereof, either by using it or by disposing of it to others: it is not necessary to allege in a complaint to enjoin the diversion of water, that the plaintiff is in a position to use the water himself, or that he is in any position which gives him a right to furnish water to others. Moore v. Clear Lake Water-Works, 68 Cal. 146; 8 Pac. 816; Conkling v. Pacific Improvement Co., 87 Cal. 296; 25 Pac. 399. Where the diversion, by the defendant, of the water of a stream is against the superior right of the plaintiff, and to the extent of depriving the latter of all the water to which he is entitled, it is not necessary to prove damages, to entitle him to an injunction. Mott v. Ewing, 90 Cal. 231; 27 Pac. 194. The plaintiff's right to an injunction does not depend upon the amount of injury he has received: being a riparian owner, he has a right to the flow of the entire stream, as against any diminution thereof by one not a riparian owner; and the claim of a defendant, that he has a right to divert a portion of its flow authorizes the plaintiff to invoke the aid of equity, in order that this claim may not ripen into a right. Gould v. Eaton, 117 Cal. 539; 38 L. R. A. 181; 49 Pac. 577; and see Moore v. Clear Lake Water-Works, 68 Cal. 146; 8 Pac. 816; Stanford v. Felt, 71 Cal. 249; 16 Pac. 900. An allegation in the complaint in an action to restrain the defendants from diverting the waters of a stream, that the defendants wrongfully claim some pretended and fictitious right to the use of water, does not prejudice the right of the plaintiff to an injunction. Tuolumne Water Co. v. Chapman, 8 Cal. 392. Where the defendant wrongfully obstructed the flow of water into the plaintiff's ditch, and threatened to continue to do so, the plaintiff was entitled to a perpetual injunction, without proof of damages. Spargur v. Heard, 90 Cal. 221; 27 Pac. 198.

Injunction where right depends on disputed questions of law. Where the right for which protection is sought is dependent upon disputed questions of law which have

never been settled by the courts of this state, and concerning which there is an actual and existing dispute, equity will withhold relief until the questions of law have been determined by the proper court. Hughes v. Dunlap, 91 Cal. 385; 27 Pac. 642. The circumstances, the consequences of the action, and the real equity of the case, will be considered by a court of chancery, before interposing by injunction, even after the right has been established at law. Peterson v. Santa Rosa, 119 Cal. 387; 51 Pac. 557. Where the title of the plaintiff is disputed by the answer, courts have frequently held that an injunction cannot be granted until the final hearing of the cause; but there is no case holding that a legal determination of the question of title, or pendency of suit for that purpose, is essential to the equitable jurisdiction of the court; the usual practice has been to ask the assistance of equity in such cases, in aid of an action at law; but there are many cases in which the powers of a court of equity have been invoked in the first instance. Hicks v. Michael, 15 Cal. 107; San Antonio Water Co. v. Bodenhamer, 133 Cal. 248; 65 Pac. 471. The only object in establishing title at law is to show that the right is in the plaintiff; the suit at law is only a means to accomplish a given end, and when that end is already obtained, there is no reason for doing an idle thing; and if the title of the plaintiff is conceded, there is no need of a trial at law to establish what is already admitted. Tuolumne Water Co. v. Chapman, 8 Cal. 392. Where the title of the plaintiff is disputed, and no action at law has been brought, the practice has generally been to direct an issue to be tried by a court of law and to await the action of such court upon the issue so directed; the jurisdiction in such cases rests upon the ground of irreparable mischief, and the policy of preventing a multiplicity of suits, the remedy at law being entirely inadequate as a means of redress. Hicks v. Michael, 15 Cal. 107. A strong showing must be made before the court will grant or sustain an injunction to stop work; there must be urgent necessity, and the title and right of the plaintiff be clear, well established, and not in dispute; and the application should be made promptly, and not delayed until large expenditures have been made. Real Del Monte etc. Mining Co. v. Pond etc. Mining Co., 23 Cal. 82.

Injury, or threats of injury, must be present and existing. An injunction cannot be granted to allay the fears and apprehensions of individuals: they must show that the acts against which they ask protection are not only threatened, but will in all probability be committed, to their injury; it must also be shown that there is at least a reasonable probability that a real injury will occur if the injunction should not be granted. Lorenz v. Waldron, 96 Cal. 243; 31 Pac. 54. No one may go into a court without having some right to enforce or wrong to redress; mere epithets, however profusely used or vehemently expressed, will not supply the place of facts in a pleading; facts must be stated, showing that a right or wrong exists; hence, a complaint for an injunction is insufficient, which does not allege that the plaintiff has been damaged, nor state facts from which such a conclusion can be drawn. Wolfe v. Titus, 124 Cal. 264; 56 Pac. 1042. An injunction applies only to a threatened injury: it has no application to wrongs that have been completed, and for which the injured party may obtain redress in an action at law. Parkinson Co. v. Building Trades Council, 154 Cal. 581; 21 L. R. A. (N. S.) 550; 16 Ann. Cas. 1165; 98 Pac. 1027. The doing of an act that has already been performed will not be restrained. Wright v. Board of Public Works, 163 Cal. 328; 125 Pac. 353. It is not necessary to show that injury is inevitable, to enable the plaintiff to maintain an action for an injunction: such a rule would prevent relief in a large class of cases, where the interposition of a court is absolutely necessary to prevent great and irreparable injury; even in plain cases it would seldom be possible to know that injury was certain to occur; that it is very probable, should be made to appear by the statement of facts, from which the court will be able to conclude the injury probable. Nicholson v. Getchell, 96 Cal. 394; 31 Pac. 265. A prayer for an injunction to prevent a future injury is proper, where a suit is brought to test the question of priority of appropriation of water. Marius v. Bicknell, 10 Cal. 217. Where the acts complained of were committed before the commencement of the action, and there was no allegation of threats on the part of the defendant to do any other further act or otherwise injure the plaintiff, there is no foundation for a merely preventive injunction. Gardner v. Stroever, 81 Cal. 148; 6 L. R. A. 90; 22 Pac. 483. A plaintiff, claiming to be the owner of a mining location, is not entitled to an injunction to restrain the defendant from mining thereon, where the defendant has not mined thereon and does not threaten to do so. Champion Mining Co. v. Consolidated Wyoming etc. Mining Co., 75 Cal. 78; 16 Pac. 513. A complaint which alleges that the defendant has agreed to furnish the plaintiff with a certain quantity of water, and is about to enter into similar contracts with others, which, in the aggregate, will be beyond the capacity of his resources, does not show that the plaintiff has been or will be injured, and does not entitle him to an injunction. Bank of California v. Fresno Canal etc. Co., 53 Cal. 201. Evidence as to the intention of a board of supervisors, as a quasi-judicial body, in regard to some act not attempted to be

performed, should not put the machinery of the courts in motion, nor invoke a writ of injunction, and if the board proceeds in accordance with law, and lets a contract contrary thereto, the taxpayer is not without remedy, but he cannot come into court upon the supposition or belief that a public officer is going to disregard his oath of office and willfully violate the law. Barto v. Board of Supervisors, 135 Cal. 494; 67 Pac. 758; and see McBride v. Newlin, 129 Cal. 36; 61 Pac. 577. A public officer having control of a trust fund will not be restrained or interfered with in his duty of managing the same, except upon a clear showing that such fund is in danger of being wasted or impaired; and acts which would justify such remedy must be such as to show that liability will be incurred or an injury done by threatened or probable malfeasance for which such agent's bond or personal responsibility would afford no possible or adequate redress. San Francisco v. Tallant, 10 Cal. 585. An injunction cannot properly be granted to restrain the defendant from entering upon land sued for, or from in any manner trespassing thereon: one cannot enter or trespass upon land, of which he is already in possession; nor can he be restrained from working thereon, where he does not commit waste. Williams v. Long, 129 Cal. 229; 61 Pac. 1087. A perpetual injunction, restraining the defendant from conducting his business in unlawful manner, does not restrain him from conducting it in a lawful manner, and he has the right at all times to adopt such means as may be within his power for such purpose. People v. Gold Run Ditch etc. Co., 66 Cal. 155; 4 Pac. 1150. Where a contract in restraint of trade is valid, and the complaint states a breach of it, the plaintiff is entitled to an injunction to prevent its violation, even if only nominal damages can be proven. Brown v. Kling, 101 Cal. 295; 35 Pac. 995. Where the plaintiff has proved his right to an injunction against a nuisance or other injury, it is not the duty of the court to inquire in what way the defendant can best remove it: it is the duty of the defendant to find his own way out of the difficulty; and the plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible. People v. Gold Run Ditch etc. Co., 66 Cal. 155; 4 Pac. 1150.

To prevent cloud on title. A court of equity will interfere by injunction to prevent a cloud upon a title; but it is not deemed necessary to exercise that authority to the injury of strangers. Goldstein v. Kelly, 51 Cal. 301. The true test by which the question may be determined, whether a deed casts a cloud upon the title is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? and if such proof is necessary, a cloud exists; if the proof is unnecessary, no shade is cast by the presence of the deed. Pixley v. Huggins, 15 Cal. 127; and see Englund v. Lewis, 25 Cal. 337; Marriner v. Smith, 27 Cal. 649; Ramsdell v. Fuller, 28 Cal. 37; 87 Am. Dec. 103; Porter v. Pico, 55 Cal. 165; Grigsby v. Schwarz, 82 Cal. 278; 22 Pac. 1041; Roth v. Insley, 86 Cal. 134; 24 Pac. 853; Woodruff v. Perry, 103 Cal. 611; 37 Pac. 526; Russ v. Crichton, 117 Cal. 695; 49 Pac. 1043. A married woman is entitled to an injunction to restrain the sale, under execution against her husband, of real property purchased by her during coverture, in her own name and with her separate property: such sale casts a cloud upon her title; for, in an action of ejectment, the burden of proof would rest on her to show that the premises were purchased with her separate property or money. Tibbetts v. Fore, 70 Cal. 242; 11 Pac. 648. Where a husband conveyed property to his wife while indebted to a third person, who secured judgments against the husband, the court may grant the wife an injunction, pending the suit to determine the ownership, to restrain the sale of the property, and thus prevent a cloud on the title and a resort to an independent action to remove the cloud. Einstein v. Bank of California, 137 Cal. 47; 69 Pac. 616. The sale of a homestead under execution casts a cloud on the title, and the owner is entitled to have the sale enjoined, as it would be necessary, in an action of ejectment by the purchaser at the sale, for the owner to offer extrinsic evidence to defeat the action. Roth v. Insley, 86 Cal. 134; 24 Pac 853. The sale, by an administrator, of land sold by an intestate during his lifetime, casts a cloud upon the title of the intestate's grantee, and will be restrained. Thompson v. Lynch, 29 Cal. 189. An order of a board of supervisors, laying out a road, which is null and void on its face, creates no cloud upon the title to the land over which it passes, and an injunction will not lie: the owner of the land will be left to his remedy at law. Leach v. Day, 27 Cal. 643. Where a board of supervisors made an order that a road should be opened across private lands, and the owner thereof was not given notice of the proceedings, he is entitled to an order restraining the opening of such road. Silva v. Garcia, 65 Cal. 591; 4 Pac. 628. The deed of a superintendent of streets, after a void sale of the property to satisfy a void assessment, would itself be void, and cast no cloud upon the title, and an injunction will not be granted to restrain the sale. Byrne v. Drain, 127 Cal. 663; 60 Pac. 433. The execution of a sheriff's deed can only be enjoined in a case where the facts alleged by the plaintiff show that, in an action of ejectment founded on the deed, he would be required to offer

evidence to overcome the effect of the deed. Schuyler v. Broughton, 65 Cal. 252; 3 Pac. 870. A tax deed, void on its face, cannot cast a cloud upon the title of the owner of the land, and a court of equity will not enjoin the issuance of such void deed. Russ v. Crichton, 117 Cal. 695; 49 Pac. 1043; Bucknall v. Story, 36 Cal. 67. A tax sale for an amount greater than that authorized by law, is void, and an injunction will lie to enjoin the execution of a deed thereon. Axtell v. Gerlach, 67 Cal. 483; 8 Pac. 34. A plaintiff holding a valid certificate of sale for non-payment of taxes may have a sale of the premises, under execution, enjoined, on the ground that such subsequent sale would be a cloud upon his title, or his right to have title; but he must show that everything has occurred which is necessary to occur in order to vest in him the right claimed: an allegation that the property was only sold to satisfy the aforesaid taxes, at public auction, by the tax-collector, to the one to whom the certificate of sale was delivered by the tax-collector, is insufficient, there being no allegation that the certificate stated either of the matters required by the Political Code. Hall v. Theisen, 61 Cal. 524. A court of equity will not interfere to restrain the issuance of a patent for lands, which would not be a cloud upon the plaintiff's title, and does not include any portion of his land, although the patent would be invalid. Taylor v. Underhill, 40 Cal. 471. The allegation, that a deed, if executed, will be a cloud upon the plaintiff's title, is a mere conclusion of law. Schuyler v. Broughton, 65 Cal. 252; 3 Pac. 870.

To prevent a multiplicity of actions. The necessity of preventing a multiplicity of suits warrants the interposition of equity, even though there is a remedy at law; and trespass of a continuing nature, whose constant recurrence renders the remedy at law inadequate, unless by a multiplicity of suits, affords sufficient ground for relief by injunction. Kellogg v. King, 114 Cal. 378; 55 Am. St. Rep. 74; 46 Pac. 166. An averment in the complaint, that the granting of an injunction will prevent a multiplicity of suits, is not sufficient to justify the issuance of the writ, unless it fairly appears from the nature of the subject-matter that a multiplicity of suits would follow if the writ should not be granted: the mere fact that the owner of the land might be compelled to defend his title, or to prosecute an action against a possible asserted claim based upon a void deed, is not sufficient. Byrne v. Drain, 127 Cal. 663; 60 Pac. 433.

Tax proceedings. In all cases involving merely the question of taxation, the issue is strictly one at common law: equity can take no cognizance thereof, and injunctions cannot issue. Minturn v. Hays, 2 Cal. 590; 56 Am. Dec. 366. Where taxes have been illegally imposed, or a valid objection appears on the face of the proceedings, the plaintiff has a perfect remedy at law. Robinson v. Gaar, 6 Cal. 273. The collection of taxes on personal property cannot be restrained by injunction, except where the injury would be irreparable, and this must appear in the bill by some issuable averment, and be sustained if denied; the bill should also show that the tax-collector would not be liable to respond in damages. Ritter v. Patch, 12 Cal. 298. It does not necessarily follow, if a tax is conceded to be illegal, that, for that reason alone, an injunction will lie: a court of equity will not restrain the action of public officers, except where it is necessary to protect the rights of a citizen whose property is taxed, and where he has no adequate remedy at law; it must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, would throw a cloud upon the title of the complainant. Savings and Loan Society v. Austin, 46 Cal. 415; Crocker v. Scott, 149 Cal. 575; 87 Pac. 102. A court of equity will not enjoin the issuance of a void tax deed (Russ v. Crichton, 117 Cal. 695; 49 Pac. 1043), nor restrain a sale for taxes, where it is apparent upon the face of the proceedings, upon which the purchaser must necessarily rely to make out a prima facie case to enable him to recover under the sale, that the sale would be void. Bucknall v. Story, 36 Cal. 67. The allegation, that if a sale shall be allowed to proceed the plaintiff will be involved in litigation with the purchasers, is a mere speculation as to probabilities; but non constat that a purchaser will be found, or that there will be more than one, or that, if found, such purchaser would claim the benefit of purchase, or that he would accept, or that the collector would ever execute a deed for the property. Savings and Loan Society v. Austin, 46 Cal. 415. A taxpayer cannot enjoin the collection of taxes due the county, on the ground that he had, in former years, paid taxes assessed on his property, which were illegally assessed and collected. Fremont v. Mariposa County, 11 Cal. 361. Goods stored in a warehouse cannot be assessed to the owner of the warehouse, and an injunction lies to prevent the sale of the warehouse for delinquent taxes upon such goods. Weyse v. Crawford, 83 Cal. 196; 24 Pac. 735. A city has no right to assess and tax a Federal franchise granted to a telegraph company: an assessment by a city upon such franchise is void, and an attempt by the city to levy upon property of the company to satisfy such assessment may properly be restrained by an injunction. Western Union Tel. Co. v. Visalia, 149 Cal. 744; 87 Pac. 1023. Where the board of directors of an irrigation district levies an assessment to pay the interest on

bonds, and the disparity between the amount of the assessment and the annual interest is so great as to make it appear that the action of the board is improper, and not in the exercise of any discretion, so that the assessment is excessive, courts are authorized to prevent its enforcement by injunction. Hughson v. Crane, 115 Cal. 404; 47 Pac. 120. The date of the sale for taxes should be alleged, so that the court may know whether or not the action can be tried and determined before such date, and therefore determine the necessity for a temporary injunction. Santa Cruz Fair Bldg. Ass'n v. Grant, 104 Cal. 306; 37 Pac. 1034.

Street-assessment proceedings. This section does not prevent the issuance of an injunction to restrain city officers from enforcing a street assessment, until it can be determined whether the proceedings preliminary to the assessment deprive the plaintiffs of their property without due process of law. Pierce v. Los Angeles, 159 Cal. 516; 114 Pac. 818. Where a city council has no jurisdiction to authorize the extension of a street, an assessment therefor would create no lien upon the property of the plaintiff, and a purchaser at a sale of the property to satisfy the assessment would acquire no title; such facts would be determined by decree in the action, and the rights of the plaintiff could be thereby fully protected. Santa Cruz Fair Bldg. Ass'n v. Grant, 104 Cal. 306; 37 Pac. 1034. An injunction will not be granted to restrain a street superintendent from selling real property, under a void sale, to satisfy a void street assessment. Byrne v. Drain, 127 Cal. 663; 60 Pac. 433. A preliminary injunction against a sale of land in satisfaction of a street assessment should be denied, where, if the allegations of the complaint should not be sustained, damages might result to the public and to others than the defendant, while, if the assessment was without jurisdiction, it would create no lien upon the land of plaintiff and a purchaser at the sale would acquire no title. Santa Cruz Fair Bldg. Ass'n v. Grant, 104 Cal. 306; 37 Pac. 1034. Where the contract between a city and a contractor was legally entered into, and it is not alleged that the work to be done thereunder will injuriously affect the plaintiff, an injunction will not be granted on the ground that by reason of the acceptance of the street the cost of the improvement should be borne at the public expense, as the question as to who shall bear the expense will be determined on completion of the work. Flickinger v. Fay, 119 Cal. 590; 51 Pac. 855.

Change of street grade, where damage not ascertained. Under the constitution, the ascertainment and payment of damages caused by a change of the grade of a street, is a condition precedent to the right of the city to make such change; hence, a property-owner can enjoin such work until his damages have been lawfully ascertained and paid. Wilcox v. Engebretsen, 160 Cal. 288; 116 Pac. 750. A defendant may be properly enjoined from erecting or maintaining any fence more than ten feet high on the division line, and may be required to remove all that portion of the division-fence which is more than ten feet high, and be enjoined from obstructing the light and air coming from his premises into the windows upon the adjoining land by any division fence or wall more than ten feet high; but such judgment has no effect upon the right of the defendant to erect any structure of greater height upon his own land. Western Granite etc. Co. v. Knickerbocker, 103 Cal. 111; 37 Pac. 192. A fence erected wholly upon the land of the defendant, is not a division-fence, within the meaning of the act of March 9, 1885, limiting the height of division-fences and partition-walls in cities and towns; and an adjoining proprietor cannot enjoin such fence as a nuisance, merely because it obstructs the passage of light and air to his building. Ingwersen v. Barry, 118 Cal. 342; 50 Pac. 536.

To prevent enforcement of judgment. Courts of equity interfere with judgments at law, and resort to their high and extraordinary power of interference by injunction, only for the prevention of fraud, or to relieve from substantial injury or gross injustice: for the correction of informalities or irregularities in legal or judicial proceedings, a complainant must prosecute his remedies at law, as from a court of equity he can receive no countenance. Gregory v. Ford, 14 Cal. 138; 73 Am. Dec. 639. A court of equity does not sit for the correction of errors in actions at law: it never grants relief upon the ground of error or mistake in the judgment of a court of law, or because, in deciding a question passed upon by a court of law, it would reach a different conclusion. Reagan v. Fitzgerald, 75 Cal. 230; 17 Pac. 198. Equity may interfere in favor of parties to a judgment, to stop the execution thereof, where it was obtained by imposition upon the court, or by fraud practiced upon the parties; and it will interfere in favor of one who was not a party to the judgment, where its enforcement would work irreparable injury to land of which he is owner and in possession, or deprive him of its use and enjoyment, or create a legal cloud upon his title. Roman Catholic Archbishop v. Shipman, 69 Cal. 586; 11 Pac. 343. Equity interferes with judgments and proceedings at law, only in peculiar cases. Gregory v. Ford, 14 Cal. 138; 73 Am. Dec. 639. Injunctions are granted to restrain proceedings at law, where the facts show that it would be against good conscience to enforce such proceedings, and also show

that the injured party could not have availed himself of such facts in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fraud or accident on his part. Reagan v. Fitzgerald, 75 Cal. 230; 17 Pac. 198. Relief in equity against a judgment on the ground of fraud will not be granted, unless the fraud was practiced under such circumstances as to leave a reasonable inference that the injured party was deceived; and if the circumstances attending the deception are such as to put a reasonable person upon inquiry, there can be no presumption of deceit. Champion v. Woods, 79 Cal. 17; 12 Am. St. Rep. 126; 21 Pac. 534. Courts of equity will interfere to enjoin a judgment at law, rendered against a party by reason of fraud or accident, only when unmixed with any fault or negligence of himself or his agents. Phelps v. Peabody, 7 Cal. 50. Ignorance as to the truth of the matters misrepresented, believing the same to be true, is not sufficient, under any circumstances, to warrant relief against the judgment; the situation of the party may be such that he will be deemed in law to have knowledge of the facts, and barred from making complaint, though actually ignorant of the true state of facts; and if the means of knowledge is at hand, and equally available to both parties, and there is no fiduciary or confidential relation, the injured party must show that he availed himself of the means of information existing at the time of the transaction, before he will be heard to say that he was deceived by the misrepresentations of the other party. Champion v. Woods, 79 Cal. 17; 12 Am. St. Rep. 126; 21 Pac. 534. A judgment at law will be enjoined only where the case presents facts not only showing the equitable rights of the complainant, but also that he could not have availed himself of such facts in a legal forum: the tendency of modern legislation and practice is to abridge the necessity for this class of bills, by providing remedies in courts of law for many of the exigencies which called them into existence. Reagan v. Fitzgerald, 75 Cal. 230; 17 Pac. 198. A court of equity will not entertain jurisdiction of a suit for relief against a judgment, merely on the ground that the demand may be unconscionable and that injustice may have been done, provided it was competent for the party to place the matter before the court in the original action, either upon issue joined or upon motion to set aside the verdict or judgment. Borland v. Thornton, 12 Cal. 440; Ede v. Hazen, 61 Cal. 360. Although a party may set up an equitable defense to an action at law, yet he is not confined to that proceeding: he may let the judgment go at law, and file his bill in equity for relief; and the practice in this state, while it enlarges the field of remedy, does not take away pre-existing remedies by implication. Lorraine v. Long, 6 Cal. 452; Hough v. Waters, 30 Cal. 309; Hills v. Sherwood, 48 Cal. 386; Golson v. Dunlap, 73 Cal. 157; 14 Pac. 576. The plaintiff is not entitled to an injunction to restrain the sale of property levied upon under execution, and to compel the carrying out of a verbal agreement to stay execution for a year, in consideration of a confession of judgment, where he was guilty of laches in not taking advantage of his adequate and speedy legal remedy by motion to set aside the execution, and to stay all legal process until the expiration of the year agreed upon. Moulton v. Knapp, 85 Cal. 385; 24 Pac. 803. Where a verdict was obtained at law against a defendant, and he neglected to apply for a new trial within the time appointed, a court of equity will not entertain a bill for an injunction on the ground that the original demand was unconscionable. Phelps v. Peabody, 7 Cal. 50. A judgment will not be enjoined on matter on which the party relied for a new trial, and which was held insufficient: equity will not give relief, by way of appeal, upon the same facts passed upon in the judgment by the law side of same court. Collins v. Butler, 14 Cal. 223. Fraudulent conduct and deceitful representations, upon the part of a plaintiff in an action at law, by means of which the defendant, who has a meritorious defense, is prevented from interposing it, or has lost the right to move for a new trial, is ground to restrain the enforcement of the judgment. Thompson v. Laughlin, 91 Cal. 313; 27 Pac. 752. A judgment debtor is entitled to an injunction restraining the execution of a judgment at law, where the grounds upon which the injunction is sought could not have been made a defense to the former action, or he was prevented from making the defense by reason of the fraudulent conduct of the judgment creditor. Kelley v. Kriess, 68 Cal. 210; 9 Pac. 129. Where no valid defense was interposed in the original action, and judgment passed in favor of the plaintiff, the defendant cannot afterwards obtain an injunction restraining the collection of the judgment, for reasons which were known, and which should have been interposed as a defense in the original action. Beaudry v. Felch, 47 Cal. 183; Aldrich v. Stephens, 49 Cal. 676; Kelley v. Kriess, 68 Cal. 210; 9 Pac. 129. Deception as to matters of law generally affords no ground of redress or relief; but this rule does not apply to transactions between parties holding fiduciary or confidential relations; and where one, who has had superior means of information, possesses a knowledge of the law, and thereby obtains an unconscionable advantage of another, who is ignorant, and was not in a situation to be informed, the injured party

is entitled to relief, as well as if the matters represented were matters of fact. Champion v. Woods, 79 Cal. 17; 12 Am. St. Rep. 126; 21 Pac. 534. Where, after judgment at law, such facts come to light as would authorize the interposition of a court of equity to enjoin the judgment, the bill, which would be in the nature of a bill in equity for a new trial, must distinctly show that such facts are of controlling force; that they were not known to the defendant at the time of trial; that defendant used all proper diligence to prepare his case for trial, and to procure the evidence, but was unable, without fault or negligence on his part, to procure it; that such testimony is now within his control, and that he will be able to procure it on another trial; and the bill should state particularly the facts to be proved, the names of witnesses, and show the bearing and relevancy of the proposed proof, and should also show when and how the facts discovered came to his knowledge, and why no motion for a new trial was made in the trial court. Mulford v. Cohn, 18 Cal. 42. In an action to restrain the enforcement of a voidable judgment, the complaint must show that the plaintiff had a good defense to the action in which the judgment was rendered; such a defense is sufficiently shown, in the absence of a special demurrer, by an allegation that at the time of the entry of the judgment the defendant had no cause of action against the plaintiff. Harnish v. Bramer, 71 Cal. 155; 11 Pac. 888. The enforcement of a judgment, obtained in violation of a written stipulation on file dismissing the action, may be restrained by the court in which the judgment was obtained. McLeran v. McNamara, 55 Cal. 508. Courts of equity will not interfere to enjoin a judgment not manifestly wrong, simply because of a defect in the evidence. Pico v. Suñol, 6 Cal. 294. An execution issued on a judgment will not be restrained on the ground that the judgment has been discharged by a decree in insolvency: the party has a sufficient remedy by motion. Green v. Thomas, 17 Cal. 86; and see Imlay v. Carpentier, 14 Cal. 173. Where the judgment was absolutely void, the party has a perfect remedy, by application to the court, to quash the execution: the court can, at any time, arrest all process issued by its clerk on void judgments; and if the judgment is not absolutely void, but merely irregular, the remedy is by motion before judgment or on appeal, and an injunction to restrain the enforcement thereof does not lie. Logan v. Hillegass, 16 Cal. 200; Comstock v. Clemens, 19 Cal. 77; Gates v. Lane, 49 Cal. 266; Luco v. Brown, 73 Cal. 3; 2 Am. St. Rep. 772; 14 Pac. 366. Where, in an action to enforce a lien on land for delinquent taxes, there was no service of summons upon nor appearance by the defendant, and the court commissioner drafted a decree, inserting a clause therein that summons had been served, and the judge, deceived by the false recital, signed the decree and ordered it entered, and the court commissioner became the purchaser and obtained a sheriff's deed at the sale of the land, a court of equity will give relief to the owner of the property, by restraining the purchaser from setting up the judgment as an estoppel, or from using it to perpetuate the advantage he has gained. Martin v. Parsons, 49 Cal. 94. Where a party moves for a new trial and fails, and the action of the court was affirmed on appeal, he cannot go into equity to enjoin the judgment on the matters relied upon for relief in the action at law. Collins v. Butler, 14 Cal. 223.

Enjoining default judgments. A defendant, who has no defense to the action, cannot enjoin a judgment by default, on the ground that the sheriff's return of service on him is false, and that he had no notice of the proceeding. Gregory v. Ford, 14 Cal. 138; 73 Am. Dec. 639. An injunction will not lie to enjoin a judgment by default, on the ground that the sheriff's return on the summons does not show the place in which service was made on the defendant, where it was proved, on the hearing of the application for the injunction, that the defendant was served in a certain county in this state, more than forty days before the entry of his default. Pico v. Suñol, 6 Cal. 294. A judgment by default upon a claim cannot be restrained, where the complaint does not allege that the plaintiff ever paid the claim for the recovery of which such action was brought, or that he had any valid defense to the same. Logan v. Hillegass, 16 Cal. 200. Where a judgment by default is rendered upon an illegal contract, a court of equity will not enjoin the enforcement of the judgment. Pacific Debenture Co. v. Caldwell, 147 Cal. 106; 81 Pac. 314.

Equitable jurisdiction over judgments. See note, ante, § 473.

Enjoining execution sales. An execution sale of personal property cannot be restrained, unless the injury would be irreparable, and this must appear by a clear showing of the plaintiff's right to the property and of the defendant's insolvency. More v. Ord, 15 Cal. 204. A court of equity will entertain an attaching creditor's bill to enjoin an execution sale of the same property, under a judgment recovered in an action where there was a prior attachment, on the ground that such judgment was fraudulent as to such creditor, without requiring him to obtain judgment, execution, and return of nulla bona, where the answer admits the defendant's debt and insolvency, and all other material allegations of the bill, except fraud. Heyneman v. Dannenberg, 6 Cal. 376; 65

Am. Dec. 519. Where a sheriff has notice of the injunction restraining an execution sale, he is bound by the order, although he was not a party to the suit. Buffandeau v. Edmondson, 17 Cal. 436; 79 Am. Dec. 139. In an action to enjoin a sale under an execution issued upon a judgment rendered by a justice of the peace, the complaint must allege that the plaintiff was not served with summons, and that he did not appear in the action in which the judgment was rendered: an allegation that he had no knowledge of the judgment for more than thirty days after its rendition is not sufficient. Farrington v. Brown, 65 Cal. 320; 4 Pac. 26.

Strikes and boycotts. Equity has no jurisdiction to enjoin workmen from not working; their threat not to work for any patrons or customers dealing with the plaintiff, affords no ground for equitable relief. Parkinson Co. v. Building Trades Council, 154 Cal. 581; 21 L. R. A. (N. S.) 550; 16 Ann. Cas. 1165; 98 Pac. 1027. Inferences, generalities, presumptions, and conclusions have no place in a pleading for an injunction; therefore an allegation that the defendants are printing and circulating false and malicious publications upon the premises of the plaintiffs, and in the vicinity of their place of business, for the purpose of preventing them from carrying on such business, and to prevent persons from dealing with them, as well as to intimidate both plaintiffs and their employees in the conduct of their business, is insufficient. Davitt v. American Bakers' Union, 124 Cal. 99; 56 Pac. 775. Union men have the right to notify contractors employing union men, having dealings with their employer, whom they have declared unfair for employing non-union men, that their employer has been so declared, and to withdraw patronage from such contractors as continue to deal with such employer; such notice and withdrawal of patronage afford no ground for equitable relief. Parkinson Co. v. Building Trades Council, 154 Cal. 581; 21 L. R. A. (N. S.) 550; 16 Ann. Cas. 1165; 98 Pac. 1027.

To stay acts of public officers. There is a marked distinction between a proceeding to stay the acts of an officer, not authorized by the process under which he assumes to act, and a proceeding to stay or suspend the vital force and the direct commands of such process: the former seeks to confine the officer within the limits of the authority conferred by his writ; the latter, to stay and nullify its direct commands. Crowley v. Davis, 37 Cal. 268; and see Pixley v. Huggins, 15 Cal. 127. The complaint to restrain the levy of a writ of attachment upon improvements to mines, made by the vendee under a contract of sale thereof, is sufficient, where it alleges that, by the terms of the contract, all improvements erected by the vendee are to be the property of the vendor until the mines are paid for. Conde v. Sweeney, 14 Cal. App. 20; 110 Pac. 973. It is error to dissolve an injunction to restrain a sheriff, acting under a writ of attachment, from totally destroying the business of the plaintiff. Dingley v. Buckner, 11 Cal. App. 181; 104 Pac. 478. Where an order for the payment of money is made by a board of supervisors, "without authority of law," as where an effort is made to pay the indebtedness of one fiscal year out of the revenues of another fiscal year, the district attorney may, without an order of the board, bring an action to restrain the payment of such warrant. Tehama County v. Sisson, 152 Cal. 167; 92 Pac. 64. Where a permit from a board of supervisors is necessary before poles may be erected in the streets of a city, and such a permit is issued to one company and denied to another, an injunction cannot be granted to restrain the superintendent of streets from interfering with the erection of poles by the company denied a permit. Mutual Electric Light Co. v. Ashworth, 118 Cal. 1; 50 Pac. 10.

To prevent the enforcement of criminal laws. Evil resorts, devoted exclusively to the persistent violation of the law, can claim no immunity from interference by the police, whose duty it is to take all proper means to suppress them; and where a person establishes a lawful business upon a public passageway, merely as an incident to and dependent for its support upon the patronage of such resorts, and his premises are used as the sole public entrance thereto, he is not entitled to an injunction to restrain the action of the police in their acts of suppression (Pon v. Wittman, 147 Cal. 280; 2 L. R. A. (N. S.) 683; 81 Pac. 984); but the inattention of parties in a court of law can scarcely be made a subject for the interference of a court of equity. Borland v. Thornton, 12 Cal. 440. An injunction will not issue to prevent the suppression of places maintained in violation of law. Asiatic Club v. Biggy, 160 Cal. 713; 117 Pac. 912.

To enjoin proceedings in court of concurrent jurisdiction. The comity which one court owes to another, of concurrent jurisdiction, should always prevent one court from lending itself as an instrument to permit a contempt of the process of the other: the one should regard a party attempting to proceed in defiance of the authority of the other as laboring under the same disability to ask for the action of the court as if he were an alien enemy, or under the ban of a decree of outlawry at common law. Engels v. Lubeck, 4 Cal. 31. One court has no power to enjoin the execution of a judgment or decree of another court of co-ordinate jurisdiction, unless the court rendering such judgment or decree is unable, by reason of its jurisdiction, to afford the relief sought; and the

fact that the parties to the injunction proceeding are not the same as the parties to such judgment or decree, does not relieve the case from the operation of the rule, nor can the consent of the parties change the rule or relax its binding force: it is not established and enforced so much to protect the rights of the parties as to protect the rights of courts of co-ordinate jurisdiction, to avoid conflict of jurisdiction, and confusion and delay, in the administration of justice. Crowley v. Davis, 37 Cal. 268; Anthony v. Dunlap, 8 Cal. 26; Rickett v. Johnson, 8 Cal. 34; Revalk v. Kraemer, 8 Cal. 66; 68 Am. Dec. 304; Chipman v. Hibbard, 8 Cal. 268; Uhlfelder v. Levy, 9 Cal. 607; Hockstacker v. Levy, 11 Cal. 76; Flaherty v. Kelly, 51 Cal. 145; Judson v. Porter, 51 Cal. 562; Waymire v. San Francisco etc. Ry. Co., 112 Cal. 646; 44 Pac. 1086. An injunction does not lie to restrain the execution of the orders or the carrying into effect of the decrees of another court of co-ordinate jurisdiction, where the latter court can afford ample relief; the only ground upon which a court of chancery formerly acted in granting injunctions, under such circumstances, was the inability of a court of law to grant the necessary relief; but as, since the adoption of our codes, the jurisdiction of all our courts is equitable as well as legal, the reason for the exercise of the power has ceased to exist. Rickett v. Johnson, 8 Cal. 34; Revalk v. Kraemer, 8 Cal. 66; 68 Am. Dec. 304; Chipman v. Hibbard, 8 Cal. 268; Pixley v. Huggins, 15 Cal. 127. The courts of this state, under § 3423 of the Civil Code, cannot restrain persons within the state from prosecuting an action already pending in a domestic or in a foreign jurisdiction, except to prevent a multiplicity of suits. Spreckels v. Hawaiian Commercial etc. Co., 117 Cal. 377; 49 Pac. 353. The superior court of one county has no jurisdiction, upon a bill of discovery filed therein, to enjoin the parties from proceeding with the trial of a prior action pending between them in the superior court of another county, and prohibition will lie to prevent the enforcement of such injunction. Wright v. Superior Court, 139 Cal. 469; 73 Pac. 145. The prosecution of a suit in one court cannot be enjoined by another court of co-ordinate jurisdiction, except where the court in which the proceedings sought to be enjoined are pending cannot afford adequate relief (Wilson v. Baker, 64 Cal. 475; 2 Pac. 253); and where the same fraudulent debtor confesses different fraudulent judgments in different jurisdictions, there is also an exception, for it would not then be necessary for the creditors to bring a different suit in each different court; and in cases where the code requires the action to be tried in a particular county, there is also an exception, for the provisions of the statute must be carried out. Uhlfelder v. Levy, 9 Cal. 607.

Enjoining mandate of supreme court. The superior court cannot enjoin the execution of a mandate of the supreme court: the order of the supreme court must control, and any conflicting order from the superior court must be disregarded. Quan Wo Chung & Co. v. Laumeister, 83 Cal. 384; 17 Am. St. Rep. 261; 23 Pac. 320.

Prevention of breach of contract not specifically enforceable. An injunction does not lie to prevent the breach of a contract that cannot be specifically enforced. Peterson v. McDonald, 13 Cal. App. 644; 110 Pac. 465.

Justice's court action, where counterclaim exceeds jurisdiction. An action in a justice's court may be enjoined, where the defendant sets up a counterclaim in excess of three hundred dollars. Gregory v. Diggs, 113 Cal. 196; 45 Pac. 261.

Title to public office not triable. The title to public office cannot be tried in a suit for an injunction. Barendt v. McCarthy, 160 Cal. 680; 118 Pac. 228.

Legislative action. The legislature has the actual power to pass any act it pleases, and the supreme court will not interfere by injunction, or otherwise, to prevent the passage of such acts: the constitution has provided other and more appropriate remedies. Nougues v. Douglass, 7 Cal. 65.

Preventing publication of libel. Equity has no jurisdiction to restrain any publication of a literary work, upon the mere ground that it is of a libelous character, and tends to the degradation or injury of the reputation or business of the plaintiff. Bailey v. Superior Court, 112 Cal. 94; 53 Am. St. Rep. 160; 32 L. R. A. 273; 44 Pac. 458.

Joinder of other causes of action. A claim for damages done to the possession of the plaintiff cannot be joined to a bill for an injunction. McCann v. Sierra County, 7 Cal. 121. In a complaint in ejectment, the parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass in the nature of waste, pending the action, but the grounds of equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought. Natoma etc. Mining Co. v. Clarkin, 14 Cal. 544. Trespass upon land is a legal injury; to threaten to enter upon and waste it is an equitable injury; but both may be joined in the same complaint, for the statutory reason that both are injuries to property. More v. Massini, 32 Cal. 590. The statute of limitations, against the right of an adjoining proprietor to maintain an action for wrongfully removing and disposing of surface water, does not commence to run until actual injury has been occasioned to the adjoining proprietor. Galbreath v. Hopkins, 159 Cal. 297; 113 Pac. 174.

Parties to action. Several abutting property-owners damaged, or threatened to be damaged, in the same manner, may properly join as plaintiffs in a suit to restrain such injury; but, in order to recover damages, they must sue separately. Geurkink v. Petaluma, 112 Cal. 306; 44 Pac. 570. There is a very plain distinction between holding one defendant liable for the past wrongful acts of all the other defendants, and simply enjoining them all from committing wrong in the future. Miller v. Highland Ditch Co., 87 Cal. 430; 22 Am. St. Rep. 254; 25 Pac. 550. Parties to whom municipal bonds are to be issued must be made parties to an action for an injunction to restrain the issuance of the bonds, and without their presence no binding determination of the questions can be had: it is not enough to sustain judgment, that none of the persons entitled to the bonds are made parties. Hutchinson v. Burr, 12 Cal. 103; Patterson v. Board of Supervisors, 12 Cal. 105. Where the plaintiff is entitled to a certain specific amount of the water of a stream, and the defendants severally diverted water therefrom, so that, in the aggregate, the volume is reduced below the amount to which the plaintiff is entitled, it is proper to join the defendants in an action to recover damages for the diversion and to restrain its continuance. Hillman v. Newington, 57 Cal. 56. In an action to abate a public or private nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined, jointly or severally: it is the nuisance itself, which, if destructive of public rights, may be enjoined. People v. Gold Run Ditch etc. Co., 66 Cal. 138; 56 Am. Rep. 80; 4 Pac. 1152; and see Miller v. Highland Ditch Co., 87 Cal. 430; 22 Am. St. Rep. 254; 25 Pac. 550. Where an injunction is sought to enjoin several separate and distinct parties, joined as defendants, from so depositing the tailings and débris from their mining claims that they will, from natural causes, flow upon the plaintiff's land, and there is no allegation that the defendants are acting in collusion or in combination with one another, there is a misjoinder of parties defendant. Keyes v. Little York Gold Washing etc. Co., 53 Cal. 724. In an action for an injunction, where the plaintiff claims an appropriative right to take water from a stream, against several defendants, who are alleged to be diverting water therefrom, to the injury of the plaintiff, with no claim for joint damages against them as joint tort-feasors, it is not necessary that the defendants shall be acting in concert, or by unity of design, in order to be joined. Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578; 77 Pac. 1113.

Injunction against corporation binds officers. An injunction restraining a corporation, its officers, agents, and employees, from continuing or maintaining a dam, is binding upon all persons acting as the agents of the corporation; and an officer of such corporation cannot be permitted to exercise the right of severing his connection therewith, and to acquire property from others, for the mere purpose of treating with contempt the orders and decrees of the court. Morton v. Superior Court, 65 Cal. 496; 4 Pac. 489.

Jury trial, and conclusiveness of verdict. The court, sitting in equity, may direct, whenever in its judgment it is proper, an issue to be framed upon the pleadings and submitted to the jury; and upon the verdict of the jury, if a new trial is not granted, the court will then act, either by dismissing the bill or by granting the decree. Donahue v. Meister, 88 Cal. 121; 22 Am. St. Rep. 283; 25 Pac. 1096; Newman v. Duane, 89 Cal. 597; 27 Pac. 66. The defendant is not entitled to a jury trial of all the issues in an injunction suit: where a jury trial is permitted in such suit, the verdict, whatever its form, is merely advisory as to the equity features of the case, if not so as to the damages; if the verdict is general, and is adopted by the court as to the damages, the defendant cannot complain; and the court properly makes full findings upon the question of the right to the injunction which are supported by the evidence. Churchill v. Louie, 135 Cal. 608; 67 Pac. 1052. Where special issues in an equity case are submitted to a jury, the verdict is only advisory to and not binding upon the court; and erroneous instructions to the jury will not be reviewed on appeal, where the court disregards the verdict and finds the facts for itself. Sweetser v. Dobbins, 65 Cal. 529; 4 Pac. 540; Schneider v. Brown, 85 Cal. 205; 24 Pac. 715; Richardson v. Eureka, 110 Cal. 441; 42 Pac. 965; Scheerer v. Goodwin, 125 Cal. 154; 57 Pac. 789. The verdict of the jury in a suit for an injunction, is merely advisory to the court, and erroneous instructions to the jury are not ground for reversing the judgment: the correctness of the decision, and not the correctness of the propositions of law laid down for the guidance of the jury, is the question for determination upon appeal. Richardson v. Eureka, 110 Cal. 441; 42 Pac. 965. With respect to controverted facts arising in suits in equity, the verdict of the jury is not conclusive upon the questions submitted, but is merely advisory: the judge may, when truth and justice require it, set aside the verdict and order a new trial, or may qualify or alter any special findings, or disregard them in whole or in part, and find the facts for himself, or he may approve them in whole or in part, and if approved, they become the findings of court. Sweetser v. Dobbins, 65 Cal. 529; 4 Pac. 540; Sullivan v. Royer, 72 Cal. 248; 1 Am. St. Rep. 51; 13 Pac. 655. The fact that an injunction is

prayed for in an action of trespass does not take away any right to have the real issues of fact tried by the jury: the right to a jury trial is not determined by the form of the action, but by the nature of the rights involved; and when the asserted rights upon which any remedy must rest are legal rights, and cognizable in a court of law, such rights must be determined according to the methods of a common-law court. Hughes v. Dunlap, 91 Cal. 385; 27 Pac. 642. The action for trespass upon real property, with a prayer for an injunction, was very common in the early history of this state: it was frequently used to determine mining and water rights, and it was generally conceded that either party had the right to a jury trial. Hughes v. Dunlap, 91 Cal. 385; 27 Pac. 642. An action to restrain the continuance or repetition of a trespass, of such a character as to produce irreparable injury, and for damages already suffered, is an equitable action, and the issues of fact raised by the pleadings should be tried by the court, unless submitted by it to a jury: a judgment, in such a case, based upon a general verdict of a jury, cannot stand. McLaughlin v. Del Re, 64 Cal. 472; 2 Pac. 244. In a suit for an injunction to restrain a threatened trespass upon land, and to recover damages for past trespasses, where certain issues of fact were tried by the jury, and they returned a verdict on all such issues favorable to the defendant, it is error for the court to set aside the verdict of the jury and make findings contrary thereto, and render judgment in favor of the plaintiff. Hughes v. Dunlap, 91 Cal. 385; 27 Pac. 642.

Findings and judgment. Findings showing the construction of a work of a permanent character, disturbing the plaintiff's possession, and which, if permitted to continue, will ripen into an easement, are sufficient to entitle a party to an injunction. Richards v. Dower, 64 Cal. 62; 28 Pac. 113. A finding that "Said levee is upon the line dividing the lands of plaintiff and defendant, and is built partly upon the lands of each," is a sufficient finding that such levee was built upon the land of the plaintiff, to sustain a judgment enjoining the defendant from destroying such levee, alleged by the plaintiff to have been constructed by him on his lands. Belcher v. Murphy, 81 Cal. 39; 22 Pac. 264. Where all the issues made by the pleadings are found for the defendant, an order granting an injunction to the plaintiff is erroneous; and findings on issues outside of the pleadings, in favor of the plaintiff, cannot change the effect: Van Horn v. Decrow, 136 Cal. 117; 68 Pac. 473. Where an injunction is sought to prevent interference with the possession of a dwelling, occupied by a tenant, an omission to find title in the plaintiff's lessor is immaterial, that not being a proper subject of litigation on such application. Zierath v. McCann, 20 Cal. App. 561; 129 Pac. 808. The right of the plaintiff to a final judgment is absolute, where the court adjudicates that he is entitled to a perpetual injunction: such adjudication definitely settles the rights of the parties as to matters litigated; and it is error to insert in the final decree, that the defendant might apply to the court to have the decree and restraining order modified, vacated, and set aside, on the performance of certain acts. People v. Gold Run Ditch etc. Co., 66 Cal. 155; 4 Pac. 1150. Findings by the court are necessary, unless waived; but the absence of such findings from the record is not a fatal defect, unless it affirmatively appears that they were not waived; and where the plaintiff merely moves the court to disregard the verdict of the jury, and to render its findings and decision in favor of the plaintiff, there is no request for findings generally, but for findings of special import; nor is such motion one which counsel is authorized to make. Richardson v. Eureka, 110 Cal. 441; 42 Pac. 965. The final injunction is a matter of strict right in many cases, and is granted as a necessary consequence of the decree; but the preliminary injunction before answer is not a matter of strict right: it is a matter resting altogether in the discretion of the court, and should not be granted, unless the injury is pressing and the delay dangerous. Santa Cruz Fair Bldg. Ass'n v. Grant, 104 Cal. 306; 37 Pac. 1034. In an action for an injunction, the court may give complete relief, if possible, whether by mandamus or injunction, or both (Fellows v. Los Angeles, 151 Cal. 52; 90 Pac. 137); and under a general prayer for relief, the court may not only quiet the plaintiff's title, but may also enjoin the doing of certain acts, where the facts alleged warrant an injunction. Los Angeles v. Los Angeles Farming etc. Co., 152 Cal. 645; 93 Pac. 869. Where the plaintiff prevails in an action to quiet title, a decree inserted in the judgment, enjoining the defendant from making any further contest on the plaintiff's title, even if not strictly correct, does not injure the defendant: he is not precluded thereby from availing himself of an after-acquired title. Reed v. Calderwood, 32 Cal. 109. After a decree granting a perpetual injunction, there is no existing order of injunction from which an appeal can be taken: the preliminary order of injunction is a provisional remedy, which is merged in the perpetual injunction granted in the final decree, and its functions and operative effect are thereby terminated. Sheward v. Citizens' Water Co., 90 Cal. 635; 27 Pac. 439. An injunction is merely a remedial process; and where the party obtaining the injunction has also obtained judgment upon his cause, thus establishing his right to the main relief applied for, the propriety of granting the right will not be revised on appeal. Hicks v. Davis, 4 Cal.

67. Voluntary fraternal organizations are not recognized as legal bodies, or as entitled to recognition in courts for the enforcement of their rules, unless there is also involved the determination of some civil right, or some right of property; and in these cases, courts are limited to inquiring whether the rules prescribed by the organization for the determination of the right have been followed; and in all matters of policy, or of the internal economy of the organization, the rules by which the members have agreed to be governed constitute the charter of their rights, and courts will not take cognizance of any matter arising under these rules. Lawson v. Hewell, 118 Cal. 613; 50 Pac. 763.

Irreparable injury which is ground for injunction. See note 1 Am. St. Rep. 374.

Right to injunctive relief where complainant has remedy by force. See note 16 Ann. Cas. 730.

Injunction as remedy for past injuries. See note Ann. Cas. 1913D, 968.

Injunction to prevent cloud on title by execution sale. See note 62 Am. Dec. 523.

Injunction against spite fences. See note 9 Ann. Cas. 734.

Injunction to compel or prevent the erection, maintenance or removal of fences or gates. See note 7 L. R. A. (N. S.) 49.

Injunction to prevent improper use of leased premises. See note 59 Am. Dec. 70.

Injunction against trespass. See notes 11 Am. Dec. 498; 53 Am. Rep. 346; 99 Am. St. Rep. 732.

Injunction to prevent injury to trees or timber. See notes 11 Ann. Cas. 456; 22 L. R. A. 233.

Injunction as remedy for continuing or repeated trespass. See note 15 Ann. Cas. 1235.

Injunction against trespass by animals. See note 14 Ann. Cas. 500.

Right of lienor or creditor to restrain waste by owner of realty. See note 13 Ann. Cas. 89.

Right to enjoin owner of vacant lots from permitting their use for playing of games. See note 14 Ann. Cas. 177.

Injunctive relief as to cemetery property, burials, or removal of remains. See note 3 L. R. A. (N. S.) 482.

Injunction to prevent removal of lateral support. See note 68 L. R. A. 697.

Injunction against obstructions in highway. See note 52 Am. Rep. 574.

Injunction as remedy for wrongful diversion of watercourse. See note Ann. Cas. 1912D, 13.

Injunction against draining sewage into stream. See note 48 L. R. A. 707.

Injunction against obstruction of stream. See note 59 L. R. A. 91, 881.

Injunction against construction of sewer. See note 60 L. R. A. 243.

Right of individual to enjoin act of public officials. See notes 3 Ann. Cas. 1013; 15 Ann. Cas. 1173.

Injunction to restrain keeping or storing of explosives. See note 14 Ann. Cas. 594.

Injunction as remedy against injury to business or property by strikers. See note 4 Ann. Cas. 783.

Injunction to prevent buying and selling of non-transferable tickets. See notes 12 Ann. Cas. 700; Ann. Cas. 1913B, 460; 10 L. R. A. (N. S.) 437.

Injunctive relief as affected by comparative injury to parties. See note 14 Ann. Cas. 19.

Injunction to prevent breach of contract. See note 90 Am. St. Rep. 634.

Injunction to restrain breach of contract not capable of being specifically enforced. See note 3 Ann. Cas. 976.

Injunction to protect personal right. See note 37 L. R. A. 783.

Injunction for violation of legal right. See note 6 L. R. A. 855.

Right of non-union employees to enjoin strike by union co-employees. See note Ann. Cas. 1913D, 369.

Injunction against strikes. See note 28 L. R. A. 464.

Allowing injunction in favor of party in pari delicto against enforcing or otherwise proceeding with illegal contract. See note 48 L. R. A. 842.

Injunction against collection of purchase-money where the title to land is defective. See note 7 L. R. A. (N. S.) 445.

Injunction against crimes and criminal proceedings. See notes 35 Am. St. Rep. 670; 1 Ann. Cas. 121; 19 Ann. Cas. 459; 21 L. R. A. 84; 2 L. R. A. (N. S.) 631; 3 L. R. A. (N. S.) 622; 21 L. R. A. (N. S.) 585; 25 L. R. A. (N. S.) 193; 34 L. R. A. (N. S.) 454.

Injunction against enforcement of void ordinance. See note 118 Am. St. Rep. 372.

Injunction to prevent multiplicity of suits. See notes 131 Am. St. Rep. 30; 20 L. R. A. (N. S.) 848.

Injunction against police surveillance of place of business or amusement. See notes 5 Ann. Cas. 483; Ann. Cas. 1913B, 713.

Injunction against prosecution under invalid ordinance. See notes 6 Ann. Cas. 1013; 10 Ann. Cas. 760.

Right of private individual to enjoin violation of municipal ordinance not nuisance per se. See note 13 Ann. Cas. 1203.

Injunction to restrain collection of taxes or assessments. See notes 69 Am. Dec. 198; 23 Am. Rep. 622; 49 Am. Rep. 287; 53 Am. Rep. 110.

Erroneous or invalid levy or assessment as ground for enjoining collection of tax. See notes 3 Ann. Cas. 564; 12 Ann. Cas. 764.

Injunction against pleading statute of limitations. See notes 51 Am. Dec. 700; 75 Am. Dec. 84.

Injunction against judicial proceedings in other states or countries. See notes 56 Am. Rep. 663; 59 Am. St. Rep. 879; 10 Ann. Cas. 26; 16 Ann. Cas. 673; 21 L. R. A. 71; 25 L. R. A. (N. S.) 267.

Power of state court to enjoin proceedings in federal court. See note 11 Ann. Cas. 744.

Injunction to restrain garnishment proceedings. See note 12 Ann. Cas. 335.

Injunction to restrain execution on dormant judgment. See note 13 Ann. Cas. 862.

Injunction against execution sales or other proceedings under final process. See note 30 L. R. A. 99.

Negligence as cause for and as a bar to injunction against judgment. See note 31 L. R. A. 33.

Injunction against judgment for defenses existing prior to their rendition. See note 31 L. R. A. 747.

Injunction against judgments for want of jurisdiction or which are void. See note 31 L. R. A. 200.

Injunction against judgment for errors and irregularities. See note 30 L. R. A. 700.

General equity jurisdiction in regard to injunctions against judgments. See note 32 L. R. A. 321.

Mandatory injunction to compel removal of structure which encroaches on adjoining property. See note 36 L. R. A. (N. S.) 402.

Mandatory injunction. See notes 20 Am. Dec. 389; 20 L. R. A. 161.

CODE COMMISSIONERS' NOTE. 1. When injunction will be granted. Where one has an outstanding deed which clouds the title of the true owner, on the application of the latter, equity will order such deed to be canceled, and so, on like application, will interfere and prevent a sale, and the consequent execution of an improper deed. Shattuck v. Carson, 2 Cal. 589. If the complaint sets forth a lease and contract to pay in kind, a refusal to pay rent, and contains an allegation that the crop is being removed, with intent to defraud the plaintiff of his rent, and a prayer for an injunction. Held, that the injunction could not issue, because the plaintiff did not aver the insolvency of defendant, and an inability to make the rent on attachment or execution. Gregory v. Hay, 3 Cal. 334. A sheriff may be enjoined from selling the real property of the wife under an execution against

the husband. Alverson v. Jones, 10 Cal. 9; 70 Am. Dec. 689. Such a sale would cloud the wife's title to the property, as the deed of the sheriff would convey to the purchaser a prima facie title, which she would have to overcome by proof. Id. That part of the act which prescribes that no injunction shall be issued against the commissioners appointed for the sale of the state interest within the water line, is invalid. Guy v. Hermance, 5 Cal. 73; 63 Am. Dec. 85; Stone v. Elkins, 24 Cal. 127. Equity will take jurisdiction of an action by attaching creditors of an insolvent to restrain proceedings on execution against the property attached under a judgment against the debtor, in favor of another, alleged to have been obtained by fraud, where all the material allegations of the complaint, except fraud, are admitted. Heyneman v. Dannenberg, 6 Cal. 376; 65 Am. Dec. 519. A ferry-owner, prevented from obtaining a renewal of his license, either by the incompetency or refusal of the supervisors to act in the premises, may, by injunction, restrain another party from running a ferry under an illegal license, granted by the county judge, within a mile of the first established ferry. Chard v. Stone, 7 Cal. 117.

The right of a party to enjoin a sale of his property for another's debt, affirmed in Hickman v. O'Neal, 10 Cal. 294; Ford v. Rigby, 10 Cal. 449. The right of homestead existing, a deed from the sheriff, under an execution against the husband, would be a cloud upon the title. Dunn v. Tozer, 10 Cal. 167. A. leased furniture to B.; during the lease, F. bought the furniture of A., B. remaining in possession and acknowledging F.'s title. J., sheriff, having an execution in favor of R. and against A., levied on the furniture as the property of A. F. thereupon filed his bill to enjoin the sale. Held, that the remedy by injunction is the only speedy, adequate, and unembarrassed remedy the lessor has to vindicate his rights. Ford v. Rigby, 10 Cal. 449. The jurisdiction of a court to enjoin a sale of real estate is coextensive with its jurisdiction to set aside, and order to be canceled, a deed of such estate. It is not necessary for its assertion in the latter case, that the deed should be operative, if suffered to remain uncanceled, to pass the title, or that the defense to the deed should rest in extrinsic evidence, liable to loss, or be available only in equity. It is sufficient to call into exercise the jurisdiction of the court that the deed clouds the title of the plaintiff. As in such case the court will remove the cloud, by directing the cancellation of the deed, so it will interfere to prevent a sale from which a conveyance creating such a cloud would result. Pixley v. Huggins, 15 Cal. 127. The true test by which the question whether a deed would cloud the title of the plaintiff may be determined is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist, otherwise not. Pixley v. Huggins, 15 Cal. 127; Ramsdell v. Fuller, 28 Cal. 37; 87 Am. Dec. 103; Thompson v. Lynch, 29 Cal. 189. A complaint alleging that plaintiffs had, for a long time, conveyed water from a stream, for mining purposes, by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in the peaceable possession thereof when defendants wrongfully diverted the same, and deprived plaintiffs thereof, and were continuing so to do, is sufficient to entitle the party to an injunction. Tuolumne Water Co. v. Chapman, 8 Cal. 392. Where a party has given a promissory note, and the payee has assigned the note, without recourse, after maturity, and suit is brought upon it by the assignee, the maker then files his bill against the assignor and assignee, alleging fraud in obtaining the note, and praying for an injunction, and that the note be canceled, it was held that the case was a proper one for equitable relief, and the maker had the right to have the note canceled. Domingo v. Getman, 9 Cal. 97.

Where the statute for the condemnation of land for road purposes is unconstitutional, or its provisions are not strictly pursued, or the compensation is not tendered to the owner, a perpetual injunction against opening the road will be granted. Curran v. Shattuck, 24 Cal. 431. An injunction will be granted, at the suit of the mortgagee of real property, to restrain the commission of waste upon the premises; but, before it can be granted, it must appear that the commission of the threatened waste will materially impair the value of the mortgaged property, so as to render it inadequate security for the mortgaged debt, and that the defendants are insolvent, or unable to respond in damages for the threatened injury. Robinson v. Russell, 24 Cal. 473. A sale by a sheriff, of real estate, upon an execution, against the grantor, will, even if not effectual to pass the title to the purchaser, create a doubt as to the validity of the grantee's title, and cast a cloud upon it, and the grantee can maintain an action to enjoin the sale. Englund v. Lewis, 25 Cal. 337. In an action by the state to procure the cancellation of a patent for land sold without authority of law, where the person claiming under the patent is engaged in removing mineral from the land, the state is entitled to an injunction to restrain the defendant from removing the same. People v. Morrill, 26 Cal. 352. Courts of equity may restrain the commission of a trespass about to be committed, by taking down fences and opening a road through the plaintiff's land, in pursuance of an order of the board of supervisors, illegally made. Grigsby v. Burtnett, 31 Cal. 406; More v. Massini, 32 Cal. 590. Where the plaintiffs are owners of mining claims located in the bed of a creek, and defendants own claims situated on a hill in the vicinity, the refuse matter from which is deposited on plaintiffs' claims to such an extent as to render the working of them impracticable, plaintiffs' claims being first located, and valuable only for the gold they contain. Held, that plaintiffs are entitled to damages for the injuries done their claims by such deposit, and to an injunction against the same in future. Logan v. Driscoll, 19 Cal. 623; 81 Am. Dec. 90. Injunction will lie to stay a threatened injury to a right of way. Kittle v. Pfeiffer, 22 Cal. 485. The construction of a reservoir across the bed of a ravine, for the purpose of collecting the water flowing down the same, for use in irrigating a garden of fruit-trees, gives the party constructing the same a right of property in the reservoir, and the right to have the water flow into the same, of which he cannot be divested by persons subsequently entering for mining purposes, and a court of equity will enjoin miners thus entering from injuring the reservoir, or diverting the water therefrom. Rupley v. Welch, 23 Cal. 452.

2. When an injunction will not be granted. Persons performing labor upon or furnishing materials for a building erected by the lessee upon a leased lot, and who have a lien for the value thereof, are entitled to an injunction restraining a judgment creditor of the lessee, whose judgment is younger than the lien, from removing the building from the lot when the security is insufficient without such building. Barber v. Reynolds, 33 Cal. 497. If the title to a mining claim is in dispute, an injunction may be granted to preserve the property pending the litigation. Hess v. Winder, 34 Cal. 270. Where the complaint alleges that the plaintiffs are the owners and in possession of a tract of land; that defendants are insolvent, and threaten to, and will, enter upon said land, and by excavations, embankments, and diverting valuable springs and streams thereon, despoil it of the substance of the inheritance, and create a cloud upon plaintiff's title, injunction lies. Bensley v. Mountain Lake Water Co., 13 Cal. 306; 73 Am. Dec. 575. Where premises containing deposits of gold are held under a patent from the United States, an injunction lies to prevent persons from excavating ditches, digging up the soil, and flooding a portion of the premises, for the purpose of extracting the gold. Henshaw v. Clark, 14 Cal. 460; Boggs v. Merced Mining Co., 14 Cal. 279. An injunction lies to restrain trespass in entering upon a mining claim, and removing auriferous quartz from it, where the injury threatens to be continuous and irreparable. It comports more with justice to restrain the trespass, than to leave the plaintiff to his remedy at law. Merced

Mining Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262. Plaintiff took 212 acres of land under the possessory act of this state, inclosed it, and planted it with fruit and ornamental trees and shrubbery. The defendants entered upon a portion of the tract for mining purposes, dug up and destroyed the trees and shrubbery, and threatened to continue such trespass, claiming the right so to do by paying to plaintiff the money value of the trees, etc. Plaintiff sued for damages for the trespasses committed, and asks a perpetual injunction against future trespasses. Verdict: "We, the jury, award the plaintiff forty-two dollars damages." Judgment accordingly, the court refusing to perpetuate the injunction. Plaintiff had recovered a similar verdict in a previous suit. Held, that the verdict is conclusive of the rights of the parties, and that perpetual injunction against the trespasses should issue; that the nature of the property, destroyed and threatened to be destroyed, is such that the injury is irreparable; that plaintiff is not bound to take the mere money value of the trees, as they may possess a peculiar value to him. Daubenspeck v. Grear, 18 Cal. 443. A threatened trespass on land, where the trespass, if committed, would destroy the substance of the land, which could not be specifically replaced, will be enjoined, even if the plaintiff is in possession of the land. More v. Massini, 32 Cal. 590. Cutting, destroying, or removing growing timber, is ground for an injunction, without an allegation of insolvency. Natoma Water etc. Co. v. Clarkin, 14 Cal. 544. In cases of waste, if anything is about to be taken from the land, which cannot be restored in specie, it is no objection to the injunction that the party making it may possibly recover what others may deem as equivalent in money. Hicks v. Michael, 15 Cal. 107. Against the cutting of timber the owner of real property is entitled to an injunction. Whilst the timber is growing, it is part of the realty, and its destruction constitutes that kind of waste, the commission of which a court of equity will restrain. When once cut, the character of the property is changed; it has ceased to be a part of the realty, and has become personalty, but its title is not changed. It belongs to the owner of the land as much after as previously, and he may pursue into whosesoever hands it goes, and is entitled to all the remedies for its recovery which the law affords for the recovery of any other personal property wrongfully taken or detained from its owner. And if he cannot find the property to enforce its specific return, he may waive the wrong committed in its removal and use, and sue for the value as upon an implied contract of sale. Halleck v. Mixer, 16 Cal. 574. After a decree foreclosing a mortgage, the mortgagor in possession may be restrained from the commission of waste. Whitney v. Allen, 21 Cal. 233; Robinson v. Russell, 24 Cal. 473. In an action for a trespass upon a mining claim, where the complaint avers that defendants are working upon and extracting the mineral from the claim, and prays for perpetual injunction, and the answer admits the entry and work, and takes issues upon the titles; if the jury to whom the issue of title is submitted finds in favor of the plaintiffs, it is the duty of the court to grant the equitable relief sought, and perpetually enjoin defendants from future trespasses. McLaughlin v. Kelly, 22 Cal. 211. Equity will restrain a sale of property for illegal taxes, since a tax deed is made prima facie evidence of title. Palmer v. Boling, 8 Cal. 388, and Fremont v. Boling, 11 Cal. 387, overruling De Witt v. Hays, 2 Cal. 463, 56 Am. Dec. 352, and Robinson v. Gaar, 6 Cal. 275. Where an assessment and sale for taxes would be void, and the matters making them void do not appear on the face of the tax-collector's deed, but must be shown by intrinsic proof, and the deed upon its face would be prima facie valid, injunction may be granted to restrain the sale. Burr v. Hunt, 18 Cal. 303. An injunction will not be granted at the suit of the landlord against a tenant to restrain the removal of buildings erected by the tenant, if it appears that the landlord is not entitled to the reversion, it not appearing that the security for the rent will be impaired by the removal. Perrine v. Marsden, 34 Cal. 14. A court will not enjoin a tax sale, when it is apparent upon the face of the proceedings upon which the purchaser must rely to make out a case to enable him to recover under the sale, that the sale would be void. Bucknall v. Story, 36 Cal. 67. Equity will not restrain by injunction the diversion of water until the party complaining is in a condition to use it. Nevada County etc. Canal Co. v. Kidd, 37 Cal. 282. Equity will not interfere by injunction to restrain naked trespasses, where there is no waste committed. Id. Equity will not restrain the execution of a judgment in forcible entry and detainer against a husband for land claimed by the wife as her separate estate, upon the ground that she was not made a party to the proceedings, or that she was a sole trader. Saunders v. Webber, 39 Cal. 287. Equity will not restrain the issuance of a patent which does not include any part of plaintiff's land, nor cloud his title, though it be admitted that the patent would not be void on its face, but would require evidence dehors to show its invalidity. Taylor v. Underhill, 40 Cal. 471. In an action by an individual to restrain the sale of tide-lands by the state, it is not sufficient to allege in the complaint that the state has no title, but it must be shown in what manner the title was lost. Farish v. Coon, 40 Cal. 33. It is not an abuse of discretion to deny the prayer for a temporary injunction when all the equities of the complaint are denied by affidavits. Kohler v. Mayor and Common Council, 39 Cal. 510. A judgment in ejectment will not be enjoined on grounds which could have been set up as a legal defense in the action at law. Agard v. Valencia, 39 Cal. 292. An injunction should not be granted, unless equitable circumstances, beyond the allegation of irreparable injury, be shown, as insolvency, impediments to a judgment at law, or to adequate legal relief, or a threatened destruction of the property, or the like. Burnett v. Whitesides, 13 Cal. 156. Nor will an injunction be granted in aid of an action of trespass, unless it appear that the injury will be irreparable and cannot be compensated in damages. Waldron v. March, 5 Cal. 119. Where the plaintiff pretends no right to the soil, but only to a franchise, sale of the realty cannot work irreparable damage, nor cloud the title. De Witt v. Hays, 2 Cal. 463; 56 Am. Dec. 352. An injunction will not be granted to restrain the commission of a trespass, where the party complaining has a complete and adequate remedy at law. Leach v. Day, 27 Cal. 643. The trustees of a mining corporation will not be enjoined from selling stock for assessments, in cases where the assessment was levied for the purpose of paying the proper and legal expenses of the company, if the assessment does not exceed the amount allowed by law. Sullivan v. Triunfo Gold etc. Min. Co., 29 Cal. 585. When the court is satisfied that a wharf erected in tide-waters, and upon soil thereunder, belonging to the state, is not a public nuisance, an injunction will be refused, or dissolved, if one has been granted. People v. Davidson, 30 Cal. 379. When there is no pretense that any injury was occasioned willfully, and there is no finding of unskillfulness, an injunction will not issue to prevent the exercise of a party's right to irrigate his crops, although an annoyance or injury may thereby be occasioned to the plaintiffs. Gibson v. Puchta, 33 Cal. 310. If a judgment by default is void, because of the absence of the seal of the district court to the summons, or because of a defect in the certificate of the sheriff of the service of the summons, or because of irregularities of the clerk in entering the judgment, an injunction to restrain the enforcement thereof does not lie. The remedy is by application to the district court to quash the execution. Logan v. Hillegass, 16 Cal. 200. In a case where the board of supervisors of San Joaquin, under the act of 1860 (Stats. 1860, p. 317), authorizing them to levy a special tax for the construction and repair of seven public highways leading from the city of Stockton, the fourth of which was "a road running from the limits of Stockton via Hamilton's Ranch, known as the Sonora Road," levied and collected the tax, and then, July 10, 1860, passed an order locating the route of this fourth road, along which plaintiffs lived, and afterwards assessed the damages to the owners of land, etc.,

but before they had obtained the right of way for the road, passed another order in March, 1861, annulling the first order and changing the location of the road, which rendered the lands of plaintiffs of less value. It was held that the first order was unexecuted; that no rights of plaintiffs had vested; and that the board had power to make the second order; that the first order was not in the nature of a power exercised and exhausted, but was, at most, a proposed mode of executing a power, which could be changed at any time before rights had vested under it. Burkett v. Supervisors of San Joaquin, 18 Cal. 702. The mortgagee of a lot on which there is a house cannot enjoin the mortgagor or his assigns from removing the house from the lot, except upon proof that the lot, without the house, will be an inadequate security for the mortgage debt. Buckout v. Swift, 27 Cal. 433; 87 Am. Dec. 90. If an order of a board of supervisors laying out a road is unconstitutional, and null and void upon its face, it does not affect or cloud the title to the land over which it passes, and an injunction will not be granted to restrain the carrying of the order into effect, but the party will be left to his remedy at law. Leach v. Day, 27 Cal. 643. An order whereby the bringing of an action is restrained will be reversed, notwithstanding an undertaking on injunction has been given. King v. Hall, 5 Cal. 82. Where the complaint and evidence show that a defendant is in possession of a tract of land, claiming and holding under an adverse title, and the weight of evidence is in favor of his title, an injunction will not be granted on the application of a party claiming title to the land, to prevent the defendant from cutting timber. Smith v. Wilson, 10 Cal. 528. Plaintiffs file their complaint to enjoin defendants from diverting a certain quantity of the water of Bear River, alleging that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes; that such quantity was necessary for their use, and that defendants had diverted the same to their damage, etc. Plaintiffs had verdict and judgment for twenty-one thousand eight hundred dollars damages. It was held that the averments are insufficient to entitle plaintiff to an injunction, the scope of the bill being simply to enforce in equity plaintiff's alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit. McDonald v. Bear River etc. Min. Co., 15 Cal. 148. A vendor of real estate made a conveyance of it to the vendee, leaving a balance of the purchase-money unpaid. The vendee afterwards mortgaged the same property to a third person, who had knowledge of the vendor's claim for unpaid purchase-money. The vendor brought an action against the vendee, obtained judgment for the balance due, issued execution, and sold the interest of the vendee in the property. The mortgagee afterwards foreclosed his mortgage, and was about to sell the property. The purchaser at the previous sale obtained an injunction to stay the sale, which was afterwards dissolved by the court, on the ground that he had purchased merely the vendee's equity of redemption, as the sale was subject to the rights of the mortgagee. It was held that the judgment of the court below was correct, and that the claim of the purchaser to be subrogated to the equitable lien of the vendor, if available at all, must be asserted in a separate equitable action. Allen v. Phelps, 4 Cal. 256. An injunction will not lie to restrain the collection of a judgment, on the ground that the judgment was for a balance of purchase-money of land under covenant for a good title, while in fact the grantor had no title, as long as the purchaser against whom the judgment was taken, and who seeks to enjoin it, remains in possession of the land. Jackson v. Norton, 6 Cal. 187. Courts of equity will not interfere to enjoin a judgment not manifestly wrong, because of a defect in the evidence. Pico v. Sunol, 6 Cal. 294. A stranger to the title of real property, though in possession, cannot enjoin the purchasers and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person, who does not complain. Treadwell v. Payne, 15 Cal. 496. Defendants claiming title under a Mexican grant, and a patent issued upon its confirmation by the United States, bring an action against plaintiffs for certain premises in their occupation; plaintiffs, claiming as United States pre-emptioners, then file their complaint in the same court to enjoin defendants from introducing in evidence the survey, plat, or patent, on the trial of the ejectment, until the determination of an action, averred to be pending in the United States circuit court, by the United States against defendants and others claiming with them, to annul the survey, plat, and patent, on the ground of fraud in the survey, and in procuring the patent, the complaint also averring such fraud. Held, that injunction does not lie; that the patent, until set aside, is conclusive evidence of the validity of the grant, of its recognition and confirmation, and also of the regularity of the survey, and of its conformity with the decree of confirmation; and that defendants, claiming to be pre-emptioners upon land of the United States, have no standing in court to resist the patent. Ely v. Frisbie, 17 Cal. 250. Where the board of supervisors of a county allowed an account presented for services as tax-collector, and the auditor drew his warrant in favor of E. for the amount, and he assigned it to defendant M., a purchaser in good faith without notice. Held, that the county cannot enjoin its collection as against M., on the ground that the account was false and fraudulent as to some of its items, and was allowed by the board, through ignorance of the facts and mistake; that the supervisors were acting within the scope of their authority, and the county cannot visit upon an innocent party the consequences of their negligence. El Dorado County v. Elstner, 18 Cal. 144. If the judgment and execution are void upon their face, an injunction will not be granted to restrain a sale of property levied under the execution, or the issuing of any other execution on the judgment. Sanchez v. Carriaga, 31 Cal. 170. When an assessment is made upon land in the city of San Francisco, it is not within the province of a court to interfere and order a sale of the land by a decree rendered in an injunction suit, instituted by the owner of the land for the purpose of preventing a sale under an ordinance of the city. Weber v. San Francisco, 1 Cal. 455. In all cases involving simply the question of taxation, the issue is strictly one at common law, and equity cannot grant an injunction. Minturn v. Hays, 2 Cal. 590; 56 Am. Dec. 366. That the assessment for state and county taxes for 1855–56, in San Francisco County, was not based on the valuation of the city assessor, as required by the act creating the board of supervisors, passed in 1851, is not ground for an injunction upon the collection of the taxes, as the party could have appealed to the board of equalization if aggrieved. Merrill v. Gorham, 6 Cal. 41. An injunction will not lie to restrain the collection of taxes due on property unless it be shown that the injury resulting from the collection would be irreparable. An averment of this character must appear in the complaint, and, if denied, it must be sustained at the hearing. Ritter v. Patch, 12 Cal. 298. Courts of equity are always ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings, rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree as when they have been misled by a mistake of fact as to the condition of the property, or the estate sold, if application be made to them in suits in which such decrees are entered, within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others. Goodenow v. Ewer, 16 Cal. 470; 76 Am. Dec. 540. The extent of the relief in such cases is matter resting very much in the sound discretion of the court. The general rule is, that the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or the par-

ties, to allow the sale to stand. But when the relief is sought in one action from a purchase made upon a mistake of law to the effect of a decree rendered in another action, it seems that the ordinary rules as to mistakes of law should apply, and, from such, courts of equity seldom relieve. Id. Where, in a suit before a justice of the peace, defendant answers, disputing plaintiff's claim, and afterwards, on a day set for trial, plaintiff being present, but defendant absent, and no one appearing for him, the justice renders judgment for plaintiff, without evidence and "by default," as the docket reads, it was held that if the justice erred in his judgment the remedy is by appeal, and that such error cannot be corrected by equity. Hunter v. Hoole, 17 Cal. 418; Comstock v. Clemens, 19 Cal. 77. Plaintiff has a deed of property from H. & P. Subsequently N., execution creditor of H. & P., causes the sheriff to levy on the property. Plaintiff files his complaint to restrain the sale, as casting a cloud on his title. Court below found plaintiff's deed to be, in effect, a mortgage. Held, that the bill must be dismissed; that the purchaser at the sheriff's sale would only acquire the interest of the judgment debtors, H. & P.; that plaintiff's right as mortgagee would be unaffected by the sale, and hence there was no necessity for equity to interfere in his behalf. Purdy v. Irwin, 18 Cal. 350. Where a party moves for a new trial and fails, he cannot, on the same facts, enjoin the judgment rendered. Collins v. Butler, 14 Cal. 223. Defendant, as coroner, levied on and advertised for sale the interest of T. in certain property in the hands of a receiver appointed in a suit between J. & T., as partners. It was held that the plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable, and this must appear by a clear showing of plaintiff's right to the property and defendant's insolvency. More v. Ord, 15 Cal. 206. Plaintiff purchased certain property under a foreclosure sale, made a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here. The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of the premises under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of Wemple v. Pender, and has not yet got a sheriff's deed. It was held that injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure not cutting off the rights of the mortgagor, Pender; that he, being entitled to possession under the sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might, under our statute, be sold for his debts; and if he chose to recognize the validity of Wemple's lien, or its enforcement, or sale under judgment, plaintiff cannot complain, his rights not being affected by the proceedings, as he was not a party. Macovich v. Wemple, 16 Cal. 104. If a judgment by default is void because of the absence of the seal of the district court to the summons, or because of a defect in the certificate of the sheriff of the service of summons, or because of irregularities of the clerk in entering the judgment, an injunction to restrain the enforcement thereof does not lie. Logan v. Hillegass, 16 Cal. 200. Where a party, relying on the verbal assurance of the attorney on the other side that he would agree to a statement, did not obtain the certificate of the referee, such party cannot be considered free from fault and negligence, and he is not in a position to invoke the aid of equity to enjoin a judgment obtained against him. Phelps v. Peabody, 7 Cal. 50. If a party enters judgment for too much, or before the whole amount is due, it is not conclusive, but only primary evidence of fraud to avoid the judgment. Patrick v. Montader, 13 Cal. 442, overruling Taaffe v. Josephson, 7 Cal. 356. An injunction to stay proceedings under a judgment obtained by neglect of a party or counsel, cannot be sustained, where, if the neglect were excusable, full relief might have been had on motion in the original action. Borland v. Thornton, 12 Cal. 440. For, to obtain the aid of equity, a party must show that he has exhausted all proper diligence to defend in the suit in which judgment was rendered. Riddle v. Baker, 13 Cal. 304; Sparks v. De la Guerra, 14 Cal. 108. Nor can defendant, having no defense to an action, go into equity and enjoin a judgment by default, on the ground that the sheriff's return of service on him is false, and that he had no notice of the proceeding. Gregory v. Ford, 14 Cal. 141; 73 Am. Dec. 639; Gibbons v. Scott, 15 Cal. 286; Logan v. Hillegass, 16 Cal. 202. If a judgment by default is void for the reason that it was entered by the clerk, without authority, that fact constitutes no ground for equity to interfere. Chipman v. Bowman, 14 Cal. 157.

3. **Doubtful cases.** A purchaser of standing timber is not entitled to an injunction to stay waste committed by the cutting of the timber. An injunction to restrain an injury in the nature of waste should not be granted before hearing on the merits, except in cases of urgent necessity, etc. Hicks v. Michael, 15 Cal. 107. Whether ditch property, situated in the mineral regions of the state, is to be regarded by courts of equity with the same measure of favor which is bestowed by them upon land which is cherished by the owner for itself, is doubted, but not decided, in Clark v. Willett, 35 Cal. 534.

4. **Granting and continuing injunctions. How far discretionary.** Granting and continuing an injunction rest, in a great degree, in the discretion of the court or judge. Hicks v. Michael, 15 Cal. 107. Abuse should be guarded against, and the discretion ought to be exercised in favor of the party most liable to be injured. Hicks v. Compton, 18 Cal. 206; De Witt v. Hays, 2 Cal. 463; 56 Am. Dec. 352; Real del Monte etc. Min. Co. v. Pond etc. Min. Co., 23 Cal. 82; Slade v. Sullivan, 17 Cal. 102. In Hess v. Winder, 34 Cal. 270, a preliminary injunction had been granted. Upon appeal to the supreme court, a judgment in favor of plaintiff was reversed, and a new trial ordered. Held, that granting a new trial did not entitle the defendants to a modification or dissolution of the injunction, but that it should be retained.

5. **Effect of injunction.** An injunction restrains not only the party, but other courts, on grounds of comity. Engels v. Lubeck, 4 Cal. 31. It cannot be granted to affect the rights of parties who cannot be heard, and who are not secured by the undertaking. Patterson v. Board of Supervisors, 12 Cal. 105. A violation of an injunction order, by the defendant's agents, servants, or employees, is, in law, a violation by the defendant himself, so as to render him liable for contempt. Field v. Chapman, 13 Abb. Pr. 320; Field v. Hunt, 22 How. Pr. 329; Field v. Hunt, 24 How. Pr. 463; Field v. Chapman, 15 Abb. Pr. 434; People v. Albany etc. R. R. Co., 12 Abb. Pr. 171; 20 How. Pr. 358; Neale v. Osborne, 15 How. Pr. 81.

6. **Revival of injunction.** The court, when the matter has been once disposed of, may, on proper showing, revive an injunction once dissolved, or grant an injunction previously denied, and this is the extent of its power. Hicks v. Michael, 15 Cal. 107. When a preliminary injunction is dissolved upon granting a nonsuit, and the judgment is afterwards reversed on appeal, the plaintiff, upon a proper application, is entitled to a renewal of the injunction. Harris v. McGregor, 29 Cal. 124; see also Hess v. Winder, 34 Cal. 270, cited in subd. 4 of this note.

§ 526a. Actions by taxpayers to enjoin illegal expenditure or waste by public. An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting

in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities.

Legislation § 526a. 1. Added by Stats. **1909**, p. 578.
2. Amended by Stats. **1913**, adding the proviso at end of section.

Taxpayer's action to enjoin illegal public expenditures. A board of supervisors before the adoption of this section could not, at the suit of a taxpayer, be restrained from incurring liabilities which could not be a legal charge against the county (Linden v. Case, 46 Cal. 171), nor from allowing an alleged illegal claim; nor could the county auditor be enjoined from drawing the same, nor the county treasurer from paying it. McBride v. Newlin, 129 Cal. 36; 61 Pac. 577. Every taxpayer is interested in the amount of the taxes to be collected on his property, and he may properly commence proceedings to enjoin a city council from doing an act which may result in an addition to the burdens of taxation. Schumacker v. Toberman, 56 Cal. 508. A taxpayer of a county has such an interest in the proper application of funds belonging to the county, that he may maintain an action to prevent their withdrawal from the treasury in payment or satisfaction of demands which have no validity against the county; and he may sue to enjoin the county auditor from drawing his warrant in payment for the purchase of land, of which no notice has been published (Winn v. Shaw, 87 Cal. 631; 25 Pac. 968); under this section, the right to sue to prevent illegal payments by a county treasurer is limited to a resident citizen or corporation, who is liable to pay a tax in the county, or who has paid a tax therein one year before the commencement of the action. Thomas v. Joplin, 14 Cal. App. 662; 112 Pac. 729. A complaint to enjoin the allowance and payment of an illegal claim, which does not allege that any claim therefor has been made out or filed with the board of supervisors, or that any such claim will be presented, is fatally defective. McBride v. Newlin, 129 Cal. 36; 61 Pac. 577; and see Barto v. Board of Supervisors, 135 Cal. 494; 67 Pac. 758. And he may sue to enjoin the consummation of an illegal contract, where it is proposed to take all the public moneys of the municipality out of the hands of the legal custodian, and place them in the possession and control of a private corporation (Yarnell v. Los Angeles, 87 Cal. 603; 25 Pac. 767); and he may sue to prevent an untrue official declaration of the result of an election on a proposition to issue bonds, and to have the true declaration made, whether the result of the election be for or against the issuance of the bonds (Gibson v. Board of Supervisors, 80 Cal. 359; 22 Pac. 225); and he may maintain an action to restrain a board of education from drawing drafts for compensation for services rendered and to be rendered under an appointment from the board, which is unauthorized by law; and an objection, that the plaintiff cannot maintain the action because he does not show that he will sustain any special injury, different from that of the public at large, is untenable (Barry v. Goad, 89 Cal. 215; 26 Pac. 785); and a taxpayer can restrain any illegal act which will increase the burden of taxation; but it is not so clear when he can compel affirmative action, although he can, by mandamus, compel an assessor to assess property subject to assessment. Gibson v. Board of Supervisors, 80 Cal. 359; 22 Pac. 225. A complaint, under this section, is insufficient, which does not allege the plaintiff's citizenship. Thomas v. Joplin, 14 Cal. App. 662; 112 Pac. 729.

Circulation of void bonds. Bonds of a municipal corporation, void in the hands of an innocent holder, are not a charge against the city, and their circulation cannot be enjoined. McCoy v. Briant, 53 Cal. 247.

Right of county to maintain action to restrain expenditure of state funds. See note Ann. Cas. 1913C, 669.

Right of taxpayer in absence of statute to enjoin unlawful expenditures by municipality. See note 36 L. R. A. (N. S.) 1.

§ 527. **Injunction. Notice. Party obtaining order must be ready. Defendant entitled to continuance. Precedence.** An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits, upon which the injunction was granted, must, if not previously served, be served therewith. No preliminary injunction shall

be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than ten days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day upon which such order is made returnable, such hearing shall take precedence of all other matters on the calendar of said day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law.

Complaint, verification of. Ante, § 446.

Service by sheriff. See Sheriff's Duties, Pol. Code, §§ 4157 et seq.

Legislation § 527. 1. Enacted March 11, **1872**; based on Practice Act, § 113 (New York Code, § 220), the only change being in the third sentence, which read: "No injunction shall be granted on the complaint, unless it be verified by the oath of the plaintiff, or some one in his behalf, that he the person making the oath has read the complaint, or heard the complaint read, and knows the contents thereof, and the same is true of his own knowledge, except the matters therein stated on information and belief, and that as to those matters he believes it to be true." When enacted in 1872, the section read: "§ 527. The injunction may be granted at the time of issuing the summons, upon the complaint, and at any time afterwards, before judgment, upon affidavits. The complaint in the one case, and the affidavits in the other, must show satisfactorily that sufficient grounds exist therefor. No injunction can be granted on the complaint unless it is verified. When granted on the complaint, a copy of the complaint and verification attached must be served with the injunction; when granted upon affidavit, a copy of the affidavit must be served with the injunction."

2. Amended by Stats. **1895**, p. 51, adding, at the end of the section, the sentence, "No injunction granted prior to the actual trial of the cause wherein it is granted shall continue in force for a longer period than twelve months from the time such injunction was granted, except by consent of the parties, or unless the cause be set for trial upon its merits."

3. Amendment by Stats. **1901**, p. 137; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 341, to read: "§ 527. An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits, if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits, upon which the injunction was granted, must, if not previously served, be served therewith. No injunction granted prior to the trial of the cause shall continue in force longer than twelve months, after answer filed, except by consent of the parties, unless the cause has been set for trial upon its merits, or unless the party in whose favor it was granted has sought to have the cause so set for trial, and the failure to set it has not been due to his fault." The code commissioner said: "The amendment permits the issuing of the injunction upon a verified complaint at any time before judgment, instead of restricting the time to the issuing of the summons, and also permits the injunction to remain in force for a longer period than twelve months, if, within that time, the party in whose favor it is granted seeks to have the cause set for trial, and the failure to set it was not due to his fault."

5. Amended by Stats. **1911**, p. 59.

Application before complaint filed. It is not necessary to wait until the com-

plaint is filed, before making application to the judge for a restraining order or a temporary injunction, either of which takes effect only upon the filing of the complaint and the bond or undertaking required; the usual practice of presenting the complaint in advance of the filing, and obtaining the order or the allowance of the writ, is regular, and not in conflict with the statute; the order or writ can then be issued with the summons. Heyman v. Landers, 12 Cal. 107.

Sufficiency of verified complaint. Where a verified complaint is the basis for the relief sought, it takes the place of an affidavit, and must be treated as such; and the facts so stated must stand the test to which oral testimony would be subjected. Willis v. Lauridson, 161 Cal. 106; 118 Pac. 530. Where the verified complaint shows the plaintiff's right to an injunction, pendente lite, restraining the defendant from committing a breach of contract, and to have the same continued in force until judgment, to prevent the relief sought from being abortive, and a temporary injunction was granted, it is error for the court to dissolve it. Farnum v. Clarke, 148 Cal. 610; 84 Pac. 166. A complaint for an injunction, otherwise unsupported, which is open to attack on general demurrer, is insufficient. Willis v. Lauridson, 161 Cal. 106; 118 Pac. 530. Where the ultimate facts pleaded warrant the temporary injunction applied for, it is the duty of the court to grant such relief upon a verified complaint, in the absence of such a counter-showing as would fully overcome or impeach the averments of the complaint. Porters Bar Dredging Co. v. Beaudry, 15 Cal. App. 751; 115 Pac. 951.

Amended complaint as affidavit. An amended complaint is a sufficient affidavit; and the court has jurisdiction to grant an injunction, after summons issued, upon such complaint alone. Smith v. Stearns Rancho Co., 129 Cal. 58; 61 Pac. 662.

Effect of amended bill. The court has discretion to permit the filing of an amended bill to support a preliminary injunction already issued; and where the amended bill shows good ground for the injunction, it is not error to refuse to dissolve the writ, merely because the original bill is defective. Tehama County v. Sisson, 152 Cal. 167; 92 Pac. 64. An amended complaint, by leave of the court or judge, may be filed without prejudice to an injunction previously granted, and, when thus filed, the injunction will not be dissolved by reason thereof. Barber v. Reynolds, 33 Cal. 497.

Mode of service of injunction. The code does not provide how or by whom an injunction shall be served; but the important matter is, that the party enjoined shall have notice; and the statute being silent, it is sufficient if service is made in conformity with the mode prescribed with reference to service of summons. Golden Gate etc. Mining Co. v. Superior Court, 65 Cal. 187; 3 Pac. 628; Hibernia Sav. & L. Soc. v. Clarke, 110 Cal. 27; 42 Pac. 425.

Sufficiency of service on attorney. An order to show cause why a corporation should not be punished for contempt in violating an injunction, may be served on the attorney for the corporation in the injunction suit, when its managing agents conceal themselves for the purpose of avoiding service. Eureka Lake etc. Canal Co. v. Superior Court, 66 Cal. 311; 5 Pac. 490.

Actual knowledge of injunction. Personal knowledge of an order of injunction, obtained by a party through being present in court at the time the order was made, would probably be sufficient to bind such party, without service; but information given to the attorney of such party, by the attorney of the adverse party, cannot be considered as binding either the attorney or his client. Elliott v. Osborne, 1 Cal. 396. Where the officers and agents of a corporation have actual notice of an injunction against the corporation, they are bound by it, although it was not served. Golden Gate etc. Mining Co. v. Superior Court, 65 Cal. 187; 3 Pac. 628; and see Ex parte Cottrell, 59 Cal. 417. Disobedience of any lawful order or process of the court is a contempt of its authority, and persons guilty of such disobedience may be proceeded against. Service of such order or process, or a demand that it be complied with, is not a condition precedent to the issuance of an attachment for disobedience thereof. Ex parte Cottrell, 59 Cal. 420.

Duration of preliminary injunction. The twelve months' limit of this section, beyond which a preliminary injunction ceases to operate, if certain conditions do not exist, applies equally, whether the injunction is granted after notice or ex parte; and it is proper for the court to ascertain the facts, and to declare by its order that an injunction is no longer in force, if the facts warrant such deduction. German Sav. & L. Soc., 5 Cal. App. 215; 89 Pac. 1063.

Preliminary injunction not adjudication of rights. The granting or denying of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. Miller & Lux v. Madera Canal etc. Co., 155 Cal. 59; 22 L. R. A. (N. S.) 391; 99 Pac. 502.

Mandatory preliminary injunction. Mandatory preliminary injunctions are seldom granted, and only in a peculiar class of extreme cases; the code definition of an injunction omits the mandatory ingredient, and there is nothing in our code more favorable to mandatory injunctions than is to be found in the general current of English and American authority. Gardner v. Stroever, 81 Cal. 148; 6 L. R. A. 90; 22 Pac. 483. A very strong and urgent case

is required to justify a mandatory preliminary injunction: a clear case of prospective injury, for which the plaintiff has no adequate remedy at law, is indispensable. Gardner v. Stroever, 84 Cal. 148; 6 L. R. A. 90; 22 Pac. 483; 89 Cal. 26; 26 Pac. 618; Hagen v. Beth, 118 Cal. 330; 50 Pac. 425.

Appeal from ex parte injunction. An appeal lies from an ex parte order granting or dissolving an injunction, the same as from an order made upon notice, or upon order to show cause. Sullivan v. Triunfo etc. Mining Co., 33 Cal. 385.

Remedy for improper preliminary injunction. The only remedy for improperly granting an injunction pendente lite, is a motion to dissolve the writ, or an appeal from the order granting it. Lange v. Superior Court, 11 Cal. App. 1; 103 Pac. 908.

Discretion of court. The discretion of the court in granting and dissolving injunctions must be regulated by sound and just rules; as, for a court of chancery to interfere in some cases might lead to the very hardships and irreparable injury which is the ground of the claim of the plaintiff for its interference; and the court should not interpose when long delays have intervened since the alleged injury, or cause of it, existed, nor unless some equitable circumstances beyond the general allegation of irreparable injury is shown, such as insolvency, or impediments to a judgment at law or to adequate legal relief, or a threatened destruction of the property, or the like. Burnett v. Whitesides, 13 Cal. 156. A preliminary injunction is not a matter of right: an application therefor is addressed to the discretion of the court (Lagunitas Water Co. v. Marin County Water Co., 163 Cal. 332; 125 Pac. 351; Marre v. Union Oil Co., 17 Cal. App. 209; 119 Pac. 104), to be governed by the nature of the case (Hicks v. Michael, 15 Cal. 107); and its action thereon will not be reviewed on appeal, except for abuse of discretion (Santa Cruz Fair Bldg. Ass'n v. Grant, 104 Cal. 306; 37 Pac. 1034; Porter v. Jennings, 89 Cal. 440; 26 Pac. 965); and where the court refused to grant a motion for an injunction pendente lite, the appellate court will not interfere, unless the right clearly appears to exist. Gower v. Andrew, 59 Cal. 119; 43 Am. Rep. 242. The question of granting or refusing a preliminary injunction, after answer denying the equities, is one calling for the exercise of the sound discretion of the court, and its decision will not be disturbed on appeal. Godey v. Godey, 39 Cal. 157; Beaudry v. Felch, 47 Cal. 183. It is not an abuse of discretion for the trial court to refuse to grant a preliminary injunction, at the instance of a riparian proprietor, where no substantial injury is shown (Lagunitas Water Co. v. Marin County Water Co., 163 Cal. 332; 125 Pac. 351); nor where it is not shown that the defendant is insolvent, or that any judgment which the court might finally make in favor of the plaintiff would be rendered ineffectual because of such refusal. Marre v. Union Oil Co., 17 Cal. App. 209; 119 Pac. 104. A temporary injunction may sometimes be properly refused upon such facts as would entitle the party, of right, to an injunction on final hearing. Santa Cruz Fair Bldg. Ass'n v. Grant, 104 Cal. 306; 37 Pac. 1034. It is within the discretion of the court to grant an injunction to restrain a sheriff's sale, where it will cast a cloud on the title; but, after the sale is made, and the delivery of a deed is threatened, an injunction may be properly granted. Goldstein v. Kelly, 51 Cal. 301. The dissolution or continuance of a preliminary injunction is a matter largely within the discretion of the trial court, and unless that discretion has been abused, the action of the court will not be disturbed on appeal. Godey v. Godey, 39 Cal. 157; McCreery v. Brown, 42 Cal. 457; Rogers v. Tennant, 45 Cal. 184; Patterson v. Board of Supervisors, 50 Cal. 344; Coolot v. Central Pacific R. R. Co., 52 Cal. 65; Efford v. South Pacific Coast R. R. Co., 52 Cal. 277; Parrott v. Floyd, 54 Cal. 534; White v. Nunan, 60 Cal. 406; Grannis v. Lorden, 103 Cal. 472; 37 Pac. 375; Marks v. Weinstock, 121 Cal. 53; 53 Pac. 362; Christopher v. Condogeorge, 128 Cal. 581; 61 Pac. 174.

Injunction on final hearing. The rule, that the granting or refusing of injunctions involves the exercise of discretion, which cannot be reviewed on appeal except for the correction of abuses, has no application to a judgment granting or refusing an injunction after a final hearing on the merits: such rule applies more especially, if not exclusively, to preliminary injunctions. Richards v. Dower, 64 Cal. 62; 28 Pac. 113. The complainant may be entitled to a perpetual injunction on the hearing, in many cases, where it would be manifestly improper to grant a temporary injunction; the final injunction is, in many cases, a matter of strict right, and granted as a necessary consequence of the decree made in the case; the preliminary injunction, on the contrary, before the answer, is a matter resting altogether in the discretion of the court, and ought not to be granted, unless the injury is pressing and the delay dangerous. Santa Cruz Fair Bldg. Ass'n v. Grant, 104 Cal. 306; 37 Pac. 1034. Injunctions to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity, or when the subject-matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance; but where the right is doubtful, the court should direct a trial at law, and in the mean time grant a temporary injunction to restrain all injurious proceedings if there is danger

of irreparable mischief. Hicks v. Michael, 15 Cal. 107.

When preliminary injunction will be granted. The court must consider, in granting a preliminary injunction, the amount of injury which may thereby be inflicted on strangers to the suit, and to third parties; and it will consider whether a greater injury will result to the defendant from granting the injunction, than to the plaintiff in refusing it; and if it is satisfied that a greater injury will so result to the defendant, and that the rights of the plaintiff will be fully conserved by granting the injunction, after a hearing upon the merits, a wise discretion would dictate a refusal. Santa Cruz Fair Bldg. Ass'n v. Grant, 104 Cal. 306; 37 Pac. 1034. As a general rule, courts of equity will not interfere by preliminary injunction to change the possession of real property, the title being in dispute; nor is it the proper remedy for recovering possession of personal property. San Antonio Water Co. v. Bodenhamer, 133 Cal. 248; 65 Pac. 471.

Right to preliminary injunction which would have effect of transferring possession of property from defendant to plaintiff. See note 39 L. R. A. (N. S.) 31.

CODE COMMISSIONERS' NOTE. The original section contained a provision prescribing the form of the verification. This was useless, for the form is prescribed in the part of this code relating to pleadings.

1. Time when the order will issue. If sought upon the complaint, the usual practice is to present the complaint to the judge in advance of the filing, and obtain an order, which order takes effect when the complaint is filed. Heyman v. Landers, 12 Cal. 107. The plaintiff, at the time of issuing summons, is entitled to an injunction upon the complaint alone, if it make a proper case, etc.; but if he ask for an injunction thereafter, he must do it upon affidavits. Falkinburg v. Lucy, 35 Cal. 52; 95 Am. Dec. 76.

2. Service. A party against whom an injunction has been issued is not bound to obey it until after due service thereof on him, giving him verbal notice that it has been granted. But if a party is in court at the time an injunction order is made, and thus has personal knowledge of the order, it may be that he would be bound thereby. Elliott v. Osborn, 1 Cal. 396. The statute points out no mode for service; but, in conformity with the provisions relative to the summons, delivery of a copy is essential to personal service, where that is required; but whether it would be necessary to exhibit the original, unless specially requested by the party served, is questioned. Edmondson v. Mason, 16 Cal. 386. A writ placed in the sheriff's hands on Sunday cannot be officially received on that day. Such writ can only be considered officially in his hands when Sunday has expired. Whitney v. Butterfield, 13 Cal. 335; 73 Am. Dec. 584. A copy of the papers upon which the injunction is granted must be served with the injunction, otherwise the service will be set aside as irregular. Penfield v. White, 8 How. Pr. 87; Johnson v. Casey, 28 How. Pr. 492; 3 Rob. 710.

§ 528. Injunction after answer. An injunction cannot be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

Legislation § 528. Enacted March 11, **1872**; based on Practice Act, § 114 (New York Code, § 221), which had, in the first line, the words "shall not" instead of "cannot."

No ex parte injunction after answer. An injunction cannot be granted after the defendant has answered, except by order to show cause. Newmann v. Moretti, 146 Cal. 31; 79 Pac. 512.

CODE COMMISSIONERS' NOTE. When the answer denies all the equity, if any, of the complaint, a preliminary injunction should not be granted. Crandall v. Woods, 6 Cal. 449. When the equities of a complaint are fully denied by affidavits on the part of defendant, an injunction, pendente lite, should not be granted. Gagliardo v. Crippen, 22 Cal. 362.

§ 529. Security upon injunction. On granting an injunction, the court or judge must require, except when it is granted on the application of the people of the state, a county, or a municipal corporation, or a wife against her husband, a written undertaking on the part of the applicant, with sufficient sureties, to the effect that he will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled thereto. Within five days after the service of the injunction, the person enjoined may except to the sufficiency of the sureties, and unless within five days thereafter, upon notice of not less than two days to the person enjoined, such sureties, or others in their place, justify before a judge of the court or county clerk at a time and place designated in such notice, the order granting the injunction must be dissolved.

Undertaking delivered to defendant on dismissal. Post, § 581, subd. 1.

Sureties.

1. Qualifications of. Ante, § 494; post, § 1057.

2. Justification of. Ante, § 495.

Court commissioners. Power to take bonds and undertakings, examine sureties, etc. Ante, § 259, subd. 3.

Legislation § 529. 1. Enacted March 11, **1872**; based on Practice Act, § 115 (New York Code,

§ 222), which read: "On granting an injunction, the court or judge shall require, except where the people of the state are a party plaintiff, a written undertaking, on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto." When enacted in 1872, the word "shall" was changed to "must," in first line.

2. Amended by Code Amdts. **1873–74**, p. 405, (1) changing, in first line, the word "where" to "when," and (2) adding at end of section, after "entitled thereto," two sentences, which read: "Within five days after the filing of the undertaking required the defendant may except to the sufficiency of the sureties; if he fails to do so he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk in the same manner as upon bail on arrest; and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the order granting an injunction shall be dissolved."

3. Amended by Code Amdts. **1880**, p. 62, (1) omitting the word "are" after "people of the state," and inserting in lieu thereof the words "a county, or municipal corporation, or a married woman in a suit against her husband is"; and (2) substituting the words "service of the injunction" for "filing of the undertaking required," in sentence beginning "Within five days."

4. Amendment by Stats. **1901**, p. 137; unconstitutional. See note ante, § 5.

5. Amended by Stats. **1907**, p. 342; the code commissioner saying, "The amendments to this section were rendered necessary by the amendments made to subds. 2 and 3 of § 526."

Necessity for undertaking. The injunction will be dissolved, where there is a failure to give the undertaking required by this section. Neumann v. Moretti, 146 Cal. 31; 79 Pac. 512. Even if a chancellor has no power to require an undertaking upon the issuance of a temporary restraining order, yet an objection on this ground cannot be sustained; for, having taken jurisdiction of the general subject of litigation, he has power, aside from the statute, to order such undertaking, or to make any other order in the progress of the case, for the furtherance of the objects of the litigation and the protection of its subject-matter. Prader v. Purkett, 13 Cal. 588. A writ of injunction is invalid, where it was issued and served prior to the time the bond was given. Carter v. Mulrein, 82 Cal. 167; 16 Am. St. Rep. 98; 22 Pac. 1086; Alaska Improvement Co. v. Hirsch, 119 Cal. 249; 51 Pac. 340. During a temporary restraining order, the better practice, as it is certainly the general practice, is to require an undertaking; but in all cases, where a preliminary injunction is granted in the first instance, or after an order to show cause, an undertaking must be required. Neumann v. Moretti, 146 Cal. 31; 79 Pac. 512. An order for an injunction is not operative until the statutory undertaking is given. Elliott v. Osborne, 1 Cal. 396. The provision of this section, that the court, on granting an injunction, shall require a written undertaking on the part of the plaintiff, is applicable, whether the injunction is granted upon an ex parte application, or upon an order to show cause. McCracken v. Harris, 54 Cal. 81. Where a temporary restraining order is made upon an application for a temporary injunction, and the restraining order is limited to the pendency of the motion for a temporary injunction, upon condition that a bond be filed to pay all damages resulting from the restraining order, a bond given in consideration of a writ of injunction, pending the hearing of the action, is not such a bond as was contemplated by the restraining order, and imposes no liability, if the action is dismissed for want of jurisdiction, without the preliminary injunction prayed for in the bill. Byam v. Cashman, 78 Cal. 525; 21 Pac. 113.

Court may order additional undertaking. Where a preliminary injunction was issued on an insufficient undertaking, the court has power, upon a motion to dissolve, to order that the injunction be dissolved unless a proper undertaking is given; and where, thereupon, an undertaking is given, the phrase therein, "in case said injunction shall issue," does not, of itself, conclusively show that the undertaking was not upon the injunction continued in force: the circumstances may be such as to show that it was so given. Lambert v. Haskell, 80 Cal. 611; 22 Pac. 327.

Justification of sureties. Notice of justification must be given the defendant, not less than two nor more than five days after the filing and serving of the notice of exception to the sufficiency of the sureties; and the plaintiff's sureties must justify within five days after the notice of exception is given, or the injunction will, upon notice, be dissolved: this construction must be given this section, in view of the damages that may result from the improper issuance of an injunction. McSherry v. Pennsylvania etc. Mining Co., 97 Cal. 637; 32 Pac. 711.

When cause of action accrues on undertaking. A cause of action upon an undertaking for an injunction does not accrue until the final determination of the action in which the injunction was obtained. Dougherty v. Dore, 63 Cal. 170. An action upon an undertaking for an injunction is prematurely brought, where the action has not been finally disposed of, although the injunction has been permanently dissolved; the condition of the obligation being that the sureties should be liable if the court should decide that the plaintiff was not entitled to the injunction. Clark v. Clayton, 61 Cal. 634. An action on an undertaking, given as security for a restraining order, is prematurely brought, though the order was vacated and the application for the injunction denied, where the plaintiff appealed from the order and executed an undertaking on appeal, and the appeal is still pending. Adams v. Andross, 77 Cal. 483; 20 Pac. 26. An undertaking, the condition of which is in pursuance of the pro-

visions of this section, is broken by a judgment of the court totally dissolving the injunction; and the defendant is entitled to maintain an action on the bond after such dissolution. Rice v. Cook, 92 Cal. 144; 28 Pac. 219. An action may be maintained against the sureties on a bond given to secure a temporary injunction, after the temporary injunction has been dissolved at the final hearing of the injunction suit. Lippitt v. Smallman, 20 Cal. App. 595; 129 Pac. 956. Where the order dissolving an injunction was granted, and a demurrer to the complaint was sustained, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and the complaint was not amended within the proper time after notice, and nothing further was done in the case, an action on the undertaking is not prematurely brought. Bennett v. Pardini, 63 Cal. 154.

Who may sue. The plaintiff may sue alone on an injunction bond given to him and others, as obligees, where the property on which the injunction operated was his sole property, and the injury his alone, and the complaint averred these facts. Browner v. Davis, 15 Cal. 9.

Demand on principal unnecessary. The demand for payment of unliquidated damages, not upon the obligors, but on the principals, for whom, as sureties, such obligors stipulated, is not necessary before bringing action on the undertaking given for the injunction. Browner v. Davis, 15 Cal. 9.

Several liability, where there are several defendants. A several liability is created by an undertaking on an injunction, though given to all the obligees by name, and using no words directly expressing a several obligation; the design being to secure each and all of the obligees from damage and injuries; the practice of requiring only one bond, though several defendants are enjoined, is the most convenient method for both plaintiff and defendant; but it would operate harshly, and in most cases would amount to no security at all, if recoveries could be had only for a joint injury, and to the extent of the joint damage: the mode of construction in such cases is, not to look merely at the language of the instrument, but to the statute under which the instrument is given. Summers v. Farish, 10 Cal. 347.

Pleading in action on undertaking. In an action upon an undertaking, the complaint must allege the non-payment of the money claimed under the contract, in order to state a cause of action. Curtiss v. Bachman, 84 Cal. 216; 24 Pac. 379. Where the condition of the undertaking was, that the plaintiff would pay all damages and costs that should be awarded against him by virtue of the issuing of the injunction, a complaint, in an action against the sureties, which did not allege that any damages had been so awarded, is fatally defective. Tarpey v. Shillenberger, 10 Cal. 390.

Malice and want of probable cause not essential to this action. An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of the court, through malice, and without probable cause; and if the action complained of is destitute of these ingredients, then only remedy of the injured party is an action upon the injunction bond, which is specially provided by statute as protection against injury, even without malice. Robinson v. Kellum, 6 Cal. 399.

Defenses. In an action on an undertaking, the defense, that the business enjoined was a public nuisance, cannot be successfully interposed: a legitimate occupation is sometimes a public nuisance, yet a party is entitled to the fruits of his labor until an abatement takes place, in some proper form. Cunningham v. Breed, 4 Cal. 384.

Effect of voluntary dismissal. The voluntary dismissal of the action, by the plaintiff, is an admission that he is unable to maintain the action, and therefore that he is not entitled to the injunction; and the defendants are entitled to recover from the sureties whatever damages they sustain by reason of the injunction (Frahm v. Walton, 130 Cal. 396; 62 Pac. 618); and such dismissal has the same effect as a decision of the court that the plaintiff is not entitled to the injunction, and makes the sureties on the undertaking liable. Asevado v. Orr, 100 Cal. 293; 32 Pac. 777; Frahm v. Walton, 130 Cal. 396; 62 Pac. 618. Where an injunction is dissolved by the court, the judgment is conclusive, and in a suit upon the undertaking the only question is the amount of damages sustained; but where the injunction is dissolved through a dismissal of the action by the party who obtained it, there is no admission that the injunction was improperly sued out: it evinces but an unwillingness further to prosecute the writ; and when in such a case, a suit is brought on the undertaking, it is necessary, in order to maintain the action, to show that there was no proper cause for the injunction. Gelston v. Whitesides, 3 Cal. 309; Asevado v. Orr, 100 Cal. 293; 34 Pac. 777; and see Frahm v. Walton, 130 Cal. 396, 62 Pac. 618, overruling Dowling v. Polack, 18 Cal. 625, the opinion in the latter case being to the effect, that, where the plaintiff fails to prosecute his suit, the issues are not actually examined and passed upon; and by his failure to appear and prosecute, he virtually confesses that the result of a trial of the issues would be against him. Under such circumstances, a dismissal must be understood as proceeding upon this idea, and as a determination of everything involved in the

case. The dismissal, in effect, is a final judgment in favor of the defendant, and, although it may not preclude the plaintiff from bringing a new suit, yet the rights of the parties are affected by it in the same manner as if there had been an adjudication upon the merits: it terminates the proceedings, and, by its legal operation, and effect, the injunction is set aside and discharged.

Damages recoverable. Where an injunction is wrongfully issued as to any part of the plaintiff's demand, and it is dissolved to that extent, the defendant is entitled to such damages, within the limit of the penalty of the bond, as he may sustain by reason of the issuing of the injunction. Rice v. Cook, 92 Cal. 144; 28 Pac. 219. Where a party is injured in consequence of the injunction, he is entitled to whatever damages he sustains; thus, destruction of the property involved, or its deterioration, and all matters whereby the party suffers loss or is injured may be taken into consideration in assessing damages. Dougherty v. Dore, 63 Cal. 170. The rule at common law was, that, on a bond to indemnify against the damage the obligee might sustain, he could recover only upon evidence that he had sustained actual damage; that compensation would be awarded only for actual loss: evidence showing that he was subject to liability, without showing payment, was not enough. Willson v. McEvoy, 25 Cal. 169. Where a contractor was prevented, by the injunction, from prosecuting work, and materials were left unprotected, and were washed away without his fault, damages are properly assessed for the loss thereof, in an action on the undertaking. Dougherty v. Dore, 63 Cal. 170. Nominal damages are presumed to follow, as a conclusion of law, from proof of breach of contract. Browner v. Davis, 15 Cal. 9. The sureties on an undertaking given for the issuance of a temporary restraining order, in connection with an order to show cause, are liable only for the damages arising between the time of issuance of the order and the date of the hearing thereof. Prader v. Grim, 13 Cal. 585. As a general rule, no undertaking can be required upon a final decree; and the functions of a preliminary injunction cease when the final decree is made; consequently, damages subsequently accruing cannot be recovered from the sureties, although the final decree is reversed on appeal. Lambert v. Haskell, 80 Cal. 611; 22 Pac. 327. The sureties on an injunction bond are entitled to stand upon the precise terms of their contract; and where a bond is given in pursuance of an order that an injunction issue upon the filing of the bond, the sureties are not liable for damages arising to the defendant from his obedience to a writ of injunction issued several days prior to the date of the bond, no writ having been issued after the filing of the undertaking. Carter v. Mulrein, 82 Cal. 167; 16 Am. St. Rep. 98; 22 Pac. 1086; and see People v. Buster, 11 Cal. 215; McDonald v. Fett, 49 Cal. 354; Pierce v. Whiting, 63 Cal. 538; Alaska Improvement Co. v. Hirsch, 119 Cal. 249; 51 Pac. 340.

Recovery of counsel fees. The fees of an attorney employed to resist an injunction under the Practice Act could not be recovered as damages, in an action on the undertaking, unless they had been paid: the fact that the plaintiff was subject to a liability to his attorney was insufficient, without showing actual payment to him. Willson v. McEvoy, 25 Cal. 169; Prader v. Grimm, 28 Cal. 11. The amount of counsel fees recoverable is limited to fees paid counsel for procuring the dissolution of the injunction, and does not extend to fees paid for defending the entire case (Bustamente v. Stewart, 55 Cal. 115; Porter v. Hopkins, 63 Cal. 53); but, under the code, whether counsel fees are paid in advance of the services, or are not paid until after the action is dismissed, is immaterial. Frahm v. Walton, 130 Cal. 396; 62 Pac. 618. Counsel fees incurred by the defendant by reason of a preliminary injunction are a part of the damages for which he has a right to indemnity, and are within the undertaking required to be given as a condition for procuring the injunction; but only such counsel fees as are incurred after the injunction is issued, and prior to the determination of the action, can be considered as within the rule. Curtiss v. Bachman, 110 Cal. 433; 52 Am. St. Rep. 111; 42 Pac. 910. Counsel fees incurred by the defendant in securing the dissolution of an injunction being recognized as a portion of the damages covered by the undertaking, the plaintiff cannot, by a voluntary dismissal of his action, deprive the defendant of his right to recover for them, once they are incurred, any more than, in that manner, he can deprive the defendant of his right to recover whatever other damages he may sustain by reason of the injunction. Frahm v. Walton, 130 Cal. 396; 62 Pac. 618. Where the defendant seeks to prevent the issuance of a permanent injunction, instead of attempting to remove the temporary injunction, or directs his efforts to defeating the action of the plaintiff, counsel fees are an incident of the suit, and are not recoverable as damages. Curtiss v. Bachman, 110 Cal. 433; 52 Am. St. Rep. 111; 42 Pac. 910. Counsel fees are not allowed as damages against the sureties on an undertaking given for a preliminary injunction, although the court finally decides that the plaintiff is not entitled to the injunction; no effort being made to dissolve the preliminary injunction, counsel is simply employed to try the case, and is paid for that service, and no other, and the cost is no greater than it would be, were no preliminary in-

junction issued. San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 216; 35 Pac. 651. Counsel fees incurred in resisting a motion for a preliminary injunction are not within the terms of the undertaking: they are not expenses made necessary "by reason of the injunction," but are expenses incurred in the action, as much as are fees incurred in attempting to prevent the issuance of a permanent injunction. Curtiss v. Bachman, 110 Cal. 433; 52 Am. St. Rep. 111; 42 Pac. 910; and see Mitchell v. Hawley, 79 Cal. 301; 21 Pac. 833. Counsel fees, upon appeal from an order refusing to dissolve an injunction, taken before the final decree is made, are recoverable, where the evidence segregates the amount of such fees from those paid generally in the cause: the counsel fees for which sureties may be held are not those expended solely or principally in procuring a dissolution of the injunction, and it is not sufficient to show the value of service rendered in the case generally. Lambert v. Haskell, 80 Cal. 611; 22 Pac. 327. An unsuccessful motion to dissolve an injunction does not authorize the recovery of counsel fees in making the motion, unless the court suspends its decision on the motion until the hearing of the case. Curtiss v. Bachman, 110 Cal. 433; 52 Am. St. Rep. 111; 42 Pac. 910.

Right to enforce injunction bond upon dissolution of temporary injunction. See note 15 Ann. Cas. 721.

Recovery on injunction bond for damages sustained after injunction made permanent. See notes 16 Ann. Cas. 1123; Ann. Cas. 1913C, 1277.

Violation of injunction as defense to action on bond. See note 19 Ann. Cas. 671.

Dismissal of injunction suit as breach of injunction bond. See note 6 Ann. Cas. 401.

Liability of injunction bond for acts of third persons. See note 34 L. R. A. (N. S.) 951.

CODE COMMISSIONERS' NOTE. 1. Form of security. A substantial compliance with the requirements of the code, in this respect, is sufficient. Guilford v. Cornell, 4 Abb. Pr. 220.

2. **Defects in undertaking.** A defect in the undertaking will not usually be a ground for dissolution of the injunction. Williams v. Hall, 1 Bland. 194.

3. **Scope of the undertaking.** The undertaking is for the benefit of all the defendants; and although one of them is not served, yet, if he obeys the order, he will be entitled to damages. Cumberland Coal etc. Co. v. Hoffman Steam Coal Co., 39 Barb. 16; 15 Abb. Pr. 78.

4. **Action on the undertaking.** A judgment of dismissal in an action in which a temporary injunction had been granted, amounts to a determination by the court that the injunction was improperly granted; and, after judgment, suit lies upon the undertaking. Dowling v. Polack, 18 Cal. 625. The grounds of the injunction cannot be inquired into in an action upon the undertaking. Id. But see Gelston v. Whitesides, 3 Cal. 309. An undertaking, though given to all the obligees by name, and using no words expressing a several obligation, creates a several liability, the design of it being to secure each of all of the obligees from damages or injury. Summers v. Farish, 10 Cal. 347. The usual undertaking being given, an order was made to show cause (August 29th) why an injunction should not be granted. A restraining order, in the "mean time," was issued. The case was continued until October 10th, when, on hearing, the order was dissolved, injunction denied, and suit dismissed. Action on the undertaking. It was held that the restraining order embraces the time between its issuance and the hearing, and that damages may be had beyond August 29th. Prader v. Grim, 13 Cal. 585. No recovery can be had on a bond purporting to be the joint bond of the principals and sureties, but signed by the sureties only. But it is otherwise as to undertakings, under our system. They are original and independent contracts on the part of sureties, and do not require the signature of the principal. Sacramento v. Dunlap, 14 Cal. 421.

5. **Damages.** See subd. 4 of this note. In an action for damages on an undertaking, the defendants cannot object that they ought not to pay the damages which they contracted to pay, because the business which they enjoined, and for the stoppage of which damages are claimed, was a public nuisance. Cunningham v. Breed, 4 Cal. 384. If an officer is enjoined from paying over money in his hands, legal interest can only be recovered as damages for its detention in an action on the undertaking. Lally v. Wise, 28 Cal. 539.

6. **Counsel fees as part of the damages.** In an action upon an undertaking, it was held that the amount paid to counsel as a fee to procure the dissolution of the injunction was properly allowed as a part of the damages; and that, generally, the recovery of counsel fees as a part of the damages is not allowed as where the loss is consequential, but where the loss is direct, as in the case of an improper commencement and prosecution of a suit, or other process in a suit, it should be allowed. Ah Thaie v. Quan Wan, 3 Cal. 216. In an action on an undertaking, the fees of an attorney employed to resist injunction cannot be recovered as damages, unless they have been paid. The fact that the plaintiff is liable to his attorney, without showing actual payment to him, is sufficient. Willson v. McEvoy, 25 Cal. 170; Prader v. Grimm, 28 Cal. 11; Fowler v. Frisbie, 37 Cal. 34.

7. **Generally.** See Fowler v. Frisbie, 37 Cal. 34.

§ 530. When injunction for use of water may be refused upon defendant giving bond. In all actions which may be hereafter brought when an injunction or restraining order may be applied for to prevent the diversion, diminution or increase of the flow of water in its natural channels, to the ordinary flow of which the plaintiff claims to be entitled, the court shall first require due notice of the application to be served upon the defendant, unless it shall appear from the verified complaint or affidavits upon which the application therefor is made, that, within ten days prior to the time of such application, the plaintiff has been in the peaceable possession of the flow of such water, and that, within such time, said plaintiff has been deprived of the flow thereof by the wrongful diversion of such flow by the defendant, or that the plaintiff, at the time of such application, is, and for

ten days prior thereto, has been, in possession of the flow of said water, and that the defendant threatens to divert the flow of such water; and if such notice of such application be given and upon the hearing thereof, it be made to appear to the court that plaintiff is entitled to the injunction, but that the issuance thereof pending the litigation will entail great damage upon defendant, and that plaintiff will not be greatly damaged by the acts complained of pending the litigation, and can be fully compensated for such damage as he may suffer, the court may refuse the injunction upon the defendant giving a bond such as is provided for in section five hundred and thirty-two; and upon the trial the same proceedings shall be had, and with the same effect as in said section provided.

Legislation § 530. **1.** Enacted March 11, **1872**; being a re-enactment of Practice Act, § 116 (New York Code, § 223), and then read: "§ 530. If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the mean time, be restrained."

2. Amended by Stats. **1887**, p. 240, adding at the end of the section, "In all actions pending or which may be hereafter brought, when an injunction or restraining order has been or may be granted, or applied for, to prevent the diversion pending the litigation, of water used or to be used for irrigation or domestic purposes only, if it be made to appear to the court that the plaintiff is entitled to the injunction, but that the issuance thereof pending the litigation will entail great damage upon the defendant, and that plaintiff can be fully compensated for such damages as he may suffer, the court may refuse the injunction upon the defendant giving a bond, such as is provided for in section five hundred and thirty-two; and upon the trial the same proceedings shall be had, and with the same effect, as in said section provided."

3. Amendment by Stats. **1901**, p. 137; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 342, to read: "§ 530. If the court or judge deem it proper that the person, sought to be enjoined, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted, and the defendant may, in the mean time, be restrained. In all actions which may be hereafter brought when an injunction or restraining order may be applied for to prevent the diversion, diminution or increase of the flow of water in its natural channels, to the ordinary flow to which the plaintiff claims to be entitled, the court shall first require due notice of the application to be served upon the defendant, and upon the hearing thereof, if it be made to appear to the court that plaintiff is entitled to the injunction, but that the issuance thereof pending the litigation will entail great damage upon defendant, and that plaintiff will not be greatly damaged by the acts complained of pending the litigation and can be fully compensated for such damages as he may suffer, the court may refuse the injunction upon the defendant giving a bond such as is provided for in section five hundred and thirty-two; and upon the trial the same proceedings shall be had, and with the same effect as in said section provided." The code commissioner said: "The section is amended to conform to the amendments made to subds. 2 and 3 of § 526. Also, the words 'diversion, diminution or increase of the flow of water in its natural channels, to the ordinary flow to which the plaintiff claims to be entitled, the court shall first require due notice of the application to be served upon the defendant, and upon the hearing thereof,' have been substituted for the words 'diversion[,] pending the litigation, of water used or to be used for irrigation or domestic purposes only.' The latter amendment was offered and adopted upon the floor of the assembly on March 4, 1907, and was a member's amendment."

5. Amended by Stats. **1911**, p. 1421.

Nature of restraining order. A temporary restraining order is an order which applies to the time intervening between the application for the injunction and the day fixed in the order to show cause. Neumann v. Moretti, 146 Cal. 31; 79 Pac. 512; and see Hicks v. Michael, 15 Cal. 107; Cohen v. Gray, 70 Cal. 85; 11 Pac. 508. It is a restraint of the same nature as an injunction, but the statute not only does not designate it as an injunction, but discriminates between it and an injunction: it is a restraint, pending the consideration of the court as to whether the party is entitled to a preliminary injunction (San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 216; 35 Pac. 651; Neumann v. Moretti, 146 Cal. 31; 79 Pac. 512); and it loses its force upon the granting of the injunction pendente lite. Cohen v. Gray, 70 Cal. 85; 11 Pac. 508. The restraining order is an injunction, when it requires the defendant to refrain from doing particular acts. Neumann v. Moretti, 146 Cal. 31; 79 Pac. 512.

Effect of answer denying equities. Where the defendant filed his answer, controverting the allegations of the complaint, and set up new matter in defense of the action, on an order made by the court requiring him to show cause why an injunction should not issue, the plaintiff has a right to read affidavits in support of his complaint, as the object of such order could only have been to enable the parties to present the case on the merits; and upon such order the awarding or refusing of an injunction must be regarded as adjudicated by the decision at the hearing. The former rule was, that affidavits could not be read in any case for the purpose of contradicting the answer; but the policy of preventing irreparable mischief has introduced an exception to this rule, in cases of waste, or of mischief analogous to waste, and affidavits may now be read against the answer in such cases, in respect to all matters of controversy, including questions of title. Hicks v. Michael, 15 Cal. 107. Where all

the equities of the complaint are denied by the affidavits filed by the defendant, there is no abuse of discretion in denying the plaintiff's motion for a temporary injunction. Kohler v. Los Angeles, 39 Cal. 510. The determination of the court, in the exercise of its discretion, to continue an injunction in force until the hearing of the cause, in so far as it rests upon the effect of the denial of the equities of the bill merely, is entitled to great consideration on appeal, and should not be disturbed, except under peculiar circumstances, or unless an abuse of discretion is shown. Godey v. Godey, 39 Cal. 157.

Duration of restraining order. The phrase, in a restraining order, "until the further order of the court," has not the effect of prolonging the restraining order beyond the pendency of the motion for an injunction; otherwise it would convert the restraining order into a preliminary injunction, which could not be operative until a bond was given; and where no bond is required for the restraining order, by making an order to show cause the court adjudges that a preliminary injunction shall not be made until the defendant is heard. San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 216; 35 Pac. 651. This phrase, "until the further order of the court," has no other meaning than "in the mean time," or "until the decision upon the order to show cause," and a restraining order, made at the commencement of the action, expires, by its own terms, at the hearing of the motion, and, although it may be continued until the termination of the suit, yet an order so continuing it is, in fact, a new and distinct restraint, which, in itself, is a preliminary injunction. Curtiss v. Bachman, 110 Cal. 433; 52 Am. St. Rep. 111; 42 Pac. 910. Where there is no appearance at the time the order to show cause is returnable, and the motion for the injunction is not continued nor kept alive in any mode, the restraining order falls, for it is only authorized to be made pending the motion. San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 216; 35 Pac. 651.

Effect of refusal of injunction on restraining order. Where an order is made to show cause why an injunction should not be granted, and to restrain the defendant until the hearing, and on the hearing the injunction is refused, the restraining order expires by limitation. Hicks v. Michael, 15 Cal. 107. Where the ultimate rights of the parties cannot be determined in advance of the trial of the action, a preliminary mandatory injunction should not be granted, unless irreparable injury will result from its refusal. Hagen v. Beth, 118 Cal. 330; 50 Pac. 425.

Undertaking required when. An undertaking, as a condition for a restraining order, is not expressly required by statute, although the supreme court has said one should be required; but it is expressly required as a condition for a preliminary injunction, which does not become operative until the bond is given. San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 216; 35 Pac. 651.

CODE COMMISSIONERS' NOTE. 1. Notice of motion. Notice of an application by plaintiff must be given for the length of time prescribed by § 517 of the Practice Act (§ 1005 of this code). If given for a shorter time, and defendant does not appear, he may treat an injunction thus obtained as granted without notice, and move to dissolve, under § 118 (§ 532 of this code). Johnson v. Wide West M. Co., 22 Cal. 479. See also Androvette v. Bowne, 15 How. Pr. 75; 4 Abb. Pr. 440.

2. **Security upon restraining order.** The temporary restraint is part of the injunctive relief which the code provides, and before the order issues should be required, as provided in the preceding section. Per Comstock, J., in Methodist Churches v. Barker, 18 N. Y. 463; Prader v. Purkett, 13 Cal. 588.

3. **Object of the order.** The object of the practice of issuing an order to show cause before granting the injunction, is to enable parties to present the case on the merits. Id.; Hicks v. Michael, 15 Cal. 107.

4. **When the order should or should not be granted.** Injunctions to restrain injuries in the nature of waste should not be granted before hearing on the merits, except in cases of urgent necessity, or when the subject-matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. But in all cases where the right is doubtful, the court should direct a trial at law, and in the mean time grant a temporary injunction to restrain injurious proceedings, if there be danger of irreparable mischief. Hicks v. Michael, 15 Cal. 107.

5. **When the order expires.** Where, under § 116 of the Practice Act (§ 530 of this code), an order is made restraining defendants until the hearing, and on the hearing upon the order the injunction is refused, the restraining order expires. Hicks v. Michael, 15 Cal. 107.

6. **Effect of an appeal.** An appeal from an order refusing an injunction, upon such hearing, or from an order dissolving an injunction, does not create an injunction or prolong the restraining order in the former case, nor revive it in the latter, pending the appeal. Hicks v. Michael, 15 Cal. 107.

§ 531. Injunction to suspend business of a corporation, how and by whom granted. An injunction to suspend the general and ordinary business of a corporation cannot be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of this state are a party to the proceeding.

Legislation § 531. 1. Enacted March 11, **1872**; based on Practice Act, § 117 (New York Code, § 224), as amended by Stats. 1865–66, p. 703, which read: "An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the court or a judge thereof; nor shall it be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of this state are a party

to the proceeding." When enacted in 1872, (1) the words "shall not" were changed to "cannot," after "corporation," and (2) the word "shall" was changed to "can," before the words "it be granted."

2. Amendment by Stats. **1901**, p. 138; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 342, the code commissioner saying, "The words 'except by the court or a judge thereof; nor can it be granted' are omitted, as entirely superfluous."

Injunction against unlawful acts. The commission of unlawful acts by a corporation is not a part of its general and ordinary business, within the meaning of this section, and a temporary injunction may issue to restrain such acts, when they are injurious to another, without notice to the corporation; and such acts are none the less unlawful, although they are necessary to the carrying on of the business of the corporation, which must so conduct its business as that it shall not be derogatory to the private rights of others. Hobbs v. Amador etc. Canal Co., 66 Cal. 161; 4 Pac. 1147.

As to manner of operation. An injunction restraining a corporation from operating its business in a particular manner, alleged to be to the injury of others, does not suspend the general and ordinary business of the corporation, "in buying and selling mining claims, or in working them." Golden Gate etc. Mining Co. v. Superior Court, 65 Cal. 187; 3 Pac. 628. A corporation, whose general, ordinary, and only business is that of mining by the hydraulic process, and of selling water to others to be used for a like purpose, may be temporarily enjoined, upon an ex parte application, without notice to it, from depositing or discharging its mining débris in certain streams, or from selling its water to others to be used for a purpose producing a like result. Eureka Lake etc. Canal Co. v. Superior Court, 66 Cal. 311; 5 Pac. 490. An injunction restraining a mining corporation from withdrawing moneys from a certain bank, or from selling its property, has not the effect of suspending the general and ordinary business of such corporation; therefore a preliminary injunction to such effect, issued without notice, is not invalid, and a writ of prohibition will not lie to dissolve such injunction. Fischer v. Superior Court, 110 Cal. 129; 42 Pac. 561.

Upon whom binding. The effect of an injunction restraining the acts of a corporation, and addressed to it and its agents, etc., is to bind not only the tangible artificial being, but also all the individuals who act for it in the transaction of its business, to whose knowledge the decree comes; otherwise it would be necessary, in order effectually to bind a corporation by an injunction, to make every person a party to the suit, who could by any possibility be its agents in doing the prohibited act. Morton v. Superior Court, 65 Cal. 496; 4 Pac. 489.

CODE COMMISSIONERS' NOTE. 1. Law of the place. As to its effect on injunctions against corporations, see O'Brien v. Chicago etc. R. R. Co., 36 How. Pr. 24; 4 Abb. Pr. (N. S.) 381.

2. Equity jurisdiction over corporations. Equity has no jurisdiction over corporations for the purpose of restraining their operations or winding up their concerns, but it may compel the officers of the corporation to account for any breach of trust; but the jurisdiction for this purpose is over the officers personally. Neall v. Hill, 16 Cal. 145; 76 Am. Dec. 508; see also Parrott v. Byers, 40 Cal. 614.

§ 532. Motion to vacate or modify injunction. Bond on modification. If an injunction is granted without notice to the person enjoined, he may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action was brought, to dissolve or modify the same. The application may be made upon the complaint or the affidavit on which the injunction was granted, or upon affidavit on the part of the person enjoined, with or without the answer. If the application is made upon affidavits on the part of the person enjoined, but not otherwise, the person against whom the application is made may oppose the same by affidavits or other evidence in addition to that on which the injunction was granted. In all actions pending, or which may hereafter be brought, wherein an injunction or restraining order has been or may be granted or applied for, to prevent the diversion, pending the litigation, of water used, or to be used, for irrigation or domestic purposes only, if it be made to appear to the court that great damage will be suffered by the person enjoined, in case the injunction is continued, and that the person in whose behalf it is issued can be fully compensated for any damages he may suffer by reason of the continuance of the acts enjoined during the pendency of the litigation, the court in its discretion, may dissolve or modify the injunction, upon the person enjoined giving a bond with sureties to be approved by the judge,

and in such amount as may be fixed by the court or judge, conditioned that such enjoined person will pay all damages which the person in whose behalf the injunction issued may suffer by reason of the continuance, during the litigation, of the acts complained of. Upon the trial the amount of such damages must be ascertained, and in case judgment is rendered for the person in whose behalf the injunction was granted, the amount fixed as such damages must be included in the judgment, together with reasonable attorney's fees. In any suit brought on the bond, the amount of such damages as fixed in said judgment is conclusive on the sureties.

Vacating orders made out of court. Post, § 937.

Legislation § 532. **1.** Enacted March 11, **1872**; re-enactment of Practice Act, § 118 (New York Code, § 225), which read: "If an injunction be granted without notice, the defendant at any time before the trial may apply upon reasonable notice to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavit on the part of the defendant, with or without the answer. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other evidence, in addition to those on which the injunction was granted."

2. Amended by Stats. **1887**, p. 241, (1) adding a comma after the word "notice," before "to the judge," and (2) adding, at the end of the section, the following: "In all actions pending, or which may be hereafter brought, when an injunction or restraining order has been or may be granted or applied for, to prevent the diversion, pending the litigation, of water used or to be used for irrigation or domestic purposes only, if it be made to appear to the court that great damage will be suffered by the defendant in case the injunction is continued, and that the plaintiff can be fully compensated for any damages he may suffer by reason of the continuance of the acts of the defendant during the pendency of the litigation, the court, in its discretion, may dissolve or modify the injunction, upon the defendant giving a bond, with sureties to be approved by the judge, and in such amount as may be fixed by the court or judge, conditioned that the defendant will pay all damages which the plaintiff may suffer by reason of the continuance during the litigation of the acts complained of. Upon the trial the amount of such damages shall be ascertained, and in case judgment is rendered for the plaintiff, the amount fixed as such damages shall be included in the judgment, together with reasonable attorneys' fees. Upon a suit brought on the bond the amount of damages as fixed in said judgment shall be conclusive upon the sureties."

3. Amendment by Stats. **1901**, p. 138; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 342; the code commissioner, in a note, saying, "See first portion of note to § 530."

Power of court to modify or dissolve. Under this section, an injunction issued under § 527, ante, can be vacated or modified. Morton v. Morton, 148 Cal. 142; 1 L. R. A. (N. S.) 660; 82 Pac. 664. An ex parte order, not in its nature permanent, may be dissolved or modified by the court, on its own motion, whenever it is satisfied that the order was improvidently or erroneously made. Wolf v. Board of Supervisors, 150 Cal. 285; 89 Pac. 85. The court granting a preliminary injunction may, in the exercise of its judicial discretion, modify the same at any time before final judgment. Hobbs v. Amador etc. Canal Co., 66 Cal. 161; 4 Pac. 1147. The right to move for the dissolution of an injunction before final hearing exists, only where it was granted without notice according to this section. Natoma etc. Mining Co. v. Parker, 16 Cal. 83. This section expressly limits the power of the court to modify or dissolve injunctions to those granted without notice. Ots v. Superior Court, 10 Cal. App. 168; 101 Pac. 431. Where the notice of a motion for an injunction was given only a few hours before the hearing, and the defendant did not appear, the order granting the injunction is to be deemed to have been made without notice, and the defendant may move to dissolve it. Johnson v. Wide West Mining Co., 22 Cal. 479. An injunction granted after notice cannot be dissolved until after or upon the trial of the case upon its merits. Humphry v. Buena Vista Water Co., 2 Cal. App. 540; 84 Pac. 296. When a temporary injunction was granted upon notice and a hearing, and no appeal was taken, it cannot be modified or dissolved until the trial of the case upon its merits. Ots v. Superior Court, 10 Cal. App. 168; 101 Pac. 431. An order dissolving an injunction, not stating the grounds therefor, is prima facie an adjudication that there was no foundation for the issuance thereof, and that it should not have been issued; otherwise it was incumbent on the defendant to see to it that the order contained the proper recitals, showing that the injunction was dissolved for other reasons, or to make the facts appear in some other proper way. Fowler v. Frisbie, 37 Cal. 34. A mere declaratory order, that the injunction is no longer in force, which is not filed with the clerk nor intended to be entered in the minutes of the court, is not a "direction" of the court nor an appealable order. Devlin v. Rydberg, 132 Cal. 324; 64 Pac. 396. The right to a temporary injunction is considered as adjudicated by the decision at the hearing upon the order to show cause; the injunction being issued, the remedy of the defendant is by appeal, if the right to apply for a dissolution upon the filing of the answer is not expressly reserved; and the privilege of moving for a dissolution upon the filing of the answer is limited to cases where the injunction is originally granted without notice. Natoma etc. Mining Co. v. Clarkin, 14 Cal. 544.

Necessity for notice of application. A preliminary injunction cannot be dissolved or modified, except upon notice to the plaintiff: to modify it in important particulars, ex parte, is error. Cherry Hill Gold Mining Co. v. Baker, 147 Cal. 724; 82 Pac. 370. Although an injunction has been granted without notice to the defendant, yet, under this section, he must serve upon the plaintiff notice of his motion to dissolve it. Page v. Vaughn, 133 Cal. 335; 65 Pac. 740; and see Hefflon v. Bowers, 72 Cal. 270; 13 Pac. 690. The manner of procuring the revocation of an order granting an injunction is prescribed by this section: it is not regulated by § 937, post, which refers to the modification of ex parte orders. Hefflon v. Bowers, 72 Cal. 270; 13 Pac. 690.

Further showing by plaintiff. Under the old chancery practice, where the defendant moved upon bill and answer, the plaintiff could make no further showing, but the plaintiff could anticipate the defendant's case, and annex to his bill affidavits designed to meet it; but this put the plaintiff to possibly useless labor, and was neither an orderly nor a logical method. Falkinburg v. Lucy, 35 Cal. 52; 95 Am. Dec. 76. So long as the defendant rests his right to have the order granting the injunction modified or vacated upon the matters considered by the court in granting it, there is no good reason for allowing the plaintiff to be heard; but where the defendant goes further, and offers evidence to overcome the plaintiff's prima facie case, it becomes necessary, by virtue of both the reason and the letter of the rule, to permit the plaintiff to support with additional evidence his prima facie case, which is all that was required of him in the first instance. Hefflon v. Bowers, 72 Cal. 270; 13 Pac. 690. Where an injunction has been granted without notice to the defendant, he may move to dissolve upon the papers upon which the injunction was granted, or upon such papers, and affidavits on his part, with or without the answer: should he pursue the first course, the plaintiff can make no further showing, but must stand upon his complaint, or complaint and affidavits, as the case may be; but should he pursue the second course, the plaintiff may meet it with a further showing. Falkinburg v. Lucy, 35 Cal. 52; 95 Am. Dec. 76. The plaintiff is not required to serve upon the defendant copies of the affidavits used in reply to the answer, on a motion to dissolve the injunction. Delger v. Johnson, 44 Cal. 182.

Effect of insufficiency of complaint. Where the complaint does not state a cause of action, an order refusing to dissolve the injunction is erroneous (Yuba County v. Cloke, 79 Cal. 239; 21 Pac. 740); but that two causes of action are improperly joined, without separately stating them, is no ground for dissolving the injunction. Fuhn v. Weber, 38 Cal. 636.

Effect of amending complaint. An amended complaint, by leave of the court or judge, may be filed without prejudice to an injunction previously granted, and, when thus filed, the injunction will not be dissolved by reason thereof. Barber v. Reynolds, 33 Cal. 497. Where, upon appeal, the complaint was held insufficient to sustain the judgment, the injunction should be dissolved upon the case being remanded, unless the complaint was so amended, prior to or contemporaneous with the motion to dissolve, as to set forth a cause of action which would uphold the decree. Pfister v. Wade, 59 Cal. 273.

Effect of answer denying equities. Where an injunction was granted, without notice, upon the filing of a complaint, and an answer is afterwards filed, denying all the equities of the complaint, the injunction will be dissolved on motion. Real Del Monte etc. Mining Co. v. Pond etc. Mining Co., 23 Cal. 82; Gardner v. Perkins, 9 Cal. 553; Burnett v. Whitesides, 13 Cal. 156; Curtis v. Sutter, 15 Cal. 259; Johnson v. Wide West Mining Co., 22 Cal. 479. Where the answer denies all the material allegations of the complaint on which the injunction was granted, and the complaint is unsupported by affidavits or other proof, the injunction should be dissolved. Johnson v. Wide West Mining Co., 22 Cal. 479. The general rule in England, that, if the answer positively denies the exclusive right of the plaintiff, the injunction will be dissolved, is based upon the practice of not permitting affidavits to be read to contradict the answer as to the question of title. Merced Mining Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262. However, under our practice, where the defendant moves to dissolve the injunction upon what he has prepared as his verified answer, he makes it an affidavit, in the sense of the statute, for all the purposes of his motion, and he cannot deprive the plaintiff of his right to reply by way of affidavits on his part. Falkinburg v. Lucy, 35 Cal. 52; 95 Am. Dec. 76; Hiller v. Collins, 63 Cal. 235. A verified answer is entitled to be read and considered, the same as is a verified complaint, in a motion to dissolve the injunction. Christopher v. Condogeorge, 128 Cal. 581; 61 Pac. 174. The defendant is not allowed to move to dissolve the injunction upon the answer with or without affidavits, but upon affidavits with or without the answer; hence, if he moves upon what he has prepared as his verified answer, he makes it an affidavit, and he cannot, by calling it an answer, deprive the plaintiff of his right to reply. Falkinburg v. Lucy, 35 Cal. 52; 95 Am. Dec. 76; Hiller v. Collins, 63 Cal. 235. The general rule, that, where the answer fully denies the equities of the bill, the injunction should be dissolved, or that

the dissolution of the injunction must follow the filing of the answer as a mere legal conclusion, is not one of universal application, or without exception (Godey v. Godey, 39 Cal. 157); but where the allegations of the complaint as to the cause of action for an injunction were upon information and belief, and the answer positively denied such allegations under oath, the injunction should be dissolved. Yuba County v. Cloke, 79 Cal. 239; 21 Pac. 740. While denials upon information and belief, in the answer, are authorized as a matter of pleading, and are sufficient to raise an issue, yet they are not such denials as will serve as the basis of a motion to dissolve the injunction on the ground that the equities of the bill are fully denied by the answer. Porter v. Jennings, 89 Cal. 440; 26 Pac. 965; Dingley v. Buckner, 11 Cal. App. 181; 104 Pac. 478. The affidavit upon a motion to dissolve the injunction, to be sufficient, must constitute written proof and state probative facts; and it is insufficient, where it assumes merely to take the place of the answer to the complaint, by admitting or denying its allegations, and stating only ultimate facts or conclusions. Marks v. Weinstock, 121 Cal. 53; 53 Pac. 362. Where there is no allegation of the insolvency of the defendant, nor that he would not be able to answer all damages recoverable at law, nor any peculiar grounds shown why a recovery could not be had at law for these damages, but there was presented the mere naked case of a claim to property and for damages, which claim is denied, and no showing of irreparable damage or equitable circumstances calling for the interposition of equity, and the entire equity of the bill is denied in the answer, the injunction should be dissolved. Burnett v. Whitesides, 13 Cal. 156.

When injunction will be dissolved. Where, although absolute insolvency is not charged, yet it appears that a judgment for damages would be worthless; that the rights of the defendant are protected by a bond, and no injury could result to him from the continuance of the injunction; that the plaintiff has no security whatever, and a dissolution of the injunction would leave him at the mercy of the defendant,—a motion to dissolve a temporary injunction should be denied. Hicks v. Compton, 18 Cal. 206. A preliminary injunction should be allowed to stand until the trial, a dissolution being improper, as practically equivalent to a dismissal of the action before a trial upon the merits, where the injunction sought is not ancillary to other relief, but is the gist of the action. Bullard v. Kempff, 119 Cal. 9; 50 Pac. 780; Porter v. Jennings, 89 Cal. 440; 26 Pac. 965. An injunction granted upon an order to show cause, after a full hearing of the case upon the merits, cannot be dissolved, upon motion, before the final hearing: the remedy is by appeal from the order granting the injunction. Natoma etc. Mining Co. v. Parker, 16 Cal. 83; and see Natoma etc. Mining Co. v. Clarkin, 14 Cal. 544. Where the acts, the performance of which is sought to be restrained, were performed before the order for the injunction was made or served, the injunction will be dissolved. Delger v. Johnson, 44 Cal. 182; and see Gardner v. Stroever, 81 Cal. 148; 6 L. R. A. 90; 22 Pac. 483. An order refusing to dissolve the injunction is an appealable order, and where no bond was given thereupon, the order must be reversed, whether the injunction was served upon the defendant or not. Neumann v. Moretti, 146 Cal. 31; 79 Pac. 512. A nonsuit should be followed by an order dissolving the injunction, as a matter of course. Harris v. McGregor, 29 Cal. 124. A verdict for the defendant dissolves an injunction granted as an ancillary remedy to a legal action. Brennan v. Gaston, 17 Cal. 372.

CODE COMMISSIONERS' NOTE. 1. When the right exists. The right to move to dissolve before final hearing exists only where the injunction was granted without notice. Natoma Water etc. Co. v. Parker, 16 Cal. 83; Henshaw v. Clark, 14 Cal. 460.

2. **Permissive nature of proceedings under this section.** This section, so far as it authorizes an application to a judge out of court, is permissive, and does not abridge the general power of the court conferred by § 937 of this code. The special provision made by this section is not intended as a substitute for the power conferred by § 937, but is in addition to such power. Borland v. Thornton, 12 Cal. 440; Woodruff v. Fisher, 17 Barb. 224, 230; Bruce v. Delaware etc. Canal Co., 8 How. Pr. 440; Peck v. Yorks, 41 Barb. 547.

3. **Motion by party in contempt.** A party in contempt for disobedience may move to dissolve. Field v. Chapman, 13 Abb. Pr. 320; 14 Abb. Pr. 133; Field v. Hunt, 23 How. Pr. 80; Field v. Hunt, 22 How. Pr. 329; Smith v. Reno, 6 How. Pr. 124. But see dictum in Krom v. Hogan, 4 How. Pr. 225; and Evans v. Van Hall, Moak's Clarke Ch. 17, 24.

4. **Motion, on what made.** Where an injunction is granted without notice, the defendant may move to dissolve it, either: 1. Upon the papers, whatever they may have been, upon which it was granted; or 2. Upon the papers upon which it was granted, and affidavits on the part of the defendant, with or without answer. In the first case the plaintiff can make no further showing, but must stand upon the papers upon which the injunction was granted; in the second case, he may meet the defendant with a counter-showing. The use of a verified answer is the use of an affidavit in the sense of § 118 of the Practice Act. Falkinburg v. Lucy, 35 Cal. 52; 95 Am. Dec. 76.

5. **When made on complaint and answer.** The general rule, that when an answer fully denies the equities of the complaint the injunction should be dissolved, is not of universal application; therefore, when the court below, upon such pleadings, continues the injunction in force, its order to that effect will not be reversed on appeal, except under peculiar circumstances. De Godey v. Godey, 39 Cal. 157; see also Gardner v. Perkins, 9 Cal. 553; Burnett v. Whitesides, 13 Cal. 156; Johnson v. Wide West Min. Co., 22 Cal. 479; Real Del Monte etc. Min. Co. v. Pond etc. Min. Co., 23 Cal. 82. A temporary injunction ought to be dissolved upon an answer which does not present a full denial of the equities in the complaint. De Godey v. Godey, 39 Cal. 157; Fuhn v. Weber, 38 Cal. 636. That two causes of action have been joined, but not separately stated, is no ground for the dissolution of an in-

junction. Fuhn v. Weber, 38 Cal. 636. An amended complaint may be filed without prejudice to an injunction previously granted. Barber v. Reynolds, 33 Cal. 497.

6. When made on affidavits. See Hicks v. Michael, 15 Cal. 107; and subd. 4 of this note.

7. Special cases of dissolution. Where an assessment was made for the purpose of improving a street, by which the property of the plaintiff, in common with the property of other persons owning lots on the same street, was benefited, and the improvement was completed without the plaintiff interposing, in the outset, to prevent it, and he then filed a complaint to stay the sale of his land, by virtue of an ordinance of the city, for the purpose of avoiding the payment of the assessment. It was held, that the injunction ought to be dissolved, on the ground that he who asks equity must do equity; that the city should be permitted to proceed and sell the plaintiff's land for the purpose of satisfying the assessment, leaving him, after the sale, to the technical rights which he set up by reason, as he claimed, of some irregularity in the mode of making the assessment. Weber v. San Francisco, 1 Cal. 455. Plaintiffs sue defendants for damages for alleged trespass upon a portion of quartz-mining claims, alleged in the complaint to be the property and in the possession of plaintiffs, asking an injunction against further trespasses, which was granted, the complaint averring the insolvency of defendants. The defendants denied all the allegations of the complaint, and averred ownership. The jury found, generally, "for defendants." Then the defendants moved to amend the judgment by adding thereto the words, "and that the injunction heretofore granted be, and the same is, hereby dissolved," which was refused; but the judgment was so modified as to permit defendants to work the surface diggings described in their answer. Held, that the action amounted to an action of trespass, with an injunction as auxiliary thereto; and that the action itself, having failed by the verdict for defendants, the injunction fell with it, and should have been dissolved. Brennan v. Gaston, 17 Cal. 372. A reversal of a judgment, which judgment awards the plaintiff possession of land, and enjoins the defendant from committing waste on the land, also reverses the injunction decree, even if the decree is not included in the record sent to the appellate court. McGarrahan v. Maxwell, 28 Cal. 84. When a preliminary injunction is granted on plaintiff's application, the injunction must be dissolved, if a nonsuit is granted. Harris v. McGregor, 29 Cal. 124.

8. Jurisdiction law of the place. The acts of a foreign corporation ultra vires, according to the law of this state, but infra vires according to the law of its own state, cannot be restrained by our courts. O'Brien v. Chicago etc. R. R. Co., 36 How. Pr. 24; 4 Abb. Pr. (N. S.) 381; 53 Barb. 568.

9. Effect of a motion for new trial. The pendency of such a motion does not suspend the injunction. Ortman v. Dixon, 9 Cal. 23.

10. Effect of an appeal. An appeal from an order dissolving a restraining order does not continue the order. Hicks v. Michael, 15 Cal. 107. Nor is an injunction dissolved or superseded by an appeal. Merced Mining Co. v. Fremont, 7 Cal. 130.

§ 533. When to be vacated or modified. If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it must be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it must be modified.

Legislation § 533. Enacted March 11, 1872; based on Practice Act, § 119, which had the word "shall" instead of "must," in both instances.

CODE COMMISSIONERS' NOTE. See note to § 532, post.

CHAPTER IV.

ATTACHMENT.

§ 537. Attachment, when and in what cases may issue.
§ 538. Affidavit for attachment, what to contain.
§ 539. Undertaking on attachment. Exceptions to sureties.
§ 540. Writ, to whom directed and what to state.
§ 541. Shares of stock and debts due defendant, how attached and disposed of.
§ 542. How real and personal property shall be attached.
§ 542a. Lien of attachment.
§ 543. Attorney to give written instructions to sheriff what to attach.
§ 544. Garnishment, when garnishee liable to plaintiff.
§ 545. Citation to garnishee to appear before a court or judge.
§ 546. Inventory, how made. Party refusing to give memorandum may be compelled to pay costs.
§ 547. Perishable property, how sold. Accounts without suit to be collected.
§ 548. Property attached may be sold as under execution, if the interests of the parties require.
§ 549. When property claimed by a third party, how tried.
§ 550. If plaintiff obtains judgment, how satisfied.
§ 551. When there remains a balance due, how collected.
§ 552. When suits may be commenced on the undertaking.
§ 553. If defendant recovers judgment, what the sheriff is to deliver.
§ 554. Proceedings to release attachments.
§ 555. Attachment, in what cases it may be released and upon what terms.
§ 556. When a motion to discharge attachment may be made, and upon what grounds.
§ 557. When motion made on affidavit, it may be opposed by affidavit.
§ 558. When writ must be discharged.
§ 559. When writ to be returned.
§ 560. Release of real property from attachment.

§ 537. Attachment, when and in what cases may issue. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as in this chapter provided, in the following cases:

1. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless.

2. In an action upon a contract, express or implied, against a defendant not residing in this state.

3. In an action against a defendant, not residing in this state, to recover a sum of money as damages, arising from an injury to property in this state, in consequence of negligence, fraud, or other wrongful act.

Garnishment. Post, §§ 542, 543–545.
Preventing levy by counter-bond. See post, § 540.
Residence. See Pol. Code, § 52.

Legislation § 537. 1. Enacted March 11, **1872**; based on Practice Act, § 120, as amended by Stats. 1860, p. 300, which read: "The plaintiff, at the time of issuing his summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as hereinafter provided, in the following cases: 1. In an action upon a contract, express or implied, for the direct payment of money, which contract is made or is payable in this state, and is not secured by a mortgage, lien, or pledge, upon real or personal property, or, if so secured, that such security has been rendered nugatory by the act of the defendant. 2. In an action upon a contract, express or implied, against a defendant not residing in this state." When enacted in 1872, (1) the word "his," before "summons," was changed to "the," (2) the word "the" was omitted before "defendant give," and (3) the word "hereinafter" was changed to the words "in this chapter."

2. Amended by Code Amdts. **1873–74**, p. 306, (1) in the introductory paragraph, (a) adding a comma after the word "attached," and (b) adding the word "the" before "defendant give"; (2) changing subd. 1 to read: "In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become [sic] valueless."

3. Amended by Stats. **1905**, p. 433, (1) in the introductory paragraph, changing "afterwards" to "afterward," (2) in subd. 1, changing "becomes" to "become," and (3) adding subd. 3.

Construction of statutes relating to attachment. All legislation bearing upon the question should be considered, and particularly that portion bearing upon attachments as the subject-matter; the sections relating to this subject are all in pari materia, and are to be construed together, in order to ascertain the intention of the legislature; and where the question stands upon implication, the court will imply that which will uphold, rather than that which must defeat, the principal purpose of the statute. Lick v. Madden, 25 Cal. 202. Where both the original statute and an amendment thereof contain a provision limiting the right of attachment to actions on contracts "made after the passage of this act," such words do not limit the right to debts contracted after the passage of the amendment. O'Connor v. Blake, 29 Cal. 312. To acquire any rights under attachment proceedings, a strict compliance with the law is required. Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36. The right to an attachment, and the mode of procedure for obtaining it, are creatures of the statute, upon the terms of which they depend for their existence and regularity. Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444; 115 Pac. 58. Proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed, in order to acquire any rights thereunder (Griswold v. Sharpe, 2 Cal. 17; Roberts v. Landecker, 9 Cal. 262; Low v. Henry, 9 Cal. 538; Hisler v. Carr, 34 Cal. 641; Mudge v. Steinhart, 78 Cal. 34; 12 Am. St. Rep. 17; 20 Pac. 147; Gow v. Marshall, 90 Cal. 565; 27 Pac. 422; Kennedy v. California Sav. Bank, 97 Cal. 93; 33 Am. St. Rep. 163; 31 Pac. 846; Rudolph v. Saunders, 111 Cal. 233; 43 Pac. 619; Beltaire v. Rosenberg, 129 Cal. 164; 61 Pac. 916; Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36); but the statutory provisions should be fairly interpreted, so as to give them a consistent and efficient operation in proper cases (Roberts v. Landecker, 9 Cal. 262; Ayres v. Burr, 132 Cal. 125; 64 Pac. 120); and the remedy cannot be extended to cases not named in the statute. Clymer v. Willis, 3 Cal. 363; 58 Am. Dec. 414; Kennedy v. California Sav. Bank, 97 Cal. 93; 33 Am. St. Rep. 163; 31 Pac. 846.

Nature of remedy. The legislature may determine in what cases an attachment may issue. Dennis v. First Nat. Bank, 127 Cal. 453; 78 Am. St. Rep. 79; 59 Pac. 777. The remedy by attachment is not a distinct proceeding, in the nature of an action in rem, but is a proceeding auxiliary to an action at law, designed to secure the payment of any judgment the plaintiff may obtain (Low v. Adams, 6 Cal. 277; Allender v. Fritts, 24 Cal. 447; Rosenthal v. Perkins, 123 Cal. 240; 55 Pac. 804); it is not a part of the main action, but is a provisional, independent proceeding, initiated by affidavit, which is the basis for the writ (Nail v. Superior Court, 11 Cal. App. 27; 103 Pac. 902); and is a remedy

given only in cases of indebtedness arising upon contract. Griswold v. Sharpe, 2 Cal. 17; Mudge v. Steinhart, 78 Cal. 34; 12 Am. St. Rep. 17; 20 Pac. 147. The right to an attachment, and the mode of procedure for obtaining it, are the creatures of statute, depending for their existence and regularity upon the terms of the code (Kohler v. Agassiz, 99 Cal. 9; 33 Pac. 741); and being merely a creature of statute, the existence and operation of the attachment in any case can continue no longer than the statute provides. Loveland v. Alvord etc. Mining Co., 76 Cal. 562; 18 Pac. 682; Hamilton v. Bell, 123 Cal. 93; 55 Pac. 758. The plaintiff cannot claim, as matter of right, the benefit of the attachment as something growing out of or necessarily connected with the contract, as he may have the benefit of an action to recover his debt; the attachment is merely auxiliary to the action, and the legislature may give, withhold, or limit it, at its pleasure, without impairing any substantial right of either party. Myers v. Mott, 29 Cal. 359; 89 Am. Dec. 49.

Time of issuing writ. The writ may be issued at the time of issuing summons, or at any time afterwards. Allender v. Fritts, 24 Cal. 447; Johnson v. Miner, 144 Cal. 785; 78 Pac. 240. An attachment, issued before the summons, is a nullity. Low v. Henry, 9 Cal. 538; Henrietta Mining etc. Co. v. Gardner, 173 U. S. 123; 43 L. Ed. 637; 19 Sup. Ct. Rep. 327.

Effect of second summons. An attachment, regularly issued at the time of the issuance of the first summons, is not vitiated by the failure to serve the first summons and the issuance of a second one; nor is the validity of the attachment in any way affected by the proceedings. Seaver v. Fitzgerald, 23 Cal. 85.

Effect of void summons. An unauthorized and void summons will not support the writ. Hisler v. Carr, 34 Cal. 641.

Sufficiency of the complaint. The plaintiff must show affirmatively that the contract falls within the provisions of this section (Drake v. De Witt, 1 Cal. App. 617; 82 Pac. 982); and that the claim or debt is due. Davis v. Eppinger, 18 Cal. 378; 79 Am. Dec. 184; Kinsey v. Wallace, 36 Cal. 462. It is not necessary that either the complaint or the contract itself shall show the amount due. Kohler v. Agassiz, 99 Cal. 9; 33 Pac. 741; De Leonis v. Etchepare, 120 Cal. 407; 52 Pac. 718. A general allegation in the complaint, that the plaintiff has, on his part, performed the contract, for the breach of which the action was prosecuted, does not imply that the plaintiff, by such performance, intended to discharge such contract or the defendant's liability thereunder. Hale Bros. v. Milliken, 142 Cal. 134; 75 Pac. 653. Where the complaint shows that the action is upon contract and not in tort, it is immaterial that the prayer is for an accounting. Kohler v. Agassiz, 99 Cal. 9; 33 Pac. 741; De Leonis v. Etchepare, 120 Cal. 407; 52 Pac. 718. Where a complaint joins two causes of action upon contract, and the plaintiff is entitled to an attachment on only one of them, the provision of § 540, post, that the amount of the plaintiff's demand must be stated in conformity to the complaint, is to be construed as limited to the cause of action for which the attachment is authorized. Baldwin v. Napa etc. Wine Co., 137 Cal. 646; 70 Pac. 732. The attachment of property of a corporation, in a suit against certain named persons and others, designated as composing the corporation, is invalid as an attachment of corporation property, although after the levy of the writ the complaint was amended so as to substitute the corporation as defendant in the place of individuals originally served. Collins v. Montgomery, 16 Cal. 398.

Action upon a contract. An action against a stockholder to recover his proportion of a debt of the corporation is one founded upon a contract, for which an attachment may issue (Kennedy v. California Sav. Bank, 97 Cal. 93; 33 Am. St. Rep. 163; 31 Pac. 846; Dennis v. Superior Court, 91 Cal. 548; 27 Pac. 1031); as is also an action by the assignee of a corporation in insolvency, to recover money due from its stockholders, upon their subscriptions to the capital stock. Agassiz v. Superior Court, 90 Cal. 101; 27 Pac. 49; Kohler v. Agassiz, 99 Cal. 9; 33 Pac. 741. An assessment by a board of directors is not a necessary element of an attachable cause of action upon a stockholder's contract of subscription. Kohler v. Agassiz, 99 Cal. 9; 33 Pac. 741. An action for a failure to receive and pay for goods according to the terms of a contract between the parties is an action founded in contract, and not in tort, and the plaintiff is entitled to an attachment. Donnelly v. Strueven, 63 Cal. 182. An undertaking on appeal is an express contract for the payment of money, in the sense of the statute in relation to attachments, for which an attachment may issue (Hathaway v. Davis, 33 Cal. 161); as is also a bail bond in a criminal case. San Francisco v. Brader, 50 Cal. 506. Where a defendant agreed, in consideration of the plaintiff making a subscription to stock at a specified price, to repurchase same on notice, there is an express contract for the direct payment of money, upon which an attachment may be issued. Flagg v. Dare, 107 Cal. 482; 40 Pac. 804. The relation between principal and agent is founded upon contract, and the law implies a promise by the latter that he will pay over moneys received by him to the principal on demand; and in an action to recover moneys so collected, an attachment may issue (De Leonis v. Etchepare, 120 Cal. 407; 52 Pac. 718); and the law implies a promise to refund money paid

on a consideration which has entirely failed: such implied promise is a contract for the direct payment of money, and an attachment may issue. Santa Clara Valley etc. Co. v. Tuck, 53 Cal. 304. A license tax is in the nature of a debt due from the licensee to the county, precisely as though he had contracted with the county, and an attachment may issue. San Luis Obispo County v. Hendricks, 71 Cal. 242; 11 Pac. 682; El Dorado County v. Meiss, 100 Cal. 268; 34 Pac. 716; Sacramento v. Dillman, 102 Cal. 107; 36 Pac. 385; San Luis Obispo County v. Greenberg, 120 Cal. 300; 52 Pac. 797. The beneficiary of a fraternal order, after the death of the member, is a creditor who has the right of attachment. Lackmann v. Supreme Council, 142 Cal. 22; 75 Pac. 583. Indorsers, guarantors, sureties, and all others who undertake to pay or become responsible for the debts of another, are liable to attachment. Hathaway v. Davis, 33 Cal. 161. Moneys received under the terms of a contract, and due the plaintiff as a specific, definite debt, are liable to attachment. Wheeler v. Farmer, 38 Cal. 203. An action to recover money intrusted by the plaintiff to an employee, and which the defendant won from him in gambling, is not upon a contract, and a writ of attachment does not lie. Babcock v. Briggs, 52 Cal. 502.

Attachment in action for damages for breach of contract. In an action for damages for the breach of a contract, an attachment may issue, even where proof is necessary at the trial to show the amount of damages; but there must exist a basis upon which the damages can be determined by proof (Dunn v. Mackey, 80 Cal. 104; 22 Pac. 64; De Leonis v. Etchepare, 120 Cal. 407; 52 Pac. 718); and an attachment lies upon a cause of action for damages for a breach of contract, where the damages are readily ascertainable by reference to the contract and proof of what was done under it, and the basis of computation of damages appears to be reasonable and definite (Hale Bros. v. Milliken, 142 Cal. 134; 75 Pac. 653); but where the contract does not furnish the measure of the liability of the defendant, and the damages are unliquidated, an attachment does not lie. De Leonis v. Etchepare, 120 Cal. 407; 52 Pac. 718; Baldwin v. Napa etc. Wine Co., 137 Cal. 646; 70 Pac. 732. Damages for breach of a contract to furnish building material, resulting in loss of rents, are such as can be readily ascertained, and entitle the plaintiff to a writ of attachment. Hale Bros. v. Milliken, 142 Cal. 134; 75 Pac. 653. Where an agent expressly contracts to sell property within a certain time, at a specified price, an attachment may issue in an action for a breach of such contract; and the measure of damages is the difference between the actual value at the end of the time specified and the price contracted to be realized. Dunn v. Mackey, 80 Cal. 104; 22 Pac. 64.

Contracts for direct payment of money. The legislature, in the use of the words "direct payment," in the first subdivision of this section, has expressed its will in language not a little obscure, and the adjective "direct" is used in an unnatural or strained sense; but, in the opinion of the supreme court, a clew to its meaning is afforded in § 538, post, where the plaintiff must swear that the defendant is indebted to him in a certain sum, specifying the amount, this language excluding all causes of action for unliquidated sums of money. Hathaway v. Davis, 33 Cal. 161; and see Dunn v. Mackay, 80 Cal. 104; 22 Pac. 64. The official bond of a county treasurer is an obligation for the direct payment of money, upon which an attachment may issue. Monterey County v. McKee, 51 Cal. 255. The liability of a tenant in possession, to the purchaser at foreclosure sale, for rents or use and occupation from the day of sale to the expiration of the time for redemption, is not a liability founded on a contract express or implied, and a writ of attachment will not lie. Walker v. McCusker, 65 Cal. 360; 4 Pac. 206; McCusker v. Walker, 77 Cal. 208; 19 Pac. 382. The amount due on the contract need not necessarily appear from the contract itself; but it must be shown by the affidavit. Dunn v. Mackey, 80 Cal. 104; 22 Pac. 64; De Leonis v. Etchepare, 120 Cal. 407; 52 Pac. 718.

Contract payable in this state. In an action on a contract not made in this state, an attachment cannot issue, unless it is expressly stipulated that it shall be paid in this state. Eck v. Hoffman, 55 Cal. 501. Such a contract is presumptively to be performed in the state where made (Tuller v. Arnold, 93 Cal. 166; 28 Pac. 863); and the right of attachment does not extend to such cases, unless express provision is made in the contract for payment in this state (Drake v. De Witt, 1 Cal. App. 617; 82 Pac. 982; Atwood v. Little Bonanza Quicksilver Co., 13 Cal. App. 594; 110 Pac. 344); and a subsequent promise to pay in this state cannot affect the question in any way, where suit is brought on the original contract. Dulton v. Shelton, 3 Cal. 206. To authorize an attachment in this state upon a contract not made in the state, it must appear by the contract itself that the money is payable in this state. Atwood v. Little Bonanza Quicksilver Co., 13 Cal. App. 594; 110 Pac. 344. A contract for the payment of money, made in another state, is presumptively to be performed there; and an attachment will not lie, if the money is not payable in this state by the contract itself. Tuller v. Arnold, 93 Cal. 166; 28 Pac. 863. A contract to pay commissions on sales to be made by plaintiff in another state, executed and to be performed there,

cannot be construed as a contract for the payment of money in this state, and will not support an attachment. Drake v. De Witt, 1 Cal. App. 617; 82 Pac. 982. A contract, made and payable in another state, cannot be changed into a new and independent contract, payable in this state, by the creditor sending a statement of the indebtedness to the debtor in this state, if such statement and the actions of the parties relating thereto, do not constitute an account stated. Beltaire v. Rosenberg, 129 Cal. 164; 61 Pac. 916. The issuance of an attachment, in a transitory action, does not affect the jurisdiction of the court. Hodgkins v. Dunham, 10 Cal. App. 690; 103 Pac. 351.

Security of mortgage, lien, or pledge. The statute has made no specification of the character of the liens necessary to fill the requirements of this section, and the court is not authorized to make any discrimination in favor of or against any particular kind of lien. Hill v. Grigsby, 32 Cal. 55. The lien must be of a fixed, determinate character, capable of being enforced with certainty, and depending on no conditions. Porter v. Brooks, 35 Cal. 199. The policy that seems to have dictated this section is, that a creditor having a security for his debt by way of mortgage, lien, or pledge, shall not be entitled to the lien afforded by attachment, until he has exhausted his security. Hill v. Grigsby, 32 Cal. 55; Porter v. Brooks, 35 Cal. 199. A lien is none the less a security because the property covered by it is without the jurisdiction of the courts of this state; its value there may be equal, or more than equal, to the creditor, to its value in this state. Hill v. Grigsby, 32 Cal. 55. A trust fund, created by the will of a deceased indorser of a note upon which the plaintiff sues, to be devoted to the payment of his debts, while it may be a security, is not a lien of the character contemplated by this section (Bank of California v. Boyd, 86 Cal. 386; 25 Pac. 20); nor is a bond executed by a defendant, and two others as sureties, to secure the plaintiff's debt, security by mortgage of real or personal property, or pledge of personal property, and it does not deprive the plaintiff of the right of attachment. Slosson v. Glosser, 5 Cal. Unrep. 460; 46 Pac. 276. An attachment lies upon unpaid installments due upon a subscription to the stock of a corporation, where no lien exists by contract, and a transferable certificate has been issued by the corporation, setting forth the terms of the subscription and the amount paid thereon; such a certificate gives as complete possession of the shares evidenced by it as if it were for paid-up stock; and the corporation, having no possession, has no seller's lien thereon, and can have no general lien, except for assessments, in the absence of a contract between the corporation and its stockholders, creating a lien not dependent upon possession of the certificate of stock to secure the indebtedness of the stockholders to the corporation. Lankershim Ranch etc. Co. v. Herberger, 82 Cal. 600; 23 Pac. 134. A landlord has no general lien upon the property of his lessee, in the possession of the lessee, on leased property, and he is entitled to a writ of attachment in an action to recover rent. Shea v. Johnson, 101 Cal. 455; 35 Pac. 1023. The lien of a landowner distraining trespassing animals is limited to two days by the act of March 7, 1878 (Stats. 1877–78, p. 179); and having no continuing relief by distraint, the act in no way conflicts with the code provision limiting the right of attachment to cases where there is no security. Wigmore v. Buell, 122 Cal. 144; 54 Pac. 600. A party, by securing a mechanic's lien, does not forfeit or waive it by causing an attachment to be issued and levied upon property of the debtor to secure the same demand: the two remedies are cumulative, and both may be pursued at the same time. Brennan v. Swasey, 16 Cal. 140; 76 Am. Dec. 507. An attachment issued and levied on a debt secured by mortgage is invalid. Kinsey v. Wallace, 36 Cal. 462. A pledge of personal property is a "mortgage" thereof, within the attachment act, the word being used therein in a general sense, meaning security; and by receiving such pledge as security for a debt, the creditor forfeits his right to enforce his debt by attachment. Payne v. Bensley, 8 Cal. 260; 68 Am. Dec. 318. Stock of a corporation, held by one as collateral security for an indebtedness of the defendant, is such security as will deprive the holder of his right of attachment; the value of such holder's lien, or its sufficiency to cover the amount of claim it was intended to secure, or whether or not the certificates had been actually indorsed, are matters not to be inquired into on a motion to dissolve the attachment. Beaudry v. Vache, 45 Cal. 3. A vendor's lien constitutes a lien, within the meaning of this section. Hill v. Grigsby, 32 Cal. 55. An attachment may issue in an action to recover purchase-money due under an executory contract for the sale of a patent right: the claim therefor is not secured by a vendor's lien upon the property sold, as no such lien exists under an executory contract for the sale of personal property, where title has not passed. Eads v. Kessler, 121 Cal. 244; 53 Pac. 656. The plaintiff cannot waive the security of a mortgage, and bring an attachment suit on the indebtedness. Barbieri v. Ramelli, 84 Cal. 154; 23 Pac. 1086. The lien of a common carrier is abandoned by his election to attach the property. Wingard v. Banning, 39 Cal. 543.

Attaching property waives lien thereon. A lien-holder, who levies a writ of attach-

ment against property upon which he has a lien, thereby abandons and forfeits such lien. Wingard v. Banning, 39 Cal. 543. Unpaid purchase-money in the hands of the purchaser of mortgaged personal property, under a sale authorized by the mortgagee, is liable to attachment, in an action by a creditor of the mortgagor, to the exclusion of any claim of the mortgagee, whose lien is extinguished by such sale. Maier v. Freeman, 112 Cal. 8; 53 Am. St. Rep. 151; 44 Pac. 357. A pledgee who voluntarily parts with the possession of pledged goods and transfers them to a third party, who guarantees payment of his debt, thereby severs the debt from the pledge, and the lien is extinguished as to him. Treadwell v. Davis, 34 Cal. 601; 94 Am. Dec. 770.

Where security has become valueless. The provision of this section, that the security must have become valueless, means that the property pledged must have ceased to have any value as a security, not that the property pledged must itself have become valueless, before the plaintiff can have an attachment; and where a pledgor authorized the pledgee to sell the pledged property at private sale only, without notice to the pledgor, any notice of such sale is thereby expressly waived, and, under the maxim, Conventio vincit legem, the agreement of the parties overcomes the provision of the law requiring a sale at public auction upon usual notice. Williams v. Hahn, 113 Cal. 475; 45 Pac. 815. An attachment may issue, under this section, though the debt was originally secured by mortgage, if such security, without any act of the plaintiff or the person to whom it was given, has depreciated in value so as to become valueless; but this section has no application to a case where the security was originally valueless or inadequate, and has not changed in value. Barbieri v. Ramelli, 84 Cal. 154; 23 Pac. 1086. Mortgage bonds, valueless at the time of their delivery as security, are not, in fact, security; and such bonds do not deprive the creditor of his right to an attachment. McPhee v. Townsend, 139 Cal. 638; 73 Pac. 584. Where land has been alienated by the vendee, the vendor is not required to litigate with the purchaser to ascertain whether he is a purchaser for value, without notice, before resorting to his attachment: the vendee, by alienating the land, has not only interposed an obstacle in the way of enforcing the lien, but has rendered it doubtful whether the lien is not wholly defeated; and he cannot compel the vendor to solve this doubt by proceeding against the purchaser before suing out his attachment. Porter v. Brooks, 35 Cal. 199; Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73. Although the lien implied by law in favor of a vendor who has parted with the legal title and taken no security for the purchase-money is not a specific, absolute charge upon the property, but is personal to the vendor, and does not pass by a transfer of his claim for the purchase-money, yet where the vendor retains the legal title under an executory contract for the conveyance of the land upon payment of the purchase-money, he holds it as security for the purchase-money, in the nature of a mortgage, and the assignee of notes given for the purchase-money is entitled to the security, as an incident to the debt, and cannot attach property thereupon, without showing that the security has become valueless. Gessner v. Palmateer, 89 Cal. 89; 13 L. R. A. 187; 24 Pac. 608.

Non-resident defendants. The residence referred to in the attachment law is an actual as contradistinguished from a constructive or legal residence or domicile; and where a person has a settled abode for the time being, for purposes of business or pleasure, that is his residence, within the meaning of the attachment law, notwithstanding an intention to return to the place of his constructive residence or domicile. Hanson v. Graham, 82 Cal. 631; 7 L. R. A. 127; 23 Pac. 56; Egener v. Juch, 101 Cal. 105; 35 Pac. 432. The determination of the question of the residence of a person is not affected by his honesty or dishonesty; hence, where absconding foreign debtors, under an assumed name, purchased property in this state, and lived thereon until the commencement of an action against them upon their indebtedness, the fact of their residence here is established, although most of the time they seemed desirous of disposing of the property, saying that in the event of selling they would leave the country. Eck v. Hoffman, 55 Cal. 501. To procure an attachment against the property of a non-resident, it is only necessary that the complaint shall show that the action is founded upon a contract, express or implied, and that the affidavit shall state the facts pointed out in the second and fourth subdivisions of § 538, post. Hale Bros. v. Milliken, 142 Cal. 134; 75 Pac. 653. The service of summons and the issuance and levy of an attachment are both requisite to confer jurisdiction in the case of a non-resident defendant; but the proceeding for the publication of summons is distinct and separate from the proceeding in attachment. Smith v. Supreme Lodge, 12 Cal. App. 189; 106 Pac. 1102. The seizure of the property of a non-resident defendant will authorize constructive service by publication on him, and justify a judgment subjecting the property attached to the satisfaction of such judgment; but it will not authorize a personal judgment against such defendant. Belcher v. Chambers, 53 Cal. 635; Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73; Mudge v. Steinhart, 78 Cal. 34; 12 Am. St. Rep. 17; 20 Pac. 147; Blanc v. Paymaster Mining Co., 95 Cal. 524; 29 Am. St. Rep. 149; 30 Pac. 765. The issuance and levy of an attachment upon the property of a non-resi-

dent within this state is essential, before jurisdiction can be acquired to render any judgment at all, and then it can only be enforced against the property attached. Smith v. Supreme Lodge, 12 Cal. App. 189; 106 Pac. 1102. A writ of attachment, issued in an action sounding in tort, does not confer jurisdiction in rem over the property of a non-resident defendant who is served with summons by publication. Mudge v. Steinhart, 78 Cal. 34; 12 Am. St. Rep. 17; 20 Pac. 147. In an action against a non-resident for the recovery of money, where there has been no personal service of process on the defendant within the state, and no appearance therein by him, no judgment can be given, other than one in the nature of or having the effect of a judgment in rem against such property of the non-resident as may have been specifically attached in the action. Brown v. Campbell, 100 Cal. 635; 38 Am. St. Rep. 314; 35 Pac. 433. Where property belonging to non-residents is attached, prohibition will not lie to restrain the plaintiff from proceeding with the action, upon the ground that it is one in which no attachment will lie, there being a remedy by appeal from an order refusing to dissolve the attachment. Agassiz v. Superior Court, 90 Cal. 101; 27 Pac. 49.

Attachment by partner, against firm. No attachment can be sued out by one partner against another for any matter touching the partnership affairs (Wheeler v. Farmer, 38 Cal. 203); but funds in the hands of a receiver, appointed in a suit by one partner for dissolution, may be attached by a creditor of the partnership, at any time before the decree of dissolution, and priority gained over other creditors. Adams v. Woods, 9 Cal. 24.

Attachment against vessel. An attachment proceeding against a vessel is distinct from an ordinary attachment under this section. Jensen v. Dorr, 157 Cal. 437; 108 Pac. 320.

Attachments against banks. Under the National Banking Act, an attachment cannot issue against a national bank from a state court (Dennis v. First Nat. Bank, 127 Cal. 453; 78 Am. St. Rep. 79; 59 Pac. 777); nor, where a commercial bank has suspended and closed its doors, owing to insolvency in fact, does the right of attachment by a depositor or creditor of the bank exist. Crane v. Pacific Bank, 106 Cal. 64; 27 L. R. A. 562; 39 Pac. 215. The attachment of a draft will excuse a collecting agent for failure to collect, or to return it to the payee. Davis v. First Nat. Bank, 118 Cal. 600; 50 Pac. 666.

Priority of attachment liens as between creditors. A prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds. Scrivener v. Dietz, 68 Cal. 1; 8 Pac. 609. All the equities are in favor of the most diligent, in a contest between attaching creditors. Dixey v. Pollock, 8 Cal. 570. The rights acquired by the attachment creditor, through the levy of the writ, are precisely those which his debtor had at the time of the levy. Handley v. Pfister, 39 Cal. 283; 2 Am. Rep. 449; Bank of Ukiah v. Petaluma Sav. Bank, 100 Cal. 590; 35 Pac. 170. An attachment issued before the maturity of the debt is prima facie void as against a subsequent attachment; but where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and other creditors, subsequently attaching, cannot complain. Patrick v. Montader, 13 Cal. 434; and see Taaffe v. Josephson, 7 Cal. 352. A collusive attachment confers no right as against subsequent bona fide attachments. Briody v. Conro, 42 Cal. 135. A subsequent attaching creditor cannot question the regularity of the affidavit and undertaking in the suit of the prior attaching creditor. Fridenberg v. Pierson, 18 Cal. 152; 79 Am. Dec. 162. Where a subsequent attaching creditor procures the first attachment against the debtor to be set aside as fraudulent, he cannot, on that ground, claim priority over the attachment preceding his. Patrick v. Montader, 13 Cal. 434.

Intervention by subsequent attaching creditor. An attachment creditor may intervene in prior attachment suit, and, upon a proper showing, defeat the lien of a prior attaching creditor. Speyer v. Ihmels, 21 Cal. 280; 81 Am. Dec. 157; McComb v. Reed, 28 Cal. 281; 87 Am. Dec. 115; McEldowney v. Madden, 124 Cal. 108; 56 Pac. 783; Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111. Where an attachment is issued on a fraudulent demand, or on one which has in fact no existence, a subsequent attachment creditor may make himself a party to the proceedings, in order to defeat them. Fridenberg v. Pierson, 18 Cal. 152; 79 Am. Dec. 162. A subsequent attaching creditor, whose writ was served by way of garnishment after the maturity of the indebtedness of the garnishee to the defendant, may intervene in the suit of a prior attaching creditor of the same defendant, whose garnishment was served before the maturity of such debt, to prevent the payment of the attached debt to the prior attaching creditor. Gregory v. Higgins, 10 Cal. 339. A creditor of an insolvent corporation, who has obtained a lien by attachment, has an equitable right of intervention in a prior attachment suit brought by an insolvent holder of unpaid stock in the corporation, whose liability to the corporation is largely in excess of his claim against it, in order to prevent the sole assets of the corporation from going to such stockholder, to the exclusion of creditors who have an equitable right to have the entire property and assets, including plaintiff's liability to the corporation, appropriated to the satisfaction of their demands; and the prior attachment

lien of such insolvent stockholder is properly postponed to that of the intervener, and the equitable rights of the parties can as well be adjusted in the proceeding in intervention as by a separate direct action for that purpose. Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111. An attaching creditor may intervene in a suit against the garnishee by the latter's creditor, an assignee of the attachment debtor, to determine his lien upon the fund. Wheatley v. Strobe, 12 Cal. 92; 73 Am. Dec. 522. The judgment of an intervener against the defendant is admissible to prove his right to intervene. Coghill v. Marks, 29 Cal. 673. The burden of proof, after the intervener has proved the facts alleged to show his right to intervene, is upon the plaintiff to prove his cause of action. Speyer v. Ihmels, 21 Cal. 280; 81 Am. Dec. 157. A lien by garnishment gives the same rights to interveners as a lien by direct attachment. Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111.

Priority as to attachment and other liens. The right of stoppage in transitu is paramount to any lien of attachment levied upon the goods, before delivery, by a creditor of the vendee. Blackman v. Pierce, 23 Cal. 508. The lien of the attachment of an interest of a beneficiary under a trust is subject to the equities of the parties to the trust agreement. Ward v. Waterman, 85 Cal. 488; 24 Pac. 930. Where certain creditors agree to a transfer of property, in trust, to another creditor, the surplus, after sale, to be returned to the debtor, the lien of the transferee and those he represents is superior to that which other creditors could acquire by a subsequent attachment. Handley v. Pfister, 39 Cal. 283; 2 Am. Rep. 449. Laborers having preferred claims cannot maintain an injunction to prevent an attaching creditor from dismissing his attachment suit, after notice given to such creditor of their preferred claims according to law; nor can they enforce a lien in equity as against such creditor, and the debtor, and the sheriff who levied the attachment. Winrod v. Wolters, 141 Cal. 399; 74 Pac. 1037. An antedated note, upon which an attachment suit is based, is not fraudulent as against a subsequent attaching creditor, merely because, when the plaintiff discovered the insolvency of the debtor, he procured the latter to execute such note, payable on demand, as a substitute for other notes not yet due, if it also appears that the latter notes had been accepted by him upon giving the defendant an extension of time for the payment of pre-existing debt, without notice of the defendant's insolvency. Brewster v. Bours, 8 Cal. 501. The lien of the attachment is not affected by the appointment of a receiver; and the delivery of the attached property to the receiver, appointed subsequently to the levying of the attachment, does not release any valid lien thereon. Von Roun v. Superior Court, 58 Cal. 358; Bories v. Union Building etc. Ass'n, 141 Cal. 74; 74 Pac. 552. The receiver of an insolvent foreign corporation, claiming under the laws of another state, has no rights as against those of a domestic attaching creditor. Lackmann v. Supreme Council, 142 Cal. 22; 75 Pac. 583. The property of a building and loan association is subject to attachment at any time prior to the commencement of an action by the attorney-general to enjoin it from doing business; and the lien of an attachment is not affected by a prior adverse report of a state board of commissioners to the attorney-general as to the hazardous business methods of such association. Bories v. Union Building etc. Ass'n, 141 Cal. 74; 74 Pac. 552.

Priority as to mortgage and attachment. A chattel mortgage, recorded without any verification by the mortgagee, is void as against subsequent attaching creditors; and a subsequent verification, without recording the instrument so verified, can give it no validity. Alferitz v. Scott, 130 Cal. 474; 62 Pac. 735. An unrecorded chattel mortgage is void as against subsequent attaching creditors of the mortgagor (Beamer v. Freeman, 84 Cal. 554; 24 Pac. 169), regardless of their actual notice thereof; and knowledge of its existence will not protect the holder of the chattel mortgage against an attachment by a creditor of the mortgagor. Cardenas v. Miller, 108 Cal. 250; 49 Am. St. Rep. 84; 39 Pac. 783; Rudolph v. Saunders, 111 Cal. 233; 43 Pac. 619. A chattel mortgage, defectively acknowledged, is void as against an attaching creditor of the mortgagor, unless the property was reduced to possession by the mortgagee, prior to the attachment. Adlard v. Rodgers, 105 Cal. 327; 38 Pac. 889. Where a mortgage of personal property was recorded in the county where it was executed, but, after the removal of the property to another county, a subsequent recordation of the mortgage in the latter county, after an attachment had been levied on the property in such county, cannot avail as against the attaching creditor. Fassett v. Wise, 115 Cal. 316; 36 L. R. A. 505; 47 Pac. 47. An attachment levied prior to the date of a mortgage, by the attachment debtor, takes precedence of the mortgage, and the sale under the execution in the attachment suit concludes the rights of the mortgagee as effectually as it does those of the mortgagor. Reilly v. Wright, 117 Cal. 77; 48 Pac. 970. The lien of an unrecorded mortgage of real estate takes priority over the lien of an attachment levied after the execution of the mortgage. Bank of Ukiah v. Petaluma Sav. Bank, 100 Cal. 590; 35 Pac. 170. A mortgage of real and personal property, executed only in the manner that a mortgage of real property is required to be executed, is void as to the personal property,

as against subsequent attaching creditors of the mortgagor. Bishop v. McKillican, 124 Cal. 321; 71 Am. St. Rep. 68; 57 Pac. 76. A secret lien cannot stand as against an attachment levied on a growing crop as the property of a tenant by his creditor. Stockton Sav. & L. Soc. v. Purvis, 112 Cal. 236; 53 Am. St. Rep. 210; 44 Pac. 561. In an action to foreclose a mortgage, defendants claiming under an attachment lien accruing after the mortgage was given are entitled to prove the existence of their lien, and to show that, in consequence of certain acts of the plaintiff, it is superior to the lien of the mortgage. Scrivener v. Dietz, 68 Cal. 1; 8 Pac. 609.

Priority as to deed and attachment. An unrecorded deed is effective as against a subsequent attachment of the land as the property of the grantor, who has conveyed, in fraud of his creditors, to a purchaser for value and without notice. Morrow v. Graves, 77 Cal. 218; 19 Pac. 489. A writ of attachment is not an "instrument," within the sense of that term as used in § 1107 of the Civil Code; therefore an unrecorded deed will prevail over an attachment lien; and the question of actual notice of the conveyance is immaterial. Hoag v. Howard, 55 Cal. 564; Plant v. Smythe, 45 Cal. 161; Foorman v. Wallace, 75 Cal. 552; 17 Pac. 680; Morrow v. Graves, 77 Cal. 218; 19 Pac. 489; Ward v. Waterman, 85 Cal. 488; 24 Pac. 930. A conveyance made after an attachment is subject to the lien of the attachment. Kinder v. Macy, 7 Cal. 206.

Priority as to individual and firm creditors. Partnership property can be seized upon attachment against one of the partners for his individual debt, and sold; but the interest which passes by the sale is only the interest of the debtor partner in the residuum of the partnership property after the settlement of the partnership debts. Robinson v. Tevis, 38 Cal. 611. A creditor attaching partnership property, in a suit against an individual partner, does not acquire any lien upon such property as against the superior equity of a subsequently attaching creditor of the partnership. Burkee v. Bunn, 22 Cal. 194; Commercial Bank v. Mitchell, 58 Cal. 42; Whelan v. Shain, 115 Cal. 326; 47 Pac. 57. Where one partner purchases the interest of his copartners in the firm, agreeing to pay the firm debts, the property of the firm remains bound for such debts, just as before the sale; and a creditor obtaining a lien by attachment is entitled to file a creditor's bill, without waiting for judgment and execution. Conroy v. Woods, 13 Cal. 626; 73 Am. Dec. 605. Where two persons, as a partnership, are also members of two other firms, and all the firms fail, and their property is attached by creditors, the creditors of the first-named partnership are entitled to priority of payment out of the proceeds of the property of such partnership, over the creditors of the other two firms, notwithstanding their priority in time to the other attachments. Bullock v. Hubbard, 23 Cal. 495; 83 Am. Dec. 130. The creditor of an individual partner, who has merely an attachment upon his interest in the partnership, has no such interest in an action to wind up the affairs of the partnership as to entitle him to intervene. Isaacs v. Jones, 121 Cal. 257; 53 Pac. 793.

Proceedings to determine priority of liens. A subsequent attaching creditor may maintain a bill in equity against a prior attaching creditor, to show that the debt alleged by the latter was fraudulent, and to subject the lien of such creditor to his own. Wright v. Levy, 12 Cal. 257. A complaint in an action to determine the invalidity of a prior attachment lien, which fails to aver facts from which the court can see that some particular kind of lien existed, is insufficient (Shea v. Johnson, 101 Cal. 455; 35 Pac. 1023); as is also a creditor's bill in equity, filed by an attachment creditor, to reach equitable assets fraudulently conveyed, or fraudulently subjected to a prior attachment, which simply avers that the conveyance was fraudulent, or that the defendant was not indebted to the prior attaching creditor: the facts and circumstances which will reasonably sustain the theory of the bill must be set forth. Kinder v. Macy, 7 Cal. 206; Castle v. Bader, 23 Cal. 75. The priority of attachment liens may be determined in an injunction suit brought by a purchaser under the first attachment to prevent the sale of the property under a subsequent attachment. Porter v. Pico, 55 Cal. 165. Where the claim of the prior attaching creditor is for a bona fide debt without tinge of fraud, an objection to the attachment proceedings, on the ground of the impropriety of the affidavit for the attachment, can be successfully made only by the defendant in the attachment suit. Shea v. Johnson, 101 Cal. 455; 35 Pac. 1023.

Discharge or release of attachment. Attachment is not of the nature of a common-law distress of the defendant's property, to be held until he pays the plaintiff's demand; but it is held in order that it may be subject to execution; and when that purpose is impossible of accomplishment, the right to hold the property for that purpose ceases. Myers v. Mott, 29 Cal. 359; 89 Am. Dec. 49. An attaching creditor may voluntarily release the property attached, and such release may be made without the sanction of the court: a mere direction to the sheriff is sufficient (Smith v. Robinson, 64 Cal. 387; 1 Pac. 353); and the sheriff may exact the execution of an undertaking as a condition of such release, and the release will be a sufficient consideration for the undertaking; or the attaching creditor may ratify the act of the sheriff, after a release, and thereby validate his act. Hesser v. Row-

ley, 139 Cal. 410; 73 Pac. 156. The death of the defendant releases the lien of the attachment, if the case is such that execution cannot issue legally after his death. Myers v. Mott, 29 Cal. 359; 89 Am. Dec. 49; Hensley v. Morgan, 47 Cal. 622; Ham v. Cunningham, 50 Cal. 365; Ham v. Henderson, 50 Cal. 367; Day v. Superior Court, 61 Cal. 489. A collateral attack on an attachment can be maintained, only for causes which render the writ absolutely void, and not merely voidable. Mudge v. Steinhart, 78 Cal. 34; 12 Am. St. Rep. 17; 20 Pac. 147.

Discharge of attachment by insolvency or bankruptcy proceedings. The dissolution of an attachment may be effected by voluntary proceedings in insolvency. Baum v. Raphael, 57 Cal. 361. The discharge of the lien by insolvency proceedings, wherein the defendant is adjudicated an insolvent debtor, takes place only where the express statutory provision declares that the proceeding in insolvency shall have that effect. Vermont Marble Co. v. Superior Court, 99 Cal. 579; 34 Pac. 326; Hefner v. Herron, 117 Cal. 473; 49 Pac. 586; Elliott v. Warfield, 122 Cal. 632; 55 Pac. 409. Under the insolvency act of 1852 and the supplementary act of 1876, an attachment levied within two months prior to the commencement of the insolvency proceedings was dissolved thereby. Cerf v. Oaks, 59 Cal. 132. Under the insolvency act of 1880, an adjudication of insolvency dissolved, by operation of law, any attachment made within one month next preceding the commencement of the insolvency proceedings (Vermont Marble Co. v. Superior Court, 99 Cal. 579; 34 Pac. 326; Elliott v. Warfield, 122 Cal. 632; 55 Pac. 409); and no order of release of the attachment was necessary. Wilhoit v. Cunningham, 87 Cal. 453; 25 Pac. 675. The insolvency act of 1895 also provided for the dissolution of an attachment levied within one month prior to the commencement of insolvency proceedings. Hefner v. Herron, 117 Cal. 473; 49 Pac. 586. The property acquired by a bankrupt after the commencement of insolvency proceedings forms no part of the estate in bankruptcy; and the assignee acquires title only to such property as the insolvent owned at the time of the commencement of the insolvency proceedings. Day v. Superior Court, 61 Cal. 489. The dismissal of insolvency proceedings does not revive the lien of a dissolved attachment. Wilhoit v. Cunningham, 87 Cal. 453; 25 Pac. 675. Notice of an order staying proceedings against an insolvent debtor need not be served on the creditor or officer, to give it effect and prevent the attachment. Taffts v. Manlove, 14 Cal. 47; 73 Am. Dec. 610. An adjudication of bankruptcy, under the act of Congress of 1898, dissolves an attachment levied within four months prior to the filing of the petition, if the creditor causing the levy had reasonable cause to believe the debtor insolvent. Alexander v. Wilson, 144 Cal. 5; 77 Pac. 706. Bankruptcy proceedings, instituted more than four months after the levy of an attachment, do not deprive the attaching creditor of the right to subject the attached property to the satisfaction of his debt. Holladay v. Hare, 69 Cal. 515; 11 Pac. 28.

Judgment in attachment suits. The court, in rendering judgment in an action in which an attachment has been procured and served, has no duty to perform in reference to the attachment proceedings; nor does the sheriff act in obedience to the judgment, but to the behests of the statute, in enforcing the lien of the attachment by a sale of the property attached. Myers v. Mott, 29 Cal. 259; 89 Am. Dec. 49; Allender v. Fritts, 24 Cal. 447. Where the defendant in an attachment suit dies after the levy of the writ, but before judgment, and his administrator is substituted, and the case continued against him, judgment cannot be rendered enforcing the attachment lien by ordering the sale of the attached property to satisfy the demand. Myers v. Mott, 29 Cal. 359; 89 Am. Dec. 49; Bank of Stockton v. Howland, 42 Cal. 129.

Merger in judgment lien. The lien of the attachment becomes merged in that of the judgment, and has no effect thereafter, except to confer a priority in the lien of the judgment; and where there are several attachments, this priority is maintained and enforced under the judgments; the attachment lien, as to its amount, depends upon the ex parte statement of the plaintiff, while that of the judgment is certain; the lien of the latter is of a higher order, if it is possible that there can be different ranks among the liens; the law does not contemplate the existence, at the same time, of two distinct liens, arising by operation of law in one action, for the security of one demand. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256; Scrivener v. Dietz, 68 Cal. 1; 8 Pac. 609; Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73. But the lien of the attachment is not merged in the judgment until the latter becomes a lien; and if the judgment is not docketed so as to become a lien, the lien of the attachment still remains upon the property. Weinreich v. Hensley, 121 Cal. 647; 54 Pac. 254. Though merged in the judgment, the attachment lien still exists so as to confer a priority in the lien of the judgment, and this result is attained, in an indirect way, by applying the doctrine of relation to the series of acts necessary to be done to transfer title to the property attached; and a sheriff's deed, executed in pursuance of an execution sale, under a judgment rendered in an attachment suit, takes effect from the levy of the attachment. Porter

v. Pico, 55 Cal. 165. The mere recovery of judgment and issuance of execution will not, in case of a garnishment in an attachment suit, without a receipt by the sheriff of the property, or an actual levy of the execution, create any additional lien upon the fund garnished, nor convert the attachment lien into a lien under final process. Howe v. Union Ins. Co., 42 Cal. 528; Fed. Cas. No. 6776. The lien of the attachment does not revive upon the expiration of the two years' lien of the judgment. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256. The purpose of the attachment is to hold the property of the defendant as security for such judgment as may be rendered in the action (Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256; Lehnhardt v. Jennings, 119 Cal. 192; 48 Pac. 56); and the lien can be enforced only by sale under execution. Myers v. Mott, 29 Cal. 359; 89 Am. Dec. 49.

Action for maliciously suing out writ. An action may be maintained for the malicious prosecution of the writ, or for the taking and detention of the property; and greater damages may be recovered in the former form of action than in the latter. McCusker v. Walker, 77 Cal. 208; 19 Pac. 382. Where the writ was a mere incident in an action for the prosecution of an unfounded claim, the use made of the writ aggravates the damages resulting from the prosecution of such action. Berson v. Ewing, 84 Cal. 89; 23 Pac. 1112. An attachment for damages resulting from negligence is a gross abuse of the process. Griswold v. Sharpe, 2 Cal. 17. An attachment for a debt secured by mortgage subjects the plaintiff, who has knowledge of such security, to liability for malicious prosecution. Kinsey v. Wallace, 36 Cal. 462. But the issue of an attachment, and a levy of the same on goods, where there is a legal cause of action existing, is not such a duress of goods as to give a cause of action for damages in favor of the one whose goods are seized. Kohler v. Wells Fargo & Co., 26 Cal. 606. Where the plaintiff commenced suit and attached before the debt became due, and thus prevented the defendant from fulfilling his part of the contract, damages for abuse of the process may be claimed by cross-complaint. Wangenheim v. Graham, 39 Cal. 169. Actual and exemplary damages may be awarded, but they should not be unreasonably or disproportionately large. Kinsey v. Wallace, 36 Cal. 462. Where a person, having a good cause of action against another, willfully sues for a greater amount than is due, and attaches the property of the other, and puts him to charges, he is liable. Weaver v. Page, 6 Cal. 681; Clark v. Nordholt, 121 Cal. 26; 53 Pac. 400. A nominal plaintiff is liable, where he gives his confederate unconditional permission to use his name in bringing suits, and the evidence shows the prosecution to have been malicious on the part of his confederate: ignorance of the facts in a particular suit cannot excuse such nominal plaintiff. Kinsey v. Wallace, 36 Cal. 462.

Pleadings in action for maliciously suing out writ. Apt words, used to describe a cause of action for malicious prosecution, rather than an action for the unlawful taking and detention of property, must be presumed to have been used by design, upon the election of the plaintiff to maintain his suit. McCusker v. Walker, 77 Cal. 208; 19 Pac. 382. The complaint must allege that the writ was sued out and prosecuted without probable cause. King v. Montgomery, 50 Cal. 115. Where, in an action for the malicious prosecution of an attachment against the plaintiff by the defendant, in the name of another, the complaint alleges, in stating what the defendant did in the issuing and levying of the writ, that the defendant and another filed their undertaking, conditioned to pay all the costs and damages that the plaintiff might sustain, the gravamen of the complaint is the malicious prosecution, and the allegations with regard to the undertaking cannot be construed as constituting a separate cause of action. Sharp v. Miller, 54 Cal. 329. In order to entitle a plaintiff to recover in an action for the malicious prosecution of the writ, he must allege and prove that the writ was executed by attaching the property: the mere malicious suing out of such a writ without probable cause, without levying it upon the property of the party against whom it is issued, does not authorize a recovery. Maskell v. Barker, 99 Cal. 642; 34 Pac. 340. An allegation that the judgment in an attachment suit was rendered and entered in favor of the defendant, is sufficient, without alleging further, that the judgment was in full force and effect, and not vacated, set aside, reversed, or appealed from. Carter v. Paige, 80 Cal. 390; 22 Pac. 188.

Statute of limitations. The statute of limitations begins to run against a claim for damages for maliciously procuring the levy of an attachment, at the time of the levy; the period of limitation being two years (Sharp v. Miller, 54 Cal. 329; 57 Cal. 431; McCusker v. Walker, 77 Cal. 208; 19 Pac. 382; and see Wood v. Currey, 57 Cal. 208; Taylor v. Bidwell, 65 Cal. 489; 4 Pac. 491); but the statute does not begin to run against a claim for damages for the malicious prosecution of a civil action upon an unfounded claim, until the action is terminated, although an attachment may have issued in the action. Berson v. Ewing, 84 Cal. 89; 23 Pac. 1112.

Priority of foreign assignment over subsequent domestic judgment. See note 17 L. R. A. 85.

Determination of status by residence of debtor in case of foreign attachment. See note 17 L. R. A. 87.

What is non-residence for the purpose of attachment. See note 19 L. R. A. 665.

Right of possession as between receiver and creditor levying attachment on property. See note 20 L. R. A. 392.

Right of attachment as affected by appointment of foreign receiver. See note 23 L. R. A. 52.

Priority between assignee for creditors and attaching creditors. See note 26 L. R. A. 593.

Effect as against attachment of pledge or other transfer of corporate stock not made in books of company. See note 67 L. R. A. 656.

When non-residence of person intending to leave permanently begins. See note 1 L. R. A. (N. S.) 778.

Waiver of lien of chattel mortgage by attachment. See note 24 L. R. A. (N. S.) 490.

CODE COMMISSIONERS' NOTE. 1. Generally. The proceedings by attachment are statutory and special, and must be strictly pursued. When a party relies upon his attachment lien as a remedy, he must strictly follow the provisions of the statute. Roberts & Co. v. Landecker, 9 Cal. 262. The remedy is given only in cases of indebtedness arising upon contract. Griswold v. Sharp, 2 Cal. 17; Dulton v. Shelton, 3 Cal. 206. The remedy is not a distinct proceeding in the nature of an action in rem, but is auxiliary to an action at law, designed to secure the payment of any judgment the plaintiff may obtain. Low v. Adams, 6 Cal. 277. An attachment issued on a complaint which was a printed form, with the blanks filled up by the clerk at the request of plaintiff, but no name was signed to the complaint till next day, and after other attachment on the same property, when it was signed by the clerk, with the name of plaintiff's attorney. It was held, that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void. Dixey v. Pollock, 8 Cal. 570. An attachment, regular upon its face, is not void because the complaint does not state a cause of action warranting the issuance of an attachment. McComb v. Reed, 28 Cal. 281; 87 Am. Dec. 115. An attachment issued before the issuance of the summons is void. Low v. Henry, 9 Cal. 538. Where G. & Co., concealing their insolvency, obtained an extension from their creditor B., and, before the maturity of the notes B., apprehending that G. & Co. would fail, and that the other creditors of G. & Co. would exhaust their assets by attachment, obtained, by an arrangement with G. & Co., an antedated note for the amount due him at the date thereof by G. & Co., on which suit was commenced by attachment, and a levy made upon the property of G. & Co. Held, that B.'s attachment and claim was valid against the subsequent attaching creditors, the case not being one of fraud. Brewster v. Bours, 8 Cal. 501. Where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt. Patrick v. Montader, 13 Cal. 434. An attachment issued upon a debt not due is void as against creditors whose rights are affected by it. Patrick v. Montader, 13 Cal. 434, cited supra, goes upon the ground that the debt upon which the attachment issued was equitably due, and hence does not conflict with this rule. Davis v. Eppinger, 18 Cal. 378; 79 Am. Dec. 184. A creditor having a lien by attachment only, may file a creditor's bill. Conroy v. Woods, 13 Cal. 626; 73 Am. Dec. 605.

2. When an attachment cannot issue. If the debt is secured by a vendor's lien, an attachment cannot issue. Hill v. Grigsby, 32 Cal. 55. But a vendor's lien for the unpaid purchase-money of a tract of land, where the land has been conveyed by the vendee to a third party, is not a lien securing the debt within the meaning of the terms used in § 120 of the Practice Act (Code, § 537). Porter v. Brooks, 35 Cal. 199. An attachment will not lie when the debt is secured by mortgage. Kinsey v. Wallace, 36 Cal. 463. The term "mortgage" is used in its most general signification, and iucludes a pledge of personal property. Payne v. Bensley, 8 Cal. 260; 68 Am. Dec. 318.

3. Partnership, attachment affected by. An attachment cannot be sued out by one partner against another for any matter touching the partnership affairs. Wheeler v. Farmer, 38 Cal. 203. The commencement of an action by one partner, against his copartners, for a dissolution and account, and for an injunction and receiver, and an appointment of a receiver by the court, does not prevent a creditor from proceeding by attachment and gaining a priority over other creditors, until a final decree of dissolution and order of distribution. Adams v. Woods, 9 Cal. 24. Where one partner buys out his copartners, agreeing to pay the debts of the firm, the partnership remains bound for firm debts, and the lien of firm creditors attaching is perferred to the lien of an individual creditor of the remaining creditor attaching first. Conroy v. Woods, 13 Cal. 626; 73 Am. Dec. 605.

Where two shareholders in a joint-stock company sold to the company goods to a large amount, and afterwards, during the existence of the company, sold their stock to A., and assigned their account for such goods to B., who sued such company on said account by attachment, it was held, that the action could not be maintained, there having been no final settlement, no balance struck, and no express promise on the part of the individual members to pay their ascertained portion. Bullard v. Kinney, 10 Cal. 60. The creditor of an individual partner obtains, by an attachment of the partner's interest, no lien but what is subject to the general lien of partners and creditors. Robinson v. Tevis, 38 Cal. 611. An attachment against V. may be levied on his interest in grain, and to effect this the sheriff may take possession of the entire quantity of grain; but he can sell, under the execution on the judgment that may be recovered in the action, only the undivided interest of V., the purchaser at the sale becoming tenant in common with the other part-owners. Bernal v. Hovious, 17 Cal. 541; 79 Am. Dec. 147.

4. Stoppage in transitu. Attachment as affected by. The right of stoppage in transitu is paramount to any lien by attachment, and may be exercised to defeat such lien by the creditor of the vendee. Blackman v. Pierce, 23 Cal. 508.

5. Priority of attachments. Patrick v. Montader, 13 Cal. 434; Speyer v. Ihmels, 21 Cal. 280; 81 Am. Dec. 157. The writ affects personal property from the time of the levy only. Taffts v. Manlove, 14 Cal. 47; 73 Am. Dec. 610. In McComb v. Reed, 28 Cal. 281, 87 Dec. 115, where two attachments had been levied on the same property, it was questioned whether a junior attaching creditor could successfully attack the validity of the first attachment, on the ground that the complaint did not contain a cause of action upon a contract, express or implied, for the direct payment of money. A junior attaching creditor cannot avail himself, in the affidavit or undertaking, of a prior attaching creditor. Fridenberg v. Pierson, 18 Cal. 152; 79 Am. Dec. 162.

6. The judgment in an attachment suit need not direct the sale of the property held under the attachment: it is the duty of the sheriff to sell it. Low v. Henry, 9 Cal. 538.

§ 538. Affidavit for attachment, what to contain. The clerk of the court must issue the writ of attachment, upon receiving an affidavit by or on behalf of plaintiff, showing:

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims) upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this state, and that the payment of

the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; or,

2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims) and that the defendant is a non-resident of the state; or,

3. That plaintiff's cause of action against defendant is one to recover a sum of money as damages (specifying the amount thereof) arising from an injury to property in this state in consequence of the negligence, fraud, or other wrongful act of defendant, and that the defendant is a non-resident of the state; and

4. That the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant.

Levy without process, a misdemeanor. See Pen. Code, § 146.

Fact of issuing attachment not to be made public. See Pol. Code, § 1032.

Affidavit. Post, § 557.

Legislation § 538. 1. Enacted March 11, **1872**; based on Practice Act, § 121, as amended by Stats. 1860, p. 301, which read: "The clerk of the court shall issue the writ of attachment upon receiving an affidavit by, or on behalf of, the plaintiff, which shall be filed, showing: 1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness, over and above all legal set-offs and counterclaims), upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this state, and that the payment of the same has not been secured by any mortgage, lien, or pledge, upon real or personal property; or, 2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness as near as may be, over and above all legal set-offs or counterclaims), and that the defendant is a non-resident of the state; and, 3. That the sum for which the attachment is asked is an actual, bona fide existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud, any creditor or creditors of the defendant." When enacted in 1872, (1) in the introductory paragraph, (a) the word "shall" was changed to "must," (b) the word "the" was omitted before "plaintiff," and (c) the words "which shall be filed," after "plaintiff," were omitted; (2) in subd. 1, the word "and," after "set-offs," was changed to "or"; (3) in subd. 3, the comma was omitted after the word "actual."

2. Amended by Code Amdts. **1873–74**, p. 307, (1) in the introductory paragraph, adding a comma after the word "attachment"; (2) in subd. 1, (a) omitting the comma after the word "indebtedness," (b) adding, before the word "lien," the word "or," and omitting, after "lien," the words "or pledge," (c) changing the word "and," before "personal property," to "or," and adding, after these words, the clauses, "or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; or"; (3) in subd. 2, striking out the words "as near as may be," after "indebtedness"; (4) changing subd. 3 to read as subd. 4 now reads.

3. Amendment by Stats. **1901**, p. 139; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1905**, p. 434.

Issuance of the writ. The issuance of the writ is not a judicial proceeding, but a ministerial act upon the part of the clerk, which he is bound to perform upon the filing of the statutory affidavit and undertaking (McCusker v. Walker, 77 Cal. 208; 19 Pac. 382); but he is not authorized to issue the writ, where there is no statement in the affidavit of the facts plainly required by the statute to be set forth therein. Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444; 115 Pac. 58. The clerk must proceed with reasonable diligence to make up and deliver to the plaintiff the process applied for, on proper presentation of the papers; and he must issue the attachments in the order in which they are demanded, and his failure to do so is actionable; but he is not bound to delay the issuing of other writs against the same party, if the party making the prior demand is not in attendance to receive his writs when ready for delivery, who thus, through his own negligence or misfortune, loses his priority. Lick v. Madden, 36 Cal. 208; 95 Am. Dec. 175. Several writs may be issued upon a single affidavit and undertaking to different counties. Martinovich v. Marsicano, 150 Cal. 597; 119 Am. St. Rep. 254; 89 Pac. 333. The affidavit and all the papers requisite to a writ of attachment may be prepared at the same time the complaint is prepared, so long as the affidavit and the undertaking in the attachment are not filed in advance of the original complaint, and the writ not issued in advance of the summons, to which it is incident. Wheeler v. Farmer, 38 Cal. 203. The prepayment of fees is not necessary upon the issuance of the writ, unless they are demanded by the clerk. Lick v. Madden, 25 Cal. 202. A defendant, who files a cross-complaint, may have an attachment against the money and property in controversy, still held by the plaintiff. Interlocking Stone Co. v. Scribner, 19 Cal. App. 344; 126 Pac. 178.

The affidavit. It is not necessary that the required affidavit be signed by the party making it; but the oath may not be taken out of the county, over the telephone: such an affidavit is a nullity, and the attachment issued thereon is void.

Fairbanks v. Getchell, 13 Cal. App. 458; 110 Pac. 331.

Allegations of facts in affidavit. The facts required by the statute must be truly stated in the affidavit; and it is immaterial that the omitted facts are stated in the complaint (Fisk v. French, 114 Cal. 400; 46 Pac. 161); but the affidavit need not necessarily have all the facts set out in respect to the contract, which are necessary to be stated in the complaint. Weaver v. Hayward, 41 Cal. 117. It is not necessary for the affidavit to state the probative facts requisite to establish the ultimate facts required by the statute to be shown as the basis of the writ (Wheeler v. Farmer, 38 Cal. 203); nor is the same particularity of statement required in the affidavit for the issuance of the writ as is required in the complaint. Bank of California v. Boyd, 86 Cal. 386; 25 Pac. 20; O'Conor v. Roark, 108 Cal. 173; 41 Pac. 465; O'Conor v. Witherby, 112 Cal. 38; 44 Pac. 340. The affidavit is fatally defective unless it states that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant, or either of them, when there are more than one. Pajaro Valley Bank v. Scurich, 7 Cal. App. 732; 95 Pac. 911. The falsity of the affidavit can be raised only by the defendant in the attachment suit (Shea v. Johnson, 101 Cal. 455; 35 Pac. 1023); and its regularity cannot be attached collaterally by a stranger to the suit. Scrivener v. Dietz, 68 Cal. 1; 8 Pac. 609.

Affidavit, by whom made. An affidavit, made by a business agent of the plaintiff, need not aver that he is an agent for the collection of the debt, that he makes it in behalf of the plaintiff, or that the facts are peculiarly within his knowledge or that there is any reason why the plaintiff does not make it. Simpson v. McCarty, 78 Cal. 175; 12 Am. St. Rep. 37; 20 Pac. 406. Where the plaintiff sets out his representative capacity in the title of the action at the head of the affidavit, but in the body thereof he refers to himself as "the plaintiff in the above-entitled action," and also states that "the defendant in said action is indebted to him," the pronoun "him" referring to himself, there is a sufficient compliance with the requirements of the section: and the use of the conjunction "and," instead of the statutory disjunctive "or," in the phrase, "over and above all legal set-offs or counterclaims," does not constitute insufficiency. O'Conor v. Roark, 108 Cal. 173; 41 Pac. 465; O'Conor v. Witherby, 112 Cal. 38; 44 Pac. 340. Where the facts are stated positively and without qualification in the affidavit, it will be presumed that they are within the knowledge of the affiant. Simpson v. McCarty, 78 Cal. 175; 12 Am. St. Rep. 37; 20 Pac. 406.

Contract for direct payment of money. It is not necessary that the affidavit shall state whether the contract is express or implied: it is sufficient if it appears therefrom that there is an indebtedness arising on contract for the direct payment of money. Flagg v. Dare, 107 Cal. 482; 40 Pac. 804; Norcross v. Nunan, 61 Cal. 640; Simpson v. McCarty, 78 Cal. 175; 12 Am. St. Rep. 37; 20 Pac. 406. An affidavit in the alternative form, that the indebtedness is upon an express or implied contract, is insufficient. Hawley v. Delmas, 4 Cal. 195. The indebtedness is the principal element required in the affidavit, and when that appears by a direct statement, the affidavit is sufficient, when there is nothing therein inconsistent with the statement. Bank of California v. Boyd, 86 Cal. 386; 25 Pac. 20; Flagg v. Dare, 107 Cal. 482; 40 Pac. 804; O'Conor v. Roark, 108 Cal. 173; 41 Pac. 465; O'Conor v. Witherby, 112 Cal. 38; 44 Pac. 340.

Amount of indebtedness. The amount of the indebtedness to the plaintiff is the principal and all-important element in the affidavit (Finch v. McVean, 6 Cal. App. 272; 91 Pac. 1019); and it must be shown by the affidavit; and it may be so shown, although it does not appear from the contract itself, and is not specially stated in the complaint. Dunn v. Mackey, 80 Cal. 104; 22 Pac. 64. The amount of the demand, in the statement, need not be identically the same as the sum stated in the complaint; set-offs and counterclaims must be stated in the affidavit, but they need not be stated in the complaint. De Leonis v. Etchepare, 120 Cal. 407; 52 Pac. 718. An affidavit directly alleging a specific indebtedness in a principal sum is not vitiated by referring to interest and attorneys' fees, without further specification, but is sufficient to sustain the attachment, at least to the extent of the principal sum. Tibbet v. Tom Sue, 122 Cal. 206; 54 Pac. 741. Where the principal and legal interest were demanded in the complaint, and the nature of the indebtedness is so sufficiently stated in the affidavit as to show that it draws legal interest from the date of its maturity, there is no substantial difference between the affidavit and complaint in respect to interest. O'Conor v. Roark, 108 Cal. 173; 41 Pac. 465; O'Conor v. Witherby, 112 Cal. 38; 44 Pac. 340. The affidavit may be for any definite sum alleged in the complaint to be due, notwithstanding the prayer also demands a further sum (De Leonis v. Etchepare, 120 Cal. 407; 52 Pac. 718); and it may be for such portion of the amount claimed in the complaint as the plaintiff is able to specify as indebtedness for which the law authorizes an attachment. Baldwin v. Napa etc. Wine Co., 137 Cal. 646; 70 Pac. 732.

Claim must be unsecured. An affidavit as to a resident, which fails to state that the payment of the claim has not been secured as required by the first subdivision of this section, is insufficient (Sparks v.

Bell, 137 Cal. 415; 70 Pac. 281; Scrivener v. Dietz, 68 Cal. 1; 8 Pac. 609); as is also an affidavit in the alternative, stating, in substance, that the payment of the indebtedness has not been secured, or if secured, that such security has become valueless, as it does not state that no security was ever given, but merely that the same had become valueless. Wilke v. Cohn, 54 Cal. 212; Merced Bank v. Morton, 58 Cal. 360; Harvey v. Foster, 64 Cal. 296; 30 Pac. 849; Winters v. Pearson, 72 Cal. 553; 14 Pac. 304. An affidavit stating the general conclusion that the mortgage given to secure the indebtedness has become valueless, is sufficient to justify the clerk in issuing the writ. Barbieri v. Ramelli, 84 Cal. 174; 24 Pac. 113. The use, in the affidavit, of the word "upon," instead of "of," in the statutory phrase, "pledge of personal property," is immaterial. O'Conor v. Witherby, 112 Cal. 38; 44 Pac. 340.

Against a non-resident. An affidavit for attachment against a non-resident need not state that the payment of the claim is not secured by mortgage, lien, or pledge, or that the claim is upon a contract: that the action is upon a contract, express or implied, need only appear from the complaint in the action (Kohler v. Agassiz, 99 Cal. 9; 33 Pac. 741); and where it is stated that the indebtedness is upon an express contract, the affidavit is sufficient in that respect (Hale Bros. v. Milliken, 142 Cal. 134; 75 Pac. 653); but an averment in the affidavit, respecting the residence of the defendant, is not conclusive: the fact may be inquired into. Sparks v. Bell, 137 Cal. 415; 70 Pac. 281.

Discharge of the writ. The court must, upon proper application, discharge a writ of attachment wrongfully issued under this section. Jensen v. Dorr, 157 Cal. 437; 108 Pac. 320. Before the amendment in 1909 of § 558, the affidavit was not amendable at the time of the hearing of the motion to discharge the attachment because of a defect in the affidavit. Winters v. Pearson, 72 Cal. 553; 14 Pac. 304.

Variance in proceedings to obtain attachments. See note 107 Am. St. Rep. 894.

Variance in statement of claim between affidavit for attachment and declaration. See note 3 Ann. Cas. 186.

Effect on affidavit for attachment of statement of grounds in alternative or disjunctive. See notes 11 Ann. Cas. 27; 20 Ann. Cas. 576.

Requisites of affidavit for foreign attachment. See note 17 L. R. A. 88.

Amendment of affidavit for attachment. See note 31 L. R. A. 422.

Affidavit for attachment by agent or corporate officer. See note 14 L. R. A. (N. S.) 1126.

CODE COMMISSIONERS' NOTE. 1. Order in which clerk must issue. The clerk of the district court must issue the writs in the order in which they are demanded; but if the party who makes the first demand is not in attendance to receive his writ when completed, the clerk is not bound in the mean time to delay the issuing of other writs against the same party. When he has prepared for delivery the writ first demanded, he is bound to issue the writ of the next comer; and if in such case the next comer is not there to receive his writ, and for that reason the next comer first delivers his writ to the sheriff, and by that means acquires a priority, and the first comer loses his debt, the clerk is not liable. Lick v. Madden, 36 Cal. 208; 95 Am. Dec. 175; see also Lick v. Madden, 25 Cal. 205.

2. Form of affidavit. The omission from the affidavit to a statement that the sum for which the writ is asked is "an actual bona fide existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the debtor," does not render the attachment issued a nullity against subsequent attaching creditors. Fridenberg v. Pierson, 18 Cal. 152; 79 Am. Dec. 162. An affidavit for attachment is insufficient which states that the defendant is indebted to the plaintiff upon an "express or implied contract." Hawley v. Delmas, 4 Cal. 195.

3. Who may take advantage of defects in affidavit. See subd. 2 of note to the preceding section.

4. Express contract. An undertaking on appeal is an express contract. Hathaway v. Davis, 33 Cal. 161.

§ 539. Undertaking on attachment. Exceptions to sureties. Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, in the sum not less than two hundred dollars and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, and that if the attachment is discharged on the ground that the plaintiff was not entitled thereto under section five hundred and thirty-seven, the plaintiff will pay all damages which the defendant may have sustained by reason of the attachment, not exceeding the sum specified in the undertaking. At any time after the issuing of the attachment, but not later than five days after actual notice of the levy thereof, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk in the same manner as

upon bail on arrest; and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the judge or clerk must issue an order vacating the writ of attachment.

Undertaking, generally. Post, § 1057.

Sureties.

1. **Justification of.** Ante, § 495; post, § 555.
2. **Qualifications of.** Post, § 1057.

Undertaking to discharge attachment. Post, § 555.

Counter-undertaking to prevent levy. Post, § 540.

Dismissal of action on. Clerk to hand undertaking to defendant. Post, § 581, subd. 1.

Legislation § 539. 1. Enacted March 11, **1872**; based on Practice Act, § 122, as amended by Stats. 1860, p. 301, which read: "Before issuing the writ, the clerk shall require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking." When enacted in 1872, (1) the word "shall" was changed to "must," and (2) the word "and" was added before "not exceeding."

2. Amended by Code Amdts. **1873–74**, p. 308 (approved March 24, 1874), (1) changing the words "a sum" to "an amount," (2) changing the word "two" to "three," before "hundred dollars," (3) omitting the words "if the defendant recover judgment," after "effect that," (4) adding the words "including reasonable attorneys' fees," after "all costs," (5) changing the word "awarded" to "adjudged," and (6) adding the words "if the attachment be wrongfully issued" at the end of the section.

3. Amended again by Code Amdts. **1873–74**, p. 406 (approved March 30, 1874), to read: "Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. Within five days after service of the summons in the action, the defendant may except to the sufficiency of the sureties. If he fails to do so he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the clerk or judge shall issue an order vacating the writ of attachment."

4. Amendment by Stats. **1901**, p. 139; unconstitutional. See note ante, § 5.

5. Amended by Stats. **1907**, p. 708; the code commissioner saying, "The amendment makes the sureties answerable if the attachment is discharged on the ground that the plaintiff was not entitled thereto under § 537, and permits the defendant to except to the sufficiency of the sureties at any time after the issuing of the attachment not later than five days after actual notice of the levy."

The undertaking. A writ of attachment is improperly issued, and void, unless it is supported by an undertaking conforming substantially to the requirements of the statute. Kern Valley Bank v. Koehn, 157 Cal. 237; 107 Pac. 111. The undertaking is an original, independent contract on the part of the sureties, and must be construed in connection with the statute authorizing it (Frankel v. Stern, 44 Cal. 168); and it is the antecedent of the attachment, and accompanies the affidavit, which must be made before the writ is issued; and if no writ is issued, the undertaking is null and void. Benedict v. Bray, 2 Cal. 251; 56 Am. Dec. 332. The code does not require the undertaking to be executed, in form, to the defendant, but specifies the conditions it shall contain; and an undertaking executed to the state of California may be sued upon by the defendants, who are the real parties in interest. Taaffe v. Rosenthal, 7 Cal. 514. The amount of the undertaking is based upon the amount specified in the affidavit, and not upon the amount demanded in the complaint (Baldwin v. Napa etc. Wine Co., 137 Cal. 646; 70 Pac. 732); and where it is in a larger sum than that required, it is not objectionable. Wigmore v. Buell, 122 Cal. 144; 54 Pac. 600. The question presented on a motion to increase the amount of the undertaking is one of fact, calling for the exercise of judicial discretion, which cannot be controlled by mandamus. American Well etc. Co. v. Superior Court, 19 Cal. App. 497; 126 Pac. 497. An undertaking is fatally defective, where it fails to contain the required stipulation concerning the discharge of the attachment. Kern Valley Bank v. Koehn, 157 Cal. 237; 107 Pac. 111. The undertaking must show that the sureties are either householders or freeholders; and a writ issued upon an undertaking, unaccompanied by the required affidavit, is irregularly and improperly issued, and should be discharged upon application. Tibbet v. Tom Sue, 122 Cal. 206; 54 Pac. 741. An undertaking executed after the levy of the writ, and the dismissal of the attachment by the plaintiff, is void. Benedict v. Bray, 2 Cal. 251; 56 Am. Dec. 332. Where, in an undertaking, the word "thousand" was omitted from the words "two thousand two hundred and twenty-five dollars," and it was apparent from the whole undertaking and the statute that the omitted word was intended to be inserted, it will be supplied at the trial, without reforming the bond. Frankel v. Stern, 44 Cal. 168. A bond exacted by an officer having no authority to require it, is void. Benedict v. Bray, 2 Cal. 251; 56 Am. Dec. 332.

State, county, or city, not required to give undertaking. An undertaking given to procure an attachment upon the suit of the state, or any county or city, is in contravention of the policy of law, without consideration, and void, both as a statutory undertaking and a common-law bond (Morgan v. Menzies, 60 Cal. 341); and an attachment for a license tax due to a county may be issued without an undertaking, in an action by the county to col-

lect the same. San Luis Obispo County v. Greenberg, 120 Cal. 300; 52 Pac. 797.

Amendment of undertaking. Before the amendment in 1909 of § 558, neither an undertaking nor an affidavit was amendable, if not sufficient to sustain the writ. Tibbet v. Tom Sue, 122 Cal. 206; 54 Pac. 741.

Liability of sureties for wrongful attachment. The liability of the sureties is limited by the terms and conditions of their contract, and cannot be extended by implication beyond its terms (Elder v. Kutner, 97 Cal. 490; 32 Pac. 563; Hisler v. Carr, 34 Cal. 641); and though they are not liable for damages caused by the carelessness of the sheriff, yet they are liable for the amount of the depreciation in value of the property by reason of the attachment, exclusive of any damage caused by the willful and negligent acts of the sheriff (Witherspoon v. Cross, 135 Cal. 96; 67 Pac. 18); but they are not liable as trespassers for seizure or detention of property attached by a sheriff, merely because of their act in signing the bond. McDonald v. Fett, 49 Cal. 354. The measure of damages in an action upon an undertaking is the amount which will compensate for all detriment caused proximately thereby, or which would be liable to result therefrom; but sureties do not undertake to become liable for remote and possible consequences, which, in some contingencies, might follow. Elder v. Kutner, 97 Cal. 490; 32 Pac. 563. The measure of damages for the wrongful seizure and detention of personal property by attachment is the market value of the use of the property during the time of the detention, not its value to the plaintiff. Hurd v. Barnhart, 53 Cal. 97. Damages may be awarded for the depreciation in the value of goods during the time they are held under attachment, estimated upon a showing of their value when taken and their value when returned. Frankel v. Stern, 44 Cal. 168; Witherspoon v. Cross, 135 Cal. 96; 67 Pac. 18. The measure of damages, in case of attachment of personal property, is the difference in value of the property when seized and its value when restored, with the loss of its use meanwhile; and there is more reason for applying such rule respecting the measure of damages in the case of an attachment of stock, whose principal value consists in its selling value, than in the case of personal property generally: not only is the selling value destroyed by the attachment, but all of the profits and dividends to accrue from it are impounded equally with the stock itself. McCarthy Co. v. Boothe, 2 Cal. App. 170; 83 Pac. 175. The impairment of the plaintiff's credit, his inability to sell the land levied upon, or to contract a loan upon the security of the land, are not proximate, but remote, consequences of the attachment. Heath v. Lent, 1 Cal. 410; Elder v. Kutner, 97 Cal. 490; 32 Pac. 563. Damages accruing from a wrongful attachment of real estate, where the owner's possession was not disturbed, cannot be more than nominal. Heath v. Lent, 1 Cal. 410. The questions of motive and probable cause are immaterial in an action against the sureties on an undertaking; and the fact that the attachment was malicious does not affect their liability. Elder v. Kutner, 97 Cal. 490; 32 Pac. 563. Counsel fees paid in defending an attachment suit constitute part of the damages, where the writ is improperly prosecuted (Ah Thaie v. Quan Wan, 3 Cal. 216); but the sureties are not liable for attorneys' fees in an attachment suit, if such fees have not been actually paid: the damage accrues from the payment, and not from incurring the liability to pay. Elder v. Kutner, 97 Cal. 490; 32 Pac. 563. Fees paid to a sheriff to procure the release of a lien of attachment are included in the damages covered by the undertaking. Perrin v. McMann, 97 Cal. 52; 31 Pac. 837.

Action on undertaking. The defendant whose property has been seized is the only one who can sue upon the bond: a co-defendant whose property was not seized should not be joined as plaintiff. Heath v. Lent, 1 Cal. 410. The right of the attachment defendant to give a bond and secure the possession of the property, and thereby avoid damages consequent upon detention thereof, is no defense to the sureties on the attachment bond. McCarthy v. Boothe, 2 Cal. App. 170; 83 Pac. 175.

Exception to sufficiency of sureties. Excepting to the sufficiency of sureties upon an undertaking is not an appearance in the action wherein the attachment is issued. Salmonson v. Streiffer, 13 Cal. App. 395; 110 Pac. 144.

Justification of sureties. A defendant waives the justification of sureties upon an undertaking, where he fails to examine them as to their sufficiency. La Dow v. National Bldg. etc. Co., 11 Cal. App. 308; 104 Pac. 838.

Effect of void levy. A void levy of an attachment does not create a lien, nor does it bar a subsequent attachment. Kern Valley Bank v. Koehn, 157 Cal. 237; 107 Pac. 111.

CODE COMMISSIONERS' NOTE. 1. The undertaking. The undertaking should precede the writ. Benedict v. Bray, 2 Cal. 251; 56 Am. Dec. 332. It is good if made payable to the people of the state of California, instead of to the defendant. Taaffe v. Rosenthal, 7 Cal. 514. A mistake in the recital of the amount for which the attachment is to be issued may be explained and corrected by parol. Palmer v. Vance, 13 Cal. 556. In Hisler v. Carr, 34 Cal. 641, it was held that an undertaking given on issuing an attachment from a justice's court, to the effect that plaintiff would pay all costs, etc., and damages that the defendant might sustain by reason of the attachment, "not exceeding one hundred dollars," was bad, and rendered the attachment void; but the code changes the rule. See § 867 of this code.

2. Who may take advantage of defects in undertaking. See subd. 2 of note to § 537 of this code.

3. Amendments to undertakings. The undertaking may be amended and made sufficient after suit commenced, or after a motion to vacate attachment, made upon the ground that it is defective. Kissam v. Marshall, 10 Abb. Pr. 424.

4. Action on the undertaking. The "recovery of judgment" means a final judgment. Bennett v. Brown, 20 N. Y. 99; 31 Barb. 158. If the undertaking is void, there can be no recovery on it. Benedict v. Bray, 2 Cal. 251; 56 Am. Dec. 332. No recovery can be had on a bond purporting to be the joint bond of the principal and sureties, but signed by the sureties only; but it is otherwise as to undertakings, under our system. They are original and independent contracts on the part of the sureties, and do not require the signature of the principal. So, also, as to joint and several bonds; each surety is bound without the signatures of the others named as obligors, unless, at the time of executing the bond, he declared he would not be bound without such signatures were obtained. Sacramento v. Dunlap, 14 Cal. 421. The recitals in statutory undertakings are conclusive of the facts stated. McMillan v. Dana, 18 Cal. 339. In an action on an undertaking on attachment against the property of a debtor, who was a merchant, where the sheriff had levied on no property except real estate, it was held that evidence as to the general effect of an attachment upon the credit and reputation of merchants was inadmissible, on the ground that damages resulting therefrom are too remote and contingent. And it was held, further, that counsel fees paid by the attachment debtor in the defense of the attachment suit were not recoverable, and that the district judge erred in refusing, when requested, to instruct the jury to that effect, after having admitted evidence of the amount of such counsel fees. Heath v. Lent, 1 Cal. 410.

§ 540. Writ, to whom directed and what to state. The writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been, or is about to be, attached; in which case, to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties.

Writ, seal necessary to. Ante, § 153, subd. 1.
Sheriff.
1. **Duties of. Excused only by written directions.** Pol. Code, § 4166.
2. **When must show process.** Pol. Code, § 4169.
Exemptions from execution. Post, § 690.
Bond for release after appearance. Post, § 555.

Legislation § 540. Enacted March 11, **1872;** based on Practice Act, § 123, as amended by Stats. 1860, p. 315, which (1) had the word "shall" instead of "must," before "be directed," (2) did not have the word "must" before "require him," and (3) had the word "shall" instead of "must," before "be stated."

The demand stated in the writ. The demand referred to in this section is that stated in the affidavit upon which the writ is sought, not the amount in the complaint for which the plaintiff asks judgment; the basis for the writ is the affidavit, and the clerk must look to that alone to determine the amount for which the sheriff is to levy under the writ, as well as the amount for which the undertaking is to be given. Baldwin v. Napa etc. Wine Co., 137 Cal. 646; 70 Pac. 732; Finch v. McVean, 6 Cal. App. 272; 91 Pac. 1019. The plaintiff may file an unverified complaint in a larger amount than he would be willing to support upon oath; but he is entitled to a writ for only the amount in which he can "specify" in the affidavit that the defendant is "indebted" to him. Baldwin v. Napa etc. Wine Co., 137 Cal. 646; 70 Pac. 732. The provision of this section, that the amount of the demand must be stated in the writ in conformity with the complaint, is so plain that there is no room left for construction or speculation (Kennedy v. California Sav. Bank, 97 Cal. 93; 33 Am. St. Rep. 163; 31 Pac. 846); but it does not follow, because an attachment cannot rightfully issue for more than is demanded in the complaint, that it may not properly issue for less. De Leonis v. Etchepare, 120 Cal. 407; 52 Pac. 718; Tibbet v. Tom Sue, 122 Cal. 206; 54 Pac. 741; Hale Bros. v. Milliken, 142 Cal. 134; 75 Pac. 653. The provision that the amount of the demand must be stated in conformity with the complaint, is to be construed as limited to a complaint upon a cause of action for which a writ of attachment is authorized: this section does not declare that the amount of the demand shall be the same as the amount asked for by the plaintiff in the prayer of his complaint; and by holding that the demand stated in the writ must be in conformity with the complaint, so far as its allegations authorize the writ of attachment, full effect is given to all the provisions of the several sections upon this subject. Baldwin v. Napa etc. Wine Co., 137 Cal. 646; 70 Pac. 732. A writ, in an action against a corporation and its stockholders, which merely states the amount of the indebtedness claimed to be due from the corporation, without specifying the amount for which each of the stockholders is claimed to be liable, is irregular as to such stockholders, and should be discharged on motion. Kennedy v. California Sav. Bank,

97 Cal. 93; 33 Am. St. Rep. 163; 31 Pac. 846. Where the complaint demands certain specific sums which the allegations show to be due from the defendant to the plaintiff, and also certain other sums which are properly part of the sheriff's costs in keeping the attached property, the writ is in sufficient conformity with the complaint if it states the demand to be the amount which is properly due to the plaintiff. Wigmore v. Buell, 122 Cal. 144; 54 Pac. 600. An attachment that requires the taking of more of a defendant's property than is required to secure the indebtedness stated in the affidavit cannot be sustained. Finch v. McVean, 6 Cal. App. 272; 91 Pac. 1019. If the value of the property was uncertain at the time of attachment, it does not necessarily follow that the attachment was excessive because its value was subsequently ascertained to be greatly in excess of the demand sued for. Sexey v. Adkison, 40 Cal. 408. The words "or thereabouts," in the writ, following the specific statement of the amount of the demand, do not render the attachment proceedings void upon a collateral attack. Davis v. Baker, 88 Cal. 106; 25 Pac. 1108. Damage caused by an excessive levy cannot be set up by the defendant by way of cross-complaint in the attachment suit. Jeffreys v. Hancock, 57 Cal. 646. The validity of a writ, regular on its face, cannot be collaterally attacked for irregularities in the proceedings upon which it is based. Scrivener v. Dietz, 68 Cal. 1; 8 Pac. 609.

Writs to different counties. Writs of attachment to different counties may be issued at different times on the same affidavit and bond, provided they are issued within a reasonable time after the making and filing of the affidavit. Martinovich v. Marsicano, 150 Cal. 597; 119 Am. St. Rep. 254; 89 Pac. 333. What is meant by delay for an "unreasonable time," is such delay as would, under the circumstances, cast suspicion on the verity of the affidavit, or lead to the supposition that the grounds stated for the attachment had ceased to exist. Id.

Undertaking to prevent attachment. The provision of this section, that the plaintiff may have the defendant's property attached unless he gives security to pay the judgment, means that the plaintiff cannot have the property attached if the required security is given by a bond to prevent the attachment: the bond is not given alone for the personal protection of the sheriff, but also to the defendant to protect his property from attachment, and to the plaintiff to secure the payment of any judgment that may be rendered. Ayres v. Burr, 132 Cal. 125; 64 Pac. 120. The act of a sheriff in refraining from enforcing the writ, or from attempting to make the levy, is a sufficient consideration for the giving of the bond to him to prevent the levy. Fresno Home Packing Co. v. Hannon, 16 Cal. App. 284; 116 Pac. 687. The undertaking is in favor of the plaintiff in the action, although it runs in the name of the sheriff: the plaintiff is the real party in interest, and he may sue upon it as such. Curiae v. Packard, 29 Cal. 194. A succeeding sheriff, having the custody of the bond given to his predecessor to prevent the levy, is justified in refusing to execute a second writ, issued by the clerk after reversal of the judgment upon appeal. Ayres v. Burr, 132 Cal. 125; 64 Pac. 120. If the sheriff takes a sufficient statutory undertaking, his duty in the premises is discharged, and he is not further responsible in the matter. Curiae v. Packard, 29 Cal. 194. It is not necessary, in an action upon the bond given to the sheriff to prevent the levy, that the complaint should aver that the defendant in the attachment suit had property within the county which was subject to be levied upon under the writ. Fresno Home Packing Co. v. Hannon, 16 Cal. App. 284; 116 Pac. 687. Where, by the terms of an undertaking to prevent the levy of an attachment, the parties thereto undertook to pay, on demand, any judgment which the attaching creditor might recover against the attachment debtor, they are not, as between themselves and the attaching creditor, released from liability by reason of the sheriff having attached the property prior to the giving of the undertaking and subsequently releasing it, nor because the judgment in the attachment suit was entered by consent, and execution stayed for sixty days by stipulation of the parties. Preston v. Hood, 64 Cal. 405; 1 Pac. 487. Where a bond, given to prevent the levy of an attachment, is, in terms, joint and several, a dismissal of the action, as against one of the sureties, does not impair or affect the maintenance of the action upon the several obligation of the other surety. Fresno Home Packing Co. v. Hannon, 16 Cal. App. 284; 116 Pac. 687.

Undertaking to release attachment. A bond taken by the sheriff, in consideration of the release of the attachment, is not void for want of conformity to the requirements of the statute, which, while prescribing one form, does not prohibit another, which may be good at common law. Smith v. Fargo, 57 Cal. 157; Palmer v. Vance, 13 Cal. 553. Where a common-law bond is given for the release of attached property, the issuance of execution against the judgment debtor and return thereof unsatisfied are not necessary prerequisites to the maintenance of suit thereon. Kanouse v. Brand, 11 Cal. App. 669; 106 Pac. 120. The recitals, in a bond for the release of an attachment, of the plaintiff's claim, of the levy of the attachment, and of the desire of the defendant to release the same by bond, are

conclusive against the obligor, whether it be a statutory or a common-law bond. Bailey v. Ætna Indemnity Co., 5 Cal. App. 740; 91 Pac. 416. A bond given for the release of a vessel seized under the act of April 10, 1850, but which was not liable to seizure thereunder, is void. McQueen v. Ship Russell, 1 Cal. 165; and see McMillan v. Dana, 18 Cal. 339; Pierce v. Whiting, 63 Cal. 538. A bond for the release of an attachment does not operate as a stay bond. Bailey v. Ætna Indemnity Co., 5 Cal. App. 740; 91 Pac. 416. The sheriff is required to release the attachment when the defendant gives an undertaking sufficient to satisfy the demand, or an undertaking in an amount equal to the value of the property attached (Curtin v. Harvey, 120 Cal. 620; 52 Pac. 1077); but he has no authority to release an attachment, other than that given him by statute; and he can release the property before the return of the writ, only upon giving the prescribed undertaking, and after the return he has no authority at all in that behalf; an attempt to release the property without the plaintiff's consent, is a breach of duty, and, if he does so with the plaintiff's consent, he obtains his authority from the plaintiff, and not from the statute; and if the defendant, after the return of the writ, desires the release of the property, he must apply to the plaintiff, or he may enter his appearance in the action, and apply to the court for the order of release, as provided in §§ 554, 555, post. Hesser v. Rowley, 139 Cal. 410; 73 Pac. 156; Maskey v. Lackmann, 146 Cal. 777; 81 Pac. 115.

Liability of the sureties. The liability of a surety, where he gives an undertaking sufficient to satisfy the demand, is the amount of the plaintiff's demand; but if he gives an undertaking in an amount equal to the value of the property attached, his liability is the value of such property. Curtin v. Harvey, 120 Cal. 620; 52 Pac. 1077. In the case of a statutory bond, a return of execution, unsatisfied in whole or in part, against the debtor, is essential to fix the liability of the sureties thereon. Kanouse v. Brand, 11 Cal. App. 669; 106 Pac. 120. A stay bond given by the defendant on appeal does not discharge the obligation of an undertaking given under this section to prevent the attachment. Ayres v. Burr, 132 Cal. 125; 64 Pac. 120. Tender to the plaintiff and refusal by him, of the full amount of the debt and costs, discharges the sureties from their obligation on the bond; and for the purpose of discharging the sureties, it is not necessary that such tender shall be paid into court or kept good. Curiac v. Packard, 29 Cal. 194; Hayes v. Josephi, 26 Cal. 535. An action upon an undertaking, conditioned to pay the amount of any judgment that should be recovered in an attachment suit, will be sustained, although judgment was rendered against only one of several defendants. McCutcheon v. Weston, 65 Cal. 37; 2 Pac. 727. Where the property of the maker of a note is attached in an action against him and his indorser, and an undertaking is thereupon given for the release of such property, conditioned that the sureties will pay any judgment which may be recovered against such maker, they cannot, on paying the judgment, be subrogated to any right not possessed by their principal; hence, they cannot take an assignment of the judgment and enforce it against such indorser. March v. Barnet, 121 Cal. 419; 66 Am. St. Rep. 44; 53 Pac. 933. The adjudication of the bankruptcy of the defendant, after the levy of the attachment, does not discharge the sureties on a bond conditioned for the payment of any judgment the plaintiff might recover against the defendant, if the defendant does not, in the attachment suit, plead the discharge in bankruptcy, and the plaintiff recovers judgment. Goodhue v. King, 55 Cal. 377; and see Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73.

Duties and liabilities of the sheriff. Under this section, the sheriff may release property from attachment at any time prior to his return on the writ (San Francisco Sulphur Co. v. Ætna Indemnity Co., 11 Cal. App. 695; 106 Pac. 111); but, by making his return, he divests himself of any statutory power or authority to release the attached property. Kanouse v. Brand, 11 Cal. App. 669; 106 Pac. 120. It is the duty of the sheriff, instead of levying the writ of attachment, to accept the undertaking in lieu of such levy; or, if he has made the levy and taken the property into custody, to accept the prescribed undertaking, when tendered prior to the return of the writ, and release the property. Kanouse v. Brand, 11 Cal. App. 669; 106 Pac. 120. The sheriff has no authority, under instructions from the creditor's attorney, to keep open and conduct a business seized on attachment, and charge the expenses to the attaching creditor: the attorney cannot bind his client for such expenditures. Alexander v. Denaveaux, 53 Cal. 663. The sheriff has no right to sell property, or to permit it to be sold, pending suit, in the absence of an order of court: the act of a warehouseman, with whom he stored the property, in making a sale thereof for storage, is the act of his principal, the sheriff, who is liable as for the conversion of property, whether or not he ever had a lien on it for his fees, and the only liability of the sureties is on their contract, not being joint tort-feasors. Aigeltinger v. Whelan, 133 Cal. 110; 65 Pac. 125. The administrator of the defendant may bring an action to recover the value of property

tortiously taken after dissolution of the attachment by the death of the defendant. Ham v. Henderson, 50 Cal. 367. The judgment for the defendant in an attachment suit is admissible in evidence to establish the dissolution of the attachment and to show the defendant's right to the return of the property, in an action against the officer for damages for failure to return the property. Aigeltinger v. Whelan, 133 Cal. 110; 65 Pac. 125. On appeal, the release must be presumed to have been made before the return of the writ, in a collateral action, where the pleadings do not allege the contrary. Maskey v. Lackmann, 146 Cal. 777; 81 Pac. 115.

Effect of unrecorded deed on subsequent attachment. An unrecorded deed takes precedence over a subsequent attachment or judgment against the grantor. Wolfe v. Langford, 14 Cal. App. 359; 112 Pac. 203.

CODE COMMISSIONERS' NOTE. 1. **Return-day.** No return-day need be inserted in the writ. Genin v. Tompkins, 12 Barb. 265–287; 1 Code Rep. (N. S.) 415; Camman v. Tompkins, 1 Code Rep. (N. S.) 12–16.

2. **Omissions.** The attachment is not void if it omits to state that "it was issued in an action then pending." Lawton v. Reil, 34 How. Pr. 465; Lawton v. Kiel, 51 Barb. 30.

3. **Form and effect of undertaking on release of attachment.** See Curiac v. Packard, 29 Cal. 194.

§ 541. Shares of stock and debts due defendant, how attached and disposed of. The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profit thereon, and all debts due such defendant, and all other property in this state of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.

Attachment.

1. **Building material, when not subject to.** See post, § 1196.

2. **Co-operative business association, property of subject to.** See Civ. Code, § 653f.

3. **Debts and credits, etc., how.** Post, § 542, subd. 5.

4. **Moneys arising from mutual-assessment contract, exemptions from.** See Civ. Code, § 453k.

5. **Stocks or shares, how.** Post, § 542, subd. 4.

6. **Vessel, tackle, furniture, etc.** See post, §§ 817 et seq.

Garnishment, generally. Post, §§ 543–545.

Legislation § 541. Enacted March 11, **1872**; based on Practice Act, § 124, which had the word "profit" instead of "profits."

Shares of stock in corporation. The attachment of corporate stock impounds all profits and dividends thereon. McCarthy Co. v. Boothe, 2 Cal. App. 170; 83 Pac. 175. A transfer of unregistered corporate stock takes precedence over a subsequent attachment or execution levied on the stock for the debt of the vendor, in whose name it stands upon the books of the corporation. National Bank v. Western Pacific Ry. Co., 157 Cal. 573; 27 L. R. A. (N. S.) 987; 21 Ann. Cas. 1391; 108 Pac. 676. Pledged stock, standing on the books of the corporation in the name of the pledgor, is attachable as his property. Strout v. Natoma etc. Mining Co., 9 Cal. 78. Stock-certificates pledged as collateral security, but not transferred on the books of the company, and the possession of which the pledgee does not retain, may be attached as against the pledgor: such pledge is void as to attaching creditors. McFall v. Buckeye etc. Ass'n, 122 Cal. 468; 68 Am. St. Rep. 47; 55 Pac. 253. The assignee or pledgee of stock-certificates, in order to protect his rights as against attachments levied thereon as the property of his assignor or pledgor, must have the certificates reissued to himself, or serve notice on the corporation that he holds them as such assignee or pledgee: one purchasing, at execution sale, shares of a corporation, standing on the books of the corporation in the name of the judgment debtor, is entitled to have the certificate of such shares reissued to him, if, at the time of the purchase, he acts in good faith, and without notice that an outstanding certificate has been assigned or pledged to some person other than the judgment debtor. West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315; 85 Am. St. Rep. 171; 65 Pac. 622. An execution purchaser of stock, with notice that it has been assigned as security, takes it subject to the rights of the assignee. Weston v. Bear River etc. Mining Co., 6 Cal. 425; Naglee v. Pacific Wharf Co., 20 Cal. 529; People v. Elmore, 35 Cal. 655; Winter v. Belmont Mining Co., 53 Cal. 428; Farmers' Nat. Gold Bank v. Wilson, 58 Cal. 600; West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315; 85 Am. St. Rep. 171; 65 Pac. 622.

Interests in real property. Land conveyed in trust to pay certain creditors, reserving the right to surplus profits, where not made in fraud of creditors, is not subject to attachment in an action against the grantor. Heath v. Wilson, 139 Cal. 362; 73 Pac. 182. The vendor's equitable lien on real estate, after absolute conveyance thereof, is not subject to levy and sale on execution: the indebtedness for the purchase price of real estate may be levied upon, but the vendor's equitable lien, attaching by virtue of indebtedness, is extinguished by the transfer of the indebtedness. Ross v. Heintzen, 36 Cal. 313; Baum v. Grigsby, 21 Cal. 172; 81 Am. Dec. 153; Lewis v. Covillaud, 21 Cal. 178; Williams v. Young, 21 Cal. 227.

Property not subject to attachment. Public buildings are not subject to attachment. Dennis v. First Nat. Bank, 127 Cal. 453; 78 Am. St. Rep. 79; 59 Pac. 777.

A license or privilege, personal in character, is not subject to attachment. Lowenberg v. Greenebaum, 99 Cal. 162; 37 Am. St. Rep. 42; 21 L. R. A. 399; 33 Pac. 794.

A patent right, not being tangible property, but an incorporeal right, is not subject to attachment (Peterson v. Sheriff, 115 Cal. 211; 46 Pac. 1060); but in proceedings supplementary to execution the execution debtor may be compelled to make an assignment, to a receiver, of his patent right. Pacific Bank v. Robinson, 57 Cal. 520; 40 Pac. 120.

Money deposited in bank, the proceeds of life-insurance policies payable to a widow as beneficiary, is not subject to execution. Holmes v. Marshall, 145 Cal. 777; 104 Am. St. Rep. 86; 69 L. R. A. 67; 2 Ann. Cas. 88; 79 Pac. 534.

A broker's seat in a stock and exchange board is not subject to attachment. Lowenberg v. Greenebaum, 99 Cal. 162; 37 Am. St. Rep. 42; 21 L. R. A. 399; 33 Pac. 794.

Salaries of public officials, whether state, county, or municipal, are not subject to attachment. Ruperick v. Baehr, 142 Cal. 190; 75 Pac. 782.

A franchise, held by an individual, to collect toll on a toll-road is not subject to attachment (Gregory v. Blanchard, 98 Cal. 311; 33 Pac. 199); nor is the franchise of a street-railroad, except when otherwise provided by statute. Risdon Iron etc. Works v. Citizens' Traction Co., 122 Cal. 94; 68 Am. St. Rep. 25; 54 Pac. 529.

An assigned chose of action is not subject to attachment. Walling v. Miller, 15 Cal. 38; McIntyre v. Hauser, 131 Cal. 11; 63 Pac. 69.

Judgments cannot be levied upon and sold under execution as personal property capable of manual delivery; it is only the debt itself that may be attached: there is no provision for attaching or levying on evidences of debt. McBride v. Fallon, 65 Cal. 301; 4 Pac. 17; Dove v. Dougherty, 72 Cal. 232; 1 Am. St. Rep. 48; 13 Pac. 621; Latham v. Blake, 77 Cal. 646; 18 Pac. 150; 20 Pac. 417; Hoxie v. Bryant, 131 Cal. 85; 63 Pac. 153; Fore v. Manlove, 18 Cal. 436.

Homestead. Where property impressed with the character of a homestead is worth more than the homestead exemption, a levy can only be made for the purpose of inaugurating proceedings for the admeasurement of the excess in value. Lubbock v. McMann, 82 Cal. 226; 16 Am. St. Rep. 108; 22 Pac. 1145; and see Ackley v. Chamberlain, 16 Cal. 181; 76 Am. Dec. 516; Bowman v. Norton, 16 Cal. 213; Barrett v. Sims, 59 Cal. 615; Sanders v. Russel, 86 Cal. 119; 21 Am. St. Rep. 26; 24 Pac. 852; Dam v. Zink, 112 Cal. 91; 44 Pac. 331; Lean v. Givens, 146 Cal. 739; 106 Am. St. Rep. 79; 81 Pac. 128.

Property, after sale on execution, left in the possession of the execution debtor, is not thereafter liable to attachment by other creditors; nor, after the execution sale, is change of possession required to make valid the transfer as against his creditors. Matteucci v. Whelan, 123 Cal. 312; 69 Am. St. Rep. 60; 55 Pac. 990.

Debts not due; negotiable instruments. Debts not due are not subject to garnishment (Early v. Redwood City, 57 Cal. 193); nor can property be taken in attachment, that is not liable to seizure under the execution when issued. Myers v. Mott, 29 Cal. 359; 89 Am. Dec. 49. Credit must exist at the time of levy of attachment, or no lien is created; hence, although a defendant may have earned a portion of the amount payable upon the conclusion of his contract with the garnishee, if the amount thereof is not payable until the conclusion of the contract, there is no credit which may be attached. Early v. Redwood City, 57 Cal. 193. Where payment is to be made when property is delivered at a specified place, no debt is created until delivery is made: an attachment served at the place of delivery, before the property is delivered, is premature and invalid. Maier v. Freeman, 112 Cal. 8; 53 Am. St. Rep. 151; 44 Pac. 357. If, at the time the attachment is served upon the garnishee, the defendant in the attachment can maintain against him an action of debt or indebitatus assumpsit, the liability of the garnishee is transferred from the defendant to the plaintiff in the attachment suit, and not otherwise. Hassie v. G. I. W. U. Congregation, 35 Cal. 378. Before the maturity of a promissory note, the indebtedness of the maker thereon is not the subject of attachment: the obligation of the maker is not to the payee named in the note, but to the holder, whoever he may be. Gregory v. Higgins, 10 Cal. 339. Money on deposit in a bank, upon which negotiable certificates have been paid for the full amount, is not subject to attachment. McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655. The garnishee is not liable to any creditor of the defendant by virtue of an attachment levied after the debt has become barred as to such defendant by the statute of limitations. Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36.

Contingent contracts and interests. Contracts, contingent and complicated, which cannot be taken into the possession of the sheriff, cannot be levied upon and sold under execution, and, apparently, are not subject to attachment (Crandall v. Blen, 13 Cal. 15); neither are contingent interests subject to attachment. Tuohy v. Wingfield, 52 Cal. 319; Howell v. Foster, 65 Cal. 169; 3 Pac. 647; Farnum v. Hefner,

79 Cal. 575; 12 Am. St. Rep. 174; 21 Pac. 955; Ward v. Waterman, 85 Cal. 488; 24 Pac. 930. An assignment may be legally made of money to become due upon the completion of work according to the terms of a contract; and upon the completion of such work the assignor has no attachable interest therein. Early v. Redwood City, 57 Cal. 193. The equitable interest of a subcontractor in a portion of a building contract assigned to him by the contractor, which is to be paid in installments upon certain contingencies is not subject to attachment (Hassie v. G. I. W. U. Congregation, 35 Cal. 378); nor is the equitable right of the assignee of a vendee under an executory contract for the conveyance of land, upon the breach of a contract, to recover the amount paid on the purchase price. Redondo Beach Co. v. Brewer, 101 Cal. 322; 35 Pac. 896. A mortgagee's interest in mortgaged land is not an estate, either before or after condition broken, and is not subject to attachment. McGurren v. Garrity, 68 Cal. 566; 9 Pac. 839. The purchaser of mortgaged premises does not, by his purchase, become indebted to the mortgagee, nor does he become a debtor by virtue of an agreement with his vendor to pay the mortgage debt; hence, he cannot be garnished by a creditor of the mortgagee. Hartman v. Olvera, 54 Cal. 61.

Property in the custody of the law. Property in the custody of the law is not subject to attachment. Yuba County v. Adams, 7 Cal. 35; Clymer v. Willis, 3 Cal. 363; 58 Am. Dec. 414. Thus, money in the hands of an administrator, before decree of distribution, is not subject to garnishment. Estate of Nerac, 35 Cal. 392; 95 Am. Dec. 111. Funds in the hands of a receiver, master in chancery, trustee of court, assignee in bankruptcy or insolvency, executor or administrator, are not subject to garnishment before the order of distribution is made by the court. Dunsmoor v. Furstenfeldt, 88 Cal. 522; 23 Am. St. Rep. 331; 12 L. R. A. 508; 26 Pac. 518; Adams v. Haskell, 6 Cal. 113; 65 Am. Dec. 491. Money collected by a sheriff on execution is not a debt due the plaintiff in execution, but is in the custody of the law until finally and properly disposed of, and is not the subject of attachment. Clymer v. Willis, 3 Cal. 363; 58 Am. Dec. 414. Money deposited with a sheriff to procure the release of an attachment is in the custody of the law, and is not the subject of attachment; but where the parties, by a mutual agreement, and without any order of the court, take the money out of the hands of the sheriff and lend it to third parties, the latter are not bailees of the sheriff, and the money is no longer in the custody of the law. Hathaway v. Brady, 26 Cal. 581. Money deposited with the clerk of the court, for the benefit of creditors, by order of the court, is in the custody of the law until the determination of the suit by a decree fixing the share of each creditor, and is not subject to attachment. Dunsmoor v. Furstenfeldt, 88 Cal. 522; 22 Am. St. Rep. 331; 12 L. R. A. 508; 26 Pac. 518. The assets of a bank in liquidation under the Bank Commissioners' Act are not subject to attachment. Crane v. Pacific Bank, 106 Cal. 64; 27 L. R. A. 562; 39 Pac. 215. Under the National Banking Act, no attachment can issue against a national bank from a state court. Dennis v. First Nat. Bank, 127 Cal. 453; 78 Am. St. Rep. 79; 59 Pac. 777. The claim of a Federal court, that money in the possession of its clerk is held by him as an officer of the court, precludes an effective garnishment thereof in a court of this state; there being no common arbiter between state and Federal courts, comity between them becomes a necessity, and is a law not to be disregarded; and the Federal court, when first in possession of the subject of litigation, must be left to determine when its possession and control thereof has ended. Swinnerton v. Oregon Pacific R. R. Co., 123 Cal. 417; 56 Pac. 40. Property taken from a prisoner, on his arrest by an officer charged with that duty, is not subject to garnishment. Coffee v. Haynes, 124 Cal. 561; 71 Am. St. Rep. 99; 57 Pac. 482.

Attachment of shares of corporate stock. See note 52 Am. St. Rep. 474.

Garnishment of stock in foreign corporation. See note 55 L. R. A. 797.

Right of creditor who is also a stockholder of an insolvent corporation to attach property of corporation as affected by his own statutory liability. See note 41 L. R. A. (N. S.) 987.

Garnishment of money due on negotiable instrument. See note 55 Am. Dec. 68.

Liability of promissory note to seizure and sale under attachment. See note 15 Ann. Cas. 980.

Whether money in officer's hands is subject to attachment. See note 55 Am. Dec. 264.

Liability of cars of foreign railroad to attachment. See notes 104 Am. St. Rep. 663; 2 Ann. Cas. 349; 11 Ann. Cas. 910.

Liability to attachment at suit of contractor's creditors, of materials furnished to be used in construction of building. See note Ann. Cas. 1913A, 876.

Equitable interest in personal property as subject to attachment. See note 11 Ann. Cas. 669.

Attachment of funds held by trustee in bankruptcy. See note 13 Ann. Cas. 810.

Garnishment of unearned salary. See note 20 L. R. A. (N. S.) 912.

Garnishment of husband's interest in wife's legacy or distributive share in decedent's estate. See note 47 L. R. A. 360.

Garnishment of unliquidated claims. See note 59 L. R. A. 353.

Garnishment of distributive shares in decedent's estate before settlement. See note 59 L. R. A. 387.

CODE COMMISSIONERS' NOTE. 1. What may or may not be attached. The interest of a pledgor is subject to execution, and is reached by serving and enforcing a garnishment on the pledgee, not by a seizure of the pledge. Treadwell v. Davis, 34 Cal. 601; 94 Am. Dec. 770. Money in the hands of an administrator, after decree made, distributing it to an heir or devisee, may be garnished by a creditor of the distributee. Estate of Nerac, 35 Cal. 392; 95 Am. Dec. 111. An equitable demand is not the subject of garnishment; it reaches only legal debts,—debts upon which the defendant, at the time of garnishment,

could have maintained, under the common-law practice, an action of debt or assumpsit. Hassie v. G. I. W. U. Congregation, 35 Cal. 378. Funds in the hands of a receiver are not subject to attachment. Adams v. Haskell, 6 Cal. 113; 65 Am. Dec. 491; Yuba County v. Adams, 7 Cal. 35. The indebtedness of a maker upon a promissory note, before its maturity, is not the subject of attachment. His obligation is not to the payee named in the note, but to the holder. Nor can such indebtedness, after maturity, be attached, unless the note is, at the time, in the possession of the defendant, from whom its delivery can be enforced on its payment upon the attachment. Gregory v. Higgins, 10 Cal. 339.

2. **Extent of the seizure.** Fitzgerald v. Blake, 42 Barb. 513; 28 How. Pr. 110. If, at the time of the levy, there is great uncertainty as to the value of the property attached, and it subsequently appears that its value was greatly in excess of the demand sued for, it does not follow that the levy was excessive. Sexey v. Adkison, 40 Cal. 408.

3. **Letters and correspondence.** The officer is not authorized to seize letters; and where he did, and took copies of business letters, and looked into the correspondence of a firm, it was held a gross abuse of his powers. Hergman v. Dettlebach, 11 How. Pr. 46.

§ 542. How real and personal property shall be attached. The sheriff to whom the writ is directed and delivered, must execute the same without delay, and if the undertaking mentioned in section five hundred and forty be not given, as follows:

1. Real property, standing upon the records of the county in the name of the defendant, must be attached, by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached; and by leaving a similar copy of the writ, description, and notice with an occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached.

2. Real property, or an interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached, by filing with the recorder of the county a copy of the writ, together with a description of the property, and a notice that such real property, and any interest of the defendant therein, held by or standing in the name of such other person (naming him), are attached; and by leaving with the occupant, if any, and with such other person, or his agent, if known and within the county, or at the residence of either, if within the county, a copy of the writ, with a similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property. The recorder must index such attachment when filed, in the names, both of the defendant and of the person by whom the property is held or in whose name it stands on the records.

3. Personal property, capable of manual delivery, must be attached by taking it into custody.

4. Stocks or shares, or interest in stocks or shares, of any corporation or company, must be attached by leaving with the president, or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ.

5. Debts and credits and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ, except in the case of attachment of growing crops, a copy of the writ, together with a description of the prop-

erty attached, and a notice that it is attached, shall be recorded the same as in the attachment of real property.

Attachment lien, officers. Civ. Code, § 3057.
Leviable interest in mortgaged property. Civ. Code, §§ 2968–2970.
Fraudulent transfers. Civ. Code, §§ 1227, 3431, 3439–3442.

Legislation § 542. 1. Enacted March 11, **1872**; based on Practice Act, § 125, as amended by Stats. 1862, p. 568, and (1) in the introductory paragraph, the word "shall" was printed "must"; (2) subd. 1 read, "Real property standing upon the records of the county, in the name of the defendant, shall be attached, by leaving a copy of the writ with an occupant thereof; or, if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the recorder of the county"; (3) subd. 2 read, "Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, shall be attached, by leaving with such person, or his agent, a copy of the writ, and a notice that such real property, (giving a description thereof,) and any interest therein, belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county, and leaving a copy of such writ and notice with an occupant of such property, or, if there be no occupant, by posting a copy thereof in a conspicuous place thereon"; (4) in subd. 3, the word "must" was printed "shall"; (5) in subd. 4, (a) the word "stocks" was printed "stock," in both instances, and (b) the word "must" was printed "shall"; (6) in subd. 5, (a) the words "Debts" and "must" were printed, respectively, "Debits" and "shall," (b) the word "owing," before "such debts," was printed "owning," and (c) the word "or," before "the credits and," was printed "on." When enacted in 1872, § 542 read as at present, except that, in subd. 5, (1) the word "owning," before "such debts," was not changed to "owing," and (2) it did not contain the exception at the end of that subdivision, beginning "except in the case."

2. Amendment by Stats. **1901**, p. 139; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1903**, p. 167, in subd. 5, (1) changing the word "owing" from "owning," and (2) adding the exception at the end, after "pursuance of such writ."

Power of legislature. The legislature may provide not only in what cases an attachment may issue, but also the classes of property upon which it may be levied. Dennis v. First Nat. Bank, 127 Cal. 453; 78 Am. St. Rep. 79; 59 Pac. 777.

Execution of writ. A writ of attachment is not wholly executed by the seizure of the attached property, so far as the officer is concerned, although it is so as to the owner of the property; the writ also, by its terms, requires the sheriff to keep safely the attached property; and where the duty of safe-keeping is not completely executed at the expiration of the term of office of the sheriff, that duty devolves, by the County Government Act, upon his successor in office. Wood v. Lowden, 117 Cal. 232; 49 Pac. 132. A writ under which nothing whatever has been done is to be turned over by the sheriff, at the expiration of his term of office, to his successor; but if it has been executed, or if the outgoing officer has already begun its execution, it is not to be turned over; neither is property held under a levy of the writ to be surrendered to the new sheriff. Sagely v. Livermore, 45 Cal. 613 (but this case arose under the law in force prior to 1883); and see Perrin v. McMann, 97 Cal. 52; 31 Pac. 837. The lien of an attachment is not affected by any irregularities in the attachment, but such irregularities are waived by the defendant, where he appears and answers without taking advantage of them by motion or otherwise. Porter v. Pico, 55 Cal. 165. The lien of an attachment, properly levied, is not divested by the failure of the officer to make a proper return of the writ. Ritter v. Scannell, 11 Cal. 239; 70 Am. Dec. 775. Where one writ of attachment was placed in the hands of the sheriff between nine and ten o'clock Sunday evening, and another writ, against the same defendant, was placed in the hands of a deputy a few minutes after midnight, the sheriff not knowing the fact; and the first levy was made on the last writ at one o'clock Monday morning, and the second levy, under the first writ, was made by the sheriff at eight o'clock of the same morning, the sheriff was held not guilty of negligence in executing the first writ, no special circumstances being shown. Whitney v. Butterfield, 13 Cal. 335; 73 Am. Dec. 584. It is the duty of the officer, after he has once entered upon the execution of the writ, to complete its execution with diligence. Wheaton v. Neville, 19 Cal. 41. The sheriff must execute the writ with all reasonable celerity; but he is not held to the duty of starting to execute it on the instant he receives it, without regard to anything else than its instant execution; unless some special reasons of urgency exist; reasonable diligence is all that is required; but this reasonable diligence depends upon the particular facts in connection with the duty. Whitney v. Butterfield, 13 Cal. 335; 73 Am. Dec. 584. The sheriff has no right to sell attached property at private sale, or to authorize another to do so, and for such default he and his sureties are liable on his official bond; and it makes no difference that the property was sold for its highest market value; and the proceeds of such sale can go merely in reduction of damages in an action by the attaching creditor against the officer. Sheehy v. Graves, 58 Cal. 449. The decision of the trial court as to the sufficiency of the levy will not be reversed on appeal, where the evidence is conflicting. Rudolph v. Saunders, 111 Cal. 233; 43 Pac. 619. Matters relied on as operating to dissolve the writ must be specially pleaded by the sheriff, in an action against him for a violation of his duty in the service thereof. McComb v. Reed, 28 Cal. 281; 87 Am. Dec. 115.

Liability for wrongful seizure. A third party, seizing the goods of the defendant

in attachment proceedings, which are pledged to the plaintiff, is a trespasser, and liable to the pledgee for the entire value of the goods. Treadwell v. Davis, 34 Cal. 601; 94 Am. Dec. 770. Where, under a writ of attachment against one person, an officer seizes the goods of another, which at the time are in the custody either of the owner or of a person other than the defendant in the writ, he is a trespasser ab initio. Black v. Clasby, 97 Cal. 482; 32 Pac. 564.

Protection of officer by writ. When property is in the possession of the defendant to the action, the writ of attachment alone, if it is issued by competent authority and is regular on its face, protects the sheriff or constable. Laughlin v. Thompson, 76 Cal. 287; 18 Pac. 330; Horn v. Corvarubias, 51 Cal. 524. Where the affidavit is defective the writ does not protect the constable. Hisler v. Carr, 34 Cal. 641. A sheriff makes out a prima facie case of justification of the seizure of property by the production of the writ and the affidavit on which it was issued, notwithstanding the affidavit was originally insufficient and was amended subsequently to the seizure, if the property was in the possession of the defendant, and attached as his property. Babe v. Coyne, 53 Cal. 261. The sheriff cannot go behind a writ, regular on its face, and adjudge the question of its validity on pleadings, affidavit, or proceedings in the action in which it is issued (McComb v. Reed, 28 Cal. 281; 87 Am. Dec. 115; Harvey v. Foster, 64 Cal. 296; 30 Pac. 849); but he may limit his inquiries as to the validity of the writ; and if it is regular on its face, it will protect him in the performance of his ministerial duties in serving it. Norcross v. Nunan, 61 Cal. 640.

Real property standing in name of defendant. In executing a writ of attachment, the failure of the officer to post upon the land, where it is not occupied, a copy of the description of the land, in connection with a copy of the writ of attachment, and of the notice that the land had been attached, is fatal to the validity of the levy, and no lien is created thereon. Main v. Tappener, 3 Cal. 206; Sharp v. Baird, 43 Cal. 577; Watt v. Wright, 66 Cal. 202; 5 Pac. 91. Where the land attached is a lot, vacant except for a small building used as an office, posting the notice on such building is sufficient. Davis v. Baker, 72 Cal. 494; 14 Pac. 102. The statute does not require that the papers shall be posted in the most conspicuous place, but in a conspicuous place: posting on a house, within five or six feet from the street, where it could be seen, is sufficient. Davis v. Baker, 88 Cal. 106; 25 Pac. 1108. An attempted levy of an attachment on real property of a judgment debtor does not create a lien thereon to which the right of a purchaser at the execution sale can relate, unless a copy of the writ, together with a description of the property attached, and a notice that it is attached, is left with an occupant of the property, or posted upon it. Schwartz v. Cowell, 71 Cal. 306; 12 Pac. 252; Maskell v. Barker, 99 Cal. 644; 34 Pac. 340. The two acts prescribed—the delivery to the occupant of a copy of the writ, or the posting of a copy on the premises, if there is no occupant, and the filing of a copy with the recorder, together with a description of the property attached—must be done, before the lien of attachment is perfected: the omission of either act is fatal to the creation of the lien. Wheaton v. Neville, 19 Cal. 41; Main v. Tappener, 43 Cal. 206. As used in this section, the word "occupant" means some one visibly occupying the property, so that when the officer visits the property to complete the levy, he can determine, from what he can see, whether he shall serve the copies by leaving them with an occupant or by posting; under this interpretation of the word, the writ may be served with the promptness essential to the beneficial use of the writ. Davis v. Baker, 72 Cal. 494; 14 Pac. 102. The property stands in the defendant's name, notwithstanding he has executed a conveyance which has been placed of record, if such conveyance appears upon its face to be void as being a trust deed to convey; in such case the levy of attachment against the defendant is to be made as prescribed in the first subdivision, and not as prescribed in the second subdivision, of this section. Johnson v. Miner, 144 Cal. 785; 78 Pac. 240. The deposit in the recorder's office of a copy of the writ, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. Ritter v. Scannell, 11 Cal. 239; 70 Am. Dec. 775. After the return of the writ to the clerk's office, the sheriff has no authority to take any proceedings, previously omitted, for the completion of the attachment: the writ is authority to him only for acts performed while it remains in his possession. Wheaton v. Neville, 19 Cal. 41. The decision of the appellate court as to the insufficiency of the testimony to prove the service of notice of attachment on the occupant of land becomes the law of the case upon a retrial, and production of same testimony. Brusie v. Gates, 96 Cal. 265; 31 Pac. 111.

Real property, or interest therein, held by others. Any interest in land, legal or equitable, is subject to attachment or execution. Fish v. Fowlie, 58 Cal. 373; Godfrey v. Monroe, 101 Cal. 224; 35 Pac. 761; and see Logan v. Hale, 42 Cal. 645. A leasehold interest, unless the lease contains a provision against the assignment thereof, and specifically provides against involuntary assignment by operation of law, is attachable (Farnum v. Hefner, 79 Cal. 575; 12 Am. St. Rep. 174; 21 Pac.

955); as is also the interest of a defendant in land held in trust (De Celis v. Porter, 59 Cal. 464); and the equitable interest of the grantor of a trust deed to a reconveyance of the land upon the payment of the debt, or to the surplus proceeds after sale (Brown v. Campbell, 100 Cal. 635; 38 Am. St. Rep. 314; 35 Pac. 433); and the right of redemption in real estate, after sale on foreclosure. Brown v. Campbell, 100 Cal. 635; 38 Am. St. Rep. 314; 35 Pac. 433; and see Knight v. Fair, 9 Cal. 117; McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655; Halsey v. Martin, 22 Cal. 645; Robinson v. Thornton, 102 Cal. 675; 34 Pac. 120. The interest of a tenant in common is attached by taking possession of the entire property of the tenants in common for the purpose of subjecting to the sale the interest of the attachment defendant. Veach v. Adams, 51 Cal. 609; and see Waldman v. Broder, 10 Cal. 379; Bernal v. Hovious, 17 Cal. 541; 79 Am. Dec. 147. The distributive share of an heir in real estate is liable to attachment, although, prior to distribution, such heir had conveyed his interest therein, in good faith and for value, where the assignee did not assert his right before the probate court and have the heir's share distributed directly to himself. Freeman v. Rahm, 58 Cal. 111. Lands conveyed in fraud of creditors, without consideration, to one not a bona fide purchaser, may be levied upon and sold as if no conveyance had been made. Bull v. Ford, 66 Cal. 176; 4 Pac. 1175; Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73. The interest of a miner in his mining claim is property, and may be taken and sold under execution. McKeon v. Bisbee, 9 Cal. 137; 70 Am. Dec. 642. A homestead selected by a wife out of the separate property of her husband, without his assent, loses its character as a homestead upon his death, and is subject to attachment. Weinreich v. Hensley, 121 Cal. 647; 54 Pac. 254.

Conveyance before completion of levy. Where, after the sheriff has entered upon the execution of a writ, and before he has completed the levy, another creditor purchases the property from the attachment debtor, such creditor takes the property free from any lien of the attachment; and the fact that such purchasing creditor and the debtor knew at the time of the sale that the attachment had issued does not render the purchase a fraud upon the attaching creditor; nor is a conveyance giving a preference to one creditor fraudulent, simply because the debtor is insolvent, and the purchasing creditor is aware at the time of the conveyance that it will have the effect of defeating the collection of other debts. Wheaton v. Neville, 19 Cal. 41; Main v. Tappener, 43 Cal. 206; Sharp v. Baird, 43 Cal. 577.

Effect of the levy. The lien of the attachment creditor takes effect immediately upon the levy of the attachment, and the deposit of a copy of the writ, together with a description of the property attached, with the county recorder. Ritter v. Scannell, 11 Cal. 239; 70 Am. Dec. 775. The writ is effectual to change the title of the property, only from the time of the levy. Taffts v. Manlove, 14 Cal. 48; 73 Am. Dec. 610. If the writ is not legally served, there is no lien. Main v. Tappener, 43 Cal. 206; Sharp v. Baird, 43 Cal. 577. The lien of the attaching creditor does not depend upon the return of the officer, but upon the levy made by him, and where he makes a proper levy, but fails to make a proper or any return, the attaching creditor cannot be deprived of his rights, but may show that a valid levy was made; and the same is true of a purchaser under an execution, whose title depends upon the validity of the attachment levy; but where such proof is allowed, the evidence must be clear and satisfactory. Brusie v. Gates, 80 Cal. 462; 22 Pac. 284.

Personal property capable of manual delivery. Levy upon personal property is the act of taking possession of it, or seizing or attaching it, by the sheriff or other officer. Taffts v. Manlove, 14 Cal. 48; 73 Am. Dec. 610. A levy upon property already in the possession of the officer by virtue of a former attachment, does not require seizure under a second attachment: all that is required to be done is to make a return on the back of the attachment. O'Connor v. Blake, 29 Cal. 312. Personal property capable of manual delivery must be taken into the custody of the sheriff, and sold after judgment, as required by law. Herron v. Hughes, 25 Cal. 556; Sheehy v. Graves, 58 Cal. 449. Goods stored in a warehouse are sufficiently levied upon by the officer taking them into actual possession and placing them in charge of a keeper. Sinsheimer v. Whitely, 111 Cal. 378; 52 Am. St. Rep. 192; 43 Pac. 1109. Where a sheriff levies on portable machinery and fittings by delivering a copy of the writ to the defendant, making a memorandum of the property attached, and takes steps to have persons meddling therewith notified that it is attached, pending the sending of a keeper, there is a sufficient taking into custody as against the defendant and persons purchasing from him with notice; but it might not be sufficient as against a purchaser in good faith, or another attaching creditor. Rogers v. Gilmore, 51 Cal. 309. The mere watching and guarding of a storehouse does not amount to a levy upon the property within: the levy dates from the entry of the officer into the house, and his levy on the property there; and, if, prior to gaining admission, other parties succeed in acquiring a valid lien upon the property, the officer loses his right to levy. Taffts v. Manlove, 14 Cal. 48; 73 Am. Dec. 610. The property of tenants in common must

all be taken into possession, in a suit against one co-tenant, for the purpose of subjecting the undivided interest of such co-tenant to the sale on execution. Veach v. Adams, 51 Cal. 609. Property subject to a lien cannot be seized by the sheriff, except upon the payment of the amount of the lien. Johnson v. Perry, 53 Cal. 351. A promissory note, the property of the defendant in an attachment and execution, is liable to seizure and sale thereunder. Davis v. Mitchell, 34 Cal. 81; Donohoe v. Gamble, 38 Cal. 340; 99 Am. Dec. 399; Robinson v. Tevis, 38 Cal. 611; Hoxie v. Bryant, 131 Cal. 85; 63 Pac. 153; and see Crandall v. Blen, 13 Cal. 15. The property of a street railroad company, such as cars, tracks, electrical supplies, is liable to attachment (Risdon Iron etc. Works v. Citizens' Traction Co., 122 Cal. 94; 68 Am. St. Rep. 25; 54 Pac. 529); as is also the property of a solvent partnership, in the hands of a receiver appointed in a suit for dissolution. Adams v. Woods, 9 Cal. 24. Property in the hands of a foreign receiver, brought by him into this state, is attachable while in his possession, upon the suit of a creditor who is a citizen of this state. Humphreys v. Hopkins, 81 Cal. 555; 15 Am. St. Rep. 76; 6 L. R. A. 792; 22 Pac. 892. Where one of several partners sells his undivided interest in the partnership property, the purchase-money stands in the place of the property, and is liable for the partnership debts, the same as the property for which it was paid. Burpee v. Bunn, 22 Cal. 194. The attaching creditor can acquire no greater right in attached property than the defendant had at the time of attachment. Howell v. Foster, 65 Cal. 169; 3 Pac. 647; Smith v. Cunningham, 67 Cal. 262; 7 Pac. 679; Ward v. Waterman, 85 Cal. 488; 24 Pac. 930.

Shares of stocks. The word "cashier," as used in the fourth subdivision of this section, refers to an executive officer of a corporation, as the cashier of a bank, and not to a simple employee who is not a managing agent, as a clerk employed in a store belonging to a mining corporation, although he may have exclusive duties in relation to the custody of moneys, keeping accounts, and paying employees; and a corporation is not bound by a writ delivered to any of its agents or employees other than those named in this section. Blanc v. Paymaster Mining Co., 95 Cal. 524; 29 Am. St. Rep. 149; 30 Pac. 765. Where shares of stock have been regularly transferred on the books of the corporation as security for a loan, the mortgagee is the only proper garnishee. Edwards v. Beugnot, 7 Cal. 162.

Attachment of unregistered stock. See note ante, § 541.

Debts, credits, and personal property, not capable of manual delivery. The mode of attaching debts and credits, and other personal property not capable of manual delivery, as provided by the code, is exclusive. McBride v. Fallon, 65 Cal. 301; 4 Pac. 17; Latham v. Blake, 77 Cal. 646; 18 Pac. 150; 20 Pac. 417. A notice of garnishment of "all moneys, credits, and effects of defendant," is not effective as an attachment of a "debt" due from the garnishee to the defendant. Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36. Promissory notes, the property of the defendant in an attachment and execution, are liable to seizure and sale thereunder. Davis v. Mitchell, 34 Cal. 81; Robinson v. Tevis, 38 Cal. 611; Gow v. Marshall, 90 Cal. 565; 27 Pac. 422; Deering v. Richardson-Kimball Co., 109 Cal. 73; 41 Pac. 801. Property acquired by an insolvent after the date of the filing of his petition in insolvency, is subject to attachment upon his subsequent adjudication in insolvency. Day v. Superior Court, 61 Cal. 489. Service of process of attachment upon the teller of a banking corporation, whose only duty is to receive and pay out moneys, does not bind the corporation. Kennedy v. Hibernia Sav. & L. Soc., 38 Cal. 151. The interest of a pledgor may be attached, but the pledgee cannot be disturbed in his possession, unless by an order of the court, made after examination, on such terms as may be just, having reference to any liens thereon or claims against the same. Treadwell v. Davis, 34 Cal. 691; 94 Am. Dec. 770; and see Deering v. Richardson-Kimball Co., 109 Cal. 73; 41 Pac. 801; Lilienthal v. Ballou, 125 Cal. 183; 57 Pac. 897; Salinas City Bank v. Graves, 79 Cal. 192; 21 Pac. 732. Mortgaged personal property is attachable at the suit of a creditor of the mortgagor; but, before the property is taken, the officer must pay or tender to the mortgagee the amount of the mortgage. Wood v. Franks, 56 Cal. 217; Berson v. Nunan, 63 Cal. 550; Wood v. Franks, 67 Cal. 32; 7 Pac. 50; Meherin v. Oaks, 67 Cal. 57; 7 Pac. 47; Irwin v. McDowell, 91 Cal. 119; 27 Pac. 601. The interest of a mortgagor is liable to attachment, whether the instrument evidencing the security be ordinary mortgage or deed of trust and defeasance. Halsey v. Martin, 22 Cal. 645; Godfrey v. Monroe, 101 Cal. 224; 35 Pac. 761. The attachment of the interest of a mortgagor after foreclosure of the mortgage, and before the execution of the deed, reaches only the right of redemption of the mortgagor, and the lien of the attachment is extinguished by the deed. Robinson v. Thornton, 102 Cal. 675; 34 Pac. 120. The interest of a partner in the partnership property is attachable. Robinson v. Tevis, 38 Cal. 611; Isaacs v. Jones, 121 Cal. 257; 53 Pac. 793. Partnership effects, in the hands of a receiver appointed in a suit for dissolution, may be attached in a suit of the creditor of the partnership at any time before the decree of dissolution and order for pro rata distribution are

made, and such creditor may thereby secure a preference or lien upon the partnership assets. Adams v. Woods, 9 Cal. 24; Adams v. Woods, 8 Cal. 152; 68 Am. Dec. 313; and see Adams v. Haskell, 6 Cal. 113; 65 Am. Dec. 491. Where a receiver of a partnership property was appointed prior to a levy of attachment on the interest of an individual partner, the sheriff is not entitled to take possession of the partnership property from the receiver; but if the attaching creditor obtains judgment against such partner, and sells his interest in the partnership, the purchaser is entitled to receive whatever may be found to belong to such partner. Isaacs v. Jones, 121 Cal. 257; 53 Pac. 793. Where a partner conveyed partnership property to a trustee, for his wife, in fraud of the creditors of the partnership, the proceeds of the sale of such property are liable to garnishment. Burpee v. Bunn, 22 Cal. 194. Crops grown by the adverse possessor of lands cannot be attached as the property of the legal owner of the land. Smith v. Cunningham, 67 Cal. 262; 7 Pac. 679. A crop abandoned by a lessee, and harvested by the lessor at an expense exceeding the value thereof, is not attachable by the creditors of the lessee. Charles v. Davis, 59 Cal. 479. A crop raised by a tenant of land, who holds under a lease containing a covenant that the entire crop shall be the property of the landlord until all advances made by him to the tenant shall be paid, is not subject to attachment by a creditor of the tenant while such advances remain unpaid. Howell v. Foster, 65 Cal. 169; 3 Pac. 647. A growing crop is personal property not capable of manual delivery, and is liable to attachment; and service upon the person in possession, by leaving with him a copy of the writ and statutory notice, is sufficient until the crop matures, when the officer may take it into his custody. Raventas v. Green, 57 Cal. 254; Cardenas v. Miller, 108 Cal. 250; 49 Am. St. Rep. 84; 39 Pac. 783; Rudolph v. Saunders, 111 Cal. 233; 43 Pac. 619; and see Davis v. McFarlane, 37 Cal. 634; 99 Am. Dec. 340. A cropper's interest in a growing crop, under a contract to work the land on shares, is liable to attachment; and to effect this, possession of the entire quantity of the crop may be taken, and the purchaser at the execution sale becomes a tenant in common with the owner of the other undivided interest. Bernal v. Hovious, 17 Cal. 541; 79 Am. Dec. 147. Where, by the terms of a contract, the entire crop was to belong to the owner of the land until division, and to be security for any indebtedness to such owner, the interest of the cropper becomes liable to attachment, when, upon division, he delivers to such owner his due proportion, and the remainder is in possession of the cropper, although still on the land of such owner, who still claims a lien for indebtedness, but who cannot maintain a secret lien upon the share of the cropper. Crocker v. Cunningham, 122 Cal. 547; 55 Pac. 404. Where a growing crop was, by the terms of a lease, to remain the property of the lessor until the harvesting and division thereof, and the lessee had no right to dispose of or to encumber the same or any portion thereof, but was to receive a certain portion upon delivery of the whole to the lessor, the lessee has an interest in the grain subject to attachment, notwithstanding the specific provision in the lease that title to crop should remain in the lessor until the division thereof. Farnum v. Hefner, 79 Cal. 575; 12 Am. St. Rep. 174; 21 Pac. 955; Stockton Sav. & L. Soc. v. Purvis, 112 Cal. 226; 53 Am. St. Rep. 210; 44 Pac. 561. An attachment upon a growing crop in the possession of the defendant is sufficiently levied by serving upon him copies of the writ and statutory notice; and there is no abandonment, where the sheriff, when the crop matures, harvests and takes it into his custody. Raventas v. Green, 57 Cal. 254; Cardenas v. Miller, 108 Cal. 250; 49 Am. St. Rep. 84; 39 Pac. 783. The estate of a prisoner may be attached, where he is imprisoned for a term less than his natural life. Estate of Nerac, 35 Cal. 392; 95 Am. Dec. 111. The property of a prisoner under sentence of life imprisonment, taken and held, upon his request, by a chief of police as bailee, and not in his official capacity, is attachable; and the court has jurisdiction to enforce execution against such property, although the judgment in the civil action was not entered against the prisoner until after his civil death. Coffee v. Haynes, 124 Cal. 561; 71 Am. St. Rep. 99; 57 Pac. 482.

Costs, expenses, and fees of officer. Where the levy is properly made, the officer is entitled to his legal fees, and the attaching creditor must pay them, and notice from the sheriff that the levy has been made is not required (Alexander v. Denaveaux, 59 Cal. 476); and where an attachment is levied upon several pieces of real estate, the sheriff is entitled to fees for each levy. Young v. Miller, 63 Cal. 302. The sheriff is the agent of the plaintiff in levying an attachment, and the plaintiff cannot relieve himself from liability for expenses incurred in such agency by the dismissal of the action, or the mere direction to release the property; neither can the parties to the action, by an agreement between themselves for its dismissal, deprive the sheriff of his fees, nor compel him to look to the solvency or caprice of the plaintiff therefor: for the purpose of protecting the sheriff against such contingencies, it is provided by statute that he may retain the property levied on under the attachment until his fees and expenses are paid. Perrin v. McMann, 97 Cal. 52; 31 Pac. 837. Where the property attached is portable, though some of it may be

classed as fixtures, the sheriff is entitled to necessary costs for safely keeping the same. Nisbet v. Clio Mining Co., 2 Cal. App. 436; 83 Pac. 1077. Keeper's fees, and expenses of keeping and preserving the property held under attachment, cannot be collected by the sheriff, unless the court from which the writ issues certifies that the charges are just and reasonable. Geil v. Stevens, 48 Cal. 590; Lane v. McElhany, 49 Cal. 421; Bower v. Rankin, 61 Cal. 108; Shumway v. Leakey, 73 Cal. 260; 14 Pac. 841. Expenditures made by the sheriff for fire-insurance premiums on property attached are not proper items of cost. Galindo v. Roach, 130 Cal. 389; 62 Pac. 597. A deputy sheriff is not authorized to bind the sheriff by contract for the payment of the keeper's fees. Krum v. King, 12 Cal. 412.

Situs of property for purpose of garnishment. See note 69 Am. St. Rep. 113.

Levy of and what essential to levy attachment. See note 21 Am. Dec. 677.

Levy of attachment as subject to collateral attack. See note Ann. Cas. 1913C, 146.

CODE COMMISSIONERS' NOTE. 1. Duty of sheriff, generally. The presumptions are that the officer faithfully performs his duty. Turner v. Billagram, 2 Cal. 520; Ritter v. Scannell, 11 Cal. 238; 70 Am. Dec. 775. An officer, after entering upon the execution of an attachment, must complete its execution with diligence. Wheaton v. Neville, 19 Cal. 41. An officer who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in the course of law, and if he does, and the debt is lost, he is responsible to the plaintiff for the amount of the debt. Nor will the oral instruction of the plaintiff in an attachment or execution, respecting property seized by the sheriff under either writ, discharge such sheriff from liability. The statute is express that such instruction must be in writing. Sandford v. Boring, 12 Cal. 539. Where one writ was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the writ at one o'clock Monday morning, it was held that the sheriff was not guilty of negligence in executing the first, no special circumstances being shown. Whitney v. Butterfield, 13 Cal. 335; 73 Am. Dec. 584. Where an officer, by virtue of a second attachment, levies on property in his possession by virtue of a former attachment, it is only necessary for him to return that he has attached the interest of the defendant in the property then in his possession. O'Connor v. Blake, 29 Cal. 312. If the sheriff take property which does not belong to the defendant, the taking is tortious, whether the property was in the possession of defendant or not. Wellman v. English, 38 Cal. 583. Where the complaint contains no allegation that the levy was excessive, in an action against a sheriff for the recovery of personal property alleged to have been improperly attached, the plaintiff cannot avail himself of the fact that the evidence showed the levy was excessive. Sexey v. Adkison, 40 Cal. 408.

2. **Levy upon real property.** The presumptions are in favor of the regularity of the acts of the officer, and a return which simply states that the property was attached is sufficient, prima facie, to show a due and proper execution of the writ. Our statute prescribes the manner in which real estate may be attached, but contains no provision requiring that all the acts necessary to a levy should be set out in the return. Nor is it necessary, when the levy is made by posting a copy of the writ on the premises, that the return of the sheriff should show that the premises were at the time unoccupied. Ritter v. Scannell, 11 Cal. 248; 70 Am. Dec. 775. An attachment of real property is not perfected until both the acts prescribed by statute, to wit, delivery to the occupant of a copy of the writ, or posting a copy upon the premises, if there be no occupant, and the filing of a copy with the recorder, together with a description of the property attached, are performed. The omission of either act is fatal to the creation of a lien. Thus, where a writ of attachment was issued on the 26th of August, and a copy delivered to the occupant of the premises, or posted upon them, on the 29th of that month, and on the same day the writ was returned, and filed in the clerk's office, but no copy of the writ, with a description of the property, was filed with the recorder, until the 9th of September following, it was held, that, after the return of the writ to the clerk's office on the 29th of August, the sheriff had no authority to take any proceedings for the completion of the attachment, previously omitted; that the writ was authority to him, only for acts performed while it remained in his possession, and hence, that another creditor of the debtor, purchasing the property from the latter on the 6th of September, took it free from any lien of the attachment. Wheaton v. Neville, 19 Cal. 41.

3. **Lien of attachment** attaches on personal property, only from the time of levy. Taffts v. Manlove, 14 Cal. 47; 73 Am. Dec. 610. On real estate, immediately upon the levy of the attachment and the deposit of a copy of the writ, together with a description of the land attached, with the county recorder. Ritter v. Scannell, 11 Cal. 238; 70 Am. Dec. 775. If, after the levy of an attachment and before judgment, the defendant dies, his death destroys the lien of the attachment, and the property passes into the hands of the administrator, to be administered, or in due course of administration. Myers v. Mott, 29 Cal. 359; 89 Am. Dec. 49. Where the first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior diligence the fraud was discovered. The prior attachments became liens in the nature of a legal estate vested in the sheriff for the benefit of the creditors. Patrick v. Montader, 13 Cal. 444. The lien of firm creditors is preferred to the lien of an individual creditor of the remaining partner attaching first. Conroy v. Woods, 13 Cal. 631; 73 Am. Dec. 605. A lien by attachment enables a creditor to file a creditor's bill, without judgment and execution. Conroy v. Woods, 13 Cal. 626; 73 Am. Dec. 605. Plaintiff, January 10, 1858, in a suit entitled C. and M. and others, composing the Wisconsin Quartz Mining Co. (a corporation), attached a quartz mill and ledge belonging to the corporation. June 28, 1858, the complaint was amended so as to make the corporation, as such, the party defendant, and judgment was rendered against the company August 14, 1858, the property sold, the plaintiff becoming the purchaser. October 7, 1857, W. received from the corporation a chattel mortgage on this property, had decree of foreclosure August 9, 1858, followed by a sale in October following, W. becoming the purchaser. Defendants here are in possession under sheriff's sale on the decree. Plaintiff claims title under his judgment and sale. It was held, that he could not recover; that he acquired no lien by the attachment, because the property attached belonged to the corporation, which was not a party to the suit until after the levy and return of the writ; that plaintiff's rights attach only from the date of his judgment, August 14, 1858, and his lien being subsequent to the lien of W.'s judgment, August 9, 1858, under which defendants claim, the latter have the better right. Collins v. Montgomery, 16 Cal. 398. T. commenced suit against J.; a writ of attachment was levied upon certain personal property by the plaintiff H., as sheriff. M. J., wife of J., claimed the property as a sole trader, and brought her action of replevin for the property, and obtained possession of the same, by the delivery of an undertaking as required by law. The undertaking

was executed by defendants R. and S. The replevin suit was decided February 5, 1855, in favor of H. T. obtained judgment in the attachment suit against J., November 30, 1854. On the 18th of February, 1855, executions in favor of other creditors of J. coming into the hands of H., as sheriff, he levied them on the same property, and subsequently sold the property and paid the proceeds into court. H. then brought this suit against the sureties in the replevin bond. It was held that the lien of T.'s attachment continued after the replevy of the goods by M. J. Hunt v. Robinson, 11 Cal. 262. The lien of an attachment upon funds in the hands of a receiver follows the property in the hands of his successors. Adams v. Woods, 9 Cal. 29. The return on an attachment cannot be amended so as to postpone the rights of creditors attaching subsequently. Webster v. Haworth, 8 Cal. 21; 68 Am. Dec. 287.

4. Garnishment. See note to § 544. Where a debtor transfers personal property to a creditor, to be sold by him and the proceeds applied to the payment of his debts and debts of certain other creditors, with their consent, the transferee and those he represents acquire a lien upon the property and its proceeds superior to any which other creditors could acquire by the subsequent levy of an attachment or other process thereon. Handley v. Pfister, 39 Cal. 283; 2 Am. Rep. 449. The lien of an attachment upon real property is merged in that of the judgment, and has no effect, except to confer a priority in the lien of the judgment, and does not revive upon the expiration of the two years' lien of the judgment. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256.

§ 542a. Lien of attachment. The attachment whether heretofore levied or hereafter to be levied shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged as provided in this chapter, by dismissal of the action or by entry and docketing of judgment in the action. At the expiration of three years the lien shall cease and any proceeding or proceedings against the property under the attachment shall be barred; provided, that upon motion of a party to the action, made not less than five nor more than sixty days before the expiration of said period of three years, the court in which the action is pending may extend the time of said lien for a period not exceeding two years from the date on which the original lien would expire, and the lien shall be extended for the period specified in the order upon the filing, before the expiration of the existing lien, of a certified copy of the order with the recorder of the county in which the real property attached is situated. The lien may be extended from time to time in the manner herein prescribed.

Legislation § 542a. 1. Added by Stats. **1909**, p. 749.

2. Amended by Stats. **1915**, p. 201, (1) in first sentence, inserting "whether heretofore levied or hereafter to be levied"; (2) in the proviso, inserting "before the expiration of the existing lien."

Origin and general nature of attachment lien. See note 39 Am. Dec. 606.

Attachment lien not perfected by judgment during husband's lifetime as prior to widow's share in estate. See note Ann. Cas. 1913A, 343.

Divestiture of attachment lien by subsequent occupation of land for homestead purposes. See note Ann. Cas. 1913B, 1149.

Attachment not prosecuted to judgment as a conclusive election of remedies. See note 34 L. R. A. (N. S.) 309.

§ 543. Attorney to give written instructions to sheriff what to attach. Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ.

Legislation § 543. Enacted March 11, **1872**; based on Practice Act, § 126.

CODE COMMISSIONERS' NOTE. To hold a corporation as garnishee, the writ and notice must be served on the president, or other head of the same, or the secretary, cashier, or other managing agent thereof. In case of a banking corporation, service of process on the teller is not sufficient. Kennedy v. Hibernia Sav. & L. Soc., 38 Cal. 151. An ex-sheriff is served as a private individual. Graham v. Endicott, 7 Cal. 144.

§ 544. Garnishment, when garnishee liable to plaintiff. All persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied.

Similar provision as to execution. Post, § 716.
Legislation § 544. Enacted March 11, 1872; re-enactment of Practice Act, § 127.

Garnishment. Although partially regulated by statute, yet garnishment is none the less a common-law proceeding. Cahoon v. Levy, 5 Cal. 294. Garnishment is the service of a writ of attachment upon personal property in the possession of persons other than the defendant in the writ, to secure the credits, debts, etc., in the hands of such third persons; and by the service in the manner provided by statute, whether termed "garnishment" or "service of attachment," while the possession is not necessarily disturbed, yet a lien is obtained on the defendant's title to the property in the hands of the garnishee. Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111. The contract liability is not converted, by the garnishment, into a statutory liability: the sole effect of the garnishment is to work a contingent transfer of the alleged indebtedness from the creditor to the garnisher, without any change in the nature of the liability. Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36. In an action against a garnishee by his creditor, the only effect of the garnishment is to suspend the proceedings: it is not a bar to the action. McFadden v. O'Donnell, 18 Cal. 160; Pierson v. McCahill, 21 Cal. 122; McKeon v. McDermott, 22 Cal. 667; 83 Am. Dec. 86. A garnishment is no defense to an action of the defendant against a garnishee while the attachment still remains pending and undetermined. Glugermovich v. Zicovich, 113 Cal. 64; 45 Pac. 174. An admission of the garnishee, consisting of a pencil-entry, after service of the notice, made in his ledger, by a book-keeper, on the margin of his account with an attachment debtor, showing that it was "attached" on the day of service, and a statement of the garnishee to such debtor, that the debt was attached, as an excuse for refusing further payments, though evidence of such attachment, is not conclusive, and may have been nothing more than the expression of an erroneous opinion as to the effect of the notice of attachment served by the sheriff, and the garnishee is not thereby estopped from showing that the notice of the garnishment attached merely "all moneys, credits, and effects," and did not include "debts." Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36. The lien of a plaintiff, obtained by his attachment upon notes, fastens itself not only upon the notes, but also upon the proceeds thereof when collected. Robinson v. Tevis, 38 Cal. 611.

The garnishee. An administrator may be garnished, after decree of distribution (Estate of Nerac, 35 Cal. 392; 95 Am. Dec. 111; Dunsmoor v. Furstenfeldt, 88 Cal. 522; 22 Am. St. Rep. 331; 12 L. R. A. 508; 26 Pac. 518); and a bailee is liable to garnishment. Chandler v. Booth, 11 Cal. 342; Hardy v. Hunt, 11 Cal. 343; 70 Am. Dec. 787. A school district is not a "person," within the meaning of the fifth subdivision of § 542, ante, and is not liable to be served as a garnishee. Skelly v. Westminster School Dist., 103 Cal. 652; 37 Pac. 643; Witter v. Mission School Dist., 121 Cal. 350; 66 Am. St. Rep. 33; 53 Pac. 905. An assignee for the benefit of creditors is not liable to garnishment, unless the assignment is subject to impeachment. Hecht v. Green, 61 Cal. 269. The garnishee has the right, which may be voluntarily exercised, to protect himself from all further liability, by delivering the property to the sheriff (Roberts v. Landecker, 9 Cal. 262; Robinson v. Tevis, 38 Cal. 611); and he may pay the attached money into court, where there are conflicting liens. Wheatley v. Strobe, 12 Cal. 92; 73 Am. Dec. 522; Maier v. Freeman, 112 Cal. 8; 53 Am. St. Rep. 151; 44 Pac. 357. He is not required, and he has no right, to appear in the action: the only answer he makes is to the sheriff, at the time of the service of the writ, and that relates only to the property actually attached, which he has in his possession or under his control. Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36. Where the garnishee is sued by the defendant in an attachment suit, he may, by affidavit or other appropriate means, apply for a stay of the proceedings until the action of the attaching creditor can be disposed of, or the court may allow the cause to proceed to judgment, and stay execution upon enough to provide for satisfaction of the demand for which the debtor is garnished. Glugermovich v. Zicovich, 113 Cal. 64; 45 Pac. 174; McKeon v. McDermott, 22 Cal. 667; 83 Am. Dec. 86. The garnishee should be permitted to amend his answer, whenever he has committed a mistake or fallen into an error which could not reasonably have been avoided. Smith v. Brown, 5 Cal. 118. A garnishee who received the property of the defendant from a former pledgee, guaranteeing payment of the defendant's debt to such pledgee, and who paid the same before the levy of attachment, is entitled to a lien for the debt of the defendant to himself, and also for the amount paid upon the defendant's indebtedness to the former pledgee. Treadwell v. Davis, 34 Cal. 601; 94 Am. Dec. 770. Where the garnishee denied both the attachment and the debt, and pleaded the bar of the statute of limitations, he cannot be deprived of his right to plead the statute, as against the plaintiff, on the ground that the attachment debtor, whose interest was adverse, had conceded the validity of the attachment. Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36.

Debts and credits. A "debt" is money owing by the garnishee to the defendant,

which may be paid over to the sheriff; while "credits" are something belonging to the defendant, but in the possession and under the control of the garnishee, such as promissory notes or other evidences of indebtedness of third parties, which may be delivered up or transferred to the sheriff. Gow v. Marshall, 90 Cal. 565; 27 Pac. 422; and see Davis v. Mitchell, 34 Cal. 81; Robinson v. Tevis, 38 Cal. 611; Deering v. Richardson-Kimball Co., 109 Cal. 73; 41 Pac. 801. The word "debt," as used in the law of garnishment, includes only legal debts, causes of action upon which the defendant in the attachment, under the common-law practice, can maintain an action of debt or indebitatus assumpsit, and not mere equity claims. Hassie v. G. I. W. U. Congregation, 35 Cal. 378; Redondo Beach Co. v. Brewer, 101 Cal. 322; 35 Pac. 896. Any kind of obligation of one to pay money to another is a debt: a debt signifies what one owes, and there is always some obligation that it shall be paid; but the manner of payment, or the means of coercing payment, does not enter into the definition. Dunsmoor v. Furstenfeldt, 88 Cal. 522; 22 Am. St. Rep. 331; 12 L. R. A. 508; 26 Pac. 518. A notice of garnishment, under a writ of attachment describing only "moneys, credits, and effects" as being attached, does not include any "indebtedness" due from the garnishee to the principal defendant, nor create any liability therefor to the attaching creditor. Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36. A garnishment of "certain credits belonging to the defendant," which a corporation has in its possession or under its control, is not an attachment of a "debt" due from the corporation to the defendant, and the attaching creditor acquires no lien upon or right to such debt by the service of the writ. Gow v. Marshall, 90 Cal. 565; 27 Pac. 422. Debts secured by mortgage may be attached by garnishment, but in no other way. McGurren v. Garrity, 68 Cal. 566; 9 Pac. 839. All debts and credits of a defendant, in possession of another person, are attachable by garnishment (Deering v. Richardson-Kimball Co., 109 Cal. 73; 41 Pac. 801; Gow v. Marshall, 90 Cal. 565; 27 Pac. 422; Davis v. Mitchell, 34 Cal. 81; Robinson v. Tevis, 38 Cal. 611); as is also the indebtedness of the vendee for the purchase price of real estate (Ross v. Heintzen, 36 Cal. 313); and the debt secured by a mortgage (McGurren v. Garrity, 68 Cal. 566; 9 Pac. 839); and the judgment debt; but the judgment itself is not. McBride v. Fallon, 65 Cal. 301; 4 Pac. 17; Dore v. Dougherty, 72 Cal. 232; 1 Am. St. Rep. 48; 13 Pac. 621; Latham v. Blake, 77 Cal. 646; 18 Pac. 150; 20 Pac. 417; Hoxie v. Bryant, 131 Cal. 85; 63 Pac. 153; and see Adams v. Hackett, 7 Cal. 187; Crandall v. Blen, 13 Cal. 15.

Equitable rights and contingent claims. The equitable right of a subcontractor, under the assignment of an interest in a building contract, whereby the contractor authorized the owner to pay to the subcontractor a certain portion of the contract price, to be paid in installments as the work progressed, upon the certificate of the architect, as provided in the contract between the owner and the contractor, is not such a legal demand as will support a garnishment of the owner in an action against the contractor; and the certificate of the architect creates no debt in favor of the subcontractor until indorsed by the contractor and accepted by the owner. Hassie v. G. I. W. U. Congregation, 35 Cal. 378. The assignee of a vendee under an executory contract for the conveyance of land has no legal demand against the vendor for the amount paid by the vendee on the purchase price, or for moneys expended by himself in improvements, where the vendor elects to declare the contract forfeited for failure of the assignee of the vendee to pay the purchase price at the stipulated time: whatever right the assignee has is merely equitable, and not subject to garnishment. Redondo Beach Co. v. Brewer, 101 Cal. 322; 35 Pac. 896. An execution purchaser, who, pending appeal, bid in the property for the entire amount of his judgment against the defendant, does not, merely by reason of the modification of the judgment on appeal, reducing the amount thereof, become the debtor of the defendant for the amount of the purchase price bid by him in excess of the judgment as modified: the sale was valid at the time it was made, but was liable to be set aside upon a reversal or modification of the judgment on appeal, or by the court below, upon the return of the case, upon motion of the defendant, or by action; and this right to have the sale set aside is at the election of the defendant, and not of his creditors; and unless he elects to treat the sale as valid, there can be no pretense that the purchaser is his debtor; and if the plaintiff's attachment is served before the defendant makes such election, there is no debt upon which the attachment can operate. Johnson v. Lamping, 34 Cal. 293. The purchaser of mortgaged property, who has agreed with the mortgagor to pay the mortgage debt, does not thereby become indebted to the mortgagee, and is not subject to garnishment in a suit against the latter. Hartman v. Olvera, 54 Cal. 61. A third party, committing a trespass against the defendant in an attachment suit, is liable to such defendant for damages; but the defendant alone has the right to waive the tort, and he cannot be deprived thereof by his creditors, who have no right to treat such tort-feasor as the defendant's debtor. Johnson v. Lamping, 34 Cal. 293.

Deposits in bank. Where moneys have been placed on general deposit in a bank, and negotiable certificates of deposit have

been issued to the depositor for the amount, there is nothing left in the possession of the bankers, belonging to the depositor, upon which an attachment can fasten; the bankers being liable to pay the amount to the holders of the certificates, whoever they may be, on presentation. McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655. A savings bank cannot avoid its liability to pay over the money of a depositor, on a garnishment at the suit of the depositor's creditor, on the ground that its by-laws, assented to by the depositor, make his pass-book transferable to order; the pass-book not being a negotiable instrument, nor capable of being made such by agreement. Witte v. Vincenot, 43 Cal. 325.

Partnership assets. Money derived from the sale of partnership property conveyed by an individual partner to a trustee for his wife, in fraud of creditors of partnership, is liable to garnishment. Burpee v. Bunn, 22 Cal. 194. Moneys in the hands of a receiver, in a suit for dissolution of partnership, are subject to attachment, at any time before a final decree of dissolution and distribution. Adams v. Woods, 9 Cal. 24; and see Adams v. Woods, 8 Cal. 152; 68 Am. Dec. 313; Adams v. Haskell, 6 Cal. 113; 65 Am. Dec. 491.

Promissory notes. The indebtedness of the maker upon a promissory note, after its maturity, is not the subject of attachment, unless the note is at the time in the possession of the defendant. Gregory v. Higgins, 10 Cal. 339. A promissory note, held by a third party as collateral security for a debt of a defendant in attachment, is a credit, and is attachable by garnishment, and the lien of the attachment upon the note transfers itself to the money collected thereon by the garnishee. Deering v. Richardson-Kimball Co., 109 Cal. 73; 41 Pac. 801; Gow v. Marshall, 90 Cal. 565; 27 Pac. 422.

Property in custodia legis. Where money is in the hands of the clerk of the court, deposited, under an order of the court, by the assignee of an insolvent, pending litigation as to the proper disposition thereof among the creditors, and an order of distribution is made by the court, the sum found due each creditor is a debt due the creditor from the clerk, and may be attached in his hands by a creditor of the creditor. Dunsmoor v. Furstenfeldt, 88 Cal. 522; 22 Am. St. Rep. 331; 12 L. R. A. 508; 26 Pac. 518; Estate of Nerac, 35 Cal. 392; 95 Am. Dec. 111. Money voluntarily paid into court, without an order of court, by a garnishee who has filed a complaint in interpleader against attaching creditors, is subject to attachment (Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111); as is also money placed in the hands of an agent to pay creditors, who have not agreed to look to the agent for payment. Chandler v. Booth, 11 Cal. 342. Money of a prisoner under sentence of life imprisonment is attachable in the hands of a chief of police, who holds it as bailee, and not in his official capacity, where it has nothing to do with the conviction on the criminal charge. Coffee v. Haynes, 124 Cal. 561; 71 Am. St. Rep. 99; 57 Pac. 482. Surplus money remaining in the hands of trustees after the satisfaction of the judgment by the sale of land on foreclosure, is subject to the lien of an attachment levied upon the equity of redemption. Brown v. Campbell, 100 Cal. 635; 38 Am. St. Rep. 314; 35 Pac. 433; and see Knight v. Fair, 9 Cal. 117; McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655; Halsey v. Martin, 22 Cal. 645.

Liability of garnishee. The liability of a garnishee to the plaintiff is direct, for the value of the goods in his possession or under his control (Roberts v. Landecker, 9 Cal. 262; Herrlich v. Kaufmann, 99 Cal. 271; 37 Am. St. Rep. 50; 33 Pac. 857; Carter v. Los Angeles Nat. Bank, 116 Cal. 370; 48 Pac. 332); and the liability dates from the service of the writ (Johnson v. Carry, 2 Cal. 34; Norris v. Burgoyne, 4 Cal. 409; Roberts v. Landecker, 9 Cal. 262); but no such liability exists where an execution is levied upon such debts. Nordstrom v. Corona City Water Co., 155 Cal. 206; 132 Am. St. Rep. 81; 100 Pac. 242. The acceptor of a bill of exchange, who, in accepting it, does not inform the payee of an attachment previously served upon him as a garnishee in a suit against such payee, is estopped from setting up such garnishment against a purchaser for a valuable consideration. Garwood v. Simpson, 8 Cal. 101. Any estoppel which may exist against the garnishee in favor of the attachment debtor, by refusal of further payments on the ground that the debt had been attached, to deny the efficacy of the notice of garnishment, cannot avail the plaintiff as attaching creditor, who relies upon an attachment in his favor which did not include the debt. Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36. A garnishee is bound to protect the rights of all parties to the goods or credits attached in his hands; and if, after notice, though execution may have been awarded against him, he satisfies the judgment, it is in his own wrong, and constitutes no valid defense to the claim of the assignee. Hardy v. Hunt, 11 Cal. 343; 70 Am. Dec. 787. The measure of the garnishee's liability depends upon the amount of property in his possession or under his control at the time the writ is served. Roberts v. Landecker, 9 Cal. 262. Partnership property can be seized under an execution against one of the partners, for his individual debt, and sold; but the interest which passes by the sale is only the interest of the debtor partner in the residuum of the partnership property, after the settlement of the partnership debts.

Robinson v. Tevis, 38 Cal. 611. The return of the officer is not conclusive against the garnishee. Broadway Ins. Co. v. Wolters, 128 Cal. 162; 60 Pac. 766.

Defenses by garnishee. The garnishee can plead any defense against his creditor, and also that his debt has been satisfied, or that he failed to recover judgment, or that it was reversed or was barred. Carter v. Los Angeles Nat. Bank, 116 Cal. 370; 48 Pac. 332. A garnishee does not relieve himself of liability by refusing to disclose his indebtedness to the judgment debtor, by holding the money in his possession until served with an execution in another case, and by then paying the money to the sheriff without any suggestion as to the former service or the appropriation of the payment; in such a case, the garnishee should be ordered to pay to the judgment creditor the amount of his indebtedness to the judgment debtor. Finch v. Finch, 12 Cal. App. 274; 107 Pac. 594. The delivery of an ordinary check upon a bank for part of the fund standing therein to the credit of the drawer, does not, prior to its presentation, operate as an assignment of the fund pro tanto, and a garnishment of the fund under execution, as belonging to the drawer, will prevail over all unpresented and unaccepted checks previously drawn. Donohoe-Kelly Banking Co. v. Southern Pacific R. R. Co., 138 Cal. 183; 94 Am. St. Rep. 28; 71 Pac. 93. The liability created by a garnishment is never barred by the statute of limitations. Carter v. Los Angeles Nat. Bank, 116 Cal. 370; 48 Pac. 332. The running of the statute of limitations in favor of a debtor is not interrupted by making him a garnishee, where he denies any indebtedness, or disputes the defendant's title to any property in his possession. Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36. This section is intended to apply to those cases, only, in which the garnishee admits his indebtedness as to the defendant in attachment, or admits his possession or control of specific property of the defendant: in such case he can discharge his admitted obligation by paying the debt to the sheriff or delivering possession of the defendant's property; and if he chooses to retain possession of the defendant's property, or to withhold payment of a sum admitted to be due, he thereby makes himself, by his own act, the trustee of a fund or of the specific property in custodia legis, and in that character liable to account to the party entitled, whenever called upon. Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36; and see Carter v. Los Angeles Nat. Bank, 116 Cal. 370; 48 Pac. 332. No equitable circumstances need be shown, to justify the suit brought by the judgment creditor against the garnishee. Carter v. Los Angeles Nat. Bank, 116 Cal. 370; 48 Pac. 332. To prevent the debt of a garnishee to his creditor becoming barred by the statute of limitations after attachment, where the creditor refuses to sue thereon, the garnisher may sue the garnishee upon his contingent liability, making the creditor of the garnishee a party to the suit, and thereby protect the interests of all parties. Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36. A judgment cannot be entered against a garnishee upon the return of the sheriff, without further proceedings, and without the appearance of the garnishee in the action, for the amount stated to be due, and a judgment entered in such manner is void upon its face. Broadway Ins. Co. v. Wolters, 128 Cal. 162; 60 Pac. 766. The judgment against a garnishee should be simply for the amount due: an order to pay the money into court is improper. Smith v. Brown, 5 Cal. 118; Brummagin v. Boucher, 6 Cal. 16. Proceedings supplementary to execution need not be invoked by the plaintiff in an attachment prior to the commencement of the action against the garnishee upon his statutory liability, where he does not seek the discovery of the property itself, or to enforce his lien upon it, but alleges that the garnishee has fraudulently disposed of the property and converted the proceeds to his own use. Roberts v. Landecker, 9 Cal. 262; Robinson v. Tevis, 38 Cal. 611; Herrlich v. Kaufmann, 99 Cal. 271; 37 Am. St. Rep. 50; 33 Pac. 857. When the debt is barred against a judgment debtor, who has been garnished, before the liability of the garnishee is sought to be enforced by the attaching creditor, the right of the latter to maintain an action against the garnishee is also barred. Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36. Having once invoked the stringent provisions of the attachment law, the plaintiff cannot resort to other remedies to the prejudice of the defendant, so long as he relies upon his attachment lien; but when the garnishee has disposed of the property and converted the proceeds to his own use, and the plaintiff neither seeks to enforce his attachment lien on the property nor asks to obtain its discovery to subject it to his debt, his means of enforcing the liability of the garnishee for the value of goods in his possession or under his control at the time of the attachment is by independent action. Roberts v. Landecker, 9 Cal. 262; Robinson v. Tevis, 38 Cal. 611; Herrlich v. Kaufmann, 99 Cal. 271; 37 Am. St. Rep. 50; 33 Pac. 857.

CODE COMMISSIONERS' NOTE. 1. **Generally.** The doctrine of garnishment, though regulated, in part, by statute, is a common-law proceeding; and in proceedings against a garnishee the parties may demand a jury trial. Cahoon v. Levy, 5 Cal. 294. The liability dates from the service on the garnishee. Johnson v. Carry, 2 Cal. 33.

2. **Effect of garnishment.** A garnishment served upon the owner, in a suit against the head con-

tractor, after the commencement of the building and before notice served, prevails over the lien of a subcontractor. Cahoon v. Levy, 6 Cal. 295; 65 Am. Dec. 515. The lien of a subcontractor filed, and notice given to the owner of a building, within thirty days after the completion of the work, under the act of 1855, attaches from the time the work was commenced, and takes precedence over a garnishment served on the owner against the contractor, after the work was commenced, and before the filing and serving notice of lien. Tuttle v. Montford, 7 Cal. 358. Where A., who carried on a printing-office, and was indebted to the hands of the office, placed in the hands of B. a certain amount of money, with directions to B. to pay the hands, which B. neglected to do, and where there was no evidence that the hands agreed to look to B. for their money, or that A. was indebted to the hands in an amount equal or approximate to the sum in B.'s hands, and the money was subsequently attached in the hands of B., at the suit of C. against A., it was held that the money was liable to the attachment. Chandler v. Booth, 11 Cal. 342. The fact that the defendant in an action for the recovery of money has been garnished by a creditor of the plaintiff constitutes no defense, and cannot be set up in bar. The remedy of defendant in such case is by motion, based upon affidavit of the fact, for stay of proceedings until the action against the plaintiff or the attachment is disposed of. McKeon v. McDermott, 22 Cal. 667; 83 Am. Dec. 86; Pierson v. McCahill, 21 Cal. 122. Money deposited with the sheriff, by a defendant, to procure the release of an attachment is in the custody of the law; but when the parties, by agreement, take it out of the hands of the sheriff and loan it out to third parties, these parties are not the bailees of the sheriff, and the money ceases to be in the custody of the law, and can only be reached on proceedings supplementary to execution, in the same manner as other debts are reached. Hathaway v. Brady, 26 Cal. 586. The defendant, previous to the suit of the plaintiff against the R. S. Mining Co., sued the company, and obtained judgment against it by default. The judgment was made to draw a certain rate of interest, without there being any prayer for such relief in the complaint, and was erroneous in certain other respects. On appeal, the judgment was modified in certain respects. There was no stay of proceedings in the court below, and before the decision on appeal the defendant had taken out an execution, and caused the mining claims of the R. S. Mining Co. to be sold. At the sale, the defendant bid the full sum for which his execution called, and became the purchaser. He paid the sheriff no money, except his fees on the execution, but gave him a receipt for a sum equal to the face of the execution, less the fees paid to the sheriff. The R. S. Mining Co. had ceased to work their mine prior to this sale. After the sale, a contract was made between the defendant and the company, by which the latter agreed to work the mine during the time allowed for redemption, and pay over the proceeds to the defendant, and the latter agreed to pay all the expenses of working, and to pay the company wages. Under this contract the defendant received from the mine, over and above expenses, the sum of seven thousand dollars in gold-dust. Plaintiff, as an attaching creditor of the R. S. Mining Co., brings suit against the defendant as garnishee. Held, that the case presented failed to make the defendant a debtor of the company within reach of plaintiff's attachment. Johnson v. Lamping, 34 Cal. 295.

§ 545. Citation to garnishee to appear before a court or judge. Any person owing debts to the defendant, or having in his possession, or under his control, any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

Compare, "Proceedings Supplementary to Execution." Post, §§ 714–721.

Legislation § 545. Enacted March 11, 1872; re-enactment of Practice Act, § 128, as amended by Stats. 1855, p. 197.

Examination of garnishee. Where a garnishee, in discharge of a rule, answers, on oath, that he was released by the plaintiff from his obligation to answer, and that the plaintiff had abandoned his examination, he should be discharged without further delay, unless his answer is controverted by the affidavit of the plaintiff. Ogden v. Mills, 3 Cal. 253. The provisions of this section were intended for the security of the plaintiff, and not to confer a privilege upon the garnishee, and the plaintiff may or may not, at his election, require the garnishee to appear and answer on oath, and his liability will not be affected by the failure of the plaintiff to take such step. Roberts v. Landecker, 9 Cal. 262; Robinson v. Tevis, 36 Cal. 611. A garnishee will be discharged of his liability to answer, by laches of the plaintiff to proceed with the examination. Ogden v. Mills, 3 Cal. 253. A garnishee can only be required to answer as to his liability to the debtor defendant at the time of the service of the writ. Norris v. Burgoyne, 4 Cal. 409. Upon proceedings supplementary to execution, where there are other persons claiming liens upon money in the possession of the garnishee, the court cannot order the garnishee to pay money in his possession to the plaintiff, but is authorized only to make an order to the effect that the plaintiff may bring an action against the garnishee as provided by § 720, post, to which action other persons claiming liens upon the money by prior attachments might be made or become par-

ties. Deering v. Richardson-Kimball Co., 109 Cal. 73; 41 Pac. 801.

Examination of defendant. A defendant, against whose property a writ of attachment has been issued, cannot be compelled to attend before the judge or a referee and submit to an examination as to the situation and condition of his property, nor can he be compelled to deliver up his property. Ex parte Rickleton, 51 Cal. 316.

Attachment of pledge. The interest of the pledgor can only be reached by serving a garnishment on the pledgee, and not by a seizure of the pledge: the law wisely provides that the pledgee shall not be deprived of his possession, unless it be by an order made after examination, and on such terms as may be just, having reference to any liens thereon or claims against the same; by this method the rights of all the parties may be protected, and it is the only method by which the interest of the pledgor can be subjected to the writ. Treadwell v. Davis, 34 Cal. 601; 94 Am. Dec. 770.

CODE COMMISSIONERS' NOTE. See note to preceding section. Where a garnishee answers on oath that he was released by the plaintiff, and that the plaintiff had abandoned his examination, he should be discharged by the court, unless his answer is controverted by the affidavit of the plaintiff. Ogden v. Mills, 3 Cal. 253. He can only be required to answer as to his liability, to the debtor, at the time of the service of the garnishment. Norris v. Burgoyne, 4 Cal. 409. He should be allowed to amend his answer, whenever it appears that he was mistaken or in error, and that either could not have been reasonably avoided. Smith v. Brown, 5 Cal. 118. Where B. was garnished in a suit against C., the day before he accepted an order drawn by A. in favor of C., but failed to inform C. thereof; and C., for a valuable consideration, sold the order, as indorsed, to D., an innocent purchaser. It was held, that B. was estopped from setting up against it any antecedent matter, and is liable to D. for the full amount thereof. Garwood v. Simpson, 8 Cal. 101. A plaintiff who has sued out an attachment, and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposes of the property, may waive his lien on the property and bring suit for the value of the property against the garnishee. Roberts & Co. v. Landecker, 9 Cal. 262.

Unless the answer of a garnishee discloses liens having priority, judgment must be rendered for the amount he admits is due. Cahoon v. Levy, 4 Cal. 244. Garnishment of bailor. Hardy v. Hunt, 11 Cal. 343; 70 Am. Dec. 787. An order requiring the garnishee to pay into court the amount for which judgment has been rendered against him, is improper. Smith v. Brown, 5 Cal. 118; Brummagim v. Boucher, 6 Cal. 16. The provisions of this section do not confer a privilege upon the garnishee. The plaintiff may or may not require the garnishee to appear and answer on oath, and his liability will not be affected by the failure of the plaintiff to take such a step. Roberts & Co. v. Landecker, 9 Cal. 262. Where shares of stock in a corporation have been regularly transferred as security for a loan, the corporation is no longer in privity with the mortgagor, and the mortgagee is the only proper garnishee in a suit against the mortgagor, in order to attach his interest in the corporation. Edwards v. Beugnot, 7 Cal. 162. After the delivery and presentation of an order, a debt due by the drawee cannot be reached on attachment issued by the creditors of the drawer. Wheatley v. Strobe, 12 Cal. 92; 73 Am. Dec. 522. Plaintiff delivered to defendants gold-dust, to be forwarded to San Francisco, to be coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and C. were two. While the dust was in the hands of the defendants, C. sold to plaintiff his interest in it, and gave a receipt evidencing the sale. Defendants after this received coin made of the dust, and a creditor of C. attached the coin by garnishing defendants. Defendants had no notice of the sale to plaintiff until the day after the attachment, when plaintiff demanded C.'s share of the coin. It was held, that plaintiff was entitled to the coin; that the dust in defendant's hands was in the constructive possession of all the five owners, C. having no exclusive interest in any part until it was converted into coin and divided among the owners; that C.'s right in the dust was a chose in action, which he could assign by order in favor of the purchaser or assignee, and after such order, neither C. nor his creditors could claim any right to the money, and that the statute of frauds has no application to a case like this. Walling v. Miller, 15 Cal. 38.

§ 546. Inventory, how made. Party refusing to give memorandum may be compelled to pay costs. The sheriff must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he must request, at the time of service, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each; and if such memorandum be refused, he must return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amounts and description of such debt or credit.

Return of writ, generally. See post, § 559.

Legislation § 546. Enacted March 11, **1872**; based on Practice Act, § 129, which had the word "shall" instead of "must," in each instance.

Debt and credit, distinguished. A "debt" is money owing by the garnishee to the defendant, which may be paid over to the sheriff; but a "credit" is something belonging to the defendant, of which the garnishee has possession and control, and which may be delivered up or transferred to the sheriff: a garnishment of "certain credits belonging to the defendant," which a corporation has in its possession or under its control, is not an attachment of a debt due from the corporation to the defendant. Gow v. Marshall, 90 Cal. 565; 27 Pac. 422.

§ 547. Perishable property, how sold. Accounts without suit to be collected. If any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution. The proceeds, and other property attached by him, must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment. Debts and credits attached may be collected by him, if the same can be done without suit. The sheriff's receipt is a sufficient discharge for the amount paid.

Legislation § 547. Enacted March 11, **1872**; based on Practice Act, § 130, which had (1) the word "shall" instead of "must," before "sell the same," and before "be retained," and (2) the words "shall be" instead of "is," after "receipt."

Perishable property. The "perishable property" attached, that the sheriff may sell, under this section, without an order of the court, is such only as is subject to speedy and natural decay; but the sale of other property, which would materially depreciate in value from other causes than decay, cannot be made, except by order of the court, under § 548, post. Witherspoon v. Cross, 135 Cal. 96; 67 Pac. 18.

CODE COMMISSIONERS' NOTE. Sale of perishable property. Davis v. Ainsworth, 14 How. Pr. 346. Collection of debts. Mechanics' etc. Bank v. Dakin, 33 How. Pr. 316; 50 Barb. 587; Heye v. Bolles, 2 Daly, 231.

§ 548. Property attached may be sold as under execution, if the interests of the parties require. Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court or a judge thereof that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court to abide the judgment in the action. Such order can be made only upon notice to the adverse party or his attorney, in case such party has been personally served with a summons in the action.

Legislation § 548. 1. Enacted March 11, **1872**; based on Practice Act, § 654, as amended by Stats. 1854, Redding ed. p. 72, Kerr ed. p. 101, § 66, which had (1) the words "in pursuance of the provisions of said act" after "writ of attachment," (2) the words "shall be" instead of "is," before "made to appear," and (3) the words "or a county judge" after "judge thereof." When enacted in 1872, it read same as at present, except that it contained the words "or a county judge," as in the Practice Act.

2. Amended by Code Amdts. **1880**, p. 4.

Application of proceeds. The proceeds of property seized by an officer under attachment from two separate courts, and sold under an order of the court on which the junior attachment issued, should not all be deposited with the latter court, as thereby the lien of the prior attachment would be lost; and the officer will not be protected by the order of such court in making such deposit, since, having both attachments in his hands, he must know that that court could deal only with the surplus remaining after the satisfaction of the first demand. Weaver v. Wood, 49 Cal. 297.

Notice. The order of sale cannot be made, except upon notice to the adverse party. Witherspoon v. Cross, 135 Cal. 96, 67 Pac. 18.

§ 549. When property claimed by a third party, how tried. If any personal property attached be claimed by a third person as his property, the same rules shall prevail as to the contents and making of said claim, and as to the holding of said property, as in case of a claim after levy upon execution, as provided for in section six hundred and eighty-nine of the Code of Civil Procedure.

Sureties on indemnity. Post, § 1055.

Legislation § 549. 1. Enacted March 11, **1872**; re-enactment of Practice Act, § 131, which read: "If any personal property attached be claimed by a third person as his property, the sheriff may summon a jury of six men to try the validity of such claim; and such proceedings shall be had thereon, with the like effect, as in case of a claim after levy upon execution."

2. Amended by Stats. **1891**, p. 20.

Claim of third person to property. Demand upon and notice to an officer are necessary, where the property is in the possession and apparent control of the defendant at the time of the seizure, before the claimant can maintain an action of claim and delivery. Taylor v. Seymour, 6 Cal. 512; Killey v. Scannell, 12 Cal. 73.

The attachment by a sheriff of goods in the possession of the attachment debtor, which he has no reason to suppose to be the property of another, is in pursuance of the authority of the writ of attachment, and does not constitute a conversion of the property attached; in order to render him liable, facts should be stated to show that upon notice of the true owner's claim, he refused to surrender the property. Fuller Desk Co. v. McDade, 113 Cal. 360; 45 Pac. 694. A demand for the return of property is not vitiated by an exception therein of property stated as that owned by a certain person, not a party to the action. Susskind v. Hall, 5 Cal. Unrep. 304; 44 Pac. 328. Where a third person has property of an attachment debtor in his possession, mingled with his own property, of a different kind and character, plainly and easily distinguishable from the other, which he refuses to point out, claiming ownership of all, the sheriff is not authorized to seize the property of such third person. Susskind v. Hall, 5 Cal. Unrep. 304; 44 Pac. 328; and see Daumiel v. Gorham, 6 Cal. 43; Wellington v. Sedgwick, 12 Cal. 469; Paige v. O'Neal, 12 Cal. 483. The claimant may be required to describe the property, when testifying in an action brought by him against an officer for the recovery of the same. Brichman v. Ross, 67 Cal. 601; 8 Pac. 316. The right of the officer to notice and demand is not affected by the fact that he has obtained indemnity before seizing the goods: notice of the claim of another may materially affect the character of the indemnity required. Taylor v. Seymour, 6 Cal. 512. Where, prior to the amendment of this section and § 689, post, a sheriff seized the goods of a third party, in the custody of the owner or a person other than the defendant, he is a trespasser ab initio, and no previous demand is necessary to authorize a recovery for such trespass. Moore v. Murdock, 26 Cal. 514; Black v. Clasby, 97 Cal. 482; 32 Pac. 564; and see Ledley v. Hays, 1 Cal. 160; Paige v. O'Neal, 12 Cal. 483; Boulware v. Craddock, 30 Cal. 190. When the taking of the property is tortious, no demand is necessary before beginning suit. Ham v. Henderson, 50 Cal. 367. The vendee of a third party, purchasing after levy, is entitled to make demand for the return of goods seized, and upon failure or refusal of the officer to yield up the possession, he can maintain an action for conversion: conversion by seizure on attachment does not deprive the owner of the title, nor render such subsequent transfer void. Howe v. Johnson, 117 Cal. 37; 48 Pac. 978. Proof of the service of the claim on the officer is admissible against him, in an action by a claimant for the wrongful seizure of property, though not pleaded; § 689, post, being for the protection of the officer, and thus a matter of defense. Paden v. Goldbaum, 4 Cal. Unrep. 767; 37 Pac. 759. In an action of claim and delivery, a simple allegation of the demand is sufficient, as against a general demurrer; if the form of the demand does not comply with the requirement of § 689, post, the defendant may set up such fact in his answer, or object to the admission of evidence of demand. Brenot v. Robinson, 108 Cal. 143; 41 Pac. 37.

Estoppel to claim ownership. The owner of property attached or levied upon as the property of another, is not conclusively estopped from showing title in himself because he has given an accountable receipt for its delivery to the officer, although the receipt admits that the property is attached or levied upon as the property of the debtor, if he makes known to the officer his claim at or before the time the receipt is given; but if he fails to make his claim known, and thus influences the conduct of the officer, he is estopped from afterwards asserting it, provided the facts and circumstances relating to his claim were then known to him; but such receipt will constitute prima facie evidence of ownership, and, unless overcome by proof on the part of the claimant, must be decisive against him; and to overcome this prima facie ownership in the debtor, the receiptor must prove that he claims the property, and that it was in fact his own. Bleven v. Freer, 10 Cal. 172; Dresbach v. Minnis, 45 Cal. 223. In an action of claim and delivery, brought by a purchaser against a sheriff who levied an attachment, the sheriff stands in the shoes of the attaching creditor, and is bound by the estoppel against such creditor, and cannot defend the action by justifying under the writ of attachment. Sullivan v. Johnson, 127 Cal. 230; 59 Pac. 583.

Indemnity to sheriff. It is the right and duty of the sheriff to take full indemnity from each attaching creditor, so that he may be secure in any event, as he cannot foresee whose levy will ultimately prevail. Davidson v. Dallas, 8 Cal. 227. Where the plaintiff, on demand of the officer, gave him not only an indemnity bond, but also a written agreement that he might retain for a reasonable time, as additional security against the claim of a third party, all the moneys that might come into his hands by reason of his attachment or any execution to be issued in the action, the reasonable time stipulated for must be construed as relating to the proceedings by such third party to recover the money attached, and the officer cannot be required, regardless of the proceedings by such third party, to pay the money into court or to apply it in satisfaction of the judgment subsequently obtained by the plaintiff in the attachment suit. Scherr v. Little, 60 Cal. 614. Where a sheriff

has required indemnity bonds from two several attaching creditors upon his seizure and detention of property claimed by a third party, and he has been held liable in damages to such claimant as a trespasser, his recourse upon the several bonds must be determined by the following rules: 1. If the attachments are both ultimately sustained, and the whole proceeds of the property are absorbed by the debt of the prior attaching creditor, then he will be solely responsible to the sheriff for the entire liability incurred by him to the claimant; 2. If the levy of the prior attaching creditor is defeated, and that of the junior attaching creditor sustained, then the latter will be solely responsible for the entire amount; 3. If both attachments are sustained, and the property is sold for more than sufficient to pay the prior attaching creditor, then each of said creditors will be responsible in proportion to the amounts paid to each by the sheriff; 4. If both attachments are defeated by the defendant in the attachment suit, or if the suits of the sheriff against the indemnitors are commenced before the determination of the attachment suits, then the separate responsibility of the attaching creditors will be in proportion to the amounts of their respective attachments, unless the whole amount for which both judgments were levied exceeded the value of the property as settled in the suit against the sheriff, in which case the prior attaching creditor will be responsible to the amount of his attachment, and the subsequent attaching creditor for the remainder. Davidson v. Dallas, 8 Cal. 227; but see same case, 15 Cal. 75, where this decision is commented on and doubted.

Justification of officer under writ. To justify under the writ, the officer must show title to the goods in the defendant in the attachment suit at the time of the levy. O'Connor v. Blake, 29 Cal. 312. An officer, in order to justify the seizure, under a writ of attachment, of personal property found in the possession of a stranger to the suit, claiming title thereto, must show a judgment or prove the debt for which judgment is demanded; and to do so, the papers in the attachment suit are not sufficient. Brown v. Cline, 109 Cal. 156; 41 Pac. 862; Brichman v. Ross, 67 Cal. 601; 8 Pac. 316; and see Thornburgh v. Hand, 7 Cal. 554. The officer must prove the existence of the debt for which the attachment was issued, when the debt has not been established by a judgment against the debtor: when that is done, the judgment proves it (Sexey v. Adkinson, 34 Cal. 346; 91 Am. Dec. 698); and he must prove not only the attachment, but also the proceedings on which it was based, against the claim of a third person. Horn v. Corvarubias, 51 Cal. 524; Thornburgh v. Hand, 7 Cal. 554; and see Darville v. Mayhall, 128 Cal. 617; 61 Pac. 276; Aigeltinger v. Einstein, 143 Cal. 609; 101 Am. St. Rep. 131; 77 Pac. 669. A sheriff, justifying on the ground that the property seized had been fraudulently sold by the attachment defendant to the claimant, need not plead such fraudulent sale in his answer, in a suit brought by the claimant to recover the property: he may simply deny the plaintiff's title, and at the trial prove the facts showing that the sale was fraudulent and void. Mason v. Vestal, 88 Cal. 396; 22 Am. St. Rep. 310; 26 Pac. 213. An officer may defeat a claim by showing that the property had been fraudulently transferred to the claimant by the defendant in the attachment suit (Howe v. Johnson, 107 Cal. 67; 40 Pac. 42); and he may show, in justification, that the property had been sold by the attachment debtor to the claimant, in contemplation of insolvency and in fraud of his creditors, and that, subsequently to such seizure, the assignee in insolvency of such debtor had recovered possession of the property from the officer. Bolander v. Gentry, 36 Cal. 105; 95 Am. Dec. 162. The circumstance that the property was in the possession of the execution debtor at the date of the seizure amounts to nothing, except upon proof of fraud or commixture. Boulware v. Craddock, 30 Cal. 190. Where the sheriff wrongfully took possession of the goods, he cannot justify on the ground that the coroner had taken them from his possession before he removed them. Squires v. Payne, 6 Cal. 654. The seizure of the property of tenants in common, on an attachment against one of such tenants, is not a trespass against his cotenants: in attaching the interest of one tenant in common, the sheriff is justified in taking possession of the entire property for the purpose of subjecting to sale the undivided interest of the attachment debtor. Bernal v. Hovious, 17 Cal. 541; 79 Am. Dec. 147; Waldman v. Broder, 10 Cal. 378; Veach v. Adams, 51 Cal. 609. The proof of the writ and of the debt are merely prima facie evidence of the right of the officer to make the levy and take possession of the property from a third party, who is entitled to recover it upon proving it to be his. Brichman v. Ross, 67 Cal. 601; 8 Pac. 316. Whenever property is found in the possession of a stranger claiming title, the mere protection of the writ does not justify its seizure: the officer must go further, and prove that the attachment defendant was indebted to the attachment plaintiff; and if in the attachment suit judgment was rendered in favor of the plaintiff, that will establish the indebtedness of the defendant; if not, the officer must otherwise prove the indebtedness of the defendant, in order to justify his proceeding. Brichman v. Ross, 67 Cal. 601; 8 Pac. 316. The sale of personal

property without change of possession is fraudulent as against the creditors of the seller, and such property may lawfully be attached in the latter's possession for his debt; the purchaser cannot recover the property from the officer. Richards v. Schroder, 10 Cal. 431; Joshua Hendy Machine Works v. Connolly, 76 Cal. 305; 18 Pac. 327. The sale of the stock and fixtures of a saloon, by the owner thereof, to a former bartender, for an actual consideration equal to the full value thereof, and not for the purpose of hindering, delaying, or defrauding his creditors, accompanied by the delivery of the exclusive possession thereof, conveys such title to the purchaser that he may demand the return of the property, which was seized immediately thereafter upon attachment. Howe v. Johnson, 117 Cal. 37; 48 Pac. 978. Live-stock seized as the property of the defendant, while in his possession, and which he formerly owned, may be claimed and recovered by a third person, to whom they had been sold and delivered by the defendant, and by whom they had been placed in the hands of the defendant as an agister. Henderson v. Hart, 122 Cal. 332; 54 Pac. 1110. The produce of a ranch conveyed by the defendant, but which remained in his possession after the conveyance, becomes the property of the grantee, without delivery, where the sale was not in fact fraudulent, and may be recovered by him, when seized on attachment against the grantor. Howe v. Johnson, 107 Cal. 67; 40 Pac. 42.

Joint trespassers jointly liable. Where a sheriff wrongfully seizes property in two attachment suits, and is notified immediately by owner, and demand made for redelivery, but sells the property after receiving bonds of indemnity from both the attaching creditors, and applies the proceeds of the sale, first to the judgment of the prior attachment, and the balance, in part, to the second, the sheriff and each of the attaching creditors are joint trespassers, and jointly liable to the owner for the damages sustained. Lewis v. Johns, 34 Cal. 629.

Attachable interest. The interest of a defendant in an attachment suit, as tenant in common, which depends upon the performance of conditions yet to be performed, is not an attachable interest. Tuohy v. Wingfield, 52 Cal. 319; Howell v. Foster, 65 Cal. 169; 3 Pac. 647. Crops grown by an adverse possessor cannot be seized on attachment, in a suit against the legal owner. Smith v. Cunningham, 67 Cal. 262; 7 Pac. 679. Where the plaintiff made a conditional sale and lease of personal property, upon the breach of which he was entitled to possession thereof, and the vendee, after the levy of an attachment against him, made default, the plaintiff, upon surrendering to the vendee all his unpaid obligations, is entitled to possession, upon demand made to the sheriff, and he has a cause of action against the sheriff for claim and delivery. Kellogg v. Burr, 126 Cal. 38; 58 Pac. 306; and see Rodgers v. Bachman, 109 Cal. 552; 42 Pac. 448. The seizure of property by a third person is wrongful and unlawful, and the owner may maintain an action against the sheriff for its recovery. Woodworth v. Knowlton, 22 Cal. 164. An officer cannot protect himself for interfering with the property of a third person, by the plea that he attached and sold only the interest of the judgment debtor; and where the judgment debtor has no interest, no harm is done the owner, and trespass lies against the sheriff for any unlawful interference. Rankin v. Ekel, 64 Cal. 446; 1 Pac. 895. That an attaching creditor had reason to believe that the property was the property of his debtor, does not justify the sheriff in seizing such property, nor is it any defense to an action by the owner for a conversion. Angell v. Hopkins, 79 Cal. 181; 21 Pac. 729. Declarations of ownership of personal property, made by a defendant to his creditors while he is in possession thereof, do not affect the ownership thereof by a third party, nor subject such property to attachment in an action against such defendant. Green v. Burr, 131 Cal. 236; 63 Pac. 360.

Mortgaged property. Property covered by a chattel mortgage, duly executed and recorded, cannot be attached without payment of the mortgage debt, or a deposit of the amount with the county clerk or county treasurer, payable to the order of the mortgagee. Berson v. Nunan, 63 Cal. 550; Meyer v. Gorham, 11 Cal. 392; Irwin v. McDowell, 91 Cal. 119; 27 Pac. 601. A levy on mortgaged property, and the placing of a keeper in charge thereof, is a conversion by the sheriff, although the property is not moved or otherwise disturbed, and although the levy is released before any demand is made by the mortgagee. Rider v. Edgar, 54 Cal. 127; Irwin v. McDowell, 91 Cal. 119; 27 Pac. 601; and see Rankin v. Ekel, 64 Cal. 446; 1 Pac. 895.

Measure of damages. The measure of damages for the seizure of mortgaged personal property is the full amount of the mortgage debt, if the property is worth enough to pay it; and if not, then such amount only as it is worth, and also, in either case, a fair compensation for loss of time, and expenses properly incurred in pursuit of the property. Irwin v. McDowell, 91 Cal. 119; 27 Pac. 601; Sherman v. Finch, 71 Cal. 68; 11 Pac. 847. In estimating the value of the property seized, the jury may consider the actual value of the property in the market when it was seized by the officer, and what amount it would take, in the market, to replace the

same. Cassin v. Marshall, 18 Cal. 689. The detriment proximately caused by the seizure of mortgaged property is, not the value of the property, but the amount of the mortgage debt; and this detriment the officer seizing the property assumes to make good. Wood v. Franks, 56 Cal. 217. In determining what was the value of the property at the time of the conversion, evidence is admissible as to the cost of the property, as a circumstance to aid in such determination. Angell v. Hopkins, 79 Cal. 181; 21 Pac. 729. The officer cannot show, as a measure of damages, that the property, when sold, brought full and fair auction prices, nor what the property sold for at the sheriff's sale, nor that he was instructed by the attaching creditor to employ a competent auctioneer to make the sale, and that he obeyed such instruction. Cassin v. Marshall, 18 Cal. 689.

Sheriff's jury. Prior to the amendment of § 689, post, in 1891, if the verdict of the sheriff's jury was in favor of the claimant, the sheriff might release the levy, unless the judgment creditor gave him sufficient indemnity; but the verdict of the sheriff's jury against the claimant did not protect the officer in retaining the attached property. Perkins v. Thornburgh, 10 Cal. 190; Sheldon v. Loomis, 28 Cal. 122.

Right of claimant of attached property to intervene. See note 18 Ann. Cas. 594.

Attack on attachment by creditors. See note 35 L. R. A. 766.

CODE COMMISSIONERS' NOTE. Davidson v. Dallas, 8 Cal. 227; Bleven v. Freer, 10 Cal. 172; Treadwell v. Davis, 34 Cal. 601; 94 Am. Dec. 770.

§ 550. If plaintiff obtains judgment, how satisfied. If judgment be recovered by the plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant, or a claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment;

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution.

Disposition of proceeds. Neglect of sheriff to pay over moneys. Pol. Code, § 4162.

Preference. Claim for labor, wages, etc. Post, § 1206.

Sales on execution. Post, §§ 692–709.

Legislation § 550. Enacted March 11, **1872**; based on Practice Act, § 132, which had the word "shall" instead of "must," in each case.

Satisfaction of judgment. Executions must be satisfied by the sheriff in the order of attachments, and when he does this, his ministerial duties are fulfilled, and he is protected against any attack by reason of irregularity in the issuance of a writ regular on its face; but irregularity in the proceedings leading up to the issuance of the writ do not excuse the officer in refusing to recognize the validity of a writ regular on its face, and in applying the attached property to the satisfaction of a judgment in a junior attachment suit (McComb v. Reed, 28 Cal. 281; 87 Am. Dec. 115); but an order of the bankruptcy court, restraining a sale, justifies the officer in refusing to execute the process. Alexander v. Wilson, 144 Cal. 5; 77 Pac. 706. An action may be maintained by an execution creditor for money collected by the sheriff on an execution. Harvey v. Foster, 64 Cal. 296; 30 Pac. 849. The levy of an execution, beyond giving notice of sale, is unnecessary, where the property is held under an attachment to satisfy the judgment. McFall v. Buckeye Grangers' etc. Ass'n, 122 Cal. 468; 68 Am. St. Rep. 47; 55 Pac. 253. The invalidity of prior attachment liens may be determined on a motion of the plaintiff for an order to compel the sheriff to pay over the proceeds of the sale of attached property; and if notice of the motion is not given by the plaintiff to the other attaching creditors, and the sheriff wishes the decision to be binding upon them, he should give them notice of the motion. Dixey v. Pollock, 8 Cal. 570. Corporate stock attached may be sold on execution, without first proceeding under § 545, ante, or §§ 714–721, post. West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315; 85 Am. St. Rep. 171; 65 Pac. 622. The code contains express directions to the sheriff as to the sale of attached property, and directions therefor are not required to be given in the judgment; nor is the lien of attachment lost by taking a simple money judgment, without embodying therein directions for the sale of the

attached property. Low v. Henry, 9 Cal. 538; Porter v. Pico, 55 Cal. 165; Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73. The segregation of interests held in common cannot be made by the sheriff or his keepers with the consent of the tenants in common, but without the consent of the attaching creditor: the latter has the right to insist upon the sale of the undivided interest of the defendant in the common property. Veach v. Adams, 51 Cal. 609. The sheriff has no right to sell at private sale, nor to authorize any one else to do so. Sheehy v. Graves, 58 Cal. 449. One who purchases property under a judgment in an attachment suit may maintain an action to enjoin another, who subsequently attaches the same property in a suit against the same defendant, from proceeding to sell the property under his subsequent lien. Porter v. Pico, 55 Cal. 165. The title of the purchaser of shares of stock at an execution sale is not affected by the failure of the officer to show that he levied before selling. McFall v. Buckeye Grangers' etc. Ass'n, 122 Cal. 468; 68 Am. St. Rep. 47; 55 Pac. 253.

Prorating proceeds of attached property among creditors. See note Ann. Cas. 1913C, 285.

CODE COMMISSIONERS' NOTE. The term "judgment" means a final one. Wright v. Rowland, 4 Keyes, 165; 36 How. Pr. 248. The application of the attaching creditor to compel the sheriff to pay over the proceeds of property attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given by the party to the other attaching creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them. Dixey v. Pollock, 8 Cal. 570.

§ 551. When there remains a balance due, how collected. If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff must proceed to collect such balance, as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

Proceedings supplementary to execution. Post, §§ 714 et seq.

Legislation § 551. Enacted March 11, 1872; based on Practice Act, § 133, which had the word "shall" instead of "must," in each instance.

Deposit with clerk not payment. A deposit, by the defendant, of the amount of the judgment against him, with the clerk of the court, pending an appeal by the plaintiff, is not such a payment as entitles him to a release of the property held under the writ of attachment. Sagely v. Livermore, 45 Cal. 613.

Surplus moneys. After the satisfaction of the judgment of the attachment creditor, any surplus moneys that remain are subject to the rights of the judgment debtor or his assignee (Sexey v. Adkison, 40 Cal. 408); and they are liable to garnishment. Graham v. Endicott, 7 Cal. 144.

CODE COMMISSIONERS' NOTE. When the attachment is satisfied, the property not disposed of, as well as surplus moneys, are subject to the rights of the debtor or his assignee. Sexey v. Adkison, 40 Cal. 408.

§ 552. When suits may be commenced on the undertaking. If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section five hundred and forty or section five hundred and fifty-five, or he may proceed, as in other cases, upon the return of an execution.

Legislation § 552. Enacted March 11, 1872; based on Practice Act, § 134, which read as at present, except for the changes in the section numbers.

Jurisdiction. Where a judgment for costs, in an action brought in the superior court in which an attachment is issued, is rendered for less than three hundred dollars, and an appeal therefrom is taken to the supreme court, and the execution of the judgment stayed, a justice's court, and the superior court on appeal, have jurisdiction of an action to enforce the bond given to secure the payment of the costs in the attachment suit, although the appeal from the judgment therein is still pending and undetermined. Karry v. Superior Court, 162 Cal. 281; 128 Pac. 760.

Demand. The object of a demand is to enable a party to perform his contract or discharge his liability, according to the nature of it, without a suit at law. There is no stereotyped form or manner of demand: any language intended to constitute a demand, and which plainly informs the party of whom the demand is made that he is required to perform the duty or obligation to which the demand refers, is sufficient; but, like all allegations of fact, the demand should be pleaded with directness and certainty. Mullally v. Townsend, 119

Cal. 47; 50 Pac. 1066. A demand for the redelivery of property released by an undertaking given under §§ 554, 555, post, may be made by either the officer or the plaintiff in the attachment suit. Brownlee v. Riffenburg, 95 Cal. 447; 30 Pac. 587. A demand that the sureties fulfill the obligation as expressed in the undertaking is sufficient: the fact that such demand is coupled with a demand that the defendant pay the amount of judgment recovered in the attachment suit does not affect it, although the undertaking was not to pay the judgment recovered, where such judgment was less than the conceded value of the goods. Mullally v. Townsend, 119 Cal. 47; 50 Pac. 1066. The return of a sheriff on an execution issued in an attachment suit, showing a demand upon the officers of the defendant corporation for the payment of the amount named in the execution, and that he was informed by the officers of the corporation that they had no property of the defendant in their possession, sufficiently shows that the defendant's property, previously seized under attachment, and released on bond, was not delivered to the sheriff pursuant to the provisions of the bond. Hammond v. Starr, 79 Cal. 556; 21 Pac. 971. Where the judgment recovered was less than the value of the property attached, as fixed in the bond for release, and less than its admitted value at the time of the release, the payment of the amount of the judgment is the full measure of the obligation of the sureties, and a demand upon them for the amount of such judgment is sufficient, where there was a refusal of the defendant to redeliver the property. Mullally v. Townsend, 119 Cal. 47; 50 Pac. 1066. Where the undertaking was, that, in case of default by the principal to redeliver the property to satisfy the judgment against him, the undertakers would, on demand, pay the value of the property released, demand, and refusal to pay the judgment and redeliver the property released, are not sufficient to fix the liability of the sureties: there must also be a demand for the payment of the value of the property. Pierce v. Whiting, 63 Cal. 538; Mullally v. Townsend, 119 Cal. 47; 50 Pac. 1066. Where the undertaking was, that the defendant would, on demand, pay a judgment, if obtained by the plaintiff, a complaint to recover on the undertaking is insufficient, which contains no averment of any demand, and no allegation showing the amount of the judgment to be unpaid. Kanouse v. Brand, 11 Cal. App. 669; 106 Pac. 120. Where the undertaking was, that the defendant would pay the amount of the judgment on demand, the sureties become immediately liable, without demand or notice, where there was a demand upon and refusal by the defendant (Gardner v. Donnelly, 86 Cal. 367; 24 Pac. 1072); and where the liability was, by the terms of the bond, joint and several, and the principal was not a party to the suit, demand upon the sureties alone is sufficient. Mullally v. Townsend, 119 Cal. 47; 50 Pac. 1066. Demand need not be made upon an insolvent debtor for the return of the property, before an action can be maintained against the sureties on his bond to release the attached property. Rosenthal v. Perkins, 123 Cal. 240; 55 Pac. 804. The sheriff's return upon execution issued in attachment may show a sufficient demand. Hammond v. Starr, 79 Cal. 556; 21 Pac. 971.

Actions on undertaking. This section makes the issuance and return of an execution a condition precedent to the right to commence an action upon an undertaking given pursuant to § 555, post. Brownlee v. Riffenburg, 95 Cal. 447; 30 Pac. 587; Rosenthal v. Perkins, 6 Cal. Unrep. 21; 53 Pac. 444. The direct collection from the sureties, of the judgment against the defendant, is not authorized. Holladay v. Hare, 69 Cal. 515; 11 Pac. 28. The plaintiff, being the real party in interest, may sue on a bond executed in the name of the sheriff (Curiac v. Packard, 29 Cal. 194); and he may institute and maintain his action against the sureties on the same day on which payment was demanded of and refused by the defendant. Gardner v. Donnelly, 86 Cal. 367; 24 Pac. 1072. Immediately upon demand on the defendant, and his failure to redeliver the property as required by the terms of the undertaking, the sureties become liable to pay the full value of the property attached. Metrovich v. Jovovich, 58 Cal. 341. Where the defendant, and one who has acquired a mortgage lien upon the property after its release upon the giving of the delivery bond, refuse to redeliver the property after judgment, except upon the payment of the amount of the mortgage lien, there is such a refusal as to fix the liability of the sureties on the undertaking: the plaintiff is not bound to accept the property burdened with a lien placed upon it after its release from attachment. Mullally v. Townsend, 119 Cal. 47; 50 Pac. 1066. The plaintiff is not required to look to the undertaking alone: he may proceed by execution against the property of the defendant, and if the execution is returned unsatisfied, he may proceed upon the undertaking. Low v. Adams, 6 Cal. 277. The undertaking cannot be enforced, pending appeal, where a stay bond is given by the defendant. Ayres v. Burr, 132 Cal. 125; 64 Pac. 120.

Pleading, variance. Where the complaint, in an action upon the undertaking, alleges that demand was made upon the defendant "for the payment of said judgment, with interest thereon, and costs," and that defendant neglected and refused "to pay the balance due on said judgment, or any portion thereof," the allegation of demand and re-

fusal is sufficient, in the absence of a special demurrer, where a portion of the judgment had already been paid. Gardner v. Donnelly, 86 Cal. 367; 24 Pac. 1072. The complaint in an action on an undertaking given to procure a release of attached property, must allege that the attachment was discharged. Palmer v. Melvin, 6 Cal. 652; Williamson v. Blattan, 9 Cal. 500; Jenner v. Stroh, 52 Cal. 504; and see Los Angeles County v. Babcock, 45 Cal. 252. Where, by the terms of the undertaking, a demand is necessary to fix the liability of the sureties, the complaint must contain the averment of such demand. Pierce v. Whiting, 63 Cal. 538. The redelivery of the property by the sheriff to the defendant need not be alleged: it is sufficient to aver the order of the court discharging the attachment upon the giving of the undertaking. McMillan v. Dana, 18 Cal. 339; Gardner v. Donnelly, 86 Cal. 367; 24 Pac. 1072. Where a bond is given before the levy of attachment, for the purpose of preventing the attachment or the completion thereof, the complaint must allege that the sheriff did not complete the levy. Coburn v. Pearson, 57 Cal. 306. An allegation, that the judgment in the attachment suit was recovered, entered, and docketed, is sufficient, where the undertaking reads, "If the plaintiff shall recover judgment in said action, we will pay," etc. McCutcheon v. Weston, 65 Cal. 37; 2 Pac. 727. Where the undertaking recites that it was given to prevent the levy, and the complaint alleges that it was given to release the property attached, there is no material variance, if the complaint avers the issuance of the attachment, that under it the sheriff attached certain property, and that the defendant, being desirous of having the attached property released, executed the undertaking set forth in the complaint, which undertaking, after reciting the issuance of the writ and command thereof, states, "Now, therefore, we, in consideration of the premises, and to prevent the levy of said attachment," etc. Preston v. Hood, 64 Cal. 405; 1 Pac. 487; McCutcheon v. Weston, 65 Cal. 37; 2 Pac. 727.

Liability of sureties. Actual ownership of the property attached is no concern of the surety; he can meddle with such property, and remove it beyond the reach of the attaching creditor, only by undertaking that if the plaintiff shall recover judgment in the action, such attached and released property shall be restored to the attaching officer; whether it belongs to a third party, or for any other reason is not legally subject to the attachment, is a question to be litigated between the plaintiff and the adversary claimant, and in no way affects the surety's express covenant to restore; the fact that the property belongs to a defendant against whom no judgment was recovered is immaterial, if judgment was recovered against any of the defendants. McCormick v. National Surety Co., 134 Cal. 510; 66 Pac. 741. The sureties are not released by the subsequent discharge of the defendant in bankruptcy, where such proceedings are instituted more than four months after the levying of the attachment: in such case the defendant is not entitled to have the attachment lien discharged; if the proceedings in bankruptcy have not the effect, under the bankruptcy law, of discharging the attachment levied upon the property of the defendant if an undertaking had not been given, they do not have the effect of releasing the undertaking given. Harding v. Minear, 54 Cal. 502. Where, at the commencement of a proceeding in insolvency, there is no attachment in force upon which it can operate, an attachment against the insolvent debtor having been previously dissolved by a bond given for that purpose, the liability of the sureties on such bond is not released or affected by the insolvency proceeding. Rosenthal v. Perkins, 123 Cal. 240; 55 Pac. 804. In an action upon an undertaking, no collateral inquiry can be made as to the fact of levy, or of the property being subject to it: the condition of the bond is to answer the judgment, and if it is regular, it is not at all important whether the property is leviable or not, for by the contract the parties have bound themselves to pay in any event, independently of all considerations of this sort. McMillan v. Dana, 18 Cal. 339; Pierce v. Whiting, 63 Cal. 538. Irregularities in the affidavit and undertaking, or in the proceedings to procure the attachment, if waived in the attachment suit, cannot be taken advantage of by the sureties in a collateral proceeding on the undertaking given to secure the release of the attachment. Hammond v. Starr, 79 Cal. 556; 21 Pac. 971. An undertaking required by a sheriff for the release of exempt property, the exemption having been claimed, is void for want of consideration. Servanti v. Lusk, 43 Cal. 238. Denials on information and belief, made by the sureties in an action upon their undertaking, in relation to matters which could easily be ascertained by reference to the record of the court in the attachment proceedings, and concerning which the affirmative allegations of the answer show that the defendant had knowledge or information, are not permissible, and do not raise an issue on matters thus attempted to be denied. Mullally v. Townsend, 119 Cal. 47; 50 Pac. 1066. Where the principals in a bond, given to a sheriff to release goods from attachment, tender to the plaintiff the full amount of his debt and costs, and the plaintiff refuses to receive the tender, the sureties are discharged, if the judgment

debtor thereafter becomes insolvent. Curiac v. Packard, 29 Cal. 194; Hayes v. Josephi, 26 Cal. 535.

Effect of recitals in bond. Whatever an obligor recites in a bond to be true, may be taken as true against him, and need not be averred in the complaint on such bond, nor proved at the trial. Smith v. Fargo, 57 Cal. 157; McMillan v. Dana, 18 Cal. 339; Pierce v. Whiting, 63 Cal. 538. Where the bond sued upon, as set out in the complaint, recites that the property of the defendant had been seized by the sheriff under the writ of attachment, and that the bond was given for the purpose of procuring the release of such property from the levy, it is unnecessary to make, in the complaint, a distinct allegation of the fact of the levy. Smith v. Fargo, 57 Cal. 157. Where the goods were in fact released as a consequence of the bond being given, and the undertaking recited that it was given pursuant to an order of the court requiring it to be given, and the officer accepted the bond and surrendered the property, it must be presumed that an order discharging the attachment was made pursuant to §§ 554, 555, post, and that the officer regularly performed his duty in releasing the goods. Rosenthal v. Perkins, 123 Cal. 240; 55 Pac. 804. A mistake in the recital, as to the amount for which the attachment issued, may be explained and corrected by parol. Palmer v. Vance, 13 Cal. 553.

Where return of execution unsatisfied is necessary to action on bond. The return of an execution unsatisfied, in whole or in part, must be made, before the plaintiff can maintain an action upon a statutory bond given under §§ 554, 555, post. Brownlee v. Riffenburg, 95 Cal. 447; 30 Pac. 587. An action on a common-law bond, given in lieu of the undertaking prescribed by § 555, post, where the condition is, that the "defendant will, on demand, pay to the plaintiff whatever judgment may be recovered in said action," may be maintained on the refusal of defendant to pay such judgment on demand, without return of the execution unsatisfied in whole or in part. Smith v. Fargo, 57 Cal. 157. The issuance and return of the execution unsatisfied is not necessary prior to an action on a common-law bond given in lieu of the undertaking provided for by § 540, ante, where the undertaking expressed is, not that the attachment debtor will pay the judgment, but a distinct and positive agreement that the sureties will themselves pay the amount on demand. Palmer v. Vance, 13 Cal. 553. The return of the execution unsatisfied, before commencing action upon the undertaking given to secure the release of the attachment, is not necessary, where the defendant in the attachment suit commenced insolvency proceedings under the act of 1880, after the release of the attachment. Rosenthal v. Perkins, 123 Cal. 240; 55 Pac. 804.

Measure of damages. In an action on the undertaking, where a portion of the attached property was levied upon and sold under execution upon the judgment, the measure of damages is the full value of the property attached, less the amount of the proceeds of the sale (Metrovich v. Jovovich, 58 Cal. 341); and in an action on the undertaking given for the release of the attached property, the measure of damages is the value of the property released, not exceeding the amount recovered in the attachment suit, with interest thereon until the date of judgment in the action on the bond. Hammond v. Starr, 79 Cal. 556; 21 Pac. 971. An agreement to pay the value of property released cannot be extended to include the liability of the defendant in the attachment suit, where the sureties do not expressly undertake to pay the amount of the judgment recovered. Curtin v. Harvey, 120 Cal. 620; 52 Pac. 1077. The rights and remedies of the parties to a contract are to be determined according to the terms of the contract; for the law binds a party to a contract, only according to its terms; and the liability of sureties is not to be extended beyond the terms of their contract; to the extent, and in the manner, and under the circumstances pointed out in their obligation, they are bound, but no further; and they are entitled to stand on its precise terms. Pierce v. Whiting, 63 Cal. 538; Curtin v. Harvey, 120 Cal. 620; 52 Pac. 1077. The sureties on an undertaking given for the release of an attachment may bind themselves and become liable for such other sums, in addition to the amount sued for, as may thereafter become due from the defendant to the plaintiff under the contract upon which the action is based; and such liability also includes amounts for which the defendant may become liable to the plaintiff under said contract, on their failure to receive and pay for goods prepared and offered for delivery, which the defendant improperly refused to accept. Crocker v. Field's Biscuit etc. Co., 93 Cal. 532; 29 Pac. 225.

CODE COMMISSIONERS' NOTE. The undertaking is not a substitution of security. Its only operation was to release the property from the custody of the sheriff, pending the suit. Low v. Adams, 6 Cal. 277.

§ 553. If defendant recovers judgment, what the sheriff is to deliver. If the defendant recovers judgment against the plaintiff, and no appeal is perfected and undertaking executed and filed as provided in section nine hun-

dred and forty-six of this code, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent, the order of attachment be discharged, and the property released therefrom.

Legislation § 553. **1.** Enacted March 11, **1872** (based on Practice Act, § 135, which had the word "shall" instead of "must," before "be delivered"), and then read: "If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent. The order of attachment shall be discharged, and the property released therefrom."

2. Amendment by Stats. **1901**, p. 140; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 708; the code commissioner saying, "The amendment consists in adding the words 'and no appeal is perfected and undertaking executed and filed as provided in § 937,' it being intended by this amendment and a proposed amendment to § 937 that an attachment should be left in force pending an appeal, though defendant had recovered judgment, if the plaintiff gave the required undertaking. The legislature failed, however, to pass the proposed amendment to § 937, so the above-mentioned amendment has no present effect."

4. Amended by Stats. **1909**, c. 631, changing, in the addition of 1907, the words "section nine hundred and thirty-seven" to "section nine hundred and forty-six of this code."

Effect of appeal. The attachment remains in force, on appeal from a judgment in favor of the defendant, where the undertaking required by § 946, post, is given. Primm v. Superior Court, 3 Cal. App. 208; 84 Pac. 786. After judgment in favor of the defendant in a justice's court, the attachment is discharged; and as the attachment is merely a creation of the statute, its existence and operation continue no longer than the statute provides; and there being no provision prior to the amendments of 1907 and 1909 for the giving of a stay bond on appeal, the sheriff was not required to retain custody of property, pending an appeal. Loveland v. Alvord Consol. Quartz Mining Co., 76 Cal. 562; 18 Pac. 682.

Action on undertaking. The omission to allege a breach of the contract, or that a demand was made, in an action against the sureties in an undertaking, renders the complaint fatally defective. Morgan v. Menzies, 60 Cal. 341.

Discharge of attachment. The fact that the time for appeal from a judgment in the attachment suit, in favor of the defendant, has not expired, and that the judgment is not final in that regard, does not limit its effect upon the attachment (Aigeltinger v. Whelan, 133 Cal. 110; 65 Pac. 125; Witherspoon v. Cross, 135 Cal. 96; 67 Pac. 18); and after such judgment the defendant can make a valid transfer of the property. Loveland v. Alvord Consol. Quartz Mining Co., 76 Cal. 562; 18 Pac. 682. A nonsuit discharges the attachment, and the obligation of the undertaking under § 555, post, notwithstanding the reversal of the judgment on appeal, and a subsequent new trial, in which judgment is given for the plaintiff: after such nonsuit, the undertaking given to procure the attachment must be delivered to the defendant. Hamilton v. Bell, 123 Cal. 93; 55 Pac. 758. The lien of the attachment ceases on dismissal of suit, and a subsequent reinstatement of the case by the court cannot restore the attachment so as to affect the right of a third party. O'Connor v. Blake, 29 Cal. 312.

§ 554. Proceedings to release attachments. Whenever the defendant has appeared in the action, he may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment, wholly or in part; and upon the execution of the undertaking mentioned in the next section an order may be made, releasing from the operation of the attachment any or all of the property attached; and all of the property so released, and all of the proceeds of the sales thereof, must be delivered to the defendant, upon the justification of the sureties on the undertaking, if required by the plaintiff. Such justification must take place within five days after notice of the filing of such undertaking.

Appearance. Post, § 1014.

Legislation § 554. **1.** Enacted March 11, **1872**; based on Practice Act, § 136, as amended by Stats. 1863, p. 305, which had (1) the words "shall have" instead of "has," before "appeared in," (2) the words "or to a county judge" after "judge thereof," (3) the words "such order may be granted" instead of "an order may be made," and (4) did not have the word "must" before "be delivered." When enacted in 1872, § 554 read as at present, except for the addition made in 1907, and that it contained the words "or to a county judge."

2. Amended by Code Amdts. **1880**, p. 4, omitting the words "or to a county judge."

3. Amendment by Stats. **1901**, p. 141; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 709, adding the last sentence; the code commissioner saying, "The amendment fixes the time within which the sureties must justify, if required by the plaintiff."

Appearance. A notice of motion to dissolve an attachment is not an appearance; but the plaintiff may require an appearance as a condition of moving to dissolve the attachment. Glidden v. Packard, 28 Cal. 649.

Application for release of attachment. After the sheriff's return to a writ of attachment, a defendant, who seeks the release of attached property, must apply to the court for an order of release. Kanouse v. Brand, 11 Cal. App. 669; 106 Pac. 120; San Francisco Sulphur Co. v. Ætna Indemnity Co., 11 Cal. App. 695; 106 Pac. 111.

Undertaking. The condition of a bond given to release attached property requires the redelivery thereof to the sheriff, if the plaintiff recovers any judgment in the action. McCormick v. National Surety Co., 134 Cal. 510; 66 Pac. 741. The bond for the release of an attachment does not operate as a stay bond. Bailey v. Ætna Indemnity Co., 5 Cal. App. 740; 91 Pac. 416.

Giving of statutory bond to dissolve attachment as bar to motion to quash. See note 12 Ann. Cas. 170.

CODE COMMISSIONERS' NOTE. See note to § 555 of this code.

§ 555. Attachment, in what cases it may be released and upon what terms. Before making such order, the court or judge must require an undertaking on behalf of the defendant, by at least two sureties, residents and freeholders, or householders, in the state, to the effect that in case the plaintiff recovers judgment in the action, defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released, not exceeding the amount of such judgment. The court or judge making such order may fix the sum for which the undertaking must be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose. The sureties may be required to justify before the court or judge, and the property attached cannot be released from the attachment without their justification, if the same is required.

Undertaking to prevent attachment. Ante, § 540.

Court commissioners, power of, to take bonds, examine sureties, etc. Ante, § 259, subd. 3.

Sureties.

1. **Qualifications of.** Ante, § 494; post, § 1057.
2. **Justification.** Ante, § 259, subd. 3, § 494; post, § 948.

Legislation § 555. 1. Enacted March 11, **1872;** based on Practice Act, § 137, as amended by Stats. 1863–64, p. 44, which had (1) in the first line, (a) the word "granting" instead of "making," and (b) the word "shall" instead of "must"; (2) the word "such" instead of "the," after "redeliver"; (3) the words "granting such release" instead of "making such order"; (4) the word "shall" instead of "must," before "be executed"; (5) the words "shall not" instead of "cannot," before "be released."

2. Amended by Code Amdts. **1873–74,** p. 308, (1) in the first line, omitting "the" before "making," (2) changing "county" to "state," (3) changing "and that" to "or," before "in default thereof," (4) adding the word "that" after "default thereof," and (5) changing the word "three" to "one or more."

3. Amendment by Stats. **1901,** p. 141; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907,** p. 709, (1) changing the word "recover" to "recovers," before "judgment in the action," (2) adding the words "not exceeding the amount of such judgment," after "property released," (3) changing the word "be" to "is," before "required," at end of section.

Necessity for order of court. No order of court is essential to the effectiveness of a bond voluntarily given to prevent the levy of an attachment, or to procure a release thereof (Bailey v. Ætna Indemnity Co., 5 Cal. App. 740; 91 Pac. 416); but after the return of a writ of attachment, a release of the attached property must be by order of court. Kanouse v. Brand, 11 Cal. App. 669; 106 Pac. 120; San Francisco Sulphur Co. v. Ætna Indemnity Co., 11 Cal. App. 695; 106 Pac. 111.

The undertaking. The lien is released by the execution of the undertaking. Hunt v. Robinson, 11 Cal. 262; Rosenthal v. Perkins, 123 Cal. 240; 55 Pac. 804. The bond provided for by this section is the bond to be given by the defendant in the attachment suit, and not by the claimant of the property. Hunt v. Robinson, 11 Cal. 263. It is to be given as a substitute for the attachment lien, and to secure a redelivery of the attached property, or payment of its value, to be applied to the payment of any judgment recoverable in the case. Harding v. Minear, 54 Cal. 502; Metrovich v. Jovovich, 58 Cal. 341; Mullally v. Townsend, 119 Cal. 47; 50 Pac. 1066; Risdon Iron etc. Works v. Citizens' Traction Co., 122 Cal. 94; 68 Am. St. Rep. 25; 54 Pac. 529. The effect of the undertaking is merely to release the property from the custody of the sheriff, pending the suit: it is not an actual substitution

of security. Low v. Adams, 6 Cal. 277. The fact that the undertaking given contains conditions more onerous than the statutory undertaking, does not render it void; and being given for a purpose which was accomplished when the order of court was obtained, it is binding as a common-law obligation. Gardner v. Donnelly, 86 Cal. 367; 24 Pac. 1072.

Liability of sureties. Where the undertaking expresses the consideration to be the release of the property from the attachment, the liability of the sureties attaches when the court makes the order releasing the property, notwithstanding the sheriff refuses to comply with such order of release, and refuses to redeliver the property to the defendant. Gardner v. Donnelly, 86 Cal. 367; 24 Pac. 1072. Where the execution is returned unsatisfied in whole or in part, the plaintiff may prosecute the undertaking given pursuant to this section. Bailey v. Ætna Indemnity Co., 5 Cal. App. 740; 91 Pac. 416. A judgment against any one of several defendants is sufficient to authorize the recovery from the sureties, upon the refusal to redeliver the property, where the undertaking is conditioned that the "plaintiff recover judgment in said action." McCormick v. National Surety Co., 134 Cal. 510; 66 Pac. 741. Where a sheriff accepts an undertaking to prevent an attachment, under § 540, ante, in which the sureties agree to pay whatever judgment the plaintiff may obtain, and the debt is established by judgment, an action on the undertaking is not affected by the debtor's adjudication in bankruptcy within four months after the attachment (San Francisco Sulphur Co. v. Ætna Indemnity Co., 11 Cal. App. 695; 106 Pac. 111); but the dissolution of an attachment by an insolvency proceeding discharges the obligation of the sureties in a redelivery bond given under this section. Rosenthal v. Perkins, 6 Cal. Unrep. 21; 53 Pac. 444.

Redelivery. Where the condition of the undertaking is, that the attached property shall be returned, such condition is not complied with by an offer to return, or by a return of a portion of the property. Metrovich v. Jovovich, 58 Cal. 341.

Plaintiff's possession in replevin. The possession obtained by the plaintiff in replevin is only temporary: it does not divest the title nor discharge the lien. Hunt v. Robinson, 11 Cal. 262.

Right of obligor in bond for release of attached property to attack attachment. See note 32 L. R. A. (N. S.) 401.

Amendment of claim or pleading as discharge of sureties on bonds given to dissolve attachments. See note 42 L. R. A. (N. S.) 484.

CODE COMMISSIONERS' NOTE. 1. Effect of undertaking. It is not a substitution of security. Low v. Adams, 6 Cal. 277. A bond given voluntarily is valid at common law. Palmer v. Vance, 13 Cal. 553. A substantial compliance with this section, in respect to the undertaking, is sufficient. Heynemann v. Eder, 17 Cal. 433; Palmer v. Vance, 13 Cal. 553. If the sheriff takes a sufficient statutory undertaking, he has no further responsibility. Curiac v. Packard, 29 Cal. 194.

2. Action on the undertaking. In an action on the undertaking, the complaint should allege that the property attached was released upon the delivery of the undertaking. Williamson v. Blatton, 9 Cal. 500. Whether each obligor is liable to the sheriff for the whole amount of any judgment against him, leaving the question of contribution to be settled between them, was questioned in White v. Fratt, 13 Cal. 521. Where defendant applied to the court for a discharge of the attachment, and an undertaking was executed by D. and R., reciting the fact of the attachment, and that "in consideration of the premises, and in consideration of the release from attachment of the property attached as above mentioned," they undertake to pay whatever judgment plaintiff may recover, etc., the court made an order discharging the writ and releasing the property. In an action against the sureties on the undertaking, it was held, that the complaint need not aver that the property was actually released and delivered to the defendant; that as the consideration for the undertaking was the release of the property, and as the complaint avers such release, in consequence and in consideration of the undertaking, by order of the court, which is set out, the actual release and redelivery of the property to defendant is immaterial, the plaintiff having no claim on it after the undertaking was given and the order of release made. McMillan v. Dana, 18 Cal. 339. An undertaking, given to a sheriff to procure a release of property attached, is for the benefit of the plaintiff, who may sue on it. Curiac v. Packard, 29 Cal. 194. If the defendant obtains an order for the release of property upon an undertaking executed by sureties, conditioned to pay the plaintiff any judgment he may recover in the action, and the property is thereupon released: whenever the liability of the sureties is fixed, by the rendition of a judgment in favor of the plaintiff, the sureties have a right to tender the plaintiff the full amount of the judgment, and if he refuses to receive the same, the sureties are discharged from their obligation on the undertaking. Hayes v. Josephi, 26 Cal. 540; Curiac v. Packard, 29 Cal. 194. Tender, by sureties, of the full amount of judgment recovered, is equivalent to payment or release by said plaintiff. Norwood v. Kenfield, 34 Cal. 329; Curiac v. Packard, 29 Cal. 194.

§ 556. When a motion to discharge attachment may be made, and upon what grounds. The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply, on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

Legislation § 556. 1. Enacted March 11, **1872** (re-enactment of Practice Act, § 138, as amended by Stats. 1860, p. 301), and then read: "The defendant may, also, any time before the time for answering expires, apply, on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, or to a county judge, that the attachment

be discharged on the ground that the writ was improperly or irregularly issued."

2. Amended by Code Amdts. **1873–74**, p. 309, to read as at present, except that (1) it had the word "the" instead of "a" before "judge thereof," and (2) had the words "or to a county judge" after these words.

3. Amended by Code Amdts. **1880**, p. 4.

Who may move for discharge. A defendant, who, more than four months after levy of attachment, secures a certificate of discharge in bankruptcy, does not thereby become entitled to file a supplemental answer and procure a discharge of the attachment: the only effect of such discharge is to limit the judgment recoverable in the attachment suit, and the plaintiff is entitled to judgment for the enforcement of his attachment lien, and if such attachment has been discharged, he is entitled to recover upon the undertaking, upon the giving of a statutory bond. Harding v. Minear, 54 Cal. 502. Persons not named as defendants, but claiming to be such, may move to discharge the writ, if, in their affidavits, they state that they are defendants in the action, misnamed in the plaintiff's complaint and affidavit, and the plaintiff does not deny such affidavits. Sparks v. Bell, 137 Cal. 415; 70 Pac. 281. Judgment creditors of the defendants may intervene to set aside the attachment, because void as to them. Davis v. Eppinger, 18 Cal. 378; 79 Am. Dec. 184. Where a subsequent attaching creditor intervenes to set aside a prior attachment on the ground of fraud, and the court finds that only a portion of the debt on which the prior attachment issued was fraudulent, the lien of the prior attachment should be postponed only as to the fraudulent portion (Coghill v. Marks, 29 Cal. 677); and an order, on motion of an intervener, entirely setting aside the plaintiff's attachment, will be modified on appeal, so as merely to postpone the plaintiff's lien to that of the intervener. Speyer v. Ihmels, 21 Cal. 280; 81 Am. Dec. 157. An assignee in insolvency may move for a release of the attached property, although not a party to the record. Baum v. Raphael, 57 Cal. 361. A stranger cannot interfere upon the ground of irregularity of the proceedings: if the proceedings of the prior attaching creditor are not void, but voidable, a subsequent attaching creditor cannot object; only the defendant can object. Dixey v. Pollock, 8 Cal. 570.

Notice of motion. The notice of motion should specify the grounds thereof, and wherein it will be urged that the writ was improperly issued. Freeborn v. Glazer, 10 Cal. 337; Loucks v. Edmondson, 18 Cal. 203.

Motion for discharge. The only remedy for an improper attachment is a motion to set it aside, where no jurisdictional defect is apparent on the face of the proceeding. Martinovich v. Marsicano, 150 Cal. 597; 119 Am. St. Rep. 254; 89 Pac. 333. The motion to discharge the writ may be made before the attachment is levied. Sparks v. Bell, 137 Cal. 415; 70 Pac. 281. The motion to dissolve cannot be turned into a demurrer to the complaint: thus, if the complaint sets forth a cause of action upon a contract, express or implied, it cannot be attacked for ambiguity or uncertainty, nor on the ground that it does not state a cause of action upon the contract. Hale Bros. v. Milliken, 142 Cal. 134; 75 Pac. 653.

Evidence on hearing of motion. The complaint and the affidavit of attachment constitute the record, which may be considered without proof upon a motion to dissolve the attachment; but when the motion is made upon matters appearing outside of the complaint and affidavit, the moving party must introduce evidence in proof of these facts: an oral admission of matter of evidence, made upon a previous motion, which was denied, and made only for the purpose of that motion, cannot dispense with evidence of the facts upon a subsequent motion to vacate the order denying the motion and to dissolve the attachment. Goldman v. Floter, 142 Cal. 388; 76 Pac. 58. The complaint, answer, and decree in liquidation proceedings against an insolvent bank may be read upon the motion to dissolve an attachment levied upon the funds of the bank, notwithstanding the plaintiff in the attachment proceedings is not a party in the liquidation proceedings. Crane v. Pacific Bank, 106 Cal. 64; 27 L. R. A. 562; 39 Pac. 215.

"Improper" and "irregular" writ, defined. An attachment is properly issued when issued in a case provided for by § 537, ante, and it is regularly issued when the requirements of §§ 538, 539, ante, are complied with; irregularities warranting a discharge of the writ usually appear upon the face of the affidavit or undertaking, or, where properly but prematurely issued, by a comparison with the summons and complaint. Where the attachment is improperly issued, that is to say, in a case not provided for by statute, the evidence must usually be sought dehors the papers upon which it is evidently founded. Kohler v. Agassiz, 99 Cal. 9; 33 Pac. 741; Sparks v. Bell, 137 Cal. 415; 70 Pac. 281.

Waiver of irregularities. Any irregularities in obtaining the attachment are waived by the defendant, where he appears and answers without taking advantage of them, by motion or otherwise, in the course of the proceedings: the process is merely auxiliary, and the judgment cures all irregularities. Porter v. Pico, 55 Cal. 165; Harvey v. Foster, 64 Cal. 296; 30 Pac. 849; Scrivener v. Dietz, 68 Cal. 1; 8 Pac. 609; Schwartz v. Cowell, 71 Cal. 306; 12 Pac. 252. The omission of the word "company," in the defendant's corporate name, in the original undertaking

and affidavit, does not affect the attachment lien, and is waived by the appearance and answer of the corporation in its true name, without objection. Hammond v. Starr, 79 Cal. 556; 21 Pac. 971. Where property is attached, the right to apply for a discharge of the writ, under this section, is not waived because a release of the property was previously obtained by giving the undertaking required by §§ 554, 555, ante. Winters v. Pearson, 72 Cal. 553; 14 Pac. 304.

Amendment of proceedings. Prior to the amendment of § 558, post, in 1909, amendments of defects in the affidavit or proceedings were not allowed. Winters v. Pearson, 72 Cal. 553; 14 Pac. 304. Where the complaint is defective merely, and can be made good by amendment, the plaintiff should be allowed to amend before the decision of the motion to dissolve; but if incurable, the attachment must be dissolved. Hathaway v. Davis, 33 Cal. 161; Hammond v. Starr, 79 Cal. 556; 21 Pac. 971. The complaint may be amended, pending a motion to discharge the attachment, so as to state an unambiguous cause of action upon the contract, where the motion is made upon the ground that the complaint does not show that the plaintiff's action is upon the contract. Hale Bros. v. Milliken, 142 Cal. 134; 75 Pac. 653. A defective complaint may be amended without affecting the attachment lien; and an objection that the amendment states a different cause of action from that declared on in the original complaint cannot be urged for the first time in a collateral suit on a bond given for the release of the attachment. Hammond v. Starr, 79 Cal. 556; 21 Pac. 971. If, in the original complaint, it appears that the defendant had pledged a certificate of stock to secure the plaintiff, and the affidavit states that no security was given, an amendment of the complaint, so as to state that the security had become valueless by reason of its sale and the application of the proceeds thereof on account of the debt, does not remedy nor cure the defects of an affidavit which does not state these facts, and the attachment must be discharged. Fisk v. French, 114 Cal. 400; 46 Pac. 161.

When writ should be discharged. The defendant can have the attachment set aside, where it is improperly issued. Laughlin v. Thompson, 76 Cal. 287; 18 Pac. 330. The writ must be discharged, if, upon motion made before or after the levy, it appears that it was improperly or irregularly issued. Jensen v. Dorr, 157 Cal. 437; 108 Pac. 320; Pajaro Valley Bank v. Scurich, 7 Cal. App. 732; 95 Pac. 911; Fairbanks v. Getchell, 13 Cal. App. 458; 110 Pac. 331. A writ improperly or irregularly issued as to one or more of several defendants, must be discharged as to such defendant or defendants, where such fact appears upon his or their motion therefor. Sparks v. Bell, 137 Cal. 415; 70 Pac. 281. The attachment should be discharged, where the writ was issued in an action for damages resulting from negligence; and where the court refuses, on motion, to do so, it may be discharged on appeal, even if final judgment is affirmed (Griswold v. Sharpe, 2 Cal. 17); and the attachment should also be discharged, where a partnership exists between the parties plaintiff and defendant as to the subject-matter of the suit (Wheeler v. Farmer, 38 Cal. 203); and also where the affidavit contains a false statement (Fish v. French, 114 Cal. 400; 46 Pac. 161), and where there is a defect in the affidavit (Winters v. Pearson, 72 Cal. 553; 14 Pac. 304), and where the affidavit is in the alternative, and insufficient (Hawley v. Delmas, 4 Cal. 195; Wilke v. Cohn, 54 Cal. 212; Harvey v. Foster, 64 Cal. 296; 30 Pac. 849; Winter v. Pearson, 72 Cal. 553; 14 Pac. 304); and also for failure of the affidavit to state the amount of the indebtedness (Harvey v. Foster, 64 Cal. 296; 30 Pac. 849), or to state that the payment of the contract sued on was not secured by any mortgage or lien upon real or personal property, or, if so secured, that the security has become valueless (Scrivener v. Dietz, 68 Cal. 1; 8 Pac. 609); and also where the writ was issued on a contract not payable in this state (Beltaire v. Rosenberg, 129 Cal. 164; 61 Pac. 916); and also where a vendor's lien existed at the time of the issue of the writ (Gessner v. Palmateer, 89 Cal. 89; 13 L. R. A. 187; 24 Pac. 608), and where the property was exempt from execution (Holmes v. Marshall, 145 Cal. 777; 104 Am. St. Rep. 86; 2 Ann. Cas. 88; 69 L. R. A. 67; 79 Pac. 534); and also where the writ was issued for an amount greater than that stated in the affidavit. Baldwin v. Napa etc. Wine Co., 137 Cal. 646; 70 Pac. 732; Kennedy v. California Sav. Bank, 97 Cal. 93; 33 Am. St. Rep. 163; 31 Pac. 846. On a motion to dissolve an attachment issued upon the plaintiff's affidavit, stating the general conclusion that the mortgage given to secure the indebtedness has become valueless, if the defendant's affidavit specifically states facts which show that the mortgage still remains in full force and effect, and that there has been no depreciation in value of the security of the mortgage, or of the mortgaged premises, up to the time of the issuance of the attachment, which facts are not controverted by the plaintiff, there is no conflict of evidence on the motion, and the order of the trial court denying the motion will be reversed on appeal. Barbieri v. Ramelli, 84 Cal. 174; 24 Pac. 113. Where the affidavit to procure the attachment states that the sum claimed "has not been secured by any mortgage or

lien upon real or personal property," and defendant's affidavit on motion to discharge the attachment states that the plaintiff "purchased the note sued upon in this action with full knowledge that the same was given as collateral to and identical with the debt secured by the said contract and lien in said real estate," and no counter-affidavit is filed by the plaintiff, the attachment should be discharged. Gessner v. Palmateer, 89 Cal. 89; 13 L. R. A. 187; 24 Pac. 608; 26 Pac. 789. Where the motion for the discharge of the attachment is made on the ground that the plaintiff has a vendor's lien as security for the debt, and the vendee, prior to the attachment, conveyed to a third party, the attachment should not be dissolved: the question whether the person purchasing from the vendee took in good faith, without notice, for a valuable consideration, cannot be determined on ex parte affidavits in an attachment suit, but must be tried in a direct proceeding against such purchaser, and, until it is determined, it cannot be known with certainty whether or not the plaintiff has an available lien. Porter v. Brooks, 35 Cal. 199. Variance in the name of the defendant is not fatal to the writ, as "Welch" for "Welsh," where the identity of the person is established by the finding of the court. Donohoe-Kelly Banking Co. v. Southern Pacific Co., 138 Cal. 183; 94 Am. St. Rep. 28; 71 Pac. 93.

Erroneous levy. The release from attachment of property exempt from execution is not a dissolution of the writ, but an order setting aside the erroneous levy, which the court has power to do, having power over its own process (Holmes v. Marshall, 145 Cal. 777; 104 Am. St. Rep. 86; 2 Ann. Cas. 88; 69 L. R. A. 67; 79 Pac. 534); and such an order as effectually dissolves the attachment as if the writ were quashed. Risdon Iron etc. Works v. Citizens' Traction Co., 122 Cal. 94; 68 Am. St. Rep. 25; 54 Pac. 529.

Order dissolving attachment. The order dissolving the attachment should specify the grounds of discharge, where the motion is made on two grounds, one of which goes to the right of the plaintiff to any attachment in the action, and the other only to an irregularity in the writ, avoidable by the issuance of another: if the order is made on the latter ground, the plaintiff is free to take proper steps to procure the issuance and service of a proper writ. Kennedy v. California Sav. Bank, 97 Cal. 93; 33 Am. St. Rep. 163; 31 Pac. 846.

Release by sheriff. Where the order of the court releases the property from attachment, the wrongful refusal of the sheriff to obey the order and to redeliver the property does not render the discharge inoperative. McMillan v. Dana, 18 Cal. 339; Gardner v. Donnelly, 86 Cal. 367; 24 Pac. 1072. An attachment debtor, upon effecting a settlement with his creditor, cannot require the sheriff to release the property attached, except upon payment of his fees. Robinett v. Connolly, 76 Cal. 56; 18 Pac. 130; Perrin v. McMann, 97 Cal. 52; 31 Pac. 837.

Appeal from order. An appeal lies from an order dissolving or refusing to dissolve the attachment (Mudge v. Steinhart, 78 Cal. 34; 12 Am. St. Rep. 17; 20 Pac. 147); and also from an order releasing property not liable to seizure: the right of appeal is not limited to orders made on the ground that the writ was improperly or irregularly issued (Risdon Iron etc. Works v. Citizens' Traction Co., 122 Cal. 94; 68 Am. St. Rep. 25; 54 Pac. 529); but an order refusing to dissolve the attachment, made on conflicting evidence, will not be reviewed on appeal (Barrell v. Lake View Land Co., 122 Cal. 129; 54 Pac. 594); nor will the decision of the court, on conflicting evidence, on motion to dissolve, be interfered with on appeal, where there is sufficient evidence to sustain the order (Rodley v. Lyons, 129 Cal. 681; 62 Pac. 313); nor will an order discharging the attachment be reversed on appeal, where the affidavits used on the motion are in conflict (Egener v. Juch, 101 Cal. 105; 35 Pac. 432); but where the court erroneously refused to dissolve an attachment improperly issued, such attachment will be ordered dissolved on appeal, even though the judgment is regular. Griswold v. Sharpe, 2 Cal. 17; Taaffe v. Rosenthal, 7 Cal. 514. The validity of the judgment or an order denying a new trial is not affected in any way by errors in the attachment-papers; nor can questions relating to them be considered on an appeal from such judgment or order. Herman v. Paris, 81 Cal. 625; 22 Pac. 971. An appeal from an order dissolving an attachment may be taken within sixty days from the date of the order; and it cannot be objected to the appeal, that the lien of the attachment was not preserved because the appeal was not perfected within five days, and the undertaking on appeal was not for double the amount claimed. Flagg v. Puterbaugh, 101 Cal. 583; 36 Pac. 95. Under the Practice Act, an order refusing to dissolve an attachment was not appealable, nor could it be reviewed on an appeal from the judgment as an intermediate order. Allender v. Fritts, 24 Cal. 447; Myers v. Mott, 29 Cal. 359; 89 Am. Dec. 49.

Irregularities and defects which will avoid attachments. See note 79 Am. Dec. 164.

Dissolution of attachment. See note 123 Am. St. Rep. 1030.

Right to recover counsel fees as damages upon dissolution of attachment. See note 10 Ann. Cas. 954.

CODE COMMISSIONERS' NOTE. The notice should specify in what particulars the writ was improperly issued. Freeborn v. Glazer, 10 Cal. 337. If the complaint does not state facts suffi-

cient to constitute a cause of action, and does not admit of amendment, the attachment should be dissolved; but if the complaint can be made good, the plaintiff should be allowed to amend, pending the motion to dissolve. Hathaway v. Davis, 33 Cal. 161; see also subds. 1 and 2 of note to § 537 of this code.

§ 557. When motion made on affidavit, it may be opposed by affidavit. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

On affidavits. Compare "Motion to Vacate or Modify Injunction." Ante, § 532.

Legislation § 557. Enacted March 11, **1872**; re-enactment of Practice Act, § 139, as amended by Stats. 1860, p. 301.

Affidavits may be controverted. Specific statements of fact made by a defendant in attachment may be contradicted by the plaintiff's affidavit, but, if this is not done, the defendant's affidavit must be taken as establishing the truth of what it contains. Barbieri v. Ramelli, 84 Cal. 174; 24 Pac. 113.

§ 558. When writ must be discharged. If upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued it must be discharged; provided that such attachment shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter.

Legislation § 558. 1. Enacted March 11, **1872**; based on Practice Act, § 140, as amended by Stats. 1860, p. 302; which had (1) the word "shall" before "satisfactorily," (2) the word "appear" instead of "appears," and (3) the word "shall" instead of "must."

2. Amendment by Stats. **1901**, p. 141; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1909**, p. 253, adding the proviso.

When writ must be discharged. Where the writ was improperly, irregularly, or wrongfully issued, it must be discharged (Winters v. Pearson, 72 Cal. 553; 14 Pac. 304; Sparks v. Bell, 137 Cal. 415; 70 Pac. 281); on motion (Martinovich v. Marsicano, 150 Cal. 597; 119 Am. St. Rep. 254; 89 Pac. 333), without reference to any levy made thereunder. Jensen v. Dorr, 157 Cal. 437; 108 Pac. 320.

Amendment of affidavit and undertaking. Prior to the amendment of 1909, neither the affidavit on which the attachment issued, nor the undertaking on attachment, is amendable, if not sufficient to sustain the writ. Winters v. Pearson, 72 Cal. 553; 14 Pac. 304; Tibbet v. Tom Sue, 122 Cal. 206; 54 Pac. 741. Under this section, a motion to discharge for irregularity may now be met by proper amendment of the affidavit, undertaking, or writ (Jensen v. Dorr, 157 Cal. 437; 108 Pac. 320; Fairbanks v. Getchell, 13 Cal. App. 458; 110 Pac. 331); but a fatally defective affidavit is not amendable. Pajaro Valley Bank v. Scurich, 7 Cal. App. 732; 95 Pac. 911; Fairbanks v. Getchell, 13 Cal. App. 458; 110 Pac. 331.

Amendment of writs of attachment and of papers on which they are based. See note 61 Am. Dec. 125.

Waiver of attachment as against third person by enlarging original claim. See note 18 Ann. Cas. 1022.

CODE COMMISSIONERS' NOTE. Speyer v. Ihmels, 21 Cal. 280; 81 Am. Dec. 157.

§ 559. When writ to be returned. The sheriff must return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto; and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be filed in the offices of the county recorders in which the notices of attachment have been filed, and be indexed in like manner.

Notices of attachment filed. Ante, § 542, subds. 1, 2.

Return of inventory with writ. See ante, § 546.

Legislation § 559. 1. Enacted March 11, **1872**; based on Practice Act, § 141, the first sentence of which, ending "attached thereto," constituted the section when enacted in 1872, except that the word "shall" was changed to "must," the rest of the section reading, "The provisions of this chapter shall not apply to any suits already commenced, but so far as such suits may be concerned, the act entitled An Act to Regulate Proceedings against Debtors by Attachment, passed April 22, 1850, shall be deemed in full force and effect."

2. Amended by Code Amdts. **1875–76**, p. 91, adding the last half of the section, beginning "and whenever."

Objections to the return. The garnishee has nothing to do with the return of the writ, unless false in some particular which

would subject him to an unwarranted liability; nor is he required to make any objections to the return, until its correctness becomes material in the action against him upon his liability as garnishee. Clyne v. Easton, 148 Cal. 287; 113 Am. St. Rep. 253; 83 Pac. 36. A mortgagee cannot complain of a discrepancy in the statement of the date appearing in the indorsement on the copy of the attachment filed in the clerk's office, where the latter, which was erroneous, was not filed until after the mortgage was executed, and did not mislead the mortgagee. Ritter v. Scannell, 11 Cal. 239; 70 Am. Dec. 775.

Conclusiveness of return. The statute does not make the return conclusive, or the only evidence of the manner of executing process (Ritter v. Scannell, 11 Cal. 239; 70 Am. Dec. 775); nor is the return conclusive as to the regularity of the attachment of property in the hands of a third party, in an action between the attaching creditor and such third party. Blanc v. Paymaster Mining Co., 95 Cal. 524; 29 Am. St. Rep. 149; 30 Pac. 765. A certificate of the sheriff, that the property stood in the name of a trustee at the time of the levy, is not conclusive, in an action between one claiming under execution sale in an attachment suit and one claiming under a trust deed, where the latter is shown to be void. Johnson v. Miner, 144 Cal. 785; 78 Pac. 240. The sheriff is concluded by his return, when it is set up by any party who may claim something under it. Harvey v. Foster, 64 Cal. 296; 30 Pac. 849; and see Meherin v. Saunders, 110 Cal. 463; 42 Pac. 966. Failure of the officer to do the things required by law, and in the order prescribed, is fatal. Watt v. Wright, 66 Cal. 202; 5 Pac. 91.

Evidence to aid return. The written return of the officer is not the only evidence that the writ was properly served: if the return simply omits to state any fact necessary to a valid service, such fact may be supplied by parol evidence, so long as the facts stated in the return are not so varied or contradicted as to affect vested rights (Brusie v. Gates, 80 Cal. 462; 22 Pac. 284; Ritter v. Scannell, 11 Cal. 238; 70 Am. Dec. 775; Sinsheimer v. Whitely, 111 Cal. 378; 52 Am. St. Rep. 192; 43 Pac. 1109); but parol evidence to supplement the return must be clear and satisfactory, and not rest upon presumption. Brusie v. Gates, 80 Cal. 462; 22 Pac. 284. Where the return merely states that the officer duly levied upon the property, upon a specified day, by posting a copy of the writ, attached to a notice to the defendant that the property was attached, on the premises, and at the trial the officer testified that he posted the papers on a small building, the only improvement on the premises, such building must necessarily be held to be the most conspicuous place on the land. Davis v. Baker, 72 Cal. 494; 14 Pac. 102. Entries in books in the sheriff's office, showing brief memoranda of the receipt of writs of attachments, dates of return, and proceedings therein, made in the usual course of business, are admissible in evidence as books of original entries, being often the only available evidence of the transaction to which they refer. Hesser v. Rowley, 139 Cal. 410; 73 Pac. 156. Where the officer testified that it was his custom to levy the writ by first posting the attachment, with the notice of the levy, upon the land, and afterwards filing the same in the recorder's office, this being the reverse of the order prescribed by statute, there is a conflict of evidence, and the finding of the court that the attachment was duly levied is conclusive. Porter v. Pico, 55 Cal. 165. Where the officer expressly states, on cross-examination, that he is not willing to swear that he served the notice with a copy of the attachment, or that other papers served were true copies, and it is evident that he testified to the doing of acts necessary to be done by him, not from recollection, but because the law made it his duty to do them, he therefore presumed that he had done them, the showing is insufficient to establish proper service. Brusie v. Gates, 80 Cal. 462; 22 Pac. 284.

Statement of facts in the return. This section contains no express provisions requiring that all acts necessary to a valid levy shall be set out in the return; the general rule with regard to mesne process is, that all presumptions are in favor of the regularity of the acts of the officer, and that a return which simply states that process was executed is sufficient, prima facie, to show due and proper execution; this is a disputable presumption, which may be controverted, but it is good as against a collateral attack. Ritter v. Scannell, 11 Cal. 239; 70 Am. Dec. 775; Porter v. Pico, 55 Cal. 165; Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73. The sheriff must state fully, in his return, what acts he performed in serving the writ, so that the court can decide upon its sufficiency, and it will be presumed that he states all that he did towards making service. Sharp v. Baird, 43 Cal. 577. Where the officer states in his return that he did certain acts as constituting his levy, but such acts are not sufficient, subsequent purchasers may rely upon such return as one stating, in effect, that the acts named therein were all the acts done by him; but where the officer states generally that he served the writ by attaching the property, and, in addition, that he did certain acts, specifically named, subsequent purchasers cannot maintain that he did nothing but what is specifically set out, and reject the general statement. Brusie v. Gates, 80 Cal. 462; 22 Pac. 284. A re-

turn which does not show that the officer posted "in a conspicuous place on the land," or at all, a copy of the description of the land, in connection with a copy of the writ of attachment, and of the notice that the land had been attached, is fatally defective. Watt v. Wright, 66 Cal. 202; 5 Pac. 91. The return need not state that the papers were posted in a conspicuous place, if the place stated is necessarily a conspicuous place. Davis v. Baker, 72 Cal. 494; 14 Pac. 102. A return showing that service was made by posting a copy of the attachment on the premises, should also state whether or not there was any occupant on the premises: it is not sufficient to state that the "notice" was posted upon the premises; the sheriff cannot substitute a notice for a copy of the writ required to be posted. Sharp v. Baird, 43 Cal. 577. The return of an attachment on a growing crop, stating that the officer "attached the same by taking it into my custody, and not putting a keeper in charge," is insufficient, in not showing the delivery of a copy of the writ and notice of attachment to the defendant in possession. Rudolph v. Saunders, 111 Cal. 233; 43 Pac. 619.

Return as notice. The return of the officer and the recording of the notice of attachment of real estate in the recorder's office is sufficient to put a subsequent purchaser on inquiry, and if the return can be aided by parol evidence, he is bound to take notice of the fact, and he takes the land at his peril, and subject to the right of a purchaser on execution sale in an attachment suit to make good his title by such evidence. Brusie v. Gates, 80 Cal. 462; 22 Pac. 284.

Description of property in the return. The return of the sheriff, filed in the recorder's office, which, through error, does not describe the property attached, cannot be amended so as to postpone the rights of creditors attaching it prior to the filing, but before the amendment. Webster v. Haworth, 8 Cal. 21; 68 Am. Dec. 287. Variance between the description of the property attached and that contained in the sheriff's deed under the execution, is immaterial, where nobody was misled, and the description in the return was sufficient to notify a purchaser of the property, and to enable the sheriff to identify the same. Godfrey v. Monroe, 101 Cal. 224; 35 Pac. 761.

CODE COMMISSIONERS' NOTE. See subd. 3 of note to § 542 of this code. The sheriff's return, how far conclusive. Egery v. Buchanan, 5 Cal. 53. How far it may be amended. Webster v. Haworth, 8 Cal. 21; 68 Am. Dec. 287; Newhall v. Provost. 6 Cal. 85; Ritter v. Scannell, 11 Cal. 238; 70 Am. Dec. 775.

§ 560. Release of real property from attachment. An attachment as to any real property may be released by a writing signed by the plaintiff, or his attorney, or the officer who levied the writ, and acknowledged and recorded in the like manner as a grant of real property; and upon the filing of such release, it is the duty of the recorder to note the same on the record of the copy of the writ on file in his office. Such attachment may also be released by an entry in the margin of the record thereof, in the county recorder's office, in the manner provided for the discharge of mortgages under section twenty-nine hundred and thirty-eight of the Civil Code.

Legislation § 560. **1.** Addition by Stats. **1901**, p. 141; unconstitutional. See note ante, § 5.

2. Added by Stats. **1907**, p. 709; amendment of unconstitutional § 560, supra, which did not have the words "or the officer who levied the writ"; the code commissioner saying of the enactment in 1907, "New section. The statute did not heretofore provide any method of releasing, without application to the court, an attachment upon real property. As it is desired to make such releases expeditiously in many instances, although the action is not dismissed or terminated, this amendment provides such mode of release."

CHAPTER V.

RECEIVERS.

§ 564. Appointment of receiver.
§ 565. Appointment of receivers upon dissolution of corporations.
§ 566. Receiver, restrictions on appointment. Ex parte application, undertaking on.
§ 567. Oath and undertaking of receiver.
§ 568. Powers of receivers.
§ 569. Investment of funds.
§ 570. Disposition of unclaimed funds in hands of receiver.

§ 564. Appointment of receiver. A receiver may be appointed by the court in which an action is pending, or by the judge thereof—

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund,

on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

Appointment of receiver on dissolution of co-operative business association. See Civ. Code, § 653j.

Legislation § 564. Enacted March 11, 1872; based on Practice Act, § 143 (New York Code, § 244), as amended by Stats. 1854, Redding ed. p. 61, Kerr ed. p. 88, which read: "A receiver may be appointed by the court in which the action is pending, or by a judge thereof. 1. Before judgment, provisionally on the application of either party when he establishes a prima facie right to the property, or to an interest in the property, [which] is the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired. 2. After judgment to dispose of the property according to the judgment, or to preserve it during the pending of an appeal, and, 3. In such other cases as are in accordance with the practice of courts of equity jurisdiction."

Receiver, defined. A receiver is a person authorized to take possession of property in litigation and hold it for the litigant finally determined to be entitled thereto. Cook v. Terry, 19 Cal. App. 765; 127 Pac. 816.

Scope of section. This section confines the power to appoint a receiver to the court, or to the judge thereof (Quiggle v. Trumbo, 56 Cal. 626); and the appointment of receivers, and their duties and powers, are regulated, in part, by this section. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121.

Nature of remedy. The appointment of a receiver is an equitable remedy, and has been said to be, in effect, an equitable execution; it is a provisional remedy, and bears the relation to courts of equity that proceedings in attachment bear to courts of law: to take possession of the property of another is, seemingly, a harsh proceeding, but it is justified by circumstances which demand its adoption, either arising from contract or the general rules of law. McLane v. Placerville etc. R. R. Co., 86 Cal. 606; 6 Pac. 748. There is no such thing as an action brought distinctly for the mere appointment of a receiver. La Société Française v. District Court, 53 Cal. 495. Such an appointment, under this section, is merely auxiliary to a pending action. Yore v. Superior Court, 108 Cal. 431; 41 Pac. 477. A new lien is not created by this section. Locke v. Klunker, 123 Cal. 231; 55 Pac. 993.

When a receiver will be appointed. The exercise of the power of appointing a receiver rests in the sound discretion of the court, to be governed by a view of the whole circumstances of the case; one of the circumstances being the probability of the plaintiff being ultimately entitled to a decree. Copper Hill Mining Co. v. Spencer, 25 Cal. 11; La Société Française v. Selheimer, 57 Cal. 623; Curnow v. Happy Valley etc. Hydraulic Co., 68 Cal. 262; 9 Pac. 149; Fish v. Benson, 71 Cal. 428; 12 Pac. 454; Downing v. Le Du, 82 Cal. 471; 23 Pac. 202; Loftus v. Fischer, 113 Cal. 286; 45 Pac. 328. The court has no power to appoint a receiver in an action to which the person to be affected by the order is not a party. Ex parte Casey, 71 Cal. 269; 12 Pac. 118. The authority conferred upon the court to make the appointment necessarily presupposes that an action is pending before it, instituted by some one authorized by law to commence it. La Société Française v. District Court, 53 Cal. 495. The appointment of a receiver must be ancillary to a pending and independent cause of action: its purpose is to preserve the property, pending the litiga-

tion, so that any judgment rendered therein may be effective. Hobson v. Pacific States Mercantile Co., 5 Cal. App. 94; 89 Pac. 866. A party to an action should not, against his will, be subjected to the onerous expense of a receiver, except the appointment is lawful, and obviously necessary for the protection of the opposite party. De Leonis v. Walsh, 148 Cal. 254; 82 Pac. 1047. The court has jurisdiction to appoint a receiver, at the commencement of an action to enforce a wife's equitable demand for maintenance, to preserve her equitable claim against the separate property of her husband, and to avoid voluntary transfers thereof by him to defeat such rights. Murray v. Murray, 115 Cal. 266; 56 Am. St. Rep. 97; 37 L. R. A. 626; 47 Pac. 37. Where a particular person is appointed a receiver by the consent of the then parties to the action, and thereafter, upon objections made by intervening creditors, he is removed, and another person is appointed receiver at the request of such interveners, a party subsequently substituted as plaintiff in the place of the original plaintiff is not estopped to question the validity of the appointment of the second receiver. Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71; 47 Pac. 872. After judgment rendered in favor of a plaintiff, the mere fact that a receiver, appointed before the judgment, at the request of the plaintiff, has died, does not warrant the appointment of another at the request of the defendant. De Leonis v. Walsh, 148 Cal. 254; 82 Pac. 1047. A receiver will not be appointed to take property out of the possession of a defendant, without trial, or previous notice to the defendant, save in case of irreparable pending injury, and in no case where a temporary injunction would be sufficient. Fischer v. Superior Court, 110 Cal. 129; 42 Pac. 561. In an action involving merely legal, as distinguished from equitable, rights, which proceeds on the assumption of ownership by the plaintiff of land and the profits thereof, the appointment of a receiver is not authorized by law. San José etc. Bank of Savings v. Bank of Madera, 121 Cal. 543; 54 Pac. 85. An order appointing a receiver, which purported to determine the question of ownership, that was never tried and never anywhere put in issue, is erroneous. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121.

Receiver upon dissolution of partnership. Where the title to mining property belonging to a partnership stands in the name of a corporation, which possesses no interest in the property, such property is assets of the copartnership, and the court is authorized to appoint a receiver to take charge of and work it, in a suit for the dissolution and accounting of the partnership. Fischer v. Superior Court, 98 Cal. 67; 32 Pac. 875.

Receiver in actions of foreclosure. A receiver should not be appointed, pendente lite, in an action to foreclose a mortgage, on the ground that the mortgaged property is in danger of being materially injured, if the injury, though considerable in extent, will still leave enough of the property remaining intact to be ample security for the debt (Title Insurance etc. Co. v. California Development Co., 164 Cal. 58; 127 Pac. 502); nor can a receiver be appointed to collect and preserve future rents to abide the result of an action, not in the nature of a suit in equity, to subject the rents to the payment of a mortgage debt, but which proceeds on the assumption of ownership, by the plaintiff, of the land and the profits thereof (San José etc. Bank of Savings v. Bank of Madera, 121 Cal. 543; 54 Pac. 85); nor can the court by the appointment of a receiver, take from the mortgagor, or from any person claiming under him, the rents, issues, and profits of the mortgaged premises and apply them to the mortgage debt, unless the mortgage so provides in terms. Locke v. Klunker, 123 Cal. 231; 55 Pac. 993. Where, in a mortgage or deed of trust (whether it is a deed of trust or a simple mortgage is immaterial), a power is expressly conferred on the parties of the second part, in case default is made in payment of the principal or interest of the bonds, for which such mortgage or deed of trust was given as security, to enter upon and take possession of the mortgaged property, the appointment of a receiver of the property described in the mortgage or deed of trust is proper, where the mortgagors made default, and refused to surrender possession of the mortgaged property. Sacramento etc. R. R. Co. v. Superior Court, 55 Cal. 453. Where a railway corporation gave, as security for the payment of bonds, a mortgage to trustees, who were empowered, after default, to collect the income and apply it to the discharge of current expenses and taxes, upon default a court of equity has power to appoint the surviving trustee as receiver, with power to retain possession of the road and exercise the powers conferred by the mortgage. McLane v. Placerville etc. R. R. Co., 66 Cal. 606; 6 Pac. 748. Where, on a foreclosure sale of mortgaged premises, a sum sufficient to satisfy the debt secured by the mortgage is not realized, and the plaintiff applies to the court for an order that the money derived from a sale of a crop grown on the premises be applied to the payment of the deficiency, the court has authority to appoint a receiver. Montgomery v. Merrill, 65 Cal. 432; 4 Pac. 414; Treat v. Dorman, 100 Cal. 623; 35 Pac. 86. An objection, in an action of foreclosure, that the court appointed a receiver of the

rents and profits of the premises during the pendency of the action, is answered by this section, which authorizes the appointment of receiver, where the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt. La Société Française v. Selheimer, 57 Cal. 623. A receiver should not be appointed in actions of foreclosure, except upon a statement of facts showing that the actual value of the mortgaged premises is less than the debt secured, with interest and costs, and that resort to the rents and profits is necessary: a general statement in the complaint, that the mortgaged premises are insufficient to pay and discharge the mortgage debt, being of a mere conclusion, is insufficient (Bank of Woodland v. Stephens, 144 Cal. 659; 79 Pac. 379); as is also an allegation, without further showing, that the mortgaged property was probably insufficient to pay the mortgage debt. Locke v. Klunker, 123 Cal. 231; 55 Pac. 993. The purchaser of property at a foreclosure sale is entitled thereto, and to its rents and profits, or to the value of the use and occupation thereof from the time of the sale up to the date of any redemption made; but where the judgment debtor remains in possession of mining property, working the same, and is insolvent, and the value of the property is liable to be destroyed through waste, and it is in the interest of all parties that the work should be continued, the purchaser is entitled to an order appointing a receiver (Hill v. Taylor, 22 Cal. 191; Walker v. McCusker, 71 Cal. 594; 12 Pac. 723; White v. White, 130 Cal. 597; 80 Am. St. Rep. 150; 62 Pac. 1062); but there is no provision in the codes, nor any decision, nor any principle, under which a purchaser is entitled to the appointment of a receiver to take charge of property, during the period of redemption, to prevent the commission of waste. West v. Conant, 100 Cal. 231; 34 Pac. 705; Scott v. Hotchkiss, 115 Cal. 89; 47 Pac. 45; Mau v. Kearney, 143 Cal. 506; 77 Pac. 411. Where a mortgagee in possession has not committed waste, nor otherwise abused his position, the court has no power to appoint a receiver to collect the rents and profits of the mortgaged property and to pay them out, giving priority to a judgment debt and counsel fees over the claim of the mortgagee. Cummings v. Cummings, 75 Cal. 434; 17 Pac. 442. Where a suit is brought to enforce the specific execution of the terms and stipulations of a mortgage, by which, on the happening of a specific event, the trustees, or the survivors of them, are entitled to take possession of the property mortgaged, hold it, receive the income arising from it and apply such income according to the terms of the mortgage, the casus fœderis, upon which the surviving trustee was to take possession, having occurred, it is within the province of a court of equity, and comes within the provision of the sixth subdivision of this section, authorizing the appointment of a receiver. McLane v. Placerville etc. R. R. Co., 66 Cal. 606; 6 Pac. 748. No stipulation can confer jurisdiction upon the court to appoint a receiver in a case where the court has no such authority given by law. Scott v. Hotchkiss, 115 Cal. 89; 47 Pac. 45; Baker v. Varney, 129 Cal. 564; 79 Am. St. Rep. 140; 62 Pac. 100. Thus, the court has no jurisdiction, in an action of foreclosure, to appoint a receiver of rents and profits of mortgaged property, merely upon a stipulation in the mortgage for such appointment in case of default and foreclosure (Baker v. Varney, 129 Cal. 564; 79 Am. St. Rep. 140; 62 Pac. 100); and, notwithstanding the stipulation, the party who desires a receiver must state facts sufficient to show that the premises mortgaged are probably insufficient to pay the mortgage debt, with interest and costs. Scott v. Hotchkiss, 115 Cal. 89; 47 Pac. 45; Baker v. Varney, 129 Cal. 564; 79 Am. St. Rep. 140; 62 Pac. 100; Bank of Woodland v. Stephens, 144 Cal. 659; 79 Pac. 379. In an action of foreclosure, where there is a stipulation in the mortgage that a receiver may be appointed, and the mortgagor is in possession of land on which there are growing crops, and there is an averment that the security is insufficient, the court is authorized to appoint a receiver to take and hold the rents and profits to secure the debt. Scott v. Hotchkiss, 115 Cal. 89; 47 Pac. 45. Where there is nothing in the complaint to justify the appointment of a receiver pending a foreclosure suit, unless it be a stipulation in the mortgage providing for the appointment of receiver on an ex parte application, it may be presumed that the order was made upon motion, and upon affidavits showing the facts necessary to give the court jurisdiction. Garretson Investment Co. v. Arndt, 144 Cal. 64; 77 Pac. 770.

Receiver after judgment. The third subdivision of this section is very comprehensive, and any suitable process or mode of proceedings may be adopted, conformably with the spirit of the code; and since the powers and duties of the person appointed by the court to execute conveyances are fixed by the decree, it is immaterial whether he is called a commissioner or a receiver. Seadden Flat Gold Mining Co. v. Seadden, 121 Cal. 33; 53 Pac. 440. Where judgment was entered in favor of the plaintiff in an action for divorce and alimony, and alimony was made a lien upon property of the defendant, the court has power to appoint a receiver to take possession of the property, collect the rents and profits, and sell the property, and pay the sums adjudged to be due (Huellmantel v. Huellmantel, 124 Cal. 583; 57 Pac. 582); and the court has power to appoint a receiver, in whom legal title may be vested

by a decree to make a conveyance, for the purpose of carrying a judgment into effect, in an action to compel a conveyance from the heirs of a deceased person, many of whom are minors (Scadden Flat Gold Mining Co. v. Scadden, 121 Cal. 33; 53 Pac. 440); but the court has no jurisdiction to appoint a receiver to carry into effect a judgment for the recovery of rents, where the execution of such judgment has been stayed by proper bond, pending an appeal therefrom by the defendant (San José etc. Bank of Savings v. Bank of Madera, 121 Cal. 543; 54 Pac. 85); nor, after the entry of a money judgment, to continue the receiver for the purpose of enforcing the judgment, where he was appointed pending the action, but took possession of no property before the judgment: his functions as a receiver ceased with the entry of the judgment. White v. White, 130 Cal. 597; 80 Am. St. Rep. 150; 62 Pac. 1062. Actions of ejectment are not included in the cases specified in this section in which receivers may be named before judgment (Bateman v. Superior Court, 54 Cal. 285; Scott v. Sierra Lumber Co., 67 Cal. 71; 7 Pac. 131); but a receiver may be appointed in an action of ejectment, after judgment, during the pendency of the appeal. Garniss v. Superior Court, 88 Cal. 413; 26 Pac. 351. Upon proceedings supplementary to execution, it is proper to order an execution debtor to make an assignment, to a receiver, of his patent right to an invention. Pacific Bank v. Robinson, 57 Cal. 520; 40 Am. Rep. 120. Seats in stock and produce exchanges constitute property within the reach of judgment creditors of the owner, and an order may be properly made, upon proceedings supplementary to execution against an owner of such seats, appointing a receiver, directing the execution debtor to make an assignment thereof to him to sell the same to satisfy the judgment. Habenicht v. Lissak, 78 Cal. 351; 12 Am. St. Rep. 63; 5 L. R. A. 713; 20 Pac. 874. While Federal courts have jurisdiction of questions arising as to the title to letters patent of the United States, yet, as they are not exempt from seizure and sale by the laws of the state, a court of equity can compel a defendant to assign them to a receiver, to be sold and applied to the satisfaction of judgments against him. Pacific Bank v. Robinson, 57 Cal. 520; 40 Am. Rep. 120.

Receivers of corporations. Under the code, the rule is, not to appoint a receiver to administer the assets of a defunct corporation, but to leave the whole matter of liquidation and distribution to the exclusive control of the directors at the date of dissolution, unless, upon the showing of some party interested, either a creditor or a stockholder, it is necessary, for the protection of his rights, that a receiver, under the control and superintendence of a court of equity, be appointed. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. The court has no jurisdiction to appoint a receiver for a corporation, organized for mutual protection, and for the payment of stipulated sums to members, and not for profit, on the alleged ground that its liabilities exceed its assets, that nearly half of its assets are due on policies to deceased members, and that salaries and expenses are wasting the assets, where there is no fraud or mismanagement, and the corporation was not dissolved nor adjudged insolvent, nor had forfeited its right to do business (Murray v. Superior Court, 129 Cal. 628; 62 Pac. 191); nor has the court jurisdiction to appoint a receiver, during the pendency of an action by a private person, to take control of the property and business of a corporation out of the corporate management, where it is operating its business, and asserting full ownership and right to the property. Fischer v. Superior Court, 110 Cal. 129; 42 Pac. 561. Where a corporation ceases to exist from any cause, whether from lapse of time, voluntary dissolution, or judgment of forfeiture for abuse of its powers, it necessarily results that its property is left to be disposed of according to law; and, in the absence of any statute regulating the matter, a court of equity has the undoubted right, in a proper proceeding instituted by a creditor or stockholder, to appoint a receiver to administer the property. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. There is no jurisdiction vested in courts of equity to appoint a receiver of the property of a corporation, in aid of a suit prosecuted by a private party. La Société Française v. District Court, 53 Cal. 495; Bateman v. Superior Court, 54 Cal. 285; Smith v. Superior Court, 97 Cal. 348; 32 Pac. 322; State Investment Co. v. Superior Court, 101 Cal. 135; 35 Pac. 549; Fischer v. Superior Court, 110 Cal. 129; 42 Pac. 561; Murray v. Superior Court, 129 Cal. 628; 62 Pac. 191; White v. White, 130 Cal. 597; 80 Am. St. Rep. 150; 62 Pac. 1062. Under this section and § 400, ante, the legislature has left to the directors of a corporation, convicted of violating their duty to the people of the state, power and discretion to pay their own debts and to divide their own property, subject to the right of a court of equity to interfere and compel them to proceed properly, if any occasion for such interference should arise; and as to creditors, their interest must, in most cases, be opposed to the appointment of a receiver. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. A court of equity has no inherent power to appoint a receiver of an insolvent corporation, merely because of its insolvency. Hobson

v. Pacific States Mercantile Co., 5 Cal. App. 94; 89 Pac. 866. The provision of the fifth subdivision of this section, that a receiver "may" be appointed when a corporation has forfeited its charter, does not mean that a receiver "must" be appointed, on the ground that the public has an interest that the power shall be exercised: the creditors and stockholders are the only parties whose interest can demand the appointment of a receiver, under § 565, post. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. The appointment of a receiver to administer the assets of a corporation whose charter is forfeited is not designed as a penalty or part of the punishment to be visited upon the stockholders of the corporation in a proceeding in quo warranto; but the punishment is limited to the forfeiture of the charter, and the fine which the court may, in its discretion, impose; and the court cannot further affect the corporate property by its judgment, nor take it away from its stockholders. Id.

Powers of courts. There is no jurisdiction to appoint a receiver of the property of a corporation in a quo warranto proceeding, upon a judgment of forfeiture of its corporate charter: a new suit must be commenced by a creditor or stockholder of the corporation for that purpose. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. A judgment declaring that a corporation defendant is guilty of usurping rights and franchises, "as charged and alleged in the complaint," and adjudging that the defendant be excluded from "such rights, privileges, and franchises," does not dissolve the corporation, nor undertake to do so; and an order appointing a receiver thereupon is without authority, and void. Yore v. Superior Court, 108 Cal. 431; 41 Pac. 477. A court of equity has power to remove the directors of a corporation for fraudulent practices, and, when they have abandoned their trust, may make an ex parte order appointing a receiver to preserve its assets. California Fruit Growers' Ass'n v. Superior Court, 8 Cal. App. 711; 97 Pac. 769. An order appointing a receiver, and a decree directing a sale of the property and a settlement of the affairs of a corporation, necessarily result in the dissolution of the corporation, and the court thus accomplishes indirectly that which it has no power to do directly: courts of equity, as such, have no jurisdiction to restrain the operations or wind up the affairs of corporations. Neall v. Hill, 16 Cal. 145; 76 Am. Dec. 508; La Société Française v. District Court, 53 Cal. 495; Fischer v. Superior Court, 110 Cal. 129; 42 Pac. 561. The rendition of the judgment authorized by § 809, post, ends the proceedings, and no receiver can be appointed, unless a new suit is commenced by a creditor or stockholder of the corporation for that purpose, under this section. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121.

Where authorized by usages of courts of equity. Where the court has general jurisdiction in a case, the authority to appoint a receiver is clearly given in both the fifth and the sixth subdivisions of this section; and such appointment in no way affects the title of any party to the property involved, but simply preserves it, and keeps it within the jurisdiction of the court, until the rights of the parties are determined. Loaiza v. Superior Court, 85 Cal. 11; 20 Am. St. Rep. 197; 9 L. R. A. 376; 24 Pac. 707. The rule in equity is, that a receiver may be appointed before answer, provided the plaintiff can satisfy the court that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve the same from loss; but such power should be very cautiously exercised. Murray v. Murray, 115 Cal. 266; 56 Am. St. Rep. 97; 37 L. R. A. 626; 47 Pac. 37. The sixth subdivision of this section is but declaratory of the equity jurisdiction conferred upon the district courts by the former constitution, in giving them jurisdiction in "all cases in equity," and includes only the suits in which it has been the usage of courts of equity to appoint a receiver; their jurisdiction in this respect would have been the same in the absence of the statutory provision. Bateman v. Superior Court, 54 Cal. 285; McLane v. Placerville etc. R. R. Co., 66 Cal. 606; 6 Pac. 748; Loaiza v. Superior Court, 85 Cal. 11; 20 Am. St. Rep. 197; 9 L. R. A. 376; 24 Pac. 707. Where a municipal corporation contracted with a water company to grant certain privileges in consideration of the company making certain improvements to property, which was to be surrendered after a term of years, on payment for the same by the municipality, which, at the expiration of the term, it was unable to do, but brought an action for the appointment of a receiver to collect and receive the rents, issues, and profits of the property, including water rates, there is no just ground for the appointment of a receiver to take away from the company its current revenues, before final settlement and payment by the municipality of the value of the improvements. Los Angeles v. Los Angeles City Water Co., 124 Cal. 368; 57 Pac. 210.

Receiver in partition proceedings. It is competent for a court of equity, in some cases, to appoint a receiver, in actions of partition, to take possession of the property and hold it for the benefit of all parties in interest (Goodale v. Fifteenth District Court, 56 Cal. 26); and though

actions in partition are regulated to a great extent by statute, yet they partake more fully of the principles and rules of equity than those of law; and whenever it is necessary to protect the interests of all the parties, the court will, upon proper application, appoint a receiver. Woodward v. Superior Court, 95 Cal. 272; 30 Pac. 535. A receiver pendente lite may be appointed, in an action of partition, where a tenant in common of a growing crop is in the sole possession thereof, and denies the right of his co-tenant to any part thereof, and threatens to sell the entire crop and appropriate the proceeds to his own use. Baughman v. Reed, 75 Cal. 319; 7 Am. St. Rep. 170; 17 Pac. 222; Rohrer v. Babcock, 126 Cal. 222; 58 Pac. 537.

Notice and undertaking. The appointment of a receiver to take property out of the defendant's possession, without a trial, will not ordinarily be made without previous notice to the defendant. Hobson v. Pacific States Mercantile Co., 5 Cal. App. 94; 89 Pac. 866. The appointment of a receiver to take property and business out of the hands of persons in possession, claiming ownership thereof, without requiring a bond from the plaintiff, is, in most cases, a gross abuse of discretion. Fischer v. Superior Court, 110 Cal. 129; 42 Pac. 561. A receiver will not be appointed upon his ex parte application, without requiring ample security by his undertaking, with sufficient sureties, for all damages that may be caused by the appointment. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. An order granting an injunction and appointing a receiver, without any notice, or any bond from the plaintiff on the appointment of the receiver, is null and void. Fischer v. Superior Court, 110 Cal. 129; 42 Pac. 561. Court commissioners have no jurisdiction to appoint a receiver: a bond given by a receiver so appointed is void. Quiggle v. Trumbo, 56 Cal. 626.

Order appointing receiver. In the appointment of a receiver, the court should declare precisely what property is to continue in the hands of the receiver, or to be otherwise subject to the satisfaction of judgment, and the remainder, if any, should be wholly exempt from the effect of the judgment (Murray v. Murray, 115 Cal. 266; 56 Am. St. Rep. 97; 37 L. R. A. 626; 47 Pac. 37; and see Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121); but it is sufficient, in appointing the receiver or assignee of an insolvent, or a corporation or partnership, or the executor or administrator of a decedent, to mention generally all the property of the insolvent, corporation or partnership, or decedent. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. An order appointing a receiver, though very informal, is sufficient, if it carries an authority to the appointee to take possession of the property, and hold it pending the litigation, subject to the further order of the court. Cook v. Terry, 19 Cal. App. 765; 127 Pac. 816. The appointment of a receiver does not operate as a sequestration of the property mentioned in the order of appointment, where the complainant, at whose instance the receiver was appointed, had some estate in, or some right to, or some lien upon, the property involved, prior to and independently of the appointment of the receiver, and the receiver is then appointed to preserve and enforce his pre-existing right. Bank of Woodland v. Heron, 120 Cal. 614; 52 Pac. 1006. Where the court, by its order, takes property out of the actual possession of a stranger to the proceeding, who claims it as his own, the order is in excess of jurisdiction and void, irrespective of the actual state of the title, because no man can be deprived of his property without due process of law; nor can a court take property from his possession without a hearing, and compel him to prove title to regain it. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. Damages for attorneys' fees for a dissolution of the order appointing a receiver cannot be allowed, where such fees have not been paid. Cook v. Terry, 19 Cal. App. 765; 127 Pac. 816.

Discharge of receiver. Where a receiver was appointed for a purpose ancillary to the main object of the action, and final judgment was rendered in favor of the defendant, from which an appeal was taken, the court has jurisdiction to discharge the receiver (Baughman v. Superior Court, 72 Cal. 572; 14 Pac. 207); and the court has power to vacate the appointment of a receiver, improvidently made, notwithstanding a motion for a new trial is pending, and admitting that the effect of the motion is to stay the proceedings generally. Copper Hill Mining Co. v. Spencer, 25 Cal. 11.

Remedies for erroneous appointment. Since the amendment in 1897 of § 939, post, allowing an appeal from an order appointing a receiver, and the amendment, at the same time, of § 943, post, providing for the staying of the order by an undertaking on appeal, a writ of prohibition will not lie to arrest proceedings under such an order, as the aggrieved party has a plain, speedy, and adequate remedy at law, within the meaning of § 1103, post, notwithstanding a question of jurisdiction is involved in the application for the writ. Jacobs v. Superior Court, 133 Cal. 364; 85 Am. St. Rep. 204; 65 Pac. 826. Although a party could, before that amendment, move the court to

set aside an invalid order appointing a receiver, yet this was not a ground for refusing an application for a writ of prohibition: the most that could be claimed was, that the application should have been made to the lower court before moving for the writ. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121; and see Jacobs v. Superior Court, 133 Cal. 364; 85 Am. St. Rep. 204; 65 Pac. 826. Where judgment was had against a corporation, and execution was levied upon moneys and personal property held by a receiver of the corporation, illegally appointed, prohibition was the proper remedy to restrain the court from withholding such assets from the creditor (Murray v. Superior Court, 129 Cal. 628; 62 Pac. 191); and prohibition was the proper remedy to prevent the attempted receivership of the property of a corporation, during the pendency of an action to displace the management of the corporation by its directors (Fischer v. Superior Court, 110 Cal. 129; 42 Pac. 561); and also where no sufficient ground for the appointment of a receiver exists (Murray v. Superior Court, 129 Cal. 628; 62 Pac. 191); and also where the court appointed a receiver and commanded a court of concurrent jurisdiction, which had first assumed jurisdiction in the matter, and appointed a receiver, to desist from proceeding further (Fischer v. Superior Court, 110 Cal. 129; 42 Pac. 561); and also where the court, through its receiver, was doing an injury to the petitioners, in possession of the property under claim of ownership. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121; Bishop v. Superior Court, 87 Cal. 226; 25 Pac. 435; Cosby v. Superior Court, 110 Cal. 45; 42 Pac. 460; Fischer v. Superior Court, 110 Cal. 129; 42 Pac. 561; Jacobs v. Superior Court, 133 Cal. 364; 85 Am. St. Rep. 204; 65 Pac. 826. If the order appointing the receiver is only collaterally involved, it cannot be assailed, except for want of jurisdiction. Title Insurance Co. v. Grider, 152 Cal. 746; 94 Pac. 601. As against a collateral attack upon an order appointing a receiver, the jurisdiction of the court will be upheld and its action validated, if this can be done, even though the facts showing such jurisdiction are defectively stated and inferences must be indulged in to support the judgment. Illinois Trust etc. Bank v. Pacific Ry. Co., 115 Cal. 285; 47 Pac. 60. A mere averment that the value of property mortgaged is insufficient, or that the premises are insufficient, may be sufficient to uphold an order appointing a receiver where the attack is collateral, but not where there is a direct attack upon appeal. Bank of Woodland v. Stephens, 144 Cal. 659; 79 Pac. 379. Where a party, on petition, obtained an order to show cause why a writ of review of proceedings for the appointment of a receiver should not issue, and it does not appear whether the order was made with or without notice, or that the court was not justified in directing the taking and holding of the property until adjudication could be had, such writ operates only as to excess of jurisdiction, as the complaint for the appointment of a receiver may have showed a case in which an appointment was proper. Real Estate Associates v. Superior Court, 60 Cal. 223. Where the court has general jurisdiction to appoint a receiver, error in the exercise of that jurisdiction is reviewable only on appeal, and not by certiorari. Loaiza v. Superior Court, 85 Cal. 11; 20 Am. St. Rep. 197; 9 L. R. A. 376; 24 Pac. 707; White v. Superior Court, 110 Cal. 60; 42 Pac. 480. Where the court has jurisdiction of the subject-matter and of the parties, it has power to hear and determine a motion for the appointment of a receiver, and its action thereon cannot be regarded as in excess of its jurisdiction; and if error is committed, the petitioner has a plain, speedy, and adequate remedy in due course of law, and the writ of prohibition cannot issue (Woodward v. Superior Court, 95 Cal. 272; 30 Pac. 535; and see Jacobs v. Superior Court, 133 Cal. 364; 85 Am. St. Rep. 204; 65 Pac. 826); nor can the title to property be tried upon a writ of prohibition. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121.

Appointment of receiver to collect rents of mortgaged property. See note 27 Am. St. Rep. 793.

When and over what property receiver will be appointed. See note 64 Am. Dec. 482.

When proper to appoint receiver. See note 72 Am. St. Rep. 29.

Equitable right to appointment of receiver in action maintained solely for such relief. See note 4 Ann. Cas. 66.

Sufficiency of affidavit for appointment of receiver sworn to upon information and belief. See note 11 Ann. Cas. 980.

Affidavit or verified bill as essential to appointment of receiver. See note Ann. Cas. 1913A, 608.

Right to appointment of receiver before suit is instituted. See note Ann. Cas. 1912B, 236.

Power of court to appoint receiver in absence of statute. See note Ann. Cas. 1913B, 648.

Appointment of receivers for corporation. See note 118 Am. St. Rep. 198.

Misconduct of officers or directors of corporation as ground for appointment of receiver. See note 17 Ann. Cas. 916.

Who is "creditor" entitled to apply for appointment of receiver for insolvent corporation. See note Ann. Cas. 1912A, 901.

Power to appoint receivers of corporations when no other relief is asked. See note 20 L. R. A. 210.

Inherent jurisdiction of equity independent of statute, at the instance of stockholders, to appoint a receiver because of mismanagement or fraud of corporate officers. See note 39 L. R. A. (N. S.) 1032.

Exhausting remedies at law as a condition of judgment creditor's right to receivership. See note 33 L. R. A. 546.

Right to have receiver appointed to take charge of claims not legally or equitably enforceable. See note 5 L. R. A. (N. S.) 771.

When notice of application for appointment of receiver of growing crop may be dispensed with. See note 11 L. R. A. (N. S.) 960.

Jurisdiction of equity to appoint receiver of real property in another state. See note 69 L. R. A. 693.

Jurisdiction of equity to appoint receiver to preserve status quo pending action or proceedings before other tribunal. See note 38 L. R. A. (N. S.) 228.

CODE COMMISSIONERS' NOTE. 1. **Receiver, appointment of.** The county judge cannot (as a thing distinct from the injunction) appoint a receiver in an action pending in the district court. Ruthrauff v. Kresz, 13 Cal. 639. The general rule is, that a receiver should not be appointed without notice to the adverse party. People v. Norton, 1 Paige, 17; Field v. Ripley, 20 How. Pr. 26; Kemp v. Harding, 4 How. Pr. 178; Dorr v. Noxon, 5 How. Pr. 29. Except in special cases, where irreparable injury, or the like, will be sustained by the delay. West v. Swan, 3 Edw. Ch. 420. The merits are not inquired into, upon the motion to appoint a receiver. Sheldon v. Weeks, 2 Barb. 532; Conro v. Gray, 4 How. Pr. 166; Higgins v. Bailey, 7 Rob. 613. The application relates only to the preservation of the property. Sheldon v. Weeks, 2 Barb. 532; Chapman v. Hammersly, 4 Wend. 173. The appointment rests in the sound discretion of the court. Copper Hill M. Co. v. Spencer, 25 Cal. 15. A third party cannot take advantage of an irregularity in the appointment. Tyler v. Whitney, 12 Abb. Pr. 465; Tyler v. Willis, 33 Barb. 327. The court may revoke the order appointing a receiver, at any time before the appointment is consummated, and appoint another person. Siney v. New York Con. Stage Co., 28 How. Pr. 481; 18 Abb. Pr. 435.

2. **Subd. 1.** The purchaser at judicial sale of a mining claim may, where the judgment debtor remains in possession, working the claim, and is insolvent, have a receiver appointed to take charge of the proceeds, pending the time for redemption. Hill v. Taylor, 22 Cal. 191. A crop of grain is part of the land, and if a plaintiff is entitled to recover the land from the possession of another, he is also (the proper showing being made) entitled to a receiver to harvest and preserve the crop. Corcoran v. Doll, 35 Cal. 476.

3. **Subd. 2.** See Guy v. Ide, 6 Cal. 101; 65 Am. Dec. 490; Hill v. Taylor, 22 Cal. 191. As a general rule, the mortgagee in possession will not be deprived of the possession by the appointment of a receiver. Bolles v. Duff, 35 How. Pr. 481. Caution must be used in appointing a receiver in mortgage cases. Shotwell v. Smith, 3 Edw. Ch. 588; Bank of Ogdensburg v. Arnold, 5 Paige, 38; Warner v. Gouverneur's Executors, 1 Barb. 36. If the mortgagee in a chattel mortgage has possession, a receiver will only be appointed in case of pressing necessity. Bolles v. Duff, 35 How. Pr. 481; Patten v. Accessory Transit Co., 4 Abb. Pr. 235. See also Thompson v. Van Vechten, 5 Duer, 618, and Bayaud v. Fellows, 28 Barb. 451.

4. **Subd. 3.** May be appointed in proceedings supplementary to execution. Hathaway v. Brady, 26 Cal. 586. After judgment, in an action to recover possession of real estate, and while a motion for a new trial is pending, a receiver of the rents and proceeds of the property in dispute may be appointed, if the facts of the case are such as warrant it. Whitney v. Buckman, 26 Cal. 447.

5. **Subd. 4.** See Hathaway v. Brady, 26 Cal. 586.

6. **Subd. 5.** See § 565 of this code. In Neall v. Hill, 16 Cal. 148, 76 Am. Dec. 503, it was held that a court of equity has no jurisdiction over corporations for the purpose of restraining their operations or winding up their concerns; that while it might compel the officers of the corporation to account for any breach of trust, the jurisdiction for this purpose was over the officers personally, and not over the corporation; hence it was error in the court below to appoint a receiver and decree a sale of the property and a settlement of the affairs of the corporation.

7. **Subd. 6.** Courts of equity have the authority to appoint receivers, and may order them to take possession of the property in controversy, whether in the immediate possession of the defendant or his agents; and in proper cases they can also order the defendant's agents or employees, although not parties to the record, to deliver the specific property to the receiver. Ex parte Cohen, 5 Cal. 494. Where the allegations of a bill are general in their nature, and the equities are fully denied by the answer, such a case is not presented as will authorize the appointment of a receiver, the withdrawal of the property from the hands of one acquainted with all the affairs of the concern, and placing it in the hands of another, who may not be equally competent to manage the business. Williamson v. Monroe, 3 Cal. 385.

8. **Generally.** Where it appears that the partners, parties to the suit for a dissolution, held a judgment against a third party, which was never reduced to the possession nor under the control of the receiver, it was held, that the appointment of the receiver did not operate as an assignment, nor transfer any property not so reduced to possession within a reasonable time. Money in the hands of a receiver is in custodia legis. Adams v. Woods, 8 Cal. 306. The transfer to a receiver, by order of court, of the effects of an insolvent, in the suit of a judgment creditor, is not an assignment absolutely void under the Insolvent Act of 1852, but is only void against the claim of creditors. Naglee v. Lyman, 14 Cal. 450. The pendency of a motion for a new trial does not operate as a stay of proceedings, so as to deprive the court of the right to vacate an order appointing a receiver, made before the trial. But where a receiver has been appointed, and, on the trial, judgment of nonsuit is rendered against the party at whose instance the receiver was appointed, a motion for a new trial suspends the operation of the judgment so as to prevent it from operating as a discharge of the action, unless an order is made discharging the receiver. Copper Hill M. Co. v. Spencer, 25 Cal. 15.

§ 565. Appointment of receivers upon dissolution of corporations. Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members.

Dissolution.
1. **Involuntary.** Civ. Code, §§ 399, 400; post, §§ 802 et seq.
2. **Voluntary.** Post, §§ 1227 et seq.

Legislation § 565. 1. Enacted March 11, **1872**; based on Stats. 1850, p. 347, §§ 16, 18, and Stats. 1862, p. 199, § 25.

2. Amended by Code Amdts. **1880**, p. 4, changing the word "district" to "superior," before "court of the county."

Scope of section. This section does not authorize the appointment of a receiver upon the ground that the corporation is not prosperous, or because its liabilities are greater than its assets, but only upon the dissolution of the corporation (Murray v. Superior Court, 129 Cal. 628; 62 Pac. 191); nor has the court power, under this section, to appoint a receiver, from the fact that a fine was imposed upon the corporation, payable to the people of the state, making the state a creditor of the corporation (Yore v. Superior Court, 108 Cal. 431; 41 Pac. 477); nor does this section confer upon the court any authority to take charge of the management of the affairs of a corporation, in an action by the state against a corporation for its dissolution, or to assume the disposition of the effects of the corporation, winding up its affairs; nor has the court authority to appoint a receiver pendente lite: upon the entry of a judgment of dissolution, the functions of the court are at an end. State Investment etc. Co. v. Superior Court, 101 Cal. 135; 35 Pac. 549.

Effect of dissolution. The dissolution of a corporation leads practically to a winding up of its business. People v. Superior Court, 100 Cal. 105; 34 Pac. 492.

Who may have receiver appointed. A receiver of a dissolved corporation may be appointed, only when necessary for the purpose of preserving and distributing the property, and only upon the application of a party in interest, namely, a creditor or a stockholder (Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121); and can neither be invoked at the instance of a stranger, nor assumed by the court of its own motion. State Investment etc. Co. v. Superior Court, 101 Cal. 135; 35 Pac. 549. Where the affairs of a defunct corporation are under the control of its late directors as trustees for its creditors and stockholders, the creditors have nothing to do but present their demands and receive payment in the ordinary course of business, or, if payment is refused or delayed, they may proceed to enforce their demands; and it is always at the option of the creditors or stockholders to have a receiver, if they can allege facts showing that one is necessary. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121.

CODE COMMISSIONERS' NOTE. Stats. 1850, p. 347, §§ 16, 18; Stats. 1862, p. 199, § 25.

§ 566. Receiver, restrictions on appointment. Ex parte application, undertaking on. No party, or attorney of a party, or person interested in an action, or related to any judge of the court by consanguinity or affinity within the third degree, can be appointed receiver therein without the written consent of the parties, filed with the clerk. If a receiver is appointed upon an ex parte application, the court, before making the order, must require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking.

Legislation § 566. **1.** Enacted March 11, **1872**, and then contained only two lines, "No party or attorney, or person interested in an action, can be appointed receiver therein."

2. Amended by Code Amdts. **1873–74**, p. 309, adding the rest of the section after the words "receiver therein," except for the changes noted infra.

3. Amended by Stats. **1897**, p. 60, adding the words "or related to any judge of the court by consanguinity or affinity within the third degree," in the first sentence.

4. Amendment by Stats. **1901**, p. 142; unconstitutional. See note ante, § 5.

5. Amended by Stats. **1907**, p. 710, (1) adding the words "of a party," in the first line, (2) changing the word "be" to "is," after "If a receiver," and (3) changing the word "may" to "must," before "require"; the code commissioner saying of the first and third changes, "Such changes having been made to conform to [sic] the section to the intent of the legislature in the passage of the original section."

Ex parte application. Undertaking. This section recognizes the appointment of a receiver upon an ex parte application (Real Estate Associates v. Superior Court, 60 Cal. 223); and an undertaking is required of the applicant, only when the appointment is asked for ex parte (Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418); and the appointment is void, where the court has failed to require the undertaking from the applicant before making the order. Davila v. Heath, 13 Cal. App. 370; 109 Pac. 893; Bibby v. Dieter, 15 Cal. App. 45; 113 Pac. 874. The undertaking required under this section, where the application is made ex parte, must run in favor of each defendant in the action, and be in such form that any defendant shall have a right of action thereon if he is injured by the appointment; and on appeal, it will be presumed that persons purporting to act as the agents of a surety company,

in the execution of such undertaking, sufficiently established their authority by evidence presented to the trial court. Title Insurance etc. Co. v. California Development Co., 164 Cal. 58; 127 Pac. 502.

CODE COMMISSIONERS' NOTE. A person should not be appointed receiver, who, by his own act, stands in an improper relation to the action. Smith v. New York Con. Stage Co., 28 How. Pr. 208; 18 Abb. Pr. 419.

§ 567. Oath and undertaking of receiver. Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with two or more sureties, approved by the court or judge, execute an undertaking to the state of California, in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action and obey the orders of the court therein.

Undertakings, generally. See post, § 941; Pol. Code, §§ 981, 947–986, 982.

Legislation § 567. 1. Enacted March 11, **1872**, and then had (1) the word "one" instead of "two," before "or more sureties," and (2) the words "such person, and" instead of "the state of California."

2. Amendment by Stats. **1901**, p. 142; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 710; the code commissioner saying, "The word 'one' is changed to 'two,' thus requiring two sureties, and making it uniform with other provisions of this code respecting sureties, and the undertaking with respect to form is left subject to the control of § 982 of the Political Code."

Liability of sureties. The sureties of a receiver merely undertake that he will faithfully execute the orders of the court; and if the receiver obeys such orders, the sureties are exonerated. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121.

§ 568. Powers of receivers. The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.

Legislation § 568. Enacted March 11, **1872**.

Scope of section. It was not intended by § 564, ante, to create a new lien by the mere appointment of a receiver in an action to foreclose a mortgage. Locke v. Klunker, 123 Cal. 231; 55 Pac. 993.

Power of receiver. A receiver appointed to keep, and care for, and dispose of property until the appointment of an assignee, has no further powers, save that he may sue and be sued in his own name, collect debts, and do such other acts respecting the property as the court may direct; but he is not authorized to bring suits not connected with his receivership, and necessary for him to perform its functions, nor to sue in his own name for property which has not come into his possession. Tibbets v. Cohn, 116 Cal. 365; 48 Pac. 372. A receiver can, with the permission of the court, do anything the court may do to make the most out of the assets in his hands; thus, he may settle disputed claims, compromise with debtors, lease and operate other property, and complete unfinished work. Pacific Ry. Co. v. Wade, 91 Cal. 449; 25 Am. St. Rep. 201; 13 L. R. A. 754; 27 Pac. 768. A receiver, appointed only to take possession of a mortgaged street-railway, and operate the same, has no authority to collect debts due to the defendant before his appointment, and mingle the funds thus received with those received in the course of his receivership. California Title Ins. etc. Co. v. Consolidated Piedmont Cable Co., 117 Cal. 237; 49 Pac. 1. The receiver of a mortgaged field has no right to cut timber from other land of the mortgagor, in order to build fences or houses on the tract covered by the mortgage, although it might benefit the mortgagor. Staples v. May, 87 Cal. 178; 25 Pac. 346. The receiver of an insolvent corporation is not bound to perform any of the contracts of the company, unless it is to the interest of creditors, or unless required by order of court; but delivery of water for irrigation under a contract of the company, is proper, where the receiver is the only person who can do so (Russ Lumber etc. Co. v. Muscupiabe etc. Water Co., 120 Cal. 521; 65 Am. St. Rep. 186; 52 Pac. 995); and the receiver may carry out to completion a special contract, necessary in the dissolution of a partnership, when in the interests of and with the consent of the partners. Rochat v. Gee, 137 Cal. 497; 70 Pac. 478. A receiver, appointed in a foreclosure suit against a deceased mortgagor, is not a public officer, charged with a trust as such officer, and he may act as agent for the sale of the note and mortgage, and make a valid contract, where the purchasers are not misled and the creditors of the deceased mortgagor do not complain. De Jarnatt v. Peake, 123 Cal. 607; 56 Pac. 467.

Order appointing receiver. The mere appointment of a receiver is not a determination of what the court shall order him

to do; and to compel a person to make certain payments to the receiver is as much in the discretion of the court as the appointment of the receiver. Bank of Woodland v. Heron, 120 Cal. 614; 52 Pac. 1006. The appointment of a receiver is merely ancillary, where he is appointed before judgment to protect, pending litigation, the property in litigation, and in this case neither his functions nor the power of the court to remove or control him are suspended by an appeal; but the appointment of a receiver is not ancillary, where he is appointed after judgment to carry it into effect, as in the case of his appointment to sell mortgaged premises under a decree of foreclosure, when his proceedings are suspended by an appeal. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. The appointment is classed in our statutes as a provisional remedy, and is sometimes styled an equitable execution before judgment; and where the appointment is made after judgment, the functions of the receiver, either for the purpose of carrying the judgment into effect or for its preservation until execution thereof, are limited to the property described in the judgment. Kreling v. Kreling, 118 Cal. 421; 50 Pac. 549. Usually, a court will not appoint a receiver to carry on a business permanently; but it is not unusual or erroneous to authorize him to do so temporarily, where the interests of the parties require it. Rochat v. Gee, 137 Cal. 497; 70 Pac. 478. Where a receiver was appointed to take possession of and to operate a street-railway, the court may enter orders authorizing and directing the issuance of receiver's certificates, and providing that such certificates shall be a first lien upon the property in the hands of the receiver. Illinois Trust etc. Bank v. Pacific Ry. Co., 115 Cal. 285; 47 Pac. 60. A direction, in a judgment, that, after the confirmation of a sale, the receiver shall execute a deed, will not be assumed to import that he shall execute it before he is authorized by law so to do, and such direction is not available to a judgment debtor, on appeal, for the purpose of impairing the sufficiency of the judgment directing the sale. Woodbury v. Nevada Southern Ry. Co., 120 Cal. 463; 52 Pac. 730. As against a collateral attack upon an order appointing a receiver, if the jurisdiction of the court can be upheld and its action validated, this will be done, even though the facts showing such jurisdiction are defectively stated and inferences must be indulged in to support the judgment. Illinois Trust etc. Bank v. Pacific Ry. Co., 115 Cal. 285; 47 Pac. 60. Where a judgment directed the defendant to satisfy a claim within a specified time, and, in default thereof, that certain real estate should be sold and the proceeds applied on the judgment, and in case of a deficiency, that judgment should be docketed therefor against the defendant, the court has no jurisdiction to appoint a receiver to take charge of any other property than that described in the judgment. Kreling v. Kreling, 118 Cal. 421; 50 Pac. 549. An action against a corporation upon a note is an action at law, and the appointment of a receiver in such a case is unauthorized and void, although the corporation assents to the appointment, and the complaint alleges that it is insolvent and that other creditors are threatening to sue it, that it has no property to respond to the judgment, and that the action is brought in behalf of the plaintiff and other creditors. Smith v. Superior Court, 97 Cal. 348; 32 Pac. 322; and see Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71; 47 Pac. 872.

Suits by receivers. This section clears the way of all former niceties as to the questions whether a receiver could sue in his own name, and whether he could recover property which had not once been in his actual possession; and in Real Estate Associates v. Superior Court, 60 Cal. 223, the power of a receiver to maintain necessary actions in insolvent cases is expressly recognized. Dennery v. Superior Court, 84 Cal. 7; 24 Pac. 147. A receiver in insolvency proceedings may maintain all actions necessary to preserve any property which comes into his possession (Tibbets v. Cohn, 116 Cal. 365; 48 Pac. 372); and he is expressly authorized, or directed, to sue for the recovery of goods fraudulently transferred by the insolvent, after demand and refusal (Tapscott v. Lyon, 103 Cal. 297; 37 Pac. 225); and he may bring an action for the conversion of property during his receivership, and must allege therein that his insolvent was the owner or entitled to the possession of the property, and that there has been a demand and refusal. Daggett v. Gray, 5 Cal. Unrep. 74; 40 Pac. 959. A receiver cannot sue to recover property which has not come into his possession, or which should have been delivered to him; he cannot maintain trover for property of the insolvent converted before the adjudication, or to recover property transferred by the debtor in fraud of his creditors (Tibbets v. Cohn, 116 Cal. 365; 48 Pac. 372); nor can he maintain an action of replevin, in an action of foreclosure, to recover the possession of personal property, not taken from his possession, but held by the sheriff under a writ of attachment, and in the possession of the receiver merely as a caretaker for the sheriff. Bishop v. McKillican, 124 Cal. 321; 71 Am. St. Rep. 68; 57 Pac. 76. An action brought by a receiver to set aside judgments obtained by fraud is proper; but he should resort to the usual means of an injunction, and give other security to indemnify creditors if they

should ultimately establish the validity of their claims. Petaluma Sav. Bank v. Superior Court, 111 Cal. 488; 44 Pac. 177. A receiver, appointed in a foreclosure suit, is not a public officer, charged with a trust as such officer; and where he acts as an agent for the sale of the mortgaged premises, and a check is given by the purchasers in payment of the purchase price, he may maintain an action against the makers upon stoppage of payment. De Jarnatt v. Peake, 123 Cal. 607; 56 Pac. 467. A foreign receiver cannot sue in another state; but, on the ground of comity, courts will, where the good of a large number demands it, permit such suits to be maintained, and recognize orders and judgments of courts of sister states; but such right to sue is not conceded, nor a suit permitted to be maintained by a foreign receiver, where the claim conflicts with the rights of citizens or creditors in the state where suit is brought. Humphreys v. Hopkins, 81 Cal. 551; 15 Am. St. Rep. 76; 6 L. R. A. 792; 22 Pac. 892; Ward v. Pacific Mut. Life Ins. Co., 135 Cal. 235; 67 Pac. 124; and see Lackmann v. Supreme Council, 142 Cal. 22; 75 Pac. 583. A receiver appointed in another state, presumably without the assent of other creditors in this state, who are not parties to the action, cannot represent such creditors in a suit between the receiver and a domestic attaching creditor. Lackmann v. Supreme Council, 142 Cal. 22; 75 Pac. 583. An action by a foreign receiver cannot be maintained here against a domestic creditor claiming the same fund, situated here, of an insolvent foreign corporation, sought to be appropriated by the receiver of such corporation. Ward v. Pacific Mut. Life Ins. Co., 135 Cal. 235; 67 Pac. 124. No rule of state comity or law requires the rights of a domestic attaching creditor to be set aside in deference to a foreign receiver claiming under the laws of another state. Lackmann v. Supreme Council, 142 Cal. 22; 75 Pac. 583.

Suits against receivers. Courts of equity will not permit their receivers to be sued, or property in their possession to be seized or sold, without leave asked and granted; but, since the refusal of leave to sue in other tribunals, or to enforce the judgments of other courts, would, in many cases, destroy or impair rights which the court appointing the receiver has no power to conserve, it is the boast of such courts that they never refuse leave in a proper case. Petaluma Sav. Bank v. Superior Court, 111 Cal. 488; 44 Pac. 177. It is contrary to the established doctrine of courts of equity to permit a receiver to be made a party defendant, unless by consent of court: this is for the protection of receivers against unnecessary litigation, because relief can be obtained on motion to the court making the appointment; but such action may be justified, where the rights of the parties or of the receiver will not be injuriously affected by the decree, and where the decree specially reserves all rights of the receiver. Murray v. Etchepare, 132 Cal. 286; 64 Pac. 282. A suit, by permission, can always be brought against a receiver, to present claims against him in his official capacity, on such terms as will protect him, while affording full opportunity to the plaintiff to test his right. Tapscott v. Lyon, 103 Cal. 297; 37 Pac. 225. Whether the court will permit, upon application, an independent suit to be brought relative to the property in the hands of a receiver, or will compel intervention in the proceeding in which the receiver is appointed, is a matter for its discretion; and when it cannot afford the same relief in intervention as the claimant would be entitled to in an independent action, it should permit an independent suit. De Forrest v. Coffey, 154 Cal. 444; 98 Pac. 27. A superior court, having jurisdiction of an action in which a receiver of an insolvent corporation is appointed, does not abuse its discretion in denying leave to sue him in an independent action. De Forrest v. Coffey, 154 Cal. 444; 98 Pac. 27; Auzerais v. Coffey, 155 Cal. 102; 99 Pac. 1134. The claimant of real property, under title adverse to that of parties represented by a receiver in an action to foreclose a mortgage, should be granted leave, on application, to commence an action of ejectment, in order to try the question of title. Petaluma Sav. Bank v. Superior Court, 111 Cal. 488; 44 Pac. 177. A mortgagee should not be required to satisfy the court, in appointing a receiver, of the validity of his mortgage, or in other words, to litigate the whole question of the mortgagor's liability, and to establish it, on the motion, as a condition precedent to any permission to sue the receiver in the county where the land is situate; for, whenever the court appointing a receiver cannot protect an asserted right in a cause before it, the party will be allowed to proceed in the proper forum to establish his right if he can, and to enforce it by appropriate means. Petaluma Sav. Bank v. Superior Court, 111 Cal. 488; 44 Pac. 177. A judgment against a receiver, final because of failure to appeal therefrom or to move for a new trial, cannot be enforced by execution: it is against the receiver in his official capacity, and operates only as an established claim against the assets in his possession; its enforcement is a matter for the determination of the court having jurisdiction of the receivership, and to it application must be made for its payment. Painter v. Painter, 138 Cal. 231; 94 Am. St. Rep. 47; 71 Pac. 90. The rights of creditors are statutory, and cannot be divested by the mere volition of the court

or judge in refusing leave to sue a receiver; but creditors have the right to take such proceedings as the law exacts for preserving or enforcing their liens according to their priority. Petaluma Sav. Bank v. Superior Court, 111 Cal. 488; 44 Pac. 177. A receiver lawfully in possession of property by direction of the court, and claimed to belong to the insolvent, cannot be held personally responsible as a trespasser, by adverse claimants, upon demand and refusal to give up the property. Tapscott v. Lyon, 103 Cal. 297; 37 Pac. 225. Where a receiver, holding by a valid appointment, containing no direction in excess of the jurisdiction of the court, attempts to take property lawfully in the possession of another, and to which he is not entitled, he may be resisted, just as any other trespasser may be resisted, and a person defending his lawful possession is not thereby brought in conflict with the court, as the fault is that of the receiver alone; and if he gains possession of property claimed by a stranger, the court will either order him to restore it, or permit an action to be brought against him to try the title. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. A receiver, being the legal custodian of all the books of a corporation defendant, may be made a party defendant to an application for an order to compel the entry of stock, in the transferee's name, upon the books of the defendant corporation, and may be commanded to make the proper entry of the transfer of the stock upon such books. People v. California Safe Deposit etc. Co., 18 Cal. App. 732; 124 Pac. 558.

Receipt of rents. Where a receiver collects and preserves rents, there is no necessity for a specific decree declaring such funds to be the property of the party finally recovering possession of the lands. Garniss v. Superior Court, 88 Cal. 413; 26 Pac. 351. The title of the defendant to the rents and profits of land under foreclosure of mortgage is in no way affected by the possession of the receiver. Garretson Investment Co. v. Arnot, 144 Cal. 64; 77 Pac. 770.

Compromise claims and payment of debts. Ordinarily, a receiver should not pay debts without a previous direction of the court; but the general rule is not inexorable, and, where the order of appointment is not broad enough, in a proper case such action of the receiver may be subsequently sanctioned by the court. Rochat v. Gee, 137 Cal. 497; 70 Pac. 478.

Possession and care of property by receiver. The possession of property by a receiver, pendente lite, does not affect the title to the property (Tibbets v. Cohn, 116 Cal. 365; 48 Pac. 372); nor does a mortgagee acquire any new or additional lien through the possession of the receiver. Bank of Woodland v. Heron, 120 Cal. 614; 52 Pac. 1006. The property of a corporation in the hands of a receiver is in custodia legis: the possession of the receiver is the possession of the court, for the benefit of all parties interested (De Forrest v. Coffey, 154 Cal. 444; 98 Pac. 27); and no one claiming a right paramount to that of the receiver can assert it in any action without the permission of the court; no sale can take place, no debt can be paid, no contract can be made, without its sanction. Pacific Ry. Co. v. Wade, 91 Cal. 449; 25 Am. St. Rep. 201; 13 L. R. A. 754; 27 Pac. 768. What the receiver does, the court does; the court, therefore, and not the receiver, holds, administers, and disposes of the property in the hands of the receiver; and, as long as it is undisposed of, action by the court is necessary. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. The receiver is the officer or representative of the court, appointed to take charge and management of the property which is the subject of litigation before it, for the purpose of its preservation and ultimate disposition according to final judgment therein; and as, in any particular action, the court has jurisdiction over only the property which is the subject of that litigation, that is the only property which it can authorize its receiver to interfere with or take into its possession. Kreling v. Kreling, 118 Cal. 421; 50 Pac. 549. Where the goods are described, and are in the possession of the person whose property the receiver is directed to take into possession, or are voluntarily delivered to him by the person having them, he must take them, on penalty of incurring contempt, and, having thus taken them, he cannot surrender them to an adverse claimant, without leave of the court. Tapscott v. Lyon, 103 Cal. 297; 37 Pac. 225. The receiver is under the control of the court, as is the property of which he is the custodian, and while the court will not permit any interference with such property without its leave, neither will it withhold such property from one who shows that he is entitled to it. De Forrest v. Coffey, 154 Cal. 444; 98 Pac. 27. Though the receiver is appointed upon the application of one of the parties interested in the property, yet his holding is not merely for the benefit of such party, or of any other party: it is the holding of the court for the equal benefit of those finally adjudged to have rights in it; and when the rights of the parties are established, the receiver is considered as holding for the benefit of the parties entitled to the property. Garniss v. Superior Court, 88 Cal. 413; 26 Pac. 351; Pacific Railway Co. v. Wade, 91 Cal. 449; 25 Am. St. Rep. 201; 27 Pac. 768. The holding of property by the receiver differs essentially from the

holding of property under attachment: in the latter case, the law itself provides that the property shall be disposed of to satisfy the judgment; in the former, there is no such provision, and the property is in the hands of the receiver, to be disposed of by the court after a valid adjudication. Garretson Investment Co. v. Arndt, 144 Cal. 64; 77 Pac. 770. Where the receiver is lawfully in possession of property claimed to belong to his insolvent, even an adverse claimant is not justified in disturbing his possession without leave of court; nor is he responsible to such person in an action for the value of the property; and, having no right to deliver it to the adverse claimant without leave of the court, he cannot be held responsible for not doing so. Tapscott v. Lyon, 103 Cal. 297; 37 Pac. 225. Such discretion as a court has to prevent proceedings by adverse claimants to property in the custody of a receiver appointed by it is a regulated discretion, which cannot be abused. Petaluma Sav. Bank v. Superior Court, 111 Cal. 488; 44 Pac. 177. Where the order appointing a receiver was made ex parte, and it was not shown that anything connected therewith ever came to the knowledge of the corporation defendant, and it was insolvent, and seems to have left its creditors to get what they could out of the property, without objection, the presumption is, that it desired its property to go to its creditors according to their legal rights. Staples v. May, 87 Cal. 178; 25 Pac. 346. The mere order of the court appointing a receiver does not constitute, ipso facto, a possession of the property, independently of any actual possession of the receiver, or of any attempt by him to take possession; and an assignee of the owner of a crop, who took title prior to the taking possession thereof by a receiver appointed ex parte in a suit for the foreclosure of a mortgage, without knowledge of such appointment, is entitled to an order directing the receiver to deliver the crop to him, rather than to the mortgagee plaintiff in the foreclosure suit. Bank of Woodland v. Herron, 120 Cal. 614; 52 Pac. 1006. The receiver cannot, when appointed for any proper purpose, be empowered to take possession of the crops of a mortgagor and apply them to the mortgage debt, nor, having taken possession, is any lien thereby acquired: this would be to give a lien upon property not included in the mortgage. Locke v. Klunker, 123 Cal. 231; 55 Pac. 993. The receiver is not required to place himself in the position of a wrong-doer, and need not take property from third persons, unless under an express order to that effect: suit should be brought to recover property in the possession of adverse claimants; but where the property is legally and properly in the possession of the receiver, the court should protect that possession, not only against acts of violence, but also against suits at law, so that a third person claiming the property may be compelled to come in and ask to be examined pro interesse suo, if he wishes to test the justice of the claim. Tapscott v. Lyon, 103 Cal. 297; 37 Pac. 225. The title of the defendant to the rents and profits of land under foreclosure of the mortgage is in no way affected by the possession of the receiver, nor can he be divested of it otherwise than by a valid adjudication; and where there is neither allegation nor prayer to justify the adjudication, it is incompetent for the court so to adjudge. Garretson Investment Co. v. Arndt, 144 Cal. 64; 77 Pac. 770. A receiver appointed to take charge of the separate property of a husband in an action for divorce, takes the property subject to all prior liens and encumbrances. Petaluma Sav. Bank v. Superior Court, 111 Cal. 488; 44 Pac. 177. The receiver has no authority to take property from the possession of strangers, who claim in good faith as absolute owners in their own right. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. Where a judgment debtor has property which cannot be reached by execution, and which he refuses to apply to the satisfaction of the judgment, he may be compelled, in proceedings supplementary to execution, to deliver it to a receiver appointed to dispose of it in aid of the execution. Pacific Bank v. Robinson, 57 Cal. 520; 40 Am. Rep. 120; Matteson v. Conley, 144 Cal. 483. Patent rights, assignable by the voluntary act of the owner, and by act and operation of law, can be ordered assigned to the receiver, to be sold and applied to the satisfaction of a judgment. Pacific Bank v. Robinson, 57 Cal. 520; 40 Am. Rep. 120. The court cannot direct a receiver to take charge of any other or additional property than that described in the judgment (Kreling v. Kreling, 118 Cal. 421; 50 Pac. 549); nor can it confer color of authority upon a receiver to extract ores from lands not covered by the securities involved in the suit, although it might enhance the value of such securities (Staples v. May, 87 Cal. 178; 25 Pac. 346); nor has the court jurisdiction, after the entry of a money judgment, to continue the receiver for the purpose of enforcing the judgment, where he had not taken possession of any property before the judgment. White v. White, 130 Cal. 597; 80 Am. St. Rep. 150; 62 Pac. 1062. When the bill upon which the appointment of a receiver was made is dismissed on demurrer, it is the duty of the court to direct the receiver to restore the property to the person from whom it was taken. Baughman v. Superior Court, 72

Cal. 572; 14 Pac. 207. There is no injustice in requiring a receiver to put back into a fund, where it belongs, a sum of money to which he has never had any right. Staples v. May, 87 Cal. 178; 25 Pac. 346. Where, upon false allegations in a pleading, the court appoints a receiver, and, at the trial, judgment is entered for the defendant, an order directing the receiver to turn the property over to the defendant is proper. Loftus v. Fischer, 117 Cal. 128; 48 Pac. 1030. The receiver may apply to the court for instruction and authority, from time to time, and in the order appointing him he may be directed to apply for instructions when necessary: he is but the hand of the court, to aid in managing and preserving the property, and any order of the court may, if erroneous, be reviewed on appeal, after final judgment has been rendered, or, in exceptional cases, after settlement of the final account of the receiver. Free Gold Mining Co. v. Spiers, 135 Cal. 130; 67 Pac. 61. An order for the direction of the receiver is in the discretion of the court, and requires immediate execution, to be of any avail; but the interests of all parties might be greatly prejudiced if every order of the court in connection with property in its custody was the subject of a direct appeal; any errors in the order should be reviewed upon an appeal from the judgment. Free Gold Mining Co. v. Spiers, 135 Cal. 130; 67 Pac. 61. The filing of an undertaking on appeal from an order appointing a receiver operates as a supersedeas, suspends all authority of the receiver under the order, withdraws from him the right to the control and possession of the property involved, and restores the same to the pleading party from whom it had been taken. Jacobs v. Superior Court, 133 Cal. 364; 85 Am. St. Rep. 204; 65 Pac. 826. Mere possession, by a receiver appointed in a foreign jurisdiction, of the debtor's property, however lawful, does not screen it from attachment in this state: to show a right superior to that of creditors, he must fall back upon the order appointing him receiver, and must depend upon the comity of this state as to the effect to be allowed that order. Humphreys v. Hopkins, 81 Cal. 551; 15 Am. St. Rep. 76; 6 L. R. A. 792; 22 Pac. 892; Ward v. Pacific Mut. Life Ins. Co., 135 Cal. 235; 67 Pac. 124; Lackmann v. Supreme Council, 142 Cal. 22; 75 Pac. 583. Where property is in the hands of a receiver appointed in a suit to cancel a lease, and a similar suit was brought in a Federal court for the same purpose, to which the receiver was not a party, it cannot be objected to that court's jurisdiction that the property is in the hands of such receiver, and that leave had not been obtained from the state court to sue him. Isom v. Rex Crude Oil Co., 147 Cal. 663; 82 Pac. 319.

Receiver's certificates. It will be presumed, in support of a judgment holding a receiver's certificates valid, that everything necessary to authorize the court to order the issue of such certificates was shown, in the absence of evidence to the contrary. Illinois Trust etc. Bank v. Pacific Ry. Co., 115 Cal. 285; 47 Pac. 60.

What expenses receiver may incur. The appointment of a receiver implies a material diminution of the fund out of which creditors are to be paid, and from which, in the first place, the fees of the receiver, his counsel and assistants, are to be subtracted. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. The receiver should be allowed reasonable fees for counsel employed by him in the proper discharge of his trust, the costs of litigation, and the expenses in taking care of, protecting, and repairing the property in his charge. McLane v. Placerville etc. R. R. Co., 66 Cal. 606; 6 Pac. 748. The receiver should be allowed reasonable expenses incurred by him in the harvesting of a crop, although his appointment was improper (Locke v. Klunker, 123 Cal. 231; 55 Pac. 993); and he should be allowed expenses incurred in finishing an uncompleted contract, and paying debts incident thereto, in winding up the affairs of a partnership. Rochat v. Gee, 137 Cal. 497; 70 Pac. 478. The trustee and receiver of a railroad corporation should be allowed his expenses, reasonably incurred in the discharge of his trust, and such expenses are a lien upon the trust property, prior to that of the bondholders. McLane v. Placerville etc. R. R. Co., 66 Cal. 606; 6 Pac. 478. Where, under circumstances authorizing such action, property is taken into the possession of the court, through a receiver, of such a character as to give the public a right to its continued operation and use, the court acquires the right and assumes the obligation of keeping such property in operation, and is authorized to incur expense and create obligations therefor (Illinois Trust etc. Bank v. Pacific Ry. Co., 115 Cal. 285; 47 Pac. 60); and the receiver is justified in expending money for the purchase of rolling-stock and machinery, necessary for the operation of a railroad. McLane v. Placerville etc. R. R. Co., 66 Cal. 606; 6 Pac. 478. The court may properly direct a receiver to pay a physician's bill for professional services, found to be a necessary item of maintenance, and being the purpose for which the funds were in the hands of the receiver. Murray v. Murray, 115 Cal. 266; 56 Am. St. Rep. 97; 37 L. R. A. 626; 47 Pac. 37.

Compensation and reimbursement of receiver. The amount of compensation and expenses allowed a receiver is properly costs of suit, and should be paid in preference to general creditors. Ephraim v. Pacific Bank, 136 Cal. 646; 69 Pac. 436.

Money in the hands of a receiver, collected by him under his order of appointment, is subject to his lien upon it for his fees and costs of receivership. Garniss v. Superior Court, 88 Cal. 413; 26 Pac. 351. The costs of a receivership are primarily a charge upon, and are to be paid out of, the fund in his possession; but it is by no means the rule, that a receiver must in all cases look to that fund alone for his reimbursement, and that he has no other remedy if that fund is not available; nor is it necessary that the order settling the receiver's account shall determine what party is liable to him for his expenses and compensation, and where, before such settlement, the suit was dismissed by the plaintiff, at whose instance he was appointed, he may maintain an action against the plaintiff for his expenses and compensation. Ephraim v. Pacific Bank, 129 Cal. 589; 62 Pac. 177. A mortgagee at whose instance a receiver is appointed in an action for the foreclosure of a mortgage is answerable for the costs of the receivership, and the receiver has a preferred lien for his expenses upon the funds and estate which come into his hands. Illinois Trust etc. Bank v. Pacific Ry. Co., 99 Cal. 407; 33 Pac. 1132; Fischer v. Superior Court, 110 Cal. 129; 42 Pac. 561. In an action by a receiver for compensation, it is a complete defense that he was appointed at his own request, and that he agreed to look entirely to the income from the property for compensation. Ephraim v. Pacific Bank, 136 Cal. 646; 69 Pac. 436. An order fixing the compensation of a receiver, founded on an absolutely void order of appointment, is equally void. Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71; 47 Pac. 872. Where a receiver has gained possession of property through an irregular, unauthorized appointment, or if the property belongs to a third party, and is taken from him by paramount authority, the person at whose instance he was appointed is liable for his compensation. Ephraim v. Pacific Bank, 129 Cal. 589; 62 Pac. 177. The obligation to compensate a receiver appointed under a null and void order rests upon those who sought and procured his appointment. Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71; 47 Pac. 872. An order fixing the compensation of a receiver, and taxing it as costs as against all the parties, and directing the receiver to apply toward its payment the balance of a fund in his hands as such receiver, is a final judgment in a collateral matter, and is appealable. Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71; 47 Pac. 872; Grant v. Superior Court, 106 Cal. 324; 39 Pac. 604. The statute of limitations does not begin to run against the action of a receiver to recover his compensation, until his account is allowed and settled; and the time during which an appeal from an order of allowance is pending suspends the running of the statute. Ephraim v. Pacific Bank, 129 Cal. 589; 62 Pac. 177.

Settling final account. The court has jurisdiction to settle the account of a receiver appointed by it in an action, although the plaintiff dismissed the action before the issuance of any summons or the appearance of any defendant. Pacific Bank v. Madera Fruit etc. Co., 124 Cal. 525; 57 Pac. 462. A receiver, authorized to manage, control, and dispose of all the property of a partnership, may carry out to completion a special contract, and the court may properly allow all his expenses incurred therein, in the settlement of his final account. Rochat v. Gee, 137 Cal. 497; 70 Pac. 478. Formal findings, separate from the order approving or disapproving the account of a receiver, are not necessary in settling the final account. Rochat v. Gee, 137 Cal. 497; 70 Pac. 478; Estate of McPhee, 156 Cal. 337; 104 Pac. 455. There is no necessity for an order to the receiver to surrender property upon the settlement of his final account, where the property was originally purchased by the partnership from the receiver, and they never paid any part of the deferred purchase-money, and after the receiver paid all the debts and completed the contract the parties to the action took no further interest in the property, and the action was dismissed, and no claim for any settlement with the receiver was demanded for nearly ten years. Rochat v. Gee, 137 Cal. 497; 70 Pac. 478.

Discharge of receiver. Where the administration of a receiver is unduly prolonged, or he is unfaithful to his trust, the parties may apply for his discharge: they could have opposed his appointment in the first instance. Painter v. Painter, 138 Cal. 231; 94 Am. St. Rep. 47; 71 Pac. 90. Where the bill upon which a receiver was appointed is afterwards dismissed on demurrer, the duties of the receiver cease as between the parties to the action; and so where the defendant finally obtains judgment, the entry of judgment seems to have the effect of terminating the receiver's functions, although the plaintiff perfects an appeal; but the abatement of the action or the entry of final judgment does not discharge the receiver ipso facto. Baughman v. Superior Court, 72 Cal. 572; 14 Pac. 207. Although the functions of the receiver terminate with the determination of the suit, yet he is still amenable to the court as its officer, until he complies with its direction as to the disposal of funds received during the receivership. Pacific Bank v. Madera Fruit etc. Co., 124 Cal. 525; 57 Pac. 462. The receiver is discharged by a decree in the cause, unless he is expressly continued; but this discharge refers to the surcease of his

functions as receiver proper, leaving on him the duty of properly accounting under the order of the court; and whether he is thereafter called receiver or not, he is subject to the order of the court with respect to the winding up of his affairs as receiver, and until he is discharged of his responsibilities as trustee. Baughman v. Superior Court, 72 Cal. 572; 14 Pac. 207. The end of the suit, its final adjudication, gives cause for the discharge of the receiver, but does not, ipso facto, effect his discharge, which results only from an order or decree of the court so directing; after the settlement of the suit, the receiver must have time and opportunity to prepare and present his accounts, and for the adjustment of the details of the receivership; nor does the dismissal of the action discharge the receiver from accountability to the court: he is still an officer of the court, and subject to its orders. Pacific Bank v. Madera Fruit etc. Co., 124 Cal. 525; 57 Pac. 462. The functions of a receiver, appointed pending an action for divorce, who does not take possession of any property before the judgment, terminates with the entry of the judgment. White v. White, 130 Cal. 597; 80 Am. St. Rep. 150; 62 Pac. 1062. Where the complaint is insufficient to justify the appointment of a receiver pending the action, the court has no power to continue him in office after the making of a final decree. Bank of Woodland v. Stephens, 144 Cal. 659; 79 Pac. 379. Where a receiver is appointed at the request of the plaintiff, for a purpose ancillary to the main object of the action, and judgment is afterwards rendered in favor of the defendant, an appeal by the plaintiff from the judgment does not deprive the lower court of jurisdiction to hear and determine a motion made by the defendant for the discharge of the receiver. Baughman v. Superior Court, 72 Cal. 572; 14 Pac. 207.

Remedies. An order fixing the compensation of a receiver, whose appointment is in excess of the jurisdiction of the court, may be reviewed either upon certiorari or upon appeal, and prohibition does not lie to arrest the proceedings in the superior court (Grant v. Superior Court, 106 Cal. 324; 39 Pac. 604); and an order appointing a receiver, made without jurisdiction, may be annulled upon certiorari, notwithstanding the petitioner has appealed therefrom and has given an undertaking to stay proceedings. Los Angeles City Water Co. v. Los Angeles, 124 Cal. 385; 57 Pac. 216. Parties have undoubted right to appeal from orders, made after final judgment, directing a receiver in an equity case to pay counsel fees; and therefore certiorari does not lie to review the same. Elliott v. Superior Court, 144 Cal. 501; 103 Am. St. Rep. 102; 77 Pac. 1109. An order, pending suit, authorizing the receiver to make purchases to conduct the prosecution of work, to be paid for out of the funds in his hands, is not appealable. Free Gold etc. Co. v. Spiers, 135 Cal. 130; 67 Pac. 61. An order authorizing and directing a receiver to pay a judgment rendered against him, cannot be attacked upon appeal, on the ground that the court erred in originally appointing him, where there is nothing to show that the court abused its discretion in granting the order. Painter v. Painter, 138 Cal. 231; 94 Am. St. Rep. 47; 71 Pac. 90. Where the receiver, under a void judicial order, seizes property in the possession of a stranger to the suit, an appeal affords no remedy for the wrong threatened; in such case, prohibition is appropriate, and the fact that the petitioner could have appealed from the order appointing the receiver, does not preclude him from that relief; the writ runs to and operates directly upon the court, but indirectly upon the receiver; and if served upon the receiver, it is notice that the proceedings are arrested, and stays his hand. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. The receiver may apply for the examination of the insolvent concerning his affairs: by this means the court can fully preserve the property of the insolvent and protect the rights of creditors. Dennery v. Superior Court, 84 Cal. 7; 24 Pac. 147. Where the receiver has possession of property under a void commission, and the further acts of the court are arrested by prohibition, the writ must require the restoration of the property to the petitioner, otherwise prohibition would be valueless; and where the court exceeds its jurisdiction in appointing a receiver, or in directing him to take specific property out of the possession of a stranger, the wrong is in the order of the court, and the appropriate remedy is in some writ or proceeding operating on the court to restrain its judicial action, and not in the sort of resistance that may be opposed to an ordinary wrong-doer, or in such an action as may be brought against a private person who has committed a trespass. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121.

Suits by receivers outside the state of their appointment. See notes 6 Am. St. Rep. 185; 8 Am. St. Rep. 49; 4 L. R. A. (N. S.) 824.

Extraterritorial powers of receiver. See notes 8 Am. St. Rep. 49; 15 Am. St. Rep. 79.

Relation of receiver to pre-existing liens and their enforcement. See note 71 Am. St. Rep. 352.

Actions against receiver without leave of court. See note 74 Am. St. Rep. 285.

Power to create liens on property in custody of receivers. See note 84 Am. St. Rep. 72.

Power of receiver of corporation to issue certificates. See note Ann. Cas. 1913C, 40.

Power to permit receiver of private corporation to create liens on its property. See note 16 L. R. A. 603.

Rights of receiver as to property outside of the jurisdiction in which he is appointed. See note 23 L. R. A. 52.

Right of receiver to question validity of attachment. See note 35 L. R. A. 770.

Right of receiver of drawer appointed after the issuance of a draft or check but before its presentation, as against the holder. See note 2 L. R. A. (N. S.) 83.

Power of railway receiver to contract for transportation beyond own line. See note 31 L. R. A. (N. S.) 33.

CODE COMMISSIONERS' NOTE. 1. Generally. He may employ counsel. Adams v. Woods, 8 Cal. 315. Generally, he can pay out nothing, except on an order of the court; but there are exceptions to the rule, and he will not be denied reimbursements in every case in which he neglects to obtain the order, especially in a court of equity. Adams v. Woods, 15 Cal. 207. On an application, after final judgment, for an order for a receiver, that he pay over to the prevailing party money in his hands as receiver, it will not be presumed that the receiver has transcended his duties and took possession of property to which he was not entitled; nor is the opposite party entitled to have issues framed and submitted to a referee or jury to ascertain the ownership of the money in the receiver's hands. Whitney v. Buckman, 26 Cal. 451.

2. Fees. See Adams v. Haskell, 6 Cal. 475.

§ 569. Investment of funds. Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made, except upon the consent of all the parties to the action.

Legislation § 569. 1. Enacted March 11, **1872. 2.** Amendment by Stats. **1901,** p. 142; unconstitutional. See note ante, § 5.

§ 570. Disposition of unclaimed funds in hands of receiver. A receiver having any funds in his hands belonging to a person whose whereabouts are unknown to him, shall, before receiving his discharge as such receiver, publish a notice, in one or more newspapers published in the county, at least once a week for four consecutive weeks, setting forth the name of the owner of any unclaimed funds, the last known place of residence or post-office address of such owner and the amount of such unclaimed funds. Any funds remaining in his hands unclaimed for thirty days after the date of the last publication of such notice, shall be reported to the court and, upon order of the court, all such funds must be paid into the state treasury accompanied with a copy of the order, which must set forth the facts required in the notice herein provided. Such funds shall be paid out by the state treasurer to the owner thereof or his order in such manner and upon such terms as are now or may hereafter be provided by law.

Legislation § 570. 1. Added by Stats. **1913,** p. 92.

2. Amended by Stats. **1915,** p. 107, substituting the present final sentence for one reading, "All funds so paid into the state treasury must be received, invested, accounted for and paid out, in the same manner and by the same officers as is provided by law in the case of escheated estates, and in section twelve hundred and seventy-two of this code."

CHAPTER VI.

DEPOSIT IN COURT.

§ 572. Deposit in court.
§ 573. Money paid to clerk must be deposited with county treasurer.
§ 574. Manner of enforcing the order.

§ 572. Deposit in court. When it is admitted by the pleadings, or shown upon the examination of a party to the action, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

Legislation § 572. 1. Enacted March 11, **1872;** based on Practice Act, § 142.

2. Amendment by Stats. **1901,** p. 142; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907,** p. 710, (1) in first line, changing "pleading" to "pleadings"; (2) inserting "to the action," after "party," "as in its present form," the code commissioner said, "the section is entirely misleading."

When court may order deposit. To justify the making of an order requiring a deposit in court, the admission, in the pleadings, of having property, not directly the subject of litigation, in possession, belonging to another, must be free from any claim thereto. Burke v. Superior

Court, 7 Cal. App. 178; 93 Pac. 1058. The order allowed by this section is, that the party pay the money into court, or to the party to whom it is admitted by the pleading, or shown by the examination of the party, to be due: to justify the court in ordering a deposit in bank, subject to its further order, of money which the party claims as his own, the court must first determine that such party has no title to it. Ex parte Casey, 71 Cal. 269; 11 Pac. 118. If the money in the possession of the party is not the subject of the litigation, but its payment is incident thereto, dependent upon the judgment to be rendered, as in the case of an action for redemption, specific performance, accounting, rescission, or the like, the provisions of this section do not authorize the issuance of an order to deposit it in court; and where the court ordered certain moneys, or a certificate of deposit, to be paid into court, and exception was taken thereto, such order may be reviewed as error of law occurring at the trial, upon appeal from an order granting or denying a new trial. Green v. Duvergey, 146 Cal. 379; 80 Pac. 234.

Trustee. This section refers to property without question in the hands of a trustee as trust property, or which belongs to or is due to another: it does not refer to that which an alleged trustee claims title to in his own right; and, under it, the court has no authority to adjudicate the title to property held by a person claiming it as his own. Ex parte Casey, 71 Cal. 269; 12 Pac. 118. Where the money directed to be paid into court was not at that time, and never had been, in the hands of the trustee, but was made up of moneys which the trustee should have but had not received as interest, the order is not within the class provided for by this section and the two following sections. Williams v. Dwinelle, 51 Cal. 442.

Sheriff's deposit not included. This section and § 573, post, provide for a case different from that of a sheriff depositing with the treasurer of a county, moneys received from a sale in foreclosure proceedings. Heppe v. Johnson, 73 Cal. 265; 14 Pac. 833.

Right to recover interest on fund in litigation or deposited in court. See note Ann. Cas. 1912B, 1004.

§ 573. Money paid to clerk must be deposited with county treasurer. Whenever money is paid into or deposited in court, the same must be delivered to the clerk in person, or to such of his deputies as shall be specially authorized by his appointment in writing to receive the same. He must, unless otherwise directed by law, deposit it with the county treasurer, to be held by him subject to the order of the court. The treasurer must keep each fund distinct, and open an account with each. Such appointment must be filed with the county treasurer, who must exhibit it, and give to each person applying for the same a certified copy of the same. It shall be in force until a revocation in writing is filed with the county treasurer, who must thereupon write "revoked," in ink, across the face of the appointment. For the safekeeping of the money deposited with him the treasurer is liable on his official bond.

Legislation § 573. 1. Enacted March 11, **1872** (based on Stats. 1863–64, p. 468), and then read: "If the money is deposited in court it must be paid to the clerk, who must deposit it with the county treasurer, by him to be held subject to the order of the court. For the safe-keeping of the money deposited with him the treasurer is liable on his official bond."

2. Amendment by Stats. **1901**, p. 142; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 711; the code commissioner saying, "The amendment consists in consolidating §§ 573 and 2104, there being two sections covering the same subject, where only one is needed, and omits the first sentence of the former section, so as to remove any possible conflict between them." When added by Code Amdts. 1873–74, p. 394, § 2104 had, (1) in the first line, the words "moneys are" instead of "money is," and (2) the word "shall" instead of "must," in all instances.

Effect of order of court. When the court has taken cognizance of a fund, and, by its judgment, determines the same to have been paid into court, and the money is then deposited by the clerk with the county treasurer, as a deposit of court, the same becomes a deposit in court; and, however erroneously the court may have acted in the premises, its order, being within its jurisdiction, is not absolutely void, and is impregnable to collateral attack. Agoure v. Peck, 17 Cal. App. 759; 121 Pac. 706.

County treasurer should cash certificate of deposit. Where a county treasurer receives, as a deposit in court, a certificate of deposit indorsed to him, it is his duty to reduce it to money; if he does not, and loss ensues, he is answerable on his bond. Agoure v. Peck, 17 Cal. App. 759; 121 Pac. 706.

CODE COMMISSIONERS' NOTE. Stats. 1863–64, p. 468.

§ 574. Manner of enforcing the order. Whenever, in the exercise of its authority, a court has ordered the deposit or delivery of money, or other thing, and the order is disobeyed, the court, beside punishing the disobedience, may make an order requiring the sheriff to take the money, or thing, and deposit or deliver it in conformity with the direction of the court.

Punishing the disobedience. Contempt. Post, § 1209.

Sheriff's duties as to official moneys. Pol. Code, § 4162.

Legislation § 574. Enacted March 11, 1872.

Scope of section. Proceedings under this section and §§ 714–721, post, were intended as a substitute for the creditors' bill as formerly used in chancery; so that any property reachable by a creditor's bill may now be reached by the process of proceedings supplementary to execution. Pacific Bank v. Robinson, 57 Cal. 520; 40 Am. Rep. 120; Herrlich v. Kaufmann, 99 Cal. 271; 37 Am. St. Rep. 50; 33 Pac. 857.

TITLE VIII.

TRIAL AND JUDGMENT IN CIVIL ACTIONS.

Chapter I. Judgment in General. §§ 577–583.
II. Judgment upon Failure to Answer. § 585.
III. Issues. Mode of Trial, and Postponements. §§ 588–596.
IV. Trial by Jury. §§ 600–628.
Article I. Formation of Jury. §§ 600–604.
II. Conduct of Trial. §§ 607–619.
III. The Verdict. §§ 624–628.
V. Trial by Court. §§ 631–636.
VI. References and Trials by Referees. §§ 638–645.
VII. Provisions Relating to Trials in General. §§ 646–663a.
Article I. Exceptions. §§ 646–653.
II. New Trials. §§ 656–663a.
VIII. Manner of Giving and Entering Judgment. §§ 664–680½.

CHAPTER I.

JUDGMENT IN GENERAL.

§ 577. Judgment defined.
§ 578. Judgment may be for or against one of the parties.
§ 579. Judgment may be against one party and action proceed as to others.
§ 580. The relief to be awarded to the plaintiff.
§ 581. Action may be dismissed, or nonsuit entered.
§ 581a. Dismissal of action for failure to issue summons, when.
§ 581b. Dismissal of actions after transfer.
§ 582. All other judgments are on the merits.
§ 583. Dismissal of actions.

§ 577. Judgment defined. A judgment is the final determination of the rights of the parties in an action or proceeding.

Judgment.
1. Confession, by. Post, § 1132.
2. Default, by. Post, § 585.
3. Demurrer, on. Post, § 636.
4. Estoppel as to. Post, § 1908.
5. Generally. Post, § 664.
6. Nonsuit. Post, § 581.
7. On trial by court. Post, § 633.
8. On trial by jury. Post, § 664.

Order, defined. Post, § 1003.
Judgment in special proceeding, defined. See post, § 1064.

Legislation § 577. 1. Enacted March 11, **1872**; based on Practice Act, § 144 (New York Code, § 245), which had, (1) the word "the" instead of "an," before "action," and (2) at end of section, the words, "and may be entered in term or vacation."
2. Amendment by Stats. **1901**, p. 143; unconstitutional. See note ante, § 5.

Scope of section. The court is not prohibited by this section, nor by § 1003, post, from entering such intermediate determinations as the exigencies of a case may demand, and there is no conflict between these sections and § 187, ante, relating to the means provided for exercising jurisdiction. Thompson v. White, 63 Cal. 505. This section must be read in connection with §§ 138, 139, of the Civil Code, in actions for divorce and for the control of minor children. McKay v. McKay, 125 Cal. 65; 57 Pac. 677. The purpose of this section is, not to abolish the power of a court of equity to pronounce what in equity practice was called an interlocutory decree or decretal order, but only to provide that that which finally determines the rights of the parties should be called a judgment, and that every other direction of a court or judge made or entered in writing should be denominated an order. This section, and § 1003, post, were taken from the New York Code of Procedure, the purpose of which sections, as explained by the codifiers of that state, was to avoid the confusion incident to the use of the word "judgment" in two senses, one as interlocutory and the other as final; it being better to use the word only in the latter sense, and to designate all other written directions of the court as orders. Thompson v. White, 63 Cal. 505.

Judgment, final judgment, and order, defined. A judgment constituting a "final determination of the rights of the parties," is a final judgment. Hentig v. Johnson, 8 Cal. App. 221; 96 Pac. 390. A judgment may be final, in the sense of the term as used in this section and §§ 936, 1908, post, and yet not final as used in § 939, post. People v. Bank of Mendocino County, 133 Cal. 107; 65 Pac. 124. A judgment without parties, or a judgment, however perfect in form, attended with none of the consequences of a judgment, can be a judgment only by pretension, and its ratification by the creditor cannot affect rights acquired by a third party prior to the ratification, and while the judgment was one only in name. Wilcox-

son v. Burton, 27 Cal. 228; 87 Am. Dec. 66. No particular form of judgment is prescribed in the statute; but it must be rendered by the court in such a mode as will conform to the cause of action stated and the proof adduced on the trial. McGarrahan v. Maxwell, 28 Cal. 78; Hentig v. Johnson, 8 Cal. App. 221; 96 Pac. 390. The decision of the court, if it finally determines the rights of parties touching the matters in controversy, is a judgment; and it is immaterial whether the court grants relief to each of the parties, or to one party only, or whether the relief is, in its character, legal or equitable, or both. McGarrahan v. Maxwell, 28 Cal. 75. An order is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying final judgment into execution; a final judgment is the determination of the court upon the issues presented by the pleadings, which ascertains and fixes absolutely and finally the rights of the parties in the particular suit in relation to the matter in litigation, and puts an end to the suit. Loring v. Illsley, 1 Cal. 24; McGuire v. Drew, 83 Cal. 225; 23 Pac. 312; Estate of Smith, 98 Cal. 636; 33 Pac. 744; Wells v. Torrance, 119 Cal. 437; 51 Pac. 626. An order, as distinguished from a final judgment, is the judgment or conclusion of the court, upon any motion or proceeding not declared, determining the rights of the parties. Estate of Rose, 80 Cal. 166; 22 Pac. 86. The judgment becomes final upon its entry, not only as to the matters actually determined, but also as to every other matter which the parties might have litigated in the cause and have had decided. McKay v. McKay, 125 Cal. 65; 57 Pac. 677. Every order of a court or judge is, in one sense, a judgment; and the term "final judgment" means the ultimate or last judgment, which puts an end to the suit or proceedings. Estate of Smith, 98 Cal. 636; 33 Pac. 744. The judgment, when entered, becomes the record of what the court has determined, and it is then as binding as if entered immediately upon its rendition. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074. The determination of a matter contained in an order is not a judgment. Scott v. Shields, 8 Cal. App. 12; 96 Pac. 385. Only one judgment is to be included in the judgment roll, and such judgment is the one defined in this section as constituting the final determination of the rights of the parties in the action. Colton Land etc. Co. v. Swartz, 99 Cal. 278; 33 Pac. 878. A judgment dissolving a partnership, and directing a sale of the partnership property and a division of the proceeds, is a final judgment. Clark v. Dunnam, 46 Cal. 204. A decree refusing to set aside a homestead is, in its essentials, a judgment; and a determination, upon the issue of widowhood, that a woman is not a widow, is a judgment. Estate of Harrington, 147 Cal. 124; 109 Am. St. Rep. 118; 81 Pac. 546. An order settling a receiver's account, although made before there has been a final judgment in the action in which he was appointed, is a final determination of the rights of the parties. Los Angeles v. Los Angeles City Water Co., 134 Cal. 121; 66 Pac. 198. A decree pro confesso on a cross-bill in a suit in equity in a Federal court is interlocutory, and not final; and, after such decree has been vacated, no suit can be maintained in the state court upon it, or to annul the order vacating it. Blythe Co. v. Bankers' Investment Co., 147 Cal. 82; 81 Pac. 281. The statute of limitations does not begin to run against an action upon the judgment from the date of its entry, but only after the lapse of the period within which an appeal might be taken from the judgment if none is taken therefrom, or after the final determination following an appeal so taken. Feeney v. Hinckley, 134 Cal. 467; 86 Am. St. Rep. 290; 66 Pac. 580. The general rule, that, until a judgment becomes final by affirmance on appeal, or by lapse of the time within which an appeal may be taken, it is not admissible in evidence and cannot be relied on as the foundation of rights declared in it, does not apply to an action in the nature of a creditor's bill. Sewell v. Price, 164 Cal. 265; 128 Pac. 407. An entry by the clerk, at the end of the trial, in the minutes of the court, of the decision of the judge, being but a ministerial act of the clerk, does not constitute a judgment; but where the decision was rendered by the judge, but was not entered, before he went out of office, the entry of the judgment by the clerk, after the term of the former judge had expired, being but a ministerial act, has as much effect as if made before. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074. An order settling the account of an administrator is not a final determination of the rights of the parties, constituting a judgment within the meaning of § 939, post, and especially where, in settling the account, portions thereof are left unsettled and undetermined. Estate of Rose, 80 Cal. 166; 22 Pac. 86. The judgment is not required to be signed by the judge, and a judgment produced from the original records needs no signature or exemplification; the signature is merely to give the clerk a surer means of accurately entering what has been adjudged. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26

Pac. 1074; Clink v. Thurston, 47 Cal. 21; Estate of Cook, 77 Cal. 220; 11 Am. St. Rep. 267; 1 L. R. A. 567; 17 Pac. 923; 19 Pac. 431.

Judgments against decedents. A judgment for mesne profits against the estate of a deceased person should be made payable in due course of administration. Nathan v. Dierssen, 164 Cal. 607; 130 Pac. 12.

Judgments of sister states. One judgment, being of as high a nature as another, a judgment in another state cannot extinguish or determine a judgment rendered here. Lilly-Brackett Co. v. Sonnemann, 163 Cal. 632; Ann. Cas. 1914A, 364; 42 L. R. A. (N. S.) 360; 126 Pac. 483.

Identity of names in judgment. Mere identity of name, in a judgment, does not establish the fact that the plaintiff and the defendant are the same person. Buckeye Refining Co. v. Kelly, 163 Cal. 8; Ann. Cas. 1913E, 840; 124 Pac. 536.

Validity of judgments. The validity of a judgment is governed by the laws of the state where it was rendered. Fox v. Mick, 20 Cal. App. 599; 129 Pac. 972. Every presumption is in favor of a judgment: it will be presumed that the plaintiff and the defendant, although bearing the same name, were different persons. Buckeye Refining Co. v. Kelly, 163 Cal. 8; Ann. Cas. 1913E, 840; 124 Pac. 536.

Jurisdiction. The jurisdiction of a court of a sister state may be controverted by extraneous evidence. Fox v. Mick, 20 Cal. App. 599; 129 Pac. 972. Where the procedure is regulated by statute, jurisdiction over the subject-matter of the action, as well as over the parties, terminates with the entry of final judgment therein, except for the purpose of enforcing the judgment and carrying out its provisions, or for correcting mistakes in the record, upon proper application therefor. McKay v. McKay, 125 Cal. 65; 57 Pac. 677.

Attack on judgments. A domestic judgment, regular upon its face, is not the subject of collateral attack. Layne v. Johnson, 19 Cal. App. 95; 134 Pac. 860. The judgment of a court of a sister state may always be impeached by showing that the court rendering it had no jurisdiction over the parties or the subject-matter of the action. Fox v. Mick, 20 Cal. App. 599; 129 Pac. 972. On a motion by the judgment debtor to have the satisfaction of a judgment entered of record, an assignee of the judgment cannot, for mere error in the exercise of jurisdiction, attack the validity of the judgment on which execution issued against his assignor. Buckeye Refining Co. v. Kelly, 163 Cal. 8; Ann. Cas. 1913E, 840; 124 Pac. 536.

Constructive service, fraud, due diligence. A judgment rendered upon a constructive service of summons should be set aside, where the evidence shows that the plaintiff did not use due diligence to find the defendant, and that his affidavit for service by publication was false, as on a direct attack upon the ground of fraud by the plaintiff in obtaining it, the question of due diligence, as between the parties, is open. Neither an order for publication of summons, based upon affidavit, nor a judgment following a service by publication thereon, is conclusive of the fact that due diligence was used to find the defendant. It is a fraud to present a false affidavit to obtain an order for the service of summons by publication, and a judgment based upon an order so obtained will be set aside, in an action by the defendant constructively served, against the plaintiff, where no rights of innocent third parties claiming under the judgment, are involved. Stern v. Judson, 163 Cal. 726; 127 Pac. 38.

Findings and conclusions of law. Whenever findings are required, there can be no rendition of the judgment until they are made and filed with the clerk. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074. On a collateral attack, an inconsistency between the findings and the judgment does not impair the judgment: the question whether the findings support the judgment cannot be raised in a collateral action. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074; Johnston v. San Francisco Savings Union, 75 Cal. 134; 7 Am. St. Rep. 129; 16 Pac. 753. Whenever findings are waived or are not required, the entry of the court's decision in the minutes of the court constitutes "rendition of the judgment," in the same manner as under the Practice Act. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074. A judgment for mesne profits may be rendered, without a judgment for restitution, or without findings establishing the plaintiff's right to restitution. Nathan v. Dierssen, 164 Cal. 607; 130 Pac. 12. The court may, at any time before entry of judgment, change its conclusions of law upon facts found; and such change may be made by a judge other than the one who tried the case. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074.

Res adjudicata. Where an issue of fact, vital to the controversy, has been tried, and a judgment depending for its sufficiency upon the finding of fact becomes final, that determination of fact is forever binding, in every court, between the parties thereto and their privies. Estate of Harrington, 147 Cal. 124; 109 Am. St. Rep. 118; 81 Pac. 546; Quirk v. Rooney, 130 Cal. 505; 62 Pac. 825; Bingham v. Kearney, 136 Cal. 175; 68 Pac. 597. The test of the plea of res adjudicata is the subject-matter of the action, and not the remedy by which the party may seek judicially to

assert the right of action. Suisun Lumber Co. v. Fairfield School District, 19 Cal. App. 587; 127 Pac. 349. It is not necessary that all of the parties plaintiff and defendant to a former action should be joined in a later action, to render a plea of res adjudicata available as an estoppel. Where an action was against a number of defendants, and its merits were adjudicated as to all, and the same plaintiff sues one, only, of such defendants upon the same cause of action, the later action is between "the same parties" as those of the former, upon the question of res adjudicata as between them. The plea of res adjudicata applies to every point that properly belongs to the subject of the litigation, and which the parties, exerting reasonable diligence, might have put forward at the time. Suisun Lumber Co. v. Fairfield School District, 19 Cal. App. 587; 127 Pac. 349. A judgment, based upon the confession of an insolvent debtor, made without the request and without the knowledge of the creditor, and entered up at the instance of the debtor alone, is not a judgment, as the creditor is not bound to accept it as the measure of his rights, nor would such confession bar an action brought by him on the same gravamen, nor estop the party by whom the confession was made from denying the facts set forth in it. Wilcoxson v. Burton, 27 Cal. 228; 87 Am. Dec. 66. A judgment that property involved in the action is community property, estops the wife from subsequently asserting that it is not such; it also estops a third party plaintiff from claiming, as between himself and the wife, that he acquired the legal title by deed. Nolan v. Hyatt, 163 Cal. 1; 124 Pac. 439. Where the plaintiff, in an action to recover pledged shares of corporate stock, obtains judgment for a return of the property, such judgment is a bar to a subsequent action to recover damages for wrongfully withholding its possession, or for the repayment of attorneys' fees incurred in the prior action. Van Horne v. Treadwell, 164 Cal. 620; 130 Pac. 5. A judgment of a court in probate, in homestead proceedings, raises an estoppel against a party seeking to have the homestead right set aside, where the right is denied upon the ground that such person was not the widow of the deceased, and the question of widowhood cannot be afterwards raised in an attempted litigation of the same claim upon distribution. Estate of Harrington, 147 Cal. 124; 109 Am. St. Rep. 118; 81 Pac. 546. The question of the validity of an executor's sale under the provisions of a will, made without notice, is concluded by the decree of distribution, where the court had jurisdiction: it cannot, more than thirty years afterwards, be again litigated in a collateral proceeding by the heir. Bagley v. San Francisco, 19 Cal. App. 255; 125 Pac. 931. Where a city alone is answerable for a demand against it, a former application for a writ of mandate against the city treasurer is no bar to an action for a money judgment against the city. Madary v. Fresno, 20 Cal. App. 91; 128 Pac. 340.

Merger of judgments. Merger takes place only where a security or an indebtedness of an inferior passes into one of a superior degree. Lilly-Brackett Co. v. Sonnemann, 163 Cal. 632; Ann. Cas. 1914A, 364; 42 L. R. A. (N. S.) 360; 126 Pac. 483. A judgment obtained in one state does not become merged in a judgment based upon it, which is rendered in favor of the judgment creditor in another state: so long as the indebtedness evidenced thereby is unsatisfied, successive suits in different states may be prosecuted. Lilly-Brackett Co. v. Sonnemann, 163 Cal. 632; Ann. Cas. 1914A, 364; 42 L. R. A. (N. S.) 360; 126 Pac. 483.

Changes in judgments. Changes in judgments are limited to the cases and conditions expressed in the statute by which they are authorized. McKay v. McKay, 125 Cal. 65; 57 Pac. 677.

Restoration of burnt records. A proceeding may be maintained for the restoration of a judgment roll destroyed by fire, although, at the time of such destruction, a motion for a new trial and the settlement of a bill of exceptions to be used thereon were then pending, and it is impossible to restore the contents of the bill of exceptions; and in such proceeding the effect of the restored record is not involved. Foerst v. Kelso, 163 Cal. 436; 125 Pac. 1054.

Action on judgment. No action lies upon a judgment until it is final. Feeney v. Hinckley, 134 Cal. 467; 86 Am. St. Rep. 290; 66 Pac. 580; Hills v. Sherwood, 33 Cal. 474; Gillmore v. American etc. Ins. Co., 65 Cal. 63; 2 Pac. 882.

Burden of proof. The burden is on the assignee of a part of a judgment to affirmatively show that the judgment debtor had notice of the assignment before paying the judgment. Buckeye Refining Co. v. Kelly, 163 Cal. 8; Ann. Cas. 1913E, 840; 124 Pac. 536.

Appeal. Where the relative rights of the parties are determined on appeal, the decision is, as to that subject and to that extent, the law of the case. Haggin v. Clark, 71 Cal. 444; 9 Pac. 736; 12 Pac. 478; Davidson v. Dallas, 15 Cal. 75; Leese v. Clark, 20 Cal. 387; Pico v. Cuyas, 48 Cal. 639. Where, on the rendition of a final judgment, the court also grants a perpetual injunction, there is but one judgment, and the decree is necessarily included in the appeal taken therefrom. McGarrahan v. Maxwell, 28 Cal. 75.

What deemed adjudged in judgment. See note post, § 1911.

Judgment as a contract. See note 2 Am. St. Rep. 414.

CODE COMMISSIONERS' NOTE. The original section contained the words, "and may be entered in term or vacation." They were omitted, first, because they are not part of the definition; second, because the same provision is contained in the other parts of this code. See, as to supreme court, § 48; district courts, § 78; county courts, § 89; justices' courts, § 118.

1. **Judgment, defined.** Every definite sentence or decision of a court, by which the merits of the cause are determined, is a judgment. Belt v. Davis, 1 Cal. 138; Loring v. Illsley, 1 Cal. 24. A judgment dismissing an action is, in effect, a final judgment in favor of the defendant. Dowling v. Polack, 18 Cal. 625. An order of the county court dismissing an appeal is a judgment, within the meaning of this section. Pearson v. Lovejoy, 35 How. 193; 53 Barb. 407. A judgment may be a final adjudication in different senses. It may be final as to the court which renders it, without being final as to the subject-matter. Although a judgment may be final with reference to the court which pronounced it, and as such be the subject of an appeal, yet it is not necessarily final with reference to the property or rights affected, so long as it is subject to appeal and liable to be reversed. Hills v. Sherwood, 33 Cal. 478; United States v. Schooner Peggy, 1 Cranch, 103; 2 L. Ed. 49.

2. **Order, defined.** See § 1003 of this code. Order, as distinguished from a final judgment, is the judgment or conclusion of the court upon any motion or proceeding. Gilman v. Contra Costa County, 8 Cal. 57; 68 Am. Dec. 290; Effect of. McKinley v. Tuttle, 34 Cal. 235.

3. **At what time judgment should be entered.** If there is no question as to the proper judgment to be entered, the entry should be made at once, without waiting for a motion for a new trial. A stay of proceedings under the judgment protects the losing party in case the judgment should be set aside, or a new trial be granted. Hutchinson v. Bours, 13 Cal. 51.

4. **Entry in vacation.** In an action tried without a jury, judgment upon the findings may be entered in vacation. People v. Jones, 20 Cal. 50. If the judgment is pronounced by the court, drawn up in the form intended to be entered, signed by the judge, and filed with the clerk before adjournment of the term, it becomes the judgment of the court of the term at which it was pronounced, and it may, by the clerk, be entered in the judgment-book during vacation. Casement v. Ringgold, 28 Cal. 335. Where a judgment is reversed on appeal, with directions that a certain judgment be entered by the district court, such judgment can be entered by the clerk of the district court in vacation. People v. Jones, 20 Cal. 50.

5. **Judgment against executors and administrators.** In an action against an executor or administrator upon a rejected claim, the judgment should ascertain the amount due, and adjudge the same to be a valid claim against the estate, and provide that it be paid by the defendant in the due course of administration. No execution can be awarded. Rice v. Inskeep, 34 Cal. 224; Racouillat v. Sansevain, 32 Cal. 376.

6. **Judgment against married woman.** A judgment may be rendered against a married woman for costs, in an action brought by her concerning her separate property; and when so rendered, an execution in the usual form may be issued on the same, and her separate property sold by the sheriff. Leonard v. Townsend, 26 Cal. 442.

7. **Judgment against husband and wife.** In an action against husband and wife for services rendered by plaintiff to the wife, before marriage, judgment may be rendered against both defendants, with directions that it be enforced only against the separate property of the wife and the common property of both. Van Maren v. Johnson, 15 Cal. 308.

8. **Judgment against infants.** It is a question whether, under our practice, an infant is entitled to have a day given in the judgment to show a cause against it. An infant is as much bound by a decree in equity as a person of full age, and will not be permitted to dispute it, except upon the same ground as an adult might have disputed it. If fraudulent, or obtained by collusion, it must be attached in a direct proceeding. Joyce v. McAvoy, 31 Cal. 273; 89 Am. Dec. 172.

9. **Presumptions in favor of judgments.** Jurisdiction will be presumed in the case of a judgment of a court of general jurisdiction; but if the want of jurisdiction appears on the face of the record of the judgment, the judgment is void, and it may be attacked in a collateral proceeding. Forbes v. Hyde, 31 Cal. 342; Thompson v. Monrow, 2 Cal. 100; 56 Am. Dec. 318; Kilburn v. Ritchie, 2 Cal. 148; 56 Am. Dec. 326; White v. Abernathy, 3 Cal. 426; Johnson v. Sepulbeda, 5 Cal. 151; Grewell v. Henderson, 7 Cal. 290; Nelson v. Lemmon, 10 Cal. 50; Gray v. Hawes, 8 Cal. 566; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. In favor of a judgment rendered by a court of general jurisdiction, it will be presumed, unless the contrary affirmatively appears, that a party to it was made a party to the action in some manner provided by law. Sharp v. Daugney, 33 Cal. 505.

10. **Identity.** A judgment was obtained against John P. Manrow, in New York, and an action was brought upon a judgment against John P. Manrow, in San Francisco. The identity of the person was presumed. Thompson v. Manrow, 1 Cal. 428; see also People v. Thompson, 28 Cal. 218.

11. **Effect of judgment.** If the court has jurisdiction of the subject-matter and parties, its judgment, whether legal or illegal, proper or improper, is valid and binding, until reversed or set aside. Reynolds v. Harris, 14 Cal. 678; 76 Am. Dec. 459; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Kohlman v. Wright, 6 Cal. 231. A judgment in favor of plaintiff against one of several defendants, in an action to set aside a deed as a cloud upon the title, is an adjudication that the title is in the plaintiff. Marshall v. Shafter, 32 Cal. 176. A judgment upon demurrer is only a bar to a subsequent action, when it determines the merits of the case. Robinson v. Howard, 5 Cal. 428. The judgment of a court of competent jurisdiction, directly upon the point, is, as a plea, and as evidence, conclusive between the same parties, upon the same matter directly, in another court (Love v. Waltz, 7 Cal. 250); but, as a plea, it is no bar, where the complaint in the former suit is so defective that a judgment rendered thereon would be a nullity. Reynolds v. Harris, 9 Cal. 338. Where there is a misdescription of a note, and a want of specification of the name of the owner, or of any allegation that his name is unknown, in the schedule of an insolvent, the proceedings in insolvency are no bar to a suit on the note, even if the insolvent did not know that the plaintiff was the real creditor. Judson v. Atwill, 9 Cal. 477. The former judgment must not only be upon the same cause of action, but between the same parties. Uhlfelder v. Levy, 9 Cal. 607; Chase v. Swain, 9 Cal. 136. Plaintiff brought an action of replevin against the defendants to recover certain property, and obtained a judgment for its restitution and damages. Defendants paid the damages, but did not restore the property. Plaintiff then brought an action of trover to recover the value. Defendants pleaded the former recovery as a bar. It was held, that the judgment in replevin did not constitute a bar to the action of trover, it not having been satisfied. Nickerson v. California Stage Co., 10 Cal. 520. An action brought by an agent, in his own name, for a trespass, in taking coin from the agent, in which action the jury found that the coin belonged to the principal, and gave only nominal damages, is not a bar to an action by the principal for such coin. Pico v. Webster, 12 Cal. 140. A discharge in insolvency of a debt, is a discharge of a judgment on that debt, and the costs, rendered between the time of filing the petition and schedule and the time of discharge. Imlay v. Carpentier, 14 Cal. 175. A judgment in an action to quiet title is a bar to subsequent litigation on the same subject-matter. Reed v. Calderwood, 32 Cal. 109. If two Mexican grants of land, made to different persons, are confirmed and surveyed so as to overlap each other in part, and the owner of one becomes a party to the proceedings relating to the confirmation and survey

of the other, he is estopped from denying that this grant was properly located. Semple v. Wright, 32 Cal. 659. A judgment in an action to recover the possession of real property is, as to all matters put in issue and passed on in the action, conclusive between the parties and their privies, and a bar in another action between the parties or their privies. Caperton v. Schmidt, 26 Cal. 490; 85 Am. Dec. 187. But the bar is limited to the rights of the parties as they existed at the time when the judgment was rendered, and neither the parties nor their privies are precluded from showing, in a subsequent action, that their rights have been waived or extinguished at a period after the rendition of the judgment. Id. A judgment in favor of the plaintiff, in an action of ejectment, does not estop the defendant from maintaining an action for the specific performance of a contract, made by the plaintiff before the commencement of the action of ejectment, to convey the same land to the defendant, if the contract was not set up in the answer as an equitable defense, and passed upon by the court. Hough v. Waters, 30 Cal. 309. In an equity case when all the proofs are in, and the case fully before the lower and the appellate court, the judgment of the latter, if it passes upon the merits of the controversy so presented, is conclusive. Soule v. Dawes, 14 Cal. 249. If an action is brought to recover possession of a lot of personal property, wrongfully taken and detained, and if the wrongful taking was one continuous act, a judgment, in that action, will be a bar to a subsequent suit for the remainder of the property. Herriter v. Porter, 23 Cal. 385. In an action at law, the defendants, in their answer, set up a set-off to plaintiff's demand, and, on the trial of the action, the record showed that the court excluded all evidence of the demand sought to be set off, and gave judgment for plaintiff. Held, that the judgment in the action at law cannot be pleaded as an estoppel in an action afterwards brought by the defendants in a court of equity to enforce the set-off. Hobbs v. Duff, 23 Cal. 596. A judgment binds only parties and privies. Beckett v. Selover, 7 Cal. 228; 68 Am. Dec. 237. Except in some cases for specific purposes. Davidson v. Dallas, 8 Cal. 227. A purchaser of land, subsequently to a suit brought against his vendor to quiet title, and to notice of lis pendens filed in the county recorder's office, is a mere volunteer, and is bound by the judgment. Gregory v. Haynes, 13 Cal. 594. One in the possession of land, who is neither a party nor a privy to a judgment for the recovery of possession, is not bound by the judgment, nor can he be dispossessed by virtue of a writ issued upon it, nor is it evidence against him. Le Roy v. Rogers, 30 Cal. 229; 89 Am. Dec. 88.

12. **Recitals in a judgment.** The recitals in a several judgment, against one of a number of defendants, that in a former judgment in the same action, the name of this defendant was stricken out on plaintiff's motion, may be contradicted by the recitals in the former judgment. Leese v. Clarke, 28 Cal. 33. The recital, that summons was served, is conclusive of the fact in a collateral proceeding. Sharp v. Lumley, 34 Cal. 611. And, generally, as to the effects of recitals in judgments, see Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; and Sharp v. Daugney, 33 Cal. 505.

13. **Void judgments.** If it affirmatively appears, upon the face of the record, that a personal judgment of court of general jurisdiction was rendered without the court having acquired jurisdiction over the person of defendant, the judgment is void. Whitwell v. Barbier, 7 Cal. 54; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Barrett v. Carney, 33 Cal. 530; Alderson v. Bell, 9 Cal. 315; McMinn v. Whelan, 27 Cal. 309. Where a summons was served by a deputy sheriff, and returned with the following signature to the return, "Elijah T. Cole, D. S.," and judgment was rendered by default, it was held, that the judgment was null and void, for want of jurisdiction. Rowley v. Howard, 23 Cal. 401; see Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. A judgment by default, entered by the clerk, where there has been no service of summons or appearance, is utterly void. Glidden v. Packard, 28 Cal. 649. When the clerk has authority to enter judgment out of court by default, but in the exercise of his authority makes a mistake as to the amount, the judgment is only erroneous; but where he enters a kind of judgment which he has no authority to enter without the direction of the court, the judgment is void. Bond v. Pacheco, 30 Cal. 530; see also Stearns v. Aguirre, 7 Cal. 448, and Lewis v. Clarkin, 18 Cal. 399. If a judgment is void for want of jurisdiction, it is not cured by the appearance of the defendant for the purpose of moving to set it aside. Gray v. Hawes, 8 Cal. 568. If the defendant was served with process, though he was sued by a wrong name, the judgment is not void. Welsh v. Kirkpatrick, 30 Cal. 202; 89 Am. Dec. 85. A judgment against an infant, which does not give the infant a day after arriving at age to show cause against it, is not, for that reason, void. Joyce v. McAvoy, 31 Cal. 273; 89 Am. Dec. 172.

14. **Collateral attacks on jurisdiction.** A judgment, void upon its face, may be attacked, anywhere, directly or collaterally, either by parties or strangers. Forbes v. Hyde, 31 Cal. 342; Whitwell v. Barbier, 7 Cal. 54; McMinn v. Whelan, 27 Cal. 309; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. But if it is only erroneous, it can only be attacked by direct proceedings against the judgment. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742, and cases cited supra. A judgment by default, if summons has been served on defendant, cannot be attacked collaterally for an irregularity of service, nor for a defective return. The defendant must assert his rights by appeal from the judgment. Dorente v. Sullivan, 7 Cal. 279. Where several persons, members of a joint-stock company, were sued as such, and the action was discontinued as to B., one of the defendants, and judgment was taken against all the others, upon which execution was substantially issued, and the property of one M., who was not a party to the suit, taken to satisfy the same, it was held, that M. could not, by suit in equity against the plaintiff in the judgment, set it aside upon the ground that the discontinuance of the suit as to B. was a discontinuance as to all of the defendants, and that the judgment could not be attacked in this collateral manner. Markley v. Rand, 12 Cal. 275. The recital in a decree, "that defendants had been served with process, or had waived service," is sufficient evidence that the requisite proof was produced. In the absence of all evidence on this point, the presumption would be in favor of the jurisdiction of the court, and of the regularity of its proceedings; and, for the want of such evidence, the decree cannot be impeached in a collateral action. Nor can a decree be impeached collaterally because entered prematurely. The remedy is by a direct proceeding in the action. Alderson v. Bell, 9 Cal. 315; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. Where a judgment was rendered by confession in open court, upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, such errors cannot, at the instance of one, not a party to the judgment, be invoked to set aside or show the judgment a nullity. Cloud v. El Dorado County, 12 Cal. 128; 73 Am. Dec. 526. A decree of the probate court, ordering a claim to be paid, rendered on petition of the administrator, is final and conclusive, and cannot be attacked collaterally nor directly, on the ground that the evidence on which it was rendered was insufficient. Estate of Cook, 14 Cal. 130; State v. McGlynn, 20 Cal. 233; 81 Am. Dec. 118. In an action in the district court, on a bond given in the court of sessions, the court of sessions having declared the bond forfeited for non-appearance, the sureties cannot defend on the ground that the judgment of forfeiture was erroneous. They cannot thus attack the judgment. People v. Wolf, 16 Cal. 385. Boards of supervisors are special tribunals, with mixed powers, administrative, judicial, and legislative, and jurisdiction over roads, ferries, and bridges. Its judgments and orders can only be attacked collaterally, when there is a want of jurisdiction. Waugh v. Chauncey, 13 Cal. 12.

15. **Effect of an alteration.** The alteration of a judgment without notice, so as to include a party not served with process, if not void, is voidable, at the election of the party. Chester v. Miller, 13 Cal. 561. Where the court makes an order requiring plaintiff to appear at a certain time and show cause why a judgment in his favor should not be set aside, and it does not appear that any notice was given of the time at which the matter was to be heard, it is error for the court to set aside the judgment, and its order to that effect will be reversed on appeal. Vallejo v. Green, 16 Cal. 161. Equity has jurisdiction to vacate a judgment fraudulently altered to include a defendant not served with process, and not originally included in the judgment. Chester v. Miller, 13 Cal. 561.

16. **Effect of appeal.** Where an appeal from a judgment is taken to the supreme court, the court below loses control over the judgment, and an order amending it is erroneous. Bryan v. Berry, 8 Cal. 135.

§ 578. Judgment may be for or against one of the parties. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

Striking out party. Ante, § 473.
Fresh parties, bringing in. Ante, § 389.
Service on one defendant out of several, effect of. Ante, § 414.
Joint debtors, proceedings against. Post, §§ 989 et seq.
Joining persons severally liable on same instrument. Ante, § 383.
Association, action against persons under name of. Ante, § 388.

Legislation § 578. Enacted March 11, 1872; re-enactment of Practice Act, § 145 (New York Code, § 274).

Scope of section. This section has modified the common-law rule, that, in a suit against several joint debtors, the plaintiff must recover against all or none, so far as to permit judgment against some of the defendants, wherever the contract purports to be the contract of all the parties sued, and it turns out in proof that only some are liable. Lewis v. Clarkin, 18 Cal. 399; Morgan v. Righette, 5 Cal. Unrep. 397; 45 Pac. 260; People v. Frisbie, 18 Cal. 402; Shain v. Forbes, 82 Cal. 577; 23 Pac. 198; Bailey Loan Co. v. Hall, 110 Cal. 490; 42 Pac. 962; Dobbs v. Purington, 136 Cal. 70; 68 Pac. 323; Zibbell v. Southern Pacific Co., 160 Cal. 237; 116 Pac. 513; Clark v. Torchiana, 19 Cal. App. 786; 127 Pac. 831.

Judgments where there are several plaintiffs. Judgment may properly be given in favor of one plaintiff only, who is entitled to it. Roberts v. Hall, 147 Cal. 434; 82 Pac. 66. Where a party, without interest in the controversy, is improperly joined as a party plaintiff, he should be dismissed from the action, and a judgment should then be rendered in favor of the remaining plaintiffs, upon findings in their favor. Gillespie v. Gouly, 152 Cal. 643; 93 Pac. 856. Two persons, each claiming a portion of premises sought to be released from a mortgage, and each conceding the validity of the other's claim, may join as parties plaintiff in an action to redeem the whole mortgaged property, and the ultimate rights of the plaintiffs, as between themselves, may be determined by the judgment. Wadleigh v. Phelps, 149 Cal. 627; 87 Pac. 93.

Judgments where defendants are joined. A several judgment may be rendered against one member of a partnership. Shain v. Forbes, 82 Cal. 577; 23 Pac. 198. Where two persons are sued jointly upon a joint contract, a judgment may now be rendered in favor of the plaintiff and against one of the defendants, or in favor of one of the defendants and against the plaintiff. Dobbs v. Purington, 136 Cal. 70; 68 Pac. 323; Rowe v. Chandler, 1 Cal. 167; Lewis v. Clarkin, 18 Cal. 399; People v. Frisbie, 18 Cal. 402; Shain v. Forbes, 82 Cal. 577; 23 Pac. 198; Bailey Loan Co. v. Hall, 110 Cal. 490; 42 Pac. 962; Redwood City Salt Co. v. Whitney, 153 Cal. 421; 95 Pac. 885. Where an action is brought upon notes, several and joint, and the prayer of the complaint is for judgment "against said defendants" for the amount of the notes, it is not necessary that the judgment shall run against the defendants as copartners, although they admitted that a copartnership existed. Bailey Loan Co. v. Hall, 110 Cal. 490; 42 Pac. 962; Redwood City Salt Co. v. Whitney, 153 Cal. 421; 95 Pac. 885. Damages cannot be severed, where the action was for a wrong in which both of the defendants joined. McCool v. Mahoney, 54 Cal. 491. Where an action was brought against a husband and wife, and a verdict was rendered in favor of the wife against the plaintiff, without mentioning the husband, who had consented that judgment be entered against him, a judgment entered against the husband in favor of the plaintiff is proper. Etter v. Hughes, 5 Cal. Unrep. 148; 41 Pac. 790. A plaintiff may join all tort-feasors as defendants, in an action for negligence, but his right to recover from one so joined is not, in any degree, dependent upon his success as against the others. Fowden v. Pacific Coast S. S. Co., 149 Cal. 151; 86 Pac. 178. In an action for personal injuries, judgment may be given against one defendant and in favor of another defendant. Cole v. Roebling Construction Co., 156 Cal. 443; 105 Pac. 255. A judgment between co-defendants, in the absence of any issues upon which evidence may be received or findings made for the support of the judg-

ment, is unauthorized. Bermingham v. Wilcox, 120 Cal. 467; 52 Pac. 822.

Effect of appeal by one defendant. Where judgment is rendered against two defendants, a defendant not appealing is not affected by the reversal of the judgment, on appeal by his co-defendant. Nichols v. Dunphy, 58 Cal. 605. Two defendants, who answer, and against whom a verdict is rendered, cannot complain that no judgment by default was entered against a third defendant who did not answer. Golden Gate etc. Mining Co. v. Joshua Hendy Machine Works, 82 Cal. 184; 23 Pac. 45. Where a verdict and judgment was jointly entered against two defendants, a new trial granted as to one of them does not vacate the judgment as to both. Fowden v. Pacific Coast S. S. Co., 149 Cal. 151; 86 Pac. 178; and see Rankin v. Central Pacific R. R. Co., 73 Cal. 93; 15 Pac. 57; Chetwood v. California Nat. Bank, 113 Cal. 414; 45 Pac. 704; Dawson v. Schloss, 93 Cal. 194; 29 Pac. 31; Grundel v. Union Iron Works, 127 Cal. 438; 70 Am. St. Rep. 75; 47 L. R. A. 467; 59 Pac. 826. The rule declared by this section is not limited to actions in which the defendants have appeared and answered, but includes those in which some of the defendants have made default; the only limitation is, that, in case of default, the relief shall not exceed that demanded by the plaintiff. Bailey Loan Co. v. Hall, 110 Cal. 490; 42 Pac. 962. This section does not apply, where it would authorize the rendition of a judgment for a party in whose favor no cause of action is stated in the complaint, and against a party who has had no notice of any such cause of action, or any opportunity to meet it (Weinreich v. Johnston, 78 Cal. 254; 20 Pac. 556; and see Cotes v. Campbell, 3 Cal. 191; Curry v. Roundtree, 51 Cal. 184; McCord v. Seale, 56 Cal. 262); nor in the case of a suit against a wife, where the husband is joined as a necessary party under the express provisions of the statute, and where he has no other interest in the subject-matter of the litigation; therefore it is error to enter judgment against the wife before the husband is served with summons. McDonald v. Porsh, 136 Cal. 301; 68 Pac. 817.

Who may be joined as defendants. See note ante, § 379.

How judgment may be. See note post, § 579.

Rights of strangers. If judgment is asked for a certain amount, with a request that, out of such amount, a bank be paid, and the very judgment asked is given, the bank has a beneficial interest in the judgment, though the verdict was nominally in favor only of the plaintiff. Johnson v. Phenix Ins. Co., 152 Cal. 196; 92 Pac. 182.

Effect of judgment against one co-trespasser as a bar to actions against the others. See note 54 Am. Dec. 204.

Single or separate judgments on consolidation of causes. See note 3 Ann. Cas. 534.

CODE COMMISSIONERS' NOTE. See § 414 of this code. If there are several defendants, having no community of interest or property, a joint judgment for affirmative relief in their favor is erroneous. Page v. Fowler, 39 Cal. 412; 2 Am. Rep. 462. In Stearns v. Aguirre, 6 Cal. 182, it was held that, in an action brought jointly against two defendants, on a joint and several obligation, the entry of final judgment on default against one of the defendants discharged the other. In cases of joint and several contracts, the plaintiff may elect whether he will sue the defendants severally or jointly; but plaintiff having elected to treat his demand as joint for the purpose of the action, he must be governed by the same rules which would have applied if his contract originally had been joint, and not joint and several; and it is clearly error to enter several judgments against the defendants. But see Lewis v. Clarkin, 18 Cal. 399. Where two persons are sued upon a joint contract, judgment may be had in favor of the plaintiff against one of the defendants, and in favor of one of the defendants against the plaintiff. Rowe v. Chandler, 1 Cal. 167. Where two or more defendants are not liable jointly, a joint judgment against both cannot be sustained; so held in an action by a lessor against two subtenants of the lessee, when it appeared that the subtenants did not occupy any portion of the premises jointly. Pierce v. Minturn, 1 Cal. 470. A judgment in an action against the sureties on an official bond, for a defalcation of the principal, should first determine the amount of the defalcation, and then proceed with a separate judgment against each of the sureties for the full amount for which he made himself liable in the bond, and costs, and with a provision that each judgment shall be satisfied by the collection or payment of the amount of the defalcation and costs. People v. Rooney, 29 Cal. 642; People v. Edwards, 9 Cal. 286. Where an action is brought by one of several persons claiming title from a common source, in his own behalf and in behalf of all others interested in the same manner as himself, on the ground of fraud, to set aside a deed executed to others by the same grantor, under whom plaintiff claims, the parties named in the complaint, for whose benefit the action is brought, are entitled to the benefit of the judgment declaring the deed fraudulent. Hurlbutt v. Butenop, 27 Cal. 54. Where a decision is made in an equitable action on any particular subject-matter, the rights of all persons whose interests are immediately connected with that decision, and affected by it, should be provided for. McPherson v. Parker, 30 Cal. 455; 89 Am. Dec. 129. Where three persons are sued on a promissory note, given by one of the parties in the name of all, as partners, and the evidence fails to show the partnership, or the authority of the party making the note, and one of the parties is nonsuited, a judgment taken against the other two was held valid. Stoddart v. Van Dyke, 12 Cal. 438. In a suit on an account, against "Randall & Inos," partners, the former only being served with process, a joint judgment was rendered against both. Held, void as against the party not served. Inos v. Winspear, 18 Cal. 397. Plaintiff sells goods to C. on his individual account. Subsequently, C. directs plaintiff to charge the goods to the joint account of C. and J., which is done. Plaintiff sues C. and J. jointly. Proven, that C. had no authority to bind J. Held, that, although J. is not liable, judgment may be rendered against C.; that our statute has modified the common-law rule, that, in a suit against several joint debtors, plaintiff must recover against all or none, so far, at least, as to permit judgment against a portion of the defendants, wherever the contract purports on its face to be the contract of all the parties sued, and it turns out in proof that a portion only are liable. Lewis v. Clarkin, 18 Cal. 399. In a suit against two,

on a joint assessment for taxes, judgment may be rendered against one of the defendants, if the other is not liable. People v. Frisbie, 18 Cal. 402. A judgment against one or more joint guarantors of a note bars the action against the others. The entire cause of action is merged in the judgment. Brady v. Reynolds, 13 Cal. 31.

§ 579. Judgment may be against one party and action proceed as to others. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

Striking out party. Ante, § 473.
Fresh parties, bringing in. Ante, § 389.
Service on one defendant out of several, effect of. Ante, § 414.
Joint debtors, proceedings against. Post, §§ 989 et seq.
Joining persons severally liable on same instrument. Ante, § 383.

Legislation § 579. Enacted March 11, 1872; re-enactment of Practice Act, § 146 (New York Code, § 274).

Judgment against one of several defendants. In an action against more than one defendant, the court may render judgment against only one, when a several judgment is proper. Madary v. Fresno, 20 Cal. App. 91; 128 Pac. 340. The court is authorized to render judgment against one defendant, without determining the liability of the others. Kelley v. Plover, 103 Cal. 35; 36 Pac. 1020. The court or jury may find against one or more of several defendants, but there must be a finding or verdict for or against each defendant. McMahon v. Hetch-Hetchy etc. Ry. Co., 2 Cal. App. 400; 84 Pac. 350. In an action to determine title, the court may order a continuance as to one defendant, direct the trial to proceed as to the other defendants, on the issues involved, and render a several judgment thereon. Bell v. Staacke, 159 Cal. 193; 115 Pac. 221. In an action on a joint and several contract, the court may proceed with the trial against a single defendant, who has voluntarily appeared, and render judgment against him. Bell v. Adams, 150 Cal. 772; 90 Pac. 118. In an action for personal injuries, against two defendants, jointly charged with negligence, a several judgment by default may be rendered against one defendant and the action proceed against the other. Cole v. Roebling Construction Co., 156 Cal. 443; 105 Pac. 255. Where a defendant fails to appear or answer, a finding that he was duly served is sufficient to show jurisdiction and to sustain the judgment. Lick v. Stockdale, 18 Cal. 219. A several judgment may be rendered against one of two defendants sued upon a joint contract, who was duly served, even though the other was not served (Kelly v. Bandini, 50 Cal. 530); and several judgments may be entered, and at different times, against several defendants occupying different portions of property sued for in ejectment. Lick v. Stockdale, 18 Cal. 219.

Joint judgment, where only one defendant served. A joint judgment against several defendants, as copartners, cannot be rendered, where only one was served. Estell v. Chenery, 3 Cal. 467.

Verdict and judgment vacated as to one defendant. A verdict against several persons sued jointly, found erroneous as to one of them, may be vacated as to that one, and continue in force and effect as to the remaining defendants. Clark v. Torchiana, 19 Cal. App. 786; 127 Pac. 831.

Validity of judgment. A judgment does not depend upon the clerk performing his duty in making up the judgment roll or in preserving the papers. Lick v. Stockdale, 18 Cal. 219.

Who may be joined as defendants. See note ante, § 379.

CODE COMMISSIONERS' NOTE. Where some of the defendants, partners, are not served with summons, the plaintiff may proceed against those served. Ingraham v. Gildemeester, 2 Cal. 88; Hirschfield v. Franklin, 6 Cal. 607. A joint judgment in ejectment, against defendants severally in possession of separate parcels of the land sued for, is erroneous. Leese v. Clark, 28 Cal. 26. In an action upon a joint or several bond, where all the obligors are made parties, the plaintiff may go to trial, if he elect to do so, before all the defendants are served. People v. Evans, 29 Cal. 429.

§ 580. The relief to be awarded to the plaintiff. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

Legislation § 580. Enacted March 11, 1872; based on Practice Act, § 147 (New York Code, § 275), substituting "cannot" for "shall not."

Construction of section. The relief provided by this section is confined, in case of default, to that demanded in the complaint, as was the rule under a prayer for special relief in equity; while in other cases it is extended to granting relief similar to that granted under a prayer for general relief in chancery courts (Johnson v. Polhemus, 99 Cal. 240; 33 Pac. 908); and the section is but a concise statement of the rule observed upon the subject of relief in courts of equity. Mock v. Santa Rosa, 126 Cal. 330; 58 Pac. 826. The

court may, under this section, grant additional relief under the original complaint, without an amendment thereof for that purpose alone (Kent v. Williams, 146 Cal. 3; 79 Pac. 527); and relief may be granted, within the issues of the complaint, even though not specifically prayed for. Security Loan etc. Co. v. Boston etc. Fruit Co., 126 Cal. 418; 58 Pac. 941; 59 Pac. 296. A judgment for more relief than is prayed for is not void as to the excess, and it cannot be attacked in collateral proceedings, although there is no prayer for general relief. Cohen v. Cohen, 150 Cal. 99; 11 Ann. Cas. 520; 88 Pac. 267.

Equitable relief. The circumstance that a court of law, as well as a court of equity, can hear and determine any issue of fact presented for adjudication in a proceeding properly before the court, has no weight in determining whether or not, upon a particular state of facts, the remedy is legal or equitable. Angus v. Craven, 132 Cal. 691; 64 Pac. 1091. Where a complaint praying for legal relief states a cause of action entitling the plaintiff to equitable relief, the court may, on the trial, permit the prayer to be so amended as to ask for the appropriate equitable relief. Walsh v. McKeen, 75 Cal. 519; 17 Pac. 673; and see Grain v. Aldrich, 38 Cal. 514; 99 Am. Dec. 423. A judgment for the value of personal property, rather than for its possession, is proper, where the action is for a rescission of the contract, on the ground of false representation. Stewart v. Hollingsworth, 129 Cal. 177; 61 Pac. 936. Rescission is only one of the remedies in case of fraud; and where real or personal property is fraudulently obtained, the most common and familiar relief granted by a court of equity is to convert the party guilty of the fraud into a trustee. More v. More, 133 Cal. 489; 65 Pac. 1044; Field v. Austin, 131 Cal. 379; 63 Pac. 692. The correction of a defect in a written instrument, not specifically pleaded, may be decreed by the court. Poledori v. Newman, 116 Cal. 375; 48 Pac. 325. Where the facts alleged and found, independently of an allegation of and a failure to find upon fraud, show a mistake in the description of property purchased, the plaintiff is entitled to a reformation of the deed to conform to the intention of the parties. Hoffman v. Kirby, 136 Cal. 26; 68 Pac. 321. A judgment in an action for the specific performance of a contract grants more relief than is authorized, where it directs specific performance by the defendant, and not by the plaintiff, and enjoins the defendant from conveying property and from working the same, without reference to any performance of the contract by the plaintiff. Ellis v. Rademacher, 125 Cal. 556; 58 Pac. 178. The amount of recoupment to which the plaintiff may in future be entitled cannot be determined by the judgment in an action, the especial object of which is to cancel a mortgage, and permitting only of the relief that the deed be reformed so as to express the real intention of the parties with reference to the property to be included therein. Hoffman v. Kirby, 136 Cal. 26; 68 Pac. 321. A judgment for the transfer and delivery of securities is a substantial compliance with this section, where the complaint set forth all the facts concerning the same, even though the formal prayer of the complaint omitted all mention thereof. Security Loan etc. Co. v. Boston etc. Fruit Co., 126 Cal. 418; 58 Pac. 941; 59 Pac. 296. Where the abatement of a nuisance was prayed for in the complaint, an injunction against the continuance of the nuisance is proper and within the issues. Sullivan v. Royer, 72 Cal. 248; 1 Am. St. Rep. 51; 13 Pac. 655. Where a plaintiff sought to prevent the discharge of mining débris into certain streams, the court is not warranted in inserting, in the decree, provisions relating to the use of the defendants' water-supply on lands other than theirs, or forbidding them to sell their water-supply or property to purchasers who they know will not respect the rights of others. Yuba County v. Kate Hayes Mining Co., 141 Cal. 360; 74 Pac. 1049. The court has a right to remove a trustee, or to appoint another in his place, under a complaint setting up a trust and all facts connected with it, alleging that the trustee had violated and repudiated his trust, that he had used trust property for his own use, and that he was an unfit person to be trustee, where issues were joined and trial had upon these averments. Schlessinger v. Mallard, 70 Cal. 326; 11 Pac. 728. If a plaintiff alleges the trust relation, the receipt of trust funds, and a failure to account, he has the right to recover in one action the specific property into which a portion of the fund is traced, and a personal judgment for the remainder which cannot be identified; but he cannot have a judgment declaring the defendant a trustee of specific property bought with trust funds, and decreeing such property to be the plaintiff's, and also a personal judgment for the money invested by the defendant in that property. Title Insurance etc. Co. v. Ingersoll, 158 Cal. 474; 111 Pac. 360.

Relief contingent on allegations and prayer of complaint. The decree should be definite and certain, and, where the answer admits the allegations of the complaint, grant no greater relief than that authorized by the complaint. Ellis v. Rademacher, 125 Cal. 556; 58 Pac. 178. The court cannot grant any relief not warranted by the averments of the complaint, whether admitted by legal effect, silence of the party, or written answer. Ellis v. Rademacher, 125 Cal. 556; 58 Pac. 178;

Hicks v. Murray, 43 Cal. 515; Carpentier v. Brenham, 50 Cal. 549; Cummings v. Cummings, 75 Cal. 434; 170 Pac. 442. Where the complaint does not allege that any money is due, but the answer presents that issue, the case is within this section. O'Donnell v. Kramer, 65 Cal. 353; 4 Pac. 204. Where the relief granted is beyond the issues embraced in the complaint, the appellate court will modify the judgment by striking out the excessive parts thereof. Yuba County v. Kate Hayes Mining Co., 141 Cal. 360; 74 Pac. 1049. The court may render judgment for the amount of a note and interest, although the complaint prays only for judgment for the face of the note. Lane v. Gluckauf, 28 Cal. 288; 87 Am. Dec. 121. In an action for support without divorce, the amount to be allowed is an issuable fact, and cannot be made, in the first instance, in excess of the amount asked for in the complaint. Benton v. Benton, 122 Cal. 395; 55 Pac. 152; Burnett v. Stearns, 33 Cal. 468; Gregory v. Nelson, 41 Cal. 278. Where, in an action for conversion, the complaint alleged attorneys' fees as an element of damages, in the absence of the evidence from the record it will be presumed that the verdict did not include attorneys' fees. McDonald v. McConkey, 57 Cal. 325. A plaintiff is not to be denied any relief, simply because he fails to prove that he is entitled to the full measure that he claims: he may be granted a part of the relief claimed, if it is justified by the pleading and evidence. Union Oil Co. v. Mercantile Refining Co., 8 Cal. App. 768; 97 Pac. 919. Where the plaintiff claimed ownership and right of possession of land, and prayed that he be adjudged to be such owner, though he did not allege that the defendant claimed some interest therein, nor call upon him to set forth his title, but the defendant denied the plaintiff's ownership, and asserted title in himself, and where the issues thus formed were tried by the jury and decided in the plaintiff's favor, the court may properly give judgment accordingly. Reiner v. Schroeder, 146 Cal. 411; 80 Pac. 517. The prayer of the complaint must receive a reasonable interpretation, and be construed with reference to the purposes and the nature of the action. Brooks v. Carpentier, 53 Cal. 287. The relief demanded does not characterize the action, nor limit the plaintiff in respect to the remedy which he may have. Angus v. Craven, 132 Cal. 691; 64 Pac. 1091; Walsh v. McKeen, 75 Cal. 519; 17 Pac. 673. Relief may be granted upon the facts within the issues, entitling to judgment, irrespective of the prayer, if the evidence is sufficient to uphold the judgment. Dennison v. Chapman, 105 Cal. 447; 39 Pac. 61. Where the plaintiff shows himself to be entitled to any relief, either at law or in equity, his complaint is not to be dismissed because he has made a mistake as to the form of his remedy, or because he has prayed for a judgment to which he is not entitled. Bedolla v. Williams, 15 Cal. App. 738; 115 Pac. 747. A decree directing the sale of real property, in an action relating to such property, may be made by the court, though such relief was not prayed for in the original complaint. Kent v. San Francisco Sav. Union, 130 Cal. 401; 62 Pac. 620.

Judgment under prayer for general relief. The provision of this section, that where there is no answer the relief granted cannot exceed that which is demanded in the complaint, does not make the judgment void, where the relief given is within the terms of a prayer for general relief, and is germane to the cause of action stated, although not authorized by the facts alleged. Cohen v. Cohen, 150 Cal. 99; 11 Ann. Cas. 520; 88 Pac. 267. The court can grant any relief consistent with the case made, and embraced within the issues, although not specifically prayed for. Zellerbach v. Allenberg, 99 Cal. 57; 33 Pac. 786; More v. Finger, 128 Cal. 313; 60 Pac. 933; Gimmy v. Gimmy, 22 Cal. 633; Scott v. Sierra Lumber Co., 67 Cal. 71; 7 Pac. 131; Hurlbutt v. N. W. Spaulding Saw Co., 93 Cal. 55; 28 Pac. 795. Any relief not inconsistent with the pleadings and the issues tried may be granted under a prayer for general relief. Mock v. Santa Rosa, 126 Cal. 330; 58 Pac. 826. Where the complaint closes with a prayer for general relief, the fact that the plaintiff is not entitled to all the relief that he has asked does not justify a nonsuit: the court should render such judgment as may appear to be proper. Fox v. Hall, 164 Cal. 287; 128 Pac. 749; Bell v. Solomons, 142 Cal. 59; 75 Pac. 649. In an action for an accounting, there may be a personal judgment for the balance of the money found to be due the plaintiff, after accounting had. Title Insurance etc. Co. v. Ingersoll, 158 Cal. 474; 111 Pac. 360. In equity, under a prayer for general relief, no relief can be granted beyond that authorized by the facts stated in the bill. Carpentier v. Brenham, 50 Cal. 549; Cummings v. Cummings, 75 Cal. 434; 17 Pac. 442. Where a suit is brought to annul deeds on the ground of undue influence and fraud, a judgment for reconveyance is appropriate, under a prayer for general relief: the rigid rules relating to rescission apply only to a rescission to be effected by the acts of the parties; the power of a court of equity to cancel the contract is of much wider scope, and its exercise governed by other principles. More v. More, 133 Cal. 489; 65 Pac. 1044. And where, in an action to quiet title, brought by the owner of an equitable estate against the holder of the legal estate, the facts upon which the plaintiff's claim

is based are alleged, and there is a prayer for general relief, the court can grant any relief proper within the limitations of this section. De Leonis v. Hammel, 1 Cal. App. 390; 82 Pac. 349.

Relief granted, where no answer filed. The nature of the action is to be determined from the character of the complaint, and from the character of the judgment which might be rendered upon a default thereto. McFarland v. Martin, 144 Cal. 771; 78 Pac. 239. Relief, other than and different from that prayed for in the complaint and specified in the summons, is improper, where the defendant defaults. Mudge v. Steinhart, 78 Cal. 34; 12 Am. St. Rep. 17; 20 Pac. 147; Staacke v. Bell, 125 Cal. 309; 57 Pac. 1012; McFarland v. Martin, 144 Cal. 771; 78 Pac. 239. A judgment by default cannot give any relief in excess of that demanded in the complaint; and a default admits the material allegations of the complaint, and no more. Ellis v. Rademacher, 125 Cal. 556; 58 Pac. 178. A decree pro confesso concludes a party, only as to the averments in the bill: it does not amount to a confession of any fact not alleged in it. Savings and Loan Society v. Horton, 63 Cal. 105. A defaulting defendant has the right to assume that no relief will be granted beyond that which the complaint specifically asks, and a general prayer cannot enlarge the power of the court to grant relief not prayed for against a defaulting defendant; hence, a decree granting relief beyond that authorized in the complaint will be reversed, in so far as the same is in excess of the relief demanded in the complaint. Staacke v. Bell, 125 Cal. 309; 57 Pac. 1012. Relief against a defaulting or disclaiming defendant must be consistent with the case made upon the complaint and embraced within the issues; and a judgment rendered against him, upon ex parte evidence, which departs in its description of property from the description thereof as set forth in the complaint, or otherwise more specifically describes it, without an amendment of the complaint to support the judgment, is erroneous. Balfour-Guthrie Investment Co. v. Sawday, 133 Cal. 228; 62 Pac. 400; and see Holman v. Vallejo, 19 Cal. 498. In a suit on a promissory note, where no issue is joined on the question of interest, the relief granted against a defaulting defendant cannot exceed that prayed for in the complaint. Brown v. Caldwell, 13 Cal. App. 29; 108 Pac. 874. In an action on a note, where the court made an allowance for taxes on property and for interest on counsel fees, but the prayer of the complaint was only for five per cent as counsel fees, relief was granted for an excess over the amount demanded in the complaint. Parrott v. Den, 34 Cal. 79. The relief "demanded in the complaint" refers to the relief asked in the prayer,—the feature of the pleading to which alone reference may be had, in default cases, to ascertain what relief the plaintiff seeks; and the rule of the statute applies in its strictness to actions in foreclosure, alike with those of any other character. Brooks v. Forrington, 117 Cal. 219; 48 Pac. 1073; Raun v. Reynolds, 11 Cal. 14; Gautier v. English, 29 Cal. 165; Parrott v. Den, 34 Cal. 79. Counsel cannot be allowed fees in a foreclosure suit, upon default, where none are specifically prayed for, notwithstanding a prayer for general relief, and a stipulation, in the mortgage, making counsel fees a charge secured by the mortgage; nor are they recoverable as costs in the action. Brooks v. Forrington, 117 Cal. 219; 48 Pac. 1073. In a foreclosure suit, where judgment is taken by default, the decree can give no relief beyond that demanded in the bill; and a judgment is erroneous, that decrees a sale of property in a manner different from that prescribed in the statute, where the complaint simply asks a foreclosure of the mortgage and a sale of the property to satisfy the judgment. Raun v. Reynolds, 11 Cal. 14. The title of the defendant to rents and profits, pending foreclosure, is in no way affected by the possession of a receiver, and cannot be divested otherwise than by valid adjudication; and where the complaint does not justify such adjudication, the defendant being in default, the court cannot adjudge the defendant divested of such title. Garretson Investment Co. v. Arndt, 144 Cal. 64; 77 Pac. 770; Scott v. Hotchkiss, 115 Cal. 89; 47 Pac. 45; Brooks v. Forrington, 117 Cal. 219; 48 Pac. 1073; Foley v. Foley, 120 Cal. 33; 65 Am. St. Rep. 147; 52 Pac. 122; Staacke v. Bell, 125 Cal. 309; 57 Pac. 1012. Where the only relief prayed for was, that the defendant be enjoined from transferring its property or mortgages, an order, on default, directing a transfer and conveyance of the property to a receiver is in excess of the relief asked. Foley v. Foley, 120 Cal. 33; 65 Am. St. Rep. 147; 52 Pac. 122. A judgment by default is erroneous, where it awards interest from the date of the filing of the complaint, instead of from the date of entry of judgment. Gage v. Rogers, 20 Cal. 91. Where the prayer of the complaint is, that the defendants be required to convey the total amount of land claimed, and the action is dismissed as to two defendants, the others being required to convey the total amount, the relief granted is not in excess of the prayer of the complaint. Brooks v. Carpentier, 53 Cal. 287. A judgment, rendered on default, granting excessive relief, is the act of the court, and not of the judgment creditor; and an action does not lie to quash the execution and perpetually en-

join the collection of the judgment, upon the ground that it was obtained by fraud. Murdock v. De Vries, 37 Cal. 527. Intendments are in favor of the regularity of judgments; and where a cause is appealed on the judgment roll, with no bill of exceptions or statement, and nothing to show that the appellant ever asked for any other or further relief than that prayed for and received, he cannot be heard to complain. Treat v. Dorman, 100 Cal. 623; 35 Pac. 86. This section has no application to questions or jurisdiction; and a judgment, where no answer is filed, rendered by a court having jurisdiction of the subject-matter and the person, even though exceeding the relief demanded in the complaint, is erroneous merely, and not void. Chase v. Christianson, 41 Cal. 253. If the defendant does not answer, and the plaintiff asks for and receives more relief than he is entitled to, nothing more can be predicated than that an erroneous judgment was obtained, or one absolutely void pro tanto: if erroneous, the remedy is by appeal; and if void pro tanto, by motion to set it aside. Murdock v. De Vries, 37 Cal. 527; Chipman v. Bowman, 14 Cal. 157; Logan v. Hillegass, 16 Cal. 200; Bell v. Thompson, 19 Cal. 706; Sanchez v. Carriaga, 31 Cal. 170.

Relief where answer filed. The court may grant to plaintiff any relief consistent with the case made by him, and embraced within the issue, where an answer is filed (Poledori v. Newman, 116 Cal. 375; 48 Pac. 325; Johnson v. Polhemus, 99 Cal. 240; 33 Pac. 908; Bedolla v. Williams, 15 Cal. App. 738; 115 Pac. 747), though not specifically prayed for (Dennison v. Chapman, 105 Cal. 447; 39 Pac. 61; Moch v. Santa Rosa, 126 Cal. 330; 58 Pac. 826; Johnson v. Polhemus, 99 Cal. 240; 33 Pac. 908); and jurisdiction to grant any particular relief depends, not upon the prayer of the complaint, but upon the issues made by the pleadings. Murphy v. Stelling, 8 Cal. App. 702; 97 Pac. 672; Reiner v. Schroeder, 146 Cal. 411; 80 Pac. 517.

Presumptions in favor of default judgment. The recital that a default was regularly entered according to law is not necessarily based upon an affidavit, showing a publication, contained in the record; it may have been made to appear to the court that another affidavit showing due publication was filed within the proper time, and the recital may have been based upon that fact, and, in a collateral attack upon the judgment, it will be presumed, in support of the judgment, that the recital in the judgment was based upon such other affidavit, and that the same may have been lost or omitted from the record, where the record does not purport to show all that was done, and the judgment states that all that was necessary to be done was done. Sacramento Bank v. Montgomery, 146 Cal. 745; 81 Pac. 138.

Modification of judgment. An error in the judgment, not affecting the verdict nor requiring a new trial, may, and should, be corrected by modifying the judgment so as to conform to the verdict read in connection with the pleadings. Compressed Air Machinery Co. v. West San Pablo Land etc. Co., 9 Cal. App. 361; 99 Pac. 531.

CODE COMMISSIONERS' NOTE. 1. Relief, when judgment is by default. If the judgment is by default, the court cannot grant any greater relief than that prayed for in the complaint and specified in the summons. Lamping v. Hyatt, 27 Cal. 102; Gautier v. English, 29 Cal. 165; Raun v. Reynolds, 11 Cal. 19; Gage v. Rogers, 20 Cal. 191; Parrott v. Den, 34 Cal. 79; McComb v. Reed, 28 Cal. 281; 87 Am. Dec. 115. If the complaint does not contain a prayer for a judgment in coin, a judgment by default in coin cannot be taken. Lamping v. Hyatt, 27 Cal. 102. A judgment rendered in an action on contract in favor of plaintiff on the complaint alone, after striking out an answer previously filed by defendant, is, in effect, a judgment by default, and is therefore erroneous if rendered for a greater amount than that for which the summons states judgment could be taken. Lattimer v. Ryan, 20 Cal. 628. A judgment entered by the clerk upon default, for an amount greater than is demanded in the prayer of the complaint, and specified in the summons, is not void, but is simply erroneous, and may be enforced until modified. Bond v. Pacheco, 30 Cal. 531.

2. Relief, after issue joined. Where an answer is filed, the court may grant any relief consistent with the case made by the complaint within the issue. San Francisco Sav. & L. Soc. v. Thompson, 34 Cal. 76; Cassacia v. Phœnix Ins. Co., 28 Cal. 628. But the facts proved or admitted must clearly justify the relief granted. Nevada County etc. Canal Co. v. Kidd, 37 Cal. 282.

3. Mandamus. Quo warranto. The provisions of this section are applicable to proceedings by mandate and quo warranto. People v. Board of Supervisors, 27 Cal. 655.

§ 581. Action may be dismissed, or nonsuit entered. An action may be dismissed, or a judgment of nonsuit entered, in the following cases:

1. By the plaintiff himself, by written request to the clerk, filed with the papers in the case, at any time before the trial, upon payment of his costs; provided, a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon;

2. By either party, upon the written consent of the other;

3. By the court, when either party fails to appear on the trial, and the other party appears and asks for the dismissal;

4. By the court, when, upon the trial and before the final submission of the case, the plaintiff abandons it;

5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury.

The dismissals mentioned in subdivisions one and two hereof are made by entry in the clerk's register. The dismissals mentioned in subdivisions three, four, and five of this section must be made by orders of the court entered upon the minutes thereof, and are effective for all purposes when so entered; but the clerk of the court must note such orders in his register of actions in the case.

Dismissal.
1. For want of prosecution. See post, § 583.
2. In justice's court. See post, § 890.
3. Of election contest. See post, §§ 1117, 1122, 1125.
4. For failure to give security for costs. See post, § 1037.
Variance, fatal or otherwise. Ante, §§ 469–471.
Trial, either party may bring on. Post, § 594.

Legislation § 581. 1. Enacted March 11, **1872**; based on Practice Act, § 148, which read: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: 1. By the plaintiff himself, at any time before trial, upon the payment of costs, if a counterclaim has not been made. If a provisional remedy has been allowed, the undertaking shall thereupon be delivered by the clerk to the defendant, who may have his action thereon; 2. By either party, upon the written consent of the other; 3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal; 4. By the court, when upon the trial, and before the final submission of the case, the plaintiff abandons it; 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions, shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly." When enacted in 1872, § 581 read the same, except for the substitution (1) of "must" for "shall," after "undertaking," in subd. 1, and (2) of "is" for "shall be," after "subdivisions."

2. Amended by Code Amdts. **1877–78**, p. 100, (1) substituting the word "provided" for "if," before "a counterclaim"; (2) inserting the clause "or affirmative relief sought by the cross-complaint or answer of defendant."

3. Amended by Stats. **1885**, p. 76, (1) in subd. 4, omitting "final" before "submission"; (2) adding subd. 6, which read: "By the court when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months."

4. Amended by Stats. **1889**, p. 398, (1) in subd. 4, adding "final" before "submission"; (2) inserting, before "is made," in subd. 6, the words "of this"; (3) adding subd. 7, which read, "And no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, and served, and return thereon made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years."

5. Amended by Stats. **1895**, p. 31, (1) inserting "section" after "this," in the second paragraph of subd. 6; (2) changing the section, after the words "within one year," in subd. 7, to read, "and all such actions shall be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants within said three years, in the same manner as if summons had been issued and served."

6. Amended by Stats. **1897**, p. 98, (1) inserting, in subd. 1, the words "by written request to the clerk, filed among the papers in the case"; (2) changing the last paragraph of subd. 6, and adding a new paragraph, both of which comprise the two sentences following: "The dismissals mentioned in subdivisions one and two hereof are made by entry in the clerk's register. The dismissals mentioned in subdivisions three, four, five, and six of this section, shall be made by orders of the court entered upon the minutes thereof, and shall be effective for all purposes when so entered, but the clerk of the court shall note such orders in his register of actions in the case."

7. Amendment by Stats. **1901**, p. 143; unconstitutional. See note ante, § 5.

8. Amended by Stats. **1907**, p. 711; the code commissioner saying, "The amendment to subd. 3 authorizes the plaintiff, as well as the defendant, to ask for the dismissal of an action if his adversary does not appear at the trial. Subd. 6, concerning the dismissal of an action because the party entitled to judgment neglects to make demand therefor within six months, is omitted, because the changes made in § 664 require the judgment to be entered by the clerk without any demand by either party. The matters contained in former subd. 7 are, with certain changes, embraced in the new § 581a."

Construction of section. This section was designed for the benefit of defendants, to relieve them from the assertion of stale demands, and to insure proper diligence in the prosecution of asserted claims (Pacific Paving Co. v. Vizelich, 141 Cal. 4: 74 Pac. 352); and, dealing with the subject of orders of dismissal of actions, it should be held to apply to all such dismissals (Marks v. Keenan, 140 Cal. 33; 73 Pac. 751); and, except as authorized by this section, the court cannot dismiss an action, either as an entirety or as against parties: any judgment not authorized by this section must be upon the merits. Townsend v. Driver, 5 Cal. App. 581; 90 Pac. 1061. This section is inapplicable to justices' courts. Hubbard v. Superior Court, 9 Cal. App. 166; 98 Pac. 394. The first subdivision cannot be restricted in its meaning to trials of merits after answer, for there may be such a trial on a general demurrer to the complaint as will effectually dispose of the case, where the plaintiff has properly alleged all the facts that constitute his cause of action; and if the demurrer is sustained, he stands on his own pleading,

and submits to judgment on the demurrer, and if not sustained, he has his remedy by appeal; in such a case there would be a trial, within the meaning of the code, and the judgment would cut off the right of dismissal, unless it was first set aside or leave given to amend. Goldtree v. Spreckels, 135 Cal. 666; 67 Pac. 1091; and see Hancock Ditch Co. v. Bradford, 13 Cal. 637; Brown v. Harter, 18 Cal. 76; Tregambo v. Comanche Mill etc. Co., 57 Cal. 501; Finn v. Spagnoli, 67 Cal. 330; 7 Pac. 746. The first subdivision relates to dismissals made by the action of the plaintiff alone, but the dismissals provided for by the other subdivisions are made by a party only upon the written consent of the other, or by the court upon motion of a party, or upon its own motion. Boca etc. R. R. Co. v. Superior Court, 150 Cal. 153; 88 Pac. 718. The auxiliary verb "may," in the introductory paragraph, cannot be read "must," as applied to either of the first two subdivisions (Rosenthal v. McMann, 93 Cal. 505; 29 Pac. 121); and the particle "an," qualifying "action," in the same paragraph, is equivalent to the word "any"; and the provisions of the section are applicable to an action in interpleader, as well as to other forms and causes of actions. Kaufman v. Superior Court, 115 Cal. 152; 46 Pac. 904.

Entry of dismissal by clerk. A request for a dismissal must be signed by the attorney of record for the plaintiff, if there is such an attorney; otherwise, the clerk is not authorized to recognize the same as a discontinuance of the action, or to make an entry of dismissal in his register. Boca etc. R. R. Co. v. Superior Court, 150 Cal. 153; 88 Pac. 718. The entry of a judgment of dismissal is not required, under this section: the entry of the order in the clerk's register is sufficient. Hopkins v. Superior Court, 136 Cal. 552; 69 Pac. 299; Huntington Park Co. v. Superior Court, 17 Cal. App. 692; 121 Pac. 701. The clerk has no authority to "order, adjudge, and decree" that an action be dismissed: such an entry by him, in his register, is not an entry of judgment. Wolters v. Rossi, 126 Cal. 644; 59 Pac. 143. A judgment to be entered upon an order of dismissal is a judgment of the court, although it is to be entered by the clerk. Wolters v. Rossi, 126 Cal. 644; 59 Pac. 143. A judgment sustaining the defendant's demurrer to a complaint, is not a mere dismissal of the action, but a final determination of the rights of the parties, which § 668, post, requires to be entered in the judgment-book. Wood v. Missouri etc. Ry. Co., 152 Cal. 344; 92 Pac. 868. The failure of the clerk to enter the dismissal in the register, and cause a proper judgment of dismissal to be entered in his judgment-book, cannot affect the substantial rights of the parties. Kaufman v. Superior Court, 115 Cal. 152; 46 Pac. 904; Huntington Park Co. v. Superior Court, 17 Cal. App. 692; 121 Pac. 701. The entry of the order of dismissal in the minute-book of the court is, in its nature, a final judgment, and the time within which an appeal may be taken begins to run from the date of that entry. Matthai v. Kennedy, 148 Cal. 699; 84 Pac. 37; and see Marks v. Keenan, 140 Cal. 33; 73 Pac. 751; Pacific Paving Co. v. Vizelich, 141 Cal. 4; 74 Pac. 352; Swortfiguer v. White, 141 Cal. 579; 75 Pac. 172. The order dismissing an action is a final judgment; and the neglect of the clerk to register the order of dismissal in his register of actions does not destroy the effectiveness of the provisions of this section. Marks v. Keenan, 140 Cal. 33; 73 Pac. 751. The validity of an entry in the register, or of a judgment thereon, must be decided by reference to the pleadings in the action, where such validity is attacked either directly or collaterally. Page v. Superior Court, 76 Cal. 372; 18 Pac. 385. The validity of a judgment entered under the first subdivision of this section cannot be questioned, although the judgment is entered by the clerk without payment of costs. Hinkel v. Donohue, 90 Cal. 389; 27 Pac. 301; Kaufman v. Superior Court, 115 Cal. 152; 46 Pac. 904. A mere order of dismissal, for any statutory cause, is to be entered in the clerk's register or minutes, but the entry of a final judgment must be made in the judgment-book. Wood v. Missouri etc. Ry. Co., 152 Cal. 344; 92 Pac. 868.

Action may be dismissed by plaintiff when. While the plaintiff has an inherent and absolute right to dismiss his action, yet such right can be exercised only in the mode prescribed by the statute, and is measured by the mode provided for its exercise (Huntington Park Improvement Co. v. Superior Court, 17 Cal. App. 692; 121 Pac. 701); and the only limitation upon such right is, that the defendant has filed a counterclaim or asked for affirmative relief (McDonald v. California Timber Co., 2 Cal. App. 165; 83 Pac. 172; Alpers v. Bliss, 145 Cal. 565; 79 Pac. 171; Thompson v. Spraig, 66 Cal. 350; 5 Pac. 506); and where no affirmative relief is demanded by the defendant, the plaintiff has the right to dismiss the action by filing with the clerk a written request therefor, the effect of which act, on his part, is, ipso facto, to dismiss the case. Huntington Park Improvement Co. v. Superior Court, 17 Cal. App. 692; 121 Pac. 701. When it is said that an action may be dismissed or a judgment of nonsuit entered by the plaintiff himself, no more is meant than that he may apply to the clerk for the entry of dismissal in the clerk's register and a judgment accordingly; and the power of the clerk to enter judgment depends upon his power to make an entry of dismissal in the register. Page

v. Superior Court, 76 Cal. 372; 18 Pac. 385. A voluntary dismissal, without prejudice, at plaintiff's costs, is proper, under the first subdivision of this section, where the defendant, after having a default judgment set aside, had obtained leave to answer, but had not answered at the time of dismissal. Hibernia Sav. & L. Soc. v. Portener, 139 Cal. 90; 72 Pac. 16. The right of the plaintiff to have the action dismissed, and the authority of the clerk to enter the judgment of dismissal, depend upon the condition of the pleadings at the time the plaintiff makes the request for such dismissal. Alpers v. Bliss, 145 Cal. 565; 79 Pac. 171. The provision of the first subdivision, concerning the dismissal of an action, is not mandatory or exclusive: the plaintiff may move for a dismissal in open court, and have an order made and entered with the same effect as though made by an entry in the clerk's register. McDonald v. California Timber Co., 2 Cal. App. 165; 83 Pac. 172. The plaintiff has no right, and the court has no authority, to dismiss a cause tried, submitted, and taken under advisement by the court (Heinlin v. Castro, 22 Cal. 100; Westbay v. Gray, 116 Cal. 660; 48 Pac. 800); but the court may grant a dismissal, on motion of the plaintiff, after the case is tried and submitted, where the order of submission was set aside and leave given to amend the pleadings, the case then standing as though no submission had ever been had. Westbay v. Gray, 116 Cal. 660; 48 Pac. 800. Where proceedings have been had under the act of 1909, authorizing the condemnation of property by municipalities for street purposes, there can be no dismissal, under either that act or this section, after the entry of the interlocutory judgment awarding damages to various defendants because of such taking. Title Insurance etc. Co. v. Lusk, 15 Cal. App. 358; 115 Pac. 53. In an action of eminent domain, the plaintiff is entitled to abandon his claim to the property and ask a dismissal before the expiration of thirty days from the entry of judgment. Southern Pacific R. R. Co. v. Reis Estate Co., 15 Cal. App. 216; 114 Pac. 808. There is no right of dismissal, under this section, where an issue of law has been tried upon demurrer to the complaint, and leave to amend refused: the clerk has no authority to enter a dismissal, in such a case, upon the plaintiff's order, and the court may set it aside. Goldtree v. Spreckels, 135 Cal. 666; 67 Pac. 1091. The plaintiff may, at any time before trial, dismiss the action as to some of the defendants, and proceed against the others alone; and after the dismissal the dismissed defendants cannot contest the validity or regularity of the judgment. Reed v. Calderwood, 22 Cal. 463.

When affirmative relief is sought by defendant. The plaintiff cannot, upon his own motion, dismiss the action, where the defendant, by his answer, claims affirmative relief (Robinson v. Placerville etc. R. R. Co., 65 Cal. 264; 3 Pac. 878); nor, where the defendant, in his answer, avers matters growing out of the matters set forth in the complaint upon which he seeks affirmative relief, can the plaintiff dismiss the action upon his own motion, without the consent of the defendant. Clark v. Hundley, 65 Cal. 96; 3 Pac. 131. A judgment of dismissal is a nullity, where the defendant, in his answer, seeks affirmative relief. Thompson v. Spraig, 2 Cal. Unrep. 346; 4 Pac. 418. A counterclaim or cross-complaint, to prevent a dismissal under the first subdivision of this section, must be one under which the plaintiff would be entitled to affirmative relief. Mott v. Mott, 82 Cal. 413; 22 Pac. 1140, 1142; Belleau v. Thompson, 33 Cal. 495. Where the cross-complaint is stricken from the answer, leaving therein matters of defense only, the plaintiff may dismiss the action at any time before trial, upon payment of costs. Thompson v. Spraig, 66 Cal. 350; 5 Pac. 506. Where the defendant, in an action of ejectment, averred title in himself, set up a lease of the premises in controversy by himself to the plaintiff, and an indebtedness by the latter for rent accruing under the lease, such indebtedness does not constitute a counterclaim (Carpenter v. Hewel, 67 Cal. 589; 8 Pac. 314); nor do matters set out in a cross-bill, not arising out of the transaction set forth in the complaint, and not connected with the subject of the action. James v. Center, 53 Cal. 31. An answer setting up the defendant's title, and praying for a decree to establish it, and to enjoin the plaintiff from asserting any interest in the property or interfering with the defendant's possession thereof, does not prevent a dismissal of the action by the plaintiff (Wood v. Jordan, 125 Cal. 263; 57 Pac. 998); but this case was decided upon the authority of Moyle v. Porter, 51 Cal. 639, without the attention of the court being called to the material change of this section since that decision, and is overruled in Islais etc. Water Co. v. Allen, 132 Cal. 432, 64 Pac. 713, where it is held that such an answer does not seek affirmative relief. An action for divorce comes within the purview of the first subdivision of this section, where the defendant files a cross-complaint, and upon such cross-complaint prays affirmative relief. Mott v. Mott, 82 Cal. 413; 22 Pac. 1140. A cross-complainant cannot dismiss his cross-complaint after the filing of the answer of the plaintiff thereto, seeking the affirmative relief of a decree that the mortgage therein set forth be

adjudged paid and satisfied. Rodgers v. Parker, 136 Cal. 313; 68 Pac. 975; Islais etc. Water Co. v. Allen, 132 Cal. 432; 64 Pac. 713. The plaintiff cannot be deprived of his right to a judgment of dismissal because the defendant files a cross-complaint after receiving notice of intention to move for an order of dismissal (Hinkel v. Donohue, 90 Cal. 389; 27 Pac. 301); nor where the defendant files an answer containing a counterclaim, after the order dismissing the cause has been entered in the minutes, but before the actual entry of the judgment. Evans v. Johnston, 115 Cal. 180; 46 Pac. 906.

In case of intervention. Where a petition in intervention is filed for the purpose, merely, of resisting the plaintiff's claim, and there is no counterclaim or cross-complaint, and no affirmative relief sought by the defendant, the plaintiff has the right to dismiss the action, both as against the defendant and the intervener. Henry v. Vineland Irrigation Dist., 140 Cal. 376; 73 Pac. 1061. An intervener, against whom no relief is prayed, may dismiss his petition of intervention, and this right is not affected by the fact that one of the plaintiffs has died and his successor is not brought in as a party. Sheldon v. Gunn, 56 Cal. 582. Where the intervener could accomplish nothing by a judgment upon the merits, that would not be accomplished by the dismissal of the action, the plaintiff may dismiss the action. Henry v. Vineland Irrigation Dist., 140 Cal. 376; 73 Pac. 1061; and see People v. Perris Irrigation Dist., 132 Cal. 289; 64 Pac. 399, 773. A judgment rendered against an intervener is erroneous, where he abandoned the contest, and was out of the case by virtue of a dismissal. Sheldon v. Gunn, 56 Cal. 582.

Judgment of retraxit. A retraxit occurred at common law when a plaintiff came into court in person and voluntarily renounced his suit or cause of action; when this was done, and a judgment was entered in favor of the defendant, the plaintiff's cause of action was forever gone. Westbay v. Gray, 116 Cal. 660; 48 Pac. 800; Hibernia Sav. & L. Soc. v. Portener, 139 Cal. 90; 72 Pac. 716; and see Board of Commissioners v. Younger, 29 Cal. 147; 87 Am. Dec. 164; Merritt v. Campbell, 47 Cal. 542. Unless an order and judgment directing a dismissal operates as a retraxit, and so bars any action by the plaintiff for the same cause, the defendant is not aggrieved thereby. Stoutenborough v. Board of Education, 104 Cal. 664; 38 Pac. 449. A judgment of dismissal, entered without prejudice, at plaintiff's costs, is not a judgment on the merits, and is not a bar to a subsequent action, and consequently not an estoppel under § 1908, post. Hibernia Sav. & L. Soc. v. Portener, 139 Cal. 90; 72 Pac. 716. A judgment of dismissal of a suit brought by a plaintiff in a Federal court, for want of jurisdiction or right of the plaintiff to sue in that court, is not res adjudicata as to the cause of action upon the merits, nor a bar to another action, for the same cause, brought by the same plaintiff in a state court. Wills v. Pauly, 116 Cal. 575; 48 Pac. 709. The power to make a retraxit, under our statute, is conferred upon the attorney of record in the case. Merritt v. Campbell, 47 Cal. 542. A judgment of dismissal is a nullity, where the defendant, in his answer, seeks affirmative relief (Thompson v. Spraig, 2 Cal. Unrep. 346; 4 Pac. 418); and the judgment relates to the date of the legal demand for the dismissal of the action, where necessary to preserve the substantial rights of the parties. Kaufman v. Superior Court, 115 Cal. 152; 46 Pac. 904. The mode pointed out in the first subdivision of this section is not mandatory, nor exclusive of the power of the court to grant an order of dismissal, which, when procured by the plaintiff, should be noted by the clerk in the register of action. Richards v. Bradley, 129 Cal. 670; 62 Pac. 316; and see Hinkel v. Donohue, 90 Cal. 389; 27 Pac. 301; Westbay v. Gray, 116 Cal. 660; 48 Pac. 800.

Dismissal by written consent. A complaint, stricken out by consent of both parties, is properly followed by a dismissal of the proceedings. Smith v. Ling, 73 Cal. 72; 14 Pac. 390. Where there is an attorney of record, the written consent that the action be dismissed must come from him or be sanctioned by him, and no stipulation as to the conduct or disposal of the action will be entertained by the court, unless the same is signed or assented to by the attorney of record; the party to the action may appear in his own proper person or by his attorney, but he cannot do both, and if he appears by his attorney, he must be heard through him. Board of Commissioners v. Younger, 29 Cal. 147; 87 Am. Dec. 164. A judgment of dismissal is invalid, where the plaintiff, without the knowledge or consent of his attorney of record, signed and delivered to the defendant's attorney a written stipulation authorizing the dismissal of the action and judgment was entered accordingly. Toy v. Haskell, 128 Cal. 558; 79 Am. St. Rep. 70; 61 Pac. 89.

Dismissal for failure to appear at trial. Upon failure of the plaintiff to appear at the trial, the defendant is not bound to take a dismissal of the action, though he may do so, where he has set up a counterclaim, and he has the right to proceed with the case and have a final judgment entered. Clune v. Quitzow, 125 Cal. 213; 57 Pac. 886. A court should not, under the third subdivision of this section, dismiss an action, in which an issue of fact is joined, for the failure of the plaintiff to

appear at the trial, except upon proof that the plaintiff has had five days' notice of such trial, as prescribed in § 594, post. Estate of Dean, 149 Cal. 487; 87 Pac. 13. Where the plaintiff fails to appear at the time set for trial, a judgment of dismissal of the action for want of prosecution is not an adjudication of the cause upon its merits, and is not a bar to another action for the same cause: not having the elements to constitute a bar to another action, it has not the elements to support a plea in abatement. Pyle v. Piercy, 122 Cal. 383; 55 Pac. 141.

Nonsuit may be granted in what classes of cases. The court has authority to grant a judgment of nonsuit, only in certain cases specified. Hanna v. De Garmo, 140 Cal. 172; 73 Pac. 830. The rules of nonsuit are the same, whether the trial is by the court or by a jury. Freese v. Hibernia Sav. & L. Soc., 139 Cal. 392; 73 Pac. 172; Goldstone v. Merchants' Ice etc. Co., 123 Cal. 625; 56 Pac. 776; Marron v. Marron, 19 Cal. App. 326; 125 Pac. 914. In determining a motion for a nonsuit upon the close of contestant's case, in a will contest, the same rules apply as in civil cases. Estate of Daly, 15 Cal. App. 329; 114 Pac. 787.

Nonsuit, granted at what stage of the action. At common law, it was the right of the plaintiff to take a nonsuit at any time before the jury retired, and this section has not altered the rule. Hancock Ditch Co. v. Bradford, 13 Cal. 637. This section does not give an absolute right to a nonsuit after the case has been submitted and the jury has retired, but the right does exist at any time before such submission and retirement. Brown v. Harter, 18 Cal. 76; Heinlin v. Castro, 22 Cal. 100. A nonsuit can properly be granted after the evidence on both sides is closed (Toulouse v. Pare, 103 Cal. 251; 37 Pac. 146; Geary v. Simmons, 39 Cal. 224; Vanderford v. Foster, 65 Cal. 49; 2 Pac. 736); but this section does not purport to warrant a nonsuit, except upon a motion of the defendant when, upon the trial, the plaintiff fails to prove a sufficient case. Saul v. Moscone, 16 Cal. App. 506; 118 Pac. 452.

Nonsuit for failure to prove cause of action. Where the plaintiff introduces proof enough to make out a prima facie case under his pleading, a motion for a nonsuit, at the close of his case, should be denied. Estate of Daly, 15 Cal. App. 329; 114 Pac. 787. The defendant's motion for a nonsuit is properly denied, where the plaintiff makes out a prima facie case (Creditors' Union v. Lundy, 16 Cal. App. 567; 117 Pac. 624); and also where there is any evidence of a substantial nature, supporting the cause of action alleged in the complaint. McEwen v. Occidental Life Ins. Co., 20 Cal. App. 477; 129 Pac. 598. The case is properly dismissed, where the plaintiff refuses to offer any testimony in support of his complaint (Stewart v. Stewart, 156 Cal. 651; 105 Pac. 955); and nonsuit is properly granted, where no evidence is introduced by him, tending to prove a particular issue material to the case. Sepulveda v. Sepulveda, 128 Cal. 661; 61 Pac. 272. In an action upon a fire-insurance policy, where no breach of the contract evidenced by the policy existed at the time of suit brought, and where the plaintiff introduces the policy in evidence at the trial, the court errs in refusing a motion for a nonsuit at the conclusion of the plaintiff's testimony. Irwin v. Insurance Co., 16 Cal. App. 143; 116 Pac. 294. In an action by a corporation to recover money alleged to have been misappropriated by its president, a nonsuit is properly granted where the misappropriation is not proved. Hercules Oil etc. Co. v. Hocknell, 5 Cal. App. 702; 91 Pac. 341. A motion for a nonsuit should be granted for failure of proof of cause of action alleged, and such motion is not waived by the subsequent introduction of evidence by the defendant, which does not change the status of the case, nor supply any defect in the plaintiff's case, as pointed out on the motion for nonsuit. Elmore v. Elmore, 114 Cal. 516; 46 Pac. 458; Smith v. Compton, 6 Cal. 24; Winans v. Hardenbergh, 8 Cal. 291; Abbey Homestead Ass'n v. Willard, 48 Cal. 614; Higgins v. Ragsdale, 83 Cal. 219; 23 Pac. 316. A nonsuit, in an action for negligence, can be granted only when the facts are undisputed, and are such that but one conclusion can be drawn from them; and the question is one of law for the court. Hanley v. California Bridge etc. Co., 127 Cal. 232; 47 L. R. A. 597; 59 Pac. 577. Where the plaintiff, in an action for personal injuries, was, as a matter of law, guilty of contributory negligence, the court should grant a nonsuit (Payne v. Oakland Traction Co., 15 Cal. App. 127; 113 Pac. 1074); but where the plaintiff's evidence shows a violation of the law of the road, and he is not chargeable, as a matter of law, with contributory negligence, a motion for a nonsuit, at the close of his evidence, is properly denied. McKernan v. Los Angeles Gas etc. Co., 16 Cal. App. 280; 116 Pac. 677. Upon a contest of a will and codicil, executed at different dates, there may be a nonsuit as to either branch of the case, where the evidence is insufficient, and the party in whose favor it is rendered is entitled to a judgment thereon. Estate of Ricks, 160 Cal. 450; 117 Pac. 532. Error in admitting evidence cannot be reviewed on a motion for a nonsuit; and where the evidence admitted substantially tends to prove all the facts essential to the plaintiff's cause of action, the nonsuit is properly denied (O'Connor v. Hooper, 102 Cal. 528; 36 Pac. 939); and a nonsuit is also properly denied,

where the defendant expressly admits that the claim sued on was presented to and rejected by him, and there is evidence sufficient to justify and sustain the demand (Warren v. McGill, 103 Cal. 153; 37 Pac. 144); and a nonsuit should be denied where the evidence, and the presumptions reasonably arising therefrom, are legally sufficient to prove the material allegations of the complaint (Goldstone v. Merchants' Ice etc. Co., 123 Cal. 625; 56 Pac. 776; De Ro v. Cordes, 4 Cal. 117; McKee v. Greene, 31 Cal. 418; Alvarado v. De Celis, 54 Cal. 588; Felton v. Millard, 81 Cal. 540; 21 Pac. 533; 22 Pac. 750; Higgins v. Ragsdale, 83 Cal. 219; 23 Pac. 316); and also where there is any evidence to sustain the plaintiff's case, without passing upon the sufficiency of the evidence (Zilmer v. Gerichten, 111 Cal. 73; 43 Pac. 408; Felton v. Millard, 81 Cal. 540; 21 Pac. 533; 22 Pac. 750); and also where the plaintiff makes out a prima facie case, and there is no material variance between the averments and the proofs. Chapman v. Neary, 115 Cal. 79; 46 Pac. 867. An order granting a nonsuit and dismissing the action, after the cause was submitted upon briefs, but granted before the time for presenting the reply brief expired, is harmless, where, upon the case made, the plaintiff was not entitled to recover. Vincent v. Pacific Grove, 102 Cal. 405; 36 Pac. 773. The court may dismiss the action as to one defendant, where no case is made against him, notwithstanding the action proceeded as between the plaintiff and the other defendants. Rowe v. Simmons, 113 Cal. 688; 45 Pac. 983.

Nonsuit where case is insufficient for jury. Ordinarily, a nonsuit can be granted only in the cases specified by law, and upon motion, but error in taking from the jury the issue of undue influence, in a will contest, is without prejudice, where the contestant totally failed to make out a case, and the defect in his case was incurable. Estate of Higgins, 156 Cal. 257; 104 Pac. 6. To justify the submission of a question of fact to the jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged: it must be such that a rational mind can reasonably draw the conclusion that the fact exists. Janin v. London etc. Bank, 92 Cal. 14; 27 Am. St. Rep. 82; 14 L. R. A. 320; 27 Pac. 1100. A motion for a nonsuit is properly denied, where the evidence entitles the plaintiff to go to the jury on an issue stated (Gilliam v. Brown, 126 Cal. 160; 58 Pac. 466); and also where there is sufficient testimony to justify the court in submitting the facts to the jury. Anderson v. Hinshaw, 110 Cal. 682; 43 Pac. 389. Where it does not appear that the plaintiff failed to prove a sufficient case for the jury, nor that the defendant moved for a judgment of nonsuit, a judgment for the defendant cannot be treated as a judgment of dismissal, under the fifth subdivision of this section. Hancock v. Lopez, 53 Cal. 362. Where the evidence adduced by the plaintiff is not sufficient to justify a verdict in his favor, it is proper for the court, in effect, to grant a nonsuit by refusing to submit special issues to the jury, and to order them discharged. Estate of Morey, 147 Cal. 495; 82 Pac. 57. A motion for a nonsuit should be granted, where a verdict in favor of the plaintiff would be set aside for want of evidence to support it, and, in the absence of a jury, where the evidence is insufficient to support a judgment for the plaintiff (Downing v. Murray, 113 Cal. 455; 45 Pac. 869); and whenever the evidence introduced by the plaintiff so conclusively establishes a defense as that the court might properly grant a new trial in case of a verdict in his favor upon like evidence the court may direct a judgment of nonsuit (Goldstone v. Merchants' Ice etc. Co., 123 Cal. 625; 56 Pac. 776; McQuilken v. Central Pacific R. R. Co., 50 Cal. 7); but not where there is any substantial evidence, which, with the aid of all legitimate inferences favorable to the plaintiff, would support a verdict or finding that the material allegations of the complaint are true (Burr v. United Railroads, 163 Cal. 663; 126 Pac. 873); nor where the plaintiff's evidence would be held sufficient, on appeal, to support a judgment upon a verdict in his favor. Freese v. Hibernia Sav. & L. Soc., 139 Cal. 392; 73 Pac. 172.

Evidence, how considered on motion for nonsuit. The motion for a nonsuit admits the truth of the plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom; and, upon such motion, the evidence should be interpreted most strongly against the defendant. Hanley v. California Bridge etc. Co., 127 Cal. 232; 47 L. R. A. 597; 59 Pac. 577; Goldstone v. Merchants' Ice etc. Co., 123 Cal. 625; 56 Pac. 776; Estate of Ricks, 160 Cal. 450; 117 Pac. 532; Estate of Daly, 15 Cal. App. 329; 114 Pac. 787; Larson v. Larson, 15 Cal. App. 531; 115 Pac. 340; Christenson Lumber Co. v. Buckley, 17 Cal. App. 37; 118 Pac. 466; Marron v. Marron, 19 Cal. App. 326; 125 Pac. 914. A motion for a nonsuit should never be granted, where there is a conflict in the evidence. Pacific Mut. Life Ins. Co. v. Fisher, 109 Cal. 566; 42 Pac. 154. A conflict of evidence as to a fact is a question for the jury: it should not be determined by the court as a matter of law, on motion for a nonsuit. Burr v. United Railroads, 163 Cal. 663; 126 Pac. 873. A motion for a nonsuit should be denied, where there is any substantial evidence tending to prove the plaintiff's case, without passing upon the sufficiency of such

evidence. Marron v. Marron, 19 Cal. App. 326; 125 Pac. 914; Larson v. Larson, 15 Cal. App. 534; 115 Pac. 340. A motion for a nonsuit, directed "to all the causes of action mentioned in the complaint," is not tenable, unless, as to all, there is a failure of evidence. Pacific Vinegar etc. Works v. Smith, 152 Cal. 507; 93 Pac. 85. Where a motion for a nonsuit for want of testimony upon any material fact has been erroneously overruled, and the defendant proceeds and supplies the defect by evidence which he himself introduces, the error is waived. Lowe v. San Francisco etc. Ry. Co., 154 Cal. 573; 98 Pac. 678.

Nature and effect of motion for nonsuit. A motion for a nonsuit admits the truth of all evidence in favor of the plaintiff, together with every inference or presumption legitimately deducible therefrom (Larson v. Larson, 15 Cal. App. 531; 115 Pac. 340; Marron v. Marron, 19 Cal. App. 326; 125 Pac. 914); it is equivalent to a demurrer to the evidence, or an objection that, admitting all of the proved facts to be true, they do not in legal effect operate in favor of the plaintiff, or entitle him to the relief asked for by him. Estate of Daly, 15 Cal. App. 329; 114 Pac. 787. A motion for a nonsuit, to prevent the submission of a case to the jury, presents a question of law for determination by the court (Estate of Daly, 15 Cal. App. 329; 114 Pac. 787); and in a statement on a motion for a new trial after nonsuit, the decision should be specified as an error of law. Donahue v. Gallavan, 43 Cal. 573; McCreery v. Everding, 44 Cal. 284; Toulouse v. Pare, 103 Cal. 251; 37 Pac. 146. A nonsuit as to a certain defendant in a consolidated action does not affect the default of a party, previously entered, nor the right to judgment authorized by such default. Kennedy & Shaw Lumber Co. v. Dusenbery, 116 Cal. 124; 47 Pac. 1008.

Question of variance, how raised. Variance may be taken advantage of either by objecting to the admissibility of the evidence or by motion for a nonsuit; and the defendant is not precluded from moving for a nonsuit on the ground of variance by reason of his failure to object to the admissibility of the evidence. Elmore v. Elmore, 114 Cal. 516; 46 Pac. 458; Farmer v. Cram, 7 Cal. 135; Tomlinson v. Monroe, 41 Cal. 94; Johnson v. Moss, 45 Cal. 515. The motion for nonsuit is the proper method by which to raise the question of variance between the pleadings and the proof. Elmore v. Elmore, 114 Cal. 516; 46 Pac. 458.

Insufficiency of complaint no ground for nonsuit. It is not a ground for nonsuit, that the complaint does not state a cause of action. Keefe v. Keefe, 19 Cal. App. 310; 125 Pac. 929.

Nonsuit before referee. A plaintiff can voluntarily submit to a nonsuit before a referee, where no counterclaim is set up by the defendant. Plant v. Fleming, 20 Cal. 92.

Costs in case of nonsuit. The court is justified in ordering the plaintiff to pay jury fees, where he is nonsuited upon a trial before a jury. Fairchild v. King, 102 Cal. 320; 36 Pac. 649; Lukes v. Logan, 66 Cal. 33; 4 Pac. 883.

Findings unnecessary in case of nonsuit. Findings of fact and conclusions of law are not required, where the plaintiff is nonsuited at the trial. Gilson Quartz Mining Co. v. Gilson, 47 Cal. 597; Reynolds v. Brumagim, 54 Cal. 254; Harney v. McLeran, 66 Cal. 34; 4 Pac. 884; Toulouse v. Pare, 103 Cal. 251; 37 Pac. 146; Kennedy & Shaw Lumber Co. v. Dusenbery, 116 Cal. 124; 47 Pac. 1008.

Motion for nonsuit, necessity for. The court's summary dismissal of an action, at the conclusion of the evidence for both parties, without any motion by the defendant for a nonsuit, is not a dismissal authorized under the fifth subdivision of this section. Saul v. Moscone, 16 Cal. App. 506; 118 Pac. 452.

Motion for nonsuit, requisites of. A motion for a nonsuit should specify the grounds upon which it is made: ordinarily, a ground not stated cannot be considered. Kiler v. Kimbal, 10 Cal. 267; Holverstot v. Bugby, 13 Cal. 43; Baker v. Joseph, 16 Cal. 173; Sanchez v. Neary, 41 Cal. 485; Raimond v. Eldridge, 43 Cal. 506; Silva v. Holland, 74 Cal. 530; 16 Pac. 385; Loring v. Stuart, 79 Cal. 200; 21 Pac. 651; Miller v. Luco, 80 Cal. 257; 22 Pac. 195; Daley v. Russ, 86 Cal. 114; 24 Pac. 867; Palmer v. Marysville Democrat Pub. Co., 90 Cal. 168; 27 Pac. 21; Fontana v. Pacific Can Co., 129 Cal. 51; 61 Pac. 580; Durfee v. Seale, 139 Cal. 603; 73 Pac. 435; Stanton v. Carnahan, 15 Cal. App. 527; 115 Pac. 339; Coghlan v. Quartararo, 15 Cal. App. 662; 115 Pac. 664; Christensen Lumber Co. v. Buckley, 17 Cal. App. 37; 118 Pac. 466; Sebring v. Harris, 20 Cal. App. 56; 128 Pac. 7. The reason for the rule that a motion for a nonsuit should state the grounds therefor is to afford to the plaintiff an opportunity to correct any defects of pleading or of proof; but the rule does not apply where the defects could not have been remedied, even if specially pointed out: in such a case it is immaterial that the grounds are not specified (Christensen Lumber Co. v. Buckley, 17 Cal. App. 37; 118 Pac. 466); nor does the rule apply, where the case is one that cannot be cured, although attention is specifically called to the defects (Fontana v. Pacific Can Co., 129 Cal. 51; 61 Pac. 580; Daley v. Russ, 86 Cal. 114; 24 Pac. 867); and where the defects do not admit of correction, error in not specifying the grounds of the motion is immaterial. Daley

v. Russ, 86 Cal. 114; 24 Pac. 867; Nightingale v. Scannell, 18 Cal. 315.

Dismissal for failure to enter judgment within six months. The old sixth subdivision of this section, which provided that an action might be dismissed where judgment was not entered within six months after its rendition, was not mandatory (Rickey Land etc. Co. v. Glader, 153 Cal. 179; 94 Pac. 768; Hall v. Justice's Court, 5 Cal. App. 133; 89 Pac. 870); and the court, in its discretion, could grant or deny a motion to dismiss an action for the cause therein mentioned, without its action being disturbed on appeal, except for abuse of discretion. Neihaus v. Morgan, 5 Cal. Unrep. 391; 45 Pac. 255; Rosenthal v. McMann, 93 Cal. 505; 29 Pac. 121; Estate of McDevitt, 95 Cal. 17; 30 Pac. 101; Jones v. Chalfant, 3 Cal. Unrep. 585; 31 Pac. 257; Marshall v. Taylor, 97 Cal. 422; 32 Pac. 515; Fitzhugh v. Mason, 2 Cal. App. 220; 83 Pac. 282. Even had the sixth subdivision been mandatory, it could not authorize the dismissal of an action, where no neglect on the part of the plaintiff was shown. Marshall v. Taylor, 97 Cal. 422; 32 Pac. 515; and see Rosenthal v. McMann, 93 Cal. 505; 29 Pac. 121. The rule was, that where the court had actually rendered judgment, but it was not entered on the record, whether in consequence of the neglect of the court or the neglect or misprision of the clerk, an order could be made that the judgment rendered be entered nunc pro tunc, after the expiration of six months. Marshall v. Taylor, 97 Cal. 422; 32 Pac. 515. Where the failure to enter judgment for more than six months was the result of the negligence of the clerk, the defendant, on receiving the verdict, having handed it to the clerk and requested its entry, a motion to set aside the verdict and decision could be denied. Jones v. Chalfant, 3 Cal. Unrep. 585; 31 Pac. 257. A party was not guilty of negligence, where he requested the clerk to make the entry of judgment, and paid the fees therefor, and the clerk promised to make the entry, and the party supposed the judgment had been entered, although he did not enter his request in an order-book, as was customary, but not required by law. Gardner v. Tatum, 77 Cal. 458. The court did not lose jurisdiction of a cause by a failure to enter the judgment within the time prescribed, or by failure of the clerk to perform his duty. Waters v. Dumas, 75 Cal. 563; 17 Pac. 685. Where the cause was tried by the court, and submitted by both parties for a decision on the merits, the court could not, in deciding the case, order that a nonsuit be granted, and the action dismissed, on the ground that the defendant had neglected to demand and have a nonsuit entered for more than six months. San José Ranch Co. v. San José Land etc. Co., 126 Cal. 322; 58 Pac. 824. A judgment of dismissal, under the sixth subdivision, could be reversed, where the court abused its discretion in granting the motion to dismiss. Rickey Land etc. Co. v. Glader, 153 Cal. 179; 94 Pac. 768. A defendant who failed to demand a nonsuit was not in default, although he could obtain it; it was his privilege and right to demand, instead, a judgment on the merits, and whether the neglect was such as to justify a dismissal was subject to review on appeal. San José Ranch Co. v. San José Land etc. Co., 126 Cal. 322; 58 Pac. 824.

Dismissal for failure to issue and serve summons. Prior to the addition of the seventh subdivision to this section in 1889, (the present § 581a, post,) service was required to be made within a reasonable time; and where not so made, it was ground for a dismissal of the action. Murray v. Gleeson, 100 Cal. 511; 35 Pac. 88; and see Carpentier v. Minturn, 39 Cal. 450; Eldridge v. Kay, 45 Cal. 49; Lander v. Flemming, 47 Cal. 614; Diggins v. Thornton, 96 Cal. 417; 31 Pac. 289. By the addition of this subdivision, it was intended to prevent the indefinite extension of the life of an obligation, in spite of the statute of limitations, by simply commencing an action. Davis v. Hart, 123 Cal. 384; 55 Pac. 1060. The subdivision is in no sense prohibitory of the power of the court to dismiss the action: it does not limit, but enlarges, the power of the court; and the discretion of the court remains as before. Kreiss v. Hotaling, 99 Cal. 383; 33 Pac. 1125. Before the addition of this subdivision, the power to dismiss an action for the causes named was wholly discretionary; now it is compulsory, where the summons is not issued within one year and served within three years. Stanley v. Gillen, 119 Cal. 176; 51 Pac. 183; Ferris v. Wood, 144 Cal. 426; 77 Pac. 1037; First Nat. Bank v. Nason, 115 Cal. 626; 47 Pac. 595. The defendant's right to dismiss an action is absolute, where the summons is not served and returned within three years, and where no appearance is made, except to demand the dismissal. Sharpstein v. Eells, 132 Cal. 507; 64 Pac. 1080. The legislative will, in this addition, is comprehensively expressed, and the prohibition therein is absolutely imperative. Davis v. Hart, 123 Cal. 384; 55 Pac. 1060. The amendment is very sweeping, and is made expressly applicable to pending suits, and is mandatory and absolute (Vrooman v. Li Po Tai, 113 Cal. 302; 45 Pac. 470; White v. Superior Court, 126 Cal. 245; 58 Pac. 450; and see Grant v. McArthur, 137 Cal. 270; 70 Pac. 88); but it is not applicable to actions which have gone to judgment, nor where service was actually made, and judgment rendered within a year after

the commencement of the action, though there was no return of service. Jones v. Gunn, 149 Cal. 687; 87 Pac. 577. The declaration, that "no further proceedings shall be had therein," is a statutory prohibition against any further proceedings; and if the court act in disregard thereof, it is acting without jurisdiction. Modoc Land etc. Co. v. Superior Court, 128 Cal. 255; 60 Pac. 848; and see White v. Superior Court, 126 Cal. 245; 58 Pac. 450. The amendment of 1895 to the seventh subdivision was intended to make the legislative intent free from ambiguity in reference to the duty of the court to dismiss an action, where the summons was not served and return made thereon within three years after the commencement of the action. Sharpstein v. Eells, 132 Cal. 507; 64 Pac. 1080; and see Vrooman v. Li Po Tai, 113 Cal. 302; 45 Pac. 470; Davis v. Hart, 123 Cal. 384; 55 Pac. 1060; Cooper v. Gordon, 125 Cal. 296; 57 Pac. 1006; White v. Superior Court, 126 Cal. 245; 58 Pac. 450; Modoc Land etc. Co. v. Superior Court, 128 Cal. 255; 60 Pac. 848. It is now compulsory on the court to dismiss the action, where the summons is not served within three years; in other cases there is no fixed rule as to dismissal for want of prosecution, and the power to dismiss an action on the ground of unnecessary delay in serving summons is still in the discretion of the court, subject to reversal for abuse of such discretion. Ferris v. Wood, 144 Cal. 426; 77 Pac. 1037; and see First Nat. Bank v. Nason, 115 Cal. 626; 47 Pac. 595; Stanley v. Gillen, 119 Cal. 176; 51 Pac. 183. The seventh subdivision is not to be construed as meaning that the plaintiff may have the full time limited thereby in all cases: it is still discretionary with the court to dismiss, even though summons is issued and served within the time limited. Stanley v. Gillen, 119 Cal. 176; 51 Pac. 183; and see First Nat. Bank v. Nason, 115 Cal. 626; 47 Pac. 595. The discretion of the court in dismissing an action on any ground, other than where the summons is not served within three years, in which case the court is without discretion, is not a capricious or arbitrary, but an impartial, discretion, guided and controlled, in its exercise, by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. Bailey v. Taaffe, 29 Cal. 422; First Nat. Bank v. Nason, 115 Cal. 626; 47 Pac. 595; Ferris v. Wood, 144 Cal. 426; 77 Pac. 1037. A delay in serving the summons, reasonably accounted for as an excuse, is not ground for dismissing the action for unreasonable delay in obtaining service. Ferris v. Wood, 144 Cal. 426; 77 Pac. 1037. The court has power to dismiss, where there has been an inexcusable delay in serving the summons, although service is had within three years after the filing of the complaint (Castro v. San Francisco, 4 Cal. Unrep. 500; 35 Pac. 1035); and where the plaintiff, in a contest for the purchase of state school-land, fails to serve and return the summons for the period of three years after the commencement of the action, the court has power, of its own motion, to dismiss the contest. Darlington v. Butler, 3 Cal. App. 448; 86 Pac. 194. Whether there has been excusable delay within the term of three years, is a question within the discretion of the court: each case must be determined upon its own peculiar circumstances. Castro v. San Francisco, 4 Cal. Unrep. 500; 35 Pac. 1035; and see Kreiss v. Hotaling, 99 Cal. 383; 33 Pac. 1125; Murray v. Gleeson, 100 Cal. 511; 35 Pac. 88. The successor in interest of a deceased defendant, upon whom summons was served as successor in interest of such defendant, has such an interest as authorizes him to make a motion to set aside a void decree entered upon such service, and for dismissal of the action for want of prosecution. Fanning v. Foley, 99 Cal. 336; 33 Pac. 1098. Where the record affirmatively shows that the summons was regularly served by publication within three years, jurisdictional recitals in the judgment must be taken, on collateral attack, as true, unless the record affirmatively shows that the facts upon which they are based are insufficient to sustain them. Sacramento Bank v. Montgomery, 146 Cal. 745; 81 Pac. 138. The original words, in the seventh subdivision, "and served, and return thereon made," referred to the summons, and those of the amendment of 1895, "and all such actions shall be in like manner dismissed, unless the summons shall be served and return thereon made," refer to the summons and also the action. Sharpstein v. Eells, 132 Cal. 507; 64 Pac. 1080.

Dismissal for want of prosecution. The trial court has power to dismiss an action for want of prosecution (Pardy v. Montgomery, 77 Cal. 326; 19 Pac. 530), and to dismiss a pending action, on the ground that it has not been diligently prosecuted (Gray v. Times-Mirror Co., 11 Cal. App. 155; 104 Pac. 481); and where there is no counter-showing, except that of the pleadings, it cannot be said, on appeal, that the court abused its discretion in dismissing the action. Davis v. Clark, 126 Cal. 232; 58 Pac. 542; Mowry v. Weisenborn, 137 Cal. 110; 69 Pac. 971. The motion to dismiss for want of prosecution is addressed to the discretion of the court; and its action will not be disturbed, except for an abuse of discretion. Vestal v. Young, 147 Cal. 715; 82 Pac. 381. All presumptions are against an abuse of discretion in vacating a former judgment or order on

the ground of excusable neglect (Moore v. Thompson, 138 Cal. 23; 70 Pac. 930); and there being no showing to the contrary, it must be presumed that the court, in dismissing the action for want of prosecution, exercised its power properly, and within the rules prescribed by law. Pardy v. Montgomery, 77 Cal. 326; 19 Pac. 530. Where the defendant entered into a stipulation with the plaintiff, in effect admitting all the allegations of the complaint, he is estopped from urging the objection that the plaintiff has neglected to prosecute the action with due diligence. Cooper v. Gordon, 125 Cal. 296; 57 Pac. 1006. The dismissal of an action of quo warranto for want of prosecution is not a bar to another action of the same kind against the same defendants. People v. Jefferds, 126 Cal. 296; 58 Pac. 704. The court has power, independently of this section, to dismiss an action for want of prosecution: the maxim, Expressio unius exclusio alterius est, cannot be invoked against the existence of such independent power. People v. Jefferds, 126 Cal. 296; 58 Pac. 704; Hassey v. South San Francisco Homestead etc. Ass'n, 102 Cal. 611; 36 Pac. 945.

Prosecution of action, where defendant appears within three years. The seventh subdivision of this section (the present § 581a, post) authorizes a dismissal as to those defendants who do not appear, and a prosecution of the action against those who do appear, whenever the court would be authorized to render a judgment against them in the absence of other defendants. Peck v. Agnew, 126 Cal. 607; 59 Pac. 125. A defendant may waive the provisions of the seventh subdivision in regard to the time for his appearance. Cooper v. Gordon, 125 Cal. 296; 57 Pac. 1006; and see Pacific Paving Co. v. Vizelich, 141 Cal. 4; 74 Pac. 352. The original defendant's appearance at any time within three years from the commencement of the action gives jurisdiction of his person, and is equivalent to personal service of the summons and copy of the complaint upon him within that period. Hibernia Sav. & L. Soc. v. Cochran, 141 Cal. 653; 75 Pac. 315. An appearance by a personal representative, within three years, obviates the necessity of service of summons: the court then exercises jurisdiction with the same effect as if the party were brought in by service of summons. Union Sav. Bank v. Barrett, 132 Cal. 453; 64 Pac. 713, 1071. A judgment of dismissal is properly vacated, where a stipulation was entered into between the parties, in lieu of an answer, containing a consent to entry of appearance of the defendant and entry of judgment. Cooper v. Gordon, 125 Cal. 296; 57 Pac. 1006; and see Pacific Paving Co. v. Vizelich, 141 Cal. 4; 74 Pac. 352. A stipulation, entered into by the defendant, admitting all the allegations of the complaint, and consenting to judgment against him, although not filed until after the case was dismissed, binds the parties, and is a basis of relief to a person injured by trusting to it (Cooper v. Gordon, 125 Cal. 296; 57 Pac. 1006); and, even though not filed, a stipulation giving the defendant time in which to plead constitutes a virtual appearance of the defendant, and is sufficient to preclude him from restraining the court from further proceedings. Roth v. Superior Court, 147 Cal. 604; 82 Pac. 246. A stipulation for an appearance, not within three years after the commencement of action, cannot be considered as an appearance. Grant v. McArthur, 137 Cal. 270; 70 Pac. 88. Verbal requests by the defendant for delay in service of summons, and verbal authority given by him to the plaintiff to enter judgment at any time without further service of papers, do not constitute an appearance in the action, nor a power of attorney to confess judgment. Siskiyou County Bank v. Hoyt, 132 Cal. 81; 64 Pac. 118. A judgment of dismissal will be modified on appeal, where the defendants who have appeared in the action are included, and an order of dismissal as to such defendants will be vacated. Peck v. Agnew, 126 Cal. 607; 59 Pac. 125.

How long jurisdiction continues. The mere pendency of a motion to dismiss cannot operate as a dismissal, nor divest the court of jurisdiction to decide the motion. Boca etc. R. R. Co. v. Superior Court, 150 Cal. 153; 88 Pac. 718. Control of the court to allow alimony and counsel fees, pendente lite, in an action for divorce, is not lost until judgment of dismissal is entered (Page v. Page, 77 Cal. 83; 19 Pac. 183); and orders in relation to alimony and counsel fees, are not void, and cannot be annulled on certiorari, where made after entry of dismissal, but before the judgment of dismissal was entered in the judgment-book (Page v. Superior Court, 76 Cal. 372; 18 Pac. 385); but these decisions were rendered before the amendment of this section in 1897, and the entry of the dismissal in the clerk's register is now sufficient. Hopkins v. Superior Court, 136 Cal. 552; 69 Pac. 299; and see Kaufman v. Superior Court, 115 Cal. 152; 46 Pac. 904.

Doctrine of relation. The judgment relates to the date of the legal demand for the dismissal of the action, where necessary to preserve the substantial rights of the parties. Kaufman v. Superior Court, 115 Cal. 152; 46 Pac. 904.

Absence of notice of motions. Where issues of fact tendered by a complaint in intervention are undetermined, an order, without notice, dismissing the action as to the interveners, where notice is not waived, is unauthorized. Townsend v. Driver, 5 Cal. App. 581; 90 Pac. 1061.

Where counsel for each of the parties are present at the hearing of a motion to vacate a judgment, and contest the same, there is a waiver of notice of the motion. Acock v. Halsey, 90 Cal. 215; 27 Pac. 193; and see McLeran v. Shartzer, 5 Cal. 70; 63 Am. Dec. 84; Reynolds v. Harris, 14 Cal. 667; 76 Am. Dec. 459.

Motion to dismiss, when improper. A motion to dismiss on the ground that the answer is sufficient to bar a recovery, is improper procedure. Forrester v. Lawler, 14 Cal. App. 170; 111 Pac. 284.

Defendant may ask dismissal. A defendant may employ counsel to take steps to bring about the dismissal of an action, without entering a general appearance. Caffey v. Mann, 3 Cal. App. 124; 84 Pac. 424.

Right of defendant to counsel fees. The right of the defendant to counsel fees, upon the dismissal of an action for slander, is not limited to a dismissal for a failure of the plaintiff to file a bond for costs. Caffey v. Mann, 3 Cal. App. 124; 84 Pac. 424.

Power of court over dismissals. The court may summarily vacate a void judgment of dismissal. Acock v. Halsey, 90 Cal. 215; 27 Pac. 193. In the absence of any showing to the contrary, it will be presumed that a judgment of dismissal was made on some good ground, and that, in ordering it, the court properly exercised its power in conformity with the rules of law (Woods v. Diepenbrock, 141 Cal. 55; 74 Pac. 546); and a judgment is proper, where, upon an issue of law involving the sufficiency of the complaint, the demurrer was sustained, and the plaintiff refused to amend (Saddlemire v. Stockton Sav. & L. Soc., 144 Cal. 650; 79 Pac. 381); but a motion to dismiss is not authorized by this section, where neither party was entitled to demand entry of judgment at any time before the motion was made. Neihaus v. Morgan, 5 Cal. Unrep. 391; 45 Pac. 255. An order of dismissal, entered by the clerk in the register, is completely annulled by a subsequent order of the court vacating it (Wolters v. Rossi, 126 Cal. 644; 59 Pac. 143); and an order refusing to vacate a judgment of dismissal for want of findings is not appealable. Estate of Gregory, 122 Cal. 483; 55 Pac. 144. The court is not precluded from exercising its discretion, on motion to dismiss, because it had, shortly before the motion was made, given the plaintiff leave to amend. San José Land etc. Co. v. Allen, 129 Cal. 247; 61 Pac. 1083. The power to dismiss an action was first exercised by courts of equity; but, for a long period, courts of law have exercised the authority as part of their inherent powers; and the same rules now apply to a dismissal either at law or in equity, under code procedure. People v. Jefferds, 126 Cal. 296; 58 Pac. 704.

Dismissal or nonsuit as bar. A judgment of dismissal, given upon motion of the plaintiff, before the hearing or trial of any issue of law or fact, and without any determination of the merits of the cause, is no bar to a subsequent suit in any court upon the same cause of action. Carr v. Howell, 154 Cal. 372; 97 Pac. 885. A wife's dismissal of her action for a divorce, without the consent, or even knowledge, of the defendant, and without consideration of any kind from him to her, is not a bar to a subsequent action concerning the matters involved therein. Clopton v. Clopton, 162 Cal. 27; 121 Pac. 720. Where a case has been removed from a state to a Federal court, the plaintiff's voluntary dismissal of his action, while a demurrer to the complaint is pending and undecided, is not a bar to a subsequent action in the state court upon the same cause of action. Carr v. Howell, 154 Cal. 372; 97 Pac. 885. A nonsuit suffered for any cause is not a bar to a suit subsequently brought on the same cause of action. San Francisco v. Brown, 153 Cal. 644; 96 Pac. 281. A nonsuit does not operate as a bar: a judgment, to operate as such, must be one rendered upon the merits, or must amount to a retraxit, as known in suits at common law, which is an open and voluntary renunciation of the plaintiff's suit in court, the plaintiff not being at liberty afterwards to renew it. Merritt v. Campbell, 47 Cal. 542; Hubbard v. Superior Court, 9 Cal. App. 166; 98 Pac. 394. A dismissal of the first action is not a bar to a second, nor a judgment on the merits, except where the judgment is, in effect, a retraxit. Westbay v. Gray, 116 Cal. 660; 48 Pac. 800; Hibernia Sav. & L. Soc. v. Portener, 139 Cal. 90; 72 Pac. 716; Merritt v. Campbell, 47 Cal. 542; Crossman v. Davis, 79 Cal. 603; 21 Pac. 963; Rosenthal v. McMann, 93 Cal. 505; 29 Pac. 121. A judgment of dismissal, rendered upon the oral agreement of the parties, in open court, with a stipulation that each party pay his own costs, is a bar to another suit upon the same cause of action. Merritt v. Campbell, 47 Cal. 542.

Dismissal as final judgment. A judgment, although termed a dismissal, which is in fact a final decision of the case, and not a mere order of nonsuit or dismissal made in accordance with the provisions of this section, will be treated as a final judgment. Saul v. Moscone, 16 Cal. App. 506; 118 Pac. 452.

Mandamus. Mandamus will issue to compel the court to try a case attempted to be dismissed by the plaintiff, where affirmative relief is sought by the answer. Clark v. Hundley, 65 Cal. 96; 3 Pac. 131. Where the plaintiff moves for a dismissal at his costs, and the motion is resisted by the defendant and denied by the court,

mandamus will not issue, commanding the judge to enter a judgment of dismissal, when the act to be done is judicial and discretionary. People v. Pratt, 28 Cal. 166; 87 Am. Dec. 110; People v. Sexton, 24 Cal. 79.

Prohibition. Prohibition is the appropriate remedy to prevent a stay of proceedings, where the court refuses to order the entry of dismissal until the plaintiff shall have paid the costs. Hopkins v. Superior Court, 136 Cal. 552; 69 Pac. 299. Prohibition will issue to restrain the court from proceeding with an action, where the plaintiff has dismissed it, and the court subsequently sets aside the order of dismissal and threatens further proceedings (Kaufman v. Superior Court, 115 Cal. 152; 46 Pac. 904); and prohibition will issue to restrain the court from proceeding with the trial of a cause, three years after the subsequent commencement of the action, where a motion to dismiss had been made. Modoc Land etc. Co. v. Superior Court, 128 Cal. 255; 60 Pac. 848.

New trial. The question presented on a motion for a nonsuit is a question of law, and in a statement on a motion for a new trial, after nonsuit, the decision should be specified as an error of law. Donahue v. Gallavan, 43 Cal. 573; McCreery v. Everding, 44 Cal. 284; Toulouse v. Pare, 103 Cal. 251; 37 Pac. 146.

Appeal. Where an action is improperly dismissed by the plaintiff, the defendant's remedy is by appeal from the judgment, and not by motion to set it aside. Higgins v. Mahoney, 50 Cal. 444; Westbay v. Gray, 116 Cal. 660; 48 Pac. 800. The appellate court will not go beyond the inquiry, whether or not the discretion of the trial court in dismissing the action has been abused. Hassey v. South San Francisco Homestead etc. Ass'n, 102 Cal. 611; 36 Pac. 945; People v. Jefferds, 126 Cal. 296; 58 Pac. 704; Nicol v. San Francisco, 130 Cal. 288; 62 Pac. 513; Martin v. San Francisco, 131 Cal. 575; 63 Pac. 913; Kennedy v. Mulligan, 136 Cal. 556; 69 Pac. 291; and see Grigsby v. Napa County, 36 Cal. 585; 95 Am. Dec. 213; Chipman v. Hibberd, 47 Cal. 638; Lander v. Flemming, 47 Cal. 614; Simmons v. Keller, 50 Cal. 38; Kornahrens v. His Creditors, 64 Cal. 492; 3 Pac. 126; Saville v. Frisbie, 70 Cal. 87; 11 Pac. 502; Pardy v. Montgomery, 77 Cal. 326; 19 Pac. 530; Kubli v. Hawkett, 89 Cal. 638; 27 Pac. 57. The order granting a nonsuit, unless excepted to and assigned as error, cannot be assailed on appeal (Toulouse v. Pare, 103 Cal. 251; 37 Pac. 146; Hanna v. De Garmo, 140 Cal. 172; 73 Pac. 830); and the bill of exceptions or statement must affirmatively show that the ruling assigned as error actually took place at the trial and was excepted to. Hanna v. De Garmo, 140 Cal. 172; 73 Pac. 830; Flashner v. Waldron, 86 Cal. 211; 24 Pac. 1063; Warner v. Darrow, 91 Cal. 309; 27 Pac. 737; Malone v. Beardsley, 92 Cal. 150; 28 Pac. 218; Craig v. Hesperia Land etc. Co., 107 Cal. 675; 40 Pac. 1057. Where prohibition to a justice's court is denied, the parties cannot, by stipulation, limit the inquiry on appeal to the moot question, not arising upon the record, whether this section applies to justice's courts. Hubbard v. Justices' Court, 5 Cal. App. 90; 89 Pac. 865. It must be presumed, on appeal, in favor of a judgment of nonsuit, that a motion therefor was regularly made and granted by the court. Hanna v. De Garmo, 140 Cal. 172; 73 Pac. 830.

Dismissal for failure to make return of summons. See note post, § 581a.

Questions on appeal as to dismissals and nonsuits. See note post, § 963.

Compulsory granting of nonsuit. See note 24 Am. Dec. 620.

Effect of nonsuit as res adjudicata. See note 49 Am. St. Rep. 831.

What constitutes "final submission" of cause so as to preclude voluntary dismissal. See note 4 Ann. Cas. 510.

Right of complainant to dismiss bill in equity without order of court. See note 5 Ann. Cas. 850.

Dismissal of action by agreement as res adjudicata. See note 13 Ann. Cas. 655.

Dismissal of action by co-plaintiff. See note 20 Ann. Cas. 1005.

Right of plaintiff to take voluntary nonsuit or dismissal after verdict or finding but before judgment. See note Ann. Cas. 1913D, 525.

Power of court to protect attorney who has taken case on contingent fee, against voluntary dismissal by claimant without his consent. See note 14 L. R. A. (N. S.) 1095.

Jurisdiction of court to enter final judgment upon dismissal. See note 26 L. R. A. (N. S.) 914.

Right of plaintiff to take a nonsuit where the defendant has interposed a counterclaim entitling him to affirmative relief, where right to such dismissal is not defined or denied by statute. See note 15 L. R. A. (N. S.) 340.

CODE COMMISSIONERS' NOTE. 1. By the plaintiff. Plaintiff may take a nonsuit at any time before the jury retires, if a counterclaim has not been made. Hancock Ditch Co. v. Bradford, 13 Cal. 637; Brown v. Harter, 18 Cal. 76. Plaintiff has not the absolute right to dismiss or take a nonsuit after the case has been finally submitted and the jury has retired. Brown v. Harter, 18 Cal. 76. Nor has the court any authority to enter an order of dismissal without the consent of defendant. Heinlin v. Castro, 22 Cal. 101. C., one of four defendants in ejectment, moved to transfer the action to a United States court, on the ground of his alienage, and an order was made, staying all proceedings until the motion could be heard. Before the hearing of the motion, plaintiff dismissed the action as to C. and one other defendant, and took judgment against the other two, who had made default. C. afterwards insisted upon his motion, and filed affidavits tending to show that the defaulting defendants were occupying the premises as his tenants, and were colluding with the plaintiff. The motion was denied, and C. having appealed from that order and from the judgment, it was held that the motion was properly denied. Reed v. Calderwood, 22 Cal. 463. In an action of ejectment against several defendants, the plaintiff may, before trial, dismiss the action as to some of the defendants, and proceed against the others. Id.; Dimick v. Deringer, 32 Cal. 488. In an action upon a joint and several bond, where all the obligors are made defendants, the plaintiff may go to trial, if he elects so to do, before all the defendants are served, and may dismiss as to some of the defendants, and take judgment

against the others. People v. Evans, 29 Cal. 429. The defendant, in his answer, set up a cross demand, and proved affirmative relief. Afterwards a stipulation, signed by the attorneys of the parties, was filed, whereby it was provided that upon the trial of the cause an account might be taken of the matter thus set up; that the stipulation should be regarded as a compromise of the counterclaim; and that the counterclaim should be deemed stricken from the answer. It was held, that, on this state of the record, the clerk was not required nor authorized by § 148 of the Practice Act, in the absence of any direction from the court or counsel of the defendant, to enter an order upon request of plaintiff dismissing the action. The construction of the pleadings and stipulation, and determination of the rights of the parties with respect to the counterclaim under them, required the exercise of judicial functions. People v. Loewy, 29 Cal. 264. Plaintiff is not bound to tender costs; the provisions subject him only to the liability. Hancock Ditch Co. v. Bradford, 13 Cal. 637.

2. **Upon written consent.** If a plaintiff, who has appeared by attorney, afterwards stipulates in writing that the action may be dismissed, the court should not make the order of dismissal, unless the attorney of record assents to the same. Board of Commissioners v. Younger, 29 Cal. 147; 87 Am. Dec. 164.

3. **When the plaintiff fails to appear.** When the plaintiff fails to appear on the trial, and the defendant appears and moves for a dismissal or nonsuit, the court must grant the motion. Peralta v. Mariea, 3 Cal. 185.

4. **When, upon the trial, the plaintiff fails to prove his case.** The court below is justified in granting a defendant's motion for a nonsuit, in a case where the evidence, if submitted to the jury, would not have supported a verdict for the plaintiff. Geary v. Simmons, 39 Cal. 224; Masten v. Griffen, 33 Cal. 111; Stuart v. Simpson, 1 Wend. 376; Cravens v. Dewey, 13 Cal. 40; Ringgold v. Haven, 1 Cal. 108; Dalrymple v. Hanson, 1 Cal. 125; Mateer v. Brown, 1 Cal. 221; 52 Am. Dec. 303; Ensminger v. McIntire, 23 Cal. 593. But the motion should not be granted, if there is evidence tending to prove all the material allegations of the complaint. McKee v. Greene, 31 Cal. 418; Ringgold v. Haven, 1 Cal. 108; De Ro v. Cordes, 4 Cal. 117; Cravens v. Dewey, 13 Cal. 40. The court should, of its own notion, dismiss a case based upon a consideration which contravenes public policy, whether the parties take the objection or not. Valentine v. Stewart, 15 Cal. 387. Plaintiffs may be nonsuited upon the opening statement of their counsel. Hoffman v. Felt, 1 Cal. Unrep. 369. Where, in an action on a verbal contract, several distinct promises, on the part of defendants, were alleged, and were denied by the answer, and on the trial the plaintiff introduced no proof, except as to one of the promises, it was held, that this was ground for nonsuit; that the provisions of the code required a relaxation of the common-law rule respecting a variance, and that it being apparent that defendants were not surprised or prejudiced by the failure of proof, the error in stating the agreement should have been disregarded. Peters v. Foss, 20 Cal. 586. In an action of ejectment, one of several defendants, who, in his answer, disclaims all right, title, and interest in the premises, but also denies all the allegations of the complaint, and avers that "he was and still is lawfully seised and in possession" of the land claimed, is not entitled to have the action dismissed as to himself. Pioche v. Paul, 22 Cal. 105. In an action against four upon a joint contract, the plaintiff adduced no evidence to establish the joint liability of all, and a motion for a nonsuit was made on this ground, but refused by the court, and judgment was rendered against all the defendants jointly. It was held, that the judgment was erroneous; but that the plaintiffs might have discontinued the suit as against those not shown to be liable, and have proceeded to judgment against those whose liability was established, upon such terms and conditions as should appear to be just. Acquital v. Crowell, 1 Cal. 191. If the complaint avers that the defendant brought a false charge against the plaintiff, and threatened to publish the same, and injure his credit, unless he paid a false account, and that by reason of the false charge and threats he paid the same without other consideration, and prays judgment for the money thus paid, the payment of the money without consideration is the gist of the plaintiff's cause of action, and if he fails to offer evidence of the facts tending to show a want of consideration, a nonsuit should be granted. Kohler v. Wells Fargo & Co., 26 Cal. 607. Where, in an action for breach of a verbal contract, there was a slight difference between the statement in the complaint and that in the answer, of the promises on the part of the plaintiff, which were the consideration of defendant's promise, but no issue was raised by the answer as to the performance, by plaintiff, of his promises, and, on the trial, plaintiff rested without proof as to the consideration, it was held, the absence of proof on this point was not ground for a nonsuit. Peters v. Foss, 20 Cal. 586. In an action of ejectment, a nonsuit should be granted as to such defendants as were not in possession of the premises at the commencement of the action. Garner v. Marshall, 9 Cal. 268. In an action of ejectment, upon disclaimer of possession or interest in the property, a judgment for the plaintiff cannot be entered. When such disclaimer is relied upon, the proper judgment is one of nonsuit. Noe v. Card, 14 Cal. 576. In passing upon the correctness of the ruling of the court below in granting a nonsuit, the supreme court will consider as proven every fact which the evidence tended to prove, and which was essential to be proven to entitle the plaintiff to recover. Dow v. Gould etc. Mining Co., 31 Cal. 630.

5. **Referee may grant nonsuit.** The referee, in cases referred to him, takes the place of the judge, and may grant, or the plaintiff may submit to, a nonsuit in a proper case. Plant v. Fleming, 20 Cal. 92.

6. **Discontinuance.** The plaintiff commenced an action of forcible entry and detainer against the defendant, in a justice's court. The justice certified it to the district court. It was held, that the transfer was illegal, and did not defeat the plaintiff's right by operating as a discontinuance. Larue v. Gaskins, 5 Cal. 507. The submission of a cause to arbitration operates as a discontinuance. Gunter v. Sanchez, 1 Cal. 45.

7. **Proceedings on motion for nonsuit or dismissal.** A party moving for a nonsuit must state in his motion the precise grounds upon which he relies, so that the attention of the court and counsel may be directed to the supposed defects in the plaintiff's case. People v. Banvard, 27 Cal. 474; Kiler v. Kimbal, 10 Cal. 267.

8. **Waiver.** Where a defendant, after moving for a nonsuit, introduces evidence supplying the defect in the plaintiff's testimony on which the motion for nonsuit was founded, he thereby waives his motion, and cannot insist upon it on appeal. Ringgold v. Haven, 1 Cal. 108; Smith v. Compton, 6 Cal. 24; Perkins v. Thornburgh, 10 Cal. 189; Winans v. Hardenbergh, 8 Cal. 291. Where plaintiffs, having excepted to the ruling of the court excluding certain evidence, take, in consequence of such ruling, a nonsuit, with leave to move to set it aside, they do not waive any of their rights to the exception taken. Natoma Water etc. Co. v. Clarkin, 14 Cal. 544.

9. **Generally.** Where a complaint disclosed that the same subject-matter had been litigated between the same parties in a prior suit, and that in such suit the plaintiff in this suit had set up the same equity which he claims by this, the action will be ordered to be dismissed. Barnett v. Kilbourne, 3 Cal. 327. Where the complaint in an action on a bill of exchange describes it as payable to the order of A., and the bill offered in evidence is drawn payable to B., it is a variance to be taken advantage of by objecting to the evidence, or by a motion of nonsuit. Farmer v. Cram, 7 Cal. 135. In cases of nonsuit, costs ought not to be taxed, by way of indemnity. Rice v. Leonard, 5 Cal. 61.

§ 581a. Dismissal of action for failure to issue summons when. No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served; provided, that, except in actions to partition or to recover possession of, or to enforce a lien upon, or to determine conflicting claims to, real or personal property, no dismissal shall be had under this section as to any defendant because of the failure to serve summons on him during his absence from the state, or while he has secreted himself within the state to prevent the service of summons on him.

Legislation § 581a. Added by Stats. **1907**, p. 712; the code commissioner saying, "A new section containing the matter in subd. 7 of former § 581, but excepting from its operation those cases in which effective judgment cannot be recovered against a defendant, when the failure to serve process upon him has been due either to his secreting himself within the state, or to absenting himself therefrom to prevent such service."

This section is an amendment of the old seventh subdivision of § 581, ante. See note to that section, ante.

Where defendant secretes himself. Proof that the defendant secreted himself to avoid the service of summons may be made in answer to a motion for dismissal. Wilson v. Leo, 19 Cal. App. 793; 127 Pac. 1043.

Summons must be issued within one year. A defendant, who specially appears in the action and moves for its dismissal on the ground that no summons has been issued within a year after the action was commenced, is entitled, upon the subsequent dismissal by the plaintiff, to one hundred dollars as costs to cover counsel fees. Caffey v. Mann, 3 Cal. App. 124; 84 Pac. 424. Where summons has been issued as against the original defendant within the year, the court may bring in an administrator as a party, and direct the issuance and service on him of summons, more than a year after the commencement of the action, if the time in which an action can be brought against him as personal representative has not expired. Churchill v. Woodworth, 148 Cal. 669; 113 Am. St. Rep. 324; 84 Pac. 155.

Service and return must be made within three years. Summons must be served and return made within three years after the commencement of the action. Bernard v. Parmelee, 6 Cal. App. 537; 92 Pac. 658. Where there is no appearance within the time limited, and no return of summons, the action may be dismissed, although there has been filed an affidavit of service on one of the defendants, and a copy of the summons. Grant v. McArthur, 137 Cal. 270; 70 Pac. 88. It is the duty of the court to dismiss an action, commenced more than five years before the motion for dismissal, and in which no summons has been served, or appearance made by the defendant. McColgan v. Piercy, 17 Cal. App. 160; 118 Pac. 957. The provision requiring a dismissal for a failure to make return of service within three years cannot apply to an action where service was actually made, trial had, and a judgment entered, which has become final, and which was rendered within a year after the commencement of the action. Jones v. Gunn, 149 Cal. 687; 87 Pac. 577.

Court may dismiss within statutory period. While it is the duty of the trial court to dismiss an action, where the summons has not been issued within one year, or served and returned within three years, yet the court still retains the discretionary power to dismiss for undue delay in issuing or serving summons, even though the delay has been for a shorter period than that named in this section. Witter v. Phelps, 163 Cal. 655; 126 Pac. 593. A statutory provision for the dismissal of an action, if summons is not issued nor served within a given period, does not affect the power of the court, in the exercise of its discretion, to dismiss the action for want of prosecution within said period. Bernard v. Parmelee, 6 Cal. App. 537; 92 Pac. 658.

Appearance by defendant. This section does not require that the appearance shall be filed within three years, or within any specified time: the time limited is for the making of an appearance, and appearance is made when written notice of appear-

ance is given to the plaintiff. Anglo-Californian Bank v. Griswold, 153 Cal. 692; 96 Pac. 353. A stipulation, signed by the attorneys for both parties, though not filed, and extending the time to answer, is an "appearance," within this section. Roth v. Superior Court, 147 Cal. 604; 82 Pac. 246. Notice of appearance and consent to judgment are not required to be filed within any particular time: filing is required only for jurisdiction. Anglo-Californian Bank v. Griswold, 153 Cal. 692; 96 Pac. 353. The defendant does not, by demurring and moving for a change of the place of trial, waive his right to have the action dismissed for undue delay in making the service of summons. Witter v. Phelps, 163 Cal. 655; 126 Pac. 593.

§ 581b. Dismissal of actions after transfer. No action heretofore or hereafter commenced, where the same was not originally commenced in the proper county, shall be further prosecuted, and no further proceedings shall be had therein, and all such actions heretofore or hereafter commenced must be dismissed by the court to which the same shall have been transferred, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, where the costs and fees of transmission of the pleadings and papers therein to the clerk or justice of the court to which it is transferred, or of filing the papers anew, have not been paid by the plaintiff for one year after the time when such pleadings or papers shall have arrived in the custody of such clerk or justice. The clerk of such court, or such justice shall, where such court or justice desires to dismiss an action under the provisions of this section, file anew such transferred pleadings and papers without fee.

Legislation § 581b. Added by Stats. **1913**, p. 244.

§ 582. All other judgments are on the merits. In all cases other than those mentioned in the last two sections, judgment must be rendered on the merits.

Legislation § 582. 1. Enacted March 11, **1872**; based on Practice Act, § 149.

2. Amendment by Stats. **1901**, p. 143; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 712, (1) substituting "all" for "every," before "case," and (2) the word "two sections" for "section"; the code commissioner saying, "Amendment rendered necessary by addition of last section to the code."

Judgment on merits, what constitutes. A judgment on the merits is one which determines, either upon an issue of law or of fact, which party is right: a judgment that a party cannot be heard concludes only as to that question. Oakland v. Oakland Water Front Co., 118 Cal. 160; 50 Pac. 277. A judgment on the pleadings is a judgment on the merits. Bailey v. Ætna Indemnity Co., 5 Cal. App. 740; 91 Pac. 416. Before the enactment of §§ 581a, 581b, ante, a judgment of dismissal, not for one of the causes named in § 581, ante, was a judgment upon the merits. Amestoy Estate Co. v. Los Angeles, 5 Cal. App. 273; 90 Pac. 42; Townsend v. Driver, 5 Cal. App. 581; 90 Pac. 1071. It is error to strike out an answer filed in time, but served two days afterwards, and render judgment by default in favor of plaintiff: judgment should be rendered, after trial, on the merits. Lybecker v. Murray, 58 Cal. 186.

Presumptions from judgment on merits. A judgment is presumed to be rendered pursuant to this section, where nonsuit was not taken by the plaintiff before or after verdict, nor the particular cause of action in any manner withdrawn at any stage of the proceedings, nor the judgment without prejudice; and the court is presumed to have passed on all the facts before it, and granted the plaintiff all the relief to which he was entitled, where, having all the facts before it, judgment is rendered on the merits; under such circumstances, the silence of the court as to further relief demanded, but not granted, must be held to be a denial thereof; and the judgment, though erroneous, is conclusive, as to parties and privies, until reversed. Gray v. Dougherty, 25 Cal. 266.

Judgment on pleadings had when. The defendant's right to move for judgment upon the pleadings, where the complaint fails to state a cause of action, is well settled. Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481; 49 Pac. 573; King v. Montgomery, 50 Cal. 115. Judgment on the pleadings is proper, where the complaint warrants the granting of the relief sought, and the answer presents nothing to bar or defeat the action (St. Mary's Hospital v. Perry, 152 Cal. 338; 92 Pac. 864; Zany v. Rawhide Gold Mining Co., 15 Cal. App. 373; 114 Pac. 1026); and also where the defendant's answer, containing no denials of the allegations of the complaint, fails to set out all the facts showing that his alleged causes of action constituted valid counterclaims (Benham v. Connor, 113 Cal. 168; 45 Pac. 258); and also whenever the answer fails to deny any of the ma-

terial allegations of the complaint, in such form as to put the same in issue (Doll v. Good, 38 Cal. 287); and also where no defense is alleged in the answer (Heydenfeldt v. Jacobs, 107 Cal. 373; 40 Pac. 492; Evinger v. Moran, 14 Cal. App. 328; 112 Pac. 68): proof of the averments in the answer would be immaterial, and denials, in such case, are merely matters of law (Heydenfeldt v. Jacobs, 107 Cal. 373; 40 Pac. 492); and the court is not precluded from passing upon a pending motion for judgment upon the pleadings by the fact that it has made an order sustaining a demurrer to the answer, without leave to amend (Le Breton v. Stanley Contracting Co., 15 Cal. App. 429; 114 Pac. 1028); but a motion for judgment on the pleadings should not be granted, where material matters, denied on information and belief, are not presumptively within the knowledge of the defendants (Wickersham v. Comerford, 104 Cal. 494; 38 Pac. 101); and where two sufficient special defenses to an action are improperly commingled, but no objection is taken on that ground, a motion for judgment on the pleadings should be denied, without reference to the sufficiency of the denials of the answer (Eppinger v. Kendrick, 114 Cal. 620; 46 Pac. 613); nor is the plaintiff entitled to judgment on the pleadings, where the answer pleads the statute of limitations, and an estoppel by reason of a former decision between the same parties. Brind v. Gregory, 122 Cal. 480; 55 Pac. 250.

Motion for judgment on pleadings. On a motion for judgment on the pleadings, by the defendant, any matter outside of the complaint, or any defense thereto in the answer, cannot be considered: the motion should be determined as a demurrer to the complaint, upon the same grounds, would be. Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481; 49 Pac. 573. A motion for a judgment on the pleadings, in favor of the plaintiff, is similar in purpose and effect to a demurrer to the answer for insufficiency. Le Breton v. Stanley Contracting Co., 15 Cal. App. 429; 114 Pac. 1028. Where, pending the motion, an amended answer is filed, the motion depends upon the sufficiency of the amended answer. Evinger v. Moran, 14 Cal. App. 328; 112 Pac. 68. It is not necessary, on passing on the motion, to determine the sufficiency of the denials in the original answer, where those in the amended answer are sufficient. Matteucci v. Whelan, 123 Cal. 312; 69 Am. St. Rep. 60; 55 Pac. 990. That facts are not definitely stated in the complaint is unavailing on the motion: there must be an entire absence of some fact or facts essential to constitute a cause of action. Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481; 49 Pac. 573. Pleadings are construed most strongly against the pleader, on a motion for judgment thereon (Benham v. Connor, 113 Cal. 168; 45 Pac. 258); and the truth of the facts alleged in the complaint are admitted for the purposes of the motion of the defendant for judgment upon the pleadings. Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481; 49 Pac. 573; McGowan v. Ford, 107 Cal. 177; 40 Pac. 231.

Effect of erroneous judgment in court of equity. Equity will not set aside a judgment for mere error, of law or fact, in the rendition of judgment. Wickersham v. Comerford, 104 Cal. 494; 38 Pac. 101.

§ 583. Dismissal of actions. The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended.

Legislation § 583. Added by Stats. **1905**, p. 244.

Dismissal for want of prosecution is not on merits. The dismissal of an action for lack of prosecution is without regard to the merits or demerits of the cause of action. Bell v. Solomons, 162 Cal. 105; 121 Pac. 377.

Dismissal without restoration of records. The trial court has jurisdiction to dismiss an action, the record of which has been destroyed; and this power is not dependent upon a restoration of the record. Bell v. Solomons, 162 Cal. 105; 121 Pac. 377.

Effect of stipulation for extension. The failure to bring an action to trial within five years after answer filed does not necessitate its dismissal, where the parties stipulated in writing for the extension. Nathan v. Dierssen, 164 Cal. 607; 130 Pac. 12.

Order dismissing entire case appealable. An order dismissing and disposing of an entire case is a final judgment, and appealable. Dempsey v. Underhill, 156 Cal. 718; 106 Pac. 73.

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

§ 585. In what cases judgment may be had upon failure of defendant to answer.

§ 585. In what cases judgment may be had upon failure of defendant to answer. Judgment may be had, if the defendant fails to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if the defendant has been personally served and no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount demanded in the complaint, including the costs, against the defendant, or against one or more of several defendants, in the cases provided for in section four hundred and fourteen.

2. In other actions, if the defendant has been personally served and no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk must enter the default of the defendant; and thereafter the plaintiff may apply to the court for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account is involved, by a reference as above provided.

3. In all actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer has been filed, apply for judgment; and the court must thereupon require proof to be made of the allegations of the complaint; and if the defendant is not a resident of the state, must require the plaintiff, or his agent, to be examined, on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of any demand mentioned in the complaint, and may render judgment for the amount which he is entitled to recover; provided, that, in all cases affecting the title to or possession of real property, where the service of the summons was by publication and the defendant has failed to answer, no judgment shall be rendered upon proof of mere occupancy, unless such occupancy shall have continued for the time and shall have been of the character necessary to confer title by prescription, and in all cases where the plaintiff bases his claim upon a paper title, the court shall require evidence establishing plaintiff's equitable right to judgment before rendering such judgment; provided, further however, that in actions involving merely the possession of real property where the complaint is verified and shows by proper allegations that no party to the action claims title to the real property involved, either by prescription, accession, transfer, will or succession but only the possession thereof, the court may render judgment upon proof of occupancy by plaintiff and ouster by defendant.

Validity of service of summons. Ante, § 411.
Names, fictitious, amending, etc. Ante, § 474.
Appeal. Post, § 939.
Award, judgment on. Post, § 1286.
Confession, judgment by. Post, §§ 1132 et seq.
Dollars and cents, without fractions, money judgments must be in. Pol. Code, § 3274.
Gold coin, judgment in. Post, § 667.
Judgment.
1. Generally. Docketing, satisfaction, etc. Post, §§ 664–675.
2. Void, etc., setting aside. Ante, § 473.
Objections, waiver of, by not demurring or answering. Ante, § 434.
Pending, action, when. Post, § 1049.
Mandamus, writ of, not granted by default. See post, § 1088.
Default.
1. In action for forcible entry and detainer. See post, § 1169.
2. In justice's court. See post, §§ 871 et seq.
3. In escheat proceedings. See post, § 1271.
4. Divorce not granted by. See Civ. Code, § 130.

Legislation § 585. 1. Enacted March 11, **1872**; based on Practice Act, § 150.

2. Amendment by Stats. **1901**, p. 144; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1905**, p. 42, (1) in subd. 1, substituting "demanded in the prayer of the complaint" for "specified in the summons"; (2) in subd. 2, first sentence, substituting "may apply to the court" for "may apply at the first or any subsequent term of the court."

4. Amended by Stats. **1907**, p. 712, (1) in subd. 1, striking out "prayer of the," in the phrase "demanded in the prayer of the complaint"; (2) substituting "is" for "be," before "involved" (in subd. 2) and before "not a resident" (in subd. 3); the code commissioner saying, "Amendments simply change the verb to the indicative, to conform to the same change elsewhere."

5. Amended by Stats. **1915**, p. 932, (1) at the beginning of subds. 1 and 2, inserting in the phrase "if no answer has been filed," the words "the defendant has been personally served and"; (2) in subd. 3, (a) inserting "all" in the phrase "In all actions," (b) substituting "allegations of the complaint" for "demand mentioned in the complaint," (c) substituting "any demand mentioned in the complaint" for "such demand," and (d) inserting at the end of the subdivision the two provisos.

Answer, what constitutes. A demurrer is an answer, within this section; a defendant does not appear and demur to a complaint until his demurrer is filed. Fletcher v. Maginnis, 136 Cal. 362; 68 Pac. 1015.

Entry of default by clerk. The clerk can enter default, only under the express provisions of this section (Kennedy v. Mulligan, 136 Cal. 556; 69 Pac. 291; Crossman v. Vivienda Water Co., 136 Cal. 571; 69 Pac. 220; Oliphant v. Whitney, 34 Cal. 25), or where the defendant has failed to appear within the time specified in the summons, or within such further time as may be granted. Kennedy v. Mulligan, 136 Cal. 556; 69 Pac. 29; People v. Weil, 53 Cal. 253; Wharton v. Harlan, 68 Cal. 422; 9 Pac. 727. He must, upon the application of the plaintiff, enter default, notwithstanding the service of a pleading if it has not been filed in time (Fletcher v. Maginnis, 136 Cal. 362; 68 Pac. 1015); and he may enter default, where a motion to strike the answer from the files is granted, and the time for pleading to the complaint has expired (Rose v. Lelande, 20 Cal. App. 502; 129 Pac. 599); but he has no authority to enter default, where the court has set aside and vacated the service of summons. Elder v. Grunsky, 127 Cal. 67; 59 Pac. 300. In entering a default he acts ministerially; he has no judicial power to pass upon the sufficiency of an answer. Rose v. Lelande, 20 Cal. App. 502; 129 Pac. 599.

Entry of judgment by clerk upon default. The clerk is a minister or servant of the law, to act where the law orders him to act; then, only, is his action valid. Junkans v. Bergin, 64 Cal. 203; 30 Pac. 627. His authority to enter judgment by default is limited to actions arising upon contracts for the recovery of money or damages only. Shay v. Chicago Clock Co., 111 Cal. 549; 44 Pac. 237; People v. Weil, 53 Cal. 253. No intendments are indulged in support of his acts: what he does must be within the authority conferred upon him by statute. Providence Tool Co. v. Prader, 32 Cal. 634; 91 Am. Dec. 598. He cannot enter a judgment by default in an action for damages for trespass. Shay v. Chicago Clock Co., 111 Cal. 549; 44 Pac. 237. He must ascertain from the complaint that the action is of the kind mentioned in the first subdivision of this section, and he must ascertain when and where the summons was served, and whether the defendant is in default: these acts are ministerial as contradistinguished from judicial acts. Providence Tool Co. v. Prader, 32 Cal. 634; 91 Am. Dec. 598; and see Bond v. Pacheco, 30 Cal. 530; Crossman v. Vivienda Water Co., 136 Cal. 571; 69 Pac. 220; Wharton v. Hanlan, 68 Cal. 422; 9 Pac. 727. His action in estimating and adding the amount of an attorney's fee to the judgment is as properly ministerial as is his calculation of interest upon the principal sum of a note sued on. Alexander v. McDow, 108 Cal. 25; 41 Pac. 24. He may, in an action on a note payable in gold coin, enter a judgment payable in gold coin, if the defendant suffers a default (Harding v. Cowing, 28 Cal. 212); and he may enter a judgment against a defaulting defendant, without at the same time entering a judgment against a co-defendant who has not been served (Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218); and he may enter judgment by default in a joint action against several defendants, only when they have been served and have failed to answer (Junkans v. Bergin, 64 Cal. 203; 30 Pac. 627); and he has power to enter the separate defaults of those defendants who have been served with summons and have not answered, and to enter a joint judgment by default against all of those served, although other of the defendants have not been served; but he has no power to enter a judgment by default against only a part of the defendants who have been served and have not answered (Wharton v. Harlan, 68 Cal. 422; 9 Pac. 727); nor can he

enter judgment for an amount in excess of that called for in the complaint. Alexander v. McDow, 108 Cal. 25; 41 Pac. 24. Excess of power exercised by the clerk, in entering judgment by default, which appears on the face of the record and renders the judgment void, may be set aside upon motion. Crossman v. Vivienda Water Co., 136 Cal. 571; 69 Pac. 220. The provision that the clerk must enter judgment immediately after entering default is merely directory: his failure to do so does not render void a judgment subsequently entered upon such default; nor can the defendant invoke such failure for the purpose of annulling the judgment, to which he has no other defense. Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218.

Judgment, or entry of default, where service is by publication. A judgment by default, where the service of summons was by publication, is not void on its face, where it contains a recital of due service, if there is nothing in the record inconsistent therewith. Howard v. McChesney, 103 Cal. 536; 37 Pac. 523. The entry of a money judgment against a non-resident, upon service of summons by publication, is unauthorized, where there is not shown to be property of such non-resident within this state, upon which the court has jurisdiction to cause its judgment and decrees to operate. Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444; 115 Pac. 58. A publication of summons which omits the notice, that, unless the defendant appears and answers, the plaintiff will apply to the court for the relief demanded in the complaint, does not authorize the clerk to enter the default of the defendant. People v. Weil, 53 Cal. 253.

Service of process, and proof thereof. The court acquires jurisdiction to enter default by service of process, and does not lose jurisdiction by neglecting to make proof of such service a matter of record. Hibernia Sav. & L. Soc. v. Matthai, 116 Cal. 424; 48 Pac. 370; Sichler v. Look, 93 Cal. 600; 29 Pac. 220; and see Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509; Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089. An amended complaint, which merely brings in new parties, in which a defaulting defendant is not interested, and which is not an amendment in matter of substance as to such defendant, does not open the default, nor require the service of the amended complaint upon the defaulting party. San Diego Sav. Bank v. Goodsell, 137 Cal. 420; 70 Pac. 299. The court has no power or authority to grant cross-complainants affirmative relief, where there was no service of the cross-complaint. Hibernia Sav. & L. Soc. v. Clarke, 110 Cal. 27; 42 Pac. 425. An affidavit of service of summons, which fails to show any service thereof, is insufficient to sustain a judgment upon a direct appeal therefrom. Linott v. Rowland, 119 Cal. 452; 51 Pac. 687; and see McMillan v. Reynolds, 11 Cal. 372; Schloss v. White, 16 Cal. 65; McKinlay v. Tuttle, 42 Cal. 570; People v. Bernal, 43 Cal. 385.

Form of summons. A variance, in the summons, from the form of words prescribed by the code, cannot mislead or injure the defendant, where the court is applied to and grants such relief as is given in the code, and the relief does not differ from nor exceed that demanded in the complaint. Clark v. Palmer, 90 Cal. 504; 27 Pac. 375.

Waiver of right to default judgment. The defendant may, by his conduct, waive his right to have judgment entered in his favor, upon the plaintiff's default to his cross-complaint. Madison v. Octave Oil Co., 154 Cal. 768; 99 Pac. 176.

Hearing of evidence by the court. Under this section, the court is authorized to hear the evidence that may be offered, as against a defaulting defendant, to sustain the allegations of the complaint. Cole v. Roebling Construction Co., 156 Cal. 443; 105 Pac. 255. In an action to determine adverse claims to real property, a judgment by default against the named defendant who has been personally served with summons is not void because evidence was not required. Los Angeles v. Los Angeles Farming etc. Co., 150 Cal. 647; 89 Pac. 615.

Default admits what. A default admits the truth of matters pleaded, and must therefore be construed to admit that the amount claimed by the complaint is both reasonable and due, and no evidence is required to be taken for the purpose of fixing such amount, where it is ascertainable from the complaint. Alexander v. McDow, 108 Cal. 25; 41 Pac. 24.

Findings waived by default. Defendants who make default and fail to appear at the trial waive findings. Hibernia Sav. & L. Soc. v. Clarke, 110 Cal. 27; 42 Pac. 425.

Validity of default judgment. A default judgment against a corporation is not void upon its face, where the complaint states a cause of action, and the summons was duly served on the president of the corporation, and the default and judgment were duly entered. Robinson v. Blood, 151 Cal. 504; 91 Pac. 238. A formal entry of default need not be first made, to confer jurisdiction on the court to enter judgment against a defaulting party, even where no notice of hearing was given. Wakefield v. Wakefield, 16 Cal. App. 113; 116 Pac. 309. A valid judgment by default may be rendered by the court, though no formal default has been entered: the default limits the time during which the defendant may file his answer, and that time never extends beyond trial and judgment. Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509. A defend-

ant is entitled to receive notice of an order dismissing a demurrer, before any default can be taken against him under a rule of the court (see Winchester v. Black, 134 Cal. 125; 66 Pac. 197); but where the defendant's attorney is present in court upon the overruling of his demurrer, and asks and obtains leave to file an answer within five days, he waives written notice, and judgment by default is rightly entered at the expiration of such time. Barron v. Deleval, 58 Cal. 95.

Discretion of court in setting aside default. The discretion of the court in setting aside a default is best exercised when it tends to bring about a judgment upon the merits of the controversy between the parties. Nicoll v. Weldon, 130 Cal. 666; 63 Pac. 63; Winchester v. Black, 134 Cal. 125; 66 Pac. 197. A motion to set aside a default rests so largely in the discretion of the trial court, that its action thereon will very rarely be disturbed upon appeal. Langford v. Langford, 136 Cal. 507; 69 Pac. 235; and see Winchester v. Black, 134 Cal. 125; 66 Pac. 197.

Vacation of default judgment. No affidavit of merits is required in a proceeding by motion, made and granted, to vacate a judgment by default, as having been prematurely entered. Quan Quock Fong v. Lyons, 20 Cal. App. 668; 130 Pac. 33. One who succeeds to property subject to a void default judgment may appear to have the judgment vacated, though not a party to the judgment. Crossman v. Vivienda Water Co., 136 Cal. 571; 69 Pac. 220; People v. Mullan, 65 Cal. 396; 4 Pac. 348; Dorland v. Smith, 93 Cal. 120; 28 Pac. 812; Malone v. Big Flat etc. Mining Co., 93 Cal. 384; 28 Pac. 1063.

Vacating default judgments. See note ante, § 473.

Appeal. An appeal may be taken from a judgment by default entered by the clerk; and the existence of a remedy by motion in the superior court to set it aside, if irregular or void, cannot affect the right of appeal, nor justify a motion to dismiss the appeal. Jameson v. Simonds Saw Co., 144 Cal. 3; 77 Pac. 662.

Terms defined. A judgment void upon its face is one that appears to be void upon an inspection of the judgment roll. Crossman v. Vivienda Water Co., 136 Cal. 571; 69 Pac. 220; and see People v. Harrison, 84 Cal. 607; 24 Pac. 311.

Judgment based on false return of process. See note 19 Am. Dec. 137.

Default judgment against married woman. See note 134 Am. St. Rep. 941.

Validity of default judgment awarding relief beyond prayer of complaint. See note 11 Ann. Cas. 353.

Default judgment entered by clerk without required order of court as void or voidable. See note 16 Ann. Cas. 1211.

Right to mandamus to compel proper official to enter judgment by default. See note Ann. Cas. 1913B, 344.

Right to amend pleadings after default judgments. See note Ann. Cas. 1913B, 481.

Validity of judgment by default rendered against person in custody. See note Ann. Cas. 1913C, 245.

Power of defendant's attorney to withdraw answer and permit default judgment. See note 33 L. R. A. 515.

Assessment of damages by jury on default. See notes 15 L. R. A. 614; 20 L. R. A. (N. S.) 1.

Effect of default against dead person. See note 49 L. R. A. 161.

Effect of default judgment beyond the scope of the relief asked. See note 11 L. R. A. (N. S.) 803.

CODE COMMISSIONERS' NOTE. 1. Generally. A judgment by default, entered before the expiration of the full time allowed for answering, will be reversed on appeal. Burt v. Scranton, 1 Cal. 416. So, too, will a judgment entered by default when the complaint does not state facts sufficient to constitute a cause of action. Hallock v. Jaudin & Co., 34 Cal. 167. In proceedings to contest the elections of county officers, the contestant is not permitted to take judgment by default. Keller v. Chapman, 34 Cal. 635. Where a complaint fails to state facts sufficient to constitute a cause of action, judgment thereon by default will be reversed on appeal. Hallock v. Jaudin & Co., 34 Cal. 167. A default may be taken against a municipal corporation. Hunt v. San Francisco, 11 Cal. 250. A judgment by default may be rendered against a corporation incorporated under the laws of two states. Dodge v. Mariposa County, 1 Cal. Unrep. 398. A judgment by default may be taken against an administrator. Chase v. Swain, 9 Cal. 130. A judgment by default can be rendered upon an unliquidated demand, where the defendant has been notified in the summons of the amount for which plaintiff will take judgment. Hartman v. Williams, 4 Cal. 254. A default on a complaint containing special counts, defectively stated, will support a judgment; the default is confession of the indebtedness for the causes and on the accounts alleged in the complaint. Hunt v. San Francisco, 11 Cal. 250. In all cases not within the exception of the statute, an answer without a verification to a verified complaint may be stricken out on motion, and application for judgment, as upon default, may be made at the same time. Drum v. Whiting, 9 Cal. 422. Where an amended complaint in ejectment sets up title acquired after commencement of action, and a judgment by default is regularly entered, the judgment is valid. Smith v. Billett, 15 Cal. 23. In an action to recover on a promissory note, and to establish a lien for the amount upon certain real estate purchased with money advanced by plaintiff to defendant, and for which advance the note was given, the clerk entered judgment by default for the amount of the note. Plaintiff, having exhausted his remedies on this judgment, by executions and proceedings supplementary thereto, obtained from the court a decree for the equitable relief sought in the complaint, to wit, for a lien upon and a sale of the real estate. Held, that this decree was void, assuming the judgment against defendant to be valid. Such judgment, if valid, terminated the controversy, and whatever related to the merits of the case was merged in the judgment. But it is doubtful whether the clerk could enter judgment in an action of this nature, without application to the court. Kittridge v. Stevens, 16 Cal. 381. A motion that defendant will move to dissolve an attachment issued in a cause is not such an appearance in an action as authorizes the clerk to enter a judgment by default. Glidden v. Packard, 28 Cal. 649. A judgment in ejectment awarding damages, rendered on a default, will not be reversed, because it does not appear that the court examined witnesses as to the amount of the damages. Dimick v. Campbell, 31 Cal. 238. If the defendant demands a bill of particulars, and obtains an order for leave to answer within ten days after the bill is served, and a bill is served which does not contain the items of account, the clerk may enter a default and judgment, if the defendant fails to answer within ten days thereafter. Providence Tool Co. v. Prader, 32 Cal. 634; 91 Am. Dec. 598. A demurrer is

an answer, within the meaning of this section. Oliphant v. Whitney, 34 Cal. 25.

2. **Clerk acts ministerially.** The clerk, in entering a judgment after default, acts in a ministerial capacity, and cannot enter a judgment granting any relief beyond that warranted by the facts stated in the complaint. Gray v. Palmer, 28 Cal. 416; Wallace v. Eldredge, 27 Cal. 495; Kelly v. Van Austin, 17 Cal. 564; Willson v. Cleaveland, 30 Cal. 192; Leese v. Clark, 28 Cal. 33; Providence Tool Co. v. Prader, 32 Cal. 634; 91 Am. Dec. 598; Oliphant v. Whitney, 34 Cal. 25. When the law declares what the judgment shall be, a judgment on default is the judgment of the law, not of the clerk. Harding v. Cowing, 28 Cal. 212. If a demurrer is filed within the time allowed for answering, the clerk cannot enter default or judgment, because the demurrer was not served upon the opposite attorney. The clerk cannot hear evidence and determine whether the demurrer or answer has been served or not. Oliphant v. Whitney, 34 Cal. 25. The entry of default, in the proper case, is a ministerial act, to be performed by the clerk; and the disqualification of the judge does not disqualify the clerk. People v. De Carrillo, 35 Cal. 37.

3. **Recitals by clerk.** Not necessary that the clerk should insert in the judgment a recital of his exposition of the preceding facts. Leese v. Clark, 28 Cal. 33.

4. **Default, when service is made on portion of defendants only.** Where two defendants are jointly sued, and service had on both, the clerk of the court has no authority to enter judgment by default against one, and his act in so doing is without color of law. Stearns v. Aguirre, 7 Cal. 449. But see Kelly v. Austin, post. In an action against defendants jointly and not severally liable, a portion only of them were served with process. Held, that the clerk could not, on the application of plaintiff, enter judgment upon default against parties served only, and that judgment so entered is void. The proper course in such a case being to enter judgment against all the defendants, but so as to be enforced against the joint property of all, and the property of those served. Kelly v. Austin, 17 Cal. 564. But see Tay v. Hawley, 39 Cal. 95, in which it is substantially held that such a judgment is invalid. See also § 414 of this code. If persons are served who are not named in the complaint, either by real or fictitious names, it is error to render judgment against them by default. Lamping v. Hyatt, 27 Cal. 102.

5. **Proof of facts, not required.** Where the complaint is verified, and the defendant fails to answer, plaintiff is entitled to judgment on the complaint, without proof of the facts. Tuolumne Redemption Co. v. Patterson, 18 Cal. 415; Lick v. Stockdale, 18 Cal. 219. See exceptions under subds. 2 and 3 of this section.

6. **Coin judgments.** If the note sued on is payable in money generally, and the complaint contains a copy of the same, the clerk cannot, after default, enter judgment payable in gold coin. Wallace v. Eldredge, 27 Cal. 495. If the complaint in an action on a judgment contains an allegation that the judgment sued on was rendered payable in gold coin, and defendant makes default, the clerk should enter judgment payable in the same kind of money. Wallace v. Eldredge, 27 Cal. 495. In an action upon a note payable in gold coin, if the defendant suffers a default, the clerk may enter a judgment against him, payable in gold coin. Harding v. Cowing, 28 Cal. 212; Galland v. Lewis, 26 Cal. 47.

7. **Judgment entered by order of court.** Upon facts found, whether by report of referee or special verdict of the jury, the action of the court must be invoked before the judgment can be entered. Peabody v. Phelps, 9 Cal. 224. If a demurrer has been filed, the clerk cannot enter a default without an order of the court. Oliphant v. Whitney, 34 Cal. 25. If a frivolous demurrer is filed, and leave is not asked to file an answer, it is not error for the court to enter a default of judgment upon overruling the demurrer. Seale v. McLaughlin, 28 Cal. 668. If an answer is filed, raising an issue, and a trial is had, and witnesses are sworn and examined, and the court takes the case into consideration, it cannot then strike out the answer of the defendant and enter his default, and render judgment for plaintiff. Abbott v. Douglass, 28 Cal. 295.

8. **What a default cures or admits.** A defective allegation of a fact may be cured by default or verdict, but not the entire absence of any allegation whatsoever. Hentsch v. Porter, 10 Cal. 555; Barron v. Frink, 30 Cal. 489; People v. Rains, 23 Cal. 137; Harlan v. Smith, 6 Cal. 173; McGregor v. Shaw, 11 Cal. 47; Watson v. Zimmerman, 6 Cal. 46; but see Payne v. Treadwell, 16 Cal. 243. If a person is sued by a fictitious name, and the return of the sheriff on the summons shows service on the defendant by his proper name, as "John Doe, alias Westfall," a default being entered, judgment may be rendered against the defendant in his true name, Westfall, without proof that Doe and Westfall are the same. Curtis v. Herrick, 14 Cal. 117; 73 Am. Dec. 632.

9. **Waiver.** The acceptance by plaintiff's attorney of service of a demurrer, filed by a defendant after his default has been entered, waives the default. Hestres v. Clements, 21 Cal. 425.

CHAPTER III.

ISSUES. MODE OF TRIAL, AND POSTPONEMENTS.

§ 588. Issue defined, and the different kinds.
§ 589. Issue of law, how raised.
§ 590. Issue of fact, how raised.
§ 591. Issue of law, how tried.
§ 592. Issue of fact, how tried. When issues both of law and fact, the former to be first disposed of.
§ 593. Clerk must enter causes on the calendar, to remain until disposed of. When may be restored.
§ 594. Parties may bring issue to trial.
§ 595. Motion to postpone a trial involving title to mining claim.
§ 596. In cases of adjournment a party may have the testimony of any witness taken.

§ 588. Issue defined, and the different kinds. Issues arise upon the pleadings when a fact or a conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

Issues.
1. **Of law and fact.** See post, §§ 589, 590.
2. **Of fact, in justice's court.** See post, §§ 878 et seq.

Legislation § 588. Enacted March 11, 1872; based on Practice Act, § 151 (New York Code, § 248), which read: "An issue arises when a fact or conclusion of law is maintained by the one party, and is controverted by the other. Issues are of two kinds: 1. Of law; and, 2. Of fact."

Construction of sections. The provisions of this section and §§ 656, 657, post, do not apply to every order that may be

made ex parte, or by the court on its own motion, simply because the court has permitted written objections to be filed. Leach v. Pierce, 93 Cal. 614; 29 Pac. 235. It is not within the discretionary power of the court to dispense with the provisions of this section and §§ 589, 590, post; yet such provisions are not violated by a decision of the appellate court, that a party, by his conduct at the trial, is estopped from asserting, on appeal, for the first time, that a fact found by the trial court, although outside of the issues, was not within the issues made by the pleadings. Ortega v. Cordero, 88 Cal. 221; 26 Pac. 80.

Issue arises when. An issue arises when a fact or conclusion of law is maintained by one party, and is controverted by the other (Harris v. San Francisco Sugar etc. Co., 41 Cal. 393); and, by implication of law, upon new matter in the answer, deemed controverted by the opposite party. Rogers v. Riverside Land etc. Co., 132 Cal. 9; 64 Pac. 95.

Motion for new trial. Whenever, under the pleadings in a suit, an issue of fact is presented to a court, which is to be determined by the preponderance of evidence on the issue, a party is entitled, after a decision or finding thereon, to have the court re-examine it upon a motion for a new trial. People v. Bank of San Luis Obispo, 152 Cal. 261; 92 Pac. 481.

CODE COMMISSIONERS' NOTE. Pardee v. Schenck, 11 How. Pr. 500.

§ 589. Issue of law, how raised. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

Issues of law, how raised in justice's court. See post, § 879.

Legislation § 589. Enacted March 11, **1872**; based on Practice Act, § 152 (New York Code, § 249), as amended by Stats. 1854, Redding ed. p. 62, Kerr ed. p. 88, which did not have the comma nor the word "or" after "answer."

CODE COMMISSIONERS' NOTE. Stats. 1854, p. 88.

§ 590. Issue of fact, how raised. An issue of fact arises—

1. Upon a material allegation in the complaint controverted by the answer; and,

2. Upon new matters in the answer, except an issue of law is joined thereon.

Issues of fact, in justice's court, how raised. See post, § 880.

Legislation § 590. Enacted March 11, **1872**; based on Practice Act, § 153 (New York Code, § 250), as amended by Stats. 1854, Redding ed. p. 62, Kerr ed. p. 88, which had "therein" instead of "thereon."

Issue of fact raised how. An issue of fact arises, only where a material averment of fact is made on the one side and controverted on the other: the law does not raise issues of fact. Crackel v. Crackel, 17 Cal. App. 600; 121 Pac. 295. The effect of § 130 of the Civil Code, providing that the court shall, upon default of the defendant in an action for divorce, require proof of the facts alleged before granting relief, is not to raise an "issue of fact." Foley v. Foley, 120 Cal. 33; 65 Am. St. Rep. 147; 52 Pac. 122. An issue of fact is raised, where a written opposition is filed to a petition for letters testamentary, alleging the incompetency of the petitioner, and the petitioner files a written answer denying the facts so alleged (Estate of Bauquier, 88 Cal. 302; 26 Pac. 178, 532); but there is no issue of fact as to an allegation of the complaint not controverted in the answer. Yaeger v. Southern California Ry. Co., 5 Cal. Unrep. 870; 51 Pac. 190.

Findings proper when. The court cannot properly make findings of fact and conclusions of law, unless issues are joined and a trial thereof had; and they have no place in an action to foreclose a mortgage, where the defendant fails to answer. Waller v. Weston, 125 Cal. 201; 57 Pac. 892. A finding is erroneous which is outside of any issue presented in the case; and if on a material allegation, it is against the admissions of the pleadings, and a judgment based thereon is erroneous. Moynihan v. Drobaz, 124 Cal. 212; 71 Am. St. Rep. 46; 56 Pac. 1026. Issues of fact upon which findings are permitted or required are only those specified in this section. Waller v. Weston, 125 Cal. 201; 57 Pac. 892.

Issues in probate accounts. The manner in which the accounts of an executor are usually made up, and the manner in which objections thereto are usually presented, do not conduce to the development of issues, such as arise upon pleadings in civil actions, and to which findings are required to be responsive. Estate of Levinson, 108 Cal. 450; 41 Pac. 483; 42 Pac. 479; Miller v. Lux, 100 Cal. 609; 35 Pac. 345, 639.

Action of court reviewed how. The mode of reviewing the action of the court upon an issue of fact is the same, whether it is an action at law or a suit in equity: there must be a motion for a new trial. Harris v. San Francisco Sugar Refining Co., 41 Cal. 393.

New trial. A determination of an issue of fact is the verdict or decision sought to

be set aside when a new trial is asked under the code. Harris v. San Francisco Sugar Refining Co., 41 Cal. 393.

CODE COMMISSIONERS' NOTE. Marshall v. Shafter, 32 Cal. 176.

§ 591. Issue of law, how tried. An issue of law must be tried by the court, unless it is referred upon consent.

Trial by court, generally. Post, §§ 631 et seq.
Issues of law, in justice's court.
1. How raised. See post, § 879.
2. How tried. See post, § 881.

Legislation § 591. Enacted March 11, **1872**; based on Practice Act, § 154, which read: "An issue of law shall be tried by the court, unless it be referred, upon consent, as provided in chapter VI of this title."

Trial, defined. A trial is the examination, before a competent tribunal, according to law, of the facts or the law put in issue in a cause, for the purpose of determining such issue: when a court hears and determines any issue of fact or of law, for the purpose of determining the rights of the parties, it may be considered a trial. Tregambo v. Comanche Mill etc. Co., 57 Cal. 501; Goldtree v. Spreckels, 135 Cal. 666. The trial, by the court, of an issue of law, upon a demurrer to the complaint, without leave to amend, is a trial of the cause, which involves a judgment of dismissal, and precludes the right of the plaintiff to dismiss the action before trial, under the statute providing for the dismissal of the cause before trial. Goldtree v. Spreckels, 135 Cal. 666; 67 Pac. 1091.

Trial of issues on appeal from justice's court. See note post, §§ 592, 976.

CODE COMMISSIONERS' NOTE. A trial is the examination before a competent tribunal, according to the law, of the facts, or a question of law put in issue in a cause, for the purpose of determining such issue. Mulford v. Estudillo, 32 Cal. 131. Until a decision has been entered in the minutes, or reduced to writing by the judge, and signed by him, and filed with the clerk, a case has not been tried. Hastings v. Hastings, 31 Cal. 95.

§ 592. Issue of fact, how tried. When issues both of law and fact, the former to be first disposed of. In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code.

Generally, as to jury trial. Post, §§ 600–628.
Waiver of jury trial. Post, § 631.
Reference. Post, §§ 638–645.
Court, trial by. Post, §§ 631–636.
Issues of fact.
1. In justice's court, how tried. See post, § 882.
2. In forcible entry and detainer, to be tried by jury. See post, § 1171.

Legislation § 592. 1. Enacted March 11, **1872**; based on Practice Act, § 155 (New York Code, § 253), which read: "An issue of fact shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as provided in this act. Where there are issues both of law and fact to the same complaint, the issues of law shall be first disposed of." When enacted in 1872, § 592 substituted (1) the word "must" for "shall," (2) "code" for "act," and (3) omitted the words "to the same complaint."
2. Amended by Code Amdts. **1873–74**, p. 309.

Right to jury trial in actions at law. It is always for the judge, sitting as a chancellor, to determine whether, when certain rights are established, he will grant an equitable remedy prayed for, or compel the party to be satisfied with his legal remedy; but when the asserted rights, upon which any remedy may rest, are legal rights, and cognizable in a court of law, such rights must be determined according to the methods of the common-law courts, and in such case the party cannot be deprived of his constitutional privilege of jury. Hughes v. Dunlap, 91 Cal. 585; 27 Pac. 642. The right to a trial by jury is secured to the defendant by this section; and a demand therefor is not necessary in an action for the recovery of possession of personal property. Swasey v. Adair, 88 Cal. 179; 25 Pac. 1119. A written demand for a jury must be held to be a continued refusal to waive the right thereto; and a party is not required to repeat the demand after the court has once denied the application; and the action of the court, after such application, in proceeding to try the case for recovery of possession of certain personal property, without a jury, is reversible error. Swasey v. Adair, 88 Cal. 179; 25 Pac. 1119. The right to a trial by jury where an action is brought to recover specific real property, is not defeated by any particular form which the action may take. Davis v. Judson, 159 Cal. 121; 113 Pac. 147; Hughes v. Dunlap, 91 Cal. 385; 27 Pac. 642. While a plaintiff out of possession may bring a suit in equity, under § 738, post, to determine an adverse claim against a defend-

ant in possession, yet where the object of the action is to recover possession, and the defendant denies the allegations of the complaint, and sets up title by adverse possession, he cannot deprive the defendant of a jury trial of the issues raised by the answer. Newman v. Duane, 89 Cal. 597; 27 Pac. 66. In an action to quiet title, brought by a party out of possession against one claiming title and in possession, either party is entitled to a jury as a matter of right. Gillespie v. Gouly, 120 Cal. 515; 52 Pac. 816. Where the plaintiff has been ousted from possession, and the question of ownership is in issue, the parties are entitled to a jury trial upon that issue. Reiner v. Schroeder, 146 Cal. 411; 80 Pac. 517; and see Donahue v. Meister, 88 Cal. 121; 22 Am. St. Rep. 283; 25 Pac. 1096. An action to recover damages for past trespasses upon land being an action at law, in which the parties thereto are entitled to a trial by jury, the fact that the plaintiff also asks for an injunction does not take away from him his right to have the real issues of fact tried by a jury. Hughes v. Dunlap, 91 Cal. 385; 27 Pac. 642.

Right to jury trial, and discretion of court, in equity cases. Causes of equitable cognizance fall solely within the provisions of the last clause of this section (Warring v. Freear, 64 Cal. 54; 28 Pac. 115; Learned v. Castle, 67 Cal. 41; 7 Pac. 34; Bell v. Marsh, 80 Cal. 411; 22 Pac. 170; and see Reiner v. Schroeder, 146 Cal. 411; 80 Pac. 517); and in such causes the defendant is not entitled to a jury (Noble v. Learned, 7 Cal. Unrep. 297; 87 Pac. 402), nor is it error to refuse a demand for a jury trial in suits in equity (Ashton v. Heggerty, 130 Cal. 516; 62 Pac. 934); hence, it is not error to refuse the plaintiff a jury trial in a proceeding in equity to reform a contract. Loftus v. Fischer, 113 Cal. 286; 45 Pac. 328; and see La Société Française v. Selheimer, 57 Cal. 623; Fish v. Benson, 71 Cal. 428; 12 Pac. 454. The defendant in an action to foreclose the lien of an assessment is not entitled to a jury trial: such action is in equity, and is not founded upon any contract made by, or personal liability against, the defendant. Santa Cruz Rock Pavement Co. v. Bowie, 104 Cal. 286; 37 Pac. 934; Emery v. Bradford, 29 Cal. 75; Taylor v. Palmer, 31 Cal. 240; Cassidy v. Sullivan, 64 Cal. 266; 28 Pac. 234. Cases of fraud are subjects of both equitable and legal jurisdiction, and the parties are entitled to a jury trial, where the facts constituting the fraud, as well as the relief sought, are cognizable in a court of law; but where, on the case made, relief can only be had in a court of equity, the parties are not entitled to a jury trial. Fish v. Benson, 71 Cal. 428; 12 Pac. 454; La Société Française v. Selheimer, 57 Cal. 623; Jones v. Gardener, 57 Cal. 641; Lorenz v. Jacobs, 59 Cal. 262. The right to trial by jury in an action to abate a nuisance is not given either by the constitution or by statute; the prayer for damages is incidental to the relief sought; and the action being properly brought in a court of equity, all the issues in the case will be determined. McCarthy v. Gaston Ridge Mill etc. Co., 144 Cal. 542; 78 Pac. 7; Hudson v. Doyle, 6 Cal. 101; Courtwright v. Bear River etc. Mining Co., 30 Cal. 573; McLaughlin v. Del Re, 64 Cal. 472; 2 Pac. 244; Sweetser v. Dobbins, 65 Cal. 529; 4 Pac. 540. The issues in suits in equity should be tried by the court, unless it sees fit to order any or all of them to be submitted to a jury. McLaughlin v. Del Re, 64 Cal. 472; 2 Pac. 244; Churchill v. Baumann, 104 Cal. 369; 36 Pac. 93; 38 Pac. 43. The granting or refusing of a demand for a jury trial in suits in equity is entirely within the discretion of the court (Curnow v. Happy Valley etc. Hydraulic Co., 68 Cal. 262; 9 Pac. 149; and see La Société Française v. Selheimer, 57 Cal. 623); and whether the court shall submit special issues to the jury is also a matter within its own discretion. Schultz v. McLean, 109 Cal. 437; 42 Pac. 557.

Right of court to order trial by jury. The court may order a cause to be tried by a jury, without assigning any reason therefor, although a jury is waived by both parties. Bullock v. Consumers' Lumber Co., 3 Cal. Unrep. 609; 31 Pac. 367.

Motion for new trial. In order to review a question of fact, whether the case is at law or in equity, there must be a motion for a new trial. Thompson v. White, 63 Cal. 505.

Waiver of jury. A jury can be waived only in one of the modes prescribed in § 631, post. Swasey v. Adair, 88 Cal. 179; 25 Pac. 1119.

Right of court to order reference. An issue of fact, in an action at law, must be tried by jury, unless a jury is waived: it cannot be referred, except upon the written consent of both parties. Seaman v. Mariani, 1 Cal. 336. Injury is not presumed in consequence of a trial by jury instead of by the court. Doll v. Anderson, 27 Cal. 248.

Issue of law, disposal of. A defendant who has interposed a demurrer to the complaint has a right to a direct decision of the issue of law thereby presented, whether he fails to urge it or not. Winchester v. Black, 134 Cal. 125; 66 Pac. 197. In an action for personal injuries, the jury should not be asked, "What was the proximate cause of the accident and injury complained of": that question involves a question of law. Petersen v. California Cotton Mills Co., 20 Cal. App. 751; 130 Pac. 169.

Trial complete when. A case cannot be considered as tried until a decision has been made and filed, unless the filing of the decision has been waived. Warring v. .

Freear, 64 Cal. 54; 28 Pac. 115; Hastings v. Hastings, 31 Cal. 95.

Conclusiveness of verdict and findings of jury. Where, in an action to quiet title to property, a jury was impaneled, without objection, to try the legal issues raised by the answer, a stipulation by the parties, that the jury might render a general verdict in favor of either party, is legitimate, and estops the unsuccessful party from repudiating the general verdict, which is conclusive of the whole case. Johnson v. Mina Rica Gold Mining Co., 128 Cal. 621; 61 Pac. 76. A general verdict of the jury is conclusive on the court, save only the power to set it aside and grant a new trial, and no finding of the court can add to or take from the force of the verdict upon the principal issue in the case. Reiner v. Schroeder, 146 Cal. 411; 80 Pac. 517. Where the issues are submitted to a jury in a suit in equity, their verdict is merely advisory. McCarthy v. Gaston Ridge Mill etc. Co., 144 Cal. 542; 78 Pac. 7; Hudson v. Doyle, 6 Cal. 101; Courtwright v. Bear River etc. Mining Co., 30 Cal. 573; McLaughlin v. Del Re, 64 Cal. 472; 2 Pac. 244; Sweetser v. Dobbings, 65 Cal. 529; 4 Pac. 540. The adoption of a verdict is equivalent to a finding by the court to the extent to which the verdict covers the issues made by the pleadings, and it is the duty of the court to find upon all the issues not covered by the verdict, unless they are waived. Warring v. Freear, 64 Cal. 54; 28 Pac. 115; Bates v. Gage, 49 Cal. 126; Wingate v. Ferris, 50 Cal. 105. The general verdict of a jury in a suit in equity should be disregarded if insufficient, and even a special verdict is merely advisory, and may be set aside, or disregarded, or adopted. Warring v. Freear, 64 Cal. 54; 28 Pac. 115; Brandt v. Wheaton, 52 Cal. 430; Stockman v. Riverside etc. Irrigation Co., 64 Cal. 57; 28 Pac. 116. Where, in proceedings to condemn property for a public use, the question whether the taking of the same is necessary for such use is submitted to the jury, and they find on the issue, the court has no power to disregard the finding and make findings of its own. Wilmington Canal etc. Co. v. Dominguez, 50 Cal. 505.

Fraud as question of law or fact. See note 1 Ann. Cas. 446.

Assumption of risk arising after commencement of employment as question of law or fact. See note 3 Ann. Cas. 814.

Reasonableness of time for delivery of goods as question of law or fact. See note 6 Ann. Cas. 245.

Proof of foreign law as properly made to court or jury. See note 7 Ann. Cas. 74.

Negligence of railroad in constructing permanent structure close to tracks as question of law or fact. See note 7 Ann. Cas. 331.

Original or collateral nature of oral promise within statute of frauds as question of law or fact. See note 8 Ann. Cas. 539.

Province of court or jury to determine whether contract is contrary to public policy. See note 11 Ann. Cas. 124.

Reasonableness of time in which goods are returned under contract of "sale or return" as question of law or fact. See note 14 Ann. Cas. 331.

CODE COMMISSIONERS' NOTE. 1. Definition of trial. Mulford v. Estudillo, 32 Cal. 131, Hastings v. Hastings, 31 Cal. 95, cited in note to § 591, ante.

2. Matters to be determined by the jury. Dedication of a street is a conclusion of fact, to be drawn by the jury from the circumstances of each case; the whole question, as against the owner of the soil, being, whether there is sufficient evidence of an intention on his part to dedicate the land to the public as a public highway. Harding v. Jasper, 14 Cal. 648. The question of abandonment of a mining claim is a question for the jury. Waring v. Crow, 11 Cal. 371. As is that of the reasonableness of the use of water to be determined by the jury upon the facts and circumstances of each particular case. Esmond v. Chew, 15 Cal. 143. So, too, the question of diligence. Weaver v. Eureka Lake Co., 15 Cal. 274. And the question of damages in an action of trespass. Drake v. Palmer, 4 Cal. 11. The fact whether a structure was a public nuisance is a question for the jury. Gunter v. Geary, 1 Cal. 467. The question of malice, in an action for malicious prosecution, is for the jury. Potter v. Seale, 8 Cal. 217. In an action for malicious prosecution of a suit on a bill of exchange which was paid, whether the plaintiffs in that suit knew that the bill was in fact paid, when they sued, is a question for the jury. Weaver v. Page, 6 Cal. 684. The existence of a custom is a question for the jury to decide. Panaud v. Jones, 1 Cal. 500. The question of notice of dissolution of partnership is a fact for the jury. Rabe v. Wells, 3 Cal. 151; Treadwell v. Wells, 4 Cal. 260. Where an action was brought for the balance of an account, and the answer set up payment by a promissory note, and the plaintiff replied that he was induced to receive the note by fraud, the court held that it was one of the cases where the party was entitled to a trial by jury, and that it could not be referred but by consent of the parties. Seaman v. Mariani, 1 Cal. 336. Where the boundaries of a lot of land are uncertain, the location of the lot is a question for the jury. Reynolds v. West, 1 Cal. 328; Hicks v. Davis, 4 Cal. 69. What is actual and what is constructive possession, in many cases is a question of fact for the jury. O'Callaghan v. Booth, 6 Cal. 65. So, too, is the question of the dedication of the premises by possession as a homestead. Cook v. McChristian, 4 Cal. 26.

3. Matters to be determined by the court. A court does not require the verdict of a jury to inform it of facts occurring in the presence of the court. People v. Judge of Tenth Judicial District, 9 Cal. 21. A party cannot try his case before a judge, without objection, and, after he has lost it, object that the case was not tried by a jury. Smith v. Brannan, 13 Cal. 115. If there is no dispute as to the facts, and the law upon those facts declares a transaction fraudulent, there is no question for the jury. Chenery v. Palmer, 6 Cal. 122; 65 Am. Dec. 493. What facts and circumstances constitute evidence of carelessness, is a question of law for the court to determine. But what weight the jury should give to these facts and circumstances is for the jury. Gerke v. California Steam Nav. Co., 9 Cal. 258; 70 Am. Dec. 650. After judgment by default in ejectment, a jury trial cannot be awarded. Smith v. Billett, 15 Cal. 26. Whether a judgment entered in the court below is entered in accordance with the mandate of the appellate court, is a question of law, and not of fact Leese v. Clark, 28 Cal. 33.

4. Juries, in equity cases. The language of the constitution as to trial by jury was used with reference to the right as it exists at common law. The right cannot be claimed in equity cases, unless an issue of fact be framed for the jury, under the direction of the court. Koppikus v. State Capitol Comm'rs, 16 Cal. 248; Smith v. Rowe, 4 Cal. 7; Walker v. Sedgwick, 5 Cal. 192; Cahoon v. Levy, 5 Cal. 294. A court of equity may direct, whenever, in its judgment, it may

become proper, an issue to be framed upon the pleadings, and submitted to the jury. Curtis v. Sutter, 15 Cal. 263; Weber v. Marshall, 19 Cal. 447. In equity cases, the court below may disregard the verdict of a jury. Goode v. Smith, 13 Cal. 84. Though special issues, framed by the court according to equity practice, may be tried by a jury in equity cases, but if the failure to present the issues is the result of plaintiff's own motion, he cannot be allowed to take advantage of it. Brewster v. Bours, 8 Cal. 505.

5. **Jury, mandamus cases.** In an application for mandamus to compel a judge to sign a bill of exceptions, which the petitioner alleges he refuses to do, where the judge in his answer avers that he has signed a true bill of exceptions, and that the one presented by the relator is not a true bill, it was held that the petitioner was not entitled to a jury to try the issue. People v. Judge of Tenth Judicial District, 9 Cal. 21.

6. **Generally.** Where issues of law and fact are both raised, the issue of law should first be disposed of. Brooks v. Douglass, 32 Cal. 208. If the answer contains a legal and an equitable defense, the court may first try the equitable defense, and refuse the plaintiff a jury trial, and, if the facts warrant it, grant the equitable relief prayed for. Bodley v. Ferguson, 30 Cal. 511.

§ 593. Clerk must enter causes on the calendar, to remain until disposed of. When may be restored. The clerk must enter causes upon the calendar of the court according to the date of issue. Causes once placed on the calendar must remain upon the calendar until finally disposed of; provided, that causes may be dropped from the calendar by consent of parties, and may be again restored upon notice.

Mandamus to compel clerk to perform duty. Post, § 1085.

Issue, generally. Ante, § 588.

Abolition of terms. See Const., art. VI, § 5.

Legislation § 593. 1. Enacted March 11, **1872**; based on Practice Act, § 156 (New York Code, § 256), which read: "The clerk shall enter causes upon the calendar of the court, according to the date of the issue. Causes once placed on the calendar for a general or special term, if not tried or heard at such term, shall remain upon the calendar from court to court, until finally disposed of." When enacted in 1872, § 593 (1) substituted the word "must" for "shall," in both instances, and (2) omitted "the" before "issue."

2. Amended by Code Amdts. **1880**, p. 5.

Change of date of cause on calendar. The position of a cause on the calendar will not be changed to a different day from that on which it is set by the clerk, whether upon the stipulation of the parties or on motion of either party, except upon good cause shown. Wetmore v. San Francisco, 43 Cal. 37. An order dismissing a demurrer must be regarded as equivalent to an order overruling it. Winchester v. Black, 134 Cal. 125; 66 Pac. 197; and see Voll v. Hollis, 60 Cal. 569; Davis v. Hurgren, 125 Cal. 48; 57 Pac. 684.

Knowledge of rules of court. The parties to an action are bound to know the rules of the trial court relating to the calling of the calendar and the setting of causes for trial. Dusy v. Prudom, 95 Cal. 646; 30 Pac. 798.

§ 594. Parties may bring issue to trial. Either party may bring an issue to trial or to a hearing, and, in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require; provided, however, if the issue to be tried is an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had five days' notice of such trial.

Dismissal. Ante, § 581.

Surprise.

1. **Setting aside judgment for.** Ante, § 473.
2. **New trial.** Post, § 657.

Legislation § 594. 1. Enacted March 11, **1872**; based on Practice Act, § 157, which had the word "an" instead of "the," before "issue," in first line.

2. Amended by Stats. **1899**, p. 5, adding the proviso.

Construction of sections. This section does not require that a party intending to apply to the court to have a day fixed for the trial shall give notice of his intended application to the adverse party: it requires merely that five days' notice of the time set for the trial shall be given. McNeill & Co. v. Doe, 163 Cal. 338; 125 Pac. 345. The provision respecting five days' notice has reference only to proceedings taken against a party in his absence: it has no application to cases in which both parties are represented when the case is called for trial. Sheldon v. Landwehr, 159 Cal. 778; 116 Pac. 44. A court should not dismiss an action, under the third subdivision of § 581, ante, except upon proof made in compliance with § 594. Estate of Dean, 149 Cal. 487; 87 Pac. 13.

Notice of trial, necessity for and sufficiency of. This section was designed to prevent the manifest injustice of dismissing a party's action, or trying it in his absence, because of his failure to appear at a time at which he could not be held to have had notice that the trial would be had, or that any proceeding would be taken against him. Estate of Dean, 149 Cal. 487; 87 Pac. 13. It is error to dismiss an action as to interveners, where issues of fact are tendered by their complaint, without the five days' notice prescribed by this section, or a waiver thereof. Townsend v. Driver, 5 Cal. App. 581; 90 Pac. 1071. The jurisdiction of the court is not affected by a failure to comply with

a rule of the court requiring five days' notice of trial. Petition of Los Angeles Trust Co., 158 Cal. 603; 112 Pac. 56. The parties to an action, and their attorneys, whether residents or non-residents of the county where the case is pending, must watch its progress, and are charged with notice of the fact that it is set for trial. Dusy v. Prudom, 95 Cal. 646; 30 Pac. 798; Bell v. Peck, 104 Cal. 35; 37 Pac. 766; Eltzroth v. Ryan, 91 Cal. 584; 27 Pac. 932. Where the judgment recites that the defendant had been notified of the day set for trial, more than five days prior thereto, a compliance with the provisions of this section is shown. Johnston v. Callahan, 146 Cal. 212; 79 Pac. 870. A recital in the judgment, that, on the hearing of a motion, both parties agreed in open court that the case should be peremptorily set for trial upon the decision of the motion, and the case was so set, is proper, where the defendant did not appear, and the finding is conclusive as against counsel's statement conflicting therewith, as to the insufficiency of the notice of trial. Rodley v. Lyons, 129 Cal. 681; 62 Pac. 313.

Dismissal or judgment in absence of adverse party. Where the plaintiff fails to appear at the trial, the defendant may proceed with the case and have final judgment entered. Clune v. Quitzow, 125 Cal. 213; 57 Pac. 886. A dismissal on account of the absence of the plaintiff, involving the absolute destruction of his rights, should be seriously considered by the court: so serious a penalty should not be imposed, unless the due administration of justice clearly requires it. Jaffe v. Lilienthal, 101 Cal. 175; 35 Pac. 636.

Absence at trial as waiver of jury. Where the defendant sends a telegram to the judge, demanding a trial by jury, on the day preceding the trial, but fails to appear in person or by counsel at the trial, the court may dispense with the jury. McGuire v. Drew, 83 Cal. 223; 23 Pac. 312.

Waiver of notice of trial. A guardian ad litem has power to waive the five days' notice of the setting of a case for trial required by this section; and such waiver is had, if the guardian, on the day set for trial, appears in court and objects to the proceeding, and the court thereupon, without further objection from him, continues the trial for three days. Granger v. Sheriff, 133 Cal. 416; 65 Pac. 873.

Presumption arising from notice of trial. A party who, having actual notice of the day of trial, and knowing also that no further postponement would be agreed to, fails to appear either in person or by attorney, must be presumed to know that such failure would result in a trial in his absence. McGuire v. Drew, 83 Cal. 225; 23 Pac. 312.

Relief for party absent from trial. To entitle a party to relief on the ground of surprise, where the trial is had in his absence, he must show that he was injured, and that a different result would be reached if a new trial were had. McGuire v. Drew, 83 Cal. 225; 23 Pac. 312; Patterson v. Ely, 19 Cal. 28; Cook v. De la Guerra, 24 Cal. 237; Brooks v. Douglass, 32 Cal. 208.

Appeal. A rule of the trial court, requiring reasonable notice to the adverse party of the time fixed for trial, cannot be considered on appeal, where it is no part of the record. Johnston v. Callahan, 146 Cal. 212; 79 Pac. 870.

CODE COMMISSIONERS' NOTE. See § 581 of this code.

§ 595. Motion to postpone a trial involving title to mining claim. A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. A trial shall be postponed when it appears to the court that the attorney of record, party, or principal witness is actually engaged in attendance upon a session of the legislature of this state as a member thereof. The court may require the moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed. In actions involving the title to mining claims, or involving trespass for damage upon mining claims, if it be made to appear to the satisfaction of the court that, in order that justice may be done and the action fairly tried on its merits, it is necessary that further developments should be made, underground or upon the surface of the mining claims involved in said action, the court shall grant the postpone-

ment of the trial of the action, giving the party a reasonable time in which to prepare for trial and to do said development-work.

Costs on continuance. Post, § 1029.
Extension of time during attendance upon legislature. See post, § 1054.

Legislation § 595. **1.** Enacted March 11, **1872** (substantially a re-enactment of Practice Act, § 158), and then consisted of the first and third sentences of the present text.
2. Amended by Code Amdts. **1880,** p. 1, (1) adding the second sentence; (2) in the third sentence (the second of the original code section), (a) striking out "also," after "The court may," (b) adding "where application is made on account of the absence of a material witness," (c) substituting "admits" for "admit."
3. Amended by Stats. **1911,** p. 1448, adding the last sentence.

Construction of section. The intention of the code, while protecting the court from imposition and unnecessary delays, is to secure a reasonable opportunity to litigants to try their cases on the merits, to the end that justice may be done; and while no definite rule can be laid down, embracing all the different circumstances under which continuances should be granted, yet the spirit and intention of the code should always be borne in mind. Light v. Richardson, 3 Cal. Unrep. 745; 31 Pac. 1123.

Due diligence must be shown by affidavit. A continuance can be granted on the ground of the absence of evidence, only upon an affidavit showing the materiality of the evidence expected to be obtained, and that due diligence had been used to obtain it. Storch v. McCain, 85 Cal. 304; 24 Pac. 639; Kern Valley Bank v. Chester, 55 Cal. 49. An affidavit, on motion for a continuance, failing to show any diligence, and not disclosing any defense on the merits, is insufficient. Harloe v. Lambie, 132 Cal. 133; 64 Pac. 88.

Absence of witness. The affidavit, upon a motion for a continuance on the ground of the absence of a witness, must show what is expected to be proved by such witness (Kern Valley Bank v. Chester, 55 Cal. 49); but this requirement is not imperative, and should not be demanded of counsel, when he cannot have the aid of his client, whose absence is excusable. Light v. Richardson, 3 Cal. Unrep. 745; 31 Pac. 1123. It is not error to refuse a continuance because a regularly subpœnaed witness does not respond, and may have left the state, particularly where his evidence appears to be merely cumulative. Hawley v. Los Angeles Creamery Co., 16 Cal. App. 50; 116 Pac. 84. The circumstance that the witness who is unable to attend is at the same time one of the parties, strengthens the showing in favor of a continuance, but does not necessarily compel the court to grant it. Sheldon v. Landwehr, 159 Cal. 778; 116 Pac. 44.

Absence of party. A showing of the illness of the defendant, of such a nature that he could neither attend the trial nor have his deposition taken, is sufficient to entitle him to a continuance, where there is nothing to contradict the showing, or to raise a suspicion as to the good faith of the application. Morehouse v. Morehouse, 136 Cal. 332; 68 Pac. 976; Jaffe v. Lilienthal, 101 Cal. 175; 35 Pac. 636. The unavoidable absence of a party does not necessarily compel the court to grant a continuance. Sheldon v. Landwehr, 159 Cal. 778; 116 Pac. 44. It is not an abuse of discretion to refuse a continuance because of the absence of the plaintiff, if nothing indicates that he would be able to appear at any later time, and no excuse is shown for the failure to take his deposition in proper form before the trial. Beckman v. Waters, 161 Cal. 581; 119 Pac. 922.

Costs as condition of continuance. The court has a right to impose costs, other than those properly taxable, as a condition for postponing a trial (Pomeroy v. Bell, 118 Cal. 635; 50 Pac. 683); and a party cannot, after agreeing that the payment of certain items of costs be made a condition to a continuance, be heard to say that the court had no power or discretion to impose any particular item of costs. Bashore v. Superior Court, 152 Cal. 1; 91 Pac. 801.

Good faith in applying for continuance. The good faith of the application for a continuance is a question that may be considered in granting a continuance. Sheldon v. Landwehr, 159 Cal. 778; 116 Pac. 44.

Discretion of court as to continuances. Continuances should not be granted without good cause, and the granting or refusing thereof is usually a matter largely within the discretion of the trial court. Marcucci v. Vowinckel, 164 Cal. 693; 130 Pac. 430; Sheldon v. Landwehr, 159 Cal. 778; 116 Pac. 44. Granting or refusing a continuance on the ground of the absence of counsel, is a matter resting largely, if not wholly, in the discretion of the court (Kern Valley Bank v. Chester, 55 Cal. 49); and the same rule applies as to the absence of associate counsel. Peachy v. Witter, 131 Cal. 316; 63 Pac. 468.

Power to continue. The jurisdiction to hear and determine a cause or proceeding involves the power to postpone the hearing for good cause, unless prohibited by statute. Curtis v. Underwood, 101 Cal. 661; 36 Pac. 110.

Refusal to continue proper when. The refusal of a continuance is proper, where the application was made on the day set for trial, and the affidavit showed that the address of the absent witness was unknown, and the cause had been set for more than two months previously, and the

defendant had not made any effort to secure the testimony of such witness. Tompkins v. Montgomery, 123 Cal. 219; 55 Pac. 997. It is not error to refuse a continuance, where the opposing party makes the admission contemplated by this section, and the affidavit containing all that was proposed to be proved by the absent witness was admitted in evidence at the trial. Loftus v. Fischer, 113 Cal. 286; 45 Pac. 328. The court is justified in refusing a continuance to allow the filing of an amended complaint, where the case had already been tried twice, and the court was not informed of the nature of the proposed amendment, or that the plaintiff was unable to establish, under the pleadings on file, the averments that he might include in such amended complaint (Schultz v. McLean, 109 Cal. 437; 42 Pac. 557); and a continuance, asked on the ground that necessary parties to a cross-complaint were not served with process, is properly refused, where they were parties to the action and had been served with summons. Rodgers v. Parker, 136 Cal. 313; 68 Pac. 975.

Discretionary nature of power to grant continuance. See note 74 Am. Dec. 141.

Absence of counsel as ground for continuance. See note Ann. Cas. 1913C, 431.

Injunction against judgment for refusal of continuance. See note 30 L. R. A. 703.

Presence of witnesses at trial as curing error in denying motion for continuance on ground of absent witnesses. See note 2 L. R. A. (N. S.) 721.

Admissibility or subsequent trial of admission made to defeat continuance. See note 25 L. R. A. (N. S.) 169.

Continuance because of illness of party. See note 42 L. R. A. (N. S.) 660.

CODE COMMISSIONERS' NOTE. 1. Absence of witnesses. The affidavit of a party moving for a continuance on the ground of the absence of a witness, must show that the facts expected to be proven by such witness are material. People v. Mellon, 40 Cal. 648; Hawley v. Stirling, 2 Cal. 470; Berry v. Metzler, 7 Cal. 418. An affidavit which merely shows that the desired witness resides in another county from that of the place of trial, and that a subpœna has been placed in the hands of the sheriff of the county where the witness resides, and has been returned not served, does not show sufficient diligence to entitle the defendant to a continuance. People v. Williams, 24 Cal. 31. Affidavits must show due diligence in endeavoring to procure the attendance of witnesses and in preparing the trial. People v. Baker, 1 Cal. 404. The party must have resorted to the proper legal means for that purpose, or must satisfy the court that a resort to such means would have been useless. Kuhland v. Sedgwick, 17 Cal. 123. Where the answer of defendant was filed May 10th, and the application for a continuance, to take testimony in New York, was filed June 14th of the same year, during which interval no attempt was made to sue out a commission for the purpose, it was held that this is not sufficient diligence to entitle the party to a continuance. Pierson v. Holbrook, 2 Cal. 598. Affidavits for a continuance, based upon the ground of absence of witnesses, must state that the facts expected to be proved by absent witnesses cannot otherwise be proved. People v. Quincy, 8 Cal. 89; Pierce v. Payne, 14 Cal. 419; People v. Gaunt, 23 Cal. 156. Nor is it sufficient to state that the party has no other witnesses by whom he expects to prove the same facts. Pope v. Dalton, 31 Cal. 218. Affidavits for a continuance on the ground of absent witnesses should state that the testimony wanted is not simply cumulative, and cannot be proven by others, and also that the application is not made for delay; the character of the diligence used in trying to obtain the attendance of the witness, whether by exhausting the process of the law or otherwise, should also be stated. People v. Thompson, 4 Cal. 240; People v. Quincy, 8 Cal. 89; Pierce v. Payne, 14 Cal. 420.

2. Absence of counsel. An action was commenced September 9, 1867, and the demurrers were filed September 19th. On the 13th of November following, the cause was placed on the calendar, and set for trial on the demurrers for the 14th. On the 14th, defendants asked for a continuance, on affidavits setting out substantially that they had employed attorneys residing in a county distant from Kern County, who had prepared and filed demurrers, and had informed them that the cause would not be tried until the term of said court for December, 1867, and that the attorneys would then be in attendance; that the term then being held was an adjourned term of the June term, 1867, and that they could not procure attendance of their attorneys, and were taken by surprise; that one Bridger was a material witness for defendant Menzel, and lived in Los Angeles, and Menzel had seen him several weeks before, when he promised to be in attendance, but that he had not come, and that by reason of the promise, and what the attorney told them, they had taken no steps to secure the witness's deposition. The court denied the motion for a continuance, and on the 15th of November overruled the demurrers. On the 18th, the defendants answered, and the cause was set for trial on the 19th. On appeal, it was held, that it was not error, under the circumstances, to deny the continuance or overrule the demurrers. Lightner v. Menzel, 35 Cal. 459. Where a case, set for trial on a particular day, with the knowledge and consent of defendant's attorney, and he then, two or three days before the day of trial, goes to another county to try another cause there, a continuance was denied. Haight v. Green, 19 Cal. 113.

3. Absence of a party. A case was called for trial in its regular place on the calendar; counsel for defendant moved to postpone the trial for three days, on account of the temporary absence of the defendant. The motion was based upon an affidavit of the business associate of the defendant, to the effect that the defendant had gone to the state of Nevada a few days previous to the motion, on important private business, and that affiant knew nothing about the facts of the case, but believed that it would be impossible to try it without the defendant's presence, as the facts were altogether within his knowledge, and that he did not know when defendant would return, but he expected him to do so within a few days. The court denied the motion, and upon appeal it was held that the denial did not amount to an abuse of discretion. Wilkinson v. Parrott, 32 Cal. 102.

4. Newly discovered evidence. Material testimony, discovered at too late a period to produce the same at the trial, is good ground for a continuance. Berry v. Metzler, 7 Cal. 418.

5. Surprise. If defendants are surprised by an amendment, and find it necessary to assume a different line of defense in consequence of it, they are entitled to a continuance to prepare for their defense. Polk v. Coffin, 9 Cal. 58. A refusal to grant a continuance for the absence of witnesses or counsel, under circumstances showing that the party or his counsel was surprised as to the time or place of holding court, is erroneous. Ross v. Austill, 2 Cal. 183. If a party is taken by surprise by an extension of time to take testimony before a referee, and by the testimony thereby introduced, he is for that reason entitled to a continuance. People v. Holden, 28 Cal. 129.

6. Discretion of the court. Granting or refusing a continuance rests very much in the sound discretion of the court. Musgrove v. Perkins, 9 Cal. 211. And even when the facts show that the action of the court below approached an arbitrary exercise of its discretion, that action will not be reviewed, unless there has been a motion for a new trial, and the application supported by the affidavits of the absent witness, if such affidavits can be obtained; or if not, then it should be shown to the court that they cannot

be obtained. Unless this be done, the appellate court will not interfere, in civil cases, with the action of the lower court. Pilot Rock Creek Canal Co. v. Chapman, 11 Cal. 161; People v. Gaunt, 23 Cal. 156. The judge, after having heard the testimony and argument of counsel in a case, and announced orally from the bench his finding, may continue the case until the next term of court. Hastings v. Hastings, 31 Cal. 95.

7. **Admissions to prevent a continuance.** In criminal cases, on a motion for continuance made by defendant, on the ground of the absence of a material witness, based on a sufficient affidavit, the agreement of the district attorney, that the witness, if present, would have deposed as averred in defendant's affidavit, is not sufficient to warrant overruling the motion; he should have agreed that the facts stated were true. People v. Diaz, 6 Cal. 249. Where the plaintiff, to avoid the continuance, admits that a witness would testify to certain facts set up in the affidavit, and the trial proceeds, the affidavit becomes evidence, but not conclusive proof of its contents. Blankman v. Vallejo, 15 Cal. 645; Boggs v. Merced Mining Co., 14 Cal. 358.

8. **Generally.** Courts are liberal in granting postponements; and if a party, who is unprepared for trial at the time of the calling of his case, fails to move for a continuance, he waives his want of preparation, and cannot afterwards, when judgment has gone against him, move for a new trial on this ground. Turner v. Morrison, 11 Cal. 21. The mistaken advice of an attorney to his client, not to prepare for trial, is not ground for a continuance. Musgrove v. Perkins, 9 Cal. 211. An agreement for a postponement, made by counsel, but not reduced to writing, will not be regarded by the court. Peralta v. Mariea, 3 Cal. 187.

§ 596. In cases of adjournment a party may have the testimony of any witness taken. The party obtaining a postponement of a trial in any court of record must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate, which must accordingly be done; and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witnesses were produced.

Depositions, in the state. Post, §§ 2019–2021, 2031–2038.

Legislation § 596. Enacted March 11, **1872**; based on Practice Act, § 664, as amended by Stats. 1854, Redding ed. p. 73, Kerr ed. p. 102, § 76, which (1) had the words "shall also" instead of "must," after "court of record," and (2) "shall" instead of "must," before "accordingly."

Essentials of deposition. The depositions must be taken in the manner prescribed by the code, when made a valid condition to a continuance; and the reporter's notes of the testimony of the witnesses, at the time of granting the continuance, but not read over or signed or corrected by them, nor certified by the reporter or by any other person, are lacking in the essential elements of a deposition, and an uncertified transcript thereof is not admissible at the trial. Thomas v. Black, 84 Cal. 221; 23 Pac. 1037.

CODE COMMISSIONERS' NOTE. Stats. 1854, p. 73.

CHAPTER IV.

TRIAL BY JURY.

Article I. Formation of Jury. §§ 600–604.
II. Conduct of Trial. §§ 607–619.
III. Verdict. §§ 624–628.

ARTICLE I.

FORMATION OF JURY.

§ 600. Jury, how drawn.
§ 601. Challenges. Each party entitled to four peremptory challenges.
§ 602. Challenge of jurors for cause.
§ 603. Challenges, how tried.
§ 604. Jury to be sworn.

§ 600. Jury, how drawn. When the action is called for trial by jury, the clerk must draw from the trial-jury box of the court the ballots containing the names of the jurors, until the jury is completed, or the ballots are exhausted.

Jury.
1. **Generally.** Ante, §§ 190–254.
2. **Trial.** Ante, §§ 193, 194.
3. **Trial by, conduct of.** Post, §§ 607 et seq.
4. **Waiver of.** Post, § 631.

Verdict. Post, §§ 624 et seq.
Trial-jury box. Ante, § 246.
Jurors, who are competent. Ante, §§ 198, 199.
Exceptions and excuses. Ante, §§ 200–202.

Legislation § 600. Enacted March 11, **1872**; based on Practice Act, § 159, which read: "When the action is called for trial by jury, the clerk shall prepare separate ballots containing the names of the jurors summoned who have appeared and not been excused, and deposit them in a box. He shall then draw from the box twelve names, and the persons whose names are drawn shall constitute the jury. If the ballots become ex-

hausted before the jury is complete, or if from any cause a juror or jurors be excused or discharged, the sheriff shall summon, under the direction of the court, from the citizens of the county and not from bystanders, so many qualified persons as may be necessary to complete the jury. The jury shall consist of twelve persons, unless the parties consent to a less number. The parties may consent to any number not less than three. Such consent shall be entered by the clerk in the minutes of the trial."

Manner of drawing jury in criminal case. Twelve names must be drawn from the box by the clerk, and the defendant must be allowed to examine the whole twelve before exercising his right of peremptory challenge as to any; and those not challenged or excused must then be sworn; after which as many more names as will make up the deficiency must be drawn, when the same process must be repeated until the jury is completed. People v. Scoggins, 37 Cal. 676; People v. Russell, 46 Cal. 122; People v. Lums, 57 Cal. 115; People v. Riley, 65 Cal. 107; 3 Pac. 413; People v. Hickman, 113 Cal. 80; 45 Pac. 175.

Special venire. The court, in impaneling a trial jury in a civil action, instead of taking the names of the jurors appearing on the supervisors' list, may order the sheriff to summon a special venire, when there is nothing to indicate that the sheriff is disqualified. Perkins v. Sunset Telephone etc. Co., 155 Cal. 712; 103 Pac. 190.

Jury in equity case. The defendant is not entitled to demand a jury trial of legal issues involved in an equitable action. Coghlan v. Quartararo, 15 Cal. App. 662; 115 Pac. 664.

CODE COMMISSIONERS' NOTE. The original section contained provisions as to the number to compose a jury, the manner summoning talesmen, and the preparation of the trial-jury box. All these provisions are contained in Part I of this code, vol. I, pp. 123 to 139, inclusive.

1. **Jury, how constituted.** See §§ 190 to 195, inclusive, ante.
2. **Qualifications and exemptions of jurors.** See §§ 198, 199, 200, 201, ante. A party who accepts a juror, knowing him to be disqualified, cannot afterwards avail himself of such disqualification. People v. Stonecifer, 6 Cal. 411.
3. **Manner of selecting and returning jurors.** See §§ 204–210, inclusive, ante.
4. **Time and manner of drawing jurors.** See §§ 214–221, inclusive, ante.
5. **Manner of summoning jurors.** See §§ 225, 226, 227, ante; People v. Rodriguez, 10 Cal. 59; People v. Stuart, 4 Cal. 225. Where the sheriff is a party. Pacheco v. Hunsaker, 14 Cal. 120.
6. **Manner of impaneling jury.** See §§ 246, 247, ante. In a criminal case. People v. Scoggins, 37 Cal. 676.
7. **Excusing jurors.** See § 201, ante; People v. Arceo, 32 Cal. 40.

§ 601. Challenges. Each party entitled to four peremptory challenges. Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.

Challenge for cause. Post, § 602.
Number of peremptory challenges, in justice's court. See post, § 885.

Legislation § 601. 1. Enacted March 11, **1872**; based on Practice Act, § 161, which read: "Either party may challenge the jurors, but when there are several parties on either side, they shall join in a challenge before it can be made. The challenges shall be to individual jurors, and shall either be peremptory, or for cause. Each party shall be entitled to four peremptory challenges." When enacted in 1872, § 601 substituted (1) the word "where" for "when," (2) "must" before "join," for "shall," (3) "are" after "challenges," for "shall be," (4) "are either" for "shall either be," and (5) "is" for "shall be," after "party."
2. Amended by Code Amdts. **1873–74**, p. 310.

Constitutionality of section. The provision of this section, that where there are several parties on either side of an action, they must join in a challenge, is not violative of the fourteenth amendment of the Federal constitution, in denying to persons the equal protection of the laws. Muller v. Hale, 138 Cal. 163; 71 Pac. 81.

Procedure on challenging jurors. The proper practice, in the selection of a jury in a civil case, is to fill the panel, and upon the challenge of a juror for cause, or without cause, immediately to call another to take his place, so that in determining whether to challenge or not, the party may do so with a full panel before him. Silcos v. Lang, 76 Cal. 118; 20 Pac. 297; Vance v. Richardson, 110 Cal. 414; 42 Pac. 909. Each party has the right to examine the twelve jurors before exercising his peremptory challenge as to any, and if some are excused for cause, the deficiency must be supplied with others, who may, in like manner, be examined, until twelve competent and qualified jurors are in the box; thereupon each party may exercise his right to a peremptory challenge, but he cannot be required to exercise it prior to this time. People v. Scoggins, 37 Cal. 676; Taylor v. Western Pacific R. R. Co., 45 Cal. 323.

Right to peremptory challenges. The right to challenge the jurors peremptorily is absolute; and the fact that a party has once passed the jury, including a juror afterwards sought to be challenged, does not cut off this right. Silcox v. Lang, 78 Cal. 118; 20 Pac. 297. Where separate trials are refused, and actions against several defendants consolidated, it is not error to restrict the defendants to four

peremptory challenges, in which all must join. San Luis Obispo County v. Simms, 1 Cal. App. 175; 81 Pac. 972. Where the defendant refuses to exercise a peremptory challenge, and passes the jury to the plaintiff, who accepts the jury, there is an acceptance of the jury, and the refusal of the court to permit the defendant thereafter to exercise a peremptory challenge is not error. Vance v. Richardson, 110 Cal. 414; 42 Pac. 909.

Challenge to favor juror. See note 9 Am. Dec. 81.

Right to examine juror to determine whether to exercise peremptory challenge. See note 109 Am. St. Rep. 564.

Right and manner of exercise of peremptory challenges by joint parties in civil actions. See note 16 Ann. Cas. 265.

Time of exercise of right of peremptory challenge. See note 19 Ann. Cas. 766.

CODE COMMISSIONERS' NOTE. People v. McCalla, 8 Cal. 303; People v. Scoggins, 37 Cal. 679. Each party has a right to put questions to a juror, to show not only that there exists proper grounds for a challenge for cause, but to elicit facts to enable the party to decide whether or not he will make a peremptory challenge. Watson v. Whitney, 23 Cal. 378; People v. Reyes, 5 Cal. 347.

§ 602. Challenge of jurors for cause. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by this code to render a person competent as a juror;

2. Consanguinity or affinity within the fourth degree to any party, or to an officer of a corporation, which is a party;

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, or debtor and creditor, to either party, or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of the capital stock of a corporation which is a party;

4. Having served as a juror in a civil action or been a witness on a previous trial between the same parties, for the same cause of action; or having served as a juror within one year previously in any civil action or proceeding in which either party was plaintiff or defendant;

5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district;

6. Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them;

7. The existence of a state of mind in the juror evincing enmity against or bias to either party;

8. That he is a party to an action pending in the court for which he is drawn and which action is set for trial before the panel of which he is member.

Subd. 1.
1. Competent jurors. Ante, § 198.
2. Incompetent jurors. Ante, § 199.
3. Exemptions and excuses. Ante, §§ 200, 201.

Subd. 2. **Consanguinity or affinity, generally.** Ante, § 170.

Challenge in criminal causes. See Pen. Code, §§ 1055 et seq.

Legislation § 602. 1. Enacted March 11, **1872**; based on Practice Act, § 162, as amended by Stats. 1860, p. 302. When enacted in 1872, (1) in subd. 1, "statute" was changed to "this code," (2) in subd. 2, "either party" was changed to "any party"; (3) in subd. 3, "being security" was changed to "surety."

2. Amended by Code Amdts. **1873–74**, p. 310, (1) in subd. 2, substituting "fourth" for "third"; (2) in subd. 5, changing "the interest of the juror" to "his interest"; (3) in subd. 6, (a) omitting "formed or expressed," after "Having," and (b) after "action" adding "founded upon knowledge of its material facts, or of some of them"; (4) in subd. 7, adding "or against," before "either party."

3. Amendment by Stats. **1901**, p. 145; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 713, (1) at end of subds. 2 and 3, adding "or to an officer of a corporation which is a party"; (2) in subd. 7, striking out the words "or against," before "either party"; (3) adding subd. 8, which ended the section, although the code commissioner said, in his note to this section, "The amendment adds to the section subdivisions 8 and 9, and to subdivisions 2 and 3 the words 'or to an officer of a corporation which is a party.'"

5. Amended by Stats. **1909**, p. 1090, (1) in subd. 2, adding a comma after "corporation"; (2) in subd. 3, (a) after "agent," adding "or debtor and creditor," (b) changing comma to semicolon after "either party," in the second instance, and (c) adding, after "either party," in third instance, "or being the holder of bonds or shares of the capital stock of a corporation which is a party"; (2) in subd. 4, (a) before "or been," adding "in a civil action," and (b) after "of action," adding "or having served as a juror within one year previously in any civil action or proceeding in which either party was plaintiff or defendant"; (3) in subd. 6, omitting a comma after "action" and after "facts"; (4) in subd. 8, omitting "for trial" after "pending," and (b) a comma after "drawn."

6. Amended by Stats. **1913**, p. 510, in subd. 5, substituting "except his interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county or municipal water district," for "except his interest as a member or citizen of a municipal corporation."

Challenge must be specific. A general challenge of a juror for cause, without specification of the particular ground, is insufficient. Paige v. O'Neal, 12 Cal. 483.

Want of qualifications prescribed by code. A juror, selected or listed, may be challenged for cause, where he does not possess the necessary qualifications. People v. Richards, 1 Cal. App. 566; 82 Pac. 691. The "last assessment-roll," within the meaning of the statute prescribing the qualifications of jurors, is the last one completed: the assessment-roll is not completed until certified by the assessor and delivered to the clerk of the board of supervisors. Houghton v. Market Street Ry. Co., 1 Cal. App. 576; 82 Pac. 972.

Competency of jurors. See note ante, § 198.

Consanguinity to a party. A liberal construction is to be given to the second subdivision; and where a brother of the juror was interested to the extent of ten per cent of the amount of the recovery, he is within the prohibition of the second subdivision. Mono County v. Flanigan, 130 Cal. 105; 62 Pac. 293.

Fiduciary or business relation. A tenant of plaintiff, under a lease which required him to deliver, as rent, a share of the crop, is not disqualified, under the third subdivision. Arnold v. Producers' Fruit Co., 141 Cal. 738; 75 Pac. 326.

Juror in previous trial. A jury is not rendered incompetent because it has just tried a case involving the liability of the defendant for a similar cause of action, depending on the same general considerations. Algier v. Steamer Maria, 14 Cal. 167.

Interest in result of action. The fifth subdivision, construed, does not expressly remove the disqualification of a judge, because of his membership or citizenship in a municipal corporation, which, alike with that of a juror, existed at common law. Meyer v. San Diego, 121 Cal. 102; 66 Am. St. Rep. 22; 41 L. R. A. 762; 53 Pac. 434.

Opinion as to merits of action. Where a juror states that he had formed an opinion on an issue in the case while sitting as a juror on a trial of a different cause of action, he is properly excused. Grady v. Early, 18 Cal. 108.

Enmity or bias. The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution; but the rule excluding jurors for actual bias in civil cases is not to be confounded with the rule in criminal cases, in relation to opinions founded or based on public rumor, statements in public journals, or common notoriety, which permits the acceptance of a juror, if it appears to the court, on his declaration, that he can and will, notwithstanding such opinion, act impartially and fairly on matters submitted to him. Lombardi v. California Street Ry. Co., 124 Cal. 311; 57 Pac. 66. The statement by a juror, that, should the testimony be evenly balanced, he would decide for the plaintiff, and should the verdict be for the plaintiff, he would go to the biggest verdict, shows such bias in favor of the plaintiff as to render the disallowance of the challenge error. Lombardi v. California Street Ry. Co., 124 Cal. 311; 57 Pac. 66. The mere fact that jurors summoned are acquainted with the plaintiff does not imply bias in his favor, any more than it raises a presumption of prejudice against him. Perkins v. Sunset Telephone Co., 155 Cal. 712; 103 Pac. 190. A challenge for actual bias, where the juror stated that he had an abiding prejudice against cases of the class in which the one he was summoned belonged, and that the evidence in the particular case must be sufficient to overcome such prejudice, is erroneously overruled. Fitts v. Southern Pacific Co., 149 Cal. 310; 117 Am. St. Rep. 130; 86 Pac. 710. In an action to recover damages for negligence in causing the death of a minor child, it is error to overrule challenges to jurors for actual bias shown generally against such suits. Quill v. Southern Pacific Co., 140 Cal. 268; 73 Pac. 991. Where a juror stated that he regarded actions for libel as being of somewhat the same character as speculations; that, in many instances, he felt they were unwarranted by the facts; and that his being a newspaperman, and having an adverse opinion of damage suits, might create a prejudice in his mind and make him unfit to act as a juror,—the disallowance of a challenge is proper, where he said that he would try the case upon the law and the evidence, and it was shown that he had no acquaintance with the parties, and had no knowledge of the facts in the case. Graybill v. De Young, 146 Cal. 421; 80 Pac. 618. Abstract bias in favor of one in plaintiff's position does not render denial of challenge error, where the juror was unacquainted with any party to the suit (Baker

v. Borello, 136 Cal. 160; 68 Pac. 591); but the declaration of a juror, that he was hostile to all landlords, where the plaintiff was one, after having been accepted and informed of the nature of the action, renders him incompetent. Lawlor v. Linforth, 72 Cal. 206; 13 Pac. 496.

Fitness of juror determined how. The conclusion of the court on the challenge of a juror is to be drawn, not from any particular answer which the juror makes to a question asked him, but from his whole testimony. Baker v. Borello, 136 Cal. 160; 68 Pac. 591. Whether a prospective juror is fair and impartial, and should be allowed to sit in the case, is to be determined, in the first instance, by the trial judge. Graybill v. De Young, 146 Cal. 421; 80 Pac. 618.

Discretion of court. In passing upon challenges to jurors for cause, considerable latitude of discretion is allowed to the trial court. McKernan v. Los Angeles Gas etc. Co., 16 Cal. App. 280; 116 Pac. 677.

Appeal. The determination of a challenge will be interfered with on appeal, only when the evidence adduced is such that it cannot be said from it, as a matter of law, that the juror was so prejudiced thereby that he could not be a fair juror (Graybill v. De Young, 146 Cal. 421; 80 Pac. 618; Mono County v. Flanigan, 130 Cal. 105; 62 Pac. 293); and where the court exercised its discretion in excusing a juror to attain justice, the appellate court will interfere with great reluctance. Grady v. Early, 18 Cal. 108; Lawlor v. Linforth, 72 Cal. 205; 13 Pac. 496.

Inability to understand the English language as ground for challenge to juror. See note 35 Am. Rep. 728.

Challenge of jurors on account of preconceived opinions. See note 36 Am. Dec. 521.

Bias or interest or prejudice which disqualifies juror. See note 9 Am. St. Rep. 744.

Prejudice as to business of party to action as disqualifying juror. See note 20 Ann. Cas. 1312.

Interest or bias sufficient to disqualify juror in eminent domain proceedings. See note 5 Ann. Cas. 923.

Effect on competency of juror of residence in county or municipality interested in suit. See notes 6 Ann. Cas. 961; Ann. Cas. 1913A, 120.

Sympathy for laboring men generally as sufficient ground for challenge of juror for cause. See note Ann. Cas. 1913A, 1279.

Sympathy for plaintiff in action for personal injuries as bias sufficient to constitute disqualification of juror. See note Ann. Cas. 1912B, 1183.

Prejudice against race or color of party to action as constituting disqualification of juror. See note Ann. Cas. 1912B, 969.

Competency of jurors who have previously served in cause involving same or similar facts. See notes 4 Ann. Cas. 965; 68 L. R. A. 871.

Personal knowledge of facts to be proved as affecting competency. See note 63 L. R. A. 807.

Who are related by affinity. See note 79 Am. St. Rep. 200.

Competency of employee of party as juror. See note 12 Ann. Cas. 306.

Relationship to witness as constituting disqualification of juror. See note Ann. Cas. 1912B, 1060.

Relationship of juror to party as ground for new trial. See note 18 L. R. A. 477.

Religious affiliations as affecting competency of juror. See note 17 Ann. Cas. 343.

Membership in a religious society or denomination as a disqualification to serve as a juror in a case involving its rights. See note 25 L. R. A. (N. S.) 992.

Relationship to private corporation or association for profit which will disqualify a juror in a civil action in which it is interested. See note 40 L. R. A. (N. S.) 978.

Competency as juror of employee or relative of employee of party or person interested in an action. See note 40 L. R. A. (N. S.) 982.

CODE COMMISSIONERS' NOTE. 1. Want of qualifications. See §§ 198, 199, 200, and 201, ante, and subd. 2 of note to § 600, ante.

2. **Consanguinity.** See §§ 1389 to 1393, inclusive, of the Civil Code.

3. **Juror or witness on former trial.** Where a juror had been accepted by both parties, and subsequently, during the examination of another juror, the fact came out that there had been a former trial of forcible entry and detainer for the same ground now in dispute, and the juror accepted then, of his own accord, stated that the title to the ground had been spoken of in the forcible entry case, and that his mind was made up as to the title, and the plaintiffs thereupon challenged him for cause, and the court excused him, defendants resisting, on the ground that it was too late. Held, not error; that where the court below exercised its discretion in excusing a juror to attain justice, this court would interfere with great reluctance. Grady v. Early, 18 Cal. 108. That a jury has just tried a case involving the liability of defendant for a similar cause of action, depending on the same general considerations, does not render a member of it incompetent to sit in the subsequent case. Algier v. Steamer Maria, 14 Cal. 167.

4. **Unqualified opinions.** If a juror heard or read a statement of the facts of a case, it does not, of itself, disqualify him, for he may not have formed or expressed an "unqualified opinion." A mere impression or suspicion derived from such reading or hearing will not disqualify. The juror must have reached a conclusion, like that upon which he would be willing to act in ordinary matters. People v. Reynolds, 16 Cal. 128. In an action of ejectment, a juror who has formed an opinion adverse to the validity of title under which defendants claimed, is disqualified. White v. Moses, 11 Cal. 68. A verdict of a jury will not be set aside on the ground that one of the jurors "knew and was aware of the circumstances connected with the affair," the subject-matter of the suit, where no objection was raised until after verdict rendered, and it not appearing that he had formed or expressed an opinion before the trial, or was in any way biased in favor of plaintiff. Lawrence v. Collier, 1 Cal. 37.

5. **Bias.** Each party has a right to put questions to a juror, to show not only that there exist proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether he will make a peremptory challenge or not. People v. Reyes, 5 Cal. 347; Watson v. Whitney, 23 Cal. 375. Prejudice has no degrees. The law contemplates that every juror who tries a cause shall have a mind free from all bias or prejudice of any kind; and if a juror is prejudiced in any manner, he is not a proper person to sit on the jury. People v. Reyes, 5 Cal. 347. A juror, being challenged, was examined before triers, and asked the following questions: 1. Are you not a member of a secret and mysterious order, known as and called Know-Nothings, which has imposed on you an oath or obligation, beside which an oath administered to you in a court of justice, if in conflict with that oath or obligation, would be by you disregarded? 2. Are you a member of any secret association, political or otherwise, by your oaths or obligations to which any prejudice exists in your mind against Catholic foreigners? 3. Do you belong to any secret political society, known as and called by the people at large in the United States, Know-Nothings? and if so, are you bound by an oath, or other obligation, not to give a prisoner of foreign birth, in a court of justice, a fair and impartial trial? The court refused to permit

the juror to answer the questions. On appeal, the refusal was held to be error, the appellate court holding that a person who had taken such oaths would be grossly unfit to act as a juror. People v. Reyes, 5 Cal. 347; see also Watson v. Whitney, 23 Cal. 375. A person who knows the defendants, who declares that if the testimony was evenly balanced, he would incline to their side, but would decide against them if the testimony was against them, and he would do his duty as a juror under the instructions of the court, is a competent juror. McFadden v. Wallace, 38 Cal. 51.

6. **Manner of taking objection.** A general challenge for cause, without specification of the particular ground, is insufficient. The code enumerates several different grounds for which such challenge may be taken, and a designation of the one upon which any particular challenge rests is essential to its consideration by the court. It is not sufficient to say: "I challenge the juror for cause." Paige v. O'Neal, 12 Cal. 483.

§ 603. Challenges, how tried. Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

Challenge, grounds of, in justice's court. See post, § 885.

Legislation § 603. Enacted March 11, **1872**; based on Practice Act, § 163, which had "shall" instead of "must."

Examination of jurors upon voir dire. See note 23 Am. Dec. 177.

Discharge of accepted juror for incapacity or impropriety. See note 1 Am. St. Rep. 522.

Improper refusal of court to sustain challenge to juror for cause as warranting reversal where injured party exhausts his peremptory challenges. See note 9 Ann. Cas. 279.

§ 604. Jury to be sworn. As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between ——, the plaintiff, and ——, defendant, and a true verdict render according to the evidence.

Oath, administration of, generally. Post, §§ 2093–2097.

Legislation § 604. Enacted March 11, **1872**; based on Practice Act, § 160, which (1) had the words "oath or affirmation shall" instead of "oath must," (2) did not have the word "and" before "each of them," and (3) had the word "the" before "defendant."

Jury sworn when completed. When the jury is completed, it is to be sworn. People v. Scoggins, 37 Cal. 676; Taylor v. Western Pacific R. R. Co., 45 Cal. 323.

Explanation of meaning of oath. It is not necessary to inform a juror that his oath means that he is to act upon his own judgment. People v. Perry, 144 Cal. 748; 78 Pac. 284.

Presumption as to verdict. It cannot be assumed that any member of a jury rendered his verdict in violation of his oath and the instructions of the court. People v. Loomer, 13 Cal. App. 654; 110 Pac. 466.

Failure of record to show that jury were sworn as ground for reversal. See notes 8 Ann. Cas. 750; 17 Ann. Cas. 178.

CODE COMMISSIONERS' NOTE. The term "oath" includes "affirmation." See subd. 7 of § 17, ante.

ARTICLE II.

CONDUCT OF TRIAL.

§ 607. Order of proceeding on trial.
§ 608. Charge to the jury. Court must furnish, in writing, upon request, the points of law contained therein.
§ 609. Special instructions.
§ 610. View by jury of the premises.
§ 611. Admonition when jury permitted to separate.
§ 612. Jury may take with them certain papers.
§ 613. Deliberation of jury, how conducted.
§ 614. May come into court for further instructions.
§ 615. Proceedings if juror becomes sick.
§ 616. When prevented from giving verdict, the cause may be again tried.
§ 617. While jury are absent, court may adjourn from time to time. Sealed verdict.
§ 618. Verdict, how declared. Form of. Polling the jury.
§ 619. Proceedings when verdict is informal.

§ 607. Order of proceeding on trial. When the jury has been sworn, the trial must proceed in the following order, unless the judge, for special reasons, otherwise directs:

1. The plaintiff, after stating the issue and his case, must produce the evidence on his part;

2. The defendant may then open his defense, and offer his evidence in support thereof;

3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

4. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument;

5. If several defendants, having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;

6. The court may then charge the jury.

Proceedings, etc., on trial.
1. Amendments. Ante, § 473.
2. Either party may bring on trial. Ante, § 594.
3. Nonsuits, etc. Ante, § 581.
4. As to proof necessary to make out case. Post, §§ 1867, 1869.
5. Variance, Ante, §§ 469–471.
6. View by jury. Post, § 610.

Evidence.
1. Order of proof. Post, § 2042.
2. Admissibility is for court. Post, § 2102.
3. Allegations, material, only, need be proved. Post, § 1867.
4. Burden of proof. Post, §§ 1869, 1981.
5. Relevancy of evidence. Post, §§ 1868–1870.
6. Relevancy, collateral facts. Post, §§ 1868, 1870.

Witnesses.
1. Answer, witness must. Post, § 2065.
2. Cross-examination. Post, § 2048.
3. Direct examination. Post, § 2045.
4. Excluding witnesses from court-room. Post, § 2043.
5. Experts. Post, § 1870, subd. 9.
6. Impeaching, and evidence of good character. Post, §§ 2049–2053.
7. Interpreters. Post, § 1884.
8. Leading questions. Post, § 2046.
9. Mode of interrogation. Post, § 2044.
10. Oaths. Post, §§ 2093–2097.
11. Protection of witnesses. Post, § 2066.
12. Refreshing memory. Post, § 2047.
13. Testimony, clerk to take down, if no shorthand reporter. Post, § 1051.
14. Writing shown to witness, other side may see. Post, § 2054.

Charge to jury. Post, §§ 608, 609.

Legislation § 607. Enacted March 11, **1872.**

Construction of section. The court may depart from the order of procedure prescribed in this section, but error cannot ordinarily be predicated upon its refusal to do so. Watkins v. Glas, 5 Cal. App. 68; 89 Pac. 840.

Plaintiffs, who are. Contestants of the probate of a will are plaintiffs, and have the affirmative of all the issues raised by the contest. Estate of Dalrymple, 67 Cal. 444; 7 Pac. 906; Estate of Latour, 140 Cal. 414; 73 Pac. 1070.

Order of proof. The mere order in which evidence is introduced is very much in the discretion of the court, and will not be interfered with on appeal, except for abuse of discretion. Bates v. Tower, 103 Cal. 404; 37 Pac. 385; Crosett v. Whelan, 44 Cal. 200; People v. Shainwold, 51 Cal. 468. Where a denial places the burden of proof on the defendant, it is not error to require him first to introduce evidence in support of an affirmative defense thus set up. Clarke v. Fast, 128 Cal. 422; 61 Pac. 72. Evidence in anticipation of an affirmative defense is properly excluded, where it is not responsive to any allegation of the complaint. Turner v. Southern Pacific Co., 142 Cal. 580; 76 Pac. 384. Proof of the execution of an instrument, relied upon by the defense, is not proper on the cross-examination of the plaintiff. Haines v. Snedigar, 110 Cal. 18; 42 Pac. 462. Any error in admitting a copy of a deed is cured by subsequent proof of its loss. Kenniff v. Caulfield, 140 Cal. 34; 73 Pac. 803. The defense of a former adjudication is available only upon proof thereof, made only after the plaintiff has proved his case. Harding v. Harding, 148 Cal. 397; 83 Pac. 434; Watkins v. Glas, 5 Cal. App. 68; 89 Pac. 840.

Admissibility of evidence in rebuttal. It is within the discretion of the court to allow, for good cause shown, the admission of evidence in rebuttal, which should have been introduced in presenting the main case. Patterson v. San Francisco etc. Ry. Co., 147 Cal. 178; 81 Pac. 531; Lisman v. Early, 15 Cal. 199; Yankee Jim's Union Water Co. v. Crary, 25 Cal. 504; 85 Am. Dec. 145; Kohler v. Wells Fargo & Co., 26 Cal. 606. The admissions of a defendant are properly excluded in rebuttal, where the plaintiff has not asked permission to reopen his case for that purpose. Young v. Brady, 94 Cal. 128; 29 Pac. 489. No good reason being shown, it is not error to refuse to permit, in rebuttal, additional evidence as to matters gone into fully in the main case (Patterson v. San Francisco etc. Ry. Co., 147 Cal. 178; 81 Pac. 531); nor is it error to refuse to allow testimony held in reserve until the testimony of the other party is in, and then attempted to be introduced by way of rebuttal (Kohler v. Wells Fargo & Co., 26 Cal. 606); nor is it error to refuse to allow a plaintiff to recall a witness, in rebuttal, for the sole purpose of contradicting a witness for the defendant on a point upon which the plaintiff's witness has already testified. Phelps v. McGloan, 42 Cal. 298. Entering upon the original case by the plaintiff, and again proving the same facts that were proved by him in making his prima facie case, is not authorized. Yankee Jim's Union Water Co. v. Crary, 25 Cal. 504. It is proper to admit, in rebuttal, evidence of deraignment of title, where the defendant relies upon adverse possession, the plaintiff being entitled to rely on prima facie evidence of title in the first instance (Abbey Homestead Ass'n v. Willard, 48 Cal. 614); and also evidence

that the plaintiff was a bona fide purchaser in good faith, without notice, and for a valuable consideration, in an action to quiet title, where the defendant had introduced a deed of a date prior to that of the plaintiff (Douglass v. Willard, 129 Cal. 38; 61 Pac. 572); and also additional evidence of the credibility of a witness, which has been attacked by the evidence of the opposite party (Wade v. Thayer, 40 Cal. 578); and evidence to explain testimony which the defendant had introduced to contradict the plaintiff's testimony. Bradford v. Woodworth, 108 Cal. 684; 41 Pac. 797.

Sufficiency of evidence. In an action to recover damages for personal injuries to the plaintiff as the result of an assault, wherein the defendant admits the assault, but pleads self-defense, the plaintiff, in order to establish his case, is not required to prove that the defendant assaulted him without cause. Hardy v. Schirmer, 163 Cal. 272; 124 Pac. 993.

Motion to strike out testimony. A motion to strike out the testimony of a witness, to be available, must be directed with precision to the testimony sought to be stricken out. Lucy v. Davis, 163 Cal. 611; 126 Pac. 490. A party objecting to a question, or moving to strike out testimony, should be required to state the grounds of his objection or motion. Spear v. United Railroads, 16 Cal. App. 637; 117 Pac. 956. Where no objection is made to the admission of evidence at the time it is given, a motion to strike it out, after the case is closed, is properly denied. Perkins v. Blauth, 163 Cal. 782; 127 Pac. 50. After a witness has testified to his opinion of the mental condition of a testator, and also to other matters, a motion to strike out the entire testimony of the witness, on the ground that he was not an intimate acquaintance, does not lie. Estate of Huston, 163 Cal. 166; 124 Pac. 852.

Right to open and close argument. Where the ownership of land, in condemnation proceedings, is not in issue, the defendant has no right to open and close the argument: that right belongs to the plaintiff. Mendocino County v. Peters, 2 Cal. App. 24; 82 Pac. 1122.

Argument of counsel may include what. The argument is under the control of the court, and extraneous matter should not be brought in and commented upon. Knight v. Russ, 77 Cal. 410; 19 Pac. 698. It is not misconduct for the defendant's counsel, in arguing to the jury, to refer to matters covered by findings that are before them. Gjurich v. Fieg, 164 Cal. 429; 129 Pac. 464. It is within the discretion of the court to permit counsel to read to the jury and to comment upon instructions previously settled by the court (Boreham v. Byrne, 83 Cal. 23; 23 Pac. 212); and to read sections of the codes to the jury, in argument (Meyer v. Foster, 147 Cal. 166; 81 Pac. 402; and see People v. Anderson, 44 Cal. 65; People v. Forsythe, 65 Cal. 101; 3 Pac. 402; People v. Treadwell, 69 Cal. 226; 10 Pac. 502; Sullivan v. Royer, 72 Cal. 248; 1 Am. St. Rep. 51; 13 Pac. 655); and the reading of pleadings, or calling the attention of the jury to facts alleged therein, during the argument, is not improper (Knight v. Russ, 77 Cal. 410; 19 Cal. 698); but the practice of reading law books to the jury is not a commendable one; hence, a refusal to allow counsel to read extracts from the decisions of the supreme court is not error. People v. Godwin, 123 Cal. 374; 55 Pac. 1059.

Written argument. To permit a motion to be argued on briefs is simply to permit a written argument on the motion instead of an oral one. McNeill & Co. v. Doe, 163 Cal. 338; 125 Pac. 345.

Reopening of case after submission. The reopening of the case after submission, for the introduction of additional evidence, is within the discretion of the court (Miller v. Sharp, 49 Cal. 233; Briswalter v. Palomares, 66 Cal. 259; 5 Pac. 226; Consolidated National Bank v. Pacific Coast S. S. Co., 95 Cal. 1; 29 Am. St. Rep. 85; 30 Pac. 96; San Francisco Breweries v. Schurtz, 104 Cal. 420; 38 Pac. 92; Douglass v. Willard, 129 Cal. 38; 61 Pac. 572); and the appellate court will interfere with the orders of the lower court, in such cases, only for abuse of discretion. Douglass v. Willard, 129 Cal. 38; 61 Pac. 572. It is not an abuse of discretion to allow the reopening of the case, after submission, in order to permit the plaintiff to prove, by the clerk's register of actions, that a prior action for the same cause had been dismissed in proper form (Loewenthal v. Coonan, 135 Cal. 381; 87 Am. St. Rep. 115; 67 Pac. 324); nor to refuse the reopening, where the proposed evidence is merely cumulative, and its admission could not affect the result (Estate of Walker, 143 Cal. 162; 82 Pac. 770); nor to refuse the reopening, to supply proof as to the sufficiency of a tax deed admitted in proof of title, after objection and warning of opposing counsel of the necessity of such proof (Haines v. Young, 132 Cal. 512; 64 Pac. 1079); nor to refuse the reopening, where no issue is raised by the pleadings to which the evidence offered is relevant. San Francisco Breweries v. Schurtz, 104 Cal. 420; 38 Pac. 92. Where an amended complaint was permitted to be filed, based on an affidavit setting up facts learned since the case was tried and submitted, and permission was given to take further testimony, what further relevant testimony may be allowed is within the discretion of the court. Lee v. Murphy, 119 Cal. 364; 51 Pac. 549, 955.

Right of trial court to direct verdict at close of opening statement of plaintiff's counsel. See note 14 Ann. Cas. 699.

CODE COMMISSIONERS' NOTE. "The length to which trials are now protracted is a matter of great and just complaint. The remedy lies chiefly with the courts. If they would adhere inflexibly to the rule that a question once decided shall not be debated anew, and would stop the examination of a witness when he has been already sufficiently examined, a vast deal of time might be saved. It is a rule in the English courts, and in the courts of some of our states, that a counsel shall stand while he is examining a witness. The same rule would be useful here. As trials are now sometimes conducted, the counsel sits leisurely in his seat, writing down at length all the questions and answers, and the court meeting at ten and adjourning at three, a single witness remains under examination from day to day, and the trial lasts for weeks, when it should be ended in as many days. . . . With resolution on the part of the courts, and a few rules, such as they should adopt, we are persuaded that more than half the time now spent in trials might be saved." Field, Graham, and Loomis.

§ 608. Charge to the jury. Court must furnish, in writing, upon request, the points of law contained therein. In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge, or sign, at the time, a statement of such points prepared and submitted by the counsel of either party.

Matters of law, court stating, in charge. Const., art. VI, § 19; post, §§ 657, subd. 7, §§ 2102, 2061.

Legislation § 608. 1. Enacted March 11, **1872**; based on Practice Act, § 165, which had (1) the word "shall" instead of "may," in first line, (2) the words "shall also" instead of "must," before "inform the jury," (3) the word "shall" instead of "must," before "furnish to either," and (4) the word "shall" before "sign."

2. Amendment by Stats. **1901**, p. 145; unconstitutional. See note ante, § 5.

Must be on law. Each party is entitled to instructions on the law of the case, on the theory that the jury will regard all his testimony as true. Sperry v. Spaulding, 45 Cal. 544. Refusal or neglect to instruct on commonplace matters of law is not ground for reversal, when no erroneous instruction on the subject is given, jurors being assumed to have ordinary intelligence and good sense. Davis v. McNear, 101 Cal. 606; 36 Pac. 105; Estate of Keegan, 139 Cal. 123; 72 Pac. 828. Quoting from the decisions of other courts, in other cases, is not error, if the quotations correctly state the law. Cousins v. Partridge, 79 Cal. 224; 21 Pac. 745; Estate of Spencer, 96 Cal. 448; 31 Pac. 453; People v. McNabb, 79 Cal. 419; 21 Pac. 843; Etchepare v. Aguirre, 91 Cal. 288; 25 Am. St. Rep. 180; 27 Pac. 668. Incorrect instructions are properly refused (Silva v. Bair, 141 Cal. 599; 75 Pac. 162); as are also instructions not containing a statement of any rule of law. Higgins v. Williams, 114 Cal. 176; 45 Pac. 1041. All the law applicable to the case is not required to be stated in a single instruction. Anderson v. Seropian, 147 Cal. 201; 81 Pac. 521; Bradley v. Lee, 38 Cal. 362. The weight of evidence, or preponderance of probability, is sufficient to establish the fact: an instruction to the jury, that it should be proved "to your satisfaction, by a preponderance of the evidence," would be better without the phrase "to your satisfaction." Hutson v. Southern California Ry. Co., 150 Cal. 701; 89 Pac. 1093.

Jury must not judge law. An instruction leaving the jury to determine whether or not the answer denies the allegations of the complaint is erroneous: the construction of pleadings is for the court (Taylor v. Middleton, 67 Cal. 656; 8 Pac. 594); and an instruction submitting to the jury the question as to what facts were admitted by the pleadings is properly refused. Tevis v. Hicks, 41 Cal. 123; Taylor v. Middleton, 67 Cal. 656; 8 Pac. 594.

Instructions bind jury. The jury are bound by the instructions, whether correct or not (Loveland v. Gardner, 79 Cal. 317; 4 L. R. A. 395; 21 Pac. 766; Emerson v. Santa Clara County, 40 Cal. 543; Sappenfield v. Main Street etc. R. R. Co., 91 Cal. 48; 27 Pac. 590); and the instructions are the law of the case, so far as the jurors are concerned. Lind v. Closs, 88 Cal. 6; 25 Pac. 972.

Should not be on facts. An instruction on a question of fact is properly refused (Estrella Vineyard Co. v. Butler, 125 Cal. 232; 57 Pac. 980); but an instruction as to "alleged defects," not constituting an instruction on a matter of fact, is not erroneous (Anderson v. Seropian, 147 Cal. 201; 81 Pac. 521); and an instruction on the facts is not erroneous, where there is no conflict in the evidence as to the facts referred to. Watson v. Damon, 54 Cal. 278. An instruction as to the form of a verdict is not an instruction on a matter of fact, where no question was raised either in the pleadings or at the trial as to the existence of such fact. Feliz v. Feliz, 105 Cal. 1; 38 Pac. 521. Judges are prohibited by the constitution from charging juries as to the facts; hence, it is improper for the court, in its instructions, to select the testimony of particular witnesses as entitled to special weight or consideration. Huyck v. Rennie, 151 Cal. 411; 90 Pac. 929. An instruction as to the force or effect of evidence on the question of

fraudulent intent, which is made a question of fact, is erroneous (Miller v. Stewart, 24 Cal. 502); but an instruction, merely stating the claim of the plaintiff as to the facts, and not stating the facts as being proved, does not invade the province of the jury (Jarman v. Rea, 137 Cal. 339; 70 Pac. 216; Carraher v. San Francisco Bridge Co., 81 Cal. 98; 22 Pac. 480); but merely applying the law to hypothetical facts, and submitting to the jury the question whether the facts hypothetically stated are true, is not an instruction on a question of fact. Baddeley v. Shea, 114 Cal. 1; 55 Am. St. Rep. 56; 33 L. R. A. 749; 45 Pac. 990. An instruction stating facts hypothetically, which are within the issues, and instructing the jury to find for the plaintiff or for the defendant, according as they may find by a preponderance of evidence, whether such facts are proved or not, does not invade the province of the jury as to matters of fact. Ryan v. Los Angeles Ice etc. Co., 112 Cal. 244; 32 L. R. A. 524; 44 Pac. 471. A statement in an instruction, that the evidence tends to prove a matter in issue, is not erroneous. Morris v. Lachman, 68 Cal. 109; 8 Pac. 799; and see People v. Vasquez, 49 Cal. 560; People v. Perry, 65 Cal. 568; 4 Pac. 572. An instruction taking from the jury the principal issue of fact in the case is erroneous (Levitzky v. Canning, 33 Cal. 299; People v. King, 27 Cal. 507; 87 Am. Dec. 95; Perkins v. Eckert, 55 Cal. 400): it is only where the fact is admitted, or there is no shadow of conflict in the evidence with respect thereto, that the court is justified in taking it from the jury. Dean v. Ross, 105 Cal. 227; 38 Pac. 912; People v. Phillips, 70 Cal. 61; 11 Pac. 493. Reference, in an instruction, to matters on which there is no evidence, is not erroneous, where the instruction does not assume the existence of such fact, and the statement does not tend to prejudice the defendant. Bosqui v. Sutro R. R. Co., 131 Cal. 390; 63 Pac. 682. An instruction as to an account stated between the parties is properly refused, where the plaintiff did not consent to the account rendered by the defendant. Ah Tong v. Earle Fruit Co., 112 Cal. 679; 45 Pac. 7. An instruction, that if the jury are satisfied that defendant's testimony is true, they shall render a verdict in his favor, and if not, they shall find for such damages as they may think proper to allow, leaves it sufficiently plain to the jury that they are the exclusive judges of the facts. Gately v. Campbell, 124 Cal. 520; 57 Pac. 567; Jones v. Chalfant, 3 Cal. Unrep. 585; 31 Pac. 257. An instruction, that the mere slipping of the wheels of a vehicle on a wet street-car track, resulting from an attempt to avoid a collision, would not conclusively, or as matter of law, repel the imputation of negligence, is not erroneous, where there is evidence to sustain the action. Roche v. Redington, 125 Cal. 174; 57 Pac. 890. The burden of proving contributory negligence is cast upon the defendant, and such negligence is a question of fact for the jury. Foley v. Northern California Power Co., 14 Cal. App. 401; 112 Pac. 467. Where death resulted from attempting to remove a broken electric wire, in an action for negligence the determination of the knowledge of danger on the part of the deceased is for the jury, without any direction from the court unfavorable to the plaintiff. Foley v. Northern California Power Co., 14 Cal. App. 401; 112 Pac. 467. In an action for injuries received while alighting from a train, an instruction, based on the injured passenger's knowledge of the premises, and her assumption of risk notwithstanding the defendant's negligence in not lighting the premises, is properly disallowed. Teale v. Southern Pacific Co., 20 Cal. App. 570; 129 Pac. 949. It is correct to instruct the jury, that a servant assumes all of the ordinary risks of the business in which he is employed, but does not assume the risk of defective premises, machinery, or structures furnished by the master, if the defect was either known to the master, or could have been discovered by the master by a reasonably careful inspection. Hayes v. Western Fuel Co., 19 Cal. App. 634; 127 Pac. 518. Without proper evidence, it is a palpable invasion of the province of the jury to ask a witness whether a certain act is within the scope of an agent's authority. Waniorek v. United Railroads, 17 Cal. App. 121; 118 Pac. 947.

Should not comment on rights of parties. An instruction that the plaintiff is entitled to no sympathy from the jury, where they were told that the rights of the parties were to be determined by the strict rules of law, is properly refused. Parker v. Otis, 130 Cal. 322; 92 Am. St. Rep. 56; 62 Pac. 571, 927.

May caution jury. It is within the discretion of the court to give an instruction cautioning against the undue influence of sympathy. Spear v. United Railroads, 16 Cal. App. 637; 117 Pac. 956.

May name witness. Mentioning the names of witnesses in the instructions is not prejudicial, where there were no others than those named, and their evidence was not contradicted. Dyas v. Southern Pacific Co., 140 Cal. 296; 73 Pac. 972.

Must not assume facts when. An instruction assuming as true a fact, in regard to which there is no conflict in the evidence, is not erroneous (Watson v. Damon, 54 Cal. 278); nor is an instruction stating merely the law applicable to the facts proved, and not taking from the jury the question as to whether or not an act was done (Low v. Warden, 77 Cal. 94; 19 Pac. 235); but an instruction assuming a

fact, as to which the evidence was conflicting, is erroneous, as invading the province of the jury (Preston v. Keys, 23 Cal. 193; Caldwell v. Center, 30 Cal. 539; 89 Am. Dec. 131; Crawford v. Roberts, 50 Cal. 235; Vulicevich v. Skinner, 77 Cal. 239; 19 Pac. 424; Dean v. Ross, 105 Cal. 227; 38 Pac. 912; Williams v. Casebeer, 126 Cal. 77; 58 Pac. 380; Roche v. Baldwin, 135 Cal. 522; 65 Pac. 459; 67 Pac. 903; Estate of Keegan, 139 Cal. 123; 72 Pac. 828; Manning v. App Consol. Gold Mining Co., 149 Cal. 35; 84 Pac. 657); as is also an instruction assuming a fact to be true, and then submitting to the jury the question whether or not such fact is true (Cahoon v. Marshall, 25 Cal. 197); and an instruction assuming a fact favorable to a party cannot be complained of by him. Hill v. Finigan, 77 Cal. 267; 11 Am. St. Rep. 279; 19 Pac. 494. An instruction assuming a fact which is not productive of injury is not erroneous (Bradley v. Lee, 38 Cal. 362); nor, where there is no conflict in the evidence as to a fact, is an instruction assuming such fact. Baker v. Southern California Ry. Co., 106 Cal. 257; 46 Am. St. Rep. 237; 39 Pac. 610. An instruction involving an uncontradicted fact, though erroneous, is not prejudicial. Courteney v. Standard Box Co., 16 Cal. App. 600; 117 Pac. 778.

Must be applicable to the facts. Requested instructions, inapplicable to any evidence adduced in the case, are properly refused. Courteney v. Standard Box Co., 16 Cal. App. 600; 117 Pac. 778; Shaw v. Shaw, 160 Cal. 733; 117 Pac. 1048. If there is some evidence in the case, upon which an instruction relative to contributory negligence might be based, it is error to refuse it. Spear v. United Railroads, 16 Cal. App. 637; 117 Pac. 956. Refusal to give correct and pertinent instructions asked is error (Sukeforth v. Lord, 87 Cal. 399; 25 Pac. 497; Mabb v. Stewart, 133 Cal. 556); but a refusal to give an instruction, purporting to be a statement of what the plaintiff alleged in the complaint, and what the defendant denied, is not error, where such facts had been correctly stated to the jury by counsel. Cody v. Market Street Ry. Co., 148 Cal. 90; 82 Pac. 666. Instructions are sufficient, if they lay down the correct rule of law applicable to the facts of the case (Peters v. Southern Pacific Co., 160 Cal. 48; 116 Pac. 400; Kearney v. Bell, 160 Cal. 661; 117 Pac. 925; Lonnergan v. Stansbury, 164 Cal. 488; 129 Pac. 770); but an instruction on a point not in issue should not be given. Branger v. Chevalier, 9 Cal. 351; Conlin v. San Francisco etc. R. R. Co., 36 Cal. 404; Marriner v. Dennison, 78 Cal. 202; 20 Pac. 386; Stevens v. San Francisco etc. R. R. Co., 100 Cal. 554; 35 Pac. 165; Baker v. Southern California Ry. Co., 106 Cal. 257; 46 Am. St. Rep. 237; 39 Pac. 610; Nofsinger v. Goldman, 122 Cal. 609; 55 Pac. 425; Wahlgren v. Market Street Ry. Co., 132 Cal. 656; 62 Pac. 308; 64 Pac. 993; Cahill v. Baird, 138 Cal. 691; 72 Pac. 342; Silva v. Bair, 141 Cal. 599; 75 Pac. 162. It is error to refuse an instruction that is a correct statement of the law, and applicable to the case as presented by the pleadings and the evidence. Hart v. Buckley, 164 Cal. 160; 128 Pac. 29. Each party is entitled to instructions applicable to his theory of the case and the testimony of his witnesses (Renton v. Monnier, 77 Cal. 449; 19 Pac. 820; Hunt v. Elliott, 77 Cal. 588; 20 Pac. 132; Davis v. Russell, 52 Cal. 611; 28 Am. Rep. 647; Buckley v. Silverberg, 113 Cal. 673; 45 Pac. 804; Eppinger v. Kendrick, 114 Cal. 620; 46 Pac. 613; Waniorek v. United Railroads, 17 Cal. App. 121; 118 Pac. 947); and the judgment will not be reversed because the evidence is insufficient to justify the verdict upon that theory, if, upon other facts, the verdict is correct. Buckley v. Silverberg, 113 Cal. 673; 45 Pac. 804. The refusal of instructions permitting the jury to find for a greater sum than that demanded in the complaint is proper, where an amendment of the complaint was conditionally granted, and the plaintiff refused to comply with the condition. Wise v. Wakefield, 118 Cal. 107; 50 Pac. 310.

Should cover issues. Instructions should not be numerous, and those given should be as simple and plain as possible, and cover the issues, so that the jury may fully understand them. Estate of Keithley, 134 Cal. 9; 66 Pac. 5. In an equity case, a refusal to give instructions is not cause for reversal, where the court finds on all the issues submitted to the jury. Hewlett v. Pilcher, 85 Cal. 542; 24 Pac. 781; Riley v. Martinelli, 97 Cal. 575; 33 Am. St. Rep. 209; 21 L. R. A. 33; 32 Pac. 579; and see Branger v. Chevalier, 9 Cal. 353.

Should be concrete, and not abstract. An instruction on an abstract principle, as to which there is no evidence, is erroneous, as tending to mislead the jury. People v. Jaurez, 28 Cal. 389; Tompkins v. Mahoney, 32 Cal. 231; Mecham v. McKay, 37 Cal. 154; Bowers v. Cherokee Bob, 45 Cal. 495; Hanks v. Naglee, 54 Cal. 51; 35 Am. Rep. 67; Estate of Holbert, 57 Cal. 257; Comptoir D'Escompte v. Dresbach, 78 Cal. 15; 20 Pac. 28; Estate of Carpenter, 94 Cal. 406; 29 Pac. 1101; Estate of Calkins, 112 Cal. 296; 44 Pac. 577; Nofsinger v. Goldman, 122 Cal. 609; 55 Pac. 425; Tompkins v. Montgomery, 123 Cal. 219; 55 Pac. 997; Gately v. Campbell, 124 Cal. 520; 57 Pac. 567; Thomas v. Gates, 126 Cal. 1; 58 Pac. 315; Lemasters v. Southern Pacific Co., 131 Cal. 105; 63 Pac. 128; Cahill v. Baird, 138 Cal. 691; 72 Pac. 342; Estate of Keegan, 139 Cal. 123; 72 Pac. 828; Jones v. Goldtree, 142 Cal. 383; 77 Pac. 939; Meyer v. Foster, 147 Cal. 166; 81 Pac. 402; Ward

Land etc. Co. v. Mapes, 147 Cal. 747; 82 Pac. 426. An instruction as to the policy of the law in reference to any particular question, is properly refused (Ward Land etc. Co. v. Mapes, 147 Cal. 747; 82 Pac. 426); as are also instructions enunciating the doctrine of caveat emptor, inapplicable to the case. Merguire v. O'Donnell, 103 Cal. 50; 36 Pac. 1033.

Should not be argumentative. Argumentative instructions are improper (Morris v. Lachman, 68 Cal. 109; 8 Pac. 799; Mabb v. Stewart, 133 Cal. 556; 65 Pac. 1085; and see People v. McNamara, 94 Cal. 509; 29 Pac. 953; People v. Vereneseneckockockhoff, 129 Cal. 497; 58 Pac. 156); but where they are not prejudicial to the appellant's rights, they will not be held erroneous. People v. Stanton, 106 Cal. 138; 39 Pac. 525.

Inconsistent or contradictory instructions. Contradictory and inconsistent instructions are erroneous (McCreery v. Everding, 44 Cal. 246; Bank of Stockton v. Bliven, 53 Cal. 708; Harrison v. Spring Valley Hydraulic Gold Co., 65 Cal. 376; 4 Pac. 381; Haight v. Vallet, 89 Cal. 245; 23 Am. St. Rep. 465; 26 Pac. 897); and cannot be harmonized by the declaration of the court that one instruction means the same thing as the other. Harrison v. Spring Valley Hydraulic Gold Co., 65 Cal. 376; 4 Pac. 381. Errors in giving instructions, and in refusing instructions which correctly state the law, are not cured by contradictory and confusing statements of the court in its oral charge. Vallens v. Tillman, 103 Cal. 187; 37 Pac. 213. Error in one of two contradictory instructions is not cured by the other instruction: it is impossible to determine on which instruction the jury acted. Chidester v. Consolidated People's Ditch Co., 53 Cal. 56; Sappenfield v. Main Street etc. R. R. Co., 91 Cal. 48; 27 Pac. 590. Where the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail, and equally impossible to know that they were not influenced by the erroneous instruction. Brown v. McAllister, 39 Cal. 573; Aguirre v. Alexander, 58 Cal. 21; Sappenfield v. Main Street etc. R. R. Co., 91 Cal. 48; 27 Pac. 590. The fact that contradictory instructions were given at the request of the appellant is not material. Wall v. Marshutz, 138 Cal. 522; 71 Pac. 692; and see Williams v. Southern Pacific R. R. Co., 110 Cal. 457; 42 Pac. 974. Inconsistent instructions that cannot mislead the jury, and that are not so contradictory but that the jury can know by which instruction they should be guided, do not constitute prejudicial error. James v. E. G. Lyons Co., 147 Cal. 69; 81 Pac. 275. An instruction, that it is the duty of the railroad company to maintain sufficient light at its stations, is not in conflict with an instruction that it is its duty to keep the station properly lighted. Teale v. Southern Pacific Co., 20 Cal. App. 570; 129 Pac. 949.

Misleading instructions. It is not error to refuse an instruction which cannot aid the jury, and which might mislead them. Estrella Vineyard Co. v. Butler, 125 Cal. 232; 57 Pac. 980. The test is, not whether it is erroneous, but whether it is misleading. Briggs v. Hall, 20 Cal. App. 372; 129 Pac. 288. Irrelevant instructions are not necessarily erroneous, unless they tend to mislead the jury. George v. Los Angeles Ry. Co., 126 Cal. 357; 77 Am. St. Rep. 184; 46 L. R. A. 829; 58 Pac. 819. A misleading and erroneous instruction is properly refused (Low v. Warden, 77 Cal. 94; 19 Pac. 235); and an instruction as to warranty, where the evidence shows a much broader and more particular warranty, and the granting of it would confuse and mislead the jury by diverting their attention from the other evidence in the case, is also properly refused. Fox v. Stockton etc. Agricultural Works, 83 Cal. 333; 23 Pac. 295. The use of the word "plaintiff," instead of "decedent," in an instruction, which could not mislead the jury, is not reversible error (O'Callaghan v. Bode, 84 Cal. 489; 24 Pac. 269); neither is the use of the word "testimony," instead of "evidence." Mann v. Higgins, 83 Cal. 66; 23 Pac. 206.

Modification of instructions. The modification of instructions, so as to state the law correctly, is proper. Nichol v. Laumeister, 102 Cal. 658; 36 Pac. 925; Boyce v. California Stage Co., 25 Cal. 460; King v. Davis, 34 Cal. 100. The modification of an instruction, requested by the defendant, cannot be objected to by him, where the instruction itself is not proper (Harrington v. Los Angeles Ry. Co., 140 Cal. 514; 98 Am. St. Rep. 85; 63 L. R. A. 238; 74 Pac. 15); and the modification of an instruction, by striking out the phrase, "and from your general knowledge," after the dependent clause, "If you find from the evidence," is not error: the jury take into consideration their knowledge, whether instructed to do so or not. Baker v. Borello, 136 Cal. 160; 68 Pac. 591; Beveridge v. Lewis, 137 Cal. 619; 92 Am. St. Rep. 188; 59 L. R. A. 581; 67 Pac. 1040; 70 Pac. 1083; and see Cederberg v. Robison, 100 Cal. 93; 34 Pac. 625; Butler v. Ashworth, 102 Cal. 663; 36 Pac. 922. It is not material that the instruction given is not in as accurate and precise language as that asked, where it is substantially the same. Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340; 73 Pac. 164. An instruction which could not be given without modification is properly refused. Garlick v. Bowers, 66 Cal. 122; 4 Pac. 1138.

Need not be repeated. An instruction is properly refused, where, so far as it is correct, it is fully covered by other in-

structions. Hayes v. Western Fuel Co., 19 Cal. App. 634; 127 Pac. 518; Ward Land etc. Co. v. Mapes, 147 Cal. 747; 82 Pac. 426; People v. Sampo, 17 Cal. App. 135; 118 Pac. 957. Refusal to use the precise language of a requested instruction is not error, where the law is substantially given in the charge of the court. Clark v. Bennett, 123 Cal. 275; 55 Pac. 908; Cook v. Los Angeles etc. Ry. Co., 134 Cal. 279; 66 Pac. 306. An error in refusing to give an instruction is cured, where the same ground is covered in an instruction subsequently given. Manning v. Dallas, 73 Cal. 420; 15 Pac. 34. There is no prejudicial error in refusing instructions that have been substantially embodied in the charge given, or that have been rendered immaterial by the special findings of the jury to the contrary, or that call for the erroneous assumption of facts. O'Connell v. United Railroads, 19 Cal. App. 36; 124 Pac. 1022. Where part of the instructions clearly informed the jury that carelessness or unskillfulness must have attended all the alleged acts of the defendant in order to make him liable, there is no necessity of repeating this matter in every part. Mervin v. Cory, 145 Cal. 573; 79 Pac. 174. Failure to give further or more explicit instructions is not error, unless they were requested, where those given substantially cover the particular point involved. Rice v. Whitmore, 74 Cal. 619; 5 Am. St. Rep. 479; 16 Pac. 501; Nichol v. Laumeister, 102 Cal. 658; 36 Pac. 925.

Erroneous instruction refused. An instruction, erroneous in part, is properly refused. Marriner v. Dennison, 78 Cal. 202; 20 Pac. 386; Smith v. Richmond, 19 Cal. 476; Preston v. Keys, 23 Cal. 194; Williams v. Casebeer, 126 Cal. 77; 58 Pac. 380.

Must be construed as a whole. Instructions must be construed together. Peters v. Southern Pacific Co., 160 Cal. 48; 116 Pac. 400; Kearney v. Bell, 160 Cal. 661; 117 Pac. 925; Lonnergan v. Stansbury, 164 Cal. 488; 129 Pac. 770. They are to be read and taken as a whole; they are not necessarily erroneous because, taken separately, some of them may fail to enunciate propositions of law in precise terms and with legal accuracy; and they are sufficient if they give the jury a fair and just notion of the law upon the point discussed (Stephenson v. Southern Pacific Co., 102 Cal. 143; 34 Pac. 618; 36 Pac. 407; People v. McDowell, 64 Cal. 467; 3 Pac. 124; People v. Turcott, 65 Cal. 126; 3 Pac. 461; Davis v. Button, 78 Cal. 247; 18 Pac. 133; 20 Pac. 545; People v. Lee Chuck, 78 Cal. 317; 20 Pac. 719; Monaghan v. Pacific Rolling Mill Co., 81 Cal. 190; 22 Pac. 590; Murray v. White, 82 Cal. 119; 23 Pac. 35; Doty v. O'Neil, 95 Cal. 244; 30 Pac. 526; Hanscom v. Drullard, 79 Cal. 234; 21 Pac. 736; Nichol v. Laumeister, 102 Cal. 658; 36 Pac. 925; People v. Anderson, 105 Cal. 32; 38 Pac. 513); and if the law is correctly stated as applicable to the case, the jury will be deemed to have given full consideration to each and every proposition of law laid before them (Feliz v. Feliz, 105 Cal. 1; 38 Pac. 521); and a judgment will not be reversed, simply because particular instructions, taken alone, may not embody all the law applicable. Anderson v. Seropian, 147 Cal. 201; 81 Pac. 521; People v. Jackson, 138 Cal. 462; 71 Pac. 566. Instructions which, taken in connection with other instructions given, could not have misled the jury, will not be held erroneous on appeal. Thomas v. Gates, 126 Cal. 1; 58 Pac. 315; Wilson v. Southern Pacific R. R. Co., 62 Cal. 164. Where the jury, taking the instructions as a whole, must have understood the words "safe and suitable" as meaning "reasonably safe and suitable," an instruction that an employer is bound to furnish "safe and suitable" appliances is not erroneous. Wall v. Marshutz, 138 Cal. 522; 71 Pac. 692. The omission of the word "preponderance," in an instruction, in a single instance, is not erroneous, where the law relating to burden of proof was repeatedly called to the attention of the jury (Humphrey v. Pope, 1 Cal. App. 374; 83 Pac. 223; People v. Moriue, 61 Cal. 372); nor is an instruction as to admissions in the pleadings erroneous. Dyas v. Southern Pacific Co., 140 Cal. 296; 73 Pac. 972. Where a party asks an instruction on an abstract proposition, he must take the risk of its being correct in all its parts; and where there is no testimony as to part of the facts on which the instruction was predicated, its refusal is not error. Thompson v. Paige, 16 Cal. 77. Where all the instructions, taken together, correctly give the law on the subject, a party objecting is not prejudiced by a verbose instruction. Estate of Black, 132 Cal. 392; 64 Pac. 695.

When court may direct verdict. Where there is no conflict in the evidence, the court may properly direct a verdict (Martin v. Ward, 69. Cal. 129; 10 Pac. 276; Chenery v. Palmer, 6 Cal. 122; 65 Am. Dec. 493; Page v. Tucker, 54 Cal. 121); otherwise it can instruct only as to the law. Estate of Everts, 163 Cal. 449; 125 Pac. 1058. The direction of a verdict is justified, not merely where there is no conflict in the evidence, but also where the evidence is such that it is clearly insufficient to support a verdict in favor of the party against whom the direction is given, unless the circumstances of the case indicate that upon another trial the evidence may be materially different. Lacey v. Porter, 103 Cal. 597; 37 Pac. 635. It is proper for the court, after the plaintiff's evidence is closed, to direct a verdict for the defendant, where the evidence would be insuffi-

cient to sustain a verdict for the plaintiff, if found. Champion Gold Mining Co. v. Champion Mines, 164 Cal. 205; 128 Pac. 315. The correctness of the direction of a verdict depends on whether there is any evidence which would authorize a different verdict; and if there is any conflict in the evidence, or if different inferences of fact may be drawn from the evidence, it is the function of the jury to determine the issue; but if, upon all the evidence, only one conclusion or finding can be made, it is immaterial whether the jury make that conclusion or finding by direction of the court or upon their own deliberation. Los Angeles Farming etc. Co. v. Thompson, 117 Cal. 594; 49 Pac. 714; and see Levitzky v. Canning, 33 Cal. 299; O'Connor v. Witherby, 111 Cal. 523; 44 Pac. 227; Wilson v. Alcatraz Asphalt Co., 142 Cal. 182; 75 Pac. 787. An instruction, that if the jury think there is some evidence in favor of the plaintiff's side of the case, whether little or great, it is their duty to find in his favor, is not proper in any conceivable case. Bunting v. Saltz, 84 Cal. 168; 24 Pac. 167. An instruction asking for a verdict on one matter, and entirely ignoring other considerations and facts in the case, is properly refused. Anderson v. Seropian, 147 Cal. 204; 81 Pac. 521. An instruction directing the jury to find for the plaintiff, without considering the defense of the statute of limitations set up in the answer, and to support which evidence was introduced, is erroneous (Heilbron v. Heinlen, 72 Cal. 371; 14 Pac. 22); as is also an instruction authorizing the jury to find a verdict for less than the amount as fixed by the admissions in the pleadings. Sukeforth v. Lord, 87 Cal. 399; 26 Pac. 497. An instruction to the jury, that the admitted facts shall be taken by them as true, and that they shall so find for the plaintiff, is not an instruction to find in favor of the plaintiff, except as to the facts so admitted. Blood v. Light, 31 Cal. 115.

Proper subjects of instructions to jury and to what extent judge may comment on evidence. See note 72 Am. Dec. 538.

Instructions invading province of jury. See note 14 Am. St. Rep. 36.

Urging or coercing verdict. See notes 105 Am. St. Rep. 566; 11 Ann. Cas. 1131; Ann. Cas. 1912D, 440; 16 L. R. A. 643.

Propriety of instruction referring jury to pleadings to determine issues. See note Ann. Cas. 1912C, 227.

Effect of request by both parties for direction of verdict. See note Ann. Cas. 1913C, 1342.

CODE COMMISSIONERS' NOTE. 1. Instructions upon abstract propositions. If the court refuse to instruct the jury upon a point in relation to which there is no evidence, it is not error. Tompkins v. Mahoney, 32 Cal. 231; Conlin v. San Francisco etc. R. R. Co., 36 Cal. 404; Mecham v. McKay, 37 Cal. 155. An instruction may be sound as an abstract proposition of law, yet have no application to the facts of the case, as disclosed by the evidence. In such an event the court may, and properly should, refuse the instruction. No instruction should ever be given, unless there is some evidence before the jury to which it is applicable upon some rational theory of the case logically deducible from such evidence. People v. Best, 39 Cal. 691; People v. McCauley, 1 Cal. 385; People v. Roberts 6 Cal. 217; People v. Arnold, 15 Cal. 482; People v. Sanchez, 24 Cal. 28; People v. King, 27 Cal. 514; 87 Am. Dec. 95; People v. Burns, 30 Cal. 207; People v. Williams, 32 Cal. 284; Fairchild v. California Stage Co., 13 Cal. 599; Thompson v. Paige, 16 Cal. 77; Fowler v. Smith, 2 Cal. 39; Benham v. Rowe, 2 Cal. 387; 56 Am. Dec. 342; Branger v. Chevalier, 9 Cal. 353. Where no question of jurisdiction of the court over the action is raised by the pleadings, it is error to instruct the jury, "that, if they believe a certain fact, they must find for the defendant, as the existence of that fact will establish a want of jurisdiction over the case," because, upon the pleadings, such a verdict would bar another action, if rendered against plaintiff in pursuance of such an instruction. Fairbanks v. Woodhouse, 6 Cal. 433. It is not error to refuse an instruction not warranted by the pleadings (Thompson v. Lee, 8 Cal. 275); nor when there is no evidence on the question of fact embraced in the instruction (People v. Hurley, 8 Cal. 390); nor when there is only such evidence as is plainly insufficient to establish it (Selden v. Cashman, 20 Cal. 56; 81 Am. Dec. 93); nor which assumes a fact to exist respecting which evidence has been introduced (Preston v. Keys, 23 Cal. 193); nor which embraces a question which comes properly before the court, and not before the jury (Branger v. Chevalier, 9 Cal. 353); nor when an instruction is erroneous on its face, even though the error would be insufficient to reverse the judgment. Visher v. Webster, 13 Cal. 58.

2. Instructions upon questions of fact. The jury are the judges of the facts, and it is error for the court to assume, in its instructions to the jury, that a certain fact exists, and then submit to them the question whether or not it does exist. Cahoon v. Marshall, 25 Cal. 198; Caldwell v. Center, 30 Cal. 539; 89 Am. Dec. 131. If the court, in an instruction, assumes the existence of a fact, (and the assumption in the condition of the case could not be productive of injury), the judgment, for this reason, will not be reversed. Bradley v. Lee, 38 Cal. 366. The right to "state the testimony" does not authorize an expression of opinion by the court. Seligman v. Kalkman, 8 Cal. 216; Battersby v. Abbott, 9 Cal. 565; Pico v. Stevens, 18 Cal. 376; People v. Dick, 32 Cal. 213; Treadwell v. Wells Fargo & Co., 4 Cal. 260. But if the answer admits the facts stated in the complaint, the court may direct the jury to find for plaintiff. Kuhland v. Sedgwick, 17 Cal. 123; Blood v. Light, 31 Cal. 115.

3. What should not be left to jury. It is error for the court to submit to a jury the question of the legal effect of written documents in evidence. Carpentier v. Thirston, 24 Cal. 268; Luckhart v. Ogden, 30 Cal. 548. If a contract is to be performed within a reasonable time, the question, "What is a reasonable time?" is one of law, and must be determined by the court. Luckhart v. Ogden, 30 Cal. 548.

4. Conflicting instructions. Where instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail, and it is equally impossible, after the verdict, to know that the jury was not influenced by that instruction which was erroneous, as the one or the other must necessarily be, where the two are repugnant. In every such case the verdict must be set aside. Brown v. McAllister, 39 Cal. 577; Clark v. McElvy, 11 Cal. 161; Yonge v. Pacific Mail S. S. Co., 1 Cal. 354; People v. Campbell, 30 Cal. 312. It seldom occurs that a single instruction, given for the purpose of presenting the law upon a point arising upon more than one fact, contains all the qualifications and provisos that would be necessary if no other instructions were given; but it is always intended that such instruction shall be read together with the other instructions upon the same point, or those involving a consideration of the same facts. Bradley v. Lee, 38 Cal. 365. **Instructions will be construed with reference to the evidence.** Brumagim v. Bradshaw, 39 Cal. 24.

5. **Instructions substantially given.** If the court has already properly instructed the jury upon a given point, it is not error to refuse another instruction upon the same point. Belden v. Henriques, 8 Cal. 87; Davis v. Perley, 30 Cal. 630; People v. King, 27 Cal. 509, 87 Am. Dec. 35; People v. Williams, 32 Cal. 280. But the reasons for the refusal should be stated, so that the jury may not be misled. People v. Ramirez, 13 Cal. 172; People v. Hurley, 8 Cal. 390.

6. **Instructions substantially correct.** If the instructions, taken as a whole, fairly submit the case to the jury, the verdict will not be disturbed because some instructions were refused which could properly have been given, or that some of those given are subject to verbal criticism. Brooks v. Crosby, 22 Cal. 42.

7. **Time at which instructions are requested.** A rule of court which requires counsel to file and submit to the court any instructions they may offer, before the argument is closed, does not operate where the cause is submitted without argument. Tinney v. Endicott, 5 Cal. 102. If there is a rule of court requiring instructions to be handed to the judge by a certain time in the progress of the trial, it is not error to refuse to give instructions not handed to the judge in time. Waldic v. Doll, 29 Cal. 556.

8. **Instructions in particular actions. Account stated.** In an action on an account stated, where the only evidence was that of a witness, who testified that defendant, on presentation of the account, admitted it to be correct, and promised to pay it, and the court charged the jury that, if they believed the testimony of the witness, they must find for the plaintiff the amount claimed, and they so found, it was held, that the instruction did not prejudice defendant, as but one verdict could have been rendered under the evidence. Terry v. Sickles, 13 Cal. 427.

By or against administrators. In an action by an administrator against defendant, for conversion of the property of the estate, under § 116 of the statute to regulate the settlement of estates, the proof, as to the right or title or possession of plaintiff, and the taking or interference by defendant, being conflicting, it is error to instruct the jury that a mere demand on the defendant, and refusal by him to surrender the property, is sufficient to charge him with a conversion. Beckman v. McKay, 14 Cal. 250. In an action against an administrator, the court must, if requested, charge the jury as to the statute time within which the action could be brought when the claim is rejected. Benedict v. Hoggin, 2 Cal. 385.

Contract. In an action on a contract of sale of cattle, to be delivered within "three weeks, at the furthest," the consideration-money being paid, complaint, with the common counts, averred the breach of the agreement by failure to deliver the cattle. It was held, that it was not error in the court below instructing the jury, that if defendant did not have the cattle ready for delivery at the time mentioned in the contract, they should find for plaintiff; and in assessing damages, they might find the purchase-money, with ten per cent interest, or the highest market price of the cattle to the time of trial. Maher v. Riley, 17 Cal. 415. Where the vendee of goods is to pay a part of the purchase-money to the creditors of his vendor, this creates no trust in goods sold in favor of such creditors; for this reason, in an action to recover such goods, the following instruction to the jury is improper: "If the jury believe from the testimony that the agreement between Stevens and Markling, the vendors of the plaintiff, was that the plaintiff was to pay certain of the debts of his vendors out of said goods, then that such sale, as against the other creditors of the vendors, is fraudulent." Wellington v. Sedgwick, 12 Cal. 469. Where defendants were sued as factors, and no claims for commissions, etc., were set out as a counterclaim, it was held error for the court to instruct the jury that it was for them exclusively to say what amount the plaintiff was entitled to recover, and that the defendants were liable for the value of the goods at the time of demand. Lubert v. Chauviteau, 3 Cal. 463; 58 Am. Dec. 415. In an action on guaranty, it is error, in terms, to charge the jury if they find for the plaintiff, to assess as damages the amount of the penalty fixed in the guaranty, yet if the plaintiff's damages, if any, must, in any event, exceed the penalty, the direction must be regarded as limiting the verdict, and the defendant is not injured by the instruction. Jones v. Post, 6 Cal. 102.

Ejectment. In ejectment for land claimed as a homestead, where the husband alone had executed a deed to defendant, there was evidence tending to show that the premises were never occupied by plaintiffs with the intention of making them the homestead, and also evidence tending to prove an abandonment of their occupancy, and a residence on other property as that of the family. The court below submitted a series of questions to the jury for a special verdict, the first of which was: "Did the plaintiffs ever dedicate and set apart the real estate described in the complaint as a homestead, by living upon it with the intention to so dedicate it?" and told the jury if they answered this question in the negative, the answer would constitute their entire verdict; but if they found in the affirmative, they should then proceed to answer the other questions. On appeal, it was held that such direction was proper, as a negative answer to this question was conclusive against a recovery, and that such directions are convenient in practice, and no abuse of discretion. Broadus v. Nelson, 16 Cal. 79. Where plaintiff asked the court to instruct the jury, "that lapse of time does not constitute an abandonment, but that it consists in a voluntary surrender and giving up of the thing by the owner, because he no longer desires to possess it, or thereafter to assert any right or dominion over it"; and the instruction was given with the qualification that lapse of time constitutes the material element in the question of abandonment. It was held that, though it would be more exact to say that lapse of time constitutes a material element to be considered in deciding the question of abandonment, but that the instruction given and the qualification are, taken in connection, the same in effect. Lawrence v. Fulton, 19 Cal. 683. The court having admitted in evidence, as sufficiently proven, the mesne conveyances through which plaintiff traced title, the defendants being mere trespassers, charged the jury "that the written evidence of title, together with the admissions of the parties, authorized them to find for the plaintiff, since the execution of the papers had been passed upon by the court." It was held, that it was no objection to this instruction, that it did not leave the execution and delivery of the conveyances to the jury; that the sufficiency of their execution was a matter addressed solely to the court, and that, no question being raised during the trial as to their delivery, and no evidence being offered to rebut the presumption of delivery arising from their possession by plaintiff, the instruction amounted only to an announcement of the law as to the effect of the conveyances and of the admissions of the defendants. Stark v. Barrett, 15 Cal. 361.

It is error for the court to instruct the jury, that plaintiff cannot recover, unless from the evidence the jury can specifically fix and establish the eastern boundary line of the grant under which plaintiff claimed, when it appears from the evidence that the land in controversy is within that boundary line. Seaward v. Malotte, 15 Cal. 307. Where the defendants deny the title of plaintiff, and set up ownership in themselves, it is not error to instruct the jury that the only question for them to determine is as to who has the better right to the premises. Such instruction does not imply that plaintiffs can recover, even if they do not establish, prima facie, a title. Busenius v. Coffee, 14 Cal. 91. In ejectment, where the title is of record and wholly documentary, the clerk may declare the effect of the papers given in evidence. McGarvey v. Little, 15 Cal. 27. In an action for a portion of a tract of land, both parties relying on possession, and the defendant proving a prior possession by actual inclosure of the entire tract, held, it was error to instruct the jury that the defendant's possession was not valid, unless in conformity with the pre-emption laws of the United States, or the possessory laws of this state. Bradshaw v. Treat,

6 Cal. 172. When a private survey is admitted as a diagram, but not as evidence, it is the duty of the court to clearly explain to the jury the purpose and effect of its admission. Rose v. Davis, 11 Cal. 133. An instruction that they must take the grant and map together, and if they believe the land in controversy within the grant, as explained by the map, they will find for the plaintiff. Held to be correct. Ferris v. Coover, 10 Cal. 589.

Fraud. In an action where one of the issues raised is a question of fraudulent intent in the sale or disposition of property, the fraudulent intent is a question of fact alone, to be left solely to the determination of the jury, and in such cases it is error for the court to instruct the jury as to the effect or force of the evidence upon that question; or to instruct a jury that if they have a doubt of the guilt of the party charged with the fraud they must find in his favor. Issues of fact in civil cases are determined by a preponderance of testimony, and this rule applies as well to cases of fraud as to any other. Ford v. Chambers, 19 Cal. 143. Upon the issue of fraud, in an application of an insolvent to be discharged from his debts, where it was alleged that the applicant had made and recorded a sham deed of his property before his application, and had omitted the deed from his schedule. Held, that it was error to instruct the jury, "that, to find the charge of fraud sustained, they must believe the deed made with the intent to defeat, hinder, or delay creditors, to have been actually delivered to the grantees; that proof of record was no proof of delivery," etc., the fraud being as complete without the delivery as with it. Fisk v. His Creditors, 12 Cal. 281. If there is no dispute as to the facts, and the law declares a transaction fraudulent, it is not a question for the jury. The court in such case may direct the jury how to find, or set aside the verdict if they find to the contrary. Chenery v. Palmer, 6 Cal. 119; 65 Am. Dec. 493; McDaniel v. Baca, 2 Cal. 326; 56 Am. Dec. 339.

Malpractice. In an action against surgeons "for malpractice, by which amputation became necessary," the court charged the jury "that if they believed from the evidence that the defendants were guilty of negligence, carelessness, or inattention in their treatment of plaintiff's wounds, by which he was caused great bodily pain and suffering, the plaintiff was entitled to a verdict." The instruction was held erroneous, because the action was not founded upon "bodily pain or suffering." Moor v. Teed, 3 Cal. 190.

Mining claims. In an action for a mining claim, where the defense is an abandonment of the claim by the plaintiff, the judgment roll in action brought by the plaintiff against third parties to recover possession of the same ground, and in which plaintiff recovered judgment, is admissible in evidence to rebut the presumption of abandonment; but the court should guard the jury by proper instructions from giving the judgment any weight as evidence, except upon the question of abandonment. Richardson v. McNulty, 24 Cal. 339. In an action for a mining claim the defendants asked the court to instruct the jury, "that if the plaintiff had abandoned the claim, and did not intend to return and work it before the commencement of the suit," and the court gave the instruction, "subject to the seventeenth section of the statute of limitations," it was held, that the qualification to the instruction was error. Davis v. Butler, 6 Cal. 510. Where the court instructed the jury, that "where an abandonment is sought to be established by the act of the party, the intention not to return, his abandonment is as complete, if it exist for a minute or a second, as though it continued for years; but if he left with the intention of returning, he might do so at any time within five years, provided there was no rule, usage, or custom of miners of such a notorious character as to raise a presumption of an intention to abandon." Held, that the question of abandonment was fairly left to the jury. Waring v. Crow, 11 Cal. 366; see also Richardson v. McNulty, 24 Cal. 339. In suit for damages for injuries upon mining claims, and for perpetual injunction, etc., held, that it was error for the court below to charge the jury that if they believed no injury or damage was done by defendants to plaintiffs, they would find for defendants; that such charge was calculated to mislead, inasmuch as the law presumes damages from a trespass, and under the charge the jury might have decided the case upon this want of proof of plaintiff's damages, instead of absence of proof of their title. Attwood v. Fricot, 17 Cal. 37; 76 Am. Dec. 567.

Mortgage. Where the complaint did not charge the mortgagee in possession with negligence or improper conduct in leasing the premises, but only demanded an account for the rents he actually received, it is proper in the court to refuse to instruct the jury that he might have leased the property differently, and to charge him with what he might have received, if so leased. Benham v. Rowe, 2 Cal. 387; 56 Am. Dec. 342.

Partnership. It is not error to instruct a jury, that, if sufficient time elapses between the dealings of the plaintiffs with the old firm, and their subsequent transactions with the new firm, to put a reasonable man on inquiry, they might be treated as new dealers. Treadwell v. Wells, 4 Cal. 260.

Slander of title. An instruction, "that where a person injuriously slanders the title of another, malice is presumed," is erroneous. It is also error to instruct that fraud cannot be presumed, but must be established by circumstances, not of a light character, but of a most conclusive nature. McDaniel v. Baca, 2 Cal. 326; 56 Am. Dec. 339.

Trespass on the case. In an action for injuries to a garden, caused by the breaking of a reservoir, the court instructed the jury, that to entitle plaintiff to recover, it must appear that the breaking of the reservoir resulted from the gross negligence of defendants; and then proceeded to explain that defendants must have taken the same care of their reservoir, and of the water in it, as they would have done, being prudent men, had the garden of plaintiff been their property; and that otherwise, they had been guilty of gross negligence, and were liable in damages. Held, that, although the instructions, without the explanation, was wrong, still, with the explanation, it was right, and could not have misled the jury. Todd v. Cochell, 17 Cal. 97.

Use and occupation. In an action for use and occupation, the court was requested to instruct the jury, "that it was necessary, to enable the plaintiff to recover, that he should show that the defendant used and occupied the premises by the permission of the plaintiff, and if the jury believed the defendant used and occupied the same against the will of the plaintiff, that they must find a verdict for the defendant." The court refused to so instruct. Held, that, in this, the court erred. Sampson v. Shaeffer, 3 Cal. 196.

Water. In an action for diverting water from plaintiff's ditch, plaintiff and defendants both having ditches supplied from the same stream, the plaintiff's rights being prior and paramount, the defendants requested the court to instruct the jury, that if defendants had brought water from foreign sources and emptied it into the stream, with the intention of taking it out again, they had the right to divert the quantity thus emptied in, less such an amount as might be lost by evaporation and other like causes. The instruction was given with the explanation that they could not so reclaim the water as to diminish the quantity to which plaintiff was entitled as prior locator. Held, that the instruction, as explained, was proper. Burnett v. Whitesides, 15 Cal. 35. In an action for diverting water from the plaintiff's ditch, and where both parties claimed, in part, the waters of the same stream, the court instructed the jury "that defendant is not liable for any deficiency of water in plaintiff's ditch, unless he was diverting from Rabbitt's Creek more water than he was entitled to at the precise time that such deficiency existed." Held, a correct instruction. Brown v. Smith, 10 Cal. 508.

9. Generally. In an action where the court instructed the jury that the facts showed no valid sale of personal property for want of the change of possession, which the statute of frauds requires, on appeal the court sustained the in-

structions. Ford v. Chambers, 19 Cal. 143. It is not error for the court to refuse to instruct the jury, "that where two innocent parties must suffer, that party who had been the cause of another's loss must lose." Davis v. Davis, 26 Cal. 44; 85 Am. Dec. 157. The jury should make up their verdict from the facts, according to the law as given to them by the court; and it is improper for a court to charge the jury, "to take into consideration all of the facts, and do equal justice between the parties," inasmuch as an instruction so general in its terms may mislead them. Kelly v. Cunningham, 1 Cal. 365. Where the court instructs a jury upon what state of facts they may find verdict for a party, the instructions should include all the facts in controversy material to the right of plaintiff or defense of defendant. Gallagher v. Williamson, 23 Cal. 331; 83 Am. Dec. 114; Pearson v. Snodgrass, 5 Cal. 479. If the court errs in the admission of testimony during the trial, but afterwards instructs the jury to disregard such testimony, the error does not entitle the party objecting to the testimony to a new trial. Yankee Jim's Union Water Co. v. Crary, 25 Cal. 507; 85 Am. Dec. 145; Emerson v. Santa Clara County, 40 Cal. 545. Instructions asked and refused ought not be read in the hearing of the jury. Waldie v. Doll, 29 Cal. 555. It is not error for the judge, in stating the testimony to the jury, to read a memorandum of testimony taken by another person. People v. Boggs, 20 Cal. 432.

§ 609. **Special instructions.** Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part.

Exceptions. Post, § 646.

Legislation § 609. Enacted March 11, **1872.**

CODE COMMISSIONERS' NOTE. Counsel may propose instructions to the court, but the court is not compelled to give or refuse them as presented. If the proposed instructions are defective in form of expression, or erroneous in law, the court may modify them in either particular, and give them to the jury in their modified form, or he may refuse them altogether. Boyce v. California Stage Co., 25 Cal. 470; Lawrence v. Fulton, 19 Cal. 683; Smith v. Richmond, 19 Cal. 476; King v. Davis, 34 Cal. 101. The cases cited supra modify Conrad v. Lindley, 2 Cal. 173; Jamson v. Quivey, 5 Cal. 491; Russel v. Amador, 3 Cal. 403. If an instruction asked, given entire, would have been erroneous, the court is not bound to separate the concluding clause and give that by itself, but may refuse the instruction. Smith v. Richmond, 19 Cal. 476.

§ 610. **View by jury of the premises.** When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

Legislation § 610. Enacted March 11, **1872.**

Purpose and result of examination. The purpose of this section is, not to convert the jurors into silent witnesses, who act on their own inspection of the premises viewed, but only to enable them more clearly to understand and apply the evidence (Wright v. Carpenter, 49 Cal. 607); and the result of their examination cannot be taken into consideration by them as independent evidence in the case. Wright v. Carpenter, 49 Cal. 607; 50 Cal. 556.

Discretion of court. The law vests in trial courts the discretion of allowing or disallowing a "view of the premises" or other physical objects relevant to the case, which it is impracticable to bring into court. People v. Sampo, 17 Cal. App. 135; 118 Pac. 957.

Power of court. The power vested in trial courts by this section should be exercised, if at all, with great caution and circumspection, lest more harm than good result, to the parties by thus receiving evidence out of the courtroom. People v. Sampo, 17 Cal. App. 135; 118 Pac. 957. In an action for damages for the death of a person, killed while in charge of machinery, the court may not only order an inspection of such machinery by the jury, but it may also allow the plaintiff's expert to examine the machinery, and give testimony relative thereto. Clark v. Tulare Lake Dredging Co., 14 Cal. App. 414; 112 Pac. 564.

Jury may view what property. The jury are not authorized to view any other property than that in litigation. Wright v. Carpenter, 50 Cal. 556.

Judge need not attend view. The failure of the judge to attend a view of the premises is not prejudicial, where no harm resulted. San Luis Obispo County v. Simas, 1 Cal. App. 175; 81 Pac. 972.

Inspection by court or jury of property or place in dispute. See note 92 Am. Dec. 342.

Impressions made on minds of jurors by view as evidence in case. See note 10 Ann. Cas. 663.

Right of jury on view to make evidence for themselves by experiment. See note 18 Ann. Cas. 571.

View by jury as resting in discretion of court. See note 18 Ann. Cas. 730.

Right of court trying case without jury to view premises. See note 19 Ann. Cas. 578.

§ 611. Admonition when jury permitted to separate. If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

Legislation § 611. Enacted March 11, 1872.

§ 612. Jury may take with them certain papers. Upon retiring for deliberation the jury may take with them all papers which have been received as evidence in the cause, except depositions, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

Legislation § 612. 1. Enacted March 11, 1872; based on Practice Act, § 167, which had the words "except depositions" inclosed in parentheses and following "all papers," instead of the present arrangement.

2. Amendment by Stats. 1901, p. 145; unconstitutional. See note ante, § 5.

What papers may be taken by the jury. This section deals solely with "papers" that have been introduced in evidence. Higgins v. Los Angeles Gas etc. Co., 159 Cal. 651; 34 L. R. A. (N. S.) 717; 115 Pac. 313. By implication, papers not received in evidence should not be allowed to be taken by the jury on their retirement. Powley v. Swensen, 146 Cal. 471; 80 Pac. 722. Promissory notes, offered in evidence after being identified and proved by testimony contained in a deposition, are not part of the deposition, and not within the prohibition of this section. Cockrill v. Hall, 76 Cal. 192; 18 Pac. 318. The sworn statement of a plaintiff, in an action on an insurance policy, as to his losses, and the certificate of a justice of the peace thereto, are documentary evidence, and not within the prohibition of this section. Clark v. Phœnix Ins. Co., 36 Cal. 168. The practice of allowing pleadings to be taken to the jury-room is not a safe one; but where no prejudice or injury is caused, it is not ground for reversal. Powley v. Swensen, 146 Cal. 471; 80 Pac. 722.

Discretion of court. This section is not to be construed as a limitation of the discretionary power of the court to allow other exhibits than papers to be taken by the jury, but as a modification and extension of the common-law rule touching exhibits containing writings (Higgins v. Los Angeles Gas etc. Co., 159 Cal. 651; 34 L. R. A. (N. S.) 717; 115 Pac. 313); and it is not error to allow the jury to take with them to the jury-room the claim upon which the suit is based, which constitutes a portion of the complaint, and which was received in evidence (McLean v. Crow, 88 Cal. 644; 26 Pac. 596); and the court may permit the jury to take with them, and use in their deliberations, any exhibit, where the circumstances call for it, observing the proper precaution of instructing them in the nature of the use that they shall make of it. Higgins v. Los Angeles Gas etc. Co., 159 Cal. 651; 34 L. R. A. (N. S.) 717; 115 Pac. 313.

Jury may compare documents. The jury may compare documents to determine their genuineness, although the testimony of experts is offered; and the jury may wholly disregard such testimony, and exercise their own judgment. Castor v. Bernstein, 2 Cal. App. 703; 84 Pac. 244.

Effect on verdict on papers improperly in jury-room. See note 6 Ann. Cas. 931.

Right of jury to take to jury-room affidavit admitted as testimony of absent witness. See note Ann. Cas. 1913C, 498.

Right of jury to take with them on retirement paper containing calculation or estimate by party as to amount due him. See note Ann. Cas. 1913C, 937.

Right of jury on retirement to take family Bible or other religious book introduced as evidence. See note 41 L. R. A. 456.

CODE COMMISSIONERS' NOTE. In an action against an insurance company, it is not error for the court to permit the jury to take to their rooms the "sworn statement of plaintiff as to his losses." Clark v. Phœnix Ins. Co., 36 Cal. 176; Sexton v. Montgomery County etc. Ins. Co., 9 Barb. 200; Newmarke v. Liverpool etc. Ins. Co., 30 Mo. 160; 77 Am. Dec. 608; Parsons on Mercantile Law, p. 536.

§ 613. Deliberation of jury, how conducted. When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three fourths of them agree upon a verdict or are discharged by the court. Unless by order of the court, the

officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they or three fourths of them are agreed upon a verdict, and he must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

Three fourths, agreement of. See Const., art. I, § 7.

Legislation § 613. 1. Enacted March 11, **1872**; based on Practice Act, § 166, which read: "After hearing the charge, the jury may either decide in court, or retire for deliberation. If they retire, they shall be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the utmost of his ability, keep the jury together, separate from other persons; he shall not suffer any communication to be made to them, or make any himself, unless by order of the court, except to ask them if they have agreed upon their verdict; and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon." When § 613 was enacted in 1872, it read as at present, except that (1) it had the word "they" instead of "at least three fourths of them," in the first sentence, (2) in the second sentence (a) it did not contain the words "or three fourths of them," and (b) had the word "their" instead of "a," before "verdict."

2. Amended by Code Amdts. **1880**, p. 10.

Oath of officer in charge of jury. It is not necessary for the court to administer a special oath to the officer taking charge of the jury upon its retirement for deliberation. Boreham v. Byrne, 83 Cal. 23; 23 Pac. 212.

When jury must be kept together and the consequences of an unauthorized separation. See note 43 Am. Dec. 75.

Separation of jury. See note 103 Am. St. Rep. 155.

Presence of officer in jury-room during deliberations of jury. See note 36 Am. Rep. 441; 8 Ann. Cas. 652.

Prejudice of officer as disqualifying him from acting as custodian of jury. See note Ann. Cas. 1912C, 882.

Discharge of jury without verdict. See note 1 Am. Dec. 176.

Delivery of food to jurymen after retiring to consider verdict. See note 16 Am. Rep. 454.

Communication to jury by custodian or other court officer as ground for new trial. See note 13 Ann. Cas. 522.

Private communication by trial judge with jury during deliberations as ground for new trial. See note 16 Ann. Cas. 1141.

Effect of judge communicating with jury not in open court. See note 17 L. R. A. (N. S.) 609.

Number and agreement of jurors necessary to verdict. See note 43 L. R. A. 34.

§ 614. May come into court for further instructions. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel.

Holidays, Sundays, non-judicial days, etc. Instructions may be given to juries deliberating on. Ante, § 134, subd. 1.

Legislation § 614. Enacted March 11, **1872**, in language of Practice Act, § 168, except that the latter had the word "shall" instead of "must."

Refusal to instruct, effect of. Where the jury return into court, and ask for instructions on a particular point, a refusal is not error, where they do not desire all the instructions read, and the court directs them to follow the instructions already given. Cockrill v. Hall, 76 Cal. 192; 18 Pac. 318.

Instructions in absence of parties or counsel. To allow the jury to come into court after they have once retired, and to give them instructions, in the absence of the parties or their counsel, is error. Redman v. Gulnac, 5 Cal. 148.

Court should not try to influence jury. Where the jury return to the courtroom and report that they cannot agree, it is prejudicial error for the court, after learning that they stand eight to three, to make it appear to them that the three, or one of the three, should yield to the eight. Mahoney v. San Francisco etc. Ry. Co., 110 Cal. 471; 42 Pac. 968; 43 Pac. 518.

Necessity that further instructions requested by jury be given in open court. See note 14 Ann. Cas. 514.

Necessity that further instructions to jury after retirement be given in presence or with consent of counsel. See note 17 Ann. Cas. 536.

CODE COMMISSIONERS' NOTE. Redman v. Gulnac, 5 Cal. 148.

§ 615. Proceedings if juror becomes sick. If, after the impaneling of the jury, and before verdict, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors with the consent of the parties, or another juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterwards impaneled.

Legislation § 615. 1. Enacted March 11, **1872**; based on Practice Act, § 164, which had the words "a new jury" instead of "another juror."

2. Amendment by Stats. **1901**, p. 146; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 714, (1) changing the subjunctive "become" of the Practice Act and original code section to the indicative "becomes," and (2) adding the words "with the consent of the parties."

Withdrawal of a juror. See notes 78 Am. St. Rep. 781; 48 L. R. A. 432.

§ 616. When prevented from giving verdict, the cause may be again tried. In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.

Legislation § 616. Enacted March 11, **1872**; based on Practice Act, § 169, which had (1) the word "a" instead of "the," before "jury," and (2) the word "shall" instead of "may," before "direct."

§ 617. While jury are absent, court may adjourn from time to time. Sealed verdict. While the jury are absent the court may adjourn from time to time, in respect to other business; but it is nevertheless open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement during a recess or adjournment for the day.

Legislation § 617. 1. Enacted March 11, **1872**; based on Practice Act, § 170, which had (1) the words "shall nevertheless be deemed open" instead of the words "is nevertheless open," and (2) a final sentence, reading, "A final adjournment of the court for the term shall discharge the jury." When enacted in 1872, the section was changed to read as at present, except for the final sentence, in which the words "shall discharge" were changed to "discharges."

2. Amended by Code Amdts. **1880**, p. 10, the omission of the final sentence, supra, being the only change.

Formerly, adjournment for term discharged jury. The adjournment of court for the term discharged the jury, and hence, where the trial had been adjourned to a certain day, and before that day the court adjourned the term sine die, and began a new term on the day the trial was adjourned to, it had no power to take up the trial at such time. Johnson v. Pacific Cement Co., 50 Cal. 648.

Delivery of sealed verdict made how. The delivery of a sealed verdict to the coroner, with the request that he deliver it to the clerk, is not objectionable. Paige v. O'Neal, 12 Cal. 483.

Amendment by jury of sealed verdict. See note 5 Ann. Cas. 394.

Right of clerk or attorney to receive verdict in absence of trial judge. See note 16 Ann. Cas. 90.

CODE COMMISSIONERS' NOTE. When a jury are instructed to bring in a sealed verdict, and, after agreeing upon the verdict, they seal it up and give it to the officer in charge of them, the clerk being absent, and request him to give it to the clerk, which is done, and after the meeting of the court the following morning the verdict is opened in the presence of the jury and read by the clerk, without exception, it is not an error sufficient to warrant a new trial. The possession by such officer left the verdict as much in the possession of the court itself as if it had been directly delivered to the clerk. Nor will it make any difference, when the names of the jurors were not called, and they were not asked whether they had agreed upon their verdict where the parties were present, and took an exception at the time; and where it is not pretended that the verdict entered differs from one sealed up, or that the result is in any respect affected by the omission. The opportunities of tampering with jury after separation are so numerous, and in important cases the temptation is so great, and the ability of detection so slight, as to make it a matter of grave doubt whether sound policy does not require an adherance to the verdict as sealed, even as against a subsequent dissent of one or more of the jurors. Paige v. O'Neal, 12 Cal. 483.

§ 618. Verdict, how declared. Form of. Polling the jury. When the jury, or three fourths of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict; if upon such inquiry or polling, more than one fourth of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case.

Verdict received on non-judicial day. Ante, § 134.

Legislation § 618. **1.** Enacted March 11, **1872**; based on Practice Act, §§ 171, 173, which read: "§ 171. When the jury have agreed upon their verdict, they shall be conducted into court by the officer having them in charge. Their names shall then be called, and they shall be asked by the court, or the clerk, whether they have agreed upon their verdict; and if the foreman answer in the affirmative, they shall, on being required, declare the same." "§ 173. When the verdict is given, and is not informal or insufficient, the clerk shall immediately record it, in full, in the minutes, and shall read it to the jury, and inquire of them whether it be their verdict. If any juror disagree, the jury shall be again sent out; but if no disagreement be expressed, the verdict shall be complete, and the jury shall be discharged from the case." When enacted in 1872, § 618 read: "When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, they must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict. If any one answer in the negative, the jury must again be sent out." **2.** Amended by Code Amdts. **1880**, p. 10.

Signature and consent to verdict. The verdict is signed by the foreman only, yet it must be concurred in by all the other jurors. Reynolds v. Harris, 8 Cal. 617. The assent of the jury must be expressed by the foreman, and his consent is conclusive upon all, unless disagreement is expressed at the time. Blum v. Pate, 20 Cal. 69. Findings of the jury on special issues are ineffective, and cannot control the general verdict, unless signed by the jury as a whole or by their foreman; and the failure of the party, against whom the special issues are found, to object to the finding being received, is not a waiver of the defect. Greenberg v. Hoff, 80 Cal. 81; 22 Pac. 69. Where questions, upon the contest of the probate of a will, are propounded to a jury and answered by them, such questions and answers, where they constitute the ultimate facts to be found, and cover the issues growing out of the contest, form a special verdict, which should be signed by the foreman. Estate of Keithley, 134 Cal. 9; 66 Pac. 5. Answers to special interrogatories must be signed either by the jury as a whole, or by their foreman, to make them effective for any purpose. Greenberg v. Hoff, 80 Cal. 81; 22 Pac. 69.

Polling after verdict recorded. Under the old practice, the polling of the jury, after the verdict was recorded, was not a matter of right. Blum v. Pate, 20 Cal. 69.

Bill of exceptions need not contain verdict. The verdict of the jury is a matter of record; hence, it is unnecessary to insert it in the bill of exceptions. Reynolds v. Harris, 8 Cal. 617.

Right of party to poll the jury. See note 30 Am. Rep. 497.

Validity of verdict rendered after jury have been polled and some jurors have dissented and jury have been sent back for further deliberations. See note 6 Ann. Cas. 457.

Foreman as spokesman for jury. See note Ann. Cas. 1913B, 385.

Necessity that verdict of jury be signed. See note Ann. Cas. 1913D, 182.

Receiving verdict on Sunday. See note 39 L. R. A. (N. S.) 844.

CODE COMMISSIONERS' NOTE. Under § 171 of the Practice Act of 1851, there was no absolute right to poll the jury in a civil case. Blum v. Pate, 20 Cal. 69.

§ 619. Proceedings when verdict is informal. When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

Legislation § 619. Enacted March 11, **1872**; based on Practice Act, § 172, which read: "If the verdict be informal, or insufficient, in not covering the whole issue or issues submitted, the verdict may be corrected by the jury, under the advice of the court, or the jury may be again sent out."

Court may instruct jury to amend verdict. The court may instruct the jury to amend their verdict as to its form, not affecting the substance, and in such manner as to be unexceptionable in law. Truebody v. Jacobson, 2 Cal. 269. A verdict for half of the property sued for, not responding to the issues, is a nullity: the court should direct a finding as to the other half. Muller v. Jewell, 66 Cal. 216; 5 Pac. 84.

Uncertainty in verdict. Where the verdict fixes a measurement different from that referred to in the pleadings, and which is uncertain, the court is not at liberty to disregard such measurement. Dougherty v. Haggin, 56 Cal. 522.

Where court may remand jury or set verdict aside. Where the verdict is not in conformity with the issues submitted, the court may remand the jury, under its advice. Ross v. Austill, 2 Cal. 183. Where the verdict does not cover all the issues submitted, the court should remand the jury to render a verdict in proper form; but it is not error to set such verdict aside. Garlick v. Bower, 62 Cal. 65.

Omission of words from verdict as affecting validity thereof. See note 16 Ann. Cas. 475.

CODE COMMISSIONERS' NOTE. If the verdict is informal, the court ought to explain the defects to the jury, and direct them to put it in proper form. People v. Dick, 34 Cal. 666. The court may instruct the jury to amend their verdict as to matters of form, not affecting the substance, and in such manner as to be unexception-

able in law. Truehody v. Jacobson, 2 Cal. 284. Or the court may amend the verdict, when it is defective in something merely formal, and which has no connection with the merits of the cause, if the amendment in no respect changes the rights of the parties. Perkins v. Wilson, 3 Cal. 139. But if the court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error. Ross v. Austill, 2 Cal. 192. A general objection to the form of a verdict, without any specification of the particulars, will not be considered. Mahoney v. Van Winkle, 21 Cal. 552. If a verdict returned by a jury is not sufficiently definite and certain to serve as a basis for a judgment, and the party against whom it is rendered consents that a certain construction thereof should be taken as the verdict, this proceeding is quite as irregular, uncertain, and ineffectual as the verdict itself. Campbell v. Jones, 38 Cal. 509.

ARTICLE III.

VERDICT.

§ 624. General and special verdicts defined.
§ 625. When a general or special verdict may be rendered.
§ 626. Verdict in actions for recovery of money or on establishing counterclaim.
§ 627. Verdict in actions for the recovery of specific personal property.
§ 628. Entry of verdict.

§ 624. General and special verdicts defined. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law.

General or special verdict, when may be rendered. Post, § 625.

Misconduct of jury. Post, § 657, subd. 2.

Legislation § 624. Enacted March 11, **1872**; based on Practice Act, § 174 (New York Code, § 250), which had the word "shall" instead of "must," in both instances.

The general verdict. A general verdict is synthetic; a compound of law and fact. Murphy v. Bennett, 68 Cal. 528; 9 Pac. 738. It must control, if the special verdict is not absolutely irreconcilable therewith. Petersen v. California Cotton Mills Co., 20 Cal. App. 751; 130 Pac. 169. It must be certain: an uncertain verdict will not support the judgment on appeal. Diggs v. Porteus, 5 Cal. Unrep. 753; 33 Pac. 447. It implies a finding in favor of the prevailing party, of every fact essential to the support of his action or defense. Plyer v. Pacific etc. Cement Co., 152 Cal. 125; 92 Pac. 56. A general verdict determines all issues, where there is evidence to support such verdict. Petersen v. California Cotton Mills Co., 20 Cal. App. 751; 130 Pac. 169.

The special verdict. A special verdict is analytic; it finds its facts, and submits the law to the court. Murphy v. Bennett, 68 Cal. 528; 9 Pac. 738. It is the office of the trial jury, by their verdict, to find the facts in issue, whether general or special: with the legal effect of such facts they have no concern. Fitzpatrick v. Himmelmann, 48 Cal. 588. Questions of fact propounded to and answered by the jury constitute the ultimate facts to be found, covering the issues growing out of the contest; and the embodiment of the questions and answers, with the foreman's certificate, constitute a special verdict. Estate of Keithley, 134 Cal. 9; 66 Pac. 5. Each question submitted to a jury as a basis for a special verdict should relate to only one fact: the grouping together of several facts is objectionable. Phœnix Water Co. v. Fletcher, 23 Cal. 481. The jury must decide all questions of fact arising from the evidence, at least where there is a substantial conflict. Estate of Everts, 163 Cal. 449; 125 Pac. 1058. When a special verdict is desired, the practice in this state is, to prepare and submit to the jury the special issues in the form of questions, and this practice is recognized by the legislature by the words of § 1314, post, "the issues submitted to them by the court." Estate of Sanderson, 74 Cal. 199; 15 Pac. 753.

Special verdict sufficient when. A special verdict must find the facts expressly and specially, not generally or impliedly; and it must present the facts so distinctly as to refer the court clearly to the questions of law arising upon them (Breeze v. Doyle, 19 Cal. 101); and it must pass on all the issues, by presenting the conclusions of fact bearing on them all. Estate of Sanderson, 74 Cal. 199; 15 Pac. 753. A special finding in the language of the complaint is sufficient. Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469. Where all the issues in the case are not submitted to the jury, the verdict is an incomplete and imperfect special verdict. Montgomery v. Sayre, 91 Cal. 206; 27 Pac. 648. A special finding, not disposing of all the

issues in the case, and not accompanied by a general verdict, is of no legal effect: no judgment, except by consent of the parties, can be entered on it. Montgomery v. Sayre, 3 Cal. Unrep. 365; 25 Pac. 552. Where two defendants answer, and a third makes default, the verdict is properly confined to those who answer, and should not include the one as to whom there is no issue. Golden Gate Mill etc. Co. v. Joshua Hendy Machine Works, 82 Cal. 184; 23 Pac. 45. Conclusions of law cannot be considered in determining the sufficiency of a special verdict. Petersen v. California Cotton Mills Co., 20 Cal. App. 751; 130 Pac. 169.

Submission of special issue. The court may properly refuse to submit a special issue already included in another issue submitted. Diehl v. Swett-Davenport Lumber Co., 14 Cal. App. 495; 112 Pac. 561; Irrgang v. Ott, 9 Cal. App. 440; 99 Pac. 528.

Court may order new trial when. Where the court, upon hearing evidence after the jury has passed upon some of the vital issues, makes findings upon all of the issues, contrary to the verdict, such action is, in effect, a setting aside and vacating of the verdict, and the court should order a new trial by jury, having no power to determine the cause without a jury. Montgomery v. Sayre, 91 Cal. 206; 27 Pac. 648.

Terms defined. The terms "verdict" and "decision" are appositional: what is predicated of one is predicated also of the other. The verdict is the decision of the jury, reported to the court, on matters lawfully submitted to them, and is either general or special; general, when it finds the facts and the law, and special, when it finds the facts only, leaving the law applicable to them to be decided by the court. Simmons v. Hamilton, 56 Cal. 493.

Verdict ascertained by averaging aggregate separate markings of all the jurors. See note 34 Am. Rep. 815.

Chance verdict. See note 2 Am. Dec. 38; 16 Ann. Cas. 910.

What special verdict must contain. See note 24 L. R. A. (N. S.) 1.

CODE COMMISSIONERS' NOTE. 1. Generally. The verdict must be confined to the issues. Benedict v. Bray, 2 Cal. 256; 56 Am. Dec. 332; Truebody v. Jacobson, 2 Cal. 285. If the court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error. Ross v. Austill, 2 Cal. 192. The verdict of a jury is a record, and copies thereof may be sufficiently authenticated by the certificate of the clerk. Reynolds v. Harris, 8 Cal. 618. A joint verdict against the defendants answering, and a defendant in default, is conclusive against all the defendants, when a separate verdict has not been demanded. Anderson v. Parker, 6 Cal. 197. A stipulation that a verdict may be entered in favor of the defendant, saving to the plaintiff the rights which he would have had in case a jury had rendered a verdict for the defendant, is to be regarded in the same light as a verdict, and is followed by the same legal results. Sunol v. Hepburn, 1 Cal. 258. The court requested counsel to prepare for the jury blank forms of the verdict, and the plaintiff's counsel prepared, and the defendant's counsel assented to, two forms, one of which was, "We, the jury, find for the plaintiff, and that the value of the property was $——"; and the other, "We, the jury, find for the defendant." And it was agreed in open court that the verdict should be in accordance with one of those forms. The stipulation, and the assent to those forms for the verdict, make it manifest that the respective parties desired and expected a general verdict for the whole property in controversy, and negative the idea that either party then claimed that his right to any parcel of the property was of a different character, or rested upon any different basis from that asserted to all the property. After an adverse verdict, rendered under those circumstances, it is too late for the plaintiff to insist on a verdict in another form, or to assert a right to a portion of the property upon principles not applicable alike to all the property. Sexey v. Adkison, 40 Cal. 418. The court may impose, as a condition of permitting a verdict to stand in other respects, the remission of damages in cases where there was no evidence on the subject of damages, or where the evidence was entirely insufficient, or where the court differs from the jury as to the effect of the evidence. But where the verdict for the damages was based entirely upon an admission by the record, it must stand. The admission, if good for anything, is good for the entire amount specified. Patterson v. Ely, 19 Cal. 28.

2. **General verdict.** A general verdict, rendered and received without objection, either by the court or the parties, is good, notwithstanding the failure of the jury to find upon certain special questions submitted to them by the court. Moss v. Priest, 1 Rob. 632; 19 Abb. Pr. 314. A general verdict concludes all parties who do not answer separately or demand separate verdicts. Winans v. Christy, 4 Cal. 70; 60 Am. Dec. 597; Ellis v. Jeans, 7 Cal. 409. The plaintiff in ejectment may sue one or more defendants, and they may answer separately, or demand separate verdicts; unless they do so, they will be bound by a general verdict. Winans v. Christy, 4 Cal. 70; 60 Am. Dec. 597. In ejectment, the defendants being in possession, the verdict may be joint against several defendants, without specifying their respective lots in a whole tract, where they file a joint answer, which contains no averment as to the particular portion of land occupied by each, no proof being offered on the point, no damages being claimed. McGarvey v. Little, 15 Cal. 31. A joint verdict against the defendants answering and a defaulting defendant, is binding against all the defendants, when a separate verdict has not been demanded. Anderson v. Parker, 6 Cal. 197; Ellis v. Jeans, 7 Cal. 409. In an action to recover real property, the jury rendered the following verdict: "We, the jury in this cause, find a verdict in favor of the plaintiff, against defendants, for the possession of the premises described in the complaint herein, and the sum of $165 damages." This was held, a general verdict, covering all the issues, and that it does not limit the finding to any particular fact or single issue. Hutton v. Reed, 25 Cal. 491; see Leese v. Clark, 28 Cal. 26. Where the jury rendered "a verdict in favor of plaintiffs, with one dollar damages," it was held, that the verdict decided the question of title in favor of plaintiffs, and that upon it they were entitled to a decree perpetually enjoining defendants from working upon the ground claimed in the complaint; that this equitable relief was a matter of right, the denial of which by the district court was error. McLaughlin v. Kelly, 22 Cal. 211.

3. **Special verdict.** A special verdict should find "facts," and not the "evidence of facts." The verdict should leave nothing for the court to determine, save questions of law. Langley v. Warner, 3 N. Y. 327; Sisson v. Barrett, 2 N. Y. 406; Hill v. Covell, 1 N. Y. 522; Williams v. Willis, 7 Abb. Pr. 90. It should state all the facts. Eisemann v. Swan, 6 Bosw. 669. Not admitted by the pleadings. Barto v. Himrod, 8 N. Y. 483; 59 Am. Dec. 506; Williams v. Jackson, 5 Johns. 489. The facts must be found expressly and specially, and not generally or-

impliedly. Breeze v. Doyle, 19 Cal. 101. Where special issues are submitted, they should include all questions of fact raised by the pleadings, and necessary to determine the case, and should be separately and distinctly stated. Phœnix Water Co. v. Fletcher, 23 Cal. 482. In an action for a quartz-ledge, when the defendants deny plaintiffs' title and ouster, and set up title in themselves to a part only of the ledge, a special verdict awarding defendants that portion of the ledge they claim, without a general verdict, if accepted by plaintiffs, is a finding in favor of defendants, and entitles them to costs. Gonzales v. Leon, 31 Cal. 98. A special verdict settles the facts, and the court, by its judgment, pronounces the conclusions of law upon those facts. If the court errs in this respect, the error may be reviewed without a motion for a new trial; but the right to correct the verdict does not depend upon the judgment, and the steps necessary for that purpose must be taken within the statutory time. People v. Hill, 16 Cal. 117. The party in whose favor a judgment is rendered on a special verdict must move for a new trial, if he is not satisfied with the verdict, as the verdict would otherwise be conclusive as to the facts in the appellate court. Garwood v. Simpson, 8 Cal. 108; Duff v. Fisher, 15 Cal. 380. In ejectment for a tract of land, plaintiff claiming under a deed from one McDowell, the case turned upon the question whether the plaintiff, at the time of his purchase from McDowell, had notice of a prior verbal sale of the land from McDowell to defendant. The jury, to whom this question had been specially submitted, returned a verdict: "If possession was notice, he had." This finding was insufficient, because equivocal, neither finding directly the fact of possession, nor the time of it, nor the kind of possession. Woodson v. McCune, 17 Cal. 298. Where the point on which the case turned was whether Kappelman & Co., who employed plaintiff to do work, acted as contractors in individual capacity, or as agents of defendants, and the jury found a special verdict, that "the work and labor done by plaintiff in the construction of the dam was done at the instance and request of Kappelman & Co., who were the agents of the corporation defendant," it was held that this verdict did not support a judgment for plaintiff, because it did not show, of itself, a legal conclusion of liability, not finding whether Kappelman & Co. acted as agents or not. Garfield v. Knight's Ferry etc. Water Co., 17 Cal. 519.

4. **Mixed verdicts.** If special matter found follows or is followed by general matter, the former controls. Fraschieris v. Henriques, 6 Abb. Pr. (N. S.) 251; see § 625, post; McDermott v. Higby, 23 Cal. 489; Leese v. Clark, 20 Cal. 387.

5. **Separate verdicts.** Where several defendants, in an action for the recovery of real property, unite in an answer amounting to a general denial, a joint verdict is proper, though the answer concludes with a prayer for separate verdicts. To entitle defendants to separate verdicts, they must set forth with specific description the parcels which they severally occupy or claim, and direct the attention of plaintiff to the course of defense upon which they will separately insist. Patterson v. Ely, 19 Cal. 28; Hicks v. Coleman, 25 Cal. 145; 85 Am. Dec. 103.

6. **Effect of verdict.** In equity cases the verdict is advisory only (Still v. Saunders, 8 Cal. 281), and the court may disregard it. Goode v. Smith, 13 Cal. 84; Garner v. Marshall, 9 Cal. 268. A defective allegation in a pleading may be cured by default or verdict, but not so the entire absence of any allegations whatsoever. Hentsch v. Porter, 10 Cal. 555; Garner v. Marshall, 9 Cal. 268; People v. Rains, 23 Cal. 128. Where a pleading states a condition precedent, and does not aver performance, the defect must be urged on demurrer; it comes too late after verdict. Hlappe v. Stout, 2 Cal. 461. An omission to allege delivery, in an action on a bond, cannot be taken advantage of after verdict. Garcia v. Satrustegui, 4 Cal. 244; Wilkins v. Stidger, 22 Cal. 235; 83 Am. Dec. 64. A verified complaint, containing only the general averment that "defendants, though often requested, have refused," etc., when a special demand was necessary, is sufficient in this respect, unless demurred to for want of certainty. If not demurred to, the defective averment is cured by verdict, and the objection cannot be raised in the appellate court. Mills v. Barney, 22 Cal. 240; Jones v. Block, 30 Cal. 227. The finding of a jury, upon a question of fact, how far final and conclusive. Perry v. Cochran, 1 Cal. 180; Duff v. Fisher, 15 Cal. 380. A general verdict does not operate as an estoppel, except as to such matters as were necessarily considered and determined by the jury. It is never conclusive upon immaterial or collateral issues. McDonald v. Bear River etc. Mining Co., 15 Cal. 145. The effect of a general verdict will be limited to such issues as necessarily controlled the action of the jury. Kidd v. Laird, 15 Cal. 161; 76 Am. Dec. 472.

7. **Affidavits of jurors to impeach a verdict.** The affidavit of jurors will not be allowed to contradict the verdict. Castro v. Gill, 5 Cal. 40; Amsby v. Dickhouse, 4 Cal. 102; Wilson v. Berryman, 5 Cal. 44; 63 Am. Dec. 78; People v. Baker, 1 Cal. 403. Except where the verdict was the result of "a resort to the determination of chance." See subd. 2, § 657, post; Boyce v. California Stage Co., 25 Cal. 475. But the testimony of the sheriff is competent to disclose what transpires in the jury-room. Wilson v. Berryman, 5 Cal. 44; 63 Am. Dec. 78. Affidavits of counsel and others on information respecting the misbehavior of the jury while considering their verdict, are not admissible to impeach the verdict. People v. Hartung, 8 Abb. Pr. 132; People v. Wilson, 8 Abb. Pr. 137. The presumptions are in favor of the verdict below, unless error is clearly manifest. Allen v. Phelps, 4 Cal. 259.

§ 625. When a general or special verdict may be rendered. In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.

Legislation § 625. 1. Enacted March 11, **1872**; based on Practice Act, § 175 (New York Code, §§ 261, 262), as amended by Stats. 1854, Redding ed. p. 62, Kerr ed. p. 88. When enacted in 1872, (1) the word "shall" was changed to "must," before "be filed," (2) the words "shall be" were changed to "is," before "inconsistent," (3) the words "shall control" were changed to "controls," and (4) the word "shall" was changed to "must," before "give judgment."

2. Amended by Stats. **1905**, p. 66, (1) adding, (a) in first sentence, after "the jury," the

words "unless instructed by the court to render a special verdict, may," and (b) placing "may" after "discretion"; (2) changing the second sentence to read, "In all cases the court must, upon the request in writing of any of the parties, direct the jury to find a special verdict in writing upon all or any of the issues and in all cases must instruct them upon the request in writing of any of the parties, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and must direct a written finding thereon."

3. Amended by Stats. **1909**, p. 193, changing the section to read as enacted in 1872, except that in second sentence commas were added before and after the words "upon all."

Special and general verdict must be consistent. A special verdict and a general verdict must be consistent with each other: the special verdict controls the general verdict; and where the jury have, by their general verdict, drawn a conclusion not warranted by law, the court should order judgment according to the special verdict. Simmons v. Hamilton, 56 Cal. 493. If a general verdict in favor of a party is not inconsistent with a special verdict in his favor, upon an issue decisive of the case, judgment should be rendered on the general verdict. McDermott v. Higby, 23 Cal. 489. A special verdict upon a single point may often determine the whole case: a special verdict, in such case, would control any general verdict to the contrary; but where the special findings do not have such controlling effect, a special verdict cannot be properly deemed inconsistent with the general verdict. McDermott v. Higby, 23 Cal. 489. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly. Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469. The general verdict must control, unless the special findings are absolutely irreconcilable with it: the court should not strain the language of a finding to make out a case of conflict. Antonian v. Southern Pacific Co., 9 Cal. App. 718; 100 Pac. 877. Where the findings are open to a double construction, that construction should be adopted which upholds the general verdict. Spear v. United Railroads, 16 Cal. App. 637; 117 Pac. 956. There need not be a finding upon each issue in a special verdict, to render it inconsistent with a general verdict. Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469. The defendant is entitled to judgment, where a special finding controlling the case is in his favor, notwithstanding a general verdict for the plaintiff. Di Vecchio v. Luchsinger, 12 Cal. App. 219; 107 Pac. 315. Special findings, which expressly negative all negligence on the part of any person at the time of an accident, and exonerate the defendant from any want of care in selecting its employees, are in conflict with a general verdict for the plaintiff. Vaughn v. California Central Ry. Co., 83 Cal. 18; 23 Pac. 215. There is no conflict between a general verdict giving the items constituting the damage, and a special verdict giving the amount of those items; but if certain small items of damages are unsupported by the evidence, the judgment should be modified accordingly. Irrgang v. Ott, 9 Cal. App. 440; 99 Pac. 528. A general verdict for the plaintiff, in an action for damages for fraud in inducing the execution of a lease, by representing that an occupant of the premises was a tenant from month to month instead of having a lease for a year, is inconsistent with a special finding that the tenant was not in possession under a lease for one year at a monthly rental. Di Vecchio v. Luchsinger, 12 Cal. App. 219; 107 Pac. 315. The party in whose favor the general verdict is rendered is entitled to judgment thereon, as a matter of course, without motion; if, therefore, the opposing party wishes to urge his right to judgment, he must move for judgment on the special findings, on the ground that they are inconsistent with the general verdict. Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469.

Conclusiveness of general verdict. A general verdict or judgment operates as an estoppel as to such matters as are necessarily considered and determined, but it is never conclusive upon immaterial or collateral issues. Chapman v. Hughes, 134 Cal. 641; 58 Pac. 298. When distinct issues are made and a general verdict is rendered, such verdict must stand, although the special findings upon one of the issues may not support the general verdict, if the special findings upon another distinct issue will support it. O'Connell v. United Railroads, 19 Cal. App. 36; 124 Pac. 1022; California Wine Ass'n v. Commercial Union Fire Ins. Co., 159 Cal. 49; 112 Pac. 858.

Objections to verdict made when. An objection to the form for a special verdict must be made at the time of the submission of the question to the jury; otherwise, it will be presumed that there was assent to the questions as presented; and the motion for a judgment on special findings must be made before judgment is entered on the general verdict. Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469. A stipulation that the jury might render a general verdict in favor of either party is legitimate, and estops the losing party from repudiating the general verdict, which is conclusive of the whole case. Johnson v. Mina Rica Gold Mining Co., 128 Cal. 521; 61 Pac. 76.

Special issues and findings. As this section stood under the amendment of 1905,

the jury were required, if so instructed by the court, at the request of either party, to return a special verdict upon any issue made by the pleadings. California Wine Ass'n v. Commercial Union Fire Ins. Co., 159 Cal. 49; 112 Pac. 858. The provision for special findings in jury trials is to be liberally construed and applied. Plyer v. Pacific etc. Cement Co., 152 Cal. 125; 92 Pac. 56. Where special issues are submitted to the jury, they should include all questions of fact raised by the pleadings, necessary to determine the case, and they should be separately and distinctly stated. Phœnix Water Co. v. Fletcher, 23 Cal. 481. The issues of fact submitted should be such that the verdict thereon would be determinative of an order of judgment to be entered by the court, and not merely determinative of subordinate facts which may be considered by the court in connection with other facts in making its order or judgment. Estate of Sanderson, 74 Cal. 199; 15 Pac. 753. Without the aid of special issues, it would be next to impossible to find a jury capable of passing understandingly upon the various questions of fact involved; and the statute contemplates that, in all such cases, special issues shall be framed under the direction of the court, according to the long-established rules of chancery practice. Brewster v. Bours, 8 Cal. 501. The court may properly direct that special issues shall be framed and settled, and stated in writing, before proceeding to trial. Smith v. Rowe, 4 Cal. 6. If special issues are improperly submitted to the jury, a party is not prejudiced thereby, where the jury finds a general verdict. Law v. Northern Assurance Co., 165 Cal. 394; 132 Pac. 590. The primary purpose of special findings is to determine whether the general verdict is or is not against law. Fujise v. Los Angeles Ry. Co., 12 Cal. App. 207; 107 Pac. 317; Plyer v. Pacific etc. Cement Co., 152 Cal. 125; 92 Pac. 56; 7 Cal. Unrep. 279; 87 Pac. 395; Larsen v. Leonardt, 8 Cal. App. 226; 96 Pac. 395. In an action for personal injuries, the defendant is entitled to have findings upon all the special issues submitted to the jury: the failure to find upon some of them requires that the judgment upon the general verdict for the plaintiff be reversed. Larsen v. Leonardt, 8 Cal. App. 226; 96 Pac. 395.

Request for special verdict, discretion of court in granting. Under the amendment of this section in 1905, special findings were made compulsory in all cases tried by jury, when properly requested (Plyer v. Pacific etc. Cement Co., 152 Cal. 125; 92 Pac. 56; 87 Pac. 395; Williams v. San Francisco etc. Ry. Co., 6 Cal. App. 715; 93 Pac. 122; California Wine Ass'n v. Commercial Union Fire Ins. Co., 159 Cal. 49; 112 Pac. 858); but, since the amendment of 1909, it is discretionary with the court to submit special issues to the jury in certain cases. O'Connell v. United Railroads, 19 Cal. App. 36; 124 Pac. 1022. Notwithstanding a compulsory provision that the court shall, upon the request of a party, direct the jury to find in writing upon all or any of the issues, it still has the power to determine whether or not a question propounded is proper for submission. Pigeon v. Fuller, 156 Cal. 691; 105 Pac. 976. Whether special issues are discretionary or compulsory, it is the duty of the court, in the submission of issues, to require such answers as will support the general verdict; or if not made, to reject that verdict. O'Connell v. United Railroads, 19 Cal. App. 36; 124 Pac. 1022. The request that special issues be submitted to the jury is addressed to the discretion of the court; and the refusal to grant the request is not the subject of an exception. Smith v. Occidental etc. S. S. Co., 99 Cal. 462; 34 Pac. 84; Schultz v. McLean, 109 Cal. 437; 42 Pac. 557; George v. Los Angeles Ry. Co., 126 Cal. 357; 77 Am. St. Rep. 184; 46 L. R. A. 829; 58 Pac. 819. Where the same issue or question of fact is involved in another special issue or question of fact, the court may refuse to submit a special issue which is but a repetition, in form or substance, of the one given. Irrgang v. Ott, 9 Cal. App. 440; 99 Pac. 528. In an action for the recovery of money only, the court has discretion to submit or to refuse to submit particular questions of fact to the jury; and error cannot be maintained without a clear showing of abuse of discretion. Olmstead v. Dauphiny, 104 Cal. 635; 38 Pac. 505. The statute does not require that the contest of the account of an executor shall be submitted to a jury on the demand of a party in interest. Estate of Sanderson, 74 Cal. 199; 15 Pac. 753. The court may, by request of counsel, direct the jury to find specially upon the corporate existence of a party, in addition to the general verdict. Fresno Canal etc. Co. v. Warner, 72 Cal. 379; 14 Pac. 37. When counsel frame a proper request, it becomes the duty of the court to give, in its own language, the short and simple direction prescribed by the statute. Plyer v. Pacific etc. Cement Co., 152 Cal. 125; 92 Pac. 56. The court has a discretion to change the phraseology of a special issue submitted to the jury. Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 395; 92 Pac. 332. What the judge has to determine is, whether the party presenting the interrogatories has a right to demand their submission to the jury in the form in which they are presented. Plyer v. Pacific etc. Cement Co., 152 Cal. 125; 92 Pac. 56.

Submission without request. Since the amendment of this section in 1909, the court, in certain actions, has statutory au-

thority, without the request of either party, to submit special issues to the jury, in addition to a general verdict. Wiencke v. Bibby, 15 Cal. App. 50; 113 Pac. 876.

Sufficiency of request. The propriety of a request for special findings depends upon two conditions: 1. Is the question so framed as to admit of a plain and direct answer? 2. Would an answer, favorable to the party preferring the request, be inconsistent with a general verdict for his adversary? and if either of these queries can be answered in the negative, the court is justified in refusing to submit the issue. Fujise v. Los Angeles Ry. Co., 12 Cal. App. 207; 107 Pac. 317; Pigeon v. Fuller, 156 Cal. 691; 105 Pac. 976.

Waiver of request. The reception and entry of a verdict, without objection on the part of the defendant, is a waiver of his request for special findings. Brown v. Central Pacific R. R. Co., 2 Cal. Unrep. 730; 12 Pac. 512.

Requirements as to interrogatories. There is no requirement that the interrogatories shall be submitted to opposing counsel; or that they shall be so framed that the jury may answer by a simple yes or no. Plyer v. Pacific etc. Cement Co., 152 Cal. 125; 92 Pac. 56.

Findings of court are special verdict. The court discharges the functions of a jury in passing upon an issue of fact, besides performing its peculiar and appropriate duty of deciding the law where the jury is waived; and so far as it acts as a jury, it is subject to the same rules and is entitled to the same privileges, with the exception of the mode of rendering its decision, for its verdict must in all cases be special. Breeze v. Doyle, 19 Cal. 101.

Judgment on verdict. The court cannot give a judgment contrary to a general verdict, except in the single instance where the special verdict is inconsistent with the general verdict; and a finding by the jury in a lesser sum than the amount claimed under an insurance policy is not such proof of fraud as will make a general verdict inconsistent with a special verdict. Obersteller v. Commercial Assur. Co., 96 Cal. 645; 31 Pac. 587; Portland Cracker Co. v. Murphy, 130 Cal. 649; 63 Pac. 70. Where the jury find on special issues, and also find a general verdict for the plaintiff, and the court thereupon declares that, on the findings, the defendant must have judgment, and some of the jury then dissent from the special verdict, and, on being sent out again, return with the general verdict, but are unable to agree on a special verdict, it is error to accept the general verdict. Fitzpatrick v. Himmelmann, 48 Cal. 588. Where general and special issues are submitted, and the jury find on the special issues alone, and do not render a general verdict, it is error for the court to render final judgment. Kiel v. Reay, 50 Cal. 61. Enough must be found by a special verdict or finding, when that is relied upon as the basis of a judgment, to show a legal conclusion of liability. Garfield v. Knight's Ferry etc. Water Co., 17 Cal. 510.

Presumptions as to verdict. Presumptions of law may be indulged in by the court; but it cannot indulge in inferences of fact as to matters bearing upon the issues presented to the jury; and if an ultimate fact be found by the jury, the court must declare that a certain particular judgment follows as matter of law. Estate of Benton, 131 Cal. 472; 63 Pac. 775. The presumption is, that all the issues presented by the pleadings were submitted to the jury under proper instructions, and were passed upon in arriving at their verdict. Horwege v. Sage, 137 Cal. 539; 70 Pac. 621. A general verdict upon issues and evidence properly submitted is presumed to decide every fact or deduction therefrom essential to support it, while a special verdict is limited and controlled by its specific terms. Spear v. United Railroads, 16 Cal. App. 637; 117 Pac. 956.

Terms compared and defined. Within the meaning of this section, "special verdicts" and "special findings" are identical in everything except the name; and it is wholly immaterial if the request of a party happens to be wrongly entitled; the term "special verdict" does not mean what it originally meant in the common-law practice, namely, a finding upon every material issue in the case; this section authorizes the demand for special verdicts on any one or more of the issues or particular questions of fact. Plyer v. Pacific etc. Cement Co., 152 Cal. 125; 92 Pac. 56.

Appeal. The sufficiency of the verdict to support the judgment cannot be considered on appeal from an order denying a new trial, but only on appeal from the judgment. Morse v. Wilson, 138 Cal. 558; 71 Pac. 801; and see Brison v. Brison, 90 Cal. 323; 27 Pac. 186; Riverside Water Co. v. Gage, 108 Cal. 240; 41 Pac. 299. A verdict for "nominal damages," in favor of the plaintiff, will not be set aside, nor judgment thereon reversed, on the ground that that term is not definite or certain. Davidson v. Devine, 70 Cal. 519; 11 Pac. 664. A general verdict is controlled by facts specially found; hence, objections to instructions in favor of the losing party need not be specially noticed on appeal. Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461; 37 Pac. 375.

Common-law power and duty of court to submit proper special interrogatories to jury. See note 15 Ann. Cas. 469.

CODE COMMISSIONERS' NOTE. It is for the court to determine as to what particular facts the jury shall find specially, and neither party

has the right to dictate the terms of any particular question to be submitted to the jury. American Company v. Bradford, 27 Cal. 364. Where special issues have been submitted to a jury, and they announce that they cannot agree upon the special issues, but can agree upon a general verdict, and by consent of counsel on both sides the special issues are withdrawn, and a general verdict is received, it is not error. Mitchell v. Hockett, 25 Cal. 538, 545; 85 Am. Dec. 151; see subd. 4 of note to § 624, ante.

§ 626. Verdict in actions for recovery of money or on establishing counterclaim. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when a counterclaim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery.

Legislation § 626. Enacted March 11, **1872**; based on Practice Act, § 176 (New York Code, § 263), which had the word "shall" instead of "must."

Certainty of verdict. A verdict for a certain amount, less another amount with interest, is insufficient, the interest being indefinite and uncertain, and not susceptible of being ascertained from the pleadings. Watson v. Damon, 54 Cal. 278; Dougherty v. Haggin, 56 Cal. 522. Where the record and the verdict, taken together, show the exact sum which the jury meant to find, the judgment is not void. Hutchinson v. Superior Court, 61 Cal. 119. Where there is no controversy as to the amount claimed by the plaintiff, and the only issue was as to whether the plaintiff contracted with the defendant, a finding by the jury for the plaintiff is sufficient. Redmond v. Weismann, 77 Cal. 423; 20 Pac. 544. A general verdict on a promissory note, where there was no issue as to execution, terms, or amount, the only defense being want of consideration, is responsive to the issue raised, and sufficiently certain. Hutchinson v. Superior Court, 61 Cal. 119. Where the complaint averred that the plaintiff was entitled to five hundred inches of water under a four-inch pressure, and the jury found that he was entitled to forty inches, miner's measurement, the verdict is uncertain, as miners' measurements vary in different localities. Dougherty v. Haggin, 56 Cal. 522. An uncertain verdict cannot be made certain by findings of fact and conclusions of law by the court; and where the action was properly one at law, and the defense was equitable, such findings and conclusions must be regarded as surplusage. Diggs v. Porteus, 5 Cal. Unrep. 753; 33 Pac. 447.

Verdict for defendant on counterclaim. A finding for the defendant for costs, where he set up a counterclaim for damages, is sufficient, as, if the jury found nothing in favor of the plaintiff, the verdict must necessarily be for the defendant, and he would be entitled to costs; the jury could not specify the amount of any recovery, for there could be no recovery by either party. Electric Improvement Co. v. San José etc. Ry. Co., 3 Cal. Unrep. 618; 31 Pac. 455.

Verdict covering matters not in issue. The jury having nothing to do with matters not in issue, so much of a verdict as refers to such matters is surplusage. Pierce v. Schaden, 62 Cal. 283.

Verdict in action for damages. Where the plaintiff claims two elements of damage, a general verdict for him, in a single sum, cannot be upheld, if substantial error was committed as to one of such elements. Peek v. Steinberg, 163 Cal. 127; 124 Pac. 834. In an action for damages for false arrest and imprisonment, the jury may consider the great humiliation and anguish of the plaintiff, a woman, as elements in fixing damages. Sebring v. Harris, 20 Cal. App. 56; 128 Pac. 7.

CODE COMMISSIONERS' NOTE. Guy v. Franklin, 5 Cal. 417; Duff v. Hobbs, 19 Cal. 646.

§ 627. Verdict in actions for the recovery of specific personal property. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or, if being in favor of defendant, they also find that he is entitled to a return thereof, must find the value of the property, and, if so instructed, the value of specific portions thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

Jury must find, etc. See post, § 667.

Legislation § 627. 1. Enacted March 11, **1872**; based on Practice Act, § 177 (New York Code, § 261), which had the word "shall" instead of "must."

2. Amended by Code Amdts. **1873–74**, p. 311, (1) omitting the word "the" after "in favor of," and (2) adding "and, if so instructed, the value of specific portions thereof."

Return of property. The plaintiff has the privilege of claiming delivery at any

time before the filing of the answer, but it is not compulsory on him to do so. Wellman v. English, 38 Cal. 583. Judgment cannot be entered on a verdict on a finding in favor of the defendant for half of certain personal property, for the recovery of which the plaintiff has sued: the jury should be directed by the court, on its own motion, to retire and find as to the other half (Muller v. Jewell, 66 Cal. 216; 5 Pac. 84); but the plaintiff is precluded from any further litigation with the defendant, where only a portion of the property sued for is granted him, and the verdict is silent as to the remainder: it must be held that the plaintiff was denied any further relief than that granted. Ryan v. Fitzgerald, 87 Cal. 345; 25 Pac. 546. Where the recovery of the property is the primary object of the suit, as where damages will not compensate the plaintiff, he should frame his bill in equity, specifying the reasons therefor, and a decree can then be so framed as to compel a specific delivery. Nickerson v. Chatterton, 7 Cal. 568.

Value of property, and damages. A special verdict as to value is a statutory requisite. Pico v. Pico, 56 Cal. 453. The value of any specific portion of property is to be found by the jury, only if so instructed; and error can arise in a case, only where such instruction is pertinent and proper, and the instruction was asked and refused. Whetmore v. Rupe, 65 Cal. 237; 3 Pac. 851; Brenot v. Robinson, 108 Cal. 143; 41 Pac. 37; Kellogg v. Burr, 126 Cal. 38; 58 Pac. 306. Where delivery of the property is made to the plaintiff before the judgment, a judgment in his favor for its possession is sufficient. Claudius v. Aguirre, 89 Cal. 501; 26 Pac. 1077. Where the defendant was entitled to the property at the commencement of the action, but such right ceased and vested in the plaintiff before the trial, the judgment should leave the property in the plaintiff's possession, and award costs to the defendant. O'Connor v. Blake, 29 Cal. 312; Flinn v. Ferry, 127 Cal. 648; 60 Pac. 434. Damages for the detention of the property may be recovered by the plaintiff, but not money expended by him in its pursuit, as in actions for conversion. Kelly v. McKibben, 54 Cal. 192. Where the court instructed the jury to render a verdict for the plaintiff for the property, and to find the value of the property and the damages, and the jury found and returned a verdict for the plaintiff for the value of the property and for damages, but did not find for the plaintiff for the property, the verdict, and the judgment thereon, are erroneous, as the plaintiff could not elect to deliver the property. Norcross v. Nunan, 61 Cal. 640.

Alternative judgment for return and value. The plaintiff may require the jury to find the value of the property, and he may insist, as a right, upon the alternative judgment. Clary v. Rolland, 24 Cal. 147; Mills v. Gleason, 21 Cal. 274. Where the jury find for the defendant, and fix the value of the property, a judgment for the return of the property, or for the value thereof in case delivery cannot be had, is justified. Etchepare v. Aguirre, 91 Cal. 288; 25 Am. St. Rep. 180; 27 Pac. 668. Where the jury find the right of possession to be in the plaintiff, the right to its delivery if it can be had, and if not, then to its value as found by the jury in the alternative, is a conclusion of law which the judgment must contain, but not the verdict. Ryan v. Fitzgerald, 87 Cal. 345; 25 Pac. 546. It is not necessary for the court to find the character or value of the property which can be returned, where such fact appears at the trial, nor is the court bound to enter judgment in the alternative. Burke v. Koch, 75 Cal. 356; 17 Pac. 28; Brown v. Johnson, 45 Cal. 76; Whetmore v. Rupe, 65 Cal. 237; 3 Pac. 851. The value of the property may be found by the jury, if their verdict is in favor of the plaintiff, only if the property has not been delivered to the plaintiff, and, conversely, if the property has been delivered to the plaintiff, they are not required to find the value; and in the absence of such finding, there is no verdict upon which to base an alternative judgment. Claudius v. Aguirre, 89 Cal. 501; 26 Pac. 1077; Caruthers v. Hensley, 90 Cal. 559; 27 Pac. 411; Seligman v. Armando, 94 Cal. 314; 29 Pac. 710; Erreca v. Meyer, 142 Cal. 308; 75 Pac. 826. Where the property has been delivered to the plaintiff, a defendant who recovers a judgment is entitled to a judgment for a return of all the property; and if it cannot be returned, then to a judgment for the value of the whole. Whetmore v. Rupe, 65 Cal. 237; 3 Pac. 851. The defendant must, in his answer, assert his formal claim for the return as a prerequisite to a judgment for the return of the property or its value. Pico v. Pico, 56 Cal. 453; Banning v. Marleau, 101 Cal. 238; 35 Pac. 772. There is no difference, in principle, between a judgment for the value of the property sued for without the alternative for its delivery, and a judgment for the delivery of the property without the alternative for its value: if the former is free from error, the latter must be equally so. Claudius v. Aguirre, 89 Cal. 501; 26 Pac. 1077; Burke v. Koch, 75 Cal. 356; 17 Pac. 228.

Judgment on nonsuit. This section does not apply to cases of nonsuit. Ginaca v. Atwood, 8 Cal. 446; Clary v. Rolland, 24 Cal. 147. To enable the defendant to obtain the value of property on a judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer relative to the

change of possession from the defendant to the plaintiff: the judgment of return is in the nature of a cross-judgment, and must be based upon proper averments. Gould v. Scannell, 13 Cal. 430; Pico v. Pico, 56 Cal. 453; Banning v. Marleau, 101 Cal. 238; 35 Pac. 772. Upon a dismissal by the plaintiff, the questions which should have been determined are left open to determination in an action on the replevin bond. Mills v. Gleason, 21 Cal. 274.

Construction of verdict by court. Where the form of the verdict is not satisfactory to a party, he should ask, at the time, to have it made formal and certain; otherwise it is the duty of the court so to construe it as to give it the effect intended by the jury, if it is susceptible of a construction which may have a lawful and relevant effect. Johnson v. Visher, 96 Cal. 310; 31 Pac. 106.

Appeal. A party will not be heard to object to a verdict for the first time on appeal from the judgment, if it is susceptible of a construction which may have a lawful and relevant effect. Johnson v. Visher, 96 Cal. 310; 31 Pac. 106.

Measure of damages recoverable in replevin. See note 22 Am. Rep. 285.

Right of defendant in replevin to compensation for depreciation in value of property returned. See note 2 Ann. Cas. 961.

Punitive damages in replevin or claim and delivery. See note 4 Ann. Cas. 71.

Effect on verdict in replevin of failure to find unlawful taking or detention. See note 20 Ann. Cas. 130.

Necessity that verdict in replevin give separate valuation of several articles involved. See note Ann. Cas. 1912D, 849.

Requisites of special verdict in action of replevin. See note 24 L. R. A. (N. S.) 18.

CODE COMMISSIONERS' NOTE. Nickerson v. Chatterton, 7 Cal. 568; Waldman v. Broder, 10 Cal. 379; Coghill v. Boring, 15 Cal. 218; Mills v. Gleason, 21 Cal. 274.

§ 628. Entry of verdict. Upon receiving a verdict, an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and setting out the verdict at length; and where special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.

Legislation § 628. Enacted March 11, 1872; based on Practice Act, § 178.

Construction of section. The matters mentioned in this section form a connection between the pleadings and the judgment, being a digression in the progress of the trial from the general course of procedure, and are properly evidenced by a permanent memorandum thereof for the guidance of the court, but their value ends on entry of judgment, and they cannot be used to impeach the record. Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109.

Entry of verdict presumed correct. The verdict is part of the judgment roll; and where the clerk properly certifies the transcript on appeal as being an authentic copy of the judgment roll, and the verdict appears therein, it will be presumed that it was properly recorded and entered by the clerk in the minutes of the court. Goldman v. Rogers, 85 Cal. 574; 24 Pac. 782.

Alteration or correction of verdict. The court acts upon the verdict as it is, and not as it should be (People v. Hill, 16 Cal. 113); and it cannot enter a verdict contrary to the will of the jury. Montgomery v. Sayre, 91 Cal. 206; 27 Pac. 648. The right to correct an unsatisfactory verdict does not depend upon the judgment, but all questions of this character should be settled before the final action of the court. People v. Hill, 16 Cal. 113.

Verdict and judgment must follow issues. To render a judgment payable in gold coin is error, even if the verdict specifies gold coin, where the agreement does not call for gold coin, and it is not demanded in the complaint; the verdict cannot go beyond the issues, and the surplus matter may be disregarded in entering judgment. Marquard v. Wheeler, 52 Cal. 445.

Judgment rendered when. The judgment is not always rendered immediately after the rendition of the verdict, nor even after the filing of the finding of facts by the judge or referee. Gray v. Palmer, 28 Cal. 416. Where there is no question as to the proper judgment to be entered on the verdict, the judgment should be entered at once, without waiting for a motion for a new trial, or any proceedings to set aside the verdict (Hutchinson v. Bours, 13 Cal. 50); but the rendition of judgment on a special verdict is often reserved for argument or further consideration, and it frequently happens that judgment cannot be rendered for several months after the rendition of the verdict or the filing of the findings of facts. Gray v. Palmer, 28 Cal. 416.

CODE COMMISSIONERS' NOTE. The verdict should be recorded as rendered. Moody v. McDonald, 4 Cal. 297. Under the code, it must be rendered in writing. Ante, § 618. If an informal verdict is recorded with consent of the prevailing party, and judgment in form is afterwards entered thereon, the informality will be disregarded. Treadwell v. Wells, 4 Cal. 263. Before a verdict is recorded, it ought to be declared by the foreman, or, if sealed, read by the clerk, so that the parties may be distinctly informed of its purport. It is irregular to record the verdict before it is thus announced, but the irregularity must be objected to at the time, or it will not be noticed on appeal. Assent to a recorded verdict, expressed by the foreman, is conclusive upon all the jury, unless a disagreement is expressed at the time. Blum v. Pate, 20 Cal. 69; but see §§ 618, 619, ante.

CHAPTER V.

TRIAL BY COURT.

§ 631. When and how trial by jury may be waived.
§ 632. Upon trial by court, decision to be in writing and filed within thirty days.
§ 633. Facts found and conclusions of law must be separately stated. Judgment on.
§ 634. Waiving findings of fact.
§ 635. Findings, how prepared. [Repealed.]
§ 636. Proceedings after determination of issue of law.

§ 631. When and how trial by jury may be waived. Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following:

1. By failing to appear at the trial.

2. By written consent filed with the clerk.

3. By oral consent, in open court, entered in the minutes.

4. By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation.

5. By failing, at the beginning of each day's session, to deposit with the clerk the jury fees and, if there be any, the mileage for such day.

Waiver of jury trial. See Const., art. I, § 7.
Waiver of jury, in justice's court. See post, § 883.

Legislation § 631. **1.** Enacted March 11, **1872**; re-enactment of Practice Act, § 179.

2. Amended by Code Amdts. **1873–74**, p. 311, (1) in the first paragraph, (a) adding "or for the recovery of specific real or personal property, with or without damages," and (b) omitting the word "the" before "manner"; (2) omitting the final paragraph, which read: "The court may prescribe by rule what shall be deemed a waiver in other cases."

3. Amendment by Stats. **1901**, p. 146; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1915**, p. 649, (1) in subd. 2, striking out the phrase "in person or by attorney," after "written consent"; (2) adding subds. 4 and 5.

Construction of section. A jury may be waived only in one of the modes prescribed by this section. People v. Metropolitan Surety Co., 164 Cal. 174; 128 Pac. 324.

Constitutional provision. The provision of the constitution securing the right to a trial by jury refers generally to those cases in which such right existed at common law at the time of the adoption of the constitution. Woods v. Varnum, 85 Cal. 639; 24 Pac. 843; and see Grim v. Norris, 19 Cal. 140; 79 Am. Dec. 206.

Waiver by failure to appear. The failure of either party to appear at the trial operates as a consent, on his part, that the issue shall be tried by the court without a jury; but failure to appear does not authorize the trial to be had by a jury of less than twelve persons. Gillespie v. Benson, 18 Cal. 409. The absence of the defendant is a waiver of the right to a trial by jury; and the mere filing of an answer does not constitute an appearance (Zane v. Crowe, 4 Cal. 112); and there is also a waiver, where the defendant fails to appear, although the judge, on receipt of a telegram from the defendant the day before the trial, had ordered a jury (McGuire v. Drew, 83 Cal. 225; 23 Pac. 312); but the failure of the defendant to appear at the trial, when the case was improperly on the equity calendar, and he had no notice thereof, is not a waiver. Sweeney v. Stanford, 60 Cal. 362.

Stipulation as waiver. A stipulation should not be regarded as a contract made upon a valuable consideration, which should not be set aside except for fraud or mistake; and relief should be had therefrom, where neither party would be injured, nor the orderly conduct of the business of the court disarranged. Ferrea v. Chabot, 121 Cal. 333; 53 Pac. 689, 1092. A stipulation of attorneys to set a case for trial on a day certain, before a department then known to be engaged in the trial of causes without a jury, is not a waiver of the right to a trial by jury: such right cannot be waived by implication. Platt v. Havens, 119 Cal. 244; 51 Pac. 342.

Oral consent as waiver. An oral agreement, made in open court, to waive a trial by jury upon a counter-agreement to transfer the cause to another department, so as to secure delay, cannot be avoided because not entered in the minutes. Hawes v. Clark, 84 Cal. 272; 24 Pac. 116.

Trial by court, without objection, as waiver. There is a waiver of trial by jury, where counsel for the defendant appears, and the cause is tried by the court without objection (Boston Tunnel Co. v. McKenzie, 67 Cal. 485; 8 Pac. 22); and also where the parties go to trial without demanding

a jury (Pfister v. Dascey, 65 Cal. 403; 4 Pac. 393; Ferrea v. Chabot, 121 Cal. 233; 53 Pac. 689); and also where the case comes on regularly for trial before the court without a jury, and the trial actually begins (Polak v. Gurnee, 66 Cal. 266; 5 Pac. 229); and also where the verdict of the jury is treated by counsel and the court as of no effect and both parties proceed to try the case, introduce further evidence, and submit the case for decision and judgment. Montgomery v. Sayre, 3 Cal. Unrep. 365; 25 Pac. 552.

Presumption of waiver. The presumption is, that the defendant waived the right to trial by jury, where the record on appeal is silent on the subject. Montgomery v. Sayre, 91 Cal. 206; 27 Pac. 648; Leadbetter v. Lake, 118 Cal. 515; 50 Pac. 686. The right to a jury trial should not be held waived by implication. People v. Metropolitan Surety Co., 164 Cal. 174; 128 Pac. 324.

Demand for jury. It is not necessary for a party entitled to a trial by jury to make any demand therefor; and where the defendant files a written demand for a jury, this must be held to be a continued refusal to waive the right. Swasey v. Adair, 88 Cal. 179; 25 Pac. 1119. Where a demand for a jury must be considered as a continuous refusal to waive the right, it is not necessary to repeat the demand. Wendling Lumber Co. v. Glenwood Lumber Co., 19 Cal. App. 1; 124 Pac. 734. Failure of the defendant to demand, on law-day, a trial by jury, as required by the rules of the court, is not a waiver of the right (Biggs v. Lloyd, 70 Cal. 447; 11 Pac. 831); nor is there a waiver, where the defendant, by reason of the postponement of the trial, at his request, from morning until the afternoon, prior to its commencement, and he is entitled to a jury trial if he demands it before the trial actually commences, unless he has waived it in one of the ways prescribed by law. Farwell v. Murray, 104 Cal. 464; 38 Pac. 199. A telegraphic demand for a jury trial, sent to the judge the day before the trial, is not sufficient, even where the judge, upon the receipt of the telegram, orders a jury, if the party fails to appear in person or by counsel at the trial. McGuire v. Drew, 83 Cal. 225; 23 Pac. 312. Where the defendant demands a trial by jury, and the plaintiff objects, it is within the discretion of the court to require the defendant, as a condition for making the order, to deposit one day's per diem and the mileage of the jury. Hudson v. Hudson, 129 Cal. 141; 61 Pac. 773; and see Naphtaly v. Rovegno, 130 Cal. 639; 63 Pac. 66.

Rules of court. The legislature alone has the power of declaring what shall constitute a waiver of trial by jury: a rule of court cannot declare what shall be considered such a waiver (People v. Metropolitan Surety Co., 164 Cal. 174; 128 Pac. 324; Biggs v. Lloyd, 70 Cal. 447; 11 Pac. 831); and the failure of the defendant to demand a trial by jury, at the time the case is set for trial, as called for by the rules of the court, is not a waiver of the right. Biggs v. Lloyd, 70 Cal. 447; 11 Pac. 831. Where a proper demand for a jury is made and entered in the minutes of the court when the case is originally set for trial, and, after a continuance, both a demand and deposit, in conformity with a rule of court, are made when the case is reset, it is error to deny a jury trial on the ground that it has been waived. Wendling Lumber Co. v. Glenwood Lumber Co., 19 Cal. App. 1; 124 Pac. 734. A rule of the court, requiring the deposit of jury fees within five days after making demand for a jury, is reasonable; and if not complied with, the right to a trial by jury is waived (Adams v. Crawford, 116 Cal. 495; 48 Pac. 488); and a rule requiring the deposit of twenty-four dollars upon demand for a jury is reasonable. Bank of Lassen County v. Sherer, 108 Cal. 513; 41 Pac. 415. A party is not entitled to a jury trial unless he deposits the jury fees, as required by a rule of court. Naphtaly v. Rovegno, 130 Cal. 639; 63 Pac. 66, 621. A rule of the court, regulating the right of a party to demand a jury trial, will be upheld, so far as it requires a deposit of jury fees as a condition to the insistence upon such right, but no further. People v. Metropolitan Surety Co., 164 Cal. 174; 128 Pac. 324. The rule requiring the jury fees to be paid in advance is a reasonable precaution to prevent jurors from being defrauded by unscrupulous parties, and to prevent the demand for a jury from being used as a pretext to obtain continuances. Conneau v. Geis, 73 Cal. 176; 2 Am. St. Rep. 785; 14 Pac. 580. A rule of the court, requiring a demand for a jury, where one is desired, and a deposit, is to be fairly and liberally construed in favor of the demandant. Wendling Lumber Co. v. Glenwood Lumber Co., 19 Cal. App. 1; 124 Pac. 734.

Jury denied in suits in equity. A demand for a trial by jury, where the jurisdiction is in equity, which can afford complete relief, is properly denied (Mesenburg v. Dunn, 125 Cal. 222; 57 Pac. 887): the parties to a suit in equity are not entitled to a trial by jury. Walker v. Sedgwick, 5 Cal. 193; Still v. Saunders, 8 Cal. 281.

Waiver of jury as affecting right to jury on second trial. See note 4 Ann. Cas. 1004.

CODE COMMISSIONERS' NOTE. 1. Generally. The right to a trial by jury may be waived in the mode prescribed by law. Russell v. Elliott, 2 Cal. 245; Exline v. Smith, 5 Cal. 112; Smith v. Pollock, 2 Cal. 92. A party cannot, without objection, try his case before the court without a jury, and then complain that it was not tried

by jury. Smith v. Brannan, 13 Cal. 107; Greason v. Keteltas, 17 N. Y. 498. In a civil case, a party may waive a beneficial constitutional provision. Van Hook v. Whitlock, 26 Wend. 43, 37 Am. Dec. 246; 7 Paige, 373; 2 Edw. Ch. 304. And having once waived the provision, he cannot subsequently avail himself of it as a protection. Tombs v. Rochester etc. R. R. Co., 18 Barb. 583; Lee v. Tillotson, 24 Wend. 337; 35 Am. Dec. 624; Baker v. Braman, 6 Hill, 47; 40 Am. Dec. 387; Embury v. Conner, 3 N. Y. 511; 53 Am. Dec 325. In criminal cases, parties have not the power to modify, by their consent, the substantial constitution of the legal tribunal nor the fundamental mode of its proceedings. Cancemi v. People, 16 N. Y. 501; People v. Cancemi, 7 Abb. Pr. 271. A prisoner cannot be legally tried or convicted on the verdict of eleven jurors, although he consented to be so tried. Cancemi v. People, supra.

2. Failure to appear. The failure to appear at the trial is a waiver of the right to a trial by jury. Waltham v. Carson, 10 Cal. 178; Doll v. Feller, 16 Cal. 432; Gillespie v. Benson, 18 Cal. 409. Filing an answer is not an appearance, within the meaning of the first subdivision of this section. Zane v. Crowe, 4 Cal. 112. A failure to appear does not authorize a trial by a jury of less than twelve. Gillespie v. Benson, 18 Cal. 409. Under a rule of court requiring a party demanding a trial by jury to file a written notice with the clerk six days before the commencement of the term, it was held, that a jury was waived by the parties by a failure to file the notice that a jury will be required, but that a court has a right to direct an issue of fact to be tried by a jury, notwithstanding the parties have waived the same. Doll v. Anderson, 27 Cal. 250.

§ 632. Upon trial by court, decision to be in writing and filed within thirty days. Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision.

Legislation § 632. 1. Enacted March 11, **1872**; based on the first sentence of Practice Act, § 180, which read: "Upon the trial of an issue of fact by the court, its decision shall be given in writing, and filed with the clerk, within ten days after the trial took place." When enacted in 1872, the section read as at present, except that (1) it had the word "twenty" instead of "thirty," and (2) at the end of the section, the clause "and unless the decision is filed within that time the action must again be tried."

2. Amended by Code Amdts. **1873–74**, p. 312.

Construction of section. This section refers to the trial of civil actions, and not to special proceedings. Lyons v. Marcher, 119 Cal. 382; 51 Pac. 559. The adoption of a verdict in a suit in equity is equivalent to a finding by the court; and the case cannot be considered as tried until the decision is made and filed. Warring v. Freear, 64 Cal. 54; 28 Pac. 115; and see Hastings v. Hastings, 31 Cal. 95. Findings by the court that several matters are not true, and a general finding that the several allegations of the complaint, not in conflict with the foregoing findings, are true, are insufficient, and not in accordance with this section: the court is required to find facts. Goodnow v. Griswold, 68 Cal. 599; 9 Pac. 837.

Findings must be signed and filed. The signature of the judge and the filing with the clerk are sufficient to make the finding a matter of record. Reynolds v. Harris, 8 Cal. 617. A transcript on appeal, setting forth the findings and conclusions, but not showing that they were signed by the judge or filed with the clerk, nor that there was any judgment entered thereon, does not show that any judgment was ever rendered by the court, and is cause for dismissal of the appeal. Estate of De Leon, 4 Cal. Unrep. 388; 35 Pac. 309. The mere entry of a minute-order of the court, as is customary on announcing its decision, is not ordinarily the decision from which an appeal is to be taken, and certainly cannot be considered such, where the court, after making the entry, filed formal findings of fact and conclusions of law and thereupon entered judgment. Sullivan v. Washburn etc. Mfg. Co., 139 Cal. 257; 72 Pac. 992. The decision must be filed before judgment may be entered. Shirran v. Dallas, 21 Cal. App. 405; 132 Pac. 454, 462.

Time prescribed is directory. The provision of this section requiring the court to file its decision in writing within thirty days after submission of the cause, is directory merely: the court trying a case without a jury may file its findings of fact and conclusions of law after the time designated. Vermule v. Shaw, 4 Cal. 214; Broad v. Murray, 44 Cal. 228; McLennan v. Bank of California, 87 Cal. 569; 25 Pac. 760. The rights of the parties are not to be prejudiced by the delay of the court in respect to any of these acts or proceedings; and the court is authorized to direct the making or filing of its findings of fact and conclusions of law, as well as the entry of a judgment thereon, nunc pro tunc, as of such date as will preserve such rights. Fox v. Hale etc. Mining Co., 108 Cal. 478; 41 Pac. 328. The filing of findings, more than six months after judgment was ordered for the defendant, is not ground for a new trial, nor can it be considered on appeal by the plaintiff from the order denying a new trial. Kepfler v. Kepfler, 134 Cal. 205; 66 Pac. 208.

Findings unnecessary when. Findings of fact are not necessary where the case is submitted upon an agreed statement of facts. Earle v. Bryant, 12 Cal. App. 553; 107 Pac. 1018.

The opinion. The opinion of the court, expressed from the bench, in deciding a case, is no part of its decision. American Well etc. Co. v. Superior Court, 19 Cal. App. 497; 126 Pac. 497. The opinion of the trial court, appearing either in the briefs or in the record, merely indicates the points involved, and the views of the court thereon, and cannot be considered

to affect or change the facts as found, and it forms no part of the record on appeal (Churchill v. Flournoy, 127 Cal. 355; 59 Pac. 791; Houston v. Williams, 13 Cal. 24; 73 Am. Dec. 565; Hidden v. Jordan, 28 Cal. 301; McClory v. McClory, 38 Cal. 575; Wixon v. Devine, 67 Cal. 341; 7 Pac. 776); and the general language found in the opinion rendered in the decision must be construed with reference to the particular facts then before the court (Chapman v. State, 104 Cal. 690; 43 Am. St. Rep. 158; 38 Pac. 457; Grant v. Murphy, 116 Cal. 427; 58 Am. St. Rep. 188; 48 Pac. 481); and a written opinion, offered for the purpose of showing the nature of the action, and the issues submitted to the court, without even the form of having been under oath, is not competent evidence for that purpose. Keech v. Beatty, 127 Cal. 177; 59 Pac. 837.

Issues. It is the duty of the court to pass upon all the issues involved in the action. Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578; 77 Pac. 1113; Kusel v. Kusel, 147 Cal. 55; 81 Pac. 297. It is indicated by this section, that, where there is no fact in issue, there is no fact to be proved; but that wherever a fact is to be established by evidence, the rule is different, as where the asserted fact is the ground upon which the party relies for a divorce. Nelson v. Nelson, 18 Cal. App. 602; 123 Pac. 1099.

Terms defined. The clerk's entry in the minutes is not the decision of the cause. Delger v. Jacobs, 19 Cal. App. 197; 125 Pac. 258. The "decision" of the court is found in its findings, and not in the giving of the judgment. Elizalde v. Murphy, 11 Cal. App. 32; 103 Pac. 904. The signing and filing of findings of fact and conclusions of law constitute the rendition of judgment by the court. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074; Hoover v. Lester, 16 Cal. App. 151; 116 Pac. 382.

CODE COMMISSIONERS' NOTE. See note to § 633, post.

§ 633. Facts found and conclusions of law must be separately stated. Judgment on. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.

Legislation § 633. Enacted March 11, **1872**; based on the second sentence of Practice Act, § 180, which had the word "shall" instead of "must," in both instances.

Object of section. The object of this section is twofold: 1. To preclude the trial court from mingling together questions of fact and law, so that the facts presented in the findings may contain all the attributes of a special verdict, to the end that the proper application of the legal principles to the case may be investigated independently of the facts; and 2. That the conclusions of law may serve as directory to the clerk in entering judgment upon the facts as found. Spencer v. Duncan, 107 Cal. 423; 40 Pac. 549. The object of this section is to abolish the doctrine of implied findings, and to separate questions of fact from questions of law; and a party to an action may now present, on appeal, the points, that the judgment is not a legal conclusion from the facts found, and that the evidence does not sustain the findings, or some of them. Dowd v. Clarke, 51 Cal. 262. One main object of this section seems to have been to prevent the court from summarily ordering judgment without stating any facts or legal conclusions upon which it is based, and also to facilitate the review of the judgment on appeal: its main object was surely not to afford a cover under which a losing party might successfully set a trap to capture a just judgment. Millard v. Supreme Council, 81 Cal. 340; 22 Pac. 864. The intention of this section is, that the decision of the court shall be the basis of the judgment, in the same manner as the verdict of the jury: the section is not merely directory, and the court has no right to impair or destroy its efficacy. Russel v. Armador, 2 Cal. 305.

Separate statement. This section is directory, so far as it applies to the conclusions of law being separately stated (Spencer v. Duncan, 107 Cal. 423; 40 Pac. 549): correct findings, or conclusions of law and fact, may be considered, wherever set out. Butler v. Agnew, 9 Cal. App. 327; 99 Pac. 395. A judgment is not rendered ineffective by reason of being contained in the same document with the findings. Hopkins v. Warner, 109 Cal. 133; 41 Pac. 868. The findings of fact and conclusions of law constitute the decision, but this does not preclude the inclusion of the conclusions of law in the judgment alone, where the judgment and the findings of fact are drawn and filed at the same time. Gainsley v. Gainsley, 5 Cal. Unrep. 310; 44 Pac. 456; and see Miller v. Hicken, 92 Cal. 229; 28 Pac. 339. A finding placed after the conclusions of law, and given as a fact resulting from the other findings of fact, does not cease to be a finding of fact by reason of its position (Knowlton v. Mackenzie, 110 Cal. 183; 42 Pac. 580); and the mere fact that a finding is placed under the wrong heading is a very feeble reason for the reversal of a judgment.

Millard v. Supreme Council, 81 Cal. 340; 22 Pac. 864; Burton v. Burton, 79 Cal. 490; 21 Pac. 847.

Separate findings, where causes of action are joint. Where several causes of action are joined, the court may make a single set of findings based on allegations common to each cause of action, and separate findings for each matter applicable only to any one cause of action. Anderson v. Blean, 19 Cal. App. 581; 126 Pac. 859.

Findings, what are. The finding of facts and conclusions of law are different from the opinion: the finding consists of a concise, distinct, pointed, and separate statement of each essential fact established by the evidence, in its proper order, without any of the testimony by which the facts are proved, followed by a similar statement of the conclusions of law drawn from facts thus found. Hidden v. Jordan, 28 Cal. 301. The special verdict of a jury is adopted by the court in making an order that judgment be entered in accordance with the verdict of the jury rendered therein, and all the special issues submitted to the jury, and their answers or findings thereon, were incorporated in the judgment, together with the general verdict; and when adopted by the court, it takes the place of and is equivalent to findings by the court. Morrison v. Stone, 103 Cal. 94; 37 Pac. 142. A document filed by the judge, in which he states the case, the testimony, and the reasons for his decision, and not the ultimate facts established by the evidence, is an opinion, and not a finding. McClory v. McClory, 38 Cal. 575.

Findings under Practice Act. Under the amendment of 1866 to § 180 of the Practice Act, if the losing party appealed without moving for a new trial, or without excepting to the findings as defective, the written findings were of no avail for any purpose to the prevailing party, nor were they of any benefit to the losing party unless they contained facts repugnant to or inconsistent with the judgment; and previous to the act of 1861 the findings were required to support the judgment, but, under that act, and § 180 of the Practice Act, where there was no exception on the ground that the finding was defective or wanting, it was only requisite that the finding should not be repugnant to or inconsistent with the judgment. Sears v. Dixon, 33 Cal. 326.

Necessity for findings. Prior to the codes, findings were not essential to the entry or validity of a judgment. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074; see also Lamb v. Harbaugh, 105 Cal. 680; 39 Pac. 56. They are required only in civil actions and in special proceedings, where made necessary by statute; written findings were not required under the common-law practice. Disbarment of Danford, 157 Cal. 425; 108 Pac. 322. Findings are necessary to support a final judgment upon the merits. Saul v. Moscone, 16 Cal. App. 506; 118 Pac. 452. In an action to recover the value of legal services, the complaint must allege the non-payment of the claim, which must also be proved, if that fact is put in issue by the answer; and, where findings are not waived, it must be substantially found, to support a judgment for the plaintiff, that the money has not been paid. Harlan v. Lambert, 19 Cal. App. 349; 125 Pac. 1079. A finding as to a fact implied by law is not necessary. Pinheiro v. Bettencourt, 17 Cal. App. 111; 118 Pac. 941. Where a finding is conclusive against the right of the plaintiff to recover, findings upon other issues are unnecessary (Gregory v. Gregory, 102 Cal. 50; 36 Pac. 364; Dyer v. Brogan, 70 Cal. 136; 11 Pac. 589); nor are findings required in a case of nonsuit. Toulouse v. Pare, 103 Cal. 251; 37 Pac. 146; and see Gilson Quartz Mining Co. v. Gilson, 47 Cal. 597; Reynolds v. Brumagim, 54 Cal. 254.

Findings are like special verdict. Findings of fact are like a special verdict. Simmons v. Hamilton, 56 Cal. 493; Kennedy & Shaw Lumber Co. v. S. S. Construction Co., 123 Cal. 584; 56 Pac. 457. The court, when trying an issue of fact, is entitled to the same privileges and is subject to the same rules as a jury, with the exception of the mode of rendering its decision: its verdict must in all cases be special. Breeze v. Doyle, 19 Cal. 101.

Form. The code does not prescribe the form of findings. Millard v. Supreme Council, 81 Cal. 340; 22 Pac. 864. Findings on material issues raised by the pleadings and evidence need not be in any particular form. Harlan v. Lambert, 19 Cal. App. 349; 125 Pac. 1079.

Trial court must find facts. The trial court is required to find the facts, not evidence of facts; the appellate court is not competent to deduce conclusions of facts from evidence; to do which would be to assume original jurisdiction, committed by the constitution to the trial court, and denied to the appellate court. McDonald v. Burton, 68 Cal. 445; 9 Pac. 714. The labor and duty of finding the facts is imposed upon the lower court by statute: that court cannot turn it over to the supreme court, or to any other tribunal or person. Goodnow v. Griswold, 68 Cal. 599; 9 Pac. 837.

Opinion or oral declaration of judge as affecting finding. The opinion of a judge is merely an informal statement of his views of the cause, which are subject to change or modification; the legal expression of his views is to be found only in the findings of fact and conclusions of law.

Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578; 77 Pac. 1113; Wadleigh v. Phelps, 149 Cal. 627; 87 Pac. 93. The finding of the court is not impaired by any oral declaration of the judge at the time he announces his decision, nor is he concluded by any such declaration by subsequently making a finding contrary thereto. Fisk v. Casey, 119 Cal. 643; 51 Pac. 1077.

Finding of probative and ultimate facts. Findings should be statements of the ultimate facts in controversy, and not of probative facts or mere conclusions of law (Murphy v. Bennett, 68 Cal. 528; 9 Pac. 738); though findings of probative facts, where the ultimate facts necessarily result from them, are sufficient (Southern Pacific R. R. Co. v. Whitaker, 109 Cal. 268; 41 Pac. 1083; Mott v. Ewing, 90 Cal. 231; 27 Pac. 194; Murdock v. Clarke, 90 Cal. 427; 27 Pac. 275); and where the probative facts are found, the court can declare that the ultimate facts necessarily result from them (Alhambra etc. Water Co. v. Richardson, 72 Cal. 598; 14 Pac. 379); and also where the ultimate facts flow as a necessary conclusion therefrom (Bull v. Bray, 89 Cal. 286; 13 L. R. A. 576; 26 Pac. 873; Estate of Benton, 131 Cal. 472; 63 Pac. 775); but an ultimate finding of fact, drawn as a conclusion from the probative facts found, cannot stand if the specific facts upon which it is based do not support it. McKay v. Gesford, 163 Cal. 243; Ann. Cas. 1913E, 1253; 41 L. R. A. (N. S.) 303; 124 Pac. 1016. Particular facts found, relied upon as a substitute for a finding upon the ultimate fact alleged and put in issue, must be inconsistent with the fact they tend to negative, and every particular fact necessary to constitute this negation must be stated in the finding. Kusel v. Kusel, 147 Cal. 52; 81 Pac. 297. A finding that "sales were not rescinded" being held the finding of an ultimate fact depending upon probative facts, and a finding that "no lien existed" being also held the finding of an ultimate fact, it cannot be seen why a finding "that the plaintiff has no prescriptive right" is not also the finding of an ultimate fact; for it depends upon certain probative facts, which, in their turn, depend upon evidence. Weidenmueller v. Stearns Ranchos Co., 128 Cal. 623; 61 Pac. 374. Findings are not necessary, where the ultimate facts put in issue by the pleadings have been agreed upon, but the finding of an ultimate fact is properly made where an agreed statement of facts sets forth merely evidentiary matter, from which the ultimate fact might be found either way. Crisman v. Lanterman, 149 Cal. 647; 117 Am. St. Rep. 167; 87 Pac. 89. Findings of probative facts will not invalidate the finding of an ultimate fact, unless the latter is based on the former and is entirely overcome thereby, and unless, also, these findings of probative facts dispose of all the facts involved in the pleadings and the facts found constitute all the facts in the case. Forsythe v. Los Angeles Ry. Co., 149 Cal. 569; 87 Pac. 24. Findings of probative facts will not, in general, control, limit, or modify the finding of the ultimate fact, and although the finding of probative facts from which the ultimate fact conclusively follows is sufficient, yet when the ultimate fact is found, no finding of probative facts which may tend to establish that the ultimate fact was found against the evidence can overcome the principal findings; in such case the only remedy is to move for a new trial. Sharp v. Bowie, 142 Cal. 462; 76 Pac. 62; Smith v. Acker, 52 Cal. 217; Gill v. Driver, 90 Cal. 72; 27 Pac. 64; Perry v. Quackenbush, 105 Cal. 299; 38 Pac. 740. A finding of the ultimate fact prevails in support of the judgment, notwithstanding the finding of a probative or evidentiary fact that tends to show that the ultimate fact was found against the evidence. Forsythe v. Los Angeles Ry. Co., 149 Cal. 569; 87 Pac. 24. A finding of ownership includes the probative facts. Hynes v. All Persons, 19 Cal. App. 185; 125 Pac. 253. The presumption on appeal is not only in favor of the ultimate fact found, but also that any conflict in the evidence as to probative facts was resolved in such a manner as to sustain the general finding. Ballard v. Nye, 138 Cal. 586; 72 Pac. 156.

Material issues. A party is entitled to a distinct finding upon every material issue, whether made by denials of averments in the complaint, or by the denials, presumed by law, of averments in the answer. Harlan v. Ely, 55 Cal. 340. Every material issue must be met by the findings. O'Brien v. O'Brien, 124 Cal. 422; 57 Pac. 225. A failure to find upon any material issue raised by the pleadings is ground for reversal (Kimball v. Stormer, 65 Cal. 116; 3 Pac. 408); but not where the findings omitted would have been adverse to the appellant. People v. Center, 66 Cal. 551; 5 Pac. 263; 6 Pac. 481; Murphy v. Bennett, 68 Cal. 528; 9 Pac. 738; Demartin v. Demartin, 85 Cal. 71; 24 Pac. 594. If all the material issues are not found upon, a reversal will not be ordered, unless the findings on the issues not found upon would have entitled the appellant to a judgment in his favor. Bloehman v. Spreckels, 135 Cal. 662; 57 L. R. A. 213; 67 Pac. 1061; and see Gould v. Adams, 108 Cal. 365; 41 Pac. 408. Where there are, in substance, findings on the material issues, it is not necessary that they shall be in the exact language of the pleadings, or in any particular form. Millard v. Supreme Council, 81 Cal. 340; 22 Pac. 864.

It is not always necessary to make a specific finding as to each of several material issues, where the findings, taken as a whole, or construed together, clearly show that they include the court's conclusion upon all the material issues. Rossi v. Beaulieu Vineyard, 20 Cal. App. 770; 130 Pac. 201. The court errs in failing to find upon the material allegations of a cross-complaint, where there is evidence to support them. Cargnani v. Cargnani, 16 Cal. App. 96; 116 Pac. 306.

Evidence on issue necessary. It is incumbent upon the party complaining to show that evidence was offered to prove his affirmative defense, and that such evidence would have justified a finding in his favor (De Tolna v. De Tolna, 135 Cal. 575; 67 Pac. 1045; and see Woodham v. Cline, 130 Cal. 497; 62 Pac. 822); and an appellant cannot complain that the court failed to find upon an issue tendered by him, unless he brings up the evidence, and shows that he introduced evidence upon that issue which would have justified a ruling in his favor. Estate of Carpenter, 127 Cal. 582; 60 Pac. 162. Where no direct evidence is introduced upon any issue, the finding should be against the party having the burden of proof. Demartin v. Demartin, 85 Cal. 71; 24 Pac. 594; People v. Center, 66 Cal. 551; 5 Pac. 263. The failure to find upon the facts in issue, constituting a defense to the action, does not justify a reversal, unless there was evidence given from which such facts could be found. Callahan v. James, 141 Cal. 291; 74 Pac. 853; Himmelman v. Henry, 84 Cal. 104; 23 Pac. 1098; Gregory v. Gregory, 102 Cal. 50; 36 Pac. 364; Kaiser v. Dalto, 140 Cal. 167; 73 Pac. 828. The omission of the court to make findings upon issues presented by a cross-complaint is not a ground for reversal, in the absence of any bill of exceptions or other showing that evidence was given upon the issues so presented. Stewart v. Hollingsworth, 129 Cal. 177; 61 Pac. 936. Where the record does not show that evidence was offered in support of a counterclaim, the failure of the court to make a finding thereon does not justify a reversal. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692; 75 Pac. 564; and see Winslow v. Gohransen, 88 Cal. 450; 26 Pac. 504; Hihn Co. v. Fleckner, 106 Cal. 95; 39 Pac. 214. Where an affirmative defense is pleaded, and the defendant offered no evidence, he cannot complain, on appeal, that the court made no finding thereon. Frantz v. Harper, 6 Cal. Unrep. 560; 62 Pac. 603. The presumption that no evidence was offered on an issue upon which there is no finding, applies not only to the issues that are made to the allegations of the complaint by the answer, but also to the issues made by the averment of new matter in the answer which are deemed controverted; and a failure to make a finding upon any of these issues is not, in the absence of a bill of exceptions, error. Bliss v. Sneath, 119 Cal. 526; 51 Pac. 848; Estate of Carpenter, 127 Cal. 582; 60 Pac. 162.

Findings as supported by evidence. To require a finding upon any affirmative matter urged to a counterclaim, it must constitute a defense thereto, and be supported by some evidence. L. Scatena & Co. v. Van Loben Sels, 19 Cal. App. 423; 126 Pac. 187. In ejectment for a strip of a city lot, where each party has exactly what he has deemed himself entitled to for over forty years, and on which, during all of that time, he has paid taxes, a finding that the plaintiff never possessed such strip is sustained by the evidence. Marsicano v. Luning, 19 Cal. App. 334; 125 Pac. 1083. Findings which are in part probative facts and in part ultimate facts, and conclusions which are in part more findings of ultimate facts than conclusions of law, may all be looked to to determine whether they are supported by sufficient evidence, are sufficiently responsive to the issues made by the pleadings, and support the judgment. Mason v. Lievre, 145 Cal. 514; 78 Pac. 1040. Where the cause is properly decided upon an issue raised by a special defense, and the decision does not rest upon the allegations of the complaint, it is of no consequence whether the findings as to such allegations are or are not contrary to the evidence. Rauer v. Fay, 128 Cal. 523; 61 Pac. 90.

Facts admitted by the pleadings. Findings need not be made of facts admitted by the pleadings, or sufficiently covered by the findings actually made. Giselman v. Starr, 106 Cal. 651; 40 Pac. 8. Facts averred in the pleading of one party, and not denied by the other, need not be found by the court. Estate of Doyle, 73 Cal. 564; 15 Pac. 125; Ortega v. Cordero, 88 Cal. 221; 26 Pac. 80; Powell v. Bank of Lemoore, 125 Cal. 468; 58 Pac. 83. Facts admitted by the pleadings need not be found by the court; but a finding by the court against a material admission is ground for a reversal of the judgment (Faulkner v. Rondoni, 104 Cal. 140; 37 Pac. 883); nor are findings required upon facts not disputed; and none are necessary, where an agreed statement covers all the facts in the case (Pomeroy v. Gregory, 66 Cal. 572; 6 Pac. 492, 493; Taylor v. Central Pacific R. R. Co., 67 Cal. 615; 8 Pac. 436); and as to such admitted facts, the pleadings, in effect, become part of the findings; and the findings determine the material issues of fact raised by the pleadings. Kennedy & Shaw Lumber Co. v. S. S. Construction Co., 123 Cal. 584; 56 Pac. 457. The facts need not necessarily follow the pleadings which they support:

if the truth or falsity of each material allegation not admitted can be demonstrated from the findings, the requirements of the code are met. Mott v. Ewing, 90 Cal. 231; 27 Pac. 194. A finding contrary to an admission in the pleadings will be disregarded in determining the question whether a proper conclusion of law was drawn from the facts found and admitted; and a finding by the court against an averment not denied does not create an issue which the party has a right to have tried. Machado v. Kinney, 135 Cal. 354; 67 Pac. 331.

Findings outside of issues. A finding of fact can only be made upon issues joined by the pleadings, where the decision of the court following the findings is a judgment. Waller v. Weston, 125 Cal. 201; 57 Pac. 892. Findings outside of the issues, and not carried into the judgment, are immaterial (Collins v. Gray, 154 Cal. 131; 97 Pac. 142); and findings not determinative of the issues are insufficient. Kimball v. Stormer, 65 Cal. 116; 3 Pac. 408. Findings outside of the issues cannot sustain a judgment. Green v. Chandler, 54 Cal. 626; Sachse v. Auburn, 95 Cal. 650; 30 Pac. 800; Gamache v. South School District, 133 Cal. 145; 65 Pac. 301. There is no error in not finding upon a particular matter not in issue. Kern River Co. v. Los Angeles County, 164 Cal. 751; 130 Pac. 714; Younger v. Moore, 155 Cal. 767; 103 Pac. 221; Pinheiro v. Bettencourt, 17 Cal. App. 119; 118 Pac. 941; Mentry v. Broadway Bank etc. Co., 20 Cal. App. 388; 129 Pac. 470. A finding and judgment based upon a supposed breach of contract, not attempted to be alleged in the complaint, are erroneous and invalid, and cannot be sustained. Lyden v. Spohn-Patrick Co., 155 Cal. 177; 100 Pac. 236.

Failure to find upon certain issues. On appeal upon the judgment roll alone, it will not be presumed that any evidence was given upon an issue as to which there is no finding. Eva v. Symons, 145 Cal. 202; 78 Pac. 648. The failure of the court to find the facts declared essential to a recovery, by the decision of the appellate court on a former appeal of the case, as well as its own construction of its findings, by rendering a judgment for the defendants, must be regarded as its own conclusion that the evidence was insufficient to justify such findings as, under the former opinion of the appellate court, would authorize a decision in favor of the plaintiff. Breeze v. Brooks, 97 Cal. 72; 22 L. R. A. 256; 31 Pac. 742. The failure to find upon an issue, a finding upon which would merely invalidate a judgment fully supported by the findings, is not a ground for reversal, unless it is shown that evidence was submitted in relation to such issue. Himmelman v. Henry, 84 Cal. 104; 23 Pac. 1098; Klokke v. Escailler, 124 Cal. 297; 56 Pac. 1113; Downing v. Donegan, 1 Cal. App. 710; 82 Pac. 1111. The failure to make an express finding on a particular issue is not prejudicial, where the effect of a finding already made renders such issue immaterial. Diefendorff v. Hopkins, 95 Cal. 343; 30 Pac. 549; and see McCourtney v. Fortune, 57 Cal. 617; Dyer v. Brogan, 70 Cal. 136; 11 Pac. 589; Malone v. Del Norte County, 77 Cal. 217; 19 Pac. 422; Brison v. Brison, 90 Cal. 323; 27 Pac. 186; Gregory v. Gregory, 102 Cal. 50; 36 Pac. 364. Where the finding of the court sufficiently determines that the amount of a debt for which judgment was entered had become due prior to the commencement of the action, the defendant cannot complain of the want of a specific finding fixing the exact date when the debt became due and payable. Wagner v. El Centro Seed etc. Co., 17 Cal. App. 387; 119 Pac. 952. The statement of new matter in an answer, constituting an alleged counterclaim, is deemed denied by the plaintiff, and the burden is on the defendant to establish it; and, upon appeal from the judgment, where the evidence cannot be reviewed, it must be presumed that a failure to find as to the new matter was not prejudicial to the appellant, and that a finding thereon, if made, would have been adverse to him. Reed v. Johnson, 127 Cal. 538; 59 Pac. 986. Special findings on issues raised by a cross-complaint and answer are not necessary, where a general verdict was proper and covers all the issues presented by the pleadings. Hunt v. Elliott, 77 Cal. 588; 20 Pac. 132. The failure to find upon an issue raised by the answer is not error, where the defense was not claimed in the court below. Bliss v. Sneath, 119 Cal. 526; 51 Pac. 848. The parties to an action have no right to a finding upon every specific issue in a case, merely because they may plead it as res adjudicata in some possible future controversy, where it may become material. Diefendorff v. Hopkins, 95 Cal. 343; 30 Pac. 549.

Additional findings. The entry of final judgment terminates the jurisdiction of the court over the cause and the parties, except as otherwise expressly provided by law; and an additional finding, made after the entry of judgment, though material, cannot be deemed a valid finding, and the court has no power to make it upon notice, any more than without notice. Los Angeles County v. Lankershim, 100 Cal. 525; 35 Pac. 153, 556; Ayres v. Burr, 132 Cal. 125; 64 Pac. 120. The court cannot insert an omitted finding in its findings as originally prepared, and upon which judgment was entered; but the judgment should not be reversed on that ground, where the additional finding is but a conclusion of

law from the facts found. Richter v. Henningsan, 110 Cal. 530; 42 Pac. 1077. Findings, otherwise sufficient, and covering all the issues, are not rendered defective by an additional finding, and such finding will be regarded merely as surplusage. Hopkins v. Warner, 109 Cal. 133; 41 Pac. 868.

Negative findings. To find that certain matters are not true is not to fix or to determine a fact, and is totally insufficient. Goodnow v. Griswold, 68 Cal. 599; 9 Pac. 837.

General and special findings. A general finding, that certain averments of the complaint are true, is controlled by a special finding inconsistent therewith. McCormick v. National Surety Co., 134 Cal. 510; 66 Pac. 741. Where an express finding upon all the material issues supports the judgment, an insufficient general finding may be disregarded. Pinheiro v. Bettencourt, 17 Cal. App. 111; 118 Pac. 941.

Findings in language of pleadings. The only purpose of the findings is to answer the questions raised by the pleadings; and facts, stated in the findings as they are stated in the pleadings, are sufficient. Dam v. Zink, 112 Cal. 91; 44 Pac. 331.

Findings inconsistent with averment. An affirmative finding of facts, inconsistent with an averment, and from which it necessarily follows that the averment is not true, is a sufficient finding that the averment is not true. Churchill v. Baumann, 95 Cal. 541; 30 Pac. 770.

Pleadings incorporated in findings by reference. The appellate court is not called upon to examine the record to determine what matters at issue, made by the pleadings, come within the findings. Perkins v. West Coast Lumber Co., 120 Cal. 27; 52 Pac. 118. The trial court should assume the labor of comparing the allegations of the answer with the facts found by it: the appellate court will not determine the truth or falsity of any of the allegations by reference to the testimony, or to the facts actually found. Harlan v. Ely, 55 Cal. 340. A finding may refer to a pleading for a specification of facts found and not found; but such reference must be sufficiently distinct to make it intelligible, and the facts must be sufficiently stated in the pleadings (McEwen v. Johnson, 7 Cal. 258); so as to leave no doubt as to what particular facts are intended. Breeze v. Doyle, 19 Cal. 101. A finding that the allegations of fact in a complaint are true, is not a finding that any conclusions of law therein are true. Postal Telegraph-Cable Co. v. Los Angeles, 164 Cal. 156; 128 Pac. 19. A finding that all the material averments of the complaint are true is sufficient (Johnson v. Squires, 53 Cal. 37; Krug v. Lux Brewing Co., 129 Cal. 322; 61 Pac. 1125); as is also a finding that all and singular the allegations of the complaint are true, and the allegations of the answer are false, and specifically negativing a charge which was the basis of a separate defense, is sufficient (Cohn v. Kelly, 132 Cal. 468; 64 Pac. 709); and also a finding that certain instruments set forth in the complaint were executed by the parties at the time alleged (Breeze v. Doyle, 19 Cal. 101); and a finding that certain named paragraphs in the complaint are true (Homeseekers Loan Ass'n v. Gleeson, 133 Cal. 312; 65 Pac. 617; and see Johnson v. Klein, 70 Cal. 186; 11 Pac. 606; Williams v. Hall, 79 Cal. 606; 21 Pac. 965); and a finding that all the allegations contained in certain subdivisions of the complaint are true, where the complaint is divided into subdivisions and the answer is not (Kennedy & Shaw Lumber Co. v. S. S. Construction Co., 123 Cal. 584; 56 Pac. 457); and a finding "that all the facts in the complaint are true, except as to those hereinafter otherwise specified, and as to those allegations, the court finds as follows," and the court then finds specifically as to such omitted matters, is sufficient (Alameda County v. Crocker, 125 Cal. 101; 57 Pac. 766); as is also a general finding, that each and all of the allegations of the plaintiff's complaint are true, and are sustained by the evidence, and that none of the denials contained in the defendant's answer herein are true, or are sustained by the evidence (Gale v. Bradbury, 116 Cal. 39; 47 Pac. 778; and see McEwen v. Johnson, 7 Cal. 258; Johnson v. Klein, 70 Cal. 186; 11 Pac. 606; Gwinn v. Hamilton, 75 Cal. 265; 17 Pac. 212; Williams v. Hall, 79 Cal. 606; 21 Pac. 965; San Diego County v. Seifert, 97 Cal. 594; 32 Pac. 644; Krug v. Lux Brewing Co., 129 Cal. 322; 61 Pac. 1125; Sutter County v. McGriff, 130 Cal. 124; 62 Pac. 412; Cohn v. Kelly, 132 Cal. 468; 64 Pac. 709); but a finding that all the allegations of the plaintiff's complaint are true, and that all the allegations of the defendant's answer, so far as they are inconsistent with the allegations of said complaint, are not true, is not sufficient (Krug v. Lux Brewing Co., 129 Cal. 322; 61 Pac. 1125; Bank of Woodland v. Treadwell, 55 Cal. 379; and see Continental Building etc. Ass'n v. Wilson, 144 Cal. 776; 78 Pac. 254); nor is a finding that all the issues of fact raised by the pleadings are hereby found and decided in favor of the plaintiff and against the defendant (Johnson v. Squires, 53 Cal. 37); nor a finding that "the foregoing are all the facts of the case, and all and singular the allegations of the second amended answer are untrue, except only in so far as they accord with the foregoing facts" (Harlan v. Ely, 55 Cal. 340); nor a finding that all other averments in the pleadings herein and in issue, not comprised in and passed

upon in these findings, are not true. Perkins v. West Coast Lumber Co., 120 Cal. 27; 52 Pac. 118.

Findings in actions at law. Findings of fact may be embodied in the decree of foreclosure. Locke v. Klunker, 123 Cal. 231; 55 Pac. 993. Recitals in a decree of foreclosure constitute sufficient findings, if findings are required. Hibernia Sav. & L. Soc. v. Clarke, 110 Cal. 27; 42 Pac. 425. Findings are required in an action of unlawful detainer. Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593; 28 Pac. 45.

Findings in suits in equity. In suits in equity, no findings of fact are necessary to support the judgment (Lyons v. Lyons, 18 Cal. 447); and the general verdict of a jury is determinative of the issues made by the pleadings. Learned v. Castle, 67 Cal. 41; 7 Pac. 34; and see Warring v. Freear, 64 Cal. 54; 28 Pac. 115; Stockman v. Riverside Land etc. Co., 64 Cal. 57; 28 Pac. 116; Bell v. Marsh, 80 Cal. 411; 22 Pac. 170. The presumption in favor of the correctness of a finding does not apply to a proceeding in equity, tried upon the complaint, answer, and exhibits. Dewey v. Bowman, 8 Cal. 145. The adoption of a verdict is equivalent to a finding by the court, to the extent to which the verdict covers the issues made by the pleadings, and it is then the duty of the court to find upon all the issues not covered by the verdict, unless such findings are waived. Warring v. Freear, 64 Cal. 54; 28 Pac. 115.

Findings in special proceedings. This section relates to the trial of civil actions, and not to special proceedings. Lyons v. Marcher, 119 Cal. 382; 51 Pac. 559. The court is not required to make findings of fact in proceedings in aid of execution (Lyons v. Marcher, 119 Cal. 382; 51 Pac. 559); nor written findings of fact and conclusions of law in a proceeding for the disbarment of an attorney. Disbarment of Danford, 157 Cal. 425; 108 Pac. 322. It has never been definitely determined that findings are necessary in all matters of probate heard before the court alone; such as a contest over the account of an executor (Estate of Sanderson, 74 Cal. 199; 15 Pac. 753), or a contest over an order for the sale of real property (Estate of Arguello, 85 Cal. 151; 24 Pac. 641), or a contest over the setting apart of a homestead (Estate of Adams, 128 Cal. 380; 57 Pac. 569; 60 Pac. 965), as such contests do not conduce to the development of such issues as arise upon the pleadings in a civil action; and in such proceedings it is not incumbent upon the court to make and file express findings (Estate of Levinson, 108 Cal. 450; 41 Pac. 483; 42 Pac. 479); but issues joined in probate proceedings are tried and determined by the court as in civil cases; and upon trial by the court without a jury, the parties are entitled to findings, unless they are waived (Estate of Burton, 63 Cal. 36; Estate of Crosby, 55 Cal. 574; and see Miller v. Lux, 100 Cal. 609; 35 Pac. 345, 639); and when the account of an executor is assailed in any particular for matters not appearing upon its face, the court may properly make express findings upon such issues, and when it does so, such findings become a part of the judgment roll. Miller v. Lux, 100 Cal. 609; 35 Pac. 315, 639.

Amendment of findings. The court may change or modify its findings before judgment, without ordering a new trial. Spaulding v. Howard, 121 Cal. 194; 53 Pac. 563; and see Smith v. Taylor, 82 Cal. 533; 23 Pac. 217. Findings of fact cannot be changed by the court in any material respect, after final judgment, and while it is allowed to stand (Los Angeles County v. Lankershim, 100 Cal. 525; 35 Pac. 153, 556); and, after the findings have been filed, and judgment entered thereon, the only method by which the findings can be completely changed or modified is by granting a new trial; and until they are set aside, they stand in their integrity as originally made. Hawxhurst v. Rathgeb, 119 Cal. 531; 63 Am. St. Rep. 142; 51 Pac. 846.

Stipulation, effect on findings. Where an action is submitted upon stipulated facts showing that the plaintiff is entitled to judgment, the making of additional findings by the court is unnecessary; and if the stipulated facts warrant a judgment, it should stand. Los Angeles v. Los Angeles etc. Milling Co., 152 Cal. 645; 93 Pac. 869, 1135. A written stipulation, that certain allegations of a pleading are true, amounts to an agreed statement of facts, and no findings thereon are required. Alderson v. Cutting, 163 Cal. 503; Ann. Cas. 1914A, 1; 126 Pac. 157. A stipulation, that a party introduced evidence on an issue does not take the place of evidence to show whether the finding was justified thereby: such stipulation, to a certain extent, deprives the appellate court of the power to determine the appeal upon the real facts of the case. Estate of Carpenter, 127 Cal. 582; 60 Pac. 162. Where findings were waived, all the issues made by the pleadings are presumed to have been found in favor of the successful party. Antonelle v. Board of New City Hall Comm'rs, 92 Cal. 228; 28 Pac. 270; Pacific Investment Co. v. Ross, 131 Cal. 8; 63 Pac. 67.

Construction of findings. Findings must be so construed as to support the judgment, if possible. Wagner v. El Centro Seed etc. Co., 17 Cal. App. 387; 119 Pac. 952; Rossi v. Beaulieu Vineyard, 20 Cal. App. 770; 130 Pac. 201. Findings of fact are like the special verdict of a jury: they must be taken in connection with the

pleadings to support the judgment; and when the language of a finding is equivocal, that construction which accords with the pleadings and supports the judgment should be adopted (Kennedy & Shaw Lumber Co. v. S. S. Construction Co., 123 Cal. 584; 56 Pac. 457); and findings of fact should receive such a construction as will uphold rather than defeat the judgment; and when, from the facts found by the court, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. Breeze v. Brooks, 97 Cal. 72; 22 L. R. A. 256; 31 Pac. 742; Warren v. Hopkins, 110 Cal. 506; 42 Pac. 986; Gould v. Eaton, 111 Cal. 639; 52 Am. St. Rep. 201; 44 Pac. 319; Perkins v. West Coast Lumber Co., 129 Cal. 427; 62 Pac. 57; Krasky v. Wollpert, 134 Cal. 338; 66 Pac. 309; De Haven v. Berendes, 135 Cal. 178; 67 Pac. 786; People's Home Sav. Bank v. Rickard, 139 Cal. 285; 73 Pac. 858; Paine v. San Bernardino Valley Traction Co., 143 Cal. 654; 77 Pac. 659. Findings are to be read and considered together, and liberally construed in support of the judgment, and, if possible, are to be reconciled, so as to prevent any conflict upon material points (People's Home Sav. Bank v. Rickard, 139 Cal. 285; 73 Pac. 858; and see Ames v. San Diego, 101 Cal. 390; 35 Pac. 1005; Murray v. Tulare Irrigation Co., 120 Cal. 311; 49 Pac. 563; Mitchell v. Hutchinson, 142 Cal. 404; 76 Pac. 55); and the language should not be strained by the court to make out a case of conflict; but the findings should be reconciled, if it can be reasonably done (Alhambra etc. Water Co. v. Richardson, 72 Cal. 598; 14 Pac. 379; Heaton-Hobson Associated Law Offices v. Arper, 145 Cal. 282; 78 Pac. 721; Schultz v. McLean, 93 Cal. 329; 28 Pac. 1053); and they cannot be altogether detached from each other and considered piecemeal; and if a particular finding is doubtful or obscure, reference may be had to the context for the purpose of ascertaining the true meaning. Mott v. Ewing, 90 Cal. 231; 27 Pac. 194. The findings come after the case is tried, considered, and determined, and after the character of the judgment, whether right or wrong, is fixed; they are merely incidental to the judgment; and to test their sufficiency by a standard which exacts the extreme of accurate statement and minute detail is to put the instrument in the place of the principal. Millard v. Supreme Council, 81 Cal. 340; 22 Pac. 864. The trial court may draw any inference of fact from the evidence before it or from the facts found by it; and the appellate court will not draw a different inference to defeat the judgment. Paine v. San Bernardino Valley etc. Co., 143 Cal. 654; 77 Pac. 659; Breeze v. Brooks, 97 Cal. 72; 22 L. R. A. 256; 31 Pac. 742; Gould v. Eaton, 111 Cal. 639; 52 Am. St. Rep. 201; 44 Pac. 319; People's Home Sav. Bank v. Rickard, 139 Cal. 285; 73 Pac. 858. A finding of fact is not affected by a conclusion of law inconsistent therewith. Niles v. Edwards, 90 Cal. 10; 27 Pac. 159.

Effect of defective findings, or of want of findings. A defect in the findings is fatal to the judgment. Cargnani v. Cargnani, 16 Cal. App. 96; 116 Pac. 306. Defective findings, or the absence of any findings, do not render a judgment a nullity, but merely constitute grounds for reversal on appeal; and the judgment cannot be collaterally attacked because of them. Breeze v. Doyle, 19 Cal. 101.

Proposed findings, submission of. Proposed findings upon propositions of law, submitted to the court after it has orally announced its decision, but before the filing of its findings, are properly refused consideration. Wheatland Mill Co. v. Pirrie, 89 Cal. 459; 26 Pac. 964. The refusal of findings presented to the court with the request that it find the same as facts in the case, is not erroneous: a party desiring a finding upon a particular point should specify the point, without dictating the terms of the finding. Edgar v. Stevenson, 70 Cal. 286; 11 Pac. 704. An exception to a refusal of the request of a party that the court find upon certain issues, is a practice not recognized by the code, and such ruling cannot be reviewed upon appeal, merely as an error of law; but it is the duty of the court to find upon all the material issues, regardless of the request of the parties. Haight v. Tryon, 112 Cal. 4; 44 Pac. 318.

Findings. See note ante, § 607.

Distinction between findings and conclusions. The line of demarcation between questions of fact and conclusions of law is not easily drawn in all cases; if, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of the truth, it becomes an ultimate fact, to be found as such; but if resort must be had to the artificial processes of the law to reach a final determination, the result is a conclusion of law. Levins v. Rovegno, 71 Cal. 273; 12 Pac. 161; Weidenmueller v. Stearns Ranchos Co., 128 Cal. 623; 61 Pac. 374. The finding of a sale and delivery is of an ultimate fact, and not of a mere conclusion of law. Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469. The conclusions reached frequently partake of the nature of both law and fact; and where there is any doubt, it should be resolved in favor of the judgment. Butler v. Agnew, 9 Cal. App. 327; 99 Pac. 395.

Conclusions of law, what are. The conclusions of law are what, in the opinion

of the judge, constitute the law of the case, arising from and applicable to the facts proved or admitted. Sears v. Dixon, 33 Cal. 326. A finding that a cause of action is barred by the statute is properly finding of a fact, and need not be placed among the conclusions of law (Spaulding v. Howard, 121 Cal. 194; 53 Pac. 563); but a finding that there was not a conversion is a finding of a conclusion of law, and not of an ultimate fact, where the facts found show a conversion. Niles v. Edwards, 90 Cal. 10; 27 Pac. 159. An order for judgment in accordance with the findings of fact, is a sufficient conclusion of law, where it is apparent that if more specific conclusions of law had been stated, they would have been in favor of the party for whom judgment was ordered. Rea v. Haffenden, 116 Cal. 596; 48 Pac. 716; Anderson v. Blean, 19 Cal. App. 581; 126 Pac. 859.

Propositions of law, when submitted. Where a cause has been tried, and submitted for decision to the court upon the law and the facts, and the court has orally announced its decision, but has not filed its findings, it cannot be compelled to pass upon propositions of law submitted to it as proposed findings (Wheatland Mill Co. v. Pirrie, 89 Cal. 459; 26 Pac. 964); nor is there any authority for the practice, at the close of a trial by the court, of presenting propositions of law, which the court is requested to declare as legal principles applicable to the facts of the case, and to render its decision in accordance therewith. Lamb v. Harbaugh, 105 Cal. 680; 39 Pac. 56; Touchard v. Crow, 20 Cal. 150; 81 Am. Dec. 108; Estate of Page, 57 Cal. 238; Wilson v. Wilson, 64 Cal. 92; 27 Pac. 861.

Effect of erroneous conclusions of law. An erroneous conclusion of law is not ground for reversal, if the judgment is correct (Spencer v. Duncan, 107 Cal. 423; 40 Pac. 549; Helm v. Dumars, 3 Cal. 454; Bleven v. Freer, 10 Cal. 172; Haffley v. Maier, 13 Cal. 13; Kidd v. Teeple, 22 Cal. 255; Davis v. Baugh, 59 Cal. 568; Miller v. Hicken, 92 Cal. 229; 28 Pac. 339); but findings of fact are like a special verdict, and an erroneous conclusion renders erroneous any judgment entered thereon, like a general verdict inconsistent with the special verdict. Simmons v. Hamilton, 56 Cal. 493.

Amendment of conclusions of law. Conclusions of law upon the facts found may be changed by the court at any time before the entry of judgment; and such change may be made by the successor of the judge who tried the cause (Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074; Condee v. Barton, 62 Cal. 1); but this cannot be done after the entry of judgment. First Nat. Bank v. Dusy, 110 Cal. 69; 42 Pac. 476.

The decision, what constitutes. The decision is the findings of fact, and the conclusions of law drawn therefrom, signed by the court and filed with the clerk as the basis of the judgment entered (Porter v. Hopkins, 63 Cal. 53; Sawyer v. Sargent, 65 Cal. 259; 3 Pac. 872; Donohoe v. Mariposa Land etc. Co., 66 Cal. 317; 5 Pac. 495; Hibernia Sav. & L. Soc. v. Moore, 68 Cal. 156; 8 Pac. 824; Clifford v. Allman, 84 Cal. 528; 24 Pac. 292; Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074; San Joaquin Land etc. Co. v. West, 99 Cal. 345; 33 Pac. 928; Gainsley v. Gainsley, 3 Cal. Unrep. 310; 44 Pac. 456; and see Miller v. Hicken, 92 Cal. 229; 28 Pac. 339); and until given and filed, there is no decision upon which judgment can be entered, and consequently no authority for entering any judgment (Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074; Broder v. Conklin, 98 Cal. 360; 33 Pac. 211; Delger v. Jacobs, 19 Cal. App. 197; 125 Pac. 258); and the facts found, and the conclusions of law drawn therefrom, are the decision to which exception can be made on the ground of the insufficiency of the evidence to sustain it. Coveny v. Hale, 49 Cal. 552. The findings, under this section, constitute the decision; hence, a notice of a motion directed against the findings, and not against the decision, is sufficient. Haight v. Tryon, 5 Cal. Unrep. 761; 34 Pac. 712. A case is not tried until all the issues are disposed of, and there is no decision until the court has passed upon the facts, and drawn its conclusions of law therefrom. Reclamation District v. Thisby, 131 Cal. 572; 63 Pac. 918. A written opinion is no part of the decision: the findings and judgment may properly make different provisions from those indicated in such opinion. Wadleigh v. Phelps, 149 Cal. 627; 87 Pac. 93. A minute-entry, made prior to the decision, directing that findings and decree be drawn in favor of the defendant, does not constitute a decision, and is immaterial. Canadian etc. Trust Co. v. Clarita etc. Investment Co., 140 Cal. 672; 74 Pac. 301. The making and the filing of the findings, and the entry of the judgment, are only parts of the decision, and together they constitute the final determination of the rights of the parties. Fox v. Hale etc. Mining Co., 108 Cal. 478; 41 Pac. 328.

Judgment must accord with conclusions. The statement of the conclusions of law precedes the rendition of a final judgment, and the judgment must accord with the conclusions; but the conclusions need not be twice stated. Gainsley v. Gainsley, 5 Cal. Unrep. 310; 44 Pac. 456; and see Miller v. Hicken, 92 Cal. 229; 28 Pac. 339.

Rendition and entry of judgment. The findings of fact and conclusions of law are the only papers in connection with a judgment that the trial judge is required to

sign and file; the signing and filing of these documents constitute the rendering of judgment, and there is no other judicial act required to be performed by the court to make the judgment effectual. Hoover v. Lester, 16 Cal. App. 151; 116 Pac. 382. Ordinarily, a party in whose favor a case has been decided is entitled to have final judgment entered. Deyoe v. Superior Court, 140 Cal. 476; 98 Am. St. Rep. 73; 74 Pac. 28. The entry of the judgment after its rendition is but the ministerial act of the clerk; the rendition of the judgment is a judicial act (San Joaquin Land etc. Co. v. West, 99 Cal. 345; 33 Pac. 928; Estate of Cook, 77 Cal. 220; 11 Am. St. Rep. 267; 1 L. R. A. 567; 17 Pac. 923; 19 Pac. 431; Broder v. Conklin, 98 Cal. 360; 33 Pac. 211); and failure to enter an order or judgment does not avoid or delay the effect of the adjudication, except where some statute expressly or by implication so provides. Otto v. Long, 144 Cal. 144; 77 Pac. 885; Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146; 16 Pac. 887; Estate of Cook, 77 Cal. 220; 11 Am. St. Rep. 267; 1 L. R. A. 567; 17 Pac. 923; 19 Pac. 431. A judgment entered by the clerk, in pursuance of findings and an order for judgment transmitted to him, which were signed by the trial judge outside of the county in which the action was pending, is regular. Estudillo v. Security Loan etc. Co., 158 Cal. 66; 109 Pac. 884. The fact that the judge signed the judgment, while it does not make his action any more or any less binding, has some significance upon the question of his intention. O'Brien v. O'Brien, 124 Cal. 422; 57 Pac. 225.

Correction of clerical errors in judgment. Clerical misprisions in a judgment can be corrected at any time by an order of the court (Egan v. Egan, 90 Cal. 15; 27 Pac. 22); as, where the clerk inserted an additional initial in the defendant's name (Fay v. Stubenrauch, 141 Cal. 573; 75 Pac. 174); and where he made an error in one of the initials of a person's name (Mitchell v. Patterson, 120 Cal. 286; 52 Pac. 589); and where he erroneously added interest to the amount of the judgment (San Joaquin Land etc. Co. v. West, 99 Cal. 345; 33 Pac. 928; and where he entered judgment in favor of all of the defendants, instead of against two only (Canadian etc. Trust Co. v. Clarita etc. Investment Co., 140 Cal. 672; 74 Pac. 301); and such amendments may be made after the expiration of six months from the entry of judgment (Egan v. Egan, 90 Cal. 15; 27 Pac. 22; San Joaquin Land etc. Co. v. West, 99 Cal. 345; 33 Pac. 928); and the record, when so corrected, as well as the order making the correction, is conclusive upon any other court or in any other proceeding in which the record is offered in evidence. Galvin v. Palmer, 134 Cal. 426; 66 Pac. 572.

Correction of judicial errors. Judicial errors can be remedied only through motion for a new trial or by appeal. Canadian etc. Trust Co. v. Clarita etc. Investment Co., 140 Cal. 672; 74 Pac. 301; San Joaquin Land etc. Co. v. West, 99 Cal. 345; 33 Pac. 928; Egan v. Egan, 90 Cal. 15; 27 Pac. 22.

Expiration of term of judge, effect on subsequent proceedings. The entry of judgment upon a decision, being but a ministerial act, can be performed by the clerk after the judge's term of office has expired, and the judgment need not be signed by the judge; hence, a judgment produced from the original records of the court where rendered needs no signature or exemplification. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074; San Joaquin Land etc. Co. v. West, 99 Cal. 345; 33 Pac. 928. The judicial power of the judge ceases upon the expiration of his term of office, and it is not competent for him thereafter to do any act necessary to complete the trial of any cause then remaining unfinished. Broder v. Conklin, 98 Cal. 360; 33 Pac. 211; and see Mace v. O'Reilley, 70 Cal. 231; 11 Pac. 721; Connolly v. Ashworth, 98 Cal. 205; 33 Pac. 60. The trial of a cause by the court is not concluded until the decision is filed with the clerk; and when the term of office of the judge expires before the decision is filed, the fact that it was signed by him, and filed by order of his successor in office, is not sufficient to sustain a judgment entered thereon. Connolly v. Ashworth, 98 Cal. 205; 33 Pac. 60; and see Hastings v. Hastings, 31 Cal. 95; Polhemus v. Carpenter, 42 Cal. 375; Comstock Quicksilver Mining Co. v. Superior Court, 57 Cal. 625; Van Court v. Winterson, 61 Cal. 615; Warring v. Freear, 64 Cal. 54; 28 Pac. 115; Mace v. O'Reilley, 70 Cal. 231; 11 Pac. 721. The trial of an action is not completed until a decision has been given in writing and filed with the clerk; and if not filed until after the expiration of the term of office of the judge, it cannot form the basis of a judgment. Broder v. Conklin, 98 Cal. 360; 33 Pac. 211; and see Connolly v. Ashworth, 98 Cal. 205; 33 Pac. 60.

New trial. The "decision" which may be vacated on a motion for a new trial is that which is given upon the original trial of the question of fact, and upon which the judgment is to be entered; and the provision that the judgment is to be entered upon the decision implies that it is subsequent to and dependent upon the decision. Brison v. Brison, 90 Cal. 323; 27 Pac. 186. The court must find upon all the material issues, regardless of any request of the parties, and a failure in this respect is ground for a new trial as a decision against law (Haight v. Tryon, 112 Cal. 4; 44 Pac. 318; and see Knight v

Roche, 56 Cal. 15; Spotts v. Hanley, 85 Cal. 155; 24 Pac. 738); but see contra, Churchill v. Flournoy, 127 Cal. 355; 59 Pac. 791. Where the court fails to find upon a material issue, it is a "decision against law," and a new trial should be granted, so that the court may make a proper finding upon the issue of fact retried. Elizalde v. Murphy, 11 Cal. App. 32; 103 Pac. 904. An objection to a finding outside of the issues is available only upon an appeal from the judgment, and is not ground for the granting of a motion for a new trial. Power v. Fairbanks, 146 Cal. 611; 80 Pac. 1075. Where all the issues of fact raised by the pleadings are found by the court, and the findings are correct, an erroneous judgment drawn from those facts cannot be corrected by means of a new trial. Kaiser v. Dalto, 140 Cal. 167; 73 Pac. 828. Where every material issue has been decided in favor of the losing party, a new trial will not be awarded: his only remedy is by appeal from the judgment. Sharp v. Bowie, 142 Cal. 462; 76 Pac. 62; and see Martin v. Matfield, 49 Cal. 42; Brison v. Brison, 90 Cal. 323; 27 Pac. 186; Bode v. Lee, 102 Cal. 583; 36 Pac. 936; Rauer v. Fay, 128 Cal. 523; 61 Pac. 90; Swift v. Occidental Mining etc. Co., 141 Cal. 161; 74 Pac. 700. A judgment based upon contradictory findings is a decision against law, for which a new trial may be granted. Langan v. Langan, 89 Cal. 186; 26 Pac. 764. The failure to find upon a material issue is a ground for a new trial of such issue. Power v. Fairbanks, 146 Cal. 611; 80 Pac. 1075. The examination on motion for a new trial is limited to a consideration of the sufficiency of the evidence to sustain the findings of fact, and whether any errors of law occurred at the trial. Churchill v. Flournoy, 127 Cal. 355; 59 Pac. 791.

Appeal. On an appeal from an order denying a new trial, neither objections that certain findings were outside of the issues, nor the sufficiency of the findings to support the judgment, or of a cross-complaint to state a cause of action, can be considered (Bell v. Southern Pacific R. R. Co., 144 Cal. 560; 77 Pac. 1124); nor the insufficiency of the findings to support the conclusions of law, or of the complaint to state a cause of action, nor the unconstitutionality of a statute (Petaluma Paving Co. v. Singley, 136 Cal. 616; 69 Pac. 426; and see Bode v. Lee, 102 Cal. 583; 36 Pac. 936; Pierce v. Willis, 103 Cal. 91; 36 Pac. 1080; Churchill v. Flournoy, 127 Cal. 355; 59 Pac. 791); nor the questions whether the judgment is supported by the complaint or the findings, or whether the findings are contradictory to and inconsistent with the pleading. Moore v. Douglas, 132 Cal. 399; 64 Pac. 705; and see Rauer v. Fay, 128 Cal. 523; 61 Pac. 90; Swift v. Occidental Mining etc. Co., 141 Cal. 161; 74 Pac. 700. A decree not warranted either by the allegations of the complaint or by the findings of the court will be ordered modified on appeal. Carmichael v. McGillivray, 57 Cal. 8. The failure to find upon a material issue is not ground for the reversal of a judgment otherwise correct, unless it appears by the statement or bill of exceptions that evidence was given upon such issue. Kaiser v. Dalto, 140 Cal. 167; 73 Pac. 828. A failure to find upon an issue, a finding upon which would merely invalidate a judgment fully supported by the findings, is not a ground for reversal, unless it is shown that evidence was submitted in relation to the issue. Winslow v. Gohransen, 88 Cal. 450; 26 Pac. 504; Dedmon v. Moffitt, 89 Cal. 211; 26 Pac. 800; Brady v. Burke, 90 Cal. 1; 27 Pac. 52; Rogers v. Duff, 97 Cal. 66; 31 Pac. 836; Gregory v. Gregory, 102 Cal. 50; 36 Pac. 364; F. A. Hihn Co. v. Fleckner, 106 Cal. 95; 39 Pac. 214; Marchant v. Hayes, 117 Cal. 669; 49 Pac. 840; Bliss v. Sneath, 119 Cal. 526; 51 Pac. 848; Roebling's Sons Co. v. Gray, 139 Cal. 607; 73 Pac. 422. A decision is against law, where there is a failure to find upon a material issue, and it may be reviewed upon appeal from an order granting or refusing a new trial. Adams v. Helbing, 107 Cal. 298; 40 Pac. 422; Clark v. Hewitt, 136 Cal. 77; 68 Pac. 303; Kaiser v. Dalto, 140 Cal. 167; 73 Pac. 828. Where a finding is not determinative of an issue, it is insufficient; but an "attempted" finding, filed as a finding, must be treated as such for the purpose of review, and as showing that findings were not waived. Kimball v. Stormer, 65 Cal. 116; 3 Pac. 408. The contention that a finding is not within the issues cannot be made on appeal, if, at the trial, no objection was made to the evidence in support thereof. McDougald v. Hulet, 132 Cal. 154; 64 Pac. 278. Where the defendant went to trial upon the theory that there was a material issue, and did not object to the evidence upon such issue, and the court made findings, with no objection from either party, neither party will be allowed on appeal to say that there was no such issue. Carroll v. Briggs, 138 Cal. 452; 71 Pac. 501. An order of the court, not prayed for in the complaint, is not erroneous as a matter of law, nor is there any presumption against its validity: if erroneous as a matter of fact, the appellant should cause such error to appear. Bank of Ukiah v. Reed, 131 Cal. 597; 63 Pac. 921. Facts found by the court, not sustaining the judgment, can be shown on an appeal without any bill of exceptions; and if the decision upon any controverted question of fact results from a failure to apply properly the law applicable thereto, or from a considera-

tion of evidence not entitled to consideration, this error can be reviewed only on a bill of exceptions. Lamb v. Harbaugh, 105 Cal. 680; 39 Pac. 56.

Presumption in favor of findings. Where there are no express findings in the record on appeal, the presumption of law is, that the court found all the matters of fact in issue necessary to support its judgment; and if the evidence is insufficient to justify the court in finding any material or necessary fact, such implied finding may be excepted to in the same manner and with the same effect as if it were an express finding. Blanc v. Paymaster Mining Co., 95 Cal. 524; 29 Am. St. Rep. 149; 30 Pac. 765. In the absence of evidence in the record on appeal, the presumption is, that there was sufficient evidence to support the findings, and that it went in without objection, and was admissible under the pleadings. Beardsley v. Clem, 137 Cal. 328; 70 Pac. 175.

CODE COMMISSIONERS' NOTE. The two preceding sections were based upon the theory:

1. That speedy decisions are desirable;
2. That the system of "implied" findings ought not to be tolerated.

First. It is provided that all causes tried by the court must be decided within twenty days after their final submission. Whilst it is important that all cases should be correctly decided in the first instance, it is equally important that they should be speedily decided. The expense attending litigation in this state is so great, that, as a general rule, a person had better, in the first instance, lose his estate, than, at the end of three years' litigation, find his claim to it established, but the title, by the delay, transferred to the attorneys and other officers of the court. There is scarcely a case that a judge with ordinary industry cannot as well decide within ten days as within ten years. If it involves points of great difficulty, it goes to the supreme court; and the sooner it reaches there, the better for both parties. It may be said, that where the judge holds court in counties distant from each other, he may not be able to forward his decision within the time allowed. The answer to this is, that he ought to decide the case before he leaves. Another advantage to inure from requiring the decision to be filed within a given time is, that all notices of filing decisions may be dispensed with. The attorney may, at the end of twenty days, by inquiry, ascertain whether or not a decision has been made. And in the sections relative to motions for new trial, etc., this period of twenty days has been taken into consideration, and no movement is required by either party within that time.

Second. The objections to the system of implied findings are so numerous, that there was, as far as the commissioners were able to take the sense of the profession upon the subject, a universal desire to do away with it. Findings should stand upon the same footing as special verdicts. In fact, it may be said that if any presumptions are to be indulged in, they should be in favor of the latter, for juries are composed of laymen, whilst judges are presumed to be learned in the law. Yet, under the old system of implied findings, we had the absurdity of requiring the findings made by the jury, by men unlearned in the law, to support any judgment that may be rendered thereon, whilst the finding made by the learned judge would support the judgment, if the judgment could be supported upon any conceivable state of facts consistent with them. Upon this topic, says Justice Sanderson, speaking for the court, in Tewksbury v. Magraff, 33 Cal. 247: "It may well be doubted whether the act of the 20th of May, 1861 (so far as it relates to findings, and reproduced in the amendments of 1866 to § 180 of the Practice Act), is not productive of more mischief than good. It certainly proceeds upon an illogical theory, for it inverts the natural and logical order of the proceedings. Instead of making it the duty of the successful party to see that the findings contain facts sufficient to sustain the judgment, it makes it the duty of the unsuccessful party to see that it contains facts sufficient to reverse it. Instead of making the finding a consistent and visible foundation for the judgment to stand upon, the statute converts it into air, or a mine for its explosion. This change certainly detracts from the logic of the judgment roll, the various parts of which, like the members of a Macedonian phalanx, should rest upon and support each other, and entails a practice which, in a majority of cases, defeats the end which findings were intended to subserve." It is believed that the supreme court, as now constituted, are unanimous in their condemnation of the system of implied findings. The members of that court occupy a position that enables them to see the evils arising from it, and their opinion had controlling weight upon the subject. This section applies to equitable as well as legal actions. Lyons v. Lyons, 18 Cal. 447; see Walker v. Sedgwick, 5 Cal. 192; Duff v. Fisher, 15 Cal. 375; see note to § 635, post.

§ 634. Waiving findings of fact. Findings of fact may be waived by several parties to an issue of fact:

1. By failing to appear at the trial;
2. By consent in writing filed with the clerk;
3. By oral consent in open court, entered in the minutes.

In all cases where the court directs a party to prepare findings, a copy of said proposed findings shall be served upon all the parties to the action at least five days before findings shall be signed by the court, and the court shall not sign any findings therein prior to the expiration of such five days.

Legislation § 634. 1. Enacted March 11, **1872.** **2.** Amended by Stats. **1913**, p. 58, (1) in introductory paragraph, striking out "the" before "several parties" (as to which, quære); (2) in subd. 2, striking out a comma after "writing"; (3) adding the final paragraph.

Necessity for findings. This section does not absolutely and unconditionally require that the findings of fact shall be filed, but only that they must be filed unless waived in some one or more of three modes mentioned. Mulcahy v. Glazier, 51 Cal. 626. The parties are entitled to findings, upon the trial of issues joined in proceedings to try objections on the confirmation of a referee's report, unless they are waived. Estate of Burton, 63 Cal. 36. In case of default, findings are not necessary, and form no part of the judgment

roll. Estate of Cook, 77 Cal. 220; 11 Am. St. Rep. 267; 1 L. R. A. 567; 17 Pac. 923; 19 Pac. 431.

Effect of want of findings. The judgment cannot be permitted to stand, in the absence of findings of fact, where such findings were not waived. Dowd v. Clarke, 51 Cal. 262; Savings and Loan Society v. Thorne, 67 Cal. 53; 7 Pac. 36. Where findings are not filed or waived, entry of judgment without them constitutes error. Bennett v. Pardini, 63 Cal. 154; Estate of Burton, 63 Cal. 36. Where no findings of fact were made, and they were not waived, the court may order its judgment set aside, and restore the cause to the calendar. Van Court v. Winterson, 61 Cal. 615. Where findings of fact were not waived, and no findings sufficient to support the judgment were signed or filed, there must be a reversal, notwithstanding a stipulation of the existence of reversible error in the record. Pierson v. Pierson, 15 Cal. App. 567; 115 Pac. 461.

Construction of section. In cases tried by the court, written findings may be waived, as prescribed in this section. Lee Sack Sam v. Gray, 104 Cal. 243; 38 Pac. 85.

Waiver must be by all. The phrase, "several parties to an issue of fact," includes all parties, and applies to infants as well as to adults. Western Lumber Co. v. Phillips, 94 Cal. 54; 29 Pac. 328.

Waiver by failure to appear at trial. Failure to attend the trial is a statutory waiver of the findings; and the fact that a judgment erroneously refers to findings, when none exist, is of no consequence. Fincher v. Malcolmson, 96 Cal. 38; 30 Pac. 835. Appearing only for the special purpose of moving for a continuance, and then withdrawing from the case, and not appearing at the trial, is a waiver of the findings (Eltzroth v. Ryan, 91 Cal. 584; 27 Pac. 932); and suffering a default to be entered, and failing to appear at the trial, is also a waiver of the findings. Hibernia Sav. & L. Soc. v. Clarke, 110 Cal. 27; 42 Pac. 425.

By consent in writing. By signing a stipulation in writing, waiving findings, a party is estopped from objecting to the want thereof, although the stipulation was not filed until after entry of judgment. Dougherty v. Friermuth, 68 Cal. 240; 9 Pac. 98.

By oral consent in open court. Where there was a waiver of written findings by oral consent of the parties, given in open court, but the clerk, through inadvertence, failed to enter the fact upon the minutes, the court may correct its minutes so as to show the real facts. Sullivan v. Hume, 4 Cal. Unrep. 161; 33 Pac. 1121.

Notice not waiver. Findings are not waived by giving notice of motion for new trial. Savings and Loan Society v. Thorne, 67 Cal. 53; 7 Pac. 36.

Presumption as to waiver. Express findings by the court are necessary, unless waived; but the absence of such findings from the record is not a fatal defect, unless it affirmatively appears that they were not waived. Richardson v. Eureka, 110 Cal. 441; 42 Pac. 965. On appeal, where no findings of fact were filed, it must be shown by the bill of exceptions that they were not waived. Mulcahy v. Glazier, 51 Cal. 626; Reynolds v. Brumagin, 54 Cal. 254; Campbell v. Coburn, 77 Cal. 36; 18 Pac. 860; Estate of Arguello, 85 Cal. 151; 24 Pac. 641; Tomlinson v. Ayres, 117 Cal. 568; 49 Pac. 717; Leadbetter v. Lake, 118 Cal. 515; 50 Pac. 686; Horwege v. Sage, 137 Cal. 539; 70 Pac. 621. Where no findings appear, it will be presumed, in favor of the judgment, that written findings were waived. Lee Sack Sam v. Gray, 104 Cal. 243; 38 Pac. 85. There is no presumption that findings were waived, where the only reasonable inference that can be drawn from the record is directly to the contrary (Saul v. Moscone, 16 Cal. App. 506; 118 Pac. 452); and if findings should have been made, and were not, it will be presumed that they were waived (Horwege v. Sage, 137 Cal. 539; 70 Pac. 621); but this presumption has no force, where a writing, clearly intended to be a finding upon a material issue, was filed by the court (Kimball v. Stormer, 65 Cal. 116; 3 Pac. 408); nor has the presumption any application to the report of a referee: no provision is made for a waiver in such cases, and in the very nature of the case should not be. Lee Sack Sam v. Gray, 104 Cal. 243; 38 Pac. 85.

Presumption arising from waiver. All the issues made by the pleadings are presumed to have been found in favor of the successful party, where findings have been waived. Antonelle v. Board of New City Hall Comm'rs, 92 Cal. 228; 28 Pac. 270. Where both parties expressly waive findings, every intendment is in favor of the judgment, and it must be assumed that the court found all of the facts necessary to sustain the judgment. Bruce v. Bruce, 16 Cal. App. 353; 116 Pac. 994.

Refusal to make requested findings as constituting contrary finding. See note 7 Ann. Cas. 380.

CODE COMMISSIONERS' NOTE. See note to § 631, ante.

§ 635. [Related to the preparation of findings. Repealed.]

Legislation § 635. 1. Enacted March 11, **1872.**
2. Amended by Code Amdts. **1873–74,** p. 312.
3. Repealed by Code Amdts. **1875–76,** p. 91.
4. By Stats. **1901, p.** 146, a new § 635 was added (code commission section), which provided that "upon trial of a question of fact, court must pass upon questions of law, upon request"; held unconstitutional. See note ante, § 5.

§ 636. Proceedings after determination of issue of law. On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of section five hundred and eighty-five, upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law, and the taking of an account, or the proof of any fact, be necessary to enable the court to complete the judgment, a reference may be ordered, as in that section provided.

Issue of law. Ante, § 589.
When a bar. Post, § 1908.
Reference. Post, §§ 638 et seq.
Leave to answer, after defendant's demurrer overruled. Ante, § 472.
Default, judgment by. Ante, § 585.
Judgment, generally. Post, § 664.

Legislation § 636. Enacted March 11, **1872**; based on Practice Act, § 181, which read: "On a judgment upon an issue of law, if the taking of an account be necessary to enable the court to complete the judgment, a reference may be ordered."

Default for not answering. A defendant who fails to answer within the time allowed by the court on the overruling of his demurrer, and whose default is entered, is not entitled to participate in the further proceedings in the case. People v. Culverwell, 44 Cal. 620. A default entered against a plaintiff for failure to answer the cross-complaint of the defendant, setting forth the same matter of counterclaim pleaded in his answer, cannot deprive the plaintiff of his right to prove the cause of action set forth in his complaint. Langford v. Langford, 136 Cal. 507; 69 Pac. 235. The entry of judgment against one defendant, who failed to answer after his demurrer was overruled, without at the same time entering judgment against a co-defendant who had not been served, is in accordance with the statute. Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218.

Judgment on pleadings proper when. Judgment on the pleadings is proper, where the denials of the answer are merely of matters of law, and where proof of the averments in the answer would be immaterial. Heydenfeldt v. Jacobs, 107 Cal. 373; 40 Pac. 492. Where judgment is granted on the pleadings, all of the averments of the answer are admitted to be true. McGowan v. Ford, 107 Cal. 177; 40 Pac. 231.

Judgment on demurrer. Where one of several defendants appears and demurs, and the demurrer is sustained, it is error to render judgment in favor of the defendants who do not appear. Farwell v. Jackson, 28 Cal. 105.

Leave to amend. Where a demurrer to a complaint was sustained without leave to amend, a judgment for the defendant cannot be reversed on appeal, on the ground that leave was not granted, where no leave was asked. Barker v. Freeman, 85 Cal. 533; 24 Pac. 926.

Time for appeal. Where judgment is duly entered on sufficient pleadings and findings, it is too late, after the lapse of the time for appeal, to inquire whether it is warranted by the law and the facts of the case. People v. Bank of Mendocino County, 133 Cal. 107; 65 Pac. 124.

CODE COMMISSIONERS' NOTE. Substituted for § 181 of the Practice Act.

CHAPTER VI.

REFERENCES AND TRIALS BY REFEREES.

§ 638. Reference ordered upon agreement of parties, in what cases.
§ 639. Reference ordered on motion, in what cases.
§ 640. Referees in eminent-domain proceedings involving city, etc.
§ 641. A party may object. Grounds of objection.
§ 642. Objections, how disposed of.
§ 643. Referees to report within twenty days.
§ 644. Effect of referee's finding.
§ 645. How excepted to, etc.

§ 638. Reference ordered upon agreement of parties, in what cases. A reference may be ordered upon the agreement of the parties filed with the clerk, or entered in the minutes:

1. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon;

2. To ascertain a fact necessary to enable the court to determine an action or proceeding.

Reference in general.
1. Court commissioners. Ante, § 259, subd. 2.
2. Fees for. Post, § 1028
3. Compulsory. See post, § 639.
Referees.
1. Number, etc. Post, § 640.
2. Objections to. Post, §§ 641, 642.
3. Report of. Post, §§ 643–645.
4. Trial by. Post, § 1053.

Legislation § 638. Enacted March 11, **1872**; based on Practice Act, § 182, as amended by

Stats. 1865–66, p. 845, which had the words, in subd. 2, "to proceed and determine the case," instead of "to determine an action or proceeding."

Appointment discretionary. The court may state the account between the parties and determine all the questions in the case; but the better and safer practice is to refer it to some competent person to state the account, although the court can pursue such course as it may deem advisable. Hidden v. Jordan, 28 Cal. 301; Emery v. Mason, 75 Cal. 222; 16 Pac. 894.

Prerequisites to reference. A reference in which there is no order of court, or agreement filed with the clerk or entered in the minutes, is a voluntary withdrawal of the case from the jurisdiction of the court, by which the court loses all control over the case, and it has no authority afterwards to enter judgment upon the findings of the referee, except by consent of the parties. Heslep v. San Francisco, 4 Cal. 1.

Consent necessary when. An issue of fact, in an action at law, must be tried by a jury, unless a jury is waived; it cannot be referred, except upon the written consent of both parties. Seaman v. Mariani, 1 Cal. 336. A reference which would amount to the finding of a jury, and have the direct effect of depriving the party of the right to trial by jury, cannot be ordered without the consent of the party in writing, or entered in the minutes. Smith v. Pollock, 2 Cal. 92. Where, by stipulation of the parties, a reference is made, and the referee reports a judgment, which is entered, the court cannot, after granting a new trial, again refer the case to the same or any other referee, without a new consent of the parties: upon the report and the entry of the judgment, the stipulation has no further force. Daverkosen v. Kelley, 43 Cal. 477. A reference cannot be ordered for the purpose of trying all the issues in partition proceedings, where there is a party whose name is unknown, and whose consent, consequently, cannot be procured. Hastings v. Cunningham, 35 Cal. 549. The consent of the parties is not necessary to a reference in suits in equity. Smith v. Rowe, 4 Cal. 6.

Reference to try issues. An order which does not require the referee to report the facts, but to try the issues and report his findings thereon, is general, and not special. Hihn v. Peck, 30 Cal. 280.

Reference of accounting. An accounting may be ordered through a reference. Fox v. Hall, 164 Cal. 287; 128 Pac. 749.

Duty of referee. Where the court has decided the principles upon which an account should be stated and settled, it is the duty of the referee simply to take the account in pursuance of those principles. Smith v. Walker, 38 Cal. 385; 99 Am. Dec. 415. The duty of the referee is to act upon the questions submitted to him, and to make such report as is required of him by the order under which he acts. Hihn v. Peck, 30 Cal. 280.

Power of referee. The referee exercises all the powers of a judge, and, upon the abandonment of the cause by the plaintiff before its submission, or upon motion of the defendant when the plaintiff fails to prove a sufficient cause, he may grant a nonsuit and report his judgment to that effect. Plant v. Fleming, 20 Cal. 92. An order of the court appointing a person, designated a "court commissioner," as a referee, is, in effect, a reference to the person named, under this section, and his authority is derived from the order appointing him, and not from the statute defining the duties and powers of court commissioner, and the power of this referee to report is unaffected by his prior resignation from the office of court commissioner. Jackson v. Puget Sound Lumber Co., 123 Cal. 97; 55 Pac. 788.

Notice of reference. It is not error for the court to adopt the report of a referee appointed to take an accounting of a partnership business and assets, where the parties had actual knowledge of the appointment, and might, by the exercise of a little diligence, have ascertained the time and place at which testimony was to be taken by the referee, even if actual notice were not given. Doudell v. Shoo, 20 Cal. App. 424; 129 Pac. 478.

Distinguished from arbitration. The reference is not a discontinuance of the suit, as is the submission of a case in arbitration. Gunter v. Sanchez, 1 Cal. 45; Draghicevich v. Vulicevich, 76 Cal. 378; 18 Pac. 406.

CODE COMMISSIONERS' NOTE. 1. Generally. The statute concerning referees is in aid of the common-law remedy by arbitration, and does not alter its principles. Tyson v. Wells, 2 Cal. 122. A court may, without consent of parties, order a reference in equity cases. Smith v. Rowe, 4 Cal. 7. See Still v. Saunders, 8 Cal. 286, and Benham v. Rowe, 2 Cal. 261. The provisions of the Practice Act relating to the partition of real property contain no special provision for the appointment of a referee to try the issues and find the title of the respective parties. The appointment of a referee in an action for partition is therefore regulated by the general provisions of the Practice Act. Hastings v. Cunningham, 35 Cal. 551.

2. **Consent.** The consent to an order of reference must be in writing, or must be entered on the minutes. Smith v. Pollock, 2 Cal. 92. An order of reference, except as provided in the next section, cannot be made without the consent of the adverse party. Benham v. Rowe, 2 Cal. 261. Where an entry on the minutes recites that "the parties came by their attorneys, and defendant, by his attorney, moved the court that the cause be referred"; held, that such reference was made in one of the modes prescribed by law, "by oral consent, in open court, entered on the minutes." Bates v. Visher, 2 Cal. 355. The whole issue in divorce cases cannot, even by consent of parties, be referred; and where a reference is had, the referee cannot pass upon the testimony. If he make any statement or finding of facts, the court is obliged to disregard it, and base its decree only upon the legal testimony taken. Baker v.

Baker, 10 Cal. 527. The court cannot, without the consent of the parties, order a reference for the trial of any other issue of fact than that involved in the examination of an account in an equity case. Williams v. Benton, 24 Cal. 425.

3. Order. An order of court is necessary to constitute a reference. Heslep v. San Francisco, 4 Cal. 2. The order cannot go beyond the pleadings of the parties. Branger v. Chevalier, 9 Cal. 353. A reference or arbitration, in which there is no order of court or agreement filed with the clerk or entered on the minutes, operates as a voluntary withdrawal of the case from the jurisdiction of the court, by which it loses all control over the case, and has no authority to enter judgment upon the finding, except by consent of parties. Heslep v. San Francisco, 4 Cal. 2; see notes to §§ 639, 643, post.

§ 639. Reference ordered on motion, in what cases. When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein;

2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;

3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action;

4. When it is necessary for the information of the court in a special proceeding.

Reference.

1. **Proceedings supplementary to execution.** Post, § 714.

2. **Mandamus.** See post, § 1095.

Legislation § 639. Enacted March 11, **1872**; based on Practice Act, § 183, which had the word "or" at end of subd. 3.

Reference for examination of an account. The compulsory power of the court over the question of reference is confined to issues involving the examination of a long account: this section does not include issues of that character, where the parties have a right to a trial by jury. Williams v. Benton, 24 Cal. 424. A motion for the appointment of a referee is properly denied, where there is no issue requiring the examination of a long account, and where the note sued on implies a settlement between the parties up to that time. Clarkson v. Hoyt, 4 Cal. Unrep. 547; 36 Pac. 382. The court is not authorized to refer all the issues involved in an action, against the consent of the parties, merely because one of them involves the examination of a long account: this is manifest by contrasting the terms of this section with those of the preceding section. Williams v. Benton, 24 Cal. 424. A reference will not be made of an issue arising upon the pleadings, except where the trial thereof requires the examination of a long account on either side. Hastings v. Cunningham, 35 Cal. 549. The court has no authority to direct a referee to report a judgment, where either of the parties object; the whole case may be sent to the referee, if there is but one issue, and that issue involves the examination of a long account, but not where there are other issues, not involving such an examination (Williams v. Benton, 24 Cal. 424); and an order of reference, made without the consent and against the objection of the defendant, in an ordinary suit at law for the recovery of a debt, is cause for a reversal of judgment; and a statute authorizing a reference in such case would be unconstitutional. Grim v. Norris, 19 Cal. 140; 79 Am. Dec. 206; Joshua Hendy Machine Works v. Pacific Cable Construction Co., 99 Cal. 421; 33 Pac. 1084. An order of reference in a divorce action, to determine the division of the community property, is not a ground for delaying the motion for a new trial upon a judgment previously rendered: such reference is for the purpose of securing information necessary for the carrying into effect of a judgment already ordered, and not for the taking of an account, or for reporting upon any subject necessary to enable the court to render judgment upon the issues in the cause. Sharon v. Sharon, 79 Cal. 633; 22 Pac. 26, 131. A reference may be made in any suit in equity, when either party alleges facts showing the examination of a long account to be necessary. Jones v. Gardner, 57 Cal. 641. The court, having power to take and state an account, has also the power to refer it to some other person to state it. Trumpler v. Cotton, 109 Cal. 250; 41 Pac. 1033. A reference to state an account between the parties is a reference of the whole case for trial, and is not authorized, except upon agreement of the parties. Joshua Hendy Machine Works v. Pacific Cable Construction Co., 99 Cal. 421; 33 Pac. 1084.

New trial. The evidence is not a necessary part of the report of a referee, under an order of court to report judgment; judgment is entered on the report as a matter of course, and the only mode in which a party can take advantage of it is by

moving to set it aside, as on motion for a new trial. Sloan v. Smith, 3 Cal. 406. Where collateral matters, not raised by the pleadings, are sent to a referee for the information of the court, a motion for a new trial is not necessary to bring the action of the referee before the court for review: the report of a referee is not binding upon the court until adopted by it. Harris v. San Francisco Sugar etc. Co., 41 Cal. 393.

Power of court to refer actions to referees. See note 79 Am. Dec. 208.

Right to order compulsory reference in equitable action independently of statute. See note Ann. Cas. 1912D, 1136.

Compulsory reference as denial of constitutional right to jury trial. See notes 25 L. R. A. 68; 13 L. R. A. (N. S.) 146; 39 L. R. A. (N. S.) 46.

CODE COMMISSIONERS' NOTE. A court cannot refer an ordinary suit at law to a referee for trial against the objection of either party; and this, whether the suit requires the examination of a long account or not. The statute, as to referring cases, applies solely to equity causes. The right of trial by jury in all common-law actions is secured by the constitution of this state Grim v. Norris, 19 Cal. 140; 79 Am. Dec. 206. In an action to dissolve a partnership and obtain a settlement of the partnership accounts, the court may order a reference for the trial of all the issues of fact relating to the condition of the partnership accounts; but it has no power, if objection is made, to order a reference of the trial of any other issue or issues in the case, nor to direct the referee to report a judgment. Where the trial of an issue of fact is involved, requiring the examination of a long account on either side, the court may order a reference, with directions to the referee to report upon the account, or any issue of fact involved in the account. Williams v. Benton, 24 Cal. 425; Hidden v. Jordan, 28 Cal. 301. The court may refer for trial the question of damages sustained by reason of an injunction issued without a cause. Russell v. Elliott, 2 Cal. 245. In an action for balance of an account, the defense was payment by a promissory note. Replication, that the plaintiff was induced to receive the note by means of fraudulent representations. It was held, that the case could not be referred without the written consent of both parties. Seamen v. Mariani, 1 Cal. 336. See notes to §§ 639, 643, of this code.

§ 640. Referees in eminent-domain proceedings involving city, etc. A reference may be ordered to the person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection, or the reference may be made to a court commissioner of the county where the cause is pending; provided, that in any action brought under Title VII of Part III of this code, if the plaintiff is the state, a county, city and county, or any incorporated city or town, or a municipal water district, the referees are not required to be residents of the county in which the action or proceeding is triable. Nothing herein contained shall be construed as repealing any law of this state giving jurisdiction to the state railroad commission to ascertain the just compensation which must be paid in eminent-domain proceedings.

Reference ordered. Ante, §§ 638, 639.
Three referees, two may act. Post, § 1053.
Court commissioner. Ante, § 259, subd. 2.

Legislation § 640. 1. Enacted March 11, **1872**; substantially a re-enactment of Practice Act, § 184, as amended by Stats. 1865–66, p. 845.

2. Amended by Stats. **1913**, p. 246, (1) in first sentence, substituting "the person" for "any person"; (2) at end of section, adding the proviso and the final sentence.

Appointment and qualification of referees. The fact that a clerk of the defendant was appointed a referee is not any considerable evidence of fraud, in view of the nature of the duties of the referee, which are very limited and plain, while his acts are subject to the revision of the court. Adams v. Hackett, 7 Cal. 187. The court may appoint a new referee, even where he has reported and acted, if his report is not approved; but a party cannot, every time the court finds it necessary to appoint a new referee, stay all proceedings by appeal from such order. Fallon v. Brittan, 84 Cal. 511; 24 Pac. 381. This section does not require that the referee shall be sworn: the imposition of an oath by the court would be of no effect, other than to put it in the power of the referee to commit moral perjury, without being amenable to the law. Sloan v. Smith, 3 Cal. 406.

§ 641. A party may object. Grounds of objection. A party may object to the appointment of any person as referee, on one or more of the following grounds:

1. A want of any of the qualifications prescribed by statute to render a person competent as a juror;

2. Consanguinity or affinity, within the third degree, to either party, or to an officer of a corporation which is a party, or to any judge of the court in which the appointment shall be made;

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party; or being a member of the family of either party; or a partner in business with either party; or security on any bond or obligation for either party;

4. Having served as a juror or been a witness on any trial between the same parties for the same cause of action;

5. Interest on the part of such person in the event of the action, or in the main question involved in the action;

6. Having formed or expressed an unqualified opinion or belief as to the merits of the action;

7. The existence of a state of mind in such person evincing enmity against or bias to either party.

Legislation § 641. 1. Enacted March 11, **1872;** re-enactment of Practice Act, § 185.

2. Amended by Stats. **1897,** p. 60, adding at end of subd. 2, "or to any judge of the court in which the appointment shall be made."

3. Amendment by Stats. **1901,** p. 146; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907,** p. 714, (1) in first paragraph, changing "A" from "Either"; (2) in subd. 2, adding "or to an officer of a corporation which is a party"; and (3) in subd. 3, striking out the word "being" before "security."

CODE COMMISSIONERS' NOTE. Adams v. Hackett, 7 Cal. 187; see note to § 602 of this code.

§ 642. Objections, how disposed of. The objections taken to the appointment of any person as referee must be heard and disposed of by the court. Affidavits may be read and witnesses examined as to such objections.

Objections. See ante, § 641.

Legislation § 642. Enacted March 11, **1872;** based on Practice Act, § 186, which had (1) the word "shall" instead of "must," and (2) instead of "witnesses examined," the words "any person examined as a witness."

§ 643. Referees to report within twenty days. The referees or commissioner must report their findings in writing to the court within twenty days after the testimony is closed, and the facts found and conclusions of law must be separately stated therein.

Referees.

1. Court commissioners as. Ante, § 259, subd. 2.

2. Where three, all must meet, but two can act. Post, § 1053.

3. Enforcing orders of. Ante, § 128, subd. 2.

4. Findings of, effect of. Post, § 645.

Legislation § 643. Enacted March 11, **1872;** based on Practice Act, § 187, as amended by Stats. 1865–66, p. 845, which read: "The referees or commissioner shall report their findings in writing to the court within ten days (or within such further time as may be allowed by the court) after the testimony shall have been closed, and the facts found and conclusions of law shall be separately stated therein. The finding of the referee or commissioner upon the whole issue shall stand as the finding of the court, and upon filing of the finding with the clerk of the court judgment may be entered thereon in the same manner as if the action had been tried by the court. The finding of the referees or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts the finding reported shall have the effect of a special verdict."

Construction of section. The word "report," in this section, is evidently used for finding or decision. Faulkner v. Hendy, 103 Cal. 15; 36 Pac. 1021.

Powers of referee. The referee cannot bring in and file an additional or amended report (Headley v. Reed, 2 Cal. 322); nor has he power to allow the parties to amend the pleadings; and the issue being made up and submitted, he must pass upon that issue, and he cannot change it. De la Riva v. Berreyesa, 2 Cal. 195. While it is the duty of the court or referee to find the specific facts in issue, yet it is only necessary to find the balance of an account. Pratalongo v. Larco, 47 Cal. 378.

Discretion of referee. The exercise of the discretion of the referee in opening the case, after it has been closed, for the purpose of receiving additional testimony, will not be reviewed on appeal, except in case of gross abuse. Marziou v. Pioche, 10 Cal. 545.

Report of referee. The referee should not only report in writing, but should also find the facts upon which the judgment is thereafter to be pronounced; by no other means can the court be informed so as to act intelligently in the premises. Lee Sack Sam v. Gray, 104 Cal. 243; 38 Pac. 85. Where the specific facts are put in issue by the pleadings, it is the duty

of the court or referee to find distinctly as to these facts; the striking out of a finding of fact by the referee, and substituting therefor a finding by the court, is a practice not to be commended. Pratalongo v. Larco, 47 Cal. 378. The report of a referee, like the finding of a court, should state the facts found and the conclusions of law thereupon; otherwise the parties would, in many cases, be remediless and their rights concluded by the arbitrary decisions of the referee. Lambert v. Smith, 3 Cal. 408. A court or judge, sitting as a referee, is governed by the same rules as other referees, and must make findings. Lee Sack Sam v. Gray, 104 Cal. 243; 38 Pac. 85.

Waiver of findings. There is no presumption that findings are waived in cases tried by a referee: there is no provision for a waiver in such cases. Lee Sack Sam v. Gray, 104 Cal. 243; 38 Pac. 85.

Judge as referee. Where the court or judge sits as a referee, his position is as distinct in law from the court acting as such within its own proper sphere as if a different referee had been selected; the code fixes but one rule for the guidance of all referees, and they are alike and without exception subject to its provisions. Lee Sack Sam v. Gray, 104 Cal. 243; 38 Pac. 85.

Effect of failure of referee to file report within time fixed by statute or order of reference. See note Ann. Cas. 1913D, 603.

CODE COMMISSIONERS' NOTE. 1. Time. Time is directory. Keller v. Sutrick, 22 Cal. 471. **2. Findings.** See notes to §§ 633, 635, and 644 of this code. The report of a referee, like the finding of a judge, should state the facts found and the conclusions of law. Lambert v. Smith, 3 Cal. 409. If the order of a reference requires the referee to try the issues, and report his finding thereon, the referee may make a general finding upon the facts put in issue, stating the facts according to their legal effect. Hihn v. Peck, 30 Cal. 280.

3. Duties of referee. Under a reference to try the issues and report a judgment, the referee may exercise all the powers of a judge in relation to the trial of the cause referred to him. Plant v. Fleming, 20 Cal. 92. But the referees have no power to allow the parties to alter the pleadings after a case has been submitted to them. De la Riva v. Berreyesa, 2 Cal. 195. It is within the discretion of the referees to open the case, after it has been once closed, for the purpose of receiving additional testimony. Marziou v. Pioche, 10 Cal. 545. The trial before a referee should be conducted in the same manner as before a court, and the evidence should be embodied in a bill of exceptions, and certified by the referee. Goodrich v. Mayor and Common Council, 5 Cal. 430. Irrelevant testimony should be excluded by the referee. De la Riva v. Berreyesa, 2 Cal. 195. Where the referee admits the testimony against the objection of the defendant, such testimony cannot, after the case has been submitted, be disregarded without first giving to the adverse party the opportunity of otherwise supplying the excluded testimony. Monson v. Cooke, 5 Cal. 436. A reference with directions to take proofs concerning the confession of a judgment by the defendant, and the judgment roll in the case, and whether the same was filed in the clerk's office, and to report the testimony, with a finding of facts, and a judgment, does not submit to the referee the question as to what amount, if any, is still unpaid in the judgment. Solomon v. Maguire, 29 Cal. 227. The referee is to act upon the questions committed to him, and to report whatever he is required to report by the order under which he acts. Hihn v. Peck, 30 Cal. 280. The referee need not be sworn. Sloan v. Smith, 3 Cal. 407. He cannot file an amended report. Headley v. Reed, 2 Cal. 324.

4. Effect of report. The facts found are conclusive, in the absence of the testimony brought before the court. Goodrich v. Mayor and Common Council, 5 Cal. 430; Knowles v. Joost, 13 Cal. 620; Muller v. Boggs, 25 Cal. 179; Peck v. Vandenberg, 30 Cal. 11. The report has the same legal effect as the award of an arbitrator. Headley v. Reed, 2 Cal. 322; Grayson v. Guild, 4 Cal. 125; Gunter v. Sanchez, 1 Cal. 45; Walton v. Minturn, 1 Cal. 362.

§ 644. Effect of referee's finding. The finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court.

Legislation § 644. Enacted March 11, **1872**; based on Practice Act, § 187, q.v. ante, Legislation § 643.

Provisions directory. The provisions of this section are directory merely, and a failure to file within the time prescribed does not invalidate the report, or the judgment rendered thereon. Keller v. Sutrick, 22 Cal. 471.

Nature and effect of report of referee. The findings and decision of the referee take the place of the findings and decision of the court; and such papers, and no others, constitute the judgment roll, just as they would if the case had been tried by the court (Faulkner v. Hendy, 103 Cal. 15; 36 Pac. 1021); and, on appeal, the decision of the referee is regarded as conclusive as the verdict of a jury (Gunter v. Sanchez, 1 Cal. 45); and the report of the referee has the same legal effect as the award of an arbitrator. Hadley v. Reed, 2 Cal. 322; Tyson v. Wells, 2 Cal. 122. The finding of a referee upon a collateral matter does not take the place of a special verdict: when he reports on the whole case, the report stands as the decision of the court; when he reports only the facts, the report is a special verdict; in other cases not mentioned, the report has neither the effect of a decision of the court nor of a special verdict. Harris v. San Francisco Sugar Refining Co., 41 Cal. 393. Where the whole issue is tried by a referee, judgment follows immediately as the conclusion of law upon the facts found, and the decision stands as the decision of the court, and may be excepted to and reviewed as if the action had been tried by the court. Peabody v. Phelps, 9 Cal. 213.

Findings by referee unnecessary when. It is not the duty of a referee, ordered to try all the issues, both of law and fact, and report a judgment thereon, to report findings. Connor v. Morris, 23 Cal. 447.

General verdict by referee. A referee, ordered to try the issues, may return a general verdict in the same manner as a jury. Hihn v. Peck, 30 Cal. 280.

Entry of judgment. Where the parties to an action stipulate for a reference authorizing the referee to determine all the issues of law and fact, and that, upon the filing of the report, judgment shall be entered by the court in accordance therewith, and the court thereupon orders the reference, the clerk is authorized to enter judgment, without further order of the court. Bowie v. Borland, 68 Cal. 233; 9 Pac. 79. The entry, by the clerk, of judgment on finding of a referee is a matter of course, and the parties can have no knowledge of the decision until it is announced in the form of a judgment or a direction for its entry. Peabody v. Phelps, 9 Cal. 213. The court cannot entertain any objection to the report of a referee: it must enter judgment in accordance therewith, if sufficient. Headley v. Reed, 2 Cal. 322. Damages upon the dissolution of an injunction being properly ascertained by reference, mandamus lies to compel the judge to enter judgment upon the report of the referee. Russell v. Elliott, 2 Cal. 245.

New trial. The right to move for a new trial, where a reference has been had of the cause, has no basis until the decision and judgment have been rendered, which is the date of their filing. Harris v. Careaga, 2 Cal. Unrep. 242; 2 Pac. 41. After rendition of judgment, the court may grant a new trial, and set aside the report, on any ground justifying the setting aside of the award of an arbitrator, and on no other. Headley v. Reed, 2 Cal. 322.

Necessity that all referees join in award. See note 15 Ann. Cas. 507.

Power of referee to overrule previous order or ruling of judge. See note Ann. Cas. 1913C, 1250.

CODE COMMISSIONERS' NOTE. Mandamus lies to compel the court to enter judgment on the report of a referee. Russell v. Elliott, 2 Cal. 246. If a report of a referee contain sufficient on which to base a judgment, it is the duty of the court below to enter judgment in accordance with the report, so far as it concerns the matter referred, and it has no right to entertain any objection whatever. Headley v. Reed, 2 Cal. 322.

§ 645. How excepted to, etc. The findings of the referee or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the finding reported has the effect of a special verdict.

Exceptions, generally. Post, §§ 646 et seq.
New trials. Post, §§ 656 et seq.
Court commissioner's report, time and mode of excepting to. Ante, § 259, subd. 2.

Legislation § 645. Enacted March 11, **1872**; based on Practice Act, § 187, q.v. ante, Legislation § 643.

Objection to report, where filed. Objection to the report of a referee should be filed before the trial court, so as to enable it to correct the error, if any exist. Porter v. Earling, 2 Cal. 72. Upon facts found, whether by a referee or by the special verdict of a jury, the direct action of the court must be invoked before judgment can be entered; though the trial has ended, judgment does not follow immediately as a matter of course; and the time within which the notice of motion to set aside the report or the verdict must be given should be the same in both cases, and date from the filing of the report or the rendition of the verdict. Peabody v. Phelps, 9 Cal. 213.

Exceptions and objections to findings of referee. Exceptions must be taken to the rulings of the referee during the trial, and certified by him; and where there are no exceptions embodied in the report, showing that the referee erred in fact, and no rule of law pointed out by which he arrived at his conclusion, the court has no right to disturb it, and must hold it final and conclusive between the parties. Tyson v. Wells, 2 Cal. 122. Written objections to the report of a referee should be filed on the entry of judgment thereon, or by a motion for a new trial, setting forth the grounds of alleged errors. Porter v. Barling, 2 Cal. 72.

Effect of referee's report. Where the reference is special, to report facts, the report has the effect of a special verdict, and the direct action of the court must be invoked before the judgment can be entered, and the time within which the notice of motion must be made to set aside the report acts from the filing of the report; where the reference is general, the report stands as the decision of the court, and judgment may be entered thereon, and exception taken and reviewed, as if the action had been tried by the court, and judgment follows immediately as a conclusion of law upon the facts found, and the time of notice of motion dates from the entry of the judgment. Peabody v. Phelps, 9 Cal. 213. The findings of facts by a referee, and the report thereof to the court, are equivalent to a special verdict, or to the findings of fact made by the court upon the trial of a cause without the intervention of a jury. Bernard v. Sloan, 2 Cal. App. 737; 84 Pac. 232.

Setting aside report of referee. The court, before entry of judgment, may set

aside conclusions of law and direct a proper judgment, where the referee reports the facts on all the issues, but draws an erroneous conclusion of law, and reports a judgment in accordance therewith. Calderwood v. Pyser, 31 Cal. 333. The court can interfere and set aside the report of a referee on grounds sufficient to set aside the verdict of a jury; and, in a suit in chancery, the court may, where exceptions are filed, set aside the report of a referee, and take up the testimony reported by him, find the facts, and render a decree in the cause; and, on appeal, where there is a mass of contradictory evidence reported, it will be presumed that the court weighed the evidence properly in setting aside the findings of the referee. McHenry v. Moore, 5 Cal. 90. Where there is no showing of error of law or of fact upon the face of the report of a referee in a suit in equity, or of any exceptions taken before the referee to point out any errors, or of any objection to his decision, the court cannot set aside the report or grant a new trial. Grayson v. Guild, 4 Cal. 122; Tyson v. Wells, 2 Cal. 122.

Evidence. The trial before a referee should be conducted as though it were before the court, and the evidence must be embodied in a bill of exceptions and certified by the referee; and where the order of reference fails to direct a return of the evidence to the court, the party objecting to the report must see to it that such testimony as he relies on is properly certified. Goodrich v. Mayor etc. of Marysville, 5 Cal. 430; Phelps v. Peabody, 7 Cal. 50. The review of the decision of a referee upon a question of fact is subject to the same rules as is the action of a jury in a special verdict, or of a court upon its finding of facts; the weight of evidence and the resolution of any conflict therein, the credibility of the witnesses and the character of their testimony, are matters in which he is required to exercise his judgment, and wherein his judgment will be accepted by the court as correct, unless clearly shown to be erroneous. Bernard v. Sloan, 2 Cal. App. 737; 84 Pac. 232.

New trial. The court has the same power in cases tried by referees as in those tried by itself or by a jury: each case is upon the same footing, and the grounds upon which a new trial may be granted are the same in all cases, irrespective of the manner in which the case was originally tried. Cappe v. Brizzolara, 19 Cal. 607.

Review on appeal. The report of a referee, which failed to find on a material issue, is a decision against law, and may be reviewed on appeal from an order granting or refusing a new trial. Clark v. Hewitt, 136 Cal. 77; 68 Pac. 303.

Necessity for taking objection or exception to error on hearing before referee. See note 20 Ann. Cas. 193.

CODE COMMISSIONERS' NOTE. 1. **Exceptions.** If the report of a referee is not made at once, upon the close of the testimony, it is deemed excepted to. Headley v. Reed, 2 Cal. 324. In an equity case, it is competent for the judge who tried the cause, after exceptions have been filed to the report of a referee upon the facts, and the report set aside for cause shown, to take up the testimony reported by the referee, find the facts, and render a decree in the cause. McHenry v. Moore, 5 Cal. 90. Trials before a referee are conducted in the same manner as before courts, and exceptions must be taken to the rulings of the referee, in the progress of the trial, in the same manner as they must be taken before a court; and such exceptions must be embodied in the report of the referee, or made part thereof by his proper certificate. Phelps v. Peabody, 7 Cal. 50; Branger v. Chevalier, 9 Cal. 353.

2. **Setting aside report.** The report cannot be attacked, except for error or mistakes of law, shown on its face, or by motion for a new trial. Goodrich v. Mayor and Common Council, 5 Cal. 430; Porter v. Barling, 2 Cal. 72; 2 Cal. 112; 56 Am. Dec. 319; Branger v. Chevalier, 9 Cal. 362; Sloan v. Smith, 3 Cal. 407; Headley v. Reed, 2 Cal. 322; Cappe v. Brizzolara, 19 Cal. 607; McHenry v. Moore, 5 Cal. 92; Tyson v. Wells, 2 Cal. 122. If the referee to take an account commits an error at the outstart, which unsettles the account, the court is not bound to go over the account and correct the error, but may set aside the report and again refer the case. Hidden v. Jordan, 32 Cal. 397. The report of a referee upon conflicting evidence has the same effect as a verdict of a jury, and will not be disturbed in the supreme court, upon an appeal from an order refusing to grant a new trial in the court below. Ritchie v. Bradshaw, 5 Cal. 229. Though a pleading would be bad upon demurrer, yet if no objection be taken at the time, and the case is submitted to a referee, the defect of the plea is not sufficient reason to set aside the report. Ritchie v. Davis, 5 Cal. 453. If there is no exception taken to the ruling of a referee, and the rule of law by which he arrived at his conclusions be not disclosed, the court cannot disturb the report. Tyson v. Wells, 2 Cal. 130; Grayson v. Guild, 4 Cal. 125; but see Butte Table Mountain Co. v. Morgan, 19 Cal. 609. When a case is referred to a referee to hear and determine the issues of fact and of law, and report the same to the court, and he makes his report, wherein no errors of law or fact occur, and no exceptions are taken, the court below should not set aside the report and grant a new trial. Grayson v. Guild, 4 Cal. 125. It would be an abuse of discretion for a court to set aside a report of a referee, correct in all its parts, without any other apparent reason than the mere volition of the judge. Goodrich v. Mayor and Common Council, 5 Cal. 430. After judgment upon a report of referee, the court may set aside the report and grant a new trial for any reason that would be sufficient to set aside the award of an arbitrator, and for no other. Headley v. Reed, 2 Cal. 322. The provisions of the Practice Act relating to new trials apply to cases tried by a referee, as well as to cases tried by the court itself, or by a jury. Cappe v. Brizzolara, 19 Cal. 607. If the alleged error consists in the final conclusion of law or fact drawn from the testimony, and the evidence is certified to the court by the referee, the proper course is to move to set aside the report and for a new trial. Branger v. Chevalier, 9 Cal. 353. See note to § 645 of this code. If a referee reports the facts upon all the issues, but draws an erroneous conclusion of law from the facts found, and also reports a judgment in accordance with his conclusions of law, the court may set aside the conclusions of law, and direct the proper judgment to be entered. Calderwood v. Pyser, 31 Cal. 333.

3. **Motion to set aside.** The time within which a notice of a motion must be filed to set aside the report of a referee is the same in which a notice of motion for a new trial must be filed, and a failure to appear and prosecute a motion to

set aside the report is an abandonment of motion, and the order made denying the motion for such failure to appear, is not the subject of review on appeal. Mahoney v. Wilson, 15 Cal. 43; Frank v. Doane, 15 Cal. 303; Green v. Doane, 15 Cal. 304.

4. Appeal. The appellate court will not review a judgment entered on the report of a referee, if no objection was made in the court below to the report. Porter v. Barling, 2 Cal. 72. When a report of a referee has been erroneously set aside and a new trial granted, and plaintiff appeals, the supreme court will correct both errors at the same time, in a chancery case. Grayson v. Guild, 4 Cal. 125. An order setting aside a report of a referee, appointed to take an account, is not the subject of appeal before judgment. Johnston v. Dopkins, 6 Cal. 83. Where a cause is tried by a referee and the testimony is conflicting, the findings will not be disturbed. Muller v. Boggs, 25 Cal. 179. The appellate court will not review the findings of a referee to ascertain whether they are contrary to the evidence, except on appeal from an order denying a new trial. Peck v. Vandenberg, 30 Cal. 11. An order setting aside the finding of a referee in a divorce case, and sending the case back to the referee for further testimony, is not the subject of appeal before judgment. Baker v. Baker, 10 Cal. 528. Where the record on appeal does not disclose a motion for new trial, it will be presumed that the findings of the referee were based upon sufficient evidence. Donahue v. Cromartie, 21 Cal. 80.

CHAPTER VII.

PROVISIONS RELATING TO TRIALS IN GENERAL.

Article I. Exceptions. §§ 646–653.
II. New Trials. §§ 656–663a.

ARTICLE I.

EXCEPTIONS.

§ 646. "Exception" defined. When taken.
§ 647. Verdict or order in absence of party, deemed excepted to.
§ 648. Exception, form of.
§ 649. Bill of exceptions, when to be presented, etc.
§ 650. Bill of exceptions. Presentment of bill.
Duty of judge to strike out useless matter.
§ 651. Exceptions after judgment.
§ 652. Proceedings if judge refuse to allow bill of exceptions.
§ 653. Settlement of bill of exceptions.

§ 646. "Exception" defined. When taken. An exception is an objection upon a matter of law to a decision made, either before or after judgment, by a court, tribunal, judge, or other judicial officer, in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in section six hundred and forty-seven.

Matters deemed excepted to. Post, § 647.
Amendments to exceptions. Post, § 650.

Legislation § 646. 1. Enacted March 11, **1872**; based on Practice Act, § 188, which read: "An exception is an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision. But no exception shall be regarded on a motion for a new trial, or on an appeal, unless the exception be material, and affect the substantial rights of the parties." When enacted in 1872, § 646 read: "Exceptions may be taken by either party to any ruling or decision made by a court or judge, either before or after judgment, in any action or proceeding, but except in the cases provided for in the next section, must be taken at the time the ruling is made."

2. Amended by Code Amdts. **1873–74**, p. 312, to read: "An exception is an objection upon a matter of law to a decision of a court, judge, or referee in an action or proceeding, and may be taken by either party to any decision made either before or after judgment; and except as provided in the following section, it must be taken at the time the decision is made."

3. Amended by Code Amdts. **1875–76**, p. 91.

Construction of section. Decisions under special statutes, prior to the adoption of the codes, requiring an objection to the findings in the court below, are of no authority now. Cargnani v. Cargnani, 16 Cal. App. 96; 116 Pac. 306. Failure of the court to pass on the question of the admissibility of evidence, taken subject to a subsequent ruling as to its admissibility, need not be excepted to, where no decision is made. Raymond v. Glover, 122 Cal. 471; 55 Pac. 398.

Exception, defined. The exception to be taken to the decision of the court is an exception to the findings of fact, which, ordinarily, is based on the insufficiency of the evidence to sustain the findings. Thompson v. Hancock, 51 Cal. 110. An essential part of the definition of an exception is, that it must be taken upon a fact or facts not denied. Will of Bowen, 34 Cal. 682.

Necessity for exception. Prior to the amendment of § 647, post, in 1909, an exception had to be taken to the admission of evidence, before it could be complained of (Crackel v. Crackel, 17 Cal. App. 600; 121 Pac. 295); and where an objection was taken to evidence by counsel, and overruled, and no exception taken thereto, it was presumed, on appeal, that counsel acquiesced in the ruling. Turner v. Tuolumne County Water Co., 25 Cal. 397; Keeran v. Griffith, 34 Cal. 580; Russell v. Dennison, 45 Cal. 337; Lucas v. Richardson, 68 Cal. 618; 10 Pac. 183; McGuire v. Drew, 83 Cal. 225; 23 Pac. 312; Dickerson v. Dickerson, 108 Cal. 351; 41 Pac. 475.

Waiver of objections. Where evidence is offered and received for a certain purpose, the party excepting to the action of the court in overruling his objection thereto may accept the decision for the purposes of the future conduct of the case, and his doing so does not constitute a waiver of the objection made. Guardianships of Boyes, 151 Cal. 143; 90 Pac. 454.

Objections not taken at trial, consideration of, on appeal. Where evidence is objected to upon a particular ground, a contention that it was inadmissible for another reason cannot be raised for the first time on appeal. Le Mesnager v. Hamilton, 101 Cal. 532; 40 Am. St. Rep. 81; 35 Pac. 1054. Where an exception is not taken at the time a decision is made, except as provided in § 647, post, no objection to the ruling can be urged on appeal. Randall v. Freed, 154 Cal. 299; 97 Pac. 669. An objection to the admissibility of evidence cannot be considered on appeal, where no objection was taken thereto at the trial (Estate of Arnold, 147 Cal. 583; 82 Pac. 252; Estate of Doyle, 73 Cal. 564; 15 Pac. 125); nor an objection to the propriety of a question asked by the court of a witness (Woods v. Jensen, 130 Cal. 200; 62 Pac. 473); nor an objection to the opinion evidence of a physician, on the ground that it was not adapted to the facts in the case, and was not based on a hypothesis consistent with those facts (Healy v. Visalia etc. R. R. Co., 101 Cal. 585; 36 Pac. 125); nor an objection to the testimony of an expert witness, that he did not possess the requisite knowledge to testify on the subject matter of the case (Brumley v. Flint, 87 Cal. 471; 25 Pac. 683; Ah Tong v. Earle Fruit Co., 112 Cal. 679; 45 Pac. 7); nor an objection on the ground of variance between the evidence and the allegations of the complaint (Bode v. Lee, 102 Cal. 583; 36 Pac. 936; Stockton etc. Agricultural Works v. Glens Falls Ins. Co., 121 Cal. 167; 53 Pac. 565; Barrett v. Lake View Land Co., 122 Cal. 129; 54 Pac. 594; Cushing v. Pires, 124 Cal. 663; 57 Pac. 572; Dikeman v. Norrie, 36 Cal. 94; Bell v. Knowles, 45 Cal. 193; Hutchings v. Castle, 48 Cal. 152; Henry v. Southern Pacific R. R. Co., 50 Cal. 176; Scott v. Sierra Lumber Co., 67 Cal. 71; 7 Pac. 131; Estate of Doyle, 73 Cal. 564; 15 Pac. 125; Knox v. Higby, 76 Cal. 264; 18 Pac. 381; Everson v. Mayhew, 85 Cal. 1; 21 Pac. 431; 24 Pac. 382; Tuffree v. Polhemus, 108 Cal. 670; 41 Pac. 806; Swamp Land District v. Glide, 112 Cal. 85; 44 Pac. 451); nor an objection to the allowance or settlement of a bill of exceptions (Estate of Dougherty, 139 Cal. 14; 72 Pac. 357); nor an objection to the legal capacity of the plaintiff to sue (Phillips v. Goldtree, 74 Cal. 151; 13 Pac. 313; 15 Pac. 451; Cook v. Fowler, 101 Cal. 89; 35 Pac. 431); nor an objection that an action cannot be maintained, by reason of the plaintiff's delay in bringing it (Larkin v. Mullin, 128 Cal. 449; 60 Pac. 1091); nor an objection to the delivery of a sealed verdict to the coroner, instead of to the clerk, and the failure of the court to ask the jurors whether they had agreed upon their verdict (Paige v. O'Neal, 12 Cal. 483); nor an objection that there was no proof of the genuineness of the indorsement of an instrument offered in evidence (Shain v. Sullivan, 106 Cal. 208; 39 Pac. 606); nor an objection to the refusal of the court to allow an amendment to the complaint, after a demurrer thereto had been sustained (Durrell v. Dooner, 119 Cal. 411; 51 Pac. 628); nor an objection to the instructions of the court to the jury (Sharp v. Hoffman, 79 Cal. 404; 21 Pac. 846; Lynn v. Southern Pacific Co., 103 Cal. 7; 24 L. R. A. 710; 36 Pac. 1018; Merguire v. O'Donnell, 103 Cal. 50; 36 Pac. 1023; Anderson v. Hinshaw, 110 Cal. 682; 43 Pac. 389; Laver v. Hotaling, 115 Cal. 613; 47 Pac. 593; Bryant v. Broadwell, 140 Cal. 490; 74 Pac. 33; Story v. Nidiffer, 146 Cal. 549; 80 Pac. 692), not taken until the return of the jury (Garoutte v. Williamson, 108 Cal. 135; 41 Pac. 35, 413; Collier v. Corbett, 15 Cal. 183; Mallett v. Swain, 56 Cal. 171), as the law, in determining the merits, is fixed by such instructions (Lynn v. Southern Pacific Co., 103 Cal. 7; 24 L. R. A. 710; 36 Pac. 1018); nor an objection to the action of the court in giving contradictory instructions (Sierra Union Water etc. Co. v. Baker, 70 Cal. 572; 8 Pac. 305; 11 Pac. 654); nor an objection to further instructions of the court to the jury, given at their request (Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84; 38 Pac. 627); nor an objection to the uncertainty of the verdict of the jury, in response to special issues (Shaw v. Shaw, 160 Cal. 733; 117 Pac. 1048); nor an objection to the allowance of costs (People v. Marin County, 103 Cal. 223; 26 L. R. A. 659; 37 Pac. 203); nor an objection to the method of procedure, where the complaint gave jurisdiction to a court of equity (Broadway Ins. Co. v. Wolters, 128 Cal. 162; 60 Pac. 766; Wood v. Currey, 49 Cal. 359; Thompson v. Laughlin, 91 Cal. 313; 27 Pac. 752); nor an objection to an order striking out the statement on motion for a new trial (Quivey v. Gambert, 32 Cal. 304); nor an objection to an order striking a bill of costs from the files (Brown v. Delavau, 63 Cal. 303); nor an exception to the refusal of the court to hear evidence in support of the defense that work contracted to be done was not done, or that the specifications were disregarded, or disregarding such evidence in its decision (Santa Cruz Rock Pavement Co. v. Bowie, 104 Cal. 286; 37 Pac. 934); nor an objection to the action of the court in recognizing the right of petitioners to

ask for the revocation of the probate of a will, and the court heard the petition and rendered a judgment denying the revocation (Estate of Robinson, 106 Cal. 493; 39 Pac. 862); nor an objection to a ruling granting a motion for a nonsuit (Schroeder v. Schmidt, 74 Cal. 459; 16 Pac. 243; Flashner v. Waldron, 86 Cal. 211; 24 Pac. 1063; Warner v. Darrow, 91 Cal. 309; 27 Pac. 737; Malone v. Beardsley, 92 Cal. 150; 28 Pac. 218; Craig v. Hesperia Land etc. Co., 107 Cal. 675; 40 Pac. 1057; Hanna v. De Garmo, 140 Cal. 172; 73 Pac. 830; Estate of Kasson, 141 Cal. 33; 74 Pac. 436; Cravens v. Dewey, 13 Cal. 40); nor an objection to the ruling of the court in the allowance or exclusion of ballots in an election contest (Lay v. Parsons, 104 Cal. 661; 38 Pac. 447); nor an exception to a ruling denying an application to file a complaint in intervention (Grand Grove v. Garibaldi Grove, 105 Cal. 219; 38 Pac. 947); nor an objection to the sufficiency of the complaint to raise a particular issue (Illinois Trust etc. Bank v. Pacific Ry. Co., 115 Cal. 285; 47 Pac. 60; King v. Davis, 34 Cal. 100; Horton v. Dominguez, 68 Cal. 642; 10 Pac. 186; Moore v. Campbell, 72 Cal. 251; 13 Pac. 689; Sukeforth v. Lord, 87 Cal. 399; 25 Pac. 497; Sprigg v. Barber, 122 Cal. 573; 55 Pac. 419; Cushing v. Pires, 124 Cal. 663; 57 Pac. 572; Casey v. Leggett, 125 Cal. 664; 58 Pac. 264); nor objections to the form of the action, or to the pleadings, or to the admission of evidence, or to any ruling of the court (Morse v. Wilson, 138 Cal. 558; 71 Pac. 801); but an objection that the complaint does not state facts sufficient to constitute a cause of action may be taken at any time, and may be taken for the first time on appeal. Holly v. Heiskell, 112 Cal. 174; 44 Pac. 466.

Order, defined. An "order," as that word is used in this section, is a decision made during the progress of the cause, either prior or subsequently to final judgment, settling some point of practice, or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed on by the court, or necessary to be determined in carrying into execution the final judgment. McGuire v. Drew, 83 Cal. 225; 23 Pac. 312.

Necessity and sufficiency of objection and exception to improper argument of counsel. See note 7 Ann. Cas. 229.

Failure to object to admission of evidence at former trial as precluding objection at subsequent trial. See note 19 Ann. Cas. 1279.

CODE COMMISSIONERS' NOTE. See note to § 661 of this code.

1. **When and how taken.** To the rulings of a referee during the trial. Tyson v. Wells, 2 Cal. 122. To a deposition at the time it is offered in evidence. Dye v. Bailey, 2 Cal. 384. To the form of a deed at the trial in the court below. Posten v. Kassette, 5 Cal. 468. To the introduction of evidence at the time it is offered. Covillaud v. Tanner, 7 Cal. 38. A party cannot, by consenting to admit evidence, "subject to all legal exceptions," avoid the necessity of taking exceptions to the relevancy or sufficiency thereof, and devolve the responsibility of discovering whatever objections may exist in the court below, and for the first time assign his objections in the supreme court. Id. If a party objects to the admission of evidence on trial, he must state the point of his objection at the time. General objection will not do. He must lay his finger on the point at the time of trial, otherwise the appellate court cannot review it. Martin v. Travers, 12 Cal. 243; Leet v. Wilson, 24 Cal. 399; Baker v. Joseph, 16 Cal. 177; People v. Glenn, 10 Cal. 32. An objection to the sufficiency of evidence must be made at the time the evidence is offered to be introduced, so that a party may have the opportunity of supplying the necessary evidence. Goodale v. West, 5 Cal. 339; Mott v. Smith, 16 Cal. 533. An objection to the admissibility of a deed in evidence must be made on the trial of the cause, at nisi prius, and an exception taken, or the point cannot be considered on appeal. Pearson v. Snodgrass, 5 Cal. 478. Where the objection to the introduction of testimony was, in general terms, that it was irrelevant, it will not be considered in the supreme court, if the testimony could under any possible circumstances have been relevant. Dreux v. Domec, 18 Cal. 83. The one hundred and eighty-eighth section of the Practice Act did not fix the precise time when an exception to the charge of the court to the jury must be taken. St. John v. Kidd, 26 Cal. 265. If, under it, an exception to the charge of the court is taken after the jury have withdrawn to consider their verdict, and before the verdict is rendered, the question of allowing or disallowing the exception rests in the discretion of the court, and whether allowed or disallowed, the supreme court will not interfere with the exercise of this discretion. A party cannot take his chances for a verdict on instructions given or refused without exceptions taken, and after the verdict, except to the action of the court. Letter v. Putney, 7 Cal. 423. Exceptions to the charge of a court must point out the specific portions of the charge excepted to, and ought to be made at the time of the trial, and before the jury retires. Hicks v. Coleman, 25 Cal. 123; 85 Am. Dec. 103.

2. **Exceptions by prevailing party.** Unless the respondent takes an appeal, the appellate court will not look into exceptions taken by him. Frank v. Doane, 15 Cal. 304; Pierce v. Jackson, 21 Cal. 636; Travers v. Crane, 15 Cal. 12; Jackson v. Feather River etc. Water Co., 14 Cal. 18.

3. **Technical exceptions.** If the judgment is right on the merits, the appellate court will not sustain mere technical exceptions taken in the course of the trial, unless compelled by law so to do. English v. Johnson, 17 Cal. 107; 76 Am. Dec. 574.

§ 647. Verdict or order in absence of party, deemed excepted to. The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights of the parties, or some of them, an order or decision from which an appeal may be taken, an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance, an order made upon ex parte application, giving

an instruction, although no objection to such instruction was made, refusing to give an instruction, modifying an instruction requested, an order or decision made in the absence of the party or an order granting or denying a nonsuit or a motion to strike out evidence or testimony, and a ruling sustaining or overruling an objection to evidence, are deemed to have been excepted to.

Legislation § 647. **1.** Enacted March 11, **1872**; based on Practice Act, § 191, which read: "When a cause has been tried by the court, or by referees, and the decision or report is not made immediately after the closing of the testimony, the decision or report shall be deemed excepted to on motion for a new trial or on appeal, without any special notice that an exception is taken thereto." When enacted in 1872, § 647 read: "The adverse party is deemed to have excepted to the verdict of the jury, or the final decision of the court or referee, to an order granting or refusing a new trial, sustaining or overruling a demurrer, striking out a pleading or any part thereof, granting or refusing a continuance, granting or refusing to change the place of trial; and is also deemed to have excepted to every order, ruling, or proceeding made or had in the action or proceeding, either before or after judgment, upon an ex parte application."

2. Amended by Code Amdts. **1875–76**, p. 92, to read as at present, down to and including the words "refusing a continuance," the section, after these words, reading, "an order made upon ex parte application, and an order or decision made in the absence of a party, are deemed to have been excepted to."

3. Amendment by Stats. **1901**, p. 146; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 715, adding, after "refusing a continuance," the words "modifying, giving, or refusing to give, in whole or in part, an instruction to the jury."

5. Amended by Stats. **1909**, p. 586, changing the section, after the words "refusing a continuance," to read as now printed.

Final decree. No exception is required to a final judgment. Thompson v. Hancock, 51 Cal. 110. A summary dismissal of an action, before the amendment of this section in 1909, without any motion for a nonsuit, was a final judgment, "deemed excepted to"; and, where the evidence for the plaintiff was sufficient to support a judgment in his favor, no exception was required as a prerequisite to reviewing such judgment upon appeal. Saul v. Moscone, 16 Cal. App. 506; 118 Pac. 452.

Interlocutory order or decision. This section makes express recognition of interlocutory orders or decisions. Thompson v. White, 63 Cal. 505. An order denying a motion to set aside a default judgment on the ground of surprise is deemed excepted to. Roberts v. Wilson, 3 Cal. App. 32; 84 Pac. 216.

Order refusing amendment of complaint. An order denying the right to amend a complaint is deemed excepted to. Schaake v. Eagle Automatic Can Co., 135 Cal. 472; 63 Pac. 1025; 67 Pac. 759.

Appealable order. An order after judgment, denying a motion for the entry of a different judgment on the findings, being appealable, is deemed excepted to. Rahmel v. Lehndorff, 142 Cal. 681; 100 Am. St. Rep. 154; 65 L. R. A. 88; 76 Pac. 659. Previously, an exception to an order setting aside a default (Grazidal v. Bastanchure, 47 Cal. 167), and an order of the probate court directing a conveyance of real estate, was not deemed excepted to, and a bill of exceptions was required. Estate of Corwin, 61 Cal. 160.

Order striking out pleading. This section does not make an order striking out a pleading, or a portion thereof, a part of the judgment roll, though it is deemed excepted to: such order must be presented by a bill of exceptions. Hawley v. Kocher, 123 Cal. 77; 55 Pac. 696. An order striking out a cross-complaint is deemed excepted to (Alpers v. Bliss, 145 Cal. 565; 79 Pac. 171); as is also an order striking out a demurrer (Davis v. Honey Lake Water Co., 98 Cal. 415; 33 Pac. 270); but an order refusing to strike out an amended answer and cross-complaint was not formerly deemed excepted to. Ganceart v. Henry, 98 Cal. 281; 33 Pac. 92.

Ex parte order. An ex parte order after judgment, correcting the record to correspond to the facts, is deemed excepted to. People v. O'Brien, 4 Cal. App. 723; 89 Pac. 438.

Instructions. Prior to the amendment of this section in 1907, instructions could not be reviewed on appeal, unless excepted to. Fleischhauer v. Fabens, 8 Cal. App. 30; 96 Pac. 17; Randall v. Freed, 154 Cal. 299; 97 Pac. 669; Story v. Nidiffer, 146 Cal. 549; 80 Pac. 692.

Order made in absence of party. An order made in the absence of a party, although deemed excepted to, must be shown by the bill of exceptions to have been actually made in his absence; and where it does not appear that an order granting plaintiff's motion for judgment on appeal was made in the absence of the defendant, it will not be deemed excepted to. Lamet v. Miller, 2 Cal. Unrep. 679; 11 Pac. 744.

Order granting or denying nonsuit. Prior to the amendment of this section in 1909, it was necessary, in order to protect the right of appeal, to reserve an exception to an order on a motion for a nonsuit (Saul v. Moscone, 16 Cal. App. 506; 118 Pac. 452); and previous to that amendment the improper granting of a nonsuit was not deemed excepted to (Smith v. Hyer, 11 Cal. App. 597; 105 Pac. 787; Flashner v. Waldron, 86 Cal. 211; 24 Pac. 1063; Hanna v. De Garmo, 140 Cal. 172; 73 Pac. 830); nor an order refusing a nonsuit. Witkowski v. Hern, 82 Cal. 604; 23 Pac. 132; Schroeder v. Schmidt, 74 Cal. 459; 16 Pac. 243.

Order admitting or excluding evidence. Before the amendment of this section in

1909, a ruling either admitting or excluding evidence was not deemed excepted to. McGuire v. Drew, 83 Cal. 225; 23 Pac. 312; Randall v. Freed, 154 Cal. 299; 97 Pac. 669.

Order refusing supplemental complaint. An order refusing to allow a supplemental complaint to be filed is not deemed excepted to. Giddings v. 76 Land and Water Co., 109 Cal. 116; 41 Pac. 788.

Order for judgment on pleadings. An order granting a motion for judgment on the pleadings, when made in the presence of a party, was, formerly, not deemed excepted to, but, being a final decision in the action, determining the rights of a party, and also a decision from which an appeal may be taken, it is deemed excepted to by the provisions of this section. Lamet v. Miller, 2 Cal. Unrep. 679; 11 Pac. 744.

Rulings in calling a jury. Rulings in calling a jury are not deemed excepted to. Randall v. Freed, 154 Cal. 299; 97 Pac. 669.

Time of service of statement for new trial. An objection, that the statement on motion for a new trial was not served in time, is not deemed excepted to. Perry v. Noonan Loan Co., 1 Cal. App. 609; 82 Pac. 623.

Under Practice Act. An order admitting a will to probate was deemed excepted to, under the Practice Act (Will of Bowen, 34 Cal. 682); and also the report of a referee, not made immediately after the close of the testimony. Hadley v. Reed, 2 Cal. 322.

Effect of stipulation. Where it is stipulated that the cause be submitted to the court upon the record of a former trial before a jury, without expressing any reservation of rulings and exceptions taken upon the former trial, there can be no review. Grunsky v. Field, 1 Cal. App. 623; 82 Pac. 979.

Necessity for exception. Objections as to matters not deemed excepted to are not available, unless an exception is taken. Kearney v. Bell, 160 Cal. 670; 117 Pac. 925; Grazidal v. Bastanchure, 47 Cal. 167; Perry v. Noonan Loan Co., 1 Cal. App. 609; 82 Pac. 623.

Necessity for objection in addition to exception in order to save giving of instruction for review. See note Ann. Cas. 1912B, 1231.

Effect of failure to move to strike out testimony which has been admitted over objection with question reserved. See note Ann. Cas. 1912C, 711.

CODE COMMISSIONERS' NOTE. The verdict, decision, order, or ruling, in the instances specified in this section, may be rendered or had in the absence of the losing party, and it was for this reason that provision was made giving him an exception by operation of law.

§ 648. **Exception, form of.** No particular form of exception is required, but when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated, with so much of the evidence or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto sufficient to identify them may be made.

Legislation § 648. 1. Enacted March 11, **1872**; based on Practice Act, § 190, which read: "No particular form of exception shall be required. The objection shall be stated, with so much of the evidence, or other matter, as is necessary to explain it, but no more; and the whole as briefly as possible." When enacted in 1872, § 648 read: "No particular form of exception is required. The objection must be stated, with so much of the evidence or other matter as is necessary to explain it, and no more. But when the exception is to the verdict or decision, upon the grounds of the insufficiency of the evidence to sustain it, the objection must specify the particulars in which such evidence is alleged to be insufficient."

2. Amended by Code Amdts. **1875–76**, p. 92.

No particular form of exception required. No particular form of exception is required. Estate of Piper, 147 Cal. 606; 82 Pac. 246. The provisions of this section are mainly intended as a guide to the judge in settling the bill, though a duty is imposed on the moving party to proceed in good faith, and to do his share of the work in the settlement of the bill, and he cannot impose on the adverse party, or on the judge, the labor of preparing matters which he knows a proper and fair bill of exceptions ought to contain, nor should he include statements or matters that are untrue or irrelevant; and a corresponding duty rests on the adverse party. Walkerley v. Greene, 104 Cal. 208; 37 Pac. 890; and see Hearst v. Dennison, 72 Cal. 228; 13 Pac. 628. This section cannot be construed to mean that the party desiring a bill of exceptions must propose a perfect bill in the first draft, or forfeit his right to a review of the decision from which he appeals. Walkerley v. Greene, 104 Cal. 208; 37 Pac 890.

Bill must specify wherein evidence is insufficient. A bill of exceptions, containing only a general exception to the decision and order of the court for entry of judgment, without any specification of particulars, is insufficient to authorize the appellate court to examine the evidence for the purpose of determining its sufficiency to justify the findings. San Francisco v. Pacific Bank, 89 Cal 23; 26 Pac. 615, 835. The mere statement that a party excepted

to the decision of the court, unaccompanied by the objection, and the grounds on which it was made, does not constitute an exception available on appeal. Estate of Page, 57 Cal. 238. A specification that the judgment is contrary to the evidence, and stating wherein, does not enable the court to inquire whether the findings are justified by the evidence. Coveny v. Hale, 49 Cal. 552; Watson v. San Francisco etc. R. R. Co., 50 Cal. 523; Bonner v. Quackenbush, 51 Cal. 180; Eltzroth v. Ryan, 89 Cal. 135; 26 Pac. 647; Winterburn v. Chambers, 91 Cal. 170; 27 Pac. 658; Commercial Bank v. Redfield, 122 Cal. 405; 55 Pac. 160, 772; Estate of Behrens, 130 Cal. 416; 62 Pac. 603. A general specification, "that the evidence is wholly insufficient to justify a judgment in favor of the plaintiffs," is improper, as not giving the particulars. Rousseau v. Cohn, 20 Cal. App. 469; 129 Pac. 618. Where a finding is assailed as unsupported by the evidence, there must be specifications of insufficiency. Knoch v. Haizlip, 163 Cal. 146; 124 Pac. 998. The sufficiency of the evidence to support the decision cannot be reviewed, when the bill of exceptions contains no specifications of the particulars in which the evidence is alleged to be insufficient. Hawley v. Harrington, 152 Cal. 188; 92 Pac. 177. A specification of the insufficiency of the evidence to justify the decision cannot be noticed on appeal, where it is impossible to ascertain in what particular the evidence fails to support any finding referred to. Bell v. Staacke, 7 Cal. Unrep. 28; 70 Pac. 472. A bill of exceptions containing no specification of the insufficiency of the evidence to justify the findings, and no assignment of error in any particular, cannot be considered on appeal from an order denying a new trial. Sather Banking Co. v. Briggs Co., 138 Cal. 724; 72 Pac. 352; Leonard v. Shaw, 114 Cal. 69; 45 Pac. 1012. The court cannot consider a statement on motion for a new trial to determine whether or not the evidence supports the findings and decision, where the statement contains no specifications of error, as prescribed by this section. Meek v. Southern California Ry. Co., 7 Cal. App. 606; 95 Pac. 166. A finding is conclusive upon appeal, where there is no specification of insufficiency of the evidence to justify it. Estate of Piper, 147 Cal. 606; 82 Pac. 246.

Sufficient specification of error, what is. A general specification of error in findings is insufficient, where there is more than one finding, and it is impossible to ascertain which finding is attacked. Meek v. Southern California Ry. Co., 7 Cal. App. 606; 95 Pac. 166. On appeal from an order refusing to revoke letters of guardianship, and to set aside an order fixing the amount of the guardian's bond, the bill of exceptions must contain a specification of the particulars wherein the evidence is insufficient to justify the findings; otherwise the court cannot review the evidence and consider its sufficiency to support the order. Guardianship of Baker, 153 Cal. 537; 96 Pac. 12. Each distinct proposition excepted to on the ground that it is not justified by the evidence should be separately specified, and no statement of the evidence, or deduction therefrom by way of argument, is proper in connection with the specification. Baird v. Peall, 92 Cal. 235; 28 Pac. 285. Upon a specification that the evidence is insufficient to justify the decision, where the evidence concerning the fact in dispute is full and complete, an objection to the consideration of its sufficiency, on the ground that certain evidence is not set out in the bill was by stipulation considered evidence, will be overruled. Sullivan v. Washburn etc. Mfg. Co., 139 Cal. 257; 72 Pac. 992. Specifications clearly designating the findings and parts of findings which it is claimed the evidence does not justify are sufficient: no reference to the evidence is required, except to say that it is insufficient to justify the particular finding called in question. Swift v. Occidental Mining etc. Co., 141 Cal. 161; 74 Pac. 700. Specifications of the particular items, in an action on account, which the appellant deems to be unsupported by the evidence, sufficiently advise the respondent of the particulars wherein he should take note whether the evidence, if any, sustaining the account appeared in the bill of exceptions when proposed. Estate of Levinson, 108 Cal. 450; 41 Pac. 483; 42 Pac. 479. Specifications, in an action to recover property, ignoring the release of property by a sheriff, and based on a statement that it was never taken by the sheriff, constitute an insufficient statement that the jury disregarded the evidence relating to the release. Rider v. Edgar, 54 Cal. 127. Where a bill of exceptions expressly shows that the only question to be raised on motion for a new trial was as to whether or not the plaintiff was entitled to damages, and the bill included all the evidence bearing on the question, a specification pointing to the sole question professedly involved in the motion, so that the opposite party might see that all the evidence bearing on the issue, and proper to be considered by the court, was set forth in the bill, is sufficient. Livestock Gazette Pub. Co. v. Union Stockyard Co., 114 Cal. 447; 46 Pac. 286. A specification that the evidence does not show certain facts, is equivalent to saying that the evidence is insufficient to justify a decision on those particular facts, and is insufficient. Estate of Fath, 132 Cal. 609; 64 Pac. 995. A specification that the plaintiff showed no right of possession to premises sued for, as against the defendant, or at all, is not a sufficient specification of the particulars in which the evidence failed

to show a tender of the purchase-money, in an action to foreclose a contract to purchase: such specification is as applicable to any other of a series of alleged facts on which the plaintiff relied to make out his right of possession. Thorne v. Hammond, 46 Cal 530. A specification that the court erred in finding certain facts is insufficient (Coglan v. Beard, 67 Cal. 303; 7 Pac. 738); as is also a specification that the court erred in its finding, inasmuch as the testimony did not disclose the state of facts found (Gamble v. Tripp, 99 Cal. 223; 33 Pac. 851); and an objection to the introduction of evidence, as incompetent, irrelevant, and immaterial without showing in what respect it is so. Adams v. Crawford, 116 Cal. 495; 48 Pac. 488. Where testimony is objected to as incompetent, irrelevant, and immaterial upon a particular ground, a contention that it was inadmissible for another reason cannot be raised for the first time on appeal. Le Mesnager v. Hamilton, 101 Cal. 532; 40 Am. St. Rep. 81; 35 Pac. 1054; and see Adams v. Crawford, 116 Cal. 495; 48 Pac. 488. Where a particular finding is assailed as being wholly without evidence to support it, a more particular specification is not required. Rousseau v. Cohn, 20 Cal. App. 469; 129 Pac. 618. Where there is no evidence to sustain a finding, it is not necessary to specify the particulars in which the evidence is insufficient: the burden, in such case, is on the party sustaining the finding to point out enough evidence to justify it (San Luis Water Co. v. Estrada, 117 Cal. 168; 48 Pac. 1075); but where there is slight evidence to sustain the finding, the specification of the insufficiency cannot be dispensed with. Estate of Behrens, 130 Cal. 416; 62 Pac. 603. An order striking out a complaint, duly excepted to, may be reviewed, though the bill of exceptions contains no specification of the particulars in which the evidence is alleged to be insufficient (Clifford v. Allman, 84 Cal. 528; 24 Pac. 292); and errors of law occurring at the trial may be reviewed, although no specification of the particular errors of law on which the appellant relies is contained in the bill. Shadburne v. Daly, 76 Cal. 355; 18 Pac. 403.

Evidence to be set out in bill of exceptions. In preparing a statement or bill of exceptions for use in the appellate court, it is not necessary to give the evidence in full: only such of the evidence or other matter as is necessary for explanation should be incorporated; the exceptions should be presented as briefly as possible; and all redundant matter should be stricken out. Cripe v. Unangst, 20 Cal. App. 75; 128 Pac. 345; Vatcher v. Wilbur, 144 Cal. 536; 78 Pac. 14. All the evidence need not be given, where the question presented is solely as to the sufficiency of conflicting evidence to sustain a particular finding: it is sufficient if there is enough evidence, on each side of the question, to show a substantial conflict, since the decision of the court will not be interfered with. Vatcher v. Wilbur, 144 Cal. 536; 78 Pac. 14. The mere rescript of the notes of the shorthand reporter, in which the evidence is detailed by question and answer, with objections taken and rulings thereon, is insufficient. Caldwell v. Parks, 50 Cal. 502; Santa Ana v. Ballard, 126 Cal. 677; 59 Pac. 133. The requirement that the petitioner shall prepare a proper statement or bill of exceptions, so as to sustain his contention of the insufficiency of the evidence, does not mean that the statement or bill of exceptions shall embody all the notes of the reporter. Vatcher v. Wilbur, 144 Cal. 536; 78 Pac. 14. A bill of exceptions, merely setting forth other findings, and stating that such facts were established by the evidence, is not a statement of so much of the evidence as may be necessary to explain the objection that a portion of one finding is not sustained by the evidence, it not being a statement of evidence at all, but a general conclusion that certain facts were established by the evidence. Cox v. McLaughlin, 2 Cal. Unrep. 858; 18 Pac. 111. It will be presumed, on appeal, that all the evidence tending to explain an objection taken at the trial is inserted in the bill of exceptions; and where, from the evidence, it appears that the court erred in ruling as to a material matter, a reversal will be granted (Wilson v. Atkinson, 68 Cal. 590; 10 Pac. 203; Couson v. Wilson, 2 Cal. App. 181; 83 Pac. 262); and if there is any evidence which will explain or overcome that set forth in the bill, it is the duty of the respondent to cause it to be incorporated therein. Couson v. Wilson, 2 Cal. App. 181; 83 Pac. 262. The evidence need not accompany the objections to the conclusions of fact from other facts specifically found. Walkerley v. Greene, 104 Cal. 208; 37 Pac. 890. The evidence or other matter which may be stated in the bill of exceptions for the purpose of explaining the exception taken, does not include exceptions taken by the party proposing the amendment, or any evidence or other matter necessary to explain the same. Application of Gates, 90 Cal. 257; 27 Pac. 195.

Bill of exceptions may include what. The party who moves for a new trial must prepare the bill of exceptions, statement, affidavits, or whatever is relied on as the ground for his motion, and the record, as thus presented, must contain specifications for the purpose of furnishing the appellate court with the grounds upon which he expects to rely should his motion be denied. Byxbee v. Dewey, 128 Cal. 322; 60 Pac. 847; Shadburne v. Daly, 76 Cal. 355; 18 Pac. 403. Where an exception is taken on

the ground of error of law, in an action tried by the court without a jury, it is proper to ask the court to decide a principle of law considered applicable by counsel, and on a refusal, to have it noted in the bill of exceptions. Estate of Page, 57 Cal. 238; and see Griswold v. Sharpe, 2 Cal. 17; Touchard v. Crow, 20 Cal. 150; 81 Am. Dec. 108. The judgment roll on the admission of a will to probate, being a matter of record, should not be included in the bill of exceptions (Estate of Robinson, 106 Cal. 493; 39 Pac. 862); nor should the notice of intention to move for a new trial be included (Kahn v. Wilson, 120 Cal. 613; 53 Pac. 24; and see Pico v. Cohn, 78 Cal. 384; 20 Pac. 706; Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84; 38 Pac. 627); nor an order refusing a new trial (Mendocino County v. Peters, 2 Cal. App. 24; 82 Pac. 1122); but an original complaint, necessary to explain an exception to an order of the court, may be included. Redington v. Cornwell, 90 Cal. 49; 27 Pac. 40. Affidavits, not read at the trial for any purpose, and such parts thereof as were not so read, nor necessary to explain the parts which were read, are redundant and useless matter, and their insertion is not reversible error, as they will be disregarded on appeal; and this is the only remedy for the error, except that the appellate court may tax the costs of the redundant matter to the party causing the insertion. Wolff v. Wolff, 102 Cal. 433; 36 Pac. 767, 1037.

Inclusion of papers by reference. Reference to documents, in the engrossed statement, by the direction, "Here insert," is countenanced by this section. Lake Shore Cattle Co. v. Modoc Land etc. Co., 127 Cal. 37; 59 Pac. 206. Reference, in the proposed statement, to a document or record by means of the direction, "Here insert," is a sufficient notification to the adverse party that such document or record is to become a part of the statement, though such reference would not be sufficient in the engrossed statement. Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074. A reference, in a bill of exceptions, to certain documents as marked, and thereto attached and therewith filed, is not a sufficient reference to exhibits so marked in a separate bill of exceptions separately filed and not attached. Estate of Carpenter, 127 Cal. 582; 60 Pac. 162.

Papers must be identified. The papers and evidence used at the hearing of a motion to set aside the service of summons by publication must be authenticated by setting them forth in and making them a part of the bill: a mere reference, in the bill, to the different papers and documents, is not sufficient, where they are authenticated merely by stipulation of counsel. San Diego Sav. Bank v. Goodsell, 137 Cal. 420; 70 Pac. 299.

Skeleton bill. The practice of proposing a bill in skeleton form does not find any support in the code, but is one created by the profession, and is possible, merely because no absolute limit is placed on the time within which the judge can certify the bill; but, recognizing the practice, the certification of a bill is not delayed by reason of its engrossment before it is presented, where the settlement thereof does not require a new engrossment. Houghton v. Superior Court, 128 Cal. 352; 60 Pac. 972.

Sufficiency of exception to charge. Exceptions to an oral charge must be specific, and point out the particular portion of the charge claimed to be objectionable, though counsel subsequently claim that all the propositions laid down in the charge are objectionable. Rider v. Edgar, 54 Cal. 127; Sill v. Reese, 47 Cal. 294. An exception to a charge, in the clause, "to which charge, and the whole thereof, the defendant then and there duly excepted," is insufficient, as not sufficiently specifying the portion thereof assailed. Love v. Anchor Raisin etc. Co., 5 Cal. Unrep. 425; 45 Pac. 1044; Rogers v. Mahoney, 62 Cal. 611; Frost v. Grizzly Bluff Creamery Co., 102 Cal. 525; 36 Pac. 929.

Terms defined. The "decision," as that word is used in this section, is the statement of the facts found, and conclusions of law therefrom, mentioned in § 633, ante. Clifford v. Allman, 84 Cal. 528; 24 Pac. 292; Coveny v. Hale, 49 Cal. 552. A judgment of dismissal, taken after the lapse of sixty days, without findings, and without an opportunity to the appellant to prepare a record, is not an "exception to the decision or verdict," within the meaning of § 939, post, and the judgment may be reviewed upon the evidence. Rickey Land etc. Co. v. Glader, 153 Cal. 179; 94 Pac. 765.

CODE COMMISSIONERS' NOTE. 1. **Form of exception.** See subd. 1 of note to § 646 of this code.

2. **Object of the bill of exceptions.** Parsons v. Davis, 3 Cal. 425.

3. **What it should contain.** Not matter of record. Johnson v. Sepulbeda, 5 Cal. 151. But must contain documents and affidavits, to be reviewed by the appellate court. Gates v. Buckingham, 4 Cal. 286. And affidavits as to the incompetency of a juror. People v. Stonecifer, 6 Cal. 411.

4. **Reserving questions of law.** Where the court tries the cause without a jury, the mode of reserving questions of law is to ask the court to decide them, and note the decision in a bill of exceptions. Griswold v. Sharpe, 2 Cal. 17. Where plaintiffs have excepted to the ruling of the court excluding certain evidence, take a nonsuit with leave to move to set aside, they do not waive any of their rights as to the exceptions. Natoma Water etc. Co. v. Clarkin, 14 Cal. 549.

5. **Exceptions to be attached to judgment roll.** More v. Del Valle, 28 Cal. 170.

§ 649. **Bill of exceptions, when to be presented, etc.** A bill containing the exception to any decision may be presented to the court or judge, for settlement at any time after the decision is made, but the same must be presented within ten days after written notice of making such decision, and after having been settled must be signed by the judge and filed with the clerk. When the decision excepted to is made by a tribunal other than a court, or by a judicial officer, the bill of exceptions must be presented to and settled and signed by such tribunal or officer.

Legislation § 649. **1.** Enacted March 11, **1872**; based on the first two sentences of Practice Act, § 189, as amended by Stats. 1863, p. 360, which read: "The point of the exception shall be particularly stated, and may be delivered in writing to the judge; or, if the party require, it shall be written down by the clerk. When delivered in writing, or written down by the clerk, it shall be made conformable to the truth, or be at the time corrected until it is so made conformable." When enacted in 1872, § 649 read: "A bill containing the exception to any ruling may be presented to the judge at the time the ruling is made. It must be conformable to the truth, or be at the time corrected until it is so, and signed by the judge, and filed with the clerk."

2. Amended by Code Amdts. **1875–76**, p. 92, the changes therefrom being noted infra.

3. Amendment by Stats. **1901**, p. 147; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 715, in first sentence, substituting (1) "within ten days after" for "at the time," and (2) "must" for "shall," in both sentences; the first sentence then reading, "A bill containing the exception to any decision may be presented to the court or judge for settlement within ten days after the decision is made, and after having been settled, must be signed by the judge and filed with the clerk."

5. Amended by Stats. **1911**, p. 402, recasting the first sentence.

Time of presentation and settlement. Under §§ 188, 189, of the Practice Act, a bill of exceptions, if not reduced to writing and settled by the judge immediately upon the taking of the exception, could be brought before the court for review only by a statement settled as provided in § 195 of the Practice Act. Central Pacific R. R. Co. v. Pearson, 35 Cal. 247. This section, prior to the amendment of 1907, was, in terms, permissive; and the privilege of presenting the bill of exceptions for settlement at the time of the ruling was not necessarily exclusive (Flagg v. Puterbaugh, 98 Cal. 134; 32 Pac. 863); and did not fix any specific time for presenting the bill of exceptions; and if not done immediately, the right was not taken away. Tregambo v. Comanche etc. Mining Co., 57 Cal. 501. Where the case falls under this section, the bill should be allowed and settled, if presented within a reasonable time: the analogy furnished by §§ 650, 651, post, should determine what is a reasonable time (Flagg v. Puterbaugh, 98 Cal. 134; 32 Pac. 863; Smith v. Jordan, 122 Cal. 68; 54 Pac. 368); hence, a proposed bill, not prepared and served until twenty days after the order was made, is too late. Smith v. Jordan, 122 Cal. 68; 54 Pac. 368. A bill of exceptions, dated more than four months after a ruling striking out a portion of the answer was made, should not be allowed. Levee District v. Huber, 57 Cal. 41. This section prescribes no time within which the exception shall be settled, but § 650, post, fixes the time for presentation of the draft of the bill. McCarty v. Wilson, 2 Cal. App. 154; 83 Pac. 170. Where the certificate of the judge recited that the bill was "duly presented within the time allowed by law," it will be assumed that it was presented when the decision was made; and if the court actually settled it at a date later than that of its presentation, it cannot affect the right of the appellant to use the bill. Estate of Gordon, 142 Cal. 125; 75 Pac. 672. This section contemplates the settlement of a bill of exceptions at the time the decision is made, during the trial, and in the presence of counsel for both parties, and does not contemplate a settlement of the bill after the adjournment of the court, without any notice to adverse counsel. Estate of Scott, 128 Cal. 578; 61 Pac. 98; Estate of Carpenter, 127 Cal. 582; 60 Pac. 162.

Signing and filing. Exceptions taken during the progress of the trial should be written down, settled, and signed by the judge, filed in the case, and afterwards attached to the judgment roll. More v. Del Valle, 28 Cal. 170; Kavanagh v. Maus, 28 Cal. 261.

Consent of parties as conferring jurisdiction on court to sign bill of exceptions after time fixed by statute. See note 13 Ann. Cas. 1115.

Effect on bill of exceptions of neglect of judge to sign same within time required by law. See note Ann. Cas. 1913A, 914.

§ 650. **Bill of exceptions. Presentment of bill. Duty of judge to strike out useless matter.** When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, at any time thereafter, and within ten days after the entry of judgment, if the action was tried with a jury, or after receiving notice of the entry of judgment, if the action was tried without a jury, or if proceedings on motion for a new trial be pending, within ten days after notice of decision denying said motion, or other determination thereof, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a

bill, and serve the same, or a copy thereof, upon the adverse party. Such draft must contain all the exceptions and proceedings taken upon which the party relies, and may contain all matters reviewable on the same appeal whether occurring at the trial or on motion for a new trial. It may also contain a statement of any matters occurring upon the trial, in the presence of the court, showing any of the matters mentioned in subdivisions one and two of section six hundred and fifty-seven of this code. Within ten days after such service the adverse party may propose amendments thereto, and serve the same or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge. When received by the clerk he must immediately deliver them to the judge, if he is in the county; if he is absent from the county, and either party desires the paper to be forwarded to the judge, the clerk must, upon notice in writing of such party, immediately forward them by mail, or other safe channel; if not thus forwarded the clerk must deliver them to the judge immediately after his return to the county. When received from the clerk, the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated the judge must settle the bill. The bill must thereupon be engrossed and presented to the judge to be certified, by the party presenting it, within ten days. If the action was tried before a referee, the proposed bill, with the amendments, if any, must be presented to such referee for settlement within ten days after service of the amendments, upon notice of five days to the adverse party, and thereupon the referee must settle the bill. If no amendments are served or if served are allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee, for settlement without notice to the adverse party.

It is the duty of the judge or referee, in settling the bill, to strike out of it all redundant and useless matter so that the exceptions and proceedings may be presented as briefly as possible. When settled, the bill must be signed by the judge or referee, with his certificate to the effect that the same is allowed, and must then be filed with the clerk.

No bill of exceptions, notice of appeal, or notice or paper, other than amendments to the pleadings or an amended pleading, need be served upon any party whose default has been duly entered, or who has not appeared in the action or proceeding.

Further time. Ante, § 473; post, § 1054.
Bill of exceptions.
1. New trial. Post, § 659, subd. 2.
2. Requisites of. Ante, § 648.
3. In criminal causes. See Pen. Code. §§ 1171 et seq.

Legislation § 650. **1.** Enacted March 11, **1872**; based on the third sentence of Practice Act, § 189, as amended by Stats. 1863, p. 360, which read: "When not delivered in writing, or written down as above, it may be entered in the judge's minutes, and afterwards settled in a statement of the case, as provided in this act." See ante, Legislation § 649. When enacted in 1872, § 650 read: "If a bill is not presented at the time of the ruling, a bill containing the exceptions, or any of them, relating to any ruling had up to the time of the entry of judgment, may, upon one day's notice to the adverse party, at any time after such ruling is made, and within thirty days after the entry of judgment, be presented to the judge and settled, as provided in the preceding section."

2. Amended by Code Amdts. **1873–74**, p. 313, the changes therefrom being noted infra.

3. Amendment by Stats. **1901**, p. **147**; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 715, (1) in first sentence, (a) changing "Where" to "When"; (b) adding "at any time thereafter, and," before "within ten days"; (c) changing "were" to "was" before "tried," in both places; (d) substituting "by copy" for "or a copy"; (2) in second sentence, inserting "and proceedings" after "exceptions"; (3) adding the sentence beginning "It may also contain"; (4) in sentence beginning "When received by," (a) substituting "is" for "be," in both instances, and (b) "desires" for "desire"; (5) adding the sentence beginning

"The bill must"; (6) in sentence beginning "If the action," substituting "must" for "shall"; (7) in sentence beginning "It is the duty," adding "and proceedings" after "exceptions"; (8) in last line, substituting "must" for "shall"; the code commissioner saying, "The changes add the words 'at any time thereafter, and' before the words 'within ten days,' add the words 'and proceedings' after 'exceptions,' and also add the words 'It may also contain. . . .' These amendments permit the bill of exceptions as to any matter occurring at the trial to be tendered before the entry of the judgment, and to contain, when presented, a statement of any matter occurring at the trial in the presence of the court mentioned in subds. 1 and 2 of § 657. A provision is also added providing the time within which the settled bill must be engrossed, and for its service on the adverse party."

5. Amended by Stats. **1909**, p. 993, (1) in first sentence, substituting "or a copy" for "by copy" (a restoration); (2) in sentence beginning "When received," substituting "paper" for "papers," after "desires the"; (3) in sentence beginning "The bill," after "ten days," striking out "and upon being certified must within five days thereafter be served upon the adverse party"; (4) making a new paragraph of the then last two sentences, beginning "It is the duty."

6. Amended by Stats. **1911**, p. 400, adding the final paragraph (compare change therein in 1915).

7. Amended by Stats. **1915**, p. 207, (1) in first sentence, inserting "or if proceedings on motion for a new trial be pending, within ten days after notice of decision denying said motion, or other determination thereof"; (2) in second sentence, inserting "and may contain all matters reviewable on the same appeal whether occurring at the trial or on motion for a new trial"; (3) in final paragraph, striking out "statement on motion for a new trial," after "No bill of exceptions."

Construction of section. This section provides how all papers, proceedings, and exceptions, not otherwise part of the record, may be made such by bill of exceptions. Herrlich v. McDonald, 80 Cal. 472; 22 Pac. 299. It is applicable where the order excepted to is appealable, as well as where the ruling can be reviewed only on an appeal from a final judgment. Flagg v. Puterbaugh, 98 Cal. 134; 32 Pac. 863. Under the Practice Act, an order made after rendition of judgment, unless founded on affidavits, could be reviewed only by a statement on appeal. Caulfield v. Doe, 45 Cal. 221. This section applies in an election contest. McCarty v. Wilson, 2 Cal. App. 154; 83 Pac. 170. Its provisions, so far as they relate to the service of notice, are not merely directory. Ford v. Braslan Seed Growers Co., 10 Cal. App. 762; 103 Pac. 946. The statute must be followed closely to perfect an appeal, but no more is demanded. Broaddus v. James, 13 Cal. App. 478; 110 Pac. 164.

Exceptions taken when. This section does not refer to exceptions taken after trial and judgment (Sacramento County v. Central Pacific R. R. Co., 61 Cal. 250): it provides for the settlement of a bill of exceptions based on errors of law occurring at the trial, which may be done after entry of judgment and after the judgment roll is made up (Estate of Gordon, 142 Cal. 125; 75 Pac. 672); and includes exceptions taken in the course of proceedings before the trial is commenced. Tregambo v. Comanche etc. Mining Co., 57 Cal. 501.

Draft of bill, and time of preparation and service. Failure to prepare the bill of exceptions within the time allowed, or any authorized extension thereof, justifies a refusal to settle the proposed bill: the right to have it settled is thereby lost (Estate of Clary, 112 Cal. 292; 44 Pac. 569); and a bill not prepared and served within the time allowed cannot be considered (Kelleher v. Creciat, 89 Cal. 38; 26 Pac. 619); neither can a bill of exceptions to an order dissolving an attachment, not prepared and served until twenty days after the order was made. Smith v. Jordan, 122 Cal. 68; 54 Pac. 368. Where the proposed bill and the amended bill were served, and no objection was made that they were not, respectively, in time, an objection on that ground will be disregarded on appeal, though not made within the time provided by law, and although no order was made extending the time. Hungarian Hill etc. Mining Co. v. Moses, 58 Cal. 168. The time within which the bill of exceptions to an order making a family allowance must be prepared and served is prescribed by this section. Leach v. Pierce, 93 Cal. 614; 29 Pac. 235. This section does not authorize the court to grant an indefinite extension of time for the preparation and serving of the draft: it is to be read in connection with the restriction in § 1054, post, on amount of time allowed by court. Cameron v. Arcata etc. R. R. Co., 129 Cal. 279; 61 Pac. 955. The law allows ten days, or such further time, not exceeding thirty days, as may be allowed by the court, within which to serve a proposed bill of exceptions. Oppenheimer v. Radke, 165 Cal. 220; 129 Pac. 798. An order extending the time for preparing and serving the draft of the bill of exceptions gives the defendant the time specified, in addition to the ten days allowed by this section. Cameron v. Arcata etc. R. R. Co., 129 Cal. 279; 61 Pac. 955. An order, made after the expiration of the statutory period within which to propose a bill of exceptions, extending the time for such proposal, is ineffectual and void (Estate of Clary, 112 Cal. 292; 44 Pac. 569); but not when the extension is made by stipulation of counsel. Simpson v. Budd, 91 Cal. 488; 27 Pac. 758. The pendency of a motion to amend or change a finding does not operate to extend the time for service of proposed bill of exceptions. Hole v. Takekawa, 165 Cal. 372; 132 Pac. 445.

What bill should contain. An exception to the ruling on motion for a new trial must appear in the stating or substantive part of the bill of exceptions, and the bill must affirmatively show that the ruling actually took place at the trial and was excepted to. Craig v. Hesperia Land etc. Co., 107 Cal. 675; 40 Pac. 1057; Hanna v.

De Garmo, 140 Cal. 172; 73 Pac. 830. A statement on motion for a new trial and a bill of exceptions may be incorporated in the same paper. Martin v. Southern Pacific Co., 150 Cal. 124; 88 Pac. 701. The mere fact that the exception was referred to in the assignment of errors relied on is not sufficient. Craig v. Hesperia Land etc. Co., 107 Cal. 675; 40 Pac. 1057. Specifications in a bill, that the conclusions of law embraced in the findings are erroneous, are not available on appeal from an order denying a new trial. Mentone Irrigation Co. v. Redlands Electric Light etc. Co., 155 Cal. 323; 17 Ann. Cas. 1222; 22 L. R. A. (N. S.) 382; 100 Pac. 1082. The fact that reference was made to the pleadings, on the hearing of a motion for a new trial, need not be presented by a bill of exceptions (Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84; 38 Pac. 627); nor need the bill contain any particular errors of law on which the appellant will rely (Reay v. Butler, 69 Cal. 572; 11 Pac. 463; Shadburne v. Daly, 76 Cal. 355; 18 Pac. 403; Hagman v. Williams, 88 Cal. 146; 25 Pac. 1111; Barfield v. South Side Irrigation Co., 111 Cal. 118; 43 Pac. 406; Snell v. Payne, 115 Cal. 218; 46 Pac. 1069; Smith v. Smith, 119 Cal. 183; 48 Pac. 730; 51 Pac. 183; Harper v. Gordon, 128 Cal. 489; 61 Pac. 84), though required in a statement under the third subdivision of § 659, post. Martin v. Southern Pacific Co., 150 Cal. 124; 88 Pac. 701. The specification of such errors though an essential part of the statement, is the act of the attorney, annexed to the bill after the trial (Braverman v. Fresno Canal etc. Co., 101 Cal. 644; 36 Pac. 386); and the statements of fact in the bill are made only to explain the exceptions which it shows were taken (Estate of Carpenter, 127 Cal. 582; 60 Pac. 162); and the matters to which the specification of errors points must be found in the substantive portion of the bill; hence, exceptions incorporated in an assignment of errors, coupled with the statement that it was given against the objection of the appellant, cannot be considered. Braverman v. Fresno Canal etc. Co., 101 Cal. 644; 36 Pac. 386; and see People v. Faulke, 96 Cal. 17; 30 Pac. 837. It is not necessary to make a specification of particular issues on which findings were omitted. Knoch v. Haizlip, 163 Cal. 146; 124 Pac. 998. Where a bill of exceptions is necessary, it must contain a statement of the facts which will authorize the review of the action of the court below; hence, an order, not deemed excepted to, must be shown by the bill to come within the statutory exception that it was made in the absence of the party. Lamet v. Miller, 2 Cal. Unrep. 679; 11 Pac. 744. The draft of a proposed bill must contain a prayer or request that it be allowed or certified as a bill of exceptions. Landers v. Lawler, 84 Cal. 547; 24 Pac. 307.

Bill must be authenticated. The draft of the bill of exceptions must be authenticated, either by the signature or the indorsement of the attorney, or of the party if he appear in person. Landers v. Lawler, 84 Cal. 547; 24 Pac. 307. An unauthenticated bill, consisting entirely of specifications of error, will not be considered. Houghton v. Trumbo, 103 Cal. 239; 37 Pac. 152.

Service on whom. Upon motion for a new trial, the bill of exceptions to be used must, under the new method of appeal, be served upon all adverse parties. Ford v. Braslan Seed Growers Co., 10 Cal. App. 762; 103 Pac. 946. Persons claiming as devisees under a will, who oppose an application for partial distribution, are adverse parties, within the meaning of this section, and must be served with a draft of the bill of exceptions. Estate of Young, 149 Cal. 173; 85 Pac. 145. Where an interlocutory decree has become final by affirmance, only such matters can be reviewed on appeal from the final decree as have intervened subsequently to the interlocutory decree; and a bill of exceptions upon such appeal need only be served upon such parties as might be affected by a modification of the final decree. Gutierrez v. Hebberd, 106 Cal. 167; 39 Pac. 529, 935.

Amendments to the bill. The amendments which may be proposed to the draft of a bill of exceptions relate to the evidence or other matter authorized to be stated in the bill to explain the objection taken, and do not include exceptions taken by the party proposing the amendments, nor any evidence or other matter necessary to explain the same. Application of Gates, 90 Cal. 257; 27 Pac. 195. An amendment by the court, after an appeal taken, inserting particulars of the insufficiency of the evidence, is proper, where the appeal is from a decision made before the bill was settled. Estate of Lamb, 95 Cal. 397; 30 Pac. 568. The determination of the judge who tries and hears the case is final as to the allowance of the matter by way of amendment to the bill. Application of Gates, 90 Cal. 257; 27 Pac. 195. A bill authenticated by the trial court cannot be amended on appeal. Mendocino County v. Peters, 2 Cal. App. 24; 82 Pac. 1122; Bonds v. Hickman, 29 Cal. 461; Boston v. Haynes, 31 Cal. 107; Satterlee v. Bliss, 36 Cal. 489; Boyd v. Burrel, 60 Cal. 280; Warren v. Hopkins, 110 Cal. 506; 42 Pac. 986. It is error to refuse to permit an amendment to a statement embodying the reporter's notes, by condensing it to the narrative form, or in any other particular (Santa Ana v. Ballard, 126 Cal. 677; 59 Pac. 133); and the fact that no amendments were proposed to the draft of a bill proposed by the appellant does not preclude the judge from amending the bill to conform to the facts. Hyde v. Boyle, 89 Cal. 590; 26 Pac. 1092. Where, in the proposed draft of a

bill, there is inserted a ruling, deemed by the party preparing the same to be erroneous, the opposite party should present, in his amendments, any matter which would obviate the error; and it will be assumed, on appeal, that the judge, in settling the bill, has caused to be inserted therein all matter which is relevant to or which will explain his ruling. Bedan v. Turney, 99 Cal. 649; 34 Pac. 442. Where amendments proposed to the draft of a bill of exceptions are merely attached thereto, and not inserted in their proper place in the bill as engrossed, the bill cannot be considered on appeal. Fritsch v. Stampfli, 117 Cal. 441; 49 Pac. 559; Marlow v. Marsh, 9 Cal. 259; Skillman v. Riley, 10 Cal. 300; Baldwin v. Ferre, 23 Cal. 461; Kimball v. Semple, 31 Cal. 657.

Service of amendments. Where the attorney who proposes a bill of exceptions acknowledges, by letter, the receipt of proposed amendments, served by mail, this does not amount to personal service, so as to shorten the time for the doing of an act as indicated in § 1013, post. Prefumo v. Russell, 148 Cal. 451; 83 Pac. 810.

Notice of presentation of bill and delivery for settlement. The delivery of a proposed statement and amendments to the judge, without notice of the day when such statement will be presented for settlement, is insufficient. Estate of Kruger, 130 Cal. 621; 63 Pac. 31. Failure to give the five days' notice of the presentment of a proposed bill to the judge, until after the expiration of the ten days in which it may be presented, renders the subsequent notice too late, and a settlement of the statement thereafter is erroneous. Witter v. Andrews, 122 Cal. 1; 54 Pac. 276. The designation of a time for settlement, in open court, both parties being present, is sufficient Horton v. Jack, 115 Cal. 29; 46 Pac. 920. Written notice of the presentation of the proposed bill to the court for settlement, being for the benefit of the adverse party, may be waived by him. Hicks v. Masten, 101 Cal. 651; 36 Pac. 130. Objection to a defective notice of settlement, which failed to specify that the proposed amendments would be presented to the judge with the bill, is waived, if the bill and amendments were presented in the presence of both parties at the time specified, and the hearing was postponed from time to time by consent, and without objection urged prior to the final hearing. O'Brien v. O'Brien, 124 Cal. 122; 57 Pac. 225. Where the judge settles the bill in the presence of the attorneys for both parties, without fixing a time for settlement, or giving previous notice thereof, and no objection was made at the time, the bill is not invalidated. Horton v. Jack, 115 Cal. 29; 46 Pac. 920. No notice of the settlement of a bill is required, where there is no contest in reference thereto. Broaddus v. James, 13 Cal. App. 478; 110 Pac. 164. Under this section and the third subdivision of § 659, post, a party moving for a new trial, who has presented his proposed statement and amendments thereto to the clerk of the court for delivery to the judge for settlement, is not required to give the adverse party the five days' notice of delivery required when such papers are presented directly to the judge. Curtin v. Ingle, 155 Cal. 53; 99 Pac. 480. Notice to the adverse party, at the time of the delivery of the bill to the clerk, of intention to present the statement and amendments to the judge, is not required. Mellor v. Crouch, 76 Cal. 594; 18 Pac. 685. If the amendments are allowed, the bill and the amendments may be presented to the judge or the referee, without notice, within a reasonable time. Gay v. Torrance, 143 Cal. 14; 76 Pac. 717; and see Pendergrass v. Cross, 73 Cal. 475; 15 Pac. 63; Houghton v. Superior Court, 128 Cal. 352; 60 Pac. 972; Black v. Hilliker, 130 Cal. 190; 62 Pac. 481.

Presentation and settlement of bill. Bills of exceptions to any decision, whenever made, may be presented and settled as provided in this section. Tregambo v. Comanche etc. Mining Co., 57 Cal. 501. Leaving the engrossed bill with the clerk, during the absence of the judge, without even a request to present it to him for his signature, is insufficient: it is not the duty of the clerk to deliver the engrossed bill to the judge for his signature. Miller v. American Central Ins. Co., 2 Cal. App. 271; 83 Pac. 289. An engrossed bill, not signed or settled, cannot be considered on appeal (Pereira v. City Sav. Bank, 128 Cal. 45; 60 Pac. 524); and a bill of exceptions, appearing in the transcript, will be stricken out, where there is no showing that it was either settled or allowed by the court. Keller v. Lewis, 56 Cal. 466. When the judge settles the bill or statement, the record is made up. Henry v. Merguire, 106 Cal. 142; 39 Pac. 599. The time for the filing of a transcript on appeal does not commence to run while there is a proceeding pending in the lower court for the settlement of a bill of exceptions on appeal from the judgment. Dernham v. Bagley, 151 Cal. 216; 90 Pac. 543.

Time for presentation and settlement. The time for the settlement and presentation of all bills of exceptions is fixed by this section. Tregambo v. Comanche etc. Mining Co., 57 Cal. 501. Failure to comply with the requirement that the proposed bill and amendments must, within ten days after service of the proposed amendments, be presented for settlement to the judge who tried or heard the case, deprives the party of his right to have the bill settled, unless he is relieved from the effect of such failure by the trial court, under § 473, ante, on account of mistake,

inadvertence, surprise, or excusable neglect; but no bill of exceptions can be made effectual for any purpose after the expiration of the statutory period of six months. Moultrie v. Tarpio, 147 Cal. 376; 81 Pac. 1112. A bill of exceptions is not required to be presented at the time of the refusal of the court to open a default. Tregambo v. Comanche etc. Mining Co., 57 Cal. 501. Where the trial court is in doubt as to a party's right to have a bill or statement settled, because not presented in time, the better practice is for it to sign the bill or statement, subject to objections thereto, the evidence in support of which should be incorporated in the bill. Calkins v. Monroe, 17 Cal. App. 324; 119 Pac. 680. Where the original proposed bill was signed by the attorneys, and the opposing counsel were notified that it was proposed as a bill of exceptions, and the judge certifies that he was asked to settle and certify it, and that he refused simply because it was not in time, an objection that the judge was not asked to settle and certify the bill cannot be sustained. Flagg v. Puterbaugh, 101 Cal. 583; 36 Pac. 95. Failure to settle the bill of exceptions within the time specified by law authorizes the dismissal of the appeal, where there is also an unexcused failure to file the transcript on appeal within the time prescribed by the rules of the appellate court. Smith v. Solomon, 84 Cal. 537; 24 Pac. 286. The service of a copy of the findings and judgment on the attorneys of the losing party, after entry of the judgment, is sufficient notice of the entry of judgment so as to require the bill of exceptions to be settled within ten days thereafter. Kelleher v. Creciat, 89 Cal. 38; 26 Pac. 619. A judgment rendered by the trial court according to the directions of the appellate court, is the final judgment in the case; hence, the losing party has ten days after the entry of such judgment in which to have exceptions taken at the trial settled. Klauber v. San Diego Street Car Co., 98 Cal. 105; 32 Pac. 876.

Extension of time. The bill of exceptions need not be presented at the time of the ruling, but it may be settled at any time within the limit prescribed by this section, and within such further time as the court may grant by an order made before the expiration of such time. Tregambo v. Comanche etc. Mining Co., 57 Cal. 501; and see Berry v. San Francisco etc. R. R. Co., 50 Cal. 435; Higgins v. Mahoney, 50 Cal. 444. The trial court may, by order, relieve a party from the failure to deliver a proposed bill and proposed amendments thereto to the clerk for the judge, within the time required by this section, where they were mailed to the clerk in due time, but were lost in transmission. Long v. Long, 162 Cal. 427; 122 Pac. 1077.

Judge who heard proceedings, authorized to settle. The bill of exceptions should be presented to the judge who made the ruling, either at the time of the ruling or after judgment; and where the ruling was made by one judge, and the trial was had before another, two or more bills may be settled and properly presented for consideration on appeal. Turner v. Hearst, 115 Cal. 394; 47 Pac. 129; and see Cummings v. Conlan, 66 Cal. 403; 5 Pac. 796, 903. A bill signed by the judge who heard the motion for a new trial, and not by the judge who tried the case, cannot be considered. Pereira v. City Sav. Bank, 128 Cal. 45; 60 Pac. 524. The settlement of a bill before a judge, other than the one before whom the proceedings were heard, is improper, where the bill was not one to be used on the motion for a new trial, and the former judge was not dead nor had refused to settle it. Estate of Carpenter, 127 Cal. 582; 60 Pac. 162.

Redundant and useless matter in bill. The provision of this section, that the judge shall strike out all redundant and useless matter, so that the exceptions may be presented as briefly as possible, is not a limitation of his functions in settling the bill, but is in the nature of a definition of the course he is authorized to adopt in settling the bill. Hyde v. Boyle, 89 Cal. 590; 26 Pac. 1092. The judge should settle the bill when properly presented, and should also strike out redundant or useless matter, whether the parties consent thereto or not, and make the statement truly represent the case. Santa Ana v. Ballard, 126 Cal. 677; 59 Pac. 133. Setting up a will twice in a bill of exceptions is improper: one copy should be stricken out. Estate of Robinson, 106 Cal. 493; 39 Pac. 862. Matters not occurring in court, and concerning which no showing was made in court, cannot be noticed upon appeal, though recited in the bill (Estate of Carpenter, 127 Cal. 582; 60 Pac. 162); neither can irrelevant matters incorporated into the bill of exceptions, nor matters which show upon the face of the bill that they were not presented to the court at the time it made its rulings, or could not have any weight in determining the correctness of such rulings. Hyde v. Boyle, 89 Cal. 590; 26 Pac. 1092. The insertion of a clause in a bill of exceptions, by the judge, stating that the evidence was sufficient to prove all the allegations of the complaint, will be disregarded on appeal, as an attempt to forestall the question to be examined on the evidence brought up. Hudson v. Hudson, 129 Cal. 141; 61 Pac. 773. Additional costs will not be imposed on the respondent by reason of his insertion of redundant matter in the bill, where the judgment is reversed and costs of appeal are imposed on him. Estate of Robinson, 106 Cal. 493; 39 Pac. 862.

Refusal to settle. Where the party proposing a bill of exceptions refuses to adopt the amendments, and fails to present the same for settlement within the time limited by this section, without offering any excuse therefor, the court is justified in refusing to settle the bill (Whipple v. Hopkins, 119 Cal. 349; 51 Pac. 535; and see Henry v. Merguire, 106 Cal. 142; 39 Pac. 599); and also where the appellant fails to file the proposed bill, with the amendments thereto, with the clerk, or to present them to the judge, until several months after the time limited. Gamache v. Budd, 129 Cal. 554; 62 Pac. 105. A failure to serve some of the necessary parties with a proposed bill does not require or authorize the trial court to refuse to settle the bill at all, nor does it affect the jurisdiction of the appellate court to entertain the appeal. Estate of Young, 149 Cal. 173; 85 Pac. 145. Failure to serve a copy of the notice of the time and place of settlement of the bill on the attorneys of the adverse party renders the refusal to settle the bill proper (Gallardo v. Atlantic etc. Telegraph Co., 49 Cal. 510); and failure to give notice of intention to ask the court to disallow the amendments to the bill, and settle the bill as proposed, within ten days after service of such amendments, renders a refusal to settle the bill proper, where no excuse was offered for not so doing (Whipple v. Hopkins, 119 Cal. 349; 51 Pac. 535); but when no amendments are proposed, failure to present the proposed bill for settlement within the ten days does not justify a refusal: no absolute limit is placed upon the time in which the judge may certify the bill. Houghton v. Superior Court, 128 Cal. 352; 60 Pac. 972. It is not the duty of the judge to make the statement on motion for a new trial; hence, where a proposed statement is a mere pretense and fraud, its settlement is properly refused. Hearst v. Dennison, 72 Cal. 227; 13 Pac. 628.

Compelling settlement. Mandamus lies to compel a judge to settle a bill of exceptions, or a statement of the case (Hearst v. Dennison, 72 Cal. 227; 13 Pac. 628; Landers v. Landers, 82 Cal. 480; 23 Pac. 126; Tibbets v. Riverside Banking Co., 97 Cal. 258; 32 Pac. 174; Hudson v. Hudson, 129 Cal. 141; 61 Pac. 773; Miller v. American Central Ins. Co., 2 Cal. App. 271; 83 Pac. 289); and to compel a referee to settle a statement on motion for a new trial, in an action tried by him (Careaga v. Fernald, 66 Cal. 351; 5 Pac. 615; Hicks v. Masten, 101 Cal. 651; 36 Pac. 130); and to compel the court to allow the amendment of a bill of exceptions or a statement (Kruse v. Chester, 66 Cal. 353; 5 Pac. 613; Leach v. Pierce, 93 Cal. 614; 29 Pac. 235; Tibbets v. Riverside Banking Co., 97 Cal. 258; 32 Pac. 174; Winters v. Buck, 121 Cal. 279; 53 Pac. 799; Santa Ana v. Ballard, 126 Cal. 677; 59 Pac. 133); but the correctness of a settled bill of exceptions cannot be tested in mandamus proceedings; and the appellate court will not order a reference so that evidence may be taken on that issue. Thornton v. Hoge, 84 Cal. 231; 23 Pac. 1112. A petition for a writ of mandamus, made more than five months after refusal to settle the statement, will not be granted (McConoughey v. Torrence, 124 Cal. 330; 57 Pac. 81); nor will a petition for mandamus be granted to compel the insertion of an improper affidavit. Gay v. Torrance, 145 Cal. 144; 78 Pac. 540. A petition for mandamus, to compel the court to settle a bill of exceptions, should allege that the proposed bill contains everything that the petitioner believes it should contain to make it a fair and proper draft of the bill. Walkerley v. Greene, 104 Cal. 208; 37 Pac. 890. Where the bill of exceptions presented does not show an attempt to present a fair and bona fide statement of the case, a writ of mandate will not be granted to compel its settlement. Pacific Land Ass'n v. Hunt, 105 Cal. 202; 38 Pac. 635. Where the refusal of the court to settle a bill, to which no amendments were proposed, was based on an erroneous construction of the code, on the ground that it was not presented for settlement in time, and that there was no excuse for delay, and the question of unreasonable delay, under the true construction of the code, was not passed upon by him, mandamus lies to compel the court to settle the proposed bill (Houghton v. Superior Court, 128 Cal. 352; 60 Pac. 972); and also where, after many agreed conferences by counsel for both parties, the moving party attached to the proposed amendments a written allowance of them all, four days after the expiration of the time allowed by law, and thereupon filed them with the clerk for the judge, and presented them to the judge on the following day, the bill and amendments were presented within a reasonable time, under the circumstances. Gay v. Torrance, 143 Cal. 14; 76 Pac. 717.

Engrossing of bill. Whether a party has exercised due diligence in causing a bill of exceptions to be engrossed after it is settled, or in presenting it to the judge for his signature after it is engrossed, is to be determined by the judge, under the circumstances of each case, and, in the absence of abuse of discretion, his determination is conclusive. Miller v. American Central Ins. Co., 2 Cal. App. 271; 83 Pac. 289; and see Galbraith v. Lowe, 142 Cal. 295; 75 Pac. 831. An unexplained delay for a period of five months in causing the bill to be engrossed, where the parties have agreed on its form and contents, is inexcusable. Miller v. Queen Ins. Co., 2 Cal. App. 267; 83 Pac. 287. Any objection to the laches of the moving party in engross-

ing the statement, as ground for denial of the motion, must be embodied in a separate bill of exceptions as ground for his own appeal from an order made after final judgment. Ryer v. Rio Land etc. Co., 147 Cal. 462; 82 Pac. 62.

Certification of bill. The bill of exceptions is not settled until it is certified as correct: this cannot be done until it is engrossed, if engrossing is necessary. Houghton v. Superior Court, 128 Cal. 352; 60 Pac. 972. Relief from the filing of a settled and engrossed bill, without being certified, through the inadvertence of the judge or referee, should be granted, if a timely request is made for a certificate of allowance to the court; and, on appeal, such filing will be considered as premature and unauthorized. Jackson v. Puget Sound Lumber Co., 115 Cal. 632; 47 Pac. 603. The trial judge must determine whether a bill of exceptions has been correctly engrossed: his certification thereof is a determination to that effect (Merced Bank v. Price, 152 Cal. 697; 93 Pac. 866); and his determination is final. Ryer v. Rio Land etc. Co., 147 Cal. 462; 82 Pac. 62. He may properly refuse to sign and certify an engrossed bill, if it fails to speak the truth. Galvin v. Hunt, 153 Cal. 103; 94 Pac. 423.

Refusal to certify. The court has discretion to refuse to sign an engrossed bill of exceptions, where there is evident lack of diligence in engrossing the same, after knowledge of the action of the judge in relation thereto. Galbraith v. Lowe, 142 Cal. 295; 75 Pac. 831. Failure to serve an engrossed bill on the attorney for the opposing party, before presentation to the judge, does not justify an absolute refusal to certify, though it might justify a refusal to certify until counsel examine it. Ryer v. Rio Land etc. Co., 147 Cal. 462; 82 Pac. 62.

Delay in filing bill. The question whether delay in filing the bill is unreasonable is for the lower court to determine, and its determination will not be reviewed on appeal, in the absence of a bill of exceptions setting out the facts (Jaffe v. Lilienthal, 101 Cal. 175; 35 Pac. 636); nor can a bill, filed two months after the order appealed from was entered in the minutes of the court, be considered on appeal (Pereira v. City Sav. Bank, 128 Cal. 45; 60 Pac. 524); nor a bill filed more than nine years after the ruling excepted to. Estate of Carpenter, 127 Cal. 582; 60 Pac. 162.

Service of settled bill unnecessary. Where the statute simply requires that a settled bill of exceptions shall be "filed," it need not be served upon the adverse party. Broaddus v. James, 13 Cal. App. 478; 110 Pac. 164. The mere failure to serve a bill of exceptions, under the amendment to this section in 1907, after such bill had been settled, engrossed, and certified, did not warrant the striking of the bill from the record on appeal. Smith v. Goethe, 159 Cal. 628; Ann. Cas. 1912C, 1205; 115 Pac. 223.

Burden of acting is upon whom. The burden is at all times on the party moving for a new trial to take the steps necessary to enable the court to hear the motion (Miller v. Queen Ins. Co., 2 Cal. App. 267; 83 Pac. 287; Estate of Depeaux, 118 Cal. 522; 50 Pac. 682); and, whether the proposed amendments are adopted or not, it is the duty of the moving party to present the statement and amendments to the judge, and it is not the duty of the opposing party to take any further proceedings towards the settlement of the statement. Lee Doon v. Tesh, 131 Cal. 406; 63 Pac. 764. Delivery of the proposed bill and amendments to the clerk for the judge is not sufficient: the moving party should obtain an order from the judge, setting the day for the settlement of the bill; the adverse party is not required to move in the matter. Miller v. Queen Ins. Co., 2 Cal. App. 267; 83 Pac. 287.

Bill constitutes record. A bill of exceptions, when certified by the judge, is filed with the clerk: it then becomes the record of the court, and the only record in the matter. Merced Bank v. Price, 152 Cal. 697; 93 Pac. 866.

Statement not considered as bill when. Where there is a failure to serve adverse parties with a proposed statement on motion for a new trial, or to give them an opportunity to serve amendments thereto, the statement cannot be considered as a bill of exceptions to be used upon appeal from the judgment. National Bank v. Mulford, 17 Cal. App. 551; 120 Pac. 446.

Waiver of notice. The waiver of notice by one adverse party does not dispense with the necessity of notice to other adverse parties. Ford v. Braslan Seed Growers Co., 10 Cal. App. 762; 103 Pac. 946.

Appeal, use of bill. Alleged errors in an award of arbitrators, entered as an order of the court by stipulation of the parties, if reviewable upon appeal, cannot be reviewed upon an ex parte affidavit of the appellant, which cannot take the place of a bill of exceptions or of a statement of the case. Arbitration of Connor and Pratt, 128 Cal. 279; 60 Pac. 862. The certificate of the judge, that, of his own motion, both in hearing and deciding the defendant's motion, he took notice of and used the court's own records in the case, and that the attorney who appeared in behalf of the motion did not use or present any papers save those annexed to the certificate, is not the equivalent of a bill of exceptions, and cannot be considered on appeal. Ramsbottom v. Fitzgerald, 128 Cal. 75; 60 Pac. 522. The mere fact that a bill

of exceptions was technically presented for settlement, and used on an appeal from a non-appealable order, cannot preclude its use for the purpose of reviewing such order on an appeal from the judgment. Foley v. Foley, 120 Cal. 33; 65 Am. St. Rep. 147; 52 Pac. 122. The fact that the appellant presented for settlement what he termed a proposed statement on appeal will not deprive him of the fruits of the appeal, but the document will be treated as a bill of exceptions; there being no substantial difference between a statement and a bill of exceptions. Witter v. Andrews, 122 Cal. 1; 54 Pac. 276; People v. Crane, 60 Cal. 279; Jue Fook Sam v. Lord, 83 Cal. 159; 23 Pac. 225. An appeal from an order directing the conveyance of real estate by an executor is properly brought by bill of exceptions. Estate of Corwin, 61 Cal. 160. A bill of exceptions, made out in behalf of one defendant, to be used on motion for a new trial by him, cannot be used by a co-defendant upon an appeal by him. Houghton v. Trumbo, 103 Cal. 239; 37 Pac. 152. Whether parties, not served with a bill of exceptions or with notice of appeal, will be affected by a proposed modification of the judgment, or whether a bill of exceptions, not served upon them, can be considered upon the appeal, must be determined by the appellate court, and the appellant should not be refused the right to ask the appellate court to consider the bill of exceptions by reason of the possibility that the bill might not be considered upon appeal. Gutierrez v. Hebberd, 106 Cal. 167; 39 Pac. 529, 835.

Appeal from refusal to settle bill. Refusal to settle a bill of exceptions cannot be reviewed on appeal. Hudson v. Hudson, 129 Cal. 141; 61 Pac. 773; Whipple v. Hopkins, 119 Cal. 349; 51 Pac. 535. That the moving party was interested in other causes, wherein the time of his attorney was occupied, is a circumstance to be considered by the judge in determining whether there was undue negligence in the settlement of the bill, and his determination on that point will not be reviewed on appeal. Miller v. Queen Ins. Co., 2 Cal. App. 267; 83 Pac. 287.

Terms defined. The word "trial," as used in this section, means the trial of an issue of law, as well as the trial of an issue of fact. Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40. The term "adverse parties," as used in this section, includes persons claiming as devisees under a will, in an application for partial distribution. Estate of Young, 149 Cal. 173; 85 Pac. 145. The words, "when there is a proceeding pending for the settlement of a bill of exceptions," found in a rule of court, include any proceeding, looking to the settlement of such a bill, that has been actually inaugurated by a party. Dernham v. Bagley, 151 Cal. 216; 90 Pac. 543.

Filing bill of exceptions. See note 15 Am. St. Rep. 297.

What bill of exceptions must show. See note 8 L. R. A. 611.

Power upon rendition of judgment to allow or extend time for preparing and filing bill of exceptions. See note 42 L. R. A. (N. S.) 625.

§ 651. Exceptions after judgment. Exceptions to any decision made after judgment may be presented to the judge at the time of such decision, and be settled or noted, as provided in section six hundred and forty-nine, or a bill thereof may be presented and settled afterward, as provided in section six hundred and fifty, and within like periods after entry of the order, upon appeal from which such decision is reviewable.

Legislation § 651. **1.** Enacted March 11, **1872,** and then read: "A bill containing the exceptions to any ruling made after judgment, except to a ruling made granting or refusing a new trial, may be presented to the judge at the time of such ruling, and be settled as provided in section six hundred and forty-nine; and, if not so presented, may, upon one day's notice, and at any time after, and within ten days of, such ruling, be presented and settled as in such section provided."

2. Amended by Code Amdts. **1873–74,** p. 314, to read as at present, except for amendments of 1907; q. v., infra.

3. Amendment by Stats. **1901,** p. 148; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907,** p. 716, (1) changing the word "and" to "or" before "a bill thereof," and (2) changing "afterwards" to "afterward."

Bill necessary when. Papers used on the hearing in the court below must be authenticated by a bill of exceptions. Herrlich v. McDonald, 80 Cal. 472; 22 Pac. 299. On an appeal from an order made after judgment, heard on affidavits, a bill of exceptions is the only proper mode of authenticating such affidavits. Somers v. Somers, 81 Cal. 608; 22 Pac. 967; Manuel v. Flynn, 5 Cal. App. 319; 90 Pac. 463; Skinner v. Horn, 144 Cal. 278; 77 Pac. 904. The refusal of the court to hear any evidence in support of the defense, or its disregard of such evidence in its decisions, must be presented in the bill of exceptions or statements of the case: it cannot be considered if presented merely in ex parte affidavits containing the evidence presented at the trial, and the rulings thereon. Santa Cruz Rock Pavement Co. v. Bowie, 104 Cal. 236; 37 Pac. 934. An order denying a new trial, being appealable, is deemed to have been excepted to, and need not be embodied in a bill of exceptions. Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84; 38 Pac. 627.

Bill may show what. A person desiring to appeal from an order granting a new trial may always show what was used on the hearing of the motion, by a bill of exceptions settled as authorized by this section. Wyckoff v. Pajaro Valley etc. R. R. Co., 146 Cal. 681; 81 Pac. 17. Exceptions to decisions after judgment may be preserved by a bill thereof, where the matter is heard on oral evidence. Lyons v. Marcher, 119 Cal. 382; 51 Pac. 559; and see Herrlich v. McDonald, 80 Cal. 472; 22 Pac. 299. Neither the findings of fact and conclusions of law, nor the decree entered thereon, nor the notice of appeal, with proof of service, nor the recital that a sufficient undertaking on appeal has been filed with the clerk, can be properly included in a bill of exceptions. White v. White, 112 Cal. 577; 44 Pac. 1026.

Compelling settlement. On an appeal from an order striking out competent affidavits to be used on a motion for a new trial, on the ground of irregularity in the proceedings, the appellant is entitled to a bill of exceptions containing such affidavits, and mandamus will issue, where the court refuses to settle the bill. Gay v. Torrance, 145 Cal. 141; 78 Pac. 540.

Stipulation as to affidavits used on hearing. A stipulation of attorneys, that certain affidavits were used on the hearing of a motion for a new trial, does not authorize the consideration of such affidavits upon appeal, where it does not appear that they constituted all the affidavits and papers used on the hearing. Manuel v. Flynn, 5 Cal. App. 319; 90 Pac. 463.

§ 652. Proceedings if judge refuse to allow bill of exceptions. If the judge in any case refuses to allow a bill of exceptions in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same; the application may be made in the mode and manner, and under such regulations as that court may prescribe; and the bill, when proven, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause.

Legislation § 652. 1. Enacted March 11, **1872**, and read the same as at present, except for amendments of 1907; q.v., infra.

2. Amendment by Stats. **1901**, p. 148; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 716, changing (1) "refuse" to "refuses," and (2) "an exception" to "a bill of exceptions," in first line.

Jurisdiction of appellate courts. The powers of the supreme court, under this section, are restricted. Estate of Dolbeer, 147 Cal. 359; 81 Pac. 1098. The district court of appeal has jurisdiction of a petition for proving exceptions. Glass v. Lawlor, 152 Cal. 602; 93 Pac. 490. The propriety of making the procedure in criminal cases correspond with that in civil cases, as to the method of proving a bill of exceptions before the appellate tribunal, is for the legislature, and not for the courts. People v. Knoblock, 11 Cal. App. 333; 104 Pac. 1012.

When appellate court will settle. This section does not apply where the trial judge refuses to settle any statement or bill of exceptions: it applies where the trial judge, in settling a bill, erroneously refuses to allow one or more exceptions. Landers v. Landers, 82 Cal. 480; 23 Pac. 126; Hyde v. Boyle, 86 Cal. 352; 24 Pac. 1059; Tibbets v. Riverside Banking Co., 97 Cal. 258; 32 Pac. 174; Hudson v. Hudson, 129 Cal. 141; 61 Pac. 773; Estate of Dolbeer, 147 Cal. 359; 81 Pac. 1098. It limits the authority of the appellate court to interfere in the settlement of a bill of exceptions to the single instance in which the judge refuses to allow an exception. Application of Gates, 90 Cal. 257; 27 Pac. 195; Hyde v. Boyle, 86 Cal. 352; 24 Pac. 1059. The appellate court is not required to discharge the duties of the judge of the court below, but only to provide a mode for the settlement of the bill, where the trial judge, on proper application therefor, refuses to settle any bill of exceptions, or to settle the bill in accordance with the facts; and the appellate court will not settle a bill which the trial judge below properly refused to settle. Gallardo v. Atlantic etc. Telegraph Co., 49 Cal. 510. The refusal of the trial judge to allow an exception to the erroneous denial of an application to prove certain facts justifies an application to the appellate court. Estate of Hill, 62 Cal. 186. A judge refusing to settle a proposed statement may be compelled to do so, by proceedings under this section. Hearst v. Dennison, 72 Cal. 227; 13 Pac. 628. Where no exception has been disallowed, a petition to the appellate court, under this section, does not lie to settle a bill of exceptions, merely to determine whether the judge has inserted or refused to insert a correct statement of proceedings and evidence in the action. Vance v. Superior Court, 87 Cal. 390; 25 Pac. 500.

Time of application. The right to apply for relief under this section accrues when the judge has concluded the settlement of the proposed bill or statement, and directed its engrossment, without including

an exception which the party seeking the allowance of the bill claims to have reserved; the application should be made promptly; but where the trial was protracted, and the engrossed statement was bulky, a delay of two months is excusable. Estate of Dolbeer, 147 Cal. 359; 81 Pac. 1098. Where the statement has been settled, and a motion for a new trial based on such statement has been denied, it is too late to apply to the appellate court to prove an exception. Frankel v. Deidesheimer, 83 Cal. 44; 23 Pac. 136.

Who may apply. "The party desiring the bill settled," who is authorized to apply to the appellate court to prove exceptions allowed, is the party who takes the exception and presents the bill to the judge for settlement: that phrase does not include the prevailing party, who has no right to have exceptions in his favor inserted by way of amendments to the bill proposed by the losing party. Application of Gates, 90 Cal. 257; 27 Pac. 195.

Contents of petition. The petition in an application to the supreme court for the settlement of a bill of exceptions should set forth fully and specifically the exceptions taken and the evidence in support thereof, and notice of the application should be given to the trial judge (Guardianship of Hawes, 68 Cal. 413; 9 Pac. 456; People v. Bitancourt, 73 Cal. 1; 14 Pac. 372; Landers v. Landers, 82 Cal. 480; 23 Pac. 126; and see Wormouth v. Gardner, 35 Cal. 227); but only a general statement of the tendency of the evidence is required, so that the materiality of the ruling may appear. People v. Bitancourt, 73 Cal. 1; 14 Pac. 372. The party seeking the allowance of exceptions should present his whole case in his original petition, or before the hearing on the reference. Estate of Dolbeer, 147 Cal. 359; 81 Pac. 1098. A petition for leave to prove a bill of exceptions, which has annexed thereto, as an exhibit, a document containing the evidence, ruling, and exceptions taken on the hearing, is sufficient. Guardianship of Hawes, 2 Cal. Unrep. 656; 11 Pac. 220. The petition for leave to prove an exception must show that the proper steps to procure the settlement of the bill were taken, and that a statement of the particular exception desired to be proven was included in the proposed bill, and that the judge, in settling the bill, refused to allow that such an exception was taken: no presumptions are indulged. Estate of Dolbeer, 147 Cal. 359; 81 Pac. 1089.

Amendment to petition. The petition cannot be amended after a reference has been ordered and a hearing had. Estate of Dolbeer, 147 Cal. 359; 81 Pac. 1098.

Evidence admissible on application. Where an exception is disallowed contrary to the facts, the party may prove to the appellate court that the exception was taken, and, in connection therewith, may prove sufficient surrounding facts to show the point of the exception; and where he succeeds in making his proof, his exception will be put into a bill certified by the chief justice and filed with the clerk below, where it will form part of the record (Vance v. Superior Court, 87 Cal. 390; 25 Pac. 500); but this section does not authorize any evidence or other matters to be added, alleged to have been improperly omitted, in addition to the statement of the ruling and exception. Estate of Dolbeer, 147 Cal. 359; 81 Pac. 1098. It authorizes the appellate court to order an instrument, to the exclusion of which an exception was taken, to be certified for its inspection, where the trial court refuses to insert it in the bill of exceptions, since it cannot be said that the judge allowed an exception to a ruling admitting it in evidence, when the instrument itself, the very thing objected to, is excluded from the bill (Jennings v. Brown, 109 Cal. 290; 41 Pac. 1085; and see Lay v. Parsons, 104 Cal. 661; 38 Pac. 447); but it does not give authority to the appellate court, when an exception to a particular ruling has been allowed, to strike out any evidence or other matters stated in connection with such ruling, on the ground that such evidence was not given, or that such matters are untruly or incorrectly stated. Estate of Dolbeer, 147 Cal. 359; 81 Pac. 1098; Hyde v. Boyle, 86 Cal. 352; 24 Pac. 1059; 89 Cal. 590; 26 Pac. 1092; Cox v. Delmas, 92 Cal. 652; 28 Pac. 687. Where it is conceded in the petition that the judge settled and signed the bill, but it is alleged that it is not a true bill, and the petition has annexed thereto a copy of the bill as settled, and also a copy of the proposed bill, a case is presented, in which the petitioner should be allowed to prove the truth of the issue thus made. Curran v. Kennedy, 3 Cal. Unrep. 259; 24 Pac. 276. Evidence that the statements contained in the bill as settled by the judge, in connection with the exceptions which he allowed, were incorrect, either as to the omission or inclusion of matter not properly omitted or included, is immaterial. Estate of Dolbeer, 147 Cal. 569; 82 Pac. 192.

Burden of proof on petitioner. Where the allegations of the petition are not established by a preponderance of evidence, the petition will be denied. Crow v. Minor, 85 Cal. 214; 24 Pac. 640. Where the evidence is directly conflicting as to whether certain alleged exceptions were made, it cannot be held that the judge erred or abused his discretion in not allowing them. People v. Scott, 121 Cal. 101; 53 Pac. 364.

Presumptions as to exhibits. Instruments marked at the trial as exhibits are presumed, on a petition to compel the allowance of exceptions by inserting them, to be in the same condition as when the court

ordered them to be sealed up; if their identity is questioned, the matter can be inquired into on appeal. Jennings v. Brown, 109 Cal. 290; 41 Pac. 1085.

Settlement of new bill by appellate court. On a petition to prove exceptions, there may be a settlement of a new bill, based upon the reporter's notes; and the bill certified by the chief justice constitutes part of the record upon appeal. Estate of Dolbeer, 147 Cal. 359; 81 Pac. 1098.

Mandamus to compel signing of bill of exceptions. See note 98 Am. St. Rep. 902.

CODE COMMISSIONERS' NOTE. See note to article II.

§ 653. Settlement of bill of exceptions. When the decision excepted to was made by any judicial officer, other than a judge, the bill of exceptions shall be presented to such judicial officer, and be settled and signed by him in the same manner as it is required to be presented to, settled, and signed by a court or judge. A judge or judicial officer may settle and sign a bill of exceptions after, as well as before, he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may, by its order or rules, direct. Judges, judicial officers, and the supreme court shall respectively possess the same power, in settling and certifying statements, as is by this section conferred upon them in settling and certifying bills of exceptions.

Legislation § 653. 1. Enacted March 11, **1872**, and then read: "If the judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may, nevertheless, settle such bill, or the party may, as provided in the preceding section, apply to the supreme court to prove the same."

2. Amended by Code Amdts. **1875–76**, p. 93.

Constitutionality of section. The power of a judge who has tried a cause to settle a bill of exceptions therein, after the expiration of his term of office, conferred by this section, has been continuously recognized by the appellate court for too long a period of time to be now questioned as unconstitutional, and its validity is affirmed upon the rule of stare decisis. Miller & Lux v. Enterprise Canal etc. Co., 142 Cal. 208; 100 Am. St. Rep. 115; 75 Pac. 770.

Power of judge to settle bill. Where the successor of the judge who tried an action hears and denies the motion for a new trial, made upon the records and minutes of the court, the subsequent statement on appeal from the order denying the motion should be settled by the judge who made the order, and not by his predecessor, who tried the action. Cummings v. Conlan, 66 Cal. 403. The ex-judge has power to settle a bill of exceptions in a cause that has been tried before him as judge. Miller & Lux v. Enterprise Canal etc. Co., 142 Cal. 208; 100 Am. St. Rep. 115; 75 Pac. 770. A bill of exceptions, settled by a judge who had no power to do so, cannot be considered on appeal. People v. Knoblock, 11 Cal. App. 333; 104 Pac. 1012.

Remedy where ex-judge refuses to settle bill. Mandamus will not lie to compel an ex-judge, before whom an action was tried, to settle a bill of exceptions therein, after his term of office expired, although he is authorized by this section to do so. Leach v. Aitken, 91 Cal. 484; 28 Pac. 777. Special application should be made to the appellate court for an order directing the settlement of a bill of exceptions, where the trial judge refuses to do so after his term of office has expired, in order to render it available on appeal; and neglect on the part of the appellant to take such steps as were necessary to secure the settlement of the bill, within a reasonable time, is equivalent to his failure to file the transcript within the time limited; and where more than six months have elapsed, the conclusion is authorized that the appellant abandoned the exceptions set forth in the bill. Estate of Depeaux, 118 Cal. 522; 50 Pac. 682.

Refusal to transfer cause. Refusal to transfer the cause to the superior court of an adjoining county, in order to settle the statement of the case, is improper, where the judge is disqualified, and the judge who tried the case is no longer in office, and the judge who heard the motion is not the judge of the adjoining county. Finn v. Spagnoli, 67 Cal. 330; 7 Pac. 746.

Mandamus to compel judge to sign bill of exceptions after expiration of term. See note 36 L. R. A. (N. S.) 1087.

ARTICLE II.

NEW TRIALS.

§ 656. New trial defined.
§ 657. When a new trial may be granted.
§ 658. Motion for new trial. Papers.
§ 659. Notice of motion. Upon whom served, and what to contain.
§ 660. Motion, when to be heard.
§ 661. Record on appeal.
§ 662. New trial on court's own motion.
§ 663. Vacation of judgment.
§ 663a. Notice of intention, service of.

§ 656. New trial defined. A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee.

Mandamus, new trial in. See post, §§ 1092, 1110.

Legislation § 656. 1. Enacted March 11, **1872;** based on Practice Act, § 192, which had, as the last words of the section, "jury, court, or referees." When enacted in 1872, these words were changed to "jury or court, or by referees."

2. Amendment by Stats. **1901,** p. 149; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907,** p. 717; the code commissioner saying, "The meaning of the section is not changed by the amendments."

Issues of fact, only, reviewable. The operation of this section is confined to those cases in which the code has expressly authorized issues of fact to be framed: it does not apply to every order which may be made ex parte, or by the court on its own motion, simply because the court has permitted written objections to be filed. Leach v. Pierce, 93 Cal. 614; 29 Pac. 235. Whenever the action of the court is dependent on the existence of extrinsic facts presented to it for determination in the form of pleadings, which are to be decided by it in conformity with the preponderance of evidence, an issue of fact arises, which, under its decision, may be re-examined on a motion for a new trial. Estate of Bauquier, 88 Cal. 302; 26 Pac. 178, 373, 532. A finding as to attorneys' fees, being on an issue raised by law, though no reference is made to it in the pleadings, is reviewable on a motion for a new trial. Hooper v. Fletcher, 145 Cal. 375; 79 Pac. 418. A new trial is authorized in proceedings for changing the boundaries of a city, under § 803, post, where other questions of fact than those relating to such proceedings are involved, or errors of law committed at the trial. People v. Oakland, 123 Cal. 145; 55 Pac. 772; People v. Sutter Street Ry. Co., 117 Cal. 604; 49 Pac. 736; People v. Rodgers, 118 Cal. 393; 46 Pac. 740; 50 Pac. 668. Where only two of the issues were submitted to the jury and passed upon by their verdict, a motion for a new trial, made on the verdict, and before the decision, is premature. Estate of McKenna, 138 Cal. 439; 71 Pac. 501; and see Morris v. De Celis, 41 Cal. 331; Gaze v. Lynch, 42 Cal. 362; Baker v. Borello, 131 Cal. 615; 63 Pac. 914. A party may move for a new trial on a single issue. Duff v. Duff, 101 Cal. 1; 35 Pac. 437; San Diego Land etc. Co. v. Neale, 78 Cal. 63; 3 L. R. A. 83; 20 Pac. 372. When a new trial is granted as to only one of several issues, it opens for examination only that issue: the determination of the other issues remains in the record, and cannot be retried; the only remedy of the moving party as to those issues is to appeal from the part of the order denying the motion for a new trial as to them. Estate of Everts, 163 Cal. 449; 125 Pac. 1058. This section does not apply to a default, as the re-examination is where there has been a previous trial of an issue of fact (Foley v. Foley, 120 Cal. 33; 65 Am. St. Rep. 147; 52 Pac. 122); and a new trial is properly denied, where the matter is admitted by the pleadings, since, in such case, there is no issue to try, even though the findings were made on a supposititious issue. Estate of Doyle, 73 Cal. 564; 15 Pac. 125. Where all the facts are agreed on, there is no issue of fact to be re-examined, and no ground for a new trial. Gregory v. Gregory, 102 Cal. 50; 36 Pac. 364. There is no ground for a new trial where the judgment is wholly upon stipulated facts. Quist v. Sandman, 154 Cal. 748; 99 Pac. 204. Where every material issue of fact was decided in favor of the losing party, a new trial will not be granted (Sharp v. Bowie, 142 Cal. 462; 76 Pac. 62); nor where there was no issue of fact to be tried, and no trial. Fabretti v. Superior Court, 77 Cal. 305; 19 Pac. 481. A motion for a new trial is not a proper proceeding to review the action of the court in rendering judgment in a case where there has been no trial upon issues of fact: in such case there is no office to be subserved by a new trial, and there is nothing to be reviewed upon appeal from an order denying a new trial. Foley v. Foley, 120 Cal. 33; 65 Am. St. Rep. 147; 52 Pac. 122; Savings and Loan Society v. Meeks, 66 Cal. 371; 5 Pac. 624; Estate of Heldt, 98 Cal. 553; 33 Pac. 549. Where no issue as to damages is presented in an action for an injunction, a new trial cannot be granted to try the question of damages. Bigelow v. Los Angeles, 141 Cal. 503; 75 Pac. 111. Where no verdict was rendered by the jury for or against the defendant, no new trial can be had. Benjamin v. Stewart, 61 Cal. 605. A motion for a new trial is not directed at the judgment, but at the verdict or other decision of fact. Martin v. Matfield, 49 Cal. 42;

Boston Tunnel Co. v. McKenzie, 67 Cal. 485; 8 Pac. 22.

Objections by demurrer or motion. Objections to form of action or pleadings, either by demurrer or motion, or objection to evidence, or that the trial was by jury, or that the verdict did not cover the material issues and is therefore insufficient, cannot be made on motion for a new trial, but only on appeal from judgment. Morse v. Wilson, 138 Cal. 558; 71 Pac. 801; and see Riverside Water Co. v. Gage, 108 Cal. 240; 41 Pac. 299. The ruling on a demurrer may be reviewed on an appeal from the judgment, but not on an appeal from an order denying a new trial (Heilbron v. Centerville etc. Ditch Co., 76 Cal. 8; 17 Pac. 932; Bode v. Lee, 102 Cal. 583; 36 Pac. 936; Evans v. Paige, 102 Cal. 132; 36 Pac. 406); and where a demurrer to the complaint has been sustained, a motion for a new trial does not lie, the demurrer raising only a question of law. Jones v. Chalfant, 128 Cal. 334; 60 Pac. 852. The sufficiency of a complaint cannot be considered on an appeal from an order denying or granting a new trial. Hook v. Hall, 2 Cal. Unrep. 459; 6 Pac. 422; Brison v. Brison, 90 Cal. 323; 27 Pac. 186; Bode v. Lee, 102 Cal. 583; 36 Pac. 936; Rauer v. Fay, 128 Cal. 523; 61 Pac. 90; Reclamation District v. Thisby, 131 Cal. 572; 63 Pac. 918; Petaluma Paving Co. v. Singley, 136 Cal. 616; 69 Pac. 426; Lambert v. Marcuse, 137 Cal. 44; 69 Pac. 620; Kaiser v. Dalto, 140 Cal. 167; 73 Pac. 828; Swett v. Gray, 141 Cal. 63; 74 Pac. 439; Swift v. Occidental Mining etc. Co., 141 Cal. 161; 74 Pac. 700; Thompson v. Los Angeles, 125 Cal. 270; 57 Pac. 1015. The sufficiency of the complaint or the findings cannot be inquired into on an appeal from an order denying a new trial, but only the question whether the findings are supported by the evidence. Brison v. Brison, 90 Cal. 323; 27 Pac. 186; Thompson v. Los Angeles, 125 Cal. 270; 57 Pac. 1015; Rauer v. Fay, 128 Cal. 523; 61 Pac. 90; Reclamation District v. Thisby, 131 Cal. 572; 63 Pac. 918; Petaluma Paving Co. v. Singley, 136 Cal. 616; 69 Pac. 426; Kaiser v. Dalto, 140 Cal. 167; 73 Pac. 828; Swift v. Occidental Mining etc. Co., 141 Cal. 161; 74 Pac. 700; Burns v. Schoenfeld, 1 Cal. App. 121; 81 Pac. 713. There can be no new trial of a motion. Harper v. Hildreth, 99 Cal. 265; 33 Pac. 1103; Doyle v. Republic Life Ins. Co., 125 Cal. 15; 57 Pac. 667.

Conclusions of law. Conclusions of law drawn from facts cannot be reviewed on a motion for a new trial. Pacific Mut. Life Ins. Co. v. Fisher, 106 Cal. 224; 39 Pac. 758; and see Brison v. Brison, 90 Cal. 323; 27 Pac. 186.

Sufficiency of verdict. The sufficiency of a verdict to support a judgment, whether treated as a verdict or as a finding, cannot be considered on an appeal from an order denying a motion for a new trial. Morse v. Wilson, 138 Cal. 558; 71 Pac. 801.

Objection to judgment. A motion for a new trial is not necessary to review an objection to a judgment which appears on the face of the findings. California Nat. Bank v. Ginty, 108 Cal. 148; 41 Pac. 38. That an erroneous judgment drawn from findings of fact, which are not complained of, cannot be corrected by means of a motion for a new trial, conceded, but not decided. Knight v. Roche, 56 Cal. 15; Jenkins v. Frink, 30 Cal. 586; 89 Am. Dec. 134. Where a judgment is upon stipulated facts, an objection that the decision is against law is reviewable only upon appeal from the judgment. Quist v. Sandman, 154 Cal. 748; 99 Pac. 204. Errors apparent on the face of the judgment roll will not be reviewed on an appeal from an order denying a motion for new trial, but only on an appeal from the judgment (Estate of Westerfield, 96 Cal. 113; 30 Pac. 1104; and see Thompson v. Patterson, 54 Cal. 542); and will be considered, even if not named in the specification of errors in the statement. Heinlen v. Heilbron, 71 Cal. 557; 12 Pac. 673; and see Sharp v. Daugney, 33 Cal. 505; Shepard v. McNeil, 38 Cal. 72; Patterson v. Sharp, 41 Cal. 133. A motion may be made, in partition proceedings, for a new trial: if there is error in an interlocutory decree in partition, it must be corrected by motion for a new trial or by an appeal. Tormey v. Allen, 45 Cal. 119.

Failure to file findings. Failure to file findings within six months after the case had been submitted for decision and the court had ordered judgment cannot be reviewed on appeal from an order denying a new trial. Kepfler v. Kepfler, 134 Cal. 205; 66 Pac. 208; and see Brison v. Brison, 90 Cal. 323; 27 Pac. 186; Rauer v. Fay, 128 Cal. 523; 61 Pac. 90; Fogarty v. Fogarty, 129 Cal. 46; 61 Pac. 570; Owen v. Pomona Land etc. Co., 131 Cal. 530; 63 Pac. 850; 64 Pac. 253; Reclamation District v. Thisby, 131 Cal. 572; 63 Pac. 918.

Nature of actions or proceedings as affecting right to new trial. A bank against which a judgment is rendered, to force it into involuntary liquidation, under the Bank Commissioners' Act, has a right to move for a new trial. People v. Bank of San Luis Obispo, 152 Cal. 261; 92 Pac. 481. Reconsideration of disbarment proceedings in the appellate court cannot be had on motion for a new trial. In re Philbrook, 108 Cal. 14; 40 Pac. 106; Disbarment of Tyler, 71 Cal. 353; 12 Pac. 289; 13 Pac. 169; Grangers' Bank v. Superior Court, 101 Cal. 198; 35 Pac. 642. The provisions of the Practice Act, in relation to new trials, had no application to a motion to set aside the report of commissioners in proceedings

to condemn land. Central Pacific R. R. Co. v. Pearson, 35 Cal. 247.

Reversal of order denying a new trial, effect of. The reversal of an order denying a new trial, on the ground assigned, that the findings are not justified by the evidence, has the effect of awarding a new trial to the parties. Riley v. Loma Vista Ranch Co., 5 Cal. App. 25; 89 Pac. 849.

Evidence admissible at new trial. Where a new trial is awarded on appeal, the case is before the court below for trial de novo of all issues of fact, upon such proper amendments to the pleadings as the court may allow; and the parties have the right to introduce any and all competent evidence. Riley v. Loma Vista Ranch Co., 5 Cal. App. 25; 89 Pac. 849.

§ 657. When a new trial may be granted. The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

3. Accident or surprise, which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial;

5. Excessive damages, appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;

7. Error in law, occurring at the trial and excepted to by the party making the application.

How application to be made. Post, § 658.

Discretion. Court may grant new trial of its own motion. Post, § 662.

Verdict against law. See post, § 662.

Legislation § 657. Enacted March 11, **1872;** based on Practice Act, § 193 (New York Code, § 264), as amended by Stats. 1862, p. 38, which had, (1) in the introductory paragraph, the word "said" instead of "such"; (2) in subd. 2, had (a) the word "shall" before "have been," (b) the words "or questions" after "question," (c) the word "affidavits" instead of "affidavit," and (d) the words "or more" after "any one"; (3) in subd. 6, omitted the word "it" before "is against law," the last evidently an error, as the word "it" is in the original section of 1851.

Construction of section. This section applies to an action brought under the act of March 23, 1901, against the state, to recover a bounty. San Francisco Law etc. Co. v. State, 141 Cal. 354; 74 Pac. 1047.

In what classes of cases motion proper. A motion for a new trial is proper in proceedings for partial distribution. Estate of Sutro, 152 Cal. 249; 92 Pac. 486, 1027. A motion for a new trial of some probate proceedings will not lie, but there may be a new trial of certain issues joined in such proceedings. Shipman v. Unangst, 150 Cal. 425; 88 Pac. 1090; Carter v. Waste, 159 Cal. 23; 112 Pac. 727.

The decision, what is. The "decision" which may be vacated is that which is given on the original trial of the question of fact, and on which the judgment is to be entered. Brison v. Brison, 90 Cal. 323; 27 Pac. 186. Until the findings are signed and filed, there is no decision, and consequently nobody is "aggrieved"; so that a notice of motion for a new trial before the findings are signed is premature and ineffectual. Dominguez v. Mascotti, 74 Cal. 269; 15 Pac. 773; and see Mahoney v. Caperton, 15 Cal. 313; Bates v. Gage, 49 Cal. 126; Hinds v. Gage, 56 Cal. 486; Spottiswood v. Weir, 66 Cal. 525; 6 Pac. 381. The decision consists of findings of fact and conclusions of law, and may be set aside and a new trial granted for certain causes; hence, the judgment may be set aside. Sawyer v. Sargent, 65 Cal. 259; 3 Pac. 872. The decision of the court is found in its findings, and not in the giving of the judgment. Elizalde v. Murphy, 11

Cal. App. 32; 103 Pac. 904. Service of a copy of the findings and judgment upon the attorneys of the defeated party, after entry of the judgment, is a sufficient notice of the entry of judgment. Kelleher v. Creciat, 89 Cal. 38; 26 Pac. 619.

Aggrieved party, who is. A party having no interest in the proceeding is not an aggrieved party, and is not prejudiced by any ruling or judgment made in the cause. Blythe v. Ayres, 102 Cal. 254; 36 Pac. 522.

Nature of motion. A motion for a new trial is an application to have the verdict or decision set aside, and is not addressed to the judgment. Wittenbrock v. Bellmer, 62 Cal. 558. The motion for a new trial attacks the verdict, rather than the judgment; such motion may be made prior to the entry of judgment. Johnson v. Phenix Ins. Co., 152 Cal. 196; 92 Pac. 182.

Specification of grounds in motion. Where a party specifies the grounds upon which he intends to rely for a new trial, he will be considered as abandoning all other grounds not enumerated. Beans v. Emanuelli, 36 Cal. 117. A general order granting a new trial must be sustained, if good on any of the grounds upon which the motion was based. Smith v. Hyer, 11 Cal. App. 597; 105 Pac. 787. A party relying upon a failure to find upon material issues must make his motion for a new trial on the ground that the decision is "against law": no further specification is required. Knoch v. Haizlip, 163 Cal. 146; 124 Pac. 998.

Irregularity in proceedings of court. Any irregularity preventing a fair trial is ground for a new trial. Piercy v. Piercy, 149 Cal. 163; 86 Pac. 507. The language of this section is sufficiently broad to include any departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected, where such departure is not evidenced by a ruling or order that may be made the subject of an exception. Gay v. Torrance, 145 Cal. 144; 78 Pac. 540. This ground for a new trial is intended to refer to matters which an appellant cannot fully present by exception taken during the progress of the trial, and which must appear by affidavit. Woods v. Jensen, 130 Cal. 200; 62 Pac. 473. The appearance of a minor by guardian ad litem, without the authority of an order of court, is an irregularity which may be raised by motion for a new trial. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. The action of the court in interrupting counsel, and in an irregular way controlling the conduct of the case on the side of the defendant, and virtually threatening to prejudice his testimony, is an irregularity (Pratt v. Pratt, 141 Cal. 247; 74 Pac. 742), as is also personal misconduct of the judge, of such a nature as to make it apparent that a substantial right has been materially affected thereby (Gay v. Torrance, 145 Cal. 144; 78 Pac. 540); but improper questions asked by the court cannot be urged as a ground of "irregularity in the proceedings of the court." Woods v. Jensen, 130 Cal. 200; 62 Pac. 473. Language of the court, in ruling upon evidence, which language is proper and embodies a correct statement of the law, does not constitute misconduct on its part. Blacholder v. Guthrie, 17 Cal. App. 297; 119 Pac. 521. Where instructions, though correct, may have misled the jury, a new trial may be granted on that ground. Briggs v. Hall, 20 Cal. App. 372; 129 Pac. 288. A finding outside of the issues is not ground for a new trial. Power v. Fairbanks, 146 Cal. 611; 80 Pac. 1075. A judgment must be reversed, where there are no findings to support it. Riley v. Loma Vista Ranch Co., 5 Cal. App. 25; 89 Pac. 849. A judgment is unauthorized, where there are no findings, and there is no waiver of findings: it cannot be deemed supported by former findings set aside upon reversal. Riley v. Loma Vista Ranch Co., 5 Cal. App. 25; 89 Pac. 849. A failure to file findings for more than six months after judgment was ordered is not ground for a new trial. Kepfler v. Kepfler, 134 Cal. 205; 66 Pac. 208.

Abuse of discretion. Where the order granting a new trial is general, it will not be reversed, unless the order itself is an abuse of discretion (Von Schroeder v. Spreckels, 147 Cal. 186; 81 Pac. 515; and see Newell v. Desmond, 63 Cal. 242; Anderson v. Hinshaw, 110 Cal. 682; 43 Pac. 389); nor will an order refusing a new trial be reversed, where there is no abuse of discretion, although, if a new trial had been granted, it would not have been disapproved. Anderson v. Hinshaw, 110 Cal. 682; 43 Pac. 389. Where the court grants a new trial without any legal reasons, its discretion has been abused. Le Tourneux v. Gilliss, 1 Cal. App. 546; 82 Pac. 627.

Order of court, when not ground for. An order, not made in the presence of the jury, committing the defendant on a charge of subornation of perjury, is not ground for a new trial (Sheehan v. Hammond, 2 Cal. App. 371; 84 Pac. 340); nor is the granting of a motion to strike out parts or all of a pleading. Stockton Iron Works v. Walters, 18 Cal. App. 373; 123 Pac. 240.

Misconduct of jury. The granting of a new trial for misconduct of the jury, such as may be shown by affidavit, is wholly different and apart from the right given by the statute to grant relief on the ground of excessive damages: the former contemplates some overt act of impropriety, while an excessive verdict does not necessarily imply misconduct, but simply that the result has been induced, perhaps

unconsciously, through excited feelings or prejudice. Harrison v. Sutter Street Ry. Co., 116 Cal. 156; 47 Pac. 1019. The conduct of jurors in conversing with parties to the action, and in drinking and carousing with one of the prevailing parties, is misconduct entitling the losing party to a new trial, notwithstanding a counter-showing that the same conduct was indulged in by both parties, and that the verdict was uninfluenced by such misconduct. Wright v. Eastlick, 125 Cal. 517; 58 Pac. 87. Mere temporary separation of the jury is not sufficient ground on which to set aside a verdict, if the moving party is not prejudiced, nor his substantial rights materially affected (Estate of McKenna, 143 Cal. 580; 76 Pac. 461); nor is misconduct of a juror, of such a trifling nature that it could not, in its very nature, have been prejudicial to the moving party, sufficient. Siemsen v. Oakland etc. Ry., 134 Cal. 494; 66 Pac. 672. A new trial will not be granted on account of immaterial misconduct of the jury. Kimic v. San José etc. Ry. Co., 156 Cal. 379; 104 Pac. 986. It is not misconduct, in the jury-room, for the foreman to examine with a magnifying-glass a memorandum-book kept by the attorney for the proponent of a will, and to inform the jury what he observed in the use of the same. Estate of Thomas, 155 Cal. 488; 101 Pac. 798. In an action for personal injuries, received while ascending in an elevator, the expression of a desire, on the part of one of the jurors, to view the premises, is not such misconduct as to warrant the granting of a new trial. Judd v. Letts, 158 Cal. 359; 111 Pac. 12. In an action to recover damages for injuries to a leased building, the mere fact that the jury, on going to lunch, was casually led past such building, does not warrant a new trial on the ground that the jury had inspected the building without the consent of the defendant. Higgins v. Los Angeles Gas etc. Co., 159 Cal. 651; 34 L. R. A. (N. S.) 717; 115 Pac. 313. The mere fact that a juror, of his own motion, visited the scene of the accident, during the progress of the trial, which fact was known to the defendant prior to the verdict, cannot be relied upon by the defendant as a ground for a new trial. Zibbell v. Southern Pacific Co., 160 Cal. 237; 116 Pac. 513. The jury's disregard of an erroneous instruction is not ground for a new trial. Western Pacific Land Co. v. Wilson, 19 Cal. App. 338; 125 Pac. 1076.

Verdict determined by chance. Where the assent of some of the jurors was secured by drawing lots, the verdict is a chance verdict, and should be set aside (Levy v. Brannan, 39 Cal. 485); and also where the verdict was determined by the guess of heads or tails of a coin. Donner v. Palmer, 23 Cal. 40. "Chance" is hazard, risk, or the result or issue of uncertain and unknown conditions or forces: an average verdict, arrived at by dividing the sum of the various amounts which each juror believed proper, by the number of the jurors, under a prior agreement that such average verdict should be the verdict of the jury without further consultation, is a chance verdict, and should be set aside (Dixon v. Pluns, 98 Cal. 384; 35 Am. St. Rep. 180; 20 L. R. A. 698; 33 Pac. 268; Weinburg v. Somps, 4 Cal. Unrep. 10; 33 Pac. 341; and see Turner v. Tuolumne County Water Co., 25 Cal. 397; Boyce v. California Stage Co., 25 Cal. 460); but the verdict is not a chance verdict, where the jurors agreed to divide the aggregate amount by twelve, and where it was understood that they were not to be bound by the result, and after the amount was so ascertained the jurors unanimously agreed to adopt it as the sum to be returned. Hunt v. Elliott, 77 Cal. 588; 20 Pac. 132; McDonnell v. Pescadero etc. Stage Co., 120 Cal. 476; 52 Pac. 725; and see Turner v. Tuolumne County Water Co., 25 Cal. 397; Boyce v. California Stage Co., 25 Cal. 460.

Juror cannot impeach verdict, except when it results from chance. The affidavit of a juror cannot be received to impeach the verdict, except in the single case of a resort to the determination of chance (People v. Azoff, 105 Cal. 632; 39 Pac. 59; People v. Findley, 132 Cal. 301; 64 Pac. 472; Saltzman v. Sunset Telephone etc. Co., 125 Cal. 501; 58 Pac. 169; and see Turner v. Tuolumne County Water Co., 25 Cal. 397; Kimic v. San José etc. Ry. Co., 156 Cal. 379; 104 Pac. 986); and the fact that the affidavit is made by a dissenting juror does not change the rule. Saltzman v. Sunset Telephone etc. Co., 125 Cal. 501; 58 Pac. 169. An average verdict may be shown to be a chance verdict, by the affidavit of a juror. Weinburg v. Somps, 4 Cal. Unrep. 10; 33 Pac. 341; and see Dixon v. Pluns, 98 Cal. 384; 35 Am. St. Rep. 180; 20 L. R. A. 698; 33 Pac. 268. Misconduct by reading newspaper reports of the trial cannot be shown by the affidavit of a juror (People v. Azoff, 105 Cal. 632; 39 Pac. 59); nor can individual jurors impeach the verdict by showing that facts not in evidence were considered. Fredericks v. Judah, 73 Cal. 604; 15 Pac. 305; and see Polhemus v. Heiman, 50 Cal. 438. The affidavit of a third person, showing declarations or admissions of a juror, made at the close of the trial, and tending to impeach the verdict, cannot be received in evidence; and the rule is not different, whether the misconduct was before or during the retirement (Siemsen v. Oakland etc. Ry., 134 Cal. 494; 66 Pac. 672; Kimic v. San José etc. Ry. Co., 156 Cal. 379; 104 Pac. 986); nor can a verdict be impeached by statements of jurors regarding such misconduct. People v. Findley, 132 Cal. 301; 64 Pac. 472. Affidavits of jurors may be used to

disprove or explain alleged misconduct on their part, and such affidavits cannot be used, where the misconduct is admitted, to show that the verdict was not influenced thereby. Kimie v. San José etc. Ry. Co., 156 Cal. 379; 104 Pac. 986. Where the affidavit of a juror as to obtaining an average verdict is overcome by counter-affidavits of two other jurors, a new trial is properly refused (Hunt v. Elliott, 77 Cal. 588; 20 Pac. 132; and see Hoare v. Hindley, 49 Cal. 274); and an affidavit of one juror, showing that an average verdict was intended to control the jury, may be overcome by counter-affidavits of other jurors (McDonnell v. Pescadero etc. Stage Co., 120 Cal. 476; 52 Pac. 725); and an order granting a new trial on the ground that the verdict was a chance verdict will not be disturbed, though the affidavit of two non-concurring jurors that it was a chance verdict is contradicted by seven concurring jurors. King v. Elton, 2 Cal. App. 145; 83 Pac. 261. An affidavit by a juror, that the verdict was determined by chance, and that he was induced to assent thereto in that manner, is not conclusive upon the trial court; and where the court finds, upon conflicting evidence, that the verdict was not a chance verdict, its action will not be disturbed on appeal. Dixon v. Pluns, 101 Cal. 511; 35 Pac. 1030.

Accident or surprise. The "surprise" contemplated by this section and § 473, ante, is "some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own which ordinary prudence could not have guarded against." Porter v. Anderson, 14 Cal. App. 716; 113 Pac. 345; McGuire v. Drew, 83 Cal. 225; 23 Pac. 312. A party moving for a new trial on the ground of surprise must show not only "surprise," as that term is used in the statute, but must also show that injury resulted to him from the cause of such surprise. Brandt v. Krogh, 14 Cal. App. 39; 111 Pac. 275. Erroneous views of the law, or the advice of an attorney contrary to the ruling of the court, is not the surprise for which a new trial will be granted. Santa Cruz Rock Pavement Co. v. Bowie, 104 Cal. 286; 37 Pac. 934; Klockenbaum v. Pierson, 22 Cal. 160. Where a plaintiff has an erroneous view of the requisites of a sufficient complaint, the subsequent discovery, through a ruling of the court, of a correct view is not "surprise," upon which a motion for a new trial may be founded. Porter v. Anderson, 14 Cal. App. 716; 113 Pac. 345. Surprise at the ruling of the court, on the trial, as to the admission of testimony, or a mistake of law, by counsel, is not ground for a new trial. Fuller v. Hutchings, 10 Cal. 523; 70 Am. Dec. 746; Le Tourneux v. Gilliss, 1 Cal. App. 546; 82 Pac. 627; Porter v. Anderson, 14 Cal. App. 716; 113 Pac. 345. The commencement of an action is sufficient notice to the defendant of its nature; and where he has knowledge that certain evidence may be used by the plaintiff in establishing his case, and makes no motion for a continuance, nor expresses any surprise when such testimony is introduced, there is no surprise in a legal sense. Dewey v. Frank, 62 Cal. 343. An attorney is presumed to know the rules of the court in which he appears: his want of such knowledge does not authorize relief from a judgment taken against him on the ground of surprise. Brooks v. Johnson, 122 Cal. 569; 55 Pac. 423. If a party claiming to be surprised by the introduction of testimony fails to apply, at the trial, for a continuance of the cause, or to resort to other testimony, or to ask for any relief to which he may be entitled under the circumstances, his failure is attributable to his own fault: he should not wait to move for a new trial on the ground of surprise. Heath v. Scott, 65 Cal. 548; 4 Pac. 557; Schellhous v. Ball, 29 Cal. 605; Turner v. Morrison, 11 Cal. 21; Delmas v. Martin, 39 Cal. 555; Ferrer v. Home Mut. Ins. Co., 47 Cal. 416. The refusal of the cashier of a bank to testify in an action against the bank, on the ground that his evidence might tend to incriminate him, is not a ground for a new trial on the ground of surprise, where there was no attempt to compel an answer, and where the cashier's successor and several directors of the bank were also witnesses. Nicholson v. Randall Banking Co., 130 Cal. 533; 62 Pac. 930. Failure to introduce a deposition, under an erroneous assumption, induced by judge and opposing counsel, does not authorize a new trial on the ground of surprise (Le Tourneux v. Gilliss, 1 Cal. App. 546; 82 Pac. 627); nor does failure to use depositions, by the party taking them, and such party is not bound to offer them in evidence. Heath v. Scott, 65 Cal. 548; 4 Pac. 557. There is no surprise where the plaintiff and his counsel fail to acquaint themselves, before the end of the trial, with the terms of a lease, on which the action was based, which was in their possession, and produced in evidence by them. Borderre v. Den, 106 Cal. 594; 39 Pac. 946. Where one of the defendant's attorneys was present in court on the day the case was called for trial, and was informed that it would soon be called, and made no objection to its being disposed of at that time, and on the day of rendition of judgment requested the clerk not to have that fact published, there is no showing of accident or surprise. Preston v. Eureka etc. Stone Co., 54 Cal. 198. A judgment cannot be set aside, merely on the ground of surprise, or failure of an attorney to be present at the trial, unless there is a showing that a different result might have been reached. Brooks v. Johnson, 122 Cal. 569; 55 Pac. 423. An

affidavit of surprise, leading to the withholding of testimony, without any affidavit of the evidence which would have been introduced, or anything to make it appear that a different finding would have been made, is not a sufficient showing of legal surprise to justify a new trial. Cohen v. Alameda, 124 Cal. 504; 57 Pac. 377; Fisk v. Casey, 119 Cal. 643; 51 Pac. 1077.

Excusable neglect. Excusable neglect is not one of the grounds of a motion for a new trial (McGuire v. Drew, 83 Cal. 225; 23 Pac. 312); but where the neglect is the result of the wrongful procurement of the other party, the rule is otherwise. Piercy v. Piercy, 149 Cal. 163; 86 Pac. 507.

Failure to serve amended complaint. The omission to serve an amendment of a complaint is not ground for a new trial, where no prejudice or injury results to the defendant. Daly v. Ruddell, 137 Cal. 671; 70 Pac. 784.

Newly discovered evidence. The provision that newly discovered evidence shall be of a character materially affecting the substantial rights of the party implies that it shall be such as to render a different result probable on a new trial, and such is the established rule of the court; and the determination whether the newly discovered evidence would affect the result of a new trial is within the discretion of the trial judge, and will not be interfered with on appeal. Oberlander v. Fixen, 129 Cal. 690; 62 Pac. 254. Newly discovered evidence, rendering a different result certain or probable, justifies the granting of a new trial. Oberlander v. Fixen, 129 Cal. 690; 62 Pac. 254; Levitsky v. Johnson, 35 Cal. 41; Von Glahn v. Brennan, 81 Cal. 261; 22 Pac. 596. The matter of granting a new trial upon the ground of newly discovered evidence is with the trial court, which must say whether or not the proffered evidence, if introduced, would affect the decision of the court. Jones v. Lewis, 19 Cal. App. 575; 126 Pac. 853. The trial court must determine the effect of newly discovered evidence that is merely cumulative; if it would have changed the result in the first instance, a new trial should be granted. Smith v. Hyer, 11 Cal. App. 597; 105 Pac. 787. Merely cumulative evidence is not sufficient to justify the granting of a new trial on the ground of newly discovered evidence (Christensen v. McBride, 4 Cal. Unrep. 542; 36 Pac. 398; Shafer v. Willis, 124 Cal. 36; 56 Pac. 635; Galvin v. Palmer, 113 Cal. 46; 45 Pac. 172; Niosi v. Empire Steam Laundry, 117 Cal. 257; 49 Pac. 185; Kuhlman v. Burns, 117 Cal. 469; 49 Pac. 585; Chalmers v. Sheehy, 132 Cal. 459; 84 Am. St. Rep. 62; 64 Pac. 709; Wood v. Moulton, 146 Cal. 317; 80 Pac. 92; Patterson v. San Francisco etc. Ry. Co., 147 Cal. 178; 81 Pac. 531); nor when not so conclusive in its character as to raise a reasonable presumption that it would change the result (O'Rourke v. Vennekohl, 104 Cal. 254; 37 Pac. 930; Shafer v. Willis, 124 Cal. 36; 56 Pac. 635; Kuhlman v. Burns, 117 Cal. 469; 49 Pac. 585); and hence, where the new evidence is that of but one more witness to an accident, the discretion of the trial court will not be disturbed on appeal. O'Rourke v. Vennekohl, 104 Cal. 254; 37 Pac. 930. Where the newly discovered evidence bears only on the question of the relative degree of negligence of the two defendants in the case, a new trial is properly refused (Howland v. Oakland Consol. etc. Ry. Co., 110 Cal. 513; 42 Pac. 983); and also where the new evidence is designed merely to contradict a witness. Chalmers v. Sheehy, 132 Cal. 459; 84 Am. St. Rep. 62; 64 Pac. 709; Wood v. Moulton, 146 Cal. 317; 80 Pac. 92; People v. Anthony, 56 Cal. 397; Brandt v. Krogh, 14 Cal. App. 39; 111 Pac. 275. Newly discovered evidence, which, if true, would contradict the averments of the complaint, and tend to show that the plaintiff was mistaken in his rights when the action was commenced, is not ground for a new trial. Bates v. Bates, 71 Cal. 307; 12 Pac. 223. Newly discovered evidence, relied on to obtain a new trial, should be presented in affidavits: it has no place in a statement. Beans v. Emanuelli, 36 Cal. 117.

Diligence in discovery and production of evidence. To obtain a new trial on the ground of newly discovered evidence, the moving party must show that he has used due diligence (Broads v. Mead, 159 Cal. 765; Ann. Cas. 1912C, 1125; 116 Pac. 46; Rockwell v. Italian-Swiss Colony, 10 Cal. App. 633; 103 Pac. 162; Brandt v. Krogh, 14 Cal. App. 39; 111 Pac. 275; Foley v. Northern California Power Co., 14 Cal. App. 401; 112 Pac. 467; Hawley v. Los Angeles Creamery Co., 16 Cal. App. 50; 116 Pac. 84; People v. Maruyama, 19 Cal. App. 290; 125 Pac. 924); and it must be shown that the proposed evidence was not known to him at the time of the trial; or, if not then known, could not with reasonable diligence have been discovered and produced at the trial. Olaine v. McGraw, 164 Cal. 424; 129 Pac. 460. The moving party must make a clear case, showing due diligence on his part, and the truth and materiality of the evidence (Tibbet v. Tom Sue, 125 Cal. 544; 58 Pac. 160); and where the newly discovered evidence is not of such a character as to put the moving party on inquiry, reasonable diligence is shown (Oberlander v. Fixen, 129 Cal. 690; 62 Pac. 254; Heintz v. Cooper, 104 Cal. 669; 38 Pac. 511); and where it is of such a character that it might have remained undiscovered even after the greatest diligence of the moving party, though known by the opposing party, or suppressed by

him, and would be likely to change the result, a new trial should be granted. Blewett v. Miller, 131 Cal. 149; 63 Pac. 157. "Diligence" is a relative term, incapable of exact definition, and depends, essentially, upon the particular circumstances of each case; and the absence of a showing of diligence must be very marked, to justify an interference with the exercise of discretion of the trial court (Heintz v. Cooper, 104 Cal. 668; 38 Pac. 511); hence, the question whether the evidence could, with reasonable diligence, have been discovered and produced at the trial, is for the trial judge, and his determination is conclusive on appeal, unless for abuse of discretion (Oberlander v. Fixen, 129 Cal. 690; 62 Pac. 254); and the action of the trial court will not be disturbed, except upon a clear showing of an abuse of discretion. Rockwell v. Italian-Swiss Colony, 10 Cal. App. 633; 103 Pac. 162; Smith v. Hyer, 11 Cal. App. 597; 105 Pac. 787. Evidence cannot be deemed newly discovered, where there was ample time, before trial, within which to ascertain the facts. Gallatin v. Corning Irrigation Co., 163 Cal. 405; Ann. Cas. 1914A, 74; 126 Pac. 864. Where the evidence was in the possession of the moving party while the case was pending, and he did not avail himself of it, a new trial on the ground of newly discovered evidence is properly denied (Sonoma County v. Stofen, 125 Cal. 32; 57 Pac. 681); and also where the president of the appellant corporation, who was present during most of the trial, and knew of the importance of his testimony and failed to give it. Hawley v. Los Angeles Creamery Co., 16 Cal. App. 50; 116 Pac. 84. Where the moving party must have known, from the testimony of the opposite party, of the existence of the evidence, and no application was made for time to procure the attendance of the witnesses, and no subpœnas were issued or other attempt made to procure their attendance, further than to send a messenger to one, who was found to be temporarily away from home, there is no showing of reasonable diligence (Weinburg v. Somps, 4 Cal. Unrep. 10; 33 Pac. 341); nor where the moving party failed to notify or subpœna a necessary witness, and asked for and was granted a continuance until the next day, when the witness was expected to but did not return, and the trial proceeded and judgment was rendered without his testimony (Butler v. Estrella etc. Vineyard Co., 124 Cal. 239; 56 Pac. 1040); nor where the evidence might have been procured at the trial by the use of reasonable diligence, and the moving party must have been fully advised as to its materiality and bearing on the case. Galvin v. Palmer, 113 Cal. 46; 45 Pac. 172. Where the moving party was notified by the testimony of the opposite party that the new witnesses knew the truth of the matter, and that they would contradict him if his testimony was false, the fact that he did not know what the witnesses would testify is no excuse for failure to procure their testimony at the trial (Weinburg v. Somps, 4 Cal. Unrep. 10; 33 Pac. 341); and where he had knowledge of the materiality of the testimony of the witness before the trial, and took steps to find him and procure his attendance, but failed to move for a continuance, he must be held to have entered upon the trial at his peril. Scanlan v. San Francisco etc. Ry. Co., 128 Cal. 586; 61 Pac. 271; Berry v. Metzler, 7 Cal. 418. Newly discovered evidence, after defeat, is looked upon with suspicion, and the appellate court, in such case, is always reluctant to interfere with the ruling of the trial court, and will not do so, unless there has been a clear abuse of discretion. Harralson v. Barrett, 99 Cal. 607; 34 Pac. 342; O'Rourke v. Vennekohl, 104 Cal. 254; 37 Pac. 930; Heintz v. Cooper, 104 Cal. 668; 38 Pac. 511; Tibbet v. Tom Sue, 125 Cal. 544; 58 Pac. 160.

Excessive damages. A new trial will not be granted, unless the verdict is so excessive as to indicate that it is the result of passion or prejudice. Boyce v. California Stage Co., 25 Cal. 460; Lee v. Southern Pacific R. R. Co., 101 Cal. 118; 35 Pac. 572; Redfield v. Oakland Consol. Street Ry. Co., 110 Cal. 277; 42 Pac. 822, 1063; Sherwood v. Kyle, 125 Cal. 652; 58 Pac. 270. Whether the verdict is excessive is to be determined solely from a consideration of the evidence in the case, as to whether it will fairly sustain the conclusion of the jury. Harrison v. Sutter Street Ry. Co., 116 Cal. 156; 47 Pac. 1019; Doolin v. Omnibus Cable Co., 125 Cal. 141; 57 Pac. 774. An order granting a new trial on the ground that excessive damages were given under the influence of passion and prejudice, will not be interfered with, unless the discretion of the trial court was abused. Doolin v. Omnibus Cable Co., 125 Cal. 141; 57 Pac. 774; Sherwood v. Kyle, 125 Cal. 652; 58 Pac. 270; and see Ingraham v. Weidler, 139 Cal. 588; 73 Pac. 415; Davis v. Southern Pacific Co., 98 Cal. 13; 32 Pac. 646; Etchas v. Oreña, 121 Cal. 270; 53 Pac. 798. The judge of the trial court is in a much better position than the appellate court to say whether a verdict is or could have been inspired by or tainted with passion or prejudice. James v. Oakland Traction Co., 10 Cal. App. 785; 103 Pac. 1082. In cases of damages for personal injuries, the verdict of the jury will not be disturbed, where the appellate court cannot say that the verdict is so disproportionate to the injury proved that it cannot be the result of the cool and dispassionate discretion of the jury. Gomez v. Scanlan, 155 Cal. 528; 102 Pac. 12; Scally v. W. T. Garratt & Co., 11 Cal. App.

138; 104 Pac. 325. A verdict for twenty-five thousand dollars, set aside; brakeman; loss of one leg (Lee v. Southern Pacific R. R. Co., 101 Cal. 118; 35 Pac. 572); eight thousand dollars, set aside; man of about seventy years; injuries resulting in death (Harrison v. Sutter Street Ry. Co., 116 Cal. 158; 47 Pac. 1019); twenty thousand dollars, reduced to five thousand; woman; concussion of spine and other injuries, physical wreck, mind impaired (Doolin v. Omnibus Cable Co., 125 Cal. 141; 57 Pac. 774); fourteen thousand dollars, affirmed; death of wife and mother; action by husband and minor children (Redfield v. Oakland Consol. Street Ry. Co., 110 Cal. 277; 42 Pac. 822, 1063); five thousand dollars, affirmed; death of father; action by orphan girl (Bowen v. Sierra Lumber Co., 3 Cal. App. 312; 84 Pac. 1010); fifteen thousand dollars, affirmed; woman; permanent injuries, rendering her unfit to labor (Morgan v. Southern Pacific Co., 95 Cal. 501; 30 Pac. 601); fifteen thousand dollars, affirmed; girl of thirteen years; permanently disfigured and crippled; injuries inflicted by being hurled from street-car (James v. Oakland Traction Co., 10 Cal. App. 785; 103 Pac. 1082); seventy thousand dollars, affirmed; stock-breeder; loss of both arms and one leg; injuries inflicted by switch-engine (Zibbell v. Southern Pacific Co., 160 Cal. 237; 116 Pac. 513); sixteen thousand five hundred dollars, affirmed; laborer; right shoulder and arm permanently injured (Boyce v. California Stage Co., 25 Cal. 460); seven thousand five hundred dollars, affirmed; boy under twelve years; improperly employed around dangerous machinery; permanent injury to hand and arm (Scally v. W. T. Garratt & Co., 11 Cal. App. 138; 104 Pac. 325); four thousand one hundred dollars, affirmed; boy of nineteen years; permanent injury to knee, received in collision (Kimball v. Northern Electric Co., 159 Cal. 225; 111 Pac. 156); two thousand dollars, affirmed; married woman; false imprisonment by constable upon pretended charge of grand larceny (Gomez v. Scanlan, 155 Cal. 528; 102 Pac. 12); three thousand five hundred dollars, affirmed; injuries to plaintiff's leasehold estate from overflow of land, caused by moving an immense timber jam in stream above plaintiff's property (Sacchi v. Bayside Lumber Co., 13 Cal. App. 72; 108 Pac. 885); eight hundred dollars, affirmed; damages caused by depriving an abutting land-owner of access over a street to and from his premises (Coates v. Atchison etc. Ry. Co., 1 Cal. App. 441; 82 Pac. 640); five hundred dollars, affirmed; damages for the wrongful taking, under attachment, of property valued at five hundred and sixty dollars. Ingraham v. Weidler, 139 Cal. 588; 73 Pac. 415. On a motion for a new trial, the court may, when the judgment is excessive, make a conditional order denying the motion, if the prevailing party consents to remit the excess, and granting it in the absence of such consent. Bentley v. Hurlburt, 153 Cal. 796; 96 Pac. 890.

Insufficient damages. A verdict for insufficient damages, under the influence of passion or prejudice, is not ground for a new trial (Benjamin v. Stewart, 61 Cal. 605); nor will the verdict for damages be disturbed, where the court deemed it wholly inadequate in amount, and ordered a new trial. Hearne v. De Young, 132 Cal. 357; 64 Pac. 576.

Jury's disregard of evidence and instructions. Plain disregard, by the jury, of the evidence in the case, and of the instructions of the court, so as to satisfy the court that the verdict was rendered under the influence of passion and prejudice, and a misapprehension of such instruction, will warrant the granting of a new trial. Anglo-Nevada Assurance Corp. v. Ross, 123 Cal. 520; 56 Pac. 335.

Insufficiency of evidence. It is the duty of the trial court to grant a new trial whenever, in its opinion, the evidence upon which the former decision was based was insufficient to justify that decision. Pollitz v. Wickersham, 150 Cal. 238; 88 Pac. 911; Hughes Bros. v. Rawhide Gold Min. Co., 16 Cal. App. 293; 116 Pac. 969; Briggs v. Hall, 20 Cal. App. 372; 129 Pac. 288. When a verdict is not supported by the evidence, an appellate court will remand the cause for a new trial. McMahon v. Hetch-Hetchy etc. Ry. Co., 2 Cal. App. 400; 84 Pac. 350. A motion for a new trial cannot be based on the ground of the insufficiency of the evidence to justify the judgment, nor on the ground that the judgment is against law: the motion, under the sixth subdivision of this section, should be directed to the "decision," and not the judgment. Boston Tunnel Co. v. McKenzie, 67 Cal. 485; 8 Pac. 22; Elizalde v. Murphy, 11 Cal. App. 32; 103 Pac. 904; Martin v. Matfield, 49 Cal. 42; Sawyer v. Sargent, 65 Cal. 259; 3 Pac. 872. Insufficiency of the evidence to justify a verdict or other decision, is a ground for a new trial, distinct from that of damages given under the influence of passion or prejudice; and the court may grant a new trial, where the evidence is insufficient to justify the verdict, without regard to whether the verdict was the result of passion or prejudice. Swett v. Gray, 141 Cal. 63; 74 Pac. 439. To say that excessive damages were given under the influence of passion or prejudice, is but to say that the evidence does not justify the verdict. Graybill v. De Young, 140 Cal. 323; 73 Pac. 1067; Harrison v. Sutter Street Ry. Co., 116 Cal. 156; 47 Pac. 1019; Doolin v. Omnibus Cable Co., 125 Cal. 141; 57 Pac. 774. Where the verdict is unsupported by the evidence and contrary to law, an order denying a new trial will be

reversed. Koebig v. Southern Pacific Co., 108 Cal. 235; 41 Pac. 469. Where the ultimate facts to be deduced from the evidence depend largely and essentially upon inferences not in themselves obvious or certain, an order granting a new trial will not be disturbed on appeal. Cauhape v. Security Sav. Bank, 118 Cal. 82; 50 Pac. 310. The granting of a new trial for want of evidence to support the verdict is usually a matter almost entirely within the discretion of the trial court. Estate of Everts, 163 Cal. 449; 125 Pac. 1058. The duty of the judge to grant a motion for a new trial when the evidence is insufficient to support the decision, is the same, whether he tried the case originally or not. Jones v. Sanders, 103 Cal. 678; 37 Pac. 649; Garton v. Stern, 121 Cal. 347; 53 Pac. 904. The sole remedy, in the trial court, of a party aggrieved by any finding of fact is a motion for a new trial. Dahlberg v. Girsch, 157 Cal. 324; 107 Pac. 616. Where the order granting a new trial is general in its terms, and one of the grounds of the motion is insufficiency of the evidence, it must be presumed upon appeal that that was one of the grounds on which the motion was granted. Pollitz v. Wickersham, 150 Cal. 238; 88 Pac. 911; Hughes Bros. v. Rawhide Gold Mining Co., 16 Cal. App. 293; 116 Pac. 969.

Conflicting evidence. Where the evidence is conflicting, the action of the court in granting a new trial will not be reviewed on appeal, except for manifest abuse of discretion. Domico v. Casassa, 101 Cal. 411; 35 Pac. 1024; Lyon v. Aronson, 140 Cal. 365; 73 Pac. 1063; Houghton v. Market Street Ry. Co., 1 Cal. App. 576; 82 Pac. 972; Martin v. Markarian, 1 Cal. App. 687; 82 Pac. 1072; Frutig v. Trafton, 2 Cal. App. 47; 83 Pac. 70. Where a finding is in direct conflict with the evidence and with an admission of the defendant, it is within the discretion of the court to grant a new trial, if the defendant will not consent to the correction of the finding. Eaton v. Jones, 107 Cal. 487; 40 Pac. 798. The trial judge is not bound by the verdict of the jury, where there is a conflict in the evidence; but it is his duty, in such case, to grant a new trial, where the verdict is against the weight of the evidence. Green v. Soule, 145 Cal. 96; 78 Pac. 337; Fowden v. Pacific Coast S. S. Co., 149 Cal. 151; 86 Pac. 178; Pollitz v. Wickersham, 150 Cal. 238; 88 Pac. 911; Witter v. Redwine, 14 Cal. App. 393; 112 Pac. 311; Walker v. Beaumont Land etc. Co., 15 Cal. App. 726; 115 Pac. 766; McCarthy v. Morris, 17 Cal. App. 723; 121 Pac. 696; Briggs v. Hall, 20 Cal. App. 372; 129 Pac. 288. The jurisdiction of the court to grant a new trial, notwithstanding a conflict in the evidence, where it is fully convinced that the verdict is wrong, is not destroyed by the fact that the jury were allowed to visit the premises to enable them to understand the evidence. McQueen v. Mechanics' Institute, 107 Cal. 163; 40 Pac. 114.

Weight and preponderance of evidence. It is the duty of the court to grant a new trial if, in its opinion, the weight or preponderance of the evidence is opposed to the findings. Conwell v. Varain, 20 Cal. App. 521; 130 Pac. 23. The trial court may grant a new trial when the verdict is against the preponderance of the evidence. Fowden v. Pacific Coast S. S. Co., 149 Cal. 151; 86 Pac. 178.

Decision against law. The phrase, "or that it is against law," in the sixth subdivision of this section, is not clear or unambiguous; but, read in connection with § 656, ante, it constitutes a reason for the re-examination of an issue of fact. Kaiser v. Dalto, 140 Cal. 167; 73 Pac. 828. That phrase has no application to cases falling within any of the other subdivisions. Brumagim v. Bradshaw, 39 Cal. 24, 35; and see People v. Amer, 151 Cal. 303; 90 Pac. 698. The terms "verdict" and "decision," also in the sixth subdivision, are appositional: what is predicated of one is predicated also of the other; and an erroneous conclusion of law, drawn from a finding of fact, is a decision against law, for which a new trial should be granted. Simmons v. Hamilton, 56 Cal. 493. A motion for a new trial on the ground that the decision is against law, is or is not permissible, according as a new trial is or is not an effective means of correcting error in the decision. Estate of Doyle, 73 Cal. 564; 15 Pac. 125; Swift v. Occidental Mining etc. Co., 141 Cal. 161; 74 Pac. 700; Quist v. Sandman, 154 Cal. 748; 99 Pac. 204. A verdict or other decision of fact against law is ground for granting a new trial. Martin v. Matfield, 49 Cal. 42. A failure to find upon all the material issues warrants a new trial, on the ground that the "decision is against law." Butler v. Agnew, 9 Cal. App. 327; 99 Pac. 395; Elizalde v. Murphy, 11 Cal. App. 32; 103 Pac. 904; Cargnani v. Cargnani, 16 Cal. App. 96; 116 Pac. 306; Knoch v. Haizlip, 163 Cal. 146; 124 Pac. 998. Where there is a failure to find on a material issue, the decision is against law, and it may be reviewed on appeal from an order granting or refusing a new trial. Adams v. Helbing, 107 Cal. 298; 40 Pac. 422; and see Knight v. Roche, 56 Cal. 15; Brown v. Burbank, 59 Cal. 535; Soto v. Irvine, 60 Cal. 436; Cummings v. Conlon, 66 Cal. 403; 5 Pac. 796, 903; Millard v. Supreme Council, 3 Cal. Unrep. 96; 21 Pac. 825; Langan v. Langan, 89 Cal. 186; 26 Pac. 761; Nuttall v. Lovejoy, 90 Cal. 163; 27 Pac. 69; Brison v. Brison, 90 Cal. 323; 27 Pac. 186; Haight v. Tryon, 112 Cal. 4; 44 Pac. 318; Polk v. Boggs, 122 Cal. 114; 54 Pac. 536; Kaiser v. Dalto, 140 Cal. 167; 73 Pac.

828; Swift v. Occidental Mining etc. Co., 141 Cal. 161; 74 Pac. 700; Knoch v. Haizlip, 163 Cal. 146; 124 Pac. 998. In such case there has been a mistrial, and the decision is to be considered as against law; but this rule applies only where the issue upon which there is no finding is material. Brison v. Brison, 90 Cal. 323; 27 Pac. 186; and see McCourtney v. Fortune, 57 Cal. 617. The failure to find on an immaterial issue, or on an issue not made, is not ground for a new trial. Pinheiro v. Bettencourt, 17 Cal. App. 111; 118 Pac. 941. Where the complaint sets forth two or more grounds for relief, either of which is sufficient to support a judgment, a finding on one of such issues is sufficient, and a failure to find on the other does not constitute a mistrial, nor render the decision against law. Adams v. Helbing, 107 Cal. 298; 40 Pac. 422. That the court erroneously applied the law to the facts, or drew the wrong conclusion of law from the facts found, is not ground for granting a new trial (Estate of Doyle, 73 Cal. 564; 15 Pac. 125; Brison v. Brison, 90 Cal. 323; 27 Pac. 186; Pierce v. Willis, 103 Cal. 91; 36 Pac. 1080; Swift v. Occidental Mining etc. Co., 141 Cal. 161; 74 Pac. 700; Quist v. Sandman, 154 Cal. 748; 99 Pac. 204); nor can a new trial be granted where the conclusion of law is logically drawn from the facts found; and the decision is not contrary to law. Heath v. Scott, 65 Cal. 548; 3 Pac. 557. A decision is not against law, merely because the findings do not support the legal conclusions drawn from them and the judgment based thereon. Estate of Keating, 162 Cal. 406; 122 Pac. 1079. That the judgment is against law is not a statutory cause for a motion for a new trial: the motion should be directed at the decision. Sawyer v. Sargent, 65 Cal. 259; 3 Pac. 872. An objection that the finding does not sustain the decision, that the complaint does not state a cause of action, and that the law is unconstitutional, cannot be considered on a motion for a new trial on the ground that the decision is against law. Petaluma Paving Co. v. Singley, 136 Cal. 616; 69 Pac. 426. A verdict in disobedience to the instructions of the court, on a point of law, is a verdict against law, and should be set aside, even though the instruction itself is erroneous in point of law. Emerson v. Santa Clara County, 40 Cal. 543. The grounds for a new trial all refer to the errors in determining any issue of fact, or affecting the determination of any question of fact: if there has been no such error, there is no ground for a new trial. Estate of Keating, 162 Cal. 406; 122 Pac. 1079.

Errors of law. The remedy to correct an error of law made at the trial is by motion for a new trial. Forrester v. Lawler, 14 Cal. App. 171; 111 Pac. 284. A party against whom judgment is rendered is not entitled to a new trial because of an error in the admission of testimony offered by himself (Laver v. Hotaling, 115 Cal. 613; 47 Pac. 593); neither is an error in admitting immaterial evidence of enough importance to warrant a new trial. Brownlee v. Reiner, 147 Cal. 641; 82 Pac. 324. An error in a ruling on defendant's motion for a nonsuit, with the exception thereto, may be set forth in a bill of exceptions or in a statement on motion for a new trial, and he is entitled to have it reviewed on motion for a new trial as an error of law occurring at the trial; and whether the court grants or refuses a new trial, its action may be reviewed on appeal. Alpers v. Hunt, 86 Cal. 78; 21 Am. St. Rep. 17; 9 L. R. A. 483; 24 Pac. 846; and see Spanagel v. Dellinger, 38 Cal. 278; People v. Turner, 39 Cal. 370; Mason v. Austin, 46 Cal. 385; Jacks v. Buell, 47 Cal. 162; Onderdonk v. San Francisco, 75 Cal. 534; 17 Pac. 678; Wheeler v. Kassabaum, 76 Cal. 90; 18 Pac. 119. In these cases it was held that the sufficiency of the complaint could not be considered on appeal from an order granting a new trial; the distinction being, that, by moving for a nonsuit, an exception to the sufficiency of the complaint could be reviewed on a motion for a new trial. Where the object of the action is to determine a permanent right, and, through error, the plaintiff is deprived of the proper judgment, the fact that he can recover only nominal damages is no reason for denying a new trial. Arkley v. Union Sugar Co., 147 Cal. 195; 81 Pac. 509; and see Hancock v. Hubbell, 71 Cal. 537; 12 Pac. 618; Kenyon v. Western Union Tel. Co., 100 Cal. 454; 35 Pac. 75.

Reasons for denying new trial. When a motion for a new trial is improper, an order denying it is properly made. Quist v. Sandman, 154 Cal. 748; 99 Pac. 204. A new trial will not be granted where it would necessarily result in the same decision and judgment. Bates v. Bates, 71 Cal. 307; 12 Pac. 223; People v. Hagar, 52 Cal. 171. A motion for a new trial is not a proper procedure, if there has been no trial by reason of the non-appearance of the plaintiffs at the trial. Estate of Dean, 149 Cal. 487; 87 Pac. 13.

Statements in newspapers. Statements in public journals, which do not appear to have been read by the jury before rendition of verdict, though severe on the defendant, are not ground for new trial. Sheehan v. Hammond, 2 Cal. App. 371; 84 Pac. 340.

Agreed facts. There is no room for demanding a new trial where the facts have been expressly agreed upon, as there is no issue of fact; and the motion will not lie

on the ground that the decision is against law, as the ground is reviewable only upon appeal from the judgment (Quist v. Sandman, 154 Cal. 748; 99 Pac. 204); but the trial court has jurisdiction to entertain a motion for the new trial of a case that was tried on an agreed statement of facts and a stipulation waiving findings; and the supreme court has likewise jurisdiction of an appeal from an order denying such motion; should it appear that the appeal is frivolous, it will be determined on the hearing thereof. Quist v. Michael, 153 Cal. 365; 95 Pac. 658.

Discretion of court. The discretion of the court in granting or denying a new trial will not be interfered with on appeal, except for manifest abuse. Pico v. Cohn, 67 Cal. 258; 7 Pac. 680; Warner v. F. Thomas Parisian Dyeing etc. Works, 105 Cal. 409; 38 Pac. 960; Estate of Martin, 113 Cal. 479; 45 Pac. 813; Anglo-Nevada Assurance Corp. v. Ross, 123 Cal. 520; 56 Pac. 335; Cutten v. Pearsall, 146 Cal. 690; 81 Pac. 25; Baldwin v. Napa etc. Wine Co., 1 Cal. App. 215; 81 Pac. 1037; Houghton v. Market Street R. R. Co., 1 Cal. App. 576; 82 Pac. 972; Weisser v. Southern Pacific Co., 148 Cal. 426; 7 Ann. Cas. 636; 83 Pac. 439. Where every material fact is contradicted by counter-affidavits, the discretion of the court in refusing a new trial will not be interfered with on appeal. Shafer v. Willis, 124 Cal. 36; 56 Pac. 635; Doyle v. Sturla, 38 Cal. 456; Merk v. Gelzhaeuser, 50 Cal. 631; People v. Mesa, 93 Cal. 580; 29 Pac. 116. A succeeding judge stands in the place of his predecessor, and has all his rights and powers, and his discretion in granting a new trial in a case tried by his predecessor will not be interfered with, except when abused. Hausmann v. Sutter Street Ry. Co., 139 Cal. 174; 72 Pac. 905.

Restoration of records. Although a judgment roll is destroyed by fire while a motion for a new trial is pending, yet a proceeding for the restoration of the record may be maintained, notwithstanding the pendency of such motion. Foerst v. Kelso, 163 Cal. 436; 125 Pac. 1054.

New trial on one of several issues. Where there is more than one issue of fact in a case, and such issues are distinct and separable in their nature, the court may order a new trial of one issue and refuse it as to the others. Estate of Everts, 163 Cal. 449; 125 Pac. 1058. Where the court has erred in its judgment upon a special issue, but the error is not of sufficient importance to warrant a new trial of the whole case, a new trial will be limited to a supplemental finding and judgment upon that issue alone. Mayberry v. Whittier, 144 Cal. 322; 78 Pac. 16.

New trial as to one joint defendant. A new trial may be granted as to one joint defendant and denied as to the other. Fowden v. Pacific Coast S. S. Co., 149 Cal. 151; 86 Pac. 178.

Presumption in favor of order granting new trial. It is conclusively presumed in favor of an order granting a new trial, that it was, in part, based upon some ground upon which affidavits could be used, and that such were used, and were sufficient to justify the order. Thompson v. Wheeler, 5 Cal. App. 195; 89 Pac. 1065.

Appeal. It is only in rare instances, and upon very strong grounds, that the appellate court will set aside an order granting a new trial. Briggs v. Hall, 29 Cal. App. 372; 129 Pac. 288. Upon appeal from an order denying a new trial, the appellate court is limited, in its review, to the grounds upon which the motion for a new trial may be based; the sufficiency of the complaint, rulings upon demurrers, and the sufficiency of the findings to support the judgment cannot be considered on such an appeal. Great Western Gold Co. v. Chambers, 153 Cal. 307; 95 Pac. 151; Fagan v. Lentz, 156 Cal. 681; 20 Ann. Cas. 221; 105 Pac. 951. The overruling of a demurrer is not open to review upon an appeal from an order denying a motion for a new trial. Aston v. Aston, 14 Cal. App. 223; 111 Pac. 1035.

Admission of irrelevant or immaterial evidence as ground for new trial. See note 66 Am. Dec. 717.

Surprise as ground for granting new trial. See note 78 Am. Dec. 518.

Duty of court to set aside verdict as contrary to evidence. See notes 2 Ann. Cas. 762; Ann. Cas. 1912D, 1226.

Inconsistent testimony in another suit as ground for new trial. See note 42 L. R. A. 692.

Misconduct of attorneys in argument as ground for new trial. See notes 9 Am. St. Rep. 599; 100 Am. St. Rep. 689.

Conduct of counsel in getting inadmissible evidence before jury as ground for new trial. See notes 6 Ann. Cas. 224; 19 Ann. Cas. 296.

Misconduct of party subsequent to action as ground for new trial. See note 12 Ann. Cas. 958.

New trial for misconduct of jury as resting in discretion of trial court. See note Ann. Cas. 1912D, 1018.

Furnishing refreshment to juror by successful party as ground for new trial. See notes Ann. Cas. 1912B, 747; 19 L. R. A. (N. S.) 733.

Use of intoxicating liquor by jury as ground for new trial. See note Ann. Cas. 1912A, 1322.

Coercion of disagreeing jury as ground for new trial. See note 16 L. R. A. 643.

Communication by judge with jury not in open court as ground for new trial. See note 17 L. R. A. (N. S.) 609.

Necessity for new trial where verdict is found contrary to erroneous instruction. See note 14 Ann. Cas. 973.

Right to new trial where jury disregard erroneous instructions. See note 21 L. R. A. (N. S.) 852.

Inadequacy of damages in personal injury action as ground for setting aside verdict. See note 17 Ann. Cas. 1073.

Inadequacy of verdict for punitive damages only as ground for setting aside verdict. See note 20 Ann. Cas. 879.

Negligence or incompetence of attorney as ground for new trial. See note Ann. Cas. 1913D, 498.

Forgotten facts as newly discovered evidence warranting new trial. See note 17 Ann. Cas. 317.

Right to new trial on ground of newly discovered evidence where incompetency of witness has been removed since trial. See note 17 Ann. Cas. 1165.

Newly discovered evidence of contradictory statements made by witness as ground for new trial. See note Ann. Cas. 1912D, 856.

What is cumulative evidence within rule excluding it when offered as newly discovered evidence in support of motion for new trial. See note Ann. Cas. 1913D, 157.

Newly discovered cumulative evidence as ground for new trial. See note 14 L. R. A. 609.

Disqualification of juror as ground for new trial. See notes Ann. Cas. 1913A, 892; 18 L. R. A. 473.

Refusal to allow cross-examination on relevant matters covered by examination in chief as ground for new trial. See note 25 L. R. A. (N. S.) 683.

Imposition of costs as condition of granting new trial for insufficiency of evidence. See notes 7 Ann. Cas. 183; 20 Ann. Cas. 41.

CODE COMMISSIONERS' NOTE. 1. Cases under subdivision 1. Parker v. Shephard, 1 Cal. 132; Lawrence v. Collier, 1 Cal. 37; Sannickson v. Brown, 5 Cal. 57; Paige v. O'Neal, 12 Cal. 483; Benedict v. Cozzens, 4 Cal. 382; Thompson v. Paige, 16 Cal. 77; Thrall v. Smiley, 9 Cal. 538; Redman v. Gulnac, 5 Cal. 148; Smith v. Billett, 15 Cal. 26; Mowry v. Starbuck, 4 Cal. 274; Thornton v. Borland, 12 Cal. 439; Keller v. Franklin, 5 Cal. 432; Gillan v. Hutchinson, 16 Cal. 156; Robinson v. Smith, 14 Cal. 254; Pilot Rock Creek Canal Co. v. Chapman, 11 Cal. 162; Broadus v. Nelson, 16 Cal. 80; Calderwood v. Tevis, 23 Cal. 335; Brooks v. Crosby, 22 Cal. 42; People v. Boggs, 20 Cal. 432; People v. Symonds, 22 Cal. 353; Ford v. Thompson, 19 Cal. 118; Minturn v. Burr, 20 Cal. 48; Argenti v. San Francisco, 30 Cal. 458; People v. Williams, 24 Cal. 34; Wilcoxson v. Burton, 27 Cal. 237; 87 Am. Dec. 66; Rice v. Cunningham, 29 Cal. 492; People v. Hughes, 29 Cal. 257; Carpentier v. Small, 35 Cal. 346.

2. Cases under subdivision 2. Turner v. Tuolumne County Water Co., 25 Cal. 400; Donner v. Palmer, 23 Cal. 40; Taylor v. California Stage Co., 6 Cal. 228; Thrall v. Smiley, 9 Cal. 529; Wilson v. Berryman, 5 Cal. 44; 63 Am. Dec. 78; Boyce v. Stage Co., 25 Cal. 473; People v. Hughes, 29 Cal. 257.

3. Cases under subdivision 3. Casement v. Ringgold, 28 Cal. 335; Packer v. Heaton, 9 Cal. 571; Cook v. De la Guerra, 24 Cal. 237; Klockenbaum v. Pierson, 22 Cal. 160; Guy v. Hanly, 21 Cal. 397; Patterson v. Ely, 19 Cal. 28; Turner v. Morrison, 11 Cal. 21; Smith v. Richmond, 15 Cal. 501; Taylor v. California Stage Co., 6 Cal. 228; Rogers v. Huie, 1 Cal. 429; 54 Am. Dec. 300; Live Yankee Co. v. Oregon Co., 7 Cal. 40; Brooks v. Lyon, 3 Cal. 113; Howe v. Briggs, 17 Cal. 385; Eagan v. Delaney, 16 Cal. 85; Fuller v. Hutchings, 10 Cal. 523; 70 Am. Dec. 746; Howe v. Briggs, 17 Cal. 385; Nooney v. Mahoney, 30 Cal. 226; Brooks v. Douglass, 32 Cal. 208; Rodiguez v. Comstock, 24 Cal. 85; Schellhous v. Ball, 29 Cal. 605; People v. Jocelyn, 29 Cal. 562; Doyle v. Sturla, 38 Cal. 456.

4. Cases under subdivision 4. Spencer v. Doane, 23 Cal. 419; O'Brien v. Brady, 23 Cal. 243; Wright v. Carrillo, 22 Cal. 596; Aldrich v. Palmer, 24 Cal. 515; Taylor v. California Stage Co., 6 Cal. 228; Berry v. Metzler, 7 Cal. 418; Gaven v. Dopman, 5 Cal. 342; Klockenbaum v. Pierson, 22 Cal. 160; Hoyt v. Sanders, 4 Cal. 345; Rogers v. Haie, 1 Cal. 429; 54 Am. Dec. 300; Weimer v. Lowery, 11 Cal. 104; Baker v. Joseph, 16 Cal. 180; Jenny Lind Co. v. Bower, 11 Cal. 194; Live Yankee v. Oregon Co., 7 Cal. 42; Brooks v. Lyon, 3 Cal. 114; Burritt v. Gibson, 3 Cal. 399; Bartlett v. Hogden, 3 Cal. 57; Perry v. Cochran, 1 Cal. 180; Coghill v. Marks, 29 Cal. 673; Levitsky v. Johnson, 35 Cal. 41; Arnold v. Skaggs, 35 Cal. 684; Stoakes v. Monroe, 36 Cal. 383.

5. Cases under subdivision 5. Clark v. Huber, 20 Cal. 196; Heath v. Lent, 1 Cal. 410; Pleasants v. North Beach etc. R. R. Co., 34 Cal. 586; Potter v. Seale, 5 Cal. 410; Hall v. Bark Emily Banning, 33 Cal. 522; Payne v. Pacific Mail S. S. Co., 1 Cal. 33; Patterson v. Ely, 19 Cal. 28; Chapin v. Bourne, 8 Cal. 294; Palmer v. Reynolds, 3 Cal. 396; Pierce v. Payne, 14 Cal. 420; Weaver v. Page, 6 Cal. 685.

6. Cases under subdivision 6. Stevens v. Irwin, 15 Cal. 504; 76 Am. Dec. 500; Adams v. Pugh, 7 Cal. 150; Ritchie v. Bradshaw, 5 Cal. 228; Knowles v. Joost, 13 Cal. 620; Brown v. Smith, 10 Cal. 508; Gagliardo v. Hoberlin, 18 Cal. 394; Lewis v. Covillaud, 21 Cal. 178; Oullahan v. Starbuck, 21 Cal. 413; Tebbs v. Weatherwax, 23 Cal. 58; Preston v. Keys, 23 Cal. 193; Lubeck v. Bullock, 24 Cal. 338; Ellis v. Jeans, 26 Cal. 275; Wilcoxson v. Burton, 27 Cal. 232; 87 Am. Dec. 66; Wilkinson v. Parrott, 32 Cal. 102; Kimball v. Gearhart, 12 Cal. 27; Johnson v. Parks, 10 Cal. 446; Algier v. Maria, 14 Cal. 167; Johnson v. Pendleton, 1 Cal. 133; Scannell v. Strahle, 9 Cal. 177; Weddle v. Stark, 10 Cal. 301; Bensley v. Atwill, 12 Cal. 240; Ritter v. Stock, 12 Cal. 402; McGarrity v. Byington, 12 Cal. 432; Visher v. Webster, 13 Cal. 60; Doe v. Vallejo, 29 Cal. 386; Wilson v. Cross, 33 Cal. 60; Appeal of Piper, 32 Cal. 530; Appeal of Brooks, 32 Cal. 559; Kile v. Tubbs, 32 Cal. 333; Hill v. Smith, 32 Cal. 166; Bernal v. Gleim, 33 Cal. 669; Maine Boys Tunnel Co. v. Boston Tunnel Co., 37 Cal. 40; Phelps v. Union Copper Min. Co., 39 Cal. 407; Dickey v. Davis, 39 Cal. 565.

7. Cases under subdivision 7. Carpenter v. Norris, 20 Cal. 437; Zeigler v. Wells Fargo & Co., 28 Cal. 263; Kiler v. Kimbal, 10 Cal. 267; Clark v. Lockwood, 21 Cal. 220; Mills v. Barney, 22 Cal. 240; Hicks v. Whitesides, 23 Cal. 404; Yankee Jim's Union Co. v. Crary, 25 Cal. 507; 85 Am. Dec. 145; Janson v. Brooks, 29 Cal. 214; De Merle v. Mathews, 26 Cal. 467; Jones v. Tuolumne County Water Co., 25 Cal. 404; Haskell v. McHenry, 4 Cal. 411; Perlberg v. Gorham, 10 Cal. 125; Smith v. Harper, 5 Cal. 329; Rice v. Gashirie, 13 Cal. 53; Innis v. Steamer Senator, 1 Cal. 462; 54 Am. Dec. 305; San Francisco v. Clark, 1 Cal. 386; Carrington v. Pacific Mail S. S. Co., 1 Cal. 478; Yonge v. Pacific Mail S. S. Co., 1 Cal. 354; Dwinelle v. Henriquez, 1 Cal. 390; Darst v. Rush, 14 Cal. 83; McCloud v. O'Neall, 16 Cal. 392; Cravens v. Dewey, 13 Cal. 42; Coghill v. Boring, 15 Cal. 213; Santillan v. Moses, 1 Cal. 92; Wilkinson v. Parrott, 32 Cal. 102; Tompkins v. Mahoney, 32 Cal. 231; Cochran v. O'Keefe, 34 Cal. 554; Richardson v. Kier, 37 Cal. 263.

8. Cases in which new trials have been refused because the error was immaterial. Gaven v. Dopman, 5 Cal. 342; McKinney v. Smith, 21 Cal. 374; Janson v. Brooks, 29 Cal. 214; Kiler v. Kimbal, 10 Cal. 267; Yankee Jim's Union Water Co. v. Crary, 25 Cal. 507; 85 Am. Dec. 145; Clark v. Lockwood, 21 Cal. 220; Mills v. Barney, 22 Cal. 240; Hicks v. Whiteside, 23 Cal. 404; De Merle v. Mathews, 26 Cal. 467; Jones v. Block, 30 Cal. 227; Zeigler v. Wells Fargo & Co., 28 Cal. 263; Kile v. Tubbs, 32 Cal. 332; Carpenter v. Norris, 20 Cal. 437; James v. Williams, 31 Cal. 211; Rice v. Cunningham, 29 Cal. 492; Tohler v. Folsom, 1 Cal. 213; Sunol v. Hepburn, 1 Cal. 285; Smith v. Compton, 6 Cal. 26; Carpentier v. Gardiner, 29 Cal. 160; Tyler v. Green, 28 Cal. 406; 87 Am. Dec. 130; People v. Moore, 8 Cal. 94; Wilkinson v. Parrott, 32 Cal. 102; Tompkins v. Mahoney, 32 Cal. 231.

9. Equity cases. Same rules apply. Duff v. Fisher, 15 Cal. 375; Riddle v. Baker, 13 Cal. 295; Green v. Butler, 26 Cal. 599; Phelan v. Ruiz, 15 Cal. 90.

10. When equity will not interfere. Borland v. Thornton, 12 Cal. 441; Mastick v. Thorp, 29 Cal. 444; Collins v. Butler, 14 Cal. 226.

11. New trial properly granted, but wrong reason given by the judge. If the court makes an order granting a new trial, and order was correct, the appellate court will not set it aside because the reason assigned for it was wrong. Coghill & Co. v. Marka, 29 Cal. 673; Grant v. Moore, 29 Cal. 644; Bolton v. Stewart, 29 Cal. 615.

12. Discretion of the court. The motion is addressed to the sound discretion of the court. Peters v. Foss, 16 Cal. 357; Drake v. Palmer, 2 Cal. 181; Watson v. McClay, 4 Cal. 288; Haa-

tings v. Steamer Uncle Sam, 10 Cal. 341; Burnett v. Whitesides, 15 Cal. 36; Quinn v. Kenyon, 22 Cal. 82; O'Brien v. Brady, 23 Cal. 243; Weddle v. Stark, 10 Cal. 301; Lestrade v. Barth, 17 Cal. 285. The court may deny the motion for a new trial, even though both parties consent. Phelan v. Ruiz, 15 Cal. 90.

13. Terms may be imposed. Battelle v. Conner, 6 Cal. 140; Rice v. Gashirie, 13 Cal. 54; Benedict v. Cozzens, 4 Cal. 382; Tyson v. Wells, 1 Cal. 378; Chapin v. Bourne, 8 Cal. 296; Carpentier v. Gardiner, 29 Cal. 160.

14. Motion may be abandoned. Stoyell v. Cole, 19 Cal. 602.

15. Stipulation that motion may be denied. If the parties stipulate that the motion shall be denied, the stipulation concludes them. Brotherton v. Hart, 11 Cal. 405.

16. Appearance of attorney without authority. If an attorney not authorized to do so appears and conducts a trial, the remedy is by motion for a new trial. McKinley v. Tuttle, 34 Cal. 235.

17. County court may grant new trials. Dorsey v. Barry, 24 Cal. 455; Dickinson v. Van Horn, 9 Cal. 211.

18. Law of the case. If the appellate court consider and decide a point of law on a case on appeal, and reverse the judgment, and remand the cause for a new trial, the point so passed upon becomes the law of the case in all its future stages. Table Mountain Tunnel Co. v. Stranahan, 21 Cal. 548; Lucas v. San Francisco, 28 Cal. 591; Estate of Pacheco, 29 Cal. 224; Mulford v. Estudillo, 32 Cal. 131; Kile v. Tubbs, 32 Cal. 332; Argenti v. Sawyer, 32 Cal. 414; Hubbard v. Sullivan, 18 Cal. 508; Soule v. Ritter, 20 Cal. 522; Leese v. Clark, 20 Cal. 387; Heirs of Nieto v. Carpenter, 21 Cal. 455; Mitchell v. Davis, 23 Cal. 381; Moore v. Murdock, 26 Cal. 524.

19. Generally. If several defenses are pleaded, either of which would be good, and the verdict is for the defendants, and the court errs in its instructions to the jury as to one of the defenses, the judgment will be reversed, unless it appears that the verdict was rendered on one of the defenses in relation to which no error was committed. Wiseman v. McNulty, 25 Cal. 234. If a defense is of a nature requiring it to be specially pleaded, the omission to plead it is not cured by the introduction, without objection, of evidence in support of it, and the finding of fact in relation to it by the court. McComb v. Reed, 28 Cal. 281; 87 Am. Dec. 115; Smith v. Owens, 21 Cal. 11. If the jury, without instruction from the court, return a verdict for gold coin, though there was no evidence that either on or after striking a balance between the parties the defendant promised in writing to pay in gold coin, a new trial will be granted. Howard v. Roeben, 33 Cal. 399. If the merits of the case were not investigated in the lower courts, by reason of an uncertainty as to the proper mode of proceeding under the provisions of the Practice Act relating to interventions, the appellate court awarded a new trial, although the decision of the court below upon the main question involved was approved, and the only error disclosed might have been cured by direction to modify the judgment. Speyer v. Ihmels, 21 Cal. 280; 81 Am. Dec. 157. When the complaint, evidence admitted, the verdict, and judgment are in harmony, but the judgment is erroneous by reason of a wrong construction given to the description of land in a deed in evidence, the appellate court cannot modify the judgment, but must reverse it, and remand the cause for a new trial. Hicks v. Coleman, 25 Cal. 145; 85 Am. Dec. 103. Injury is presumed from illegal evidence admitted, and the prevailing party must rebut this presumption, or a new trial will be granted. Grimes v. Fall, 15 Cal. 63. New trials should be granted whenever justice requires it. Ross v. Austill, 2 Cal. 183; Reed v. Jourdin, 1 Cal. 102. On motion for a new trial, the court cannot reverse its first judgment and render another. Mitchell v. Hackett, 14 Cal. 661.

§ 658. Motion for new trial. Papers. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last section, it must be made upon affidavits; otherwise it must be made on the minutes of the court.

Mode of application for new trial.

1. Affidavits, on. Post, § 659, subd. 1.
2. Minutes of court, on. Post, § 659, subd. 4.
3. Bill of exceptions, on. Post, § 659, subd. 2.
4. Statement of case, on. Post, § 659, subd. 3.

Legislation § 658. 1. Enacted March 11, **1872**, and then read: "When the application is made for a cause mentioned in the fifth, sixth, and seventh subdivisions of the last section, it is made upon bills of exception on file; for any other cause it is made upon affidavit. If the application is made upon affidavits, the affidavits of the moving party must be filed with the clerk and served upon the adverse party, within twenty-five days after the verdict or decision is made. The adverse party may file counter affidavits within five days thereafter, and, upon leave of the court or judge, the moving party may within five days file affidavits in rebuttal."

2. Amended by Code Amdts. **1873-74**, p. 314 (compare changes therefrom in 1915).

3. Amendment by Stats. **1901**, p. 149; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1915**, p. 201, substituting "otherwise it must be made on the minutes of the court" for "for any other cause it may be made, at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case, prepared as hereinafter provided."

Amendments, in 1915, of sections relating to new trials and appeals. The Commonwealth Club of California, after the close of the session of the legislature in 1915, issued a pamphlet prepared by the bar associations of the state, making specific reference to some of the matters affected in making the changes to eliminate the delays in appeals and motions for a new trial. It is said: "§ 658 is amended to require motions for a new trial to be made on the minutes of the court, excepting in the cases mentioned in the first four subdivisions of § 657; . . . § 659 is amended to compel the giving of notice of intention to move for a new trial within ten days; to prohibit the extension of this time; and to limit the time within which affidavits may be prepared under the first four subdivisions of § 657. . . . § 660 is amended to require the motion for a new trial to be made orally, while the matters are fresh in the minds of court and counsel, and to allow the widest latitude in referring to all proceedings on the trial without any bill of exceptions, statement, or specifications; . . . also makes it mandatory on the court to dispose of the motion within three months. § 963 is amended by striking out the provisions relating to appeals from orders granting or refusing a new trial. The amendment does, however, allow an appeal from an order granting a new trial in an action or proceeding tried by a jury when such trial by jury is a matter of right, . . . [and] from an interlocutory decree of divorce: this provision is taken from the Civil Code. . . . The time for taking such appeal is, however, fixed at sixty days. . . . § 939 is amended to reduce to uniformity the time to appeal in all cases from judgments or orders of the superior court. . . . It is, however, provided that the time to appeal shall not expire, if proceedings on motion for new trial are pending, until thirty days after the de-

termination in the trial court of such motion for a new trial. . . . § 641b, providing for appeals under the alternative method, is amended to limit the time for appeals to sixty days, thus making it conform to the provisions of § 939 as amended. While, with the exception of the single case of the appeal from the order granting a new trial in jury cases, separate appeals from orders granting or denying new trials will no longer be permitted, a litigant is not, . . . denied the right to review any order on motion for a new trial. By an amendment to § 956 it is provided that on appeal from a judgment any order on motion for new trial may be reviewed. For the purpose of allowing an appellant to present all matters on a single record, § 650, relating to bills of exceptions, is amended, extending the time within which to prepare and serve a copy of the bill to ten days after notice of decision denying the motion for a new trial or other determination thereof. It is expressly provided . . . that such bills may contain all matters reviewable on the same appeal, whether . . . at the trial or on the motion for a new trial. § 953a is also amended to allow an appellant ten days after the entry of the order denying the motion for a new trial or other determination thereof within which to prepare his record under the alternative system; . . . to make it clear that all appeals may be presented by this method, and that all matters reviewable on appeal from a judgment may be presented on the same record. This, under the terms of § 956, includes orders on motion for a new trial. . . . The amendment above referred to, § 659, has the effect of abolishing the statement of the case."

Affidavit proper when. An affidavit, alleging facts showing irregularity in the proceedings of the court, made solely on information and belief, is unavailing for any purpose. Gay v. Torrance, 145 Cal. 144; 78 Pac. 540. A motion for a new trial, on the grounds of irregularity in the proceedings of the jury, and misconduct, must be supported by affidavits setting forth the facts constituting the irregularity or the misconduct (Benjamin v. Stewart, 61 Cal. 605); and a motion for a new trial on the ground of accident or surprise must be made upon affidavits. Melde v. Reynolds, 120 Cal. 234; 52 Pac. 491. Newly discovered evidence, relied on to obtain a new trial, has no place in a statement: it should be presented in affidavits. Beans v. Emanuelli, 36 Cal. 117. The moving party is entitled to have such competent affidavits as are material to a motion, and are seasonably served and filed, considered on the hearing of the motion, and also reply affidavits to counter-affidavits; but an affidavit, made on information and belief, on the ground of irregularity, is properly stricken from the files. Gay v. Torrance, 145 Cal. 144; 78 Pac. 540. Affidavits used on the hearing of a motion for a new trial cannot be considered on appeal, unless they are incorporated into a bill of exceptions. Manuel v. Flynn, 5 Cal. App. 319; 90 Pac. 463.

Necessity for bill of exceptions. Where the notice of intention to move for a new trial stated that the motion would be made on a bill of exceptions, but none was presented to the trial court or to the court on appeal, neither court can review the case as to alleged errors of law or as to the insufficiency of the evidence. Pereira v. City Savings Bank, 128 Cal. 45; 60 Pac. 524. A motion for a new trial, so far as it is based on a bill of exceptions, is based and must be determined on the bill as certified and filed, or as previously corrected under § 473, ante. Merced Bank v. Price, 152 Cal. 697; 93 Pac. 866.

Bill of exceptions proper when. The refusal to allow a supplemental answer, though an abuse of discretion, may be incorporated in a bill of exceptions, it being deemed excepted to under § 647, ante, and need not be presented by affidavit. Seehorn v. Big Meadows etc. Road Co., 60 Cal. 240. A motion for a new trial, on the ground of error of law or insufficiency of evidence, must be made upon bills of exceptions on file. Kelly v. Larkin, 47 Cal. 58. An order directing a conveyance of real estate by an executor is properly brought up on appeal by bill of exceptions. Estate of Corwin, 61 Cal. 160.

Statement proper when. A notice of motion for a new trial, stating that the motion would be made on a statement and affidavits, is improper, when made upon the ground of the misconduct of the jury: a statement, in such case, is unauthorized. Saltzman v. Sunset Telephone etc. Co., 125 Cal. 501; 58 Pac. 169.

Specification of error required. A specification in the notice of intention to move for a new trial, that such motion will be made on account of errors of law occurring at the trial, and excepted to by the plaintiffs, is all the specification of error that is necessary. Martin v. Southern Pacific Co., 150 Cal. 124; 88 Pac. 701. A motion for a new trial, made upon a statement that contains no specifications of the particular errors relied on, must be disregarded. Johnston v. Blanchard, 16 Cal. App. 321; 116 Pac. 973.

Deposition regarded as affidavit when. The deposition of a deputy sheriff, in charge of a jury, must be regarded as an affidavit, on the motion for a new trial, where the deputy refuses to make an affidavit. Saltzman v. Sunset Telephone etc. Co., 125 Cal. 501; 58 Pac. 169.

Motion denied when. Where the statement on motion for a new trial is stricken from the files, the motion is properly denied. Sutton v. Symons, 100 Cal. 576; 35 Pac. 158; Symons v. Bunnell, 101 Cal. 223; 35 Pac. 770.

Admissibility on application for new trial on ground of newly discovered evidence of affidavit of others than witnesses themselves to show such evidence. See note 14 Ann. Cas. 423.

CODE COMMISSIONERS' NOTE. The court may exclude affidavits filed on a motion for a new trial, which are written in a foreign language. Spencer v. Doane, 23 Cal. 419.

§ 659. Notice of motion. Upon whom served, and what to contain. The party intending to move for a new trial must, within ten days after receiving notice of the entry of the judgment, or within ten days after verdict, if the trial was by jury, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court or both. The time above specified shall not be extended by order or stipulation. If the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, or such further time as the court in which the action is pending, or a judge thereof, may allow (but not to exceed twenty days' additional time) file such affidavits with the clerk and serve a copy thereof upon the adverse party, who shall have ten days thereafter, or such further time as the court may allow (not exceeding twenty days' additional time) to file counter-affidavits and serve a copy thereof upon the moving party.

Bill of exceptions.
1. **Settling.** Ante, § 650.
2. **Extension of time.** Post, § 1054.

Time to except to court commissioner's report on matters other than issues of fact raised by pleadings. Ante, § 259.

Legislation § 659. 1. Enacted March 11, **1872;** based on Practice Act, § 623, which read: "The application shall be made upon affidavit and notice. The affidavit shall be filed with the justice, with a statement of the grounds upon which the party intends to rely. The adverse party may use counter-affidavits on the motion, provided they be filed one day previous to the hearing of the motion." When enacted in 1872, § 659 read: "The party intending to move for a new trial must, within thirty days after the decision or verdict, file with the clerk and serve upon the adverse party a notice of his intention, designating therein generally the grounds upon which the motion will be made, and the time and place at which it will be brought on for hearing. The time designated must be not less than ten nor more than twenty days after service of the notice."

2. Amended by Code Amdts. **1873–74,** p. 315, to read: "§ 659. The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the court, or a bill of exceptions, or a statement of the case: One. If the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, or such further time as the court in which the action is pending, or a judge thereof, may allow, file such affidavits with the clerk, and serve a copy upon the adverse party, who shall have ten days to file counter-affidavits, a copy of which must be served upon the moving party. Two. If the motion is to be made upon a bill of exceptions, and no bill has already been settled as hereinbefore provided, the moving party shall have the same time after service of the notice to prepare and obtain a settlement of a bill of exceptions as is provided after the entry of judgment, or after receiving notice of such entry by section six hundred and fifty, and the bill shall be prepared and settled in a similar manner. If a bill of exceptions has been already settled and filed, when the notice of motion is given, such bill shall be used on the motion. Three. If the motion is to be made upon a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof, may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party. If such proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto, and serve the same, or a copy thereof, upon the moving party. If the amendments be adopted, the statement shall be amended accordingly, and then presented to the judge who tried or heard the cause, for settlement, or be delivered to the clerk of the court for the judge. If not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge; and thereupon the same proceedings for the settlement of the statement shall be taken by the parties, and clerk, and judge, as are required for the settlement of bills of exception by section six hundred and fifty. If the action was heard by a referee, the same proceedings shall be had for the settlement of the statement by him as are required by that section for the settlement of bills of exception by a referee. If no amendments are served within the time designated, or, if served, are allowed, the proposed statement and amendments, if any, may be presented to the judge or referee, for settlement, without notice to the adverse party. When the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion. It is the duty of the judge or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement. When settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk. Four. When the motion is to be made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the ver-

dict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and, if the ground of the motion be errors in law occurring at the trial, and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain the specifications here indicated, when the motion is made on the minutes of the court, the motion must be denied."

3. Amendment by Stats. **1901**, p. 149; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 717, (1) in introductory paragraph, substituting "receiving notice of the entry of the judgment" for "the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury"; (2) throughout the section, making rhetorical and grammatical changes, not substantially affecting the meaning; the code commissioner saying, "The amendment fixes the notice of the entry of a judgment as the period from which to compute the time for moving for a new trial."

5. Amended by Stats. **1915**, p. 201, (1) recasting the introductory paragraph and subds. 1 and 2; (2) striking out subds. 3 and 4.

Construction of section. The three steps, under the Practice Act, to obtain a new trial were: 1. A notice of intention; 2. Filing and serving a statement or affidavits; 3. Motion for a new trial. Jenkins v. Frink, 27 Cal. 337. The right to move for a new trial is statutory, and must be pursued in the manner pointed out by the statute. California Improvement Co. v. Baroteau, 116 Cal. 136; 47 Pac. 1018. A party who fails to comply with the statute waives his right to move for a new trial. Caney v. Silverthorne, 9 Cal. 67; Wing v. Owen, 9 Cal. 247; Easterby v. Larco, 24 Cal. 179; Bear River etc. Mining Co. v. Boles, 24 Cal. 354; Ellsassar v. Hunter, 26 Cal. 279; Jenkins v. Frink, 27 Cal. 337. A motion for a new trial, not made as prescribed in this section, is properly denied. Hill v. Beatty, 61 Cal. 292. Statements on motion for a new trial will be disregarded, unless the statutory requirements have been complied with. Linn v. Twist, 3 Cal. 89; Ellsassar v. Hunter, 26 Cal. 279; Vilhac v. Biven, 28 Cal. 410; Le Roy v. Rassette, 32 Cal. 171; Barstow v. Newman, 34 Cal. 90; Green v. Killey, 38 Cal. 201; Sawyer v. Sargent, 65 Cal. 259; 3 Pac. 872; Leonard v. Shaw, 114 Cal. 69; 45 Pac. 1012. The "notice of motion," in the fourth subdivision of this section, is the same as the "notice of intention to move for a new trial," in the first subdivision; and a party moving for a new trial, on the minutes of the court, who has failed to make the required specifications in his notice of intention, cannot cure the defect, after the expiration of the time for giving notice of intention, by giving an additional notice, that he will "bring on for hearing his motion for a new trial," and by annexing thereto a formal motion for a new trial, together with specifications of particulars in which the evidence was insufficient and of the errors of law relied upon. Neale v. Depot Railway Co., 94 Cal. 425; 29 Pac. 954.

Notice of decision. To set the time running in which the losing party to a suit must serve and file his notice of intention to move for a new trial, the successful party must serve upon him a written notice of the decision. Estate of Richards, 154 Cal. 478; 98 Pac. 528. No particular form of notice is required, nor a notice of what the decision was: a simple notice, in writing, that a decision has been rendered is sufficient (Waddingham v. Tubbs, 95 Cal. 249; 30 Pac. 527); and this written notice of the filing of the decision is required in all cases, unless waived by facts appearing in the records, files, or minutes of the court (Mallory v. See, 129 Cal. 356; 61 Pac. 1123); and the party intending to move for a new trial is entitled to such written notice, before he is called upon to act, although he was present in court when the decision was rendered, and waived the findings and asked for a stay of proceedings on the judgment (Biagi v. Howes, 66 Cal. 469; 6 Pac. 100; Kelleher v. Creciat, 89 Cal. 38; 26 Pac. 619; and see Carpentier v. Thurston, 30 Cal. 123; Roussin v. Stewart, 33 Cal. 208; Sawyer v. San Francisco, 50 Cal. 370); but these decisions are overruled, and now the application of the appellant for a stay of execution of the judgment is a waiver, as of that date, of the giving of written notice, which cannot be impaired by the subsequent action of another defendant in serving written notice on him. Gardner v. Stare, 135 Cal. 118; 67 Pac. 5; Gray v. Winder, 77 Cal. 525; 20 Pac. 47. A notice of intention, in writing, that "a motion will be made to set aside and vacate the judgment heretofore rendered and entered herein," constitutes a sufficient notice that a decision of the court had theretofore been rendered, to require the adverse party to serve and file his notice of intention within ten days thereafter (Waddingham v. Tubbs, 95 Cal. 249; 30 Pac. 527); as is also a notice, that you will please take notice "that a decree, a copy of which is herewith served upon you, has this day been entered in this action, in accordance with the decision rendered" by the court upon a previous date, giving the substance of the decree. Gumpel v. Castagnetto, 97 Cal. 15; 31 Pac. 898. Notice of the decision may be served by mail (Estate of Richards, 154 Cal. 478; 98 Pac. 528); and a notice of the decision, addressed to the plaintiff, and to his attorneys of record, which was accepted by one of the attorneys named, must be treated as a notice to and as accepted by all of the losing parties. Scott v. Glenn, 97 Cal. 513; 32 Pac. 573.

Notice of judgment. Notice of rendition of judgment is not required. Fatjo v. Swasey, 111 Cal. 628; 44 Pac. 225.

Waiver of notice of decision. Notice of the decision may be waived (Estate of Richards, 154 Cal. 478; 98 Pac. 528); and where the record shows that the party entitled to notice acted in court as if he had formal notice of the decision, such action constitutes a waiver of formal notice (Gray v. Winder, 77 Cal. 525; 20 Pac. 47; and see Cottle v. Leitch, 43 Cal. 320; Thorne v. Finn, 69 Cal. 251; 10 Pac. 414); and where the moving party recites that the court has filed its findings, he will not be heard to say that he had no notice of such findings. California Improvement Co. v. Baroteau, 116 Cal. 136; 47 Pac. 1018. A notice of motion for a new trial, made one year after judgment, but technically within the time allowed by law, there having been no formal notice of the rendition of judgment, is properly denied, where the appellant's counsel knew of its rendition from the date thereof. Preston v. Eureka etc. Stone Co., 54 Cal. 198. Actual notice or knowledge, other than written, is insufficient, in any case, unless it appears from the facts that written notice was waived (Mallory v. See, 129 Cal. 356; 61 Pac. 1123); and the evidence of waiver must be clear and uncontradicted, and not dependent upon oral testimony or ex parte affidavits. Gardner v. Stare, 135 Cal. 118; 67 Pac. 5. Consent to entry of judgment, given by guardians, which was authorized, renders written notice unnecessary. San Fernando Farm etc. Ass'n v. Porter, 58 Cal. 81. Written notice is waived by moving to dismiss the action, on the grounds that the findings had been made more than one year prior thereto, and that no judgment had been entered in favor of the plaintiff (Forni v. Yoell, 99 Cal. 173; 33 Pac. 887); and also by moving to modify and set aside the findings (Wall v. Heald, 95 Cal. 364; 30 Pac. 551; California Improvement Co. v. Baroteau, 116 Cal. 136; 47 Pac. 1018); and by service of notice of intention to move for a new trial (Girdner v. Beswick, 2 Cal. Unrep. 535; 8 Pac. 11; and see Cottle v. Leitch, 43 Cal. 320); and where, after findings of fact are filed, a notice of motion for a new trial is given, before the service of notice of filing such findings, notice of such filing is rendered unnecessary (Cottle v. Leitch, 43 Cal. 320); but acceptance of the service of the notice of intention, with a reservation of the objection that the notice was not served within the time allowed by law, is not a waiver (Gumpel v. Castagnetto, 97 Cal. 15; 31 Pac. 898); nor is proceeding to act under the decision, proven merely by the affidavit of the opposite party, a waiver. Mallory v. See, 129 Cal. 356; 61 Pac. 1123. The fact that the moving parties were minors at the time of judgment is immaterial, where they commenced and prosecuted the action to final judgment. Gray v. Winder, 77 Cal. 525; 20 Pac. 47.

Motion for new trial proper when. An application to set aside a judgment, where the moving party was represented by an attorney at the trial, which resulted in the rendition of such judgment, should be by a motion for a new trial. McKinley v. Tuttle, 34 Cal. 235.

When proceedings may be commenced. No proceedings for a new trial can be had until after the trial and decision by a jury or court; in suits in equity, the findings of the jury are merely advisory; a case has not been tried until all the issues have been disposed of, and there has been no decision until the court has passed on the facts and drawn its conclusions therefrom. Bell v. Marsh, 80 Cal. 411; 22 Pac. 170. Proceedings on motion for a new trial are premature, where they were based on a minute-entry of the decision, unsigned by the judge, and not entered in the judgment-book, and after the verdict was filed the case was reserved and submitted for further consideration and decision. Fountain Water Co. v. Dougherty, 134 Cal. 376; 66 Pac. 316. The filing of additional findings, inadvertently omitted, by the court, of its own motion, does not render a notice of intention premature, where made after the findings and conclusions of law. Bell v. Staacke, 141 Cal. 186; 74 Pac. 774. The time within which the notice of intention must be served does not begin to run, in suits in equity, until the court has adopted or rejected the special verdict of the jury (Bell v. Marsh, 80 Cal. 411; 22 Pac. 170); and a notice of motion is premature, where it was given after the verdict of the jury upon special issues, and before the conclusion of the trial and the determination of the remaining issues by the court (Reclamation District v. Thisby, 131 Cal. 572; 63 Pac. 918; and see Bates v. Gage, 49 Cal. 126); and a notice of intention to move for a new trial and the presentation of the statement for settlement are premature, where the jury had found upon certain issues, but the court had not rendered its decision. James v. Superior Court, 78 Cal. 107; 20 Pac. 241. The proceedings for a new trial are entirely independent of the entry of the judgment, and may be instituted before or after its entry, and even while the appeal from the judgment is pending. Brison v. Brison, 90 Cal. 323; 27 Pac. 186; and see Spanagel v. Dellinger, 43 Cal. 476. The motion for a new trial attacks the verdict, rather than the judgment, and may be made prior to the entry of judgment. Johnson v. Phenix Ins. Co., 152 Cal. 196; 92 Pac. 182. Where all the issues necessary to final judgment had been tried and determined, and all that remained was to carry the judgment into

effect, a motion, although made before the coming in of the referee's report as to community property, is not premature. Sharon v. Sharon, 79 Cal. 633; 22 Pac. 26, 131. Guardians of minors, authorized to consent to a judgment as entered, are not required to be notified of the judgment, in order to impose on them the obligation to move for a new trial within ten days after the entry of judgment. San Fernando Farm etc. Ass'n v. Porter, 58 Cal. 81.

Necessity for notice of intention. Failure to serve the adverse party with notice of intention is equivalent to a failure to serve an adverse party with notice of appeal from the judgment; and the court has no jurisdiction to re-examine an issue of fact that it has tried, and change its decision thereon, unless all the parties to the issue and the former decision are properly before it. Herriman v. Menzies, 115 Cal. 16; 56 Am. St. Rep. 82; 35 L. R. A. 318; 44 Pac. 460; 46 Pac. 730; United States v. Crooks, 116 Cal. 43; 47 Pac. 870; Niles v. Gonzalez, 155 Cal. 359; 100 Pac. 1080; Ford etc. Co. v. Braslan Seed Growers Co., 10 Cal. App. 762; 103 Pac. 946. A motion for a new trial is a special proceeding within the case; and the court has no jurisdiction to entertain the motion, unless the notice of intention is given substantially as prescribed. Calderwood v. Brooks, 28 Cal. 151; Wright v. Snowball, 45 Cal. 654; Kelly v. Larkin, 47 Cal. 58; Dominguez v. Mascotti, 74 Cal. 269; 15 Pac. 773; O'Connell v. Main etc. Hotel Co., 90 Cal. 515; 27 Pac. 373. A failure to serve the notice of motion for a new trial on an adverse party necessitates the denial of the motion. Johnson v. Phenix Ins. Co., 152 Cal. 196; 92 Pac. 182; National Bank v. Mulford, 17 Cal. App. 551; 120 Pac. 446. The making and filing of a statement on motion for a new trial does not give the court jurisdiction of the subject-matter of a new trial, where no notice of intention was given or waived. Bear River etc. Mining Co. v. Boles, 24 Cal. 354. Service of the notice of intention to move for a new trial, and of the other steps in the preparation of a bill of exceptions, were not dispensed with by the newly added sections, 941a, 941b, 941c, post. Ford etc. Co. v. Braslan Seed etc. Co., 10 Cal. App. 762; 103 Pac. 946.

Form and contents of notice of intention. A notice of motion for a new trial should be in writing. Bear River etc. Mining Co. v. Boles, 24 Cal. 354. The notice of intention need not, in terms, contain a notice of intention to move that the decision be vacated. Bauder v. Tyrrel, 59 Cal. 99; and see Fulton v. Hanna, 40 Cal. 278; Wittenbrock v. Bellmer, 57 Cal. 12; Heinlen v. Heilbron, 71 Cal. 557; 12 Pac. 673. A notice designating the grounds of the motion, and stating that the defendant will make and submit a motion for a new trial, is sufficient. Heinlen v. Heilbron, 71 Cal. 557; 12 Pac. 673; and see Kimple v. Conway, 69 Cal. 71; 10 Pac. 389. The notice of intention must designate the grounds upon which the motion will be made: a matter not stated cannot be considered by the trial court upon the hearing of the motion. Sebring v. Harris, 20 Cal. App. 56; 128 Pac. 7. A notice of motion which does not state whether it will be made on affidavits, minutes of the court, bill of exceptions, or statement, is insufficient. Hughes v. Alsip, 112 Cal. 587; 44 Pac. 1027; and see Hill v. Beatty, 61 Cal. 292. A notice of intention reciting that it will be made upon a statement or bill of exceptions, and upon the record of the court and the minutes, is not defective, merely because the motion is based on the bill of exceptions alone. Duncan v. Times-Mirror Co., 120 Cal. 402; 52 Pac. 652. A notice that the defendant will move to set aside the decision and judgment, setting out, as the grounds relied on, the fourth, sixth, and seventh subdivisions of § 657, ante, is sufficient. O'Connell v. Main etc. Hotel Co., 90 Cal. 515; 27 Pac. 373. While the notice of intention need state only, in general terms, that the evidence is insufficient to justify the decision, yet the specification must point out the particulars wherein the evidence fails to sustain the findings. Molera v. Martin, 120 Cal. 544; 52 Pac. 825. A notice of motion specifying the insufficiency of the evidence to support or justify the findings, is sufficient (Boston Tunnel Co. v. McKenzie, 67 Cal. 485; 8 Pac. 22); as is also a notice of motion so made, specifying merely that the evidence is insufficient to justify the decision. McLennan v. Wilcox, 126 Cal. 51; 58 Pac. 305. A notice of intention stating that the motion is made on the minutes of the court, and failing to specify the errors of law which will be relied upon, is insufficient. Packer v. Doray, 4 Cal. Unrep. 297; 34 Pac. 628; Estate of Cahill, 74 Cal. 52; 15 Pac. 364; Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202; 10 Pac. 510; Neale v. Depot Railway Co., 94 Cal. 425; 29 Pac. 954; Salisbury v. Burr, 5 Cal. Unrep. 314; 44 Pac. 461; and see Jue Fook Sam v. Lord, 83 Cal. 159; 23 Pac. 225; Buckley v. Althorf, 86 Cal. 643; 25 Pac. 134; McLennan v. Wilcox, 126 Cal. 51; 58 Pac. 305. Where the motion for a new trial is made upon the minutes of the court, the statement of the grounds for the motion is necessary: this may be done by reference to the notice of intention on file, which reference may be incorporated in the bill of exceptions, if the notice is made part of it. Williams v. Hawley, 114 Cal. 97; 77 Pac. 762. The signing of the notice of motion by an attorney, not of record, is of no avail; and a waiver of

the objection that he did not appear as the attorney of record, is not shown by his recognition as attorney of record by the attorney for the opposing party. McMahon v. Thomas, 114 Cal. 588; 46 Pac. 732.

Amendment of notice of intention. The amendment of a notice of intention to move for a new trial, made after the expiration of the statutory time for giving notice, cannot be allowed. Cooney v. Furlong, 66 Cal. 520; 6 Pac. 388; People v. Hill, 16 Cal. 113; Bear River etc. Mining Co. v. Boles, 24 Cal. 354; Ellsassar v. Hunter, 26 Cal. 279; Le Roy v. Rassette, 32 Cal. 171. The trial court has no jurisdiction to allow the original notice to be amended so as to designate that the motion will be made for the same causes, upon the minutes of the court, after the statutory time for giving the notice has passed (Cooney v. Furlong, 66 Cal. 520; 6 Pac. 388; and see Bear River etc. Mining Co. v. Boles, 24 Cal. 354; Thompson v. Lynch, 43 Cal. 482); and a notice of intention, which fails to specify the errors of law on which the motion will be based, cannot be amended after the statutory time, by inserting such specification of errors. Packer v. Doray, 98 Cal. 315; 33 Pac. 118; Little v. Jacks, 67 Cal. 165; 7 Pac. 449.

Waiver of defects in notice. A defect in the notice of motion, in not stating upon what it will be based, is not waived by proposing amendments to the bill, nor by participation in the settlement of such bill, as the appellant is entitled to use the bill of exceptions upon appeal from the judgment (Hughes v. Alsip, 112 Cal. 587; 44 Pac. 1027); but an irregularity in the notice of motion is waived by the failure to make any objection on the ground of such irregularity, either at the settlement of the statement or on the hearing of the motion (Christy v. Spring Valley Water Works, 68 Cal. 73; 8 Pac. 849); and there is a waiver of the form of the notice of motion, where the respondent's attorneys stipulated to give further time to the defendant to prepare and serve his statement. O'Connell v. Main etc. Hotel Co., 90 Cal. 515; 27 Pac. 373.

Who must be served. The notice of intention to move for a new trial must be served on the same parties on whom the notice of appeal itself would be served, that is, on every party in interest to whom the subject-matter of the motion is adverse, or who will be affected by the granting of the motion or by the changing of the former decision of the court. Herriman v. Menzies, 115 Cal. 16; 56 Am. St. Rep. 82; 35 L. R. A. 318; 44 Pac. 660; 46 Pac. 730. The new method of appeal does not dispense with the necessity of serving the notice of intention to move for a new trial, and of serving the bill of exceptions to be used thereon, upon all adverse parties. Ford v. Braslan Seed Growers Co., 10 Cal. App. 762; 103 Pac. 946. Co-defendants, whose interests may be adversely affected, must be served with notice: service on the plaintiff alone is not sufficient. United States v. Crooks, 116 Cal. 43; 47 Pac. 870.

Adverse parties, who are. Every party whose interest in the subject-matter of the motion is adverse, or whose interests will be affected by the granting of the motion or the changing of the former decision of the court, is an "adverse party." Johnson v. Phenix Ins. Co., 152 Cal. 196; 92 Pac. 182; Niles v. Gonzalez, 155 Cal. 359; 100 Pac. 1080; Ford v. Braslan Seed Growers Co., 10 Cal. App. 762; 103 Pac. 946. The verdict or findings, rather than the judgment, must be looked to to determine whether or not a party to whom notice has not been given is an adverse party. Johnson v. Phenix Ins. Co., 152 Cal. 196; 92 Pac. 182. The "adverse party" upon whom a notice of intention to move for a new trial shall be served is determined by the same rules as is the "adverse party" upon whom a notice of appeal is to be served. Johnson v. Phenix Ins. Co., 152 Cal. 196; 92 Pac. 182; Niles v. Gonzalez, 155 Cal. 359; 100 Pac. 1080. If an adverse party is properly served with notice of intention to move for a new trial, he does not, by reason of his death after such service, but before the motion is heard, cease to be a party to the proceeding for a new trial. Bell v. San Francisco Sav. Union, 153 Cal. 64; 94 Pac. 225. The burden is upon a respondent moving to dismiss an appeal for want of service upon an adverse party, to show from the record that the party not served was adverse in interest. Niles v. Gonzalez, 155 Cal. 359; 100 Pac. 1080. Where a judgment is one which, under the pleadings, properly follows from the verdict found, the question as to who are adverse parties is the same, whether determined from the verdict or the judgment. Johnson v. Phenix Ins. Co., 152 Cal. 196; 92 Pac. 182. The executor of a partner, in whose favor judgment was rendered in an action for an accounting, is an adverse party (Herriman v. Menzies, 115 Cal. 16; 56 Am. St. Rep. 82; 35 L. R. A. 318; 44 Pac. 660; 46 Pac. 730); but a party who would not be adversely affected by the new trial, and who was made defendant only because he refused to join as plaintiff, and whose interest is not mentioned in the judgment, is not an adverse party. Sprague v. Walton, 145 Cal. 228; 78 Pac. 645.

Time for serving notice. Under this section, prior to the amendment of 1907, a party intending to move for a new trial was required, within ten days after the verdict, to file with the clerk and serve upon the adverse party a notice of such

intention (Brichman v. Ross, 67 Cal. 601; 8 Pac. 316; San Francisco Farm etc. Ass'n v. Porter, 58 Cal. 81); and if he did not give such notice within the prescribed time, his right to move was gone. Clark v. Crane, 57 Cal. 629. Under the earlier decisions of the court, the time to serve notice of intention did not commence to run until written notice of the rendering of the decision was served, where the action was tried by the court (Roussin v. Stewart, 33 Cal. 208; Burnett v. Stearns, 33 Cal. 468), but written notice may now be waived. Gardner v. Stare, 135 Cal. 118; 67 Pac. 5. The decision of a referee is not binding upon the court until adopted by it: it is not a trial; hence, a notice of motion for a new trial need not be given until the statutory period after the confirmation of the referee's report. Harris v. San Francisco Sugar Refining Co., 41 Cal. 393. A party giving notice of motion for a new trial is bound by that notice: he cannot afterwards give a second notice, and file his statement within the statutory period, but more than that period after the first notice. Le Roy v. Rassette, 32 Cal. 171.

Extension of time for serving notice. The court may extend the time within which to give notice of motion for a new trial (Harper v. Minor, 27 Cal. 107); under § 1054, post, when asked for before the expiration of the statutory ten days required by this section (Burton v. Todd, 68 Cal. 485, 9 Pac. 663, overruling Brichman v. Ross, 67 Cal. 601; 8 Pac. 316; and see Clark v. Crane, 57 Cal. 629; Hook v. Hall, 2 Cal. Unrep. 459; 6 Pac. 422); and the court does not exceed its power in extending the time to thirty days, in addition to the time allowed by this section, under § 1054, post. Moffat v. Cook, 65 Cal. 236; 3 Pac. 805. Where an order is made extending the time, and the party gives notice before the statutory time expires, he derives no benefit from the order. Cottle v. Leitch, 43 Cal. 320. An order extending the time to prepare and file the motion, extends the time to prepare and file the notice of motion. Cottle v. Leitch, 43 Cal. 320. The time named in an order extending the time to give notice of intention commences to run at the expiration of the ten days allowed by statute for the notice (Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418); and the time may be extended by stipulation of counsel, without an order of court ratifying the same (Simpson v. Budd, 91 Cal. 488; 27 Pac. 758); but a motion to modify and set aside the findings will not extend the time, nor will an order staying the entry of judgment until after the determination of such motion to modify. California Improvement Co. v. Baroteau, 116 Cal. 136; 47 Pac. 1018.

Objection to delay in serving notice. The objection that the notice was not served in time must be taken in the lower court, or it will be deemed to have been waived, and the time extended by consent of parties: such objection cannot be taken for the first time on appeal (Brichman v. Ross, 67 Cal. 601; 8 Pac. 316; and see Hobbs v. Duff, 43 Cal. 485; Hodgdon v. Griffin, 56 Cal. 610; Gray v. Nunan, 63 Cal. 220; Patrick v. Morse, 64 Cal. 462; 2 Pac. 49; Schieffery v. Tapia, 68 Cal. 184; 8 Pac. 878; Girdner v. Beswick, 69 Cal. 112; 10 Pac. 278; Simpson v. Budd, 91 Cal. 488; 27 Pac. 758; Mendocino County v. Peters, 2 Cal. App. 24; 82 Pac. 1122); and such objection should be overruled, where the facts alleged do not appear in the record, and the statement was settled by the judge (Nippert v. Warneke, 128 Cal. 501; 61 Pac. 96, 270); and it is not available, in the absence of a proper showing that the notice was not served in time. Hook v. Hall, 68 Cal. 22; 8 Pac. 596.

Waiver of notice. Notice of intention to move for a new trial may be waived. Gibson v. Berryman, 14 Cal. App. 330; 111 Pac. 926.

Effect of service of notice. In a proceeding for a new trial, the parties are determined by the notice of motion; and jurisdiction of the parties, other than the party moving, is obtained by service upon them of such notice. Bell v. San Francisco Sav. Union, 153 Cal. 64; 94 Pac. 225.

Presumption as to notice. Where the notice is not inserted in the record, it will be presumed that notice was properly given; but where it is inserted, and there are defects therein, it devolves upon the moving party to show that the defects were overcome or were waived. Reclamation District v. Thisby, 131 Cal. 572; 63 Pac. 918; and see Patrick v. Morse, 64 Cal. 462; 2 Pac. 49. A recital in the bill of exceptions, that the notice was seasonably served and filed, will prevail over the notice of intention in the record, stating that it was filed one day too late. Mendocino County v. Peters, 2 Cal. App. 24; 82 Pac. 1122; Nye v. Marysville etc. Street Ry. Co., 97 Cal. 461; 32 Pac. 530; Downing v. Le Du, 82 Cal. 471; 23 Pac. 202, Monterey County v. Cushing, 83 Cal. 507; 23 Pac. 700.

Filing the notice. The filing and service of the notice of intention to move for a new trial is the initiation of a proceeding for a new trial. Bell v. San Francisco Sav. Union, 153 Cal. 64; 94 Pac. 225. Failure to file the notice of intention within ten days after notice of the decision, is fatal to the motion, although timely service is made on the adverse party (Sutton v. Symons, 100 Cal. 576; 35 Pac. 158); and failure to file the notice within ten days after the verdict renders such notice ineffective (Hook v. Hall, 2 Cal. Unrep. 459; 6 Pac. 422; and see

Coveny v. Hale, 49 Cal. 552; Brady v. Feisil, 54 Cal. 180; Clark v. Crane, 57 Cal. 629; Jue Fook Sam v. Lord, 83 Cal. 159; 23 Pac. 225); and renders the refusal to settle the statement proper (Clark v. Crane, 57 Cal. 629; Jue Fook Sam v. Lord, 83 Cal. 159; 23 Pac. 225); and prevents the appellant from impeaching the findings. Brady v. Feisil, 54 Cal. 180. Leaving the notice of intention with the clerk on the last day allowed by law, without paying the fees therefor, does not constitute a legal filing; and a filing made three days thereafter, as of the day of receipt, on payment of the fees, is too late. Davis v. Hurgren, 125 Cal. 48; 57 Pac. 684. A recital in the statement on the motion, that the plaintiff reserved the right to object to the motion, on the ground that the notice of intention was not filed with the clerk within the statutory time, cannot be treated as in the nature of bill of exceptions. Hook v. Hall, 68 Cal. 22; 8 Pac. 596.

Affidavits, time of filing. Affidavits on which the motion for a new trial was based, showing the disqualification of the judge, cannot be considered, when not filed within ten days after the notice of intention. Estate of Kasson, 141 Cal. 33; 74 Pac. 436. The time for filing such affidavits may be extended to more than thirty days beyond the statutory time, under this section. Oberlander v. Fixen, 129 Cal. 690; 62 Pac. 254.

Affidavits must be identified. The affidavits used on the hearing of the motion for a new trial must be identified. Johnson v. Muir, 43 Cal. 542.

Contents of bill of exceptions. A specification of particular errors relied upon, though required in the statement, is not required in the bill of exceptions. Martin v. Southern Pacific Co., 150 Cal. 124; 88 Pac. 701.

Objections to bill of exceptions. An objection to a bill of exceptions, on motion for a new trial, in which no facts are stated or presented in support of such objection, cannot be considered. Anderson v. Anderson, 4 Cal. App. 269; 87 Pac. 558.

Time for serving bill of exceptions. The time for service of a proposed bill of exceptions expires at the termination of the stipulation extending such time, and is not extended by the pendency of another motion. Hole v. Takekawa, 165 Cal. 372; 132 Pac. 445.

Waiver of delay in presenting bill of exceptions. An objection that a bill of exceptions on motion for a new trial was not presented in time may be waived. Bollinger v. Bollinger, 153 Cal. 190; 94 Pac. 770.

Object of bill of exceptions or statement. The office of the statement on motion for a new trial is to bring into the record certain matters which constitute the basis of the motion, and which the party desires to have reviewed on appeal from the order granting or refusing a new trial. Harper v. Minor, 27 Cal. 107. The object of the statement or bill of exceptions is to make that of record which before was not recorded, but rested only in the recollection of the court or counsel, or in the minutes of the clerk (Williams v. Southern Pacific R. R. Co., 2 Cal. Unrep. 613; 9 Pac. 152; Johnson v. Sepulbeda, 5 Cal. 149); and to bring into the record those matters which have arisen in the progress of the trial, and matters which constitute the basis of the motion or grounds for a new trial, out of which arise whatever questions the appellant desires to have reviewed on appeal from the order granting or refusing a new trial. Graham v. Stewart, 68 Cal. 374; 9 Pac. 555.

Contents of statement. The statement on motion for a new trial should contain so much of the evidence, rulings of the court, instructions, etc., as may be necessary to explain the points relied on, but no more. Hutton v. Reed, 25 Cal. 475; Harper v. Minor, 27 Cal. 107; McMinn v. Whelan, 27 Cal. 300; Hidden v. Jordan, 28 Cal. 302. Neither the notice of motion for a new trial, nor the affidavits filed in support thereof, have properly any place in the statement. Ferrer v. Home Mutual Ins. Co., 47 Cal. 416. On application for a new trial, and on review, a statement which does not specify the particular errors relied on, or the particulars in which the evidence is alleged to be insufficient, should be disregarded (Burnett v. Pacheco, 27 Cal. 408; Vilhac v. Biven, 28 Cal. 410; Reamer v. Nesmith, 34 Cal. 624; Beans v. Emanuelli, 36 Cal. 117; Green v. Killey, 38 Cal. 201; Spanagel v. Dellinger, 38 Cal. 278; Brumagim v. Bradshaw, 39 Cal. 24; Mack v. Wetzlar, 39 Cal. 247; Kusel v. Sharkey, 46 Cal. 3; Coleman v. Gilmore, 49 Cal. 340; Ferrer v. Home Mutual Ins. Co., 47 Cal. 416; Leonard v. Shaw, 114 Cal. 69; 45 Pac. 1012); and the failure to insert in the statement the particular points on which the party will rely, is not cured by inserting such points in the notice of motion. Ferrer v. Home Mutual Ins. Co., 47 Cal. 416.

Amendments should be incorporated. Amendments to the statements should be incorporated in the engrossed statement, and not merely attached thereto (Marlow v. Marsh, 9 Cal. 259; Skillman v. Riley, 10 Cal. 300; Baldwin v. Ferre, 23 Cal. 461; Kimball v. Semple, 31 Cal. 657); but failure to re-engross the statement, and place the allowed amendments therein, is not error, where they were treated by the court and the parties as part of the statement. Swett v. Gray, 141 Cal. 63; 74 Pac. 439.

Amendments as waiver of objections. Proposing amendments to a statement is a waiver of a failure to serve a notice of the motion, unless the party proposing the amendments makes the objection, or reserves his right to make it when he proposes his amendments; but no particular form of reserving the objection is required. Brundage v. Adams, 41 Cal. 619. A defendant in a motion for a new trial may file amendments to the statement, without waiving his right to object that the notice or statement was not filed or served in time, by a preface that he does so without prejudice to his right to object, at the hearing, to the notice or statement on these grounds. Quivey v. Gambert, 32 Cal. 304.

Waiver of right to propose amendments. The right to propose amendments to the statement is waived by an agreement that the statement was correct, and authorizing the defendant to present it to the judge for settlement without notice. Perry v. Noonan Loan Co., 1 Cal. App. 609; 82 Pac. 623. Failure to serve the plaintiff with notice of motion to amend the statement is not prejudicial to him, where the proposed amendments were served, and he was present at the hearing, and offered no amendments, and did not object. Swett v. Gray, 141 Cal. 63; 74 Pac. 439.

Adoption of amendments. The presumption is, that the amendments were adopted, where the moving party does not indicate to the contrary by serving notice that the statement and amendments would be presented to the judge for settlement as prescribed by this section. Pendergrass v. Cross, 73 Cal. 475; 15 Pac. 63. Failure to give any notice in reference to the adoption or rejection of the proposed amendments is an admission that they were to be allowed (Black v. Hilliker, 130 Cal. 190; 62 Pac. 481); but failure to notify the opposing party of refusal to adopt the amendments does not amount to their adoption, where the moving party has delivered the statement and amendments to the clerk or judge. Mellor v. Crouch, 76 Cal. 594; 18 Pac. 685.

Extension of time to preserve and serve statement. An extension of time for thirty days, in which to prepare and serve a proposed statement, is authorized; and an order extending the time within which to "file," as well as to prepare and serve, the proposed statement, cannot mislead the opposite party, where the notice of intention has been served, and the stipulation extending the time refers to the statement. Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074. An extension of time in which to prepare and serve the statement, though within the limit of thirty days, is void, if the time previously allowed had fully elapsed while the mover was in default. Freese v. Freese, 134 Cal. 48; 66 Pac. 43. Where the time in which to prepare and serve the statement was extended for thirty days by the judge, his power is exhausted: the fact that the time is further extended by consent of the adverse party does not confer on the judge any additional authority (Bunnel v. Stockton, 83 Cal. 319; 23 Pac. 301); but a stipulation of the parties, extending the time for less than thirty days, does not affect the power of the court to extend the time for thirty days from the expiration of the stipulated time. Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074. Where the order extending the time in which to serve the notice of intention is void, the order extending the time to prepare and file the statement is also void. Clark v. Crane, 57 Cal. 629. The order extending the time to prepare the statement carries with it the same extension of time to serve the statement. Bryant v. Sternfeld, 89 Cal. 611; 26 Pac. 1091; Curtis v. Superior Court, 70 Cal. 390; 11 Pac. 652; Burton v. Todd, 68 Cal. 485; 9 Pac. 663. The judge who tried the case has the power to extend the time to prepare the statement, although he is sitting in a county other than that in which the case was tried. Matthews v. Superior Court, 68 Cal. 638; 10 Pac. 128.

Excuse for delay in preparing and serving statement. Ignorance of the time within which a bill of exceptions or statement must be prepared and served cannot be held to be the result of mistake, surprise, or inadvertence, so as to justify relief therefrom. Ingrim v. Epperson, 137 Cal. 370; 70 Pac. 165.

Result of delay in serving statement. A statement on motion, served six days after the expiration of the time allowed by law and by all extensions given, will not be considered on appeal. Buckley v. Althorf, 86 Cal. 643; 25 Pac. 134.

Service of statement. The service of the proposed statement is not invalid or void because made on a Sunday or on a legal holiday. Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074.

Extension of time for presentation of statement and for notice thereof. Under § 1054, post, the court has power to extend the time within which the proposed statement and amendments shall be presented for settlement, and also to extend the time for giving actual notice of the presentation, provided always that the adverse party has five days' notice of the presentation. Douglas v. Southern Pacific Co., 151 Cal. 242; 90 Pac. 538.

Notice of settlement. The third subdivision of this section fixes a time when the statement shall be presented, and provides different methods whereby the adverse party may have notice of the fact;

thus, the statement must, unless the time is extended, be presented within ten days, but the method of its presentation is optional with the moving party, who may present it on five days' notice to his adversary, or may deliver it to the clerk for the judge. Douglas v. Southern Pacific Co., 151 Cal. 242; 90 Pac. 538. When the statement with the proposed amendments is delivered to the clerk for the judge, no previous notice of settlement is required to be given by the moving party. Mellor v. Crouch, 76 Cal. 594; 18 Pac. 685. One purpose of the statute is to place a limitation on the time for presenting the proposed statement and amendments, and another purpose is to provide an optional mode of presentation; but the main purpose is to give notice of the presentation of the statement. Douglas v. Southern Pacific Co., 151 Cal. 242; 90 Pac. 538. Where the record fails to show that the proposed amendments were not all adopted, an objection that no notice of the time and place of settlement was given to the parties making the proposed amendments is without merit. Standard Quicksilver Co. v. Habishaw, 132 Cal. 115; 64 Pac. 113. The provision requiring five days' notice to be given to the adverse party, of the hearing of the settlement of the bill of exceptions, where the amendments have been served but not adopted, and the statement and amendments have been delivered to the judge, requires such notice to be given by the party, and not by the clerk. Mellor v. Crouch, 76 Cal. 594; 18 Pac. 685. The objection that the moving party failed to serve notice of the presentation of the proposed statement and amendments for settlement, is waived by a subsequent stipulation, that the statement might be settled by the judge who tried the cause, at his convenience, and that, after settlement, the motion might be heard and determined at the residence of the judge in another county. Cooper v. Burch, 140 Cal. 548; 74 Pac. 37.

Objection to delay in presentation. The objection that the proposed statement was not presented in time must be urged when the statement is presented for settlement, and if the objection is overruled, the party must have his objection, and the matter in support of it, incorporated in the statement, so as to avail himself of it as a reason for denial of a motion for a new trial, or in order to present objections on appeal from an order granting or refusing the motion; but this applies only to objections urged at the time the proposed statement comes up for settlement, and has no application to objections or motions made subsequently to the order settling the statement, and when the statement as settled is presented for certification; but such matter must be supported by a bill of exceptions. Ryder v. Rio Land etc. Co., 147 Cal. 462; 82 Pac. 62. Where no showing is made that the amendments were ever served on the plaintiff's attorney, the objection that the statement and amendments were not presented for settlement within ten days after the service of the amendments on the plaintiff's attorney, and upon five days' notice, will not be considered. Abbott v. Jack, 136 Cal. 510; 69 Pac. 257. Where the statement is not filed or presented in time, an objection interposed to the settlement on that ground is not available after settlement, when the motion for a new trial comes on for hearing, if the court, at the time of settling the statement, granted relief for the delay under § 473, ante. Grubb v. Chase, 158 Cal. 352; 111 Pac. 90. Where the respondent stipulates "that the foregoing is a true and correct statement and bill of exceptions," he will not be permitted, for the first time, on appeal, to object that the bill of exceptions was not presented, signed, or settled in time. Estate of Dougherty, 139 Cal. 14; 72 Pac. 357.

Result of delay in presenting statement. Failure of the plaintiff to present the statement to the judge within ten days after the receipt of the proposed amendments does not deprive the judge of the power to settle the statement as amended, where no notice was given that the amendments were either adopted or rejected: this procedure is authorized by the third subdivision of this section, which fixes no time for the statement to be presented, where the amendments are adopted; and the failure to give notice of the rejection of the amendments is, in itself, an admission of their adoption (Black v. Hilliker, 130 Cal. 190; 62 Pac. 481); but where the proposed amendments have been rejected, and the statement, with the amendments, is not presented by the moving party within ten days after such amendments were served, the court is not authorized to consider the statement, nor can it be considered on appeal. Henry v. Merguire, 106 Cal. 142; 39 Pac. 599. Failure of the moving party to present the statement and amendments for settlement for a period of ten or twelve years after the amendments have been served, without any satisfactory explanation, is gross and inexcusable neglect (Lee Doon v. Tesh, 131 Cal. 406; 63 Pac. 764); and an unexplained delay of seven months in presenting the statement and amendments for settlement, demands that the statement be disregarded on appeal. Connor v. Southern California Motor Road Co., 101 Cal. 429; 35 Pac. 990; Willis v. Rhen Kong, 70 Cal. 548; 11 Pac. 780. Where the proposed statement is not presented in time, and no excuse appears therefor in the record, such delay is fatal to a consideration of the statement. Henry

v. Merguire, 106 Cal. 142; 39 Pac. 599. Failure to incorporate and certify in the statement a valid excuse for delay in its presentation is inexcusable negligence (Estate of Kruger, 130 Cal. 621; 63 Pac. 31; Higgins v. Mahoney, 50 Cal. 444; Tregambo v. Comanche etc. Mining Co., 57 Cal. 501; Connor v. Southern California Motor Road Co., 101 Cal. 429; 35 Pac. 990); and the court has jurisdiction to dismiss the proceedings for inexcusable neglect in failing to present the statement for settlement. Kokole v. Superior Court, 17 Cal. App. 454; 120 Pac. 67. Where the hearing of the settlement of the statement is postponed from time to time, and the statement is lost, and no explanation is given of the delay of the moving party to obtain the settlement of a substituted statement, the dismissal of the motion is justified. Moore v. Kendall, 121 Cal. 145; 53 Pac. 647. Where the notice of intention states that the motion will be made upon a bill of exceptions, but no proper bill or statement is presented upon the hearing of the motion, there can be no review of the action of the trial court, either in that court or on appeal. Pereira v. City Savings Bank, 128 Cal. 45; 60 Pac. 524.

Time for presentation when amendments adopted. When the amendments are adopted by the moving party, the time within which the statement as amended shall be presented to the judge or delivered to the clerk is not limited by this section, and it may be presented within a reasonable time. Pendergrass v. Cross, 73 Cal. 475; 15 Pac. 63.

Statement or bill of exceptions must contain what evidence. A bill of exceptions should contain only so much of the evidence, or a reference thereto, as may be necessary to explain the grounds specifically set forth as causes for new trial. McMinn v. Whelan, 27 Cal. 300. The statement need not contain all the evidence, where the question is solely as to the sufficiency of conflicting evidence to sustain a particular finding: it is sufficient if there is enough evidence, on each side of the question, to show a substantial conflict, since the decision of the court will not be interfered with; and where the proposed statement or bill of exceptions fails to present sufficient evidence, it is the duty of the opposing party to propose amendments, and not throw that labor on the trial judge. Vatcher v. Wilbur, 144 Cal. 536; 78 Pac. 14. Where the statement does not purport to contain all the evidence, it will not be presumed that the evidence admitted was adverse to the finding by the court. Harris v. Duarte, 141 Cal. 497; 70 Pac. 298; 75 Pac. 58. The requirement that the moving party shall prepare and serve a proper statement or bill of exceptions, so as to sustain his contention of the insufficiency of the evidence, does not mean that the statement or bill of exceptions shall embody all the notes of the reporter. Vatcher v. Wilbur, 144 Cal. 536; 78 Pac. 14. The practice of embodying in the statement or bill of exceptions the reporter's notes, in bulk, is not justified by the law or good practice: the code requires only so much of the evidence or other matter as is necessary to explain the objections or points sought to be presented. Santa Ana v. Ballard, 126 Cal. 677; 59 Pac. 133. Where the statement contains the reporter's notes, in bulk, the court should permit the statement to be amended so as to set out its substance, and cause redundant and useless matter to be stricken out; mandamus lies to compel the judge to do so, should he refuse to allow the amendment. Santa Ana v. Ballard, 126 Cal. 677; 59 Pac. 133; Kruse v. Chester, 66 Cal. 353; 5 Pac. 613; Leach v. Pierce, 93 Cal. 614; 29 Pac. 235; Tibbets v. Riverside Banking Co., 97 Cal. 258; 32 Pac. 174; Winters v. Buck, 121 Cal. 279; 53 Pac. 799. Where the proposed statement contains questions and answers claimed to have been erroneously excluded, it is the right of the opposite party to propose amendments showing that the exclusion of the testimony sought to be stricken out could not change the result; hence, the cost of printing the transcript will not be taxed against him, though such amendment requires the insertion of the greater portion of the evidence. Duffy v. Duffy, 104 Cal. 602; 38 Pac. 443. Where the total amount involved in the case is only some six hundred dollars, and a transcript of the reporter's notes would cost almost a quarter of the amount involved, an order requiring the moving party to procure such transcript as a condition of settlement of the proposed statement, to which no amendments are proposed, is unreasonable. Vatcher v. Wilbur, 144 Cal. 536; 78 Pac. 14. The engrossed statement will be disregarded on appeal, where the certificate thereto states that it is but a skeleton, and does not contain all the evidence (Brind v. Gregory, 122 Cal. 480; 55 Pac. 250); but where an exhibit is omitted from the statement, and no objection is made, and the attorneys for the respondent indorse on the statement, "The foregoing statement agreed to by us," and the same is thereupon signed by the judge, an objection that such exhibit has been omitted is waived, and presents no cause for striking out the statement, or any part of it. Sharon v. Sharon, 79 Cal. 633; 22 Pac. 26, 131.

Evidence set out in statement how. The evidence, as written out by the reporter, is not the statement contemplated by statute: it is the duty of attorneys to see that evidence is correctly stated, and

that exceptions are correctly noted. Quinn v. Wetherbee, 41 Cal. 247. Where exhibits, claimed to have been used in evidence, are referred to by number in the body of the statement, and are set out in the appendix thereto, properly numbered, and preceded by a proper title, they are sufficiently identified, and incorporated in and made a part of the statement. Sharon v. Sharon, 79 Cal. 633; 22 Pac. 26, 131. Reference, in the proposed statement, to a document or record by means of the direction, "Here insert." is a sufficient notification to the opposite party that such document or record is to become a part of the statement; but such reference would not be sufficient in the engrossed statement (Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074); and depositions on file may be made part of the statement, by calling for them by the direction, "Here insert," at the proper place; and when the transcript is made up, they should be copied in full where called for. Sharon v. Sharon, 79 Cal. 633; 22 Pac. 26, 131.

Stipulation as to evidence in statement. Where it is stipulated that the statement "does not contain all the evidence," but that "the statement is correct," it will be inferred that only so much of the evidence has been inserted as is necessary to explain the grounds specified in the notice. Cahill v. Baird, 7 Cal. Unrep. 61; 70 Pac. 1061.

Specification of errors. Specification of grounds of error is the essence of the statement, without which it has no legal existence. Hutton v. Reed, 25 Cal. 478; Coleman v. Gilmore, 49 Cal. 340; Thompson v. Patterson, 54 Cal. 542; Crowther v. Rowlandson, 27 Cal. 376; Burnett v. Pacheco, 27 Cal. 408; Partridge v. San Francisco, 27 Cal. 415; Beans v. Emanuelli, 36 Cal. 117; Ferrer v. Home Mutual Ins. Co., 47 Cal. 416; Hill v. Beatty, 61 Cal. 292; Alameda Macadamizing Co. v. Williams, 70 Cal. 534; 12 Pac. 530. A statement that contains no specifications of the particular errors relied upon must be disregarded. Johnston v. Blanchard, 16 Cal. App. 321; 116 Pac. 973. A general specification, that "the court erred in giving each and every instruction requested by plaintiff," while not to be commended, sufficiently notifies the plaintiff of the errors relied on. Light v. Stevens, 159 Cal. 288; 113 Pac. 659. Where the statement contains no specification of error, the motion is properly denied (Nye v. Marysville etc. R. R. Co., 97 Cal. 461; 32 Pac. 530); and the decision is conclusive of the facts of the case. Graham v. Stewart, 68 Cal. 374; 9 Pac. 555. Errors not specified in the statement will not be considered on appeal. Budd v. Drais, 50 Cal. 120; Thompson v. Patterson, 54 Cal. 542; Heilen v. Heilbron, 71 Cal. 557; 12 Pac. 673; Hershey v. Kness, 75 Cal. 115; 16 Pac. 548; Bohnert v. Bohnert, 95 Cal. 441; 30 Pac. 590; Leonard v. Shaw, 114 Cal. 69; 45 Pac. 1012; Lambert v. Marcuse, 137 Cal. 44; 69 Pac. 620; Ferrer v. Home Mutual Ins. Co., 47 Cal. 416; Fleming v. Albeck, 67 Cal. 227; 7 Pac. 659; Pico v. Cohn, 67 Cal. 258; 7 Pac. 680; Sprigg v. Barber, 122 Cal. 573; 55 Pac. 419; Ackley v. Fishbeck, 124 Cal. 409; 57 Pac. 207. The object of the provision requiring the statement to specify the errors relied on is to enable the adverse party to prepare his amendments, without the necessity of going through the statement proposed by the moving party to ascertain what objections, rulings, and exceptions are incorporated therein; and unless the alleged errors are specifically pointed out, they are waived by the moving party. Bohnert v. Bohnert, 95 Cal. 444; 30 Pac. 590. The specification of errors is essential to the statement, to call attention to the precise ground relied on, and not to fortify the alleged errors by a statement of facts in its support; hence, a statement by the moving party, that he objected to the testimony, and excepted to the decision admitting it in evidence, cannot be considered, where the statement does not show any exception. Alameda Macadamizing Co. v. Williams, 70 Cal. 534; 12 Pac. 530. The question presented on a motion for a nonsuit is a question of law, and, in the statement on motion for a new trial, the decision of the court should be specified as an error of law; but the specification need not embody the evidence. Donahue v. Gallavan, 43 Cal. 573. Where no errors of law are specified in the statement, it will be presumed that they were disregarded on the hearing of the motion. Pico v. Cohn, 67 Cal. 258; 7 Pac. 680. A misleading instruction, not specified as a ground of the motion, cannot support an order granting a new trial. Laver v. Hotaling, 115 Cal. 613; 47 Pac. 593. An objection, that the verdict shows prejudice, is untenable, where no assignment of error on that ground appears in the motion for a new trial. Kirk v. Santa Barbara Ice Co., 157 Cal. 591; 108 Pac. 509. Failure to find on all the issues raised by the pleadings need not be specified in the statement as a ground of the motion. Millard v. Supreme Council, 3 Cal. Unrep. 96; 21 Pac. 825. A specification of errors in the statement, that they are pointed out and designated in the transcript by certain numbered exceptions, and that the court erred in each of its rulings, is insufficient (Hall v. Susskind, 120 Cal. 559; 53 Pac. 46); and the incorporation of an instruction, in the assignment of errors, coupled with the statement that it was given against the objection of the appellant, is also insufficient. Braverman

v. Fresno Canal etc. Co., 101 Cal. 644; 36 Pac. 386. Where the notice of motion specified that it would be made upon a "statement of the case," and the trial judge, in his settlement, designated it as a "bill of exceptions," it may be treated either as a statement or a bill of exceptions: in either case, it is sufficient, where it contains a proper specification of errors. Northwestern Redwood Co. v. Dicken, 13 Cal. App. 689; 110 Pac. 591. A paper, appended to the statement, but forming no part of it, designated as an assignment of errors, but not authenticated as part of the record, nor included in the stipulation certifying to the contents of the transcript, and no showing made that it was considered on the motion, cannot be considered on appeal. Ackley v. Fishbeck, 124 Cal. 409; 57 Pac. 207. Failure to specify in the statement that the court did not find on an issue raised by the pleadings prevents its consideration on appeal. Kaiser v. Dalto, 140 Cal. 167; 73 Pac. 828; Haight v. Tryon, 112 Cal. 4; 44 Pac. 318. The objection that a judgment is in favor of a party on a cause of action which he has not alleged, will be considered on appeal, where the facts are all of record, though it is not specified in the statement. Heinlen v. Heilbron, 71 Cal. 557; 12 Pac. 673; Putman v. Lamphier, 36 Cal. 151. Rulings on the admission of evidence, not specified as error in the statement, cannot be considered on appeal; but no specifications of errors are required when the motion is based on a bill of exceptions. Smith v. Smith, 119 Cal. 183; 48 Pac. 730; 51 Pac. 183. The ruling on a demurrer, not specified or referred to in the statement, will not be considered on appeal. Heilbron v. Centerville etc. Ditch Co., 76 Cal. 8; 17 Pac. 932. The specifications should conform to the notice of intention to move for a new trial; and where they do not, the opposite party should move for such amendments thereto as will remove therefrom all matter foreign to the grounds stated in the notice. Pico v. Cohn, 78 Cal. 384; 20 Pac. 706. The specifications may be amended after the time has expired for preparing and settling the statement. Alameda Macadamizing Co. v. Williams, 70 Cal. 534; 12 Pac. 530; Low v. McCallam, 64 Cal. 2; 27 Pac. 787.

Specifications of insufficiency of evidence. The specification of the insufficiency of the evidence is not required to be made in any particular form of words, but it should distinguish each particular proposition of fact excepted to from all others found by the court or in the verdict of the jury. Dawson v. Schloss, 93 Cal. 194; 29 Pac. 31; Smith v. Ellis, 103 Cal. 294; 37 Pac. 400; Molera v. Martin, 120 Cal. 544; 52 Pac. 825; Du Brutz v. Jessup, 54 Cal. 118; Brenot v. Brenot, 102 Cal. 294; 36 Pac. 672. The statement is not a pleading, nor a complaint in error, where all the intendments are against the pleader: it is in the nature of a notice, to be regarded with liberality, the sufficiency of which is to be tested by inquiring whether the opposing party is injured by defects. American Type Founders Co. v. Packer, 130 Cal. 459; 62 Pac. 744. The specification of insufficiency need not be inserted in any particular place in the statement, nor under any particular subheading. Stuart v. Lord, 138 Cal. 672; 72 Pac. 142. The purpose of this section in requiring the particulars of the insufficiency to be specified in the statement, is to direct the attention of the court and counsel to the particulars relied on by the moving party, so that the evidence bearing on the specifications may be inserted in the statement and considered by the court (Eddelbuttel v. Durrell, 55 Cal. 277; Spotts v. Hanley, 85 Cal. 155; 24 Pac. 738; Cummings v. Ross, 90 Cal. 68; 27 Pac. 62; Brenot v. Brenot, 102 Cal. 294; 36 Pac. 672; Molera v. Martin, 120 Cal. 544; 25 Pac. 825; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115; 64 Pac. 113); and so that the adverse party may intelligently prepare such amendments as will support the decision, and the court determine whether any portion of the statement is useless and redundant (Molera v. Martin, 120 Cal. 544; 52 Pac. 825); and to direct the attention of counsel and the court to the particular point on which the evidence is alleged to be insufficient (Estate of Yoakam, 103 Cal. 503; 37 Pac. 485; McCullough v. Clark, 41 Cal. 298; Brenot v. Brenot, 102 Cal. 294; 36 Pac. 672); and to provide a statement restricted to such evidence as is relevant and material to prove or disprove the specified facts. Dawson v. Schloss, 93 Cal. 194; 29 Pac. 31. It is clearly prescribed in this section that the moving party shall state the grounds of the insufficiency upon which the motion should be granted, differently from and at greater length than that required in the notice of intention to move for a new trial: the mere repetition, in the statement, of the grounds of the motion designated in the notice, without specifying the particulars wherein the evidence is insufficient, does not satisfy the statute. Molera v. Martin, 120 Cal. 544; 52 Pac. 825. The specification need not be more specific than the issues made by the pleadings, if the motion is directed against a general verdict, or an omnibus finding that all or certain designated allegations of the complaint or answer are true, or a judgment without findings. Harris v. Duarte, 141 Cal. 497; 70 Pac. 298; 75 Pac. 58. Where the evi-

dence is all presented in the transcript, a specification of its insufficiency to sustain the findings is sufficient, where there is a reasonably successful effort made to state the particulars, and they are such as might be sufficient to inform the opposing counsel and the court of the grounds. Porter v. Counts, 6 Cal. App. 550; 92 Pac. 655. Where the specifications fully inform counsel and the court as to the points on which the plaintiff relies in contending that the decision is contrary to the evidence, and all the evidence is contained in the record, they are sufficient (Gwin v. Calegaris, 139 Cal. 384; 73 Pac. 851; Estate of Motz, 136 Cal. 558; 69 Pac. 295; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115; 64 Pac. 113; Osborn v. Hopkins, 160 Cal. 501; 117 Pac. 519); and specifications, full enough to enable the court to understand the question presented, are sufficient (Newell v. Desmond, 63 Cal. 242); as are also specifications which enable the opposing counsel to determine what evidence should be put in the statement, and the judge to strike out useless and redundant matter. American Type Founders Co. v. Packer, 130 Cal. 459; 62 Pac. 744. Where the statement fails to specify any particular in which the evidence is insufficient, it must be disregarded, so far as the notice of motion specifies the insufficiency of the evidence as one of its grounds (Hill v. Beatty, 61 Cal. 292; Benjamin v. Stewart, 61 Cal. 605; Bate v. Miller, 63 Cal. 233; Donohoe v. Mariposa etc. Mining Co., 66 Cal. 317; 5 Pac. 495; Hartman v. Rogers, 69 Cal. 643; 11 Pac. 581; Heinlen v. Heilbron, 71 Cal. 557; 12 Pac. 673; Silva v. Holland, 74 Cal. 530; 16 Pac. 385; Lowrie v. Salz, 75 Cal. 349; 17 Pac. 232; Heilbron v. Kings River etc. Canal Co., 76 Cal. 11; 17 Pac. 933; Millan v. Hood, 3 Cal. Unrep. 548; 30 Pac. 1107; Gregory v. Gregory, 102 Cal. 50; 36 Pac. 364; Green v. Green, 103 Cal. 108; 37 Pac. 188; Citizens' Bank v. Jones, 121 Cal. 30; 53 Pac. 354; Thompson v. Los Angeles, 125 Cal. 270; 57 Pac. 1015; Rauer v. Fay, 128 Cal. 523; 61 Pac. 90; O'Leary v. Castle, 133 Cal. 508; 65 Pac. 950; Liurette v. Hiller, 139 Cal. 729; 73 Pac. 836; Graybill v. De Young, 140 Cal. 323; 73 Pac. 1067; Ben Lomond Wine Co. v. Sladky, 141 Cal. 619; 75 Pac. 332; Estate of Antoldi, 7 Cal. Unrep. 211; 81 Pac. 278); and, since the decision includes the facts found, the findings must be taken as absolutely true (Donohoe v. Mariposa etc. Mining Co., 66 Cal. 317; 5 Pac. 495); hence, the question whether excessive damages appear to have been given under the influence of passion or prejudice cannot be considered, it being but another form of saying that the evidence does not justify the verdict. Graybill v. De Young, 140 Cal. 323; 73 Pac. 1067. A specification in a statement, in a case tried by the court, where findings of fact have been filed, that a particular finding, naming it, was not justified by the evidence, is sufficient to enable the court to review the evidence so far as it relates to each finding thus pointed out. Strang v. Ryan, 46 Cal. 33; Bell v. Staacke, 141 Cal. 186; 74 Pac. 774. A finding as to the amount of damages, which is not attacked in the specification of the insufficiency of the evidence, will not be considered on appeal (Fitzhugh v. Mason, 2 Cal. App. 220; 83 Pac. 282); nor, where the statement fails to specify the particulars of the insufficiency of the evidence, will the decision of the court be considered on appeal. Preston v. Hearst, 54 Cal. 595; Phillips v. Lowery, 54 Cal. 584. Where the specification of the insufficiency of the evidence is directed to a portion of the findings, that a certain amount was due, and not that the principal had never been paid, except a certain sum on account of interest, which was also a part of the finding, no contention can be made on appeal that there is no evidence in support of the finding that the note had not been paid. First Nat. Bank v. Kelso, 5 Cal. Unrep. 40; 40 Pac. 427. Where the statement contains no specifications of the insufficiency of the evidence, or of errors of law occurring at the trial, a specification that the decision is against law will be limited to errors appearing in the judgment roll. Thompson v. Los Angeles, 125 Cal. 270; 57 Pac. 1015. Where there are no findings of fact, and no motion for a new trial, but the appeal is from an order denying an application for distribution, a specification of insufficiency is not necessary. Estate of Fath, 132 Cal. 609; 64 Pac. 995. The statement that "the court should have found" is only another way of stating what "the evidence shows," which is a form of specification repeatedly held to be insufficient (Taylor v. Bell, 128 Cal. 306; 60 Pac. 853); the statement that "the evidence shows" is, in effect, only a statement that, upon all the evidence, the court should have come to a different conclusion, and a mere repetition of what was previously stated in the notice of intention. Taylor v. Bell, 128 Cal. 306; 60 Pac. 853; Adams v. Helbing, 107 Cal. 298; 40 Pac. 422; Haight v. Tryon, 112 Cal. 4; 44 Pac. 318; Love v. Anchor Raisin etc. Co., 5 Cal. Unrep. 425; 45 Pac. 1044. An allegation as to what the evidence shows is unnecessary, and out of place, in the specifications required by this section. Dawson v. Schloss, 93 Cal. 194; 29 Pac. 31; Adams v. Helbing, 107 Cal. 298; 40 Pac. 422. A specification, that "the evidence is insufficient to justify the verdict, in this, that the evidence shows certain specific facts," is sufficient (Estate of Yoakam, 103 Cal. 503; 37 Pac. 485; Harnett v. Central Pacific R. R. Co.,

78 Cal. 31; 20 Pac. 154); but a specification, not directed at any particular one of numerous findings of fact, but at all of them, and at the verdict adopted, and at the finding made thereon, and at the judgment, is insufficient (Cummings v. Ross, 90 Cal. 68; 27 Pac. 62); as is also a specification that the court erred in finding and deciding in favor of the defendant when the finding and decision should have been in favor of the plaintiff, and in rendering judgment in favor of the defendant when the judgment should have been in favor of the plaintiff (Lower Kings River Rec. District v. Phillips, 5 Cal. Unrep. 776; 39 Pac. 634); and also a specification that "the evidence is wholly insufficient to justify or sustain the verdict, and, on the contrary, shows that said verdict should have been in favor of the petitioners" (In re Strock, 128 Cal. 658; 61 Pac. 282); and also a specification that the first finding of the court is not sustained by the evidence, and is contrary thereto, with a repetition in regard to the second and third findings (Eddelbuttel v. Durrell, 35 Cal. 277; Parker v. Reay, 76 Cal. 103; 18 Pac. 124); and also a specification that the court erred in finding as it did, and in not finding contrary thereto. Heilbron v. Centerville etc. Ditch Co., 76 Cal. 8; 17 Pac. 932; Smith v. Christian, 47 Cal. 18; Shepherd v. Jones, 71 Cal. 223; 16 Pac. 711. A general specification, that the evidence is insufficient to justify the decision, is not aided by proper and particular specifications contained in the plaintiff's brief. Molera v. Martin, 120 Cal. 544; 52 Pac. 825. A specification as to the insufficiency of the evidence to sustain one point cannot be considered upon an objection to the verdict upon a ground inconsistent therewith; thus, an objection to a verdict against a sheriff for conversion, that it includes the value of certain property released by him, cannot be considered under the specification that the property had never been taken by him. Rider v. Edgar, 54 Cal. 127. Specifications may be either in the positive or negative form, although the latter is preferable, and criticism in this regard goes to form rather than to substance; thus, the positive form, "It clearly appears from the evidence," etc., is sufficient, although the negative form, "The evidence is insufficient," etc., is preferable. Drathman v. Cohen, 139 Cal. 310; 73 Pac. 181. A specification, that "the evidence was insufficient for the jury to find that the plaintiffs were only entitled to judgment for" a certain sum, without setting out what additional items of credit were claimed to be established by the evidence, is insufficient (Wise v. Wakefield, 118 Cal. 107; 50 Pac. 310); as is also a specification which stands alone as a mere statement of what the evidence shows (Spotts v. Hanley, 83 Cal. 155; 24 Pac. 738); and a specification that "there is no evidence to support the verdict," where several facts are involved in and affirmed by the verdict (Dawson v. Schloss, 93 Cal. 194; 29 Pac. 31); and a specification that there was no evidence to sustain or justify certain findings (Spotts v. Hanley, 85 Cal. 155; 24 Pac 738; Parker v. Reay, 76 Cal. 103; 18 Pac. 124); and a specification that the findings were unsupported by the evidence. Knott v. Peden, 84 Cal. 299; 24 Pac. 160. A specification, that there was no evidence introduced, tending to show that the plaintiff was injured by any act of the defendant, or that the plaintiff sustained any loss by reason of any act of the defendant, is sufficient (Clark v. Rauer, 2 Cal. App. 259; 83 Pac. 291); as is also a specification that there was no evidence to justify or to prove, or tending to prove, such particular finding, even where there is slight, but insufficient, evidence to support it (Owen v. Pomona Land etc. Co., 131 Cal. 530; 63 Pac. 850; 64 Pac. 253); and a specification pointing out particular findings objected to, and calling attention to the fact that none of them are supported by the evidence (Standard Quicksilver Co. v. Habishaw, 132 Cal. 115; 64 Pac. 113); and a specification directing attention, in various ways, to the single issue of fact in the case, and no evidence on this question was omitted (Pendola v. Ramm, 138 Cal. 517; 71 Pac. 624); and a specification that the decision is against law, in this, that the evidence shows that the plaintiff had been paid nothing on account of work done for and services rendered by him (Stuart v. Lord, 138 Cal. 672; 72 Pac. 142); and a specification pointing out the particular findings and parts of findings which it is claimed the evidence does not justify (Owen v. Pomona Land etc. Co., 131 Cal. 530; 63 Pac. 850; 64 Pac. 253); and a specification pointing to the particular finding objected to (Harris v. Duarte, 141 Cal. 497; 70 Cal. 298; 75 Pac. 58); and a statement on motion, that the evidence fails to show that the defendant was guilty of certain acts, being directly responsive to the findings of fact (Brenot v. Brenot, 102 Cal. 294; 36 Pac. 672); and a specification pointing out with considerable detail the particular facts claimed to be not proved (Holmes v. Hoppe, 140 Cal. 212; 73 Pac. 1002); and a specification of the insufficiency of the evidence to sustain any one of a number of probative facts found by the court, or any particular finding contained therein (Bell v. Staacke, 141 Cal. 186; 74 Pac. 774); and a specification of the insufficiency of the evidence to sustain probative facts in regard to waiver or credit given by an agent (Blake v. National Life Ins.

Co., 123 Cal. 470; 56 Pac. 101); and a statement setting forth the views of counsel as to the result of the testimony, and a statement that the verdict of the jury on each special issue was error. Kumle v. Grand Lodge, 110 Cal. 204; 42 Pac. 634; Menk v. Home Ins. Co., 76 Cal. 50; 9 Am. St. Rep. 158; 14 Pac. 837; 18 Pac. 117; Baird v. Peall, 92 Cal. 235; 28 Pac. 285. A specification that the evidence is insufficient to justify the findings, without stating the particulars wherein the insufficiency lies, is insufficient. Kyle v. Craig, 125 Cal. 107; 57 Pac. 791; Kumle v. Grand Lodge, 110 Cal. 204; 42 Pac. 634. Where the statement on motion for a new trial states that substantially all the evidence given on the trial is embodied therein, an objection to the sufficiency of the particulars in which the evidence is insufficient to justify the decision will not be sustained. Di Nola v. Allison, 143 Cal. 106; 101 Am. St. Rep. 84; 65 L. R. A. 419; 76 Pac. 976; American Type Founders Co. v. Packer, 130 Cal. 459; 62 Pac. 744; Estate of Motz, 136 Cal. 558; 69 Pac. 294. Laidlaw v. Pacific Bank, 137 Cal. 392; 70 Pac. 277; Drathman v. Cohen, 139 Cal. 310; 73 Pac. 181; Jones v. Goldtree, 142 Cal. 383; 77 Pac. 939. Where insufficient specifications are treated as sufficient, or are not objected to, the evidence may be reviewed on appeal. Knott v. Peden, 84 Cal. 299; 24 Pac. 160; Jones v. Goldtree, 142 Cal. 383; 77 Pac. 939. The appellate court will confine its examination of the evidence to the points raised by the specifications of the insufficiency of the evidence to support the verdict. Nishkian v. Chisholm, 2 Cal. App. 496; 84 Pac. 312.

Settlement of statement. Provisions for the settlement of statements must be liberally construed, with a view to promoting the rights of the parties, and in the interests of justice. Douglas v. Southern Pacific Co., 151 Cal. 242; 90 Pac. 538. Where the statement prepared by the defendant's counsel represents as correctly as possible the proceedings had on the trial of the cause, the court should settle the same accordingly. Storke v. Storke, 116 Cal. 47; 47 Pac. 869; 48 Pac. 121. It is the duty of the court to settle a proposed statement in all cases, where the attorneys are unable to agree to it as filed, no matter what reasons exist which render them unable to agree to it. Lucas v. Marysville, 44 Cal. 210. The settlement of the statement by the judge, by the adoption of the proposed amendments, without any express notice from the moving party that he adopted the amendments, is proper. Black v. Hilliker, 130 Cal. 190; 62 Pac. 481.

Redundant and useless matter should be stricken out and statement corrected. It is the duty of the judge, in settling a statement, to strike out all redundant and useless matter, notwithstanding the consent of the parties to such matter, or to an inaccurate statement. Arnold v. Producers' Fruit Co., 141 Cal. 738; 75 Pac. 326. Where the statement, as settled, does not truly state the case, the judge is authorized, and it is his duty, to make such corrections therein as will make it conform to the facts. Fountain Water Co. v. Superior Court, 139 Cal. 648; 73 Pac. 590.

Court may allow statement to be amended. Where the statement has been settled by the judge and filed with the clerk, the court may, on motion of the moving party, vacate the settlement and allowance of the statement, and allow it to be re-engrossed, so as to include exhibits referred to therein, which had not been engrossed at length. Warner v. F. Thomas etc. Cleaning Works, 105 Cal. 409; 38 Pac. 960; Clark v. Rauer, 2 Cal. App. 259; 83 Pac. 291; Swett v. Gray, 141 Cal. 63; 74 Pac. 439; Lucas v. Marysville, 44 Cal. 210.

Who must settle statement. The judge who tried the cause is the proper judge to settle the statement, and he can take all the necessary steps to have it properly settled. Matthews v. Superior Court, 68 Cal. 638; 10 Pac. 128.

Refusal to settle statement. Refusal to settle a statement, made after judgment has been ordered, is not justified by the settlement of a premature statement, though such judgment was entered after the denial of the premature statement. Fountain Water Co. v. Dougherty, 134 Cal. 376; 66 Pac. 316. A party's remedy for error of the trial court in refusing to settle a statement is by proper proceedings to compel the settlement. Estudillo v. Security Loan etc. Co., 158 Cal. 66; 109 Pac. 884.

Delay in engrossing statement. Where the statement was a short one, and could have been engrossed in a few days, and no showing was made, explaining or excusing an unreasonable delay, further than a few orders extending the time to engross, but not stating on what ground they were required, an order dismissing the motion is not an abuse of discretion. Descalso v. Duane, 3 Cal. Unrep. 893; 33 Pac. 328.

Objection to statement as settled. A party who has notice of the time and place of the settlement of the statement, but who does not attend, cannot complain of the statement as settled. Vilhac v. Biven, 28 Cal. 410.

Signature and certificate of judge. The signature and the certificate of the judge are indispensable to the statement (Adams v. Dohrmann, 63 Cal. 417); and a statement, neither signed nor certified by the judge, will not be considered on appeal. Sawyer v. Sargent, 65 Cal. 259; 3 Pac. 872; Schreiber v. Whitney, 60 Cal. 431;

Martin v. Vanderhoff, 2 Cal. Unrep. 485; 7 Pac. 307; Douglass v. McFarland, 92 Cal. 656; 28 Pac. 687. A certificate, signed by the judge, that the "foregoing statement of the case on motion for a new trial is the statement settled and allowed by me therefor," is in accord with the statute (Girdner v. Beswick, 69 Cal. 112; 10 Pac. 278); and a certificate, that "The foregoing statement on motion for a new trial has been settled and allowed by me, and is correct," includes authenticated exhibits as part thereof, although the certificate is attached to the body of the statement and precedes the exhibits. Sharon v. Sharon, 79 Cal. 633; 22 Pac. 26, 131; and see Kimball v. Semple, 31 Cal. 657; People v. Bartlett, 40 Cal. 142; Bush v. Taylor, 45 Cal. 112; Thompson v. Patterson, 54 Cal. 542. Where the signature and the certificate of the judge to the statement were made after the motion has been heard and determined, and an appeal taken from the order, the statement is a nullity. Adams v. Dohrmann, 63 Cal. 417.

Signature and authentication by attorneys. The fact that the statement is certified to be correct by the attorneys for both parties does not validate it. Schreiber v. Whitney, 60 Cal. 431. A paper, printed in the record, appearing to be a copy of certain specifications as to alleged insufficiency of the evidence, but no part of the statement, and without authentication, and signed by the appellant's attorney only, cannot be considered as part of the statement or record (O'Leary v. Castle, 133 Cal. 508; 65 Pac. 950); and a statement, signed only by the attorney for the respondent, is not a part of the record, nor has it any place in the transcript. Barclay v. Blackinton, 127 Cal. 189; 59 Pac. 834.

Filing of statement. The statement is not required to be filed until it has been signed by the judge, with his certificate that it is allowed, and it is not a part of the record until it is filed. Biagi v. Howes, 55 Cal. 469; 6 Pac. 100. A statement which has never been filed is no part of the record, and cannot be considered on appeal. Wells v. Kreyenhagen, 117 Cal. 329; 49 Pac. 128; Mills v. Dearborn, 82 Cal. 51; 22 Pac. 1114; Mix v. San Diego etc. R. Co., 86 Cal. 235; 24 Pac. 1027. Any statement agreed to by the parties, or duly settled and certified by the court, becomes a part of the record, when it is filed. Towdy v. Ellis, 22 Cal. 650. A stipulation that a statement has been served in time, and was correct, and might be presented for settlement without further notice, does not estop opposing counsel from claiming that it was not filed. Mills v. Dearborn, 82 Cal. 51; 22 Pac. 1114. A stipulation that a statement on motion for a new trial shall be filed, which waives informalities respecting filing and service, does not justify the moving party in neglecting to file the statement for five months after the date of the stipulation. Potter v. Froment, 47 Cal. 165. Failure to file a statement of the case after notice of intention to move for a new trial, is a waiver of the right to move for a new trial. Cooney v. Furlong, 66 Cal. 520; 6 Pac. 388; Stoyell v. Cole, 19 Cal. 602; Campbell v. Jones, 41 Cal. 515; Thompson v. Lynch, 43 Cal. 482; O'Neil v. Dougherty, 47 Cal. 164. The motion for a new trial cannot be passed on by the court until the bill of exceptions or statement has been filed. Wells v. Kreyenhagen, 117 Cal. 329; 49 Pac. 128. A statement, not filed within the time allowed by law, will be disregarded on appeal, where the time was not extended either by stipulation or order, and no amendment was proposed. Wheeler v. Karnes, 125 Cal. 51; 57 Pac. 893. To file a paper is to place it in the official custody of the clerk, to be by him permanently kept among the papers in the cause, open to the inspection of those having a right to inspect the same; this, accompanied by payment of the proper fee, constitutes a sufficient filing of papers. McCann v. McCann, 20 Cal. App. 564; 129 Pac. 965.

Extension of time to file statement. The court may extend the time within which to file the statement. Harper v. Minor, 27 Cal. 107; Jenkins v. Frink, 27 Cal. 337; Carrillo v. Smith, 37 Cal. 337. An order giving twenty days' time in which to file the statement must be construed as giving twenty days from the date of the order (Jenkins v. Frink, 27 Cal. 337); and an order extending the time is good only for the period prescribed by law. Cottle v. Leitch, 43 Cal. 320. The order should be in writing, and entered in the court minutes, in open session, or signed by the judge and filed. Campbell v. Jones, 41 Cal. 515. An order extending the time, made after the time for filing the statement has expired, is void (Bear River etc. Mining Co. v. Boles, 24 Cal. 354); and the time for filing is not extended, where the judge fails to have the order extending the time entered of record. Campbell v. Jones, 41 Cal. 515.

Motion on minutes of court, notice must specify what. Where the motion for a new trial is made on the minutes of the court, the notice of the motion must specify the particulars in which the evidence is insufficient, if such insufficiency is a ground of the motion, and must specify the particular errors of law upon which the moving party will rely. Estudillo v. Security Loan etc. Co., 158 Cal. 66; 109 Pac. 884. A motion made upon the minutes of the court must be denied, where it does not contain the specification

of particulars required by the fourth subdivision of this section. National Bank v. Mulford, 17 Cal. App. 551; 120 Pac. 446. The particulars required by this section must be specified, or there can be no review, on appeal, of the sufficiency of the evidence and errors of law. Estudillo v. Security Loan etc. Co., 158 Cal. 71; 109 Pac. 884.

Jurisdiction of superior court. The superior court has no jurisdiction to reexamine an issue of fact tried by it, and change its decision thereon, unless all the parties to the issue and the former decision are properly before it. Niles v. Gonzalez, 155 Cal. 359; 100 Pac. 1080; Ford v. Braslan Seed Growers Co., 10 Cal. App. 762; 103 Pac. 946.

Nature of motion. The motion for a new trial is in the nature of a distinct proceeding, and is to be heard on an independent record, distinct from the record on which the judgment depends. Bode v. Lee, 102 Cal. 583; 36 Pac. 936; Kaltschmidt v. Weber, 136 Cal. 675; 69 Pac. 497.

Abandonment of motion, effect of. The abandonment of a motion for a new trial, by one of the defendants, does not preclude another defendant from prosecuting his own motion therefor, or from appealing from the judgment therein. Johnson v. Reed, 125 Cal. 74; 57 Pac. 680.

Motion must state grounds. The motion for a new trial must state the particular grounds on which it is based; but this may be done by reference to the notice of intention. Williams v. Hawley, 144 Cal. 97; 77 Pac. 762; and see Holverstot v. Bugby, 13 Cal. 43; People v. Ah Sam, 41 Cal. 645; Herrlich v. McDonald, 80 Cal. 472; 22 Pac. 299.

What may be considered on motion. In passing on the motion, the court below cannot go beyond the grounds on which the new trial is asked; and where the new trial is asked upon the ground of the insufficiency of the pleading, the evidence introduced on the trial cannot be considered. Alpers v. Hunt, 86 Cal. 78; 21 Am. St. Rep. 17; 9 L. R. A. 483; 24 Pac. 846.

Refusal of new trial. There is no error in refusing to grant a new trial, where the statute governing new trials has not been complied with. Williams v. Gregory, 9 Cal. 76. Where the appellant, on motion, was granted relief from his failure to serve the statement in time, and the statement was duly settled and certified by the court, there is no presumption that the new trial was refused on the ground of delay in service. Baily v. Kreutzmann, 141 Cal. 519; 75 Pac. 104.

Notice of order denying new trial. Notice of the entry of an order denying a new trial is not required. Bell v. Staacke, 148 Cal. 404; 83 Pac. 245.

Setting aside order for new trial. An order for a new trial will be set aside, where the statutory requirements have not been complied with. Hill v. White, 2 Cal. 306.

Mandamus. On refusal to settle the statement, after a decision against a petition to revoke the probate of a will, the proper remedy is by mandamus to compel the settlement, and not by an appeal from an order denying a new trial. Hartmann v. Smith, 140 Cal. 461; 72 Pac. 7. Mandamus does not lie to compel the settlement of the statement on motion for a new trial, where the notice was given before a decision by the court. James v. Superior Court, 78 Cal. 107; 20 Pac. 241.

Appeal. Notice of appeal from an order denying a motion for a new trial need be served only on the parties who were adverse to the motion. Niles v. Gonzalez, 155 Cal. 359; 100 Pac. 1080. The notice of intention constitutes no part of the record on appeal from an order granting or refusing a new trial. Hook v. Hall, 68 Cal. 22; 8 Pac. 596. A statement on motion for a new trial, not signed or certified by the trial judge, cannot be considered on appeal. Sawyer v. Sargent, 65 Cal. 259; 3 Pac. 872. An appeal lies from an order refusing an application to settle the statement, where the party seeking the settlement has not fully complied with the statutory requirements, and appeals to the court for relief on the ground that his failure has been caused by surprise, accident, and excusable neglect, when relief rests in the discretion of the court. Murphy v. Stelling, 138 Cal. 641; 72 Pac. 176. Although the appellate court has power to dismiss an appeal for a failure to proceed with proper diligence to procure a settlement of the statement, yet the better practice is to require the respondent to avail himself of that objection in the lower court, when the proceeding for the settlement of the statement is pending. Curtin v. Engle, 155 Cal. 53; 99 Pac. 480. An irregularity complained of, not appearing in the record as one of the grounds of the motion, will not be considered on appeal (Wilcoxson v. Burton, 27 Cal. 228; 87 Am. Dec. 66); nor an objection that the decision is against law. Polk v. Boggs, 122 Cal. 114; 54 Pac. 536. The appellate court will confine its examination of evidence to the points embraced within the specifications. Nishkian v. Chisholm, 2 Cal. App. 496; 84 Pac. 312. Where a motion for a new trial is made upon a bill of exceptions or a statement, it is not necessary that the moving party shall appeal from the order denying him a new trial as a condition to his right to use the bill of exceptions or the statement upon appeal from the judgment; and there seems to be no distinction between these cases and one in which the motion has been made upon the minutes

of the court. Vinson v. Los Angeles Pacific R. R. Co., 141 Cal. 151; 74 Pac. 757.

Terms defined and distinguished. The word "grounds," in the phrase in the introductory paragraph of this section, "designating the grounds upon which the motion will be made," are the "causes," in § 657, ante, for which a new trial may be granted. Molera v. Martin, 120 Cal. 544; 52 Pac. 825. The only distinction between a "bill of exceptions" and a "statement of the case" is, that the latter, in addition to setting forth the exceptions, also sets forth the particular errors upon which the moving party relies. Pease v. Fink, 3 Cal. App. 371; 85 Pac. 657.

New trial after satisfaction of judgment. See notes 3 Ann. Cas. 19; 68 L. R. A. 126.

Right to new trial of party who has lost benefit of his exceptions from causes beyond his control. See note 12 Ann. Cas. 1056.

Right of adverse party on motion for new trial to introduce counter-affidavits. See note Ann. Cas. 1912D, 1303.

CODE COMMISSIONERS' NOTE. 1. Notice must be in writing. Borland v. Thornton, 12 Cal. 448.

2. Must be filed. Jenkins v. Frink, 27 Cal. 337.

3. Must be served. Bear River etc. Min. Co. v. Boles, 24 Cal. 354. Acknowledgment of service. Towdy v. Ellis, 22 Cal. 650.

4. Time. Ellsassar v. Hunter, 26 Cal. 279; Garwood v. Simpson, 8 Cal. 108; Duff v. Fisher, 15 Cal. 380; People v. Hill, 16 Cal. 113; Mahoney v. Caperton, 15 Cal. 313; Crowther v. Rowlandson, 27 Cal. 385; Casement v. Ringgold, 28 Cal. 337; Genella v. Relyea, 32 Cal. 159; Carpentier v. Thurston, 30 Cal. 123; Peck v. Courtis, 31 Cal. 207; Gray v. Palmer, 28 Cal. 416.

5. First notice cannot be abandoned. Le Roy v. Rassette, 32 Cal. 171.

6. Filing and serving notice does not stay proceedings. Crowther v. Rowlandson, 27 Cal. 385, Ortman v. Dixon, 9 Cal. 23; see also Lurvey v. Wells Fargo & Co., 4 Cal. 106.

§ 660. Motion, when to be heard. The motion for a new trial must be heard at the earliest practicable time after the filing of affidavits and counter-affidavits, in case the motion is made on affidavits, in other cases after the filing of the notice. On such hearing reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions and documentary evidence offered at the trial and to the report of the proceedings on the trial taken by the phonographic reporter, or to any certified transcript of such report, or if there be no such report or certified transcript, to such proceedings occurring at the trial as are within the recollection of the judge; when the proceedings at the trial have been phonographically reported, but the reporter's notes have not been transcribed, the reporter must, upon request of the court, or either party, attend the hearing of the motion, and shall read his notes, or such parts thereof as the court, or either party, may require. The hearing and disposition of the motion for a new trial shall have precedence over all other matters except criminal cases, probate matters and cases actually on trial, and it shall be the duty of the court to determine the same at the earliest possible moment. The power of the court to pass on motion for new trial shall expire within three months after the verdict of the jury or service on the moving party of notice of the decision of the court. If such motion is not determined within said three months, the effect shall be a denial of the motion without further order of the court.

Chambers, motions for new trials may be heard at. Ante, § 166.

Legislation § 660. **1.** Enacted March 11, **1872**, and then read: "At the time specified in the notice, or at such other time as the court or judge may adjourn the hearing to, not exceeding ten days, the motion must be heard. If the moving party fail to appear at either time it must be dismissed, and the case will stand as though no motion had ever been noticed or made. If heard by the court or judge, it must be decided within ten days after the hearing."

2. Amended by Code Amdts. **1873–74**, p. 317, to read: "§ 660. The application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court, and in other cases, after the affidavits, bill of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing upon motion of either party. On such hearing reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions, documentary evidence, and phonographic report of the testimony on file."

3. Amendment by Stats. **1901**, p. 149; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 718, in second sentence, substituting "and documentary evidence offered at the trial, and to the report of the proceedings on the trial taken by the phonographic reporter, or to any certified tran-

script of such report" for "documentary evidence, and phonographic report of the testimony on file"; the code commissioner saying, "The amendment permits reference to be had to any certified transcript of the reporter's notes on the hearing of the motion, whether on file or not."

5. Amended by Stats. **1915**, p. 202, (1) recasting the first sentence; (2) in second sentence, adding new provisions at the end thereof, and also adding the three final sentences.

Time of hearing motion. A motion for a new trial may be brought on for hearing after notice, and after a full opportunity to the adverse party to meet the contentions of the moving party. Eades v. Trowbridge, 143 Cal. 25; 76 Pac. 714. Where the objection that a motion for a new trial was not heard within a reasonable time was first made on appeal, it will be presumed that the time was extended by consent of the parties. Churchill v. Flournoy, 127 Cal. 355; 59 Pac. 791; and see Boggs v. Clark, 37 Cal. 236; Patrick v. Morse, 64 Cal. 462; 2 Pac. 49; Horton v. Jack, 115 Cal. 29; 46 Pac. 920.

Bringing motion to hearing. Although a motion for a new trial may be brought to a hearing by either party, yet the opposing party may apply for a dismissal where, through inexcusable neglect, the motion has not been brought into condition for hearing, and an order denying and dismissing the motion for a new trial, though inconsistent, will not be reversed on that ground. Descalso v. Duane, 3 Cal. Unrep. 893; 33 Pac. 328; Quivey v. Gambert, 32 Cal. 304; Calderwood v. Peyser, 42 Cal. 110; McDonald v. McConkey, 57 Cal. 325. A motion for a new trial may be dismissed on the ground that it has not been prosecuted with due diligence: the question as to whether there has been due diligence is one largely within the discretion of the trial court. Dorcy v. Brodis, 153 Cal. 673; 96 Pac. 278. A defendant, who has served proposed amendments to the plaintiff's statement, is not required to take any further proceedings towards its settlement. Lee Doon v. Tesh, 131 Cal. 406; 63 Pac. 764.

What may be used at hearing. The motion is in the nature of a distinct proceeding, and is to be heard upon an independent record, distinct from the record upon which the judgment depends; and reference may be had to the pleadings to ascertain the issues in the case, and determine the correctness of the rulings of the court as to the relevancy of the evidence; but whether the complaint is sufficient to support the judgment, or whether the court erred in overruling a demurrer to the complaint, can be considered only on an appeal from the judgment. Bode v. Lee, 102 Cal. 583; 36 Pac. 936; Byxbee v. Dewey, 128 Cal. 322; 60 Pac. 847; Lambert v. Marcuse, 137 Cal. 44; 69 Pac. 620; and see Onderdonk v. San Francisco, 75 Cal. 534; 17 Pac. 678; Wheeler v. Kassabaum, 76 Cal. 90; 18 Pac. 119; Evans v. Paige, 102 Cal. 132; 36 Pac. 406. The motion for a new trial, so far as it is based on a bill of exceptions, is based and must be heard and determined on the bill that has become the record of the court (Merced Bank v. Price, 152 Cal. 699; 93 Pac. 866); it can be heard only on the record made and settled before the motion was made. Quivey v. Gambert, 32 Cal. 304. Where the motion is made on the ground of newly discovered evidence, affidavits not tending to prove any of the allegations of the complaint, but which are contradictory thereof, cannot be used. Bates v. Bates, 71 Cal. 307; 12 Pac. 223. The moving party may rely on the recollection of the judge as to the evidence and proceedings, though not reported, and can thereafter secure a statement of the case, including the evidence material to the motion, and mandamus lies to compel the settlement of such statement. Malcolmson v. Harris, 90 Cal. 262; 27 Pac. 206. The right to be heard involves the right to get the facts properly before the court, and the right to aid and assist the court by argument and authority on questions of law. Eades v. Trowbridge, 143 Cal. 25; 76 Pac. 714.

Stay of proceedings. A motion for a new trial does not stay proceedings; but the court, in its discretion, may, upon motion, grant a stay. Pierce v. Los Angeles, 159 Cal. 516; 114 Pac. 818.

Grounds stated at hearing. The grounds upon which a motion for a new trial may be resisted should be raised on the argument. Quivey v. Gambert, 32 Cal. 304. The reasons for granting or refusing the motion need not be specified in the order. Estate of Martin, 113 Cal. 479; 45 Pac. 813.

Striking out notice or statement. A notice or statement on motion for a new trial should never be stricken out. Quivey v. Gambert, 32 Cal. 304; Calderwood v. Peyser, 42 Cal. 110. A party is entitled to a ruling on his motion for a new trial (Quivey v. Gambert, 32 Cal. 304); but the dismissal of the motion is a denial of it. Davis v. Hurgren, 125 Cal. 48; 57 Pac. 684; Warden v. Mendocino County, 32 Cal. 655.

Power of court to impose terms. The trial court has power to impose terms and conditions in granting or denying the motion (Garoutte v. Haley, 104 Cal. 497; 38 Pac. 194; Brooks v. San Francisco etc. Ry. Co., 110 Cal. 173; 42 Pac. 570); and failure to perform the conditions converts the order into a denial of the motion. Garoutte v. Haley, 104 Cal. 497; 38 Pac. 194; Eaton v. Jones, 107 Cal. 487; 40 Pac. 798; Garoutte v. Williamson, 108 Cal. 135; 41 Pac. 35; 413; Brown v. Cline, 109 Cal. 156; 41 Pac. 862; Holtum v. Greif, 144 Cal. 521; 78 Pac. 11. A condition that the plaintiff pay a certain amount as costs

cannot be complained of by the defendant (Anglo-Nevada Assurance Corp. v. Ross, 123 Cal. 520; 56 Pac. 335; Brooks v. San Francisco etc. Ry. Co., 110 Cal. 173; 42 Pac. 570); and the remission of a portion of the verdict may be imposed as a condition, if the verdict is for more than the evidence justifies. Etchas v. Oreña, 121 Cal. 270; 53 Pac. 798; Sherwood v. Kyle, 125 Cal. 652; 58 Pac. 270; Swett v. Gray, 141 Cal. 63; 74 Pac. 439; Gregg v. San Francisco etc. Ry. Co., 59 Cal. 312; Doolin v. Omnibus Cable Co., 125 Cal. 141; 57 Pac. 774. Unwarranted conditions do not render the order void, where the motion is granted for any valid reason. Bledsoe v. Decrow, 132 Cal. 312; 64 Pac. 397.

Motion denied when. A motion for a new trial should be denied, where the notice or statement was not served in time. Quivey v. Gambert, 32 Cal. 304. A notice of motion for a new trial, specifying that it will be made upon the minutes of the court, cannot be considered, where it is not embodied in any statement or bill of exceptions, nor authenticated in any way. Leonard v. Shaw, 114 Cal. 69; 45 Pac. 1012.

Granting new trial as to some issues or some parties. A new trial may be granted as to part of the issues (San Diego Land etc. Co. v. Neale, 78 Cal. 63; 3 L. R. A. 83; 20 Pac. 372; Duff v. Duff, 101 Cal. 1; 35 Pac. 437; Flinn v. Mowry, 131 Cal. 481; 63 Pac. 724, 1006), and also as to issues raised by a cross-complaint, without granting one as to those raised by the complaint and answer. Jacob v. Carter, 4 Cal. Unrep. 543; 36 Pac. 381. In granting the motion as to certain particular issues only, the trial court should, by its order, recite with great certainty, and in terms, the issues on which the new trial is to be had. Mountain Tunnel etc. Mining Co. v. Bryan, 111 Cal. 36; 43 Pac. 410. Where the motion was made by all the parties defendant, though a portion of them disclaimed any interest, the granting of the motion being proper as to one, it is immaterial to the plaintiff whether it was granted to all or as to one. Boehmer v. Big Rock Irrigation Dist., 117 Cal. 19; 48 Pac. 908.

Effect of granting or denying. An order granting the motion vacates the judgment. Etchas v. Oreña, 121 Cal. 270; 53 Pac. 798. When the motion is granted as to all the parties, the whole judgment falls, as an incident to the vacation of the verdict or decision; and when the motion is granted as to some of the parties, the findings which determine their rights are set aside, and as to them the case stands as if it had never been tried; but the judgment and findings, so far as they determine the rights of the moving party, and of those as to whom the new trial has been denied, continue to exist, and the judgment is appealable. Wittenbrock v. Bellmer, 62 Cal. 558. After the motion has been denied, the moving party is not at liberty to make a second motion therefor, either on any grounds on which the court has once denied it, or on any grounds which might have been presented in the first instance. Egan v. Egan, 90 Cal. 15; 27 Pac. 22. An order, not appealed from, denying a previous motion to dismiss proceedings for a new trial, on the ground of delay in presenting it, is not res adjudicata upon a renewed motion, made long after the order denying the former motion, unless the order made thereon was made upon the same facts which existed when the previous motion was made; and the burden is then on the plaintiff to show that the facts were the same. Lee Doon v. Tesh, 131 Cal. 406; 63 Pac. 764. The recitals in the order denying the motion, though contradictory to the findings in the case, do not operate to change the findings: they can be set aside only by granting a new trial. Hawxhurst v. Rathgeb, 119 Cal. 531; 63 Am. St. Rep. 142; 51 Pac. 846.

Amendment of order. An order amending the order granting a new trial supersedes the original order, and becomes the only order of the court on the motion. Garoutte v. Haley, 104 Cal. 497; 38 Pac. 194. Where the payment of costs, imposed as a condition for granting the motion, was not made within the time specified in the order, the court has no power to make a further order granting the motion without such payment. Brown v. Cline, 109 Cal. 156; 41 Pac. 862. The court cannot vacate the order after it has been regularly made and entered. Holtum v. Greif, 144 Cal. 521; 78 Pac. 11.

§ 661. [Record on appeal. Repealed.]

Legislation § 661. 1. Enacted March 11, 1872.
2. Amended by Code Amdts. 1873–74, p. 318.
3. Amendment by Stats. 1901, p. 150; unconstitutional. See note ante, § 5.
4. Repealed by Stats. 1915, p. 202.

Construction of sections. Where the party aggrieved desires to rely on the insufficiency of the evidence, or on errors not appearing on the judgment roll, he must either secure a bill of exceptions under § 649 or § 650, ante, or take the proper steps to complete a motion for a new trial under § 659, ante. Jue Fook Sam v. Lord, 83 Cal. 159; 23 Pac. 225. A judgment of dismissal, without findings of fact, and without an opportunity to the appel-

lant to prepare a record, is not "an exception to the decision and verdict," within § 939, post. Rickey Land etc. Co. v. Glader, 153 Cal. 179; 94 Pac. 768. Where it appears on the face of the record that the statute was not followed in making it up, that fact may be urged, both in the lower court and on appeal, as a reason why the motion for a new trial should be denied. Henry v. Merguire, 106 Cal. 142; 39 Pac. 599.

Purpose of section. The obvious purpose of this section was to provide that any statement or bill of exceptions regularly settled in any proceeding in which such statement or bill might be lawfully settled could be used on an appeal from a judgment, although it was not originally intended for that purpose. Foley v. Foley, 120 Cal. 33; 65 Am. St. Rep. 147; 52 Pac. 122; Vinson v. Los Angeles Pacific R. R. Co., 141 Cal. 151; 74 Pac. 757; 7 Cal. Unrep. 142; 72 Pac. 840.

Necessity for judgment roll. The judgment roll must appear in and constitute a part of the record in all cases on appeal. Thomas v. Anderson, 55 Cal. 43. On appeal from an order denying a motion for a new trial, the judgment roll must be in the transcript. Kimple v. Conway, 69 Cal. 71; 10 Pac. 189.

What constitutes judgment roll. There is no judgment roll, strictly speaking, in proceedings in probate; but whenever such proceedings are so akin to a civil action as to necessitate the papers declared by § 670, post, to constitute the judgment roll in a civil action, they may be held to constitute the judgment roll referred to by this section. Estate of Ryer, 110 Cal. 556; 42 Pac. 1082. A motion to strike out parts of an answer, and an order denying the same, not embodied in any statement or bill of exceptions, cannot be considered on appeal: they do not constitute any part of the judgment roll (Sutton v. Stephan, 101 Cal. 545; 36 Pac. 106); nor do the notice, affidavit, and motion on which an order striking out a demurrer was made, in the absence of a bill of exceptions, constitute part of the judgment roll (Orange Growers' Bank v. Duncan, 133 Cal. 254; 65 Pac. 469; Dimick v. Campbell, 31 Cal. 238; Catanich v. Hayes, 52 Cal. 338); nor do notices, not embraced in the statement or bill of exceptions. Girdner v. Beswick, 69 Cal. 112; 10 Pac. 278.

Affidavits must be authenticated. On appeal from an order heard upon affidavits, the only proper method of authenticating the affidavits is by bill of exceptions. Herrlich v. McDonald, 80 Cal. 472; 22 Pac. 299; Somers v. Somers, 81 Cal. 608; 22 Pac. 967. Affidavits and other documentary matter, used on a motion to set aside a default not embodied in the bill of exceptions, nor identified with or made a part of the record, cannot be considered on appeal. La Fetra v. Gleason, 101 Cal. 246; 35 Pac. 765. An affidavit, not included in the bill of exceptions, and certified merely by the clerk, cannot be considered on appeal. People v. Gay, 141 Cal. 41; 74 Pac. 443. Affidavits and other papers used on the hearing of a motion must be authenticated by including the same in a bill of exceptions, except where another mode of authentication is provided by law. Estate of Dean, 149 Cal. 487; 87 Pac. 13. Affidavits or other evidence, taken on the hearing of a motion for a new trial, should be incorporated in a bill of exceptions; otherwise there can be no review on appeal. Pereira v. City Savings Bank, 128 Cal. 45; 60 Pac. 524. An affidavit, certified by the clerk as having been used on a motion to vacate a judgment, forms no part of the record on appeal, where it is not contained in any bill of exceptions (People v. Wrin, 143 Cal. 11; 76 Pac. 646); nor an affidavit showing surprise, by reason of which certain testimony was not introduced at the trial, which was not contained in any bill of exceptions, nor authenticated as having been used at the hearing of the motion for a new trial, except by the certificate of the clerk (Cohen v. Alameda, 124 Cal. 504; 57 Pac. 377); nor an affidavit of alleged misconduct of the jury, not incorporated in the bill of exceptions (Cahill v. Baird, 138 Cal. 691; 72 Pac. 342); nor an affidavit used on a motion for a new trial, not authenticated by being incorporated in the bill of exceptions, and thus not a part of the record (Skinner v. Horn, 144 Cal. 278; 77 Pac. 904; and see Von Glahn v. Brennan, 81 Cal. 261; 22 Pac. 596; Spreckels v. Spreckels, 114 Cal. 60; 45 Pac. 1022; Melde v. Reynolds, 120 Cal. 234; 52 Pac. 491; Esert v. Glock, 137 Cal. 533; 70 Pac. 479; Cahill v. Baird, 138 Cal. 691; 72 Pac. 342); nor affidavits embodied in the record, and marked as filed by the clerk, but not contained in nor forming part of the bill of exceptions and statement certified by the judge, nor identified by him as having been used on the motion. Fish v. Benson, 71 Cal. 428; 12 Pac. 454; Whipple v. Hopkins, 119 Cal. 349; 51 Pac. 535. Where the appellant did not propose any bill of exceptions, and the respondent, having no occasion or right to propose a bill, the decision on the motion having been in his favor, the appellant cannot be aided by these facts to have such affidavits considered, where they were not incorporated in the bill of exceptions. Skinner v. Horn, 144 Cal. 278; 77 Pac. 904. A certificate of the judge, authenticating certain affidavits as having been used upon the hearing of the motion, without showing that these were all the papers used at the hearing, is insufficient. Melde v. Reynolds, 120 Cal. 234; 52 Pac. 491; Pereira v. City Savings Bank, 128 Cal. 45; 60 Pac.

524; Shain v. Eikerenkotter, 88 Cal. 13; 25 Pac. 966.

Presumption as to affidavits. Where the grounds of the motion, and what was based thereon, do not appear in the record, it will be conclusively presumed, in favor of the order, that the motion was in part based on some ground on which the affidavits could be used, and that such affidavits were in fact used, and were sufficient to justify the order. Wyckoff v. Pajaro Valley etc. R. R. Co., 146 Cal. 681; 81 Pac. 17; Skinner v. Horn, 144 Cal. 278; 77 Pac. 904.

Bill of exceptions necessary when. The allowance of costs, being within the discretion of the court in a suit in equity, cannot be reviewed without a statement or bill of exceptions (Faulkner v. Hendy, 103 Cal. 15; 36 Pac. 1021); nor can the question of costs be considered, where there is no bill of exceptions showing any ruling thereon. People v. Marin County, 103 Cal. 223; 26 L. R. A. 659; 37 Pac. 203. An appeal from an order refusing to settle a bill of exceptions, assuming such order to be appealable, must be disregarded, in the absence of a bill of exceptions. Williamson v. Joyce, 137 Cal. 151; 69 Pac. 980. Error in allowing a cross-complaint to be filed cannot be considered, where there is no bill of exceptions saving and presenting that point. Bell v. Southern Pacific R. R. Co., 144 Cal. 560; 77 Pac. 1124. Error in denying a motion for a new trial, without hearing or considering the grounds presented and urged in support thereof, should be excepted to at the time, and the facts embodied and settled in a bill of exceptions. Williams v. Harter, 121 Cal. 47; 53 Pac. 405. Error in making a second order for judgment, without setting aside or modifying the first, cannot be considered on appeal from the judgment, on the judgment roll alone, but should be presented on a bill of exceptions. Rooney v. Gray, 145 Cal. 753; 79 Pac. 523; and see Paige v. Roeding, 96 Cal. 388; 31 Pac. 264; Von Schmidt v. Von Schmidt, 104 Cal. 547; 38 Pac. 361. Error in rejecting ballots, because not marked as required by law, cannot be considered on appeal, unless the original ballots, or facsimile copies thereof, authenticated and identified, and properly referred to in the bill of exceptions, accompany the record. Lay v. Parsons, 104 Cal. 661; 38 Pac. 447. Errors of law, committed at the trial, will not be considered on appeal, in the absence of a bill of exceptions. Pereira v. City Savings Bank, 128 Cal. 45; 60 Pac. 524; Williams v. Savings and Loan Society, 133 Cal. 360; 65 Pac. 822; Thompson v. Patterson, 54 Cal. 542. Failure to find on an issue is not ground for reversing a judgment otherwise correct, unless it appears by the statement or bill of exceptions that evidence was given on such issue. Kaiser v. Dalto, 140 Cal. 167; 73 Pac. 828; Himmelman v. Henry, 84 Cal. 104; 23 Pac. 1098. Findings of fact must be taken as absolutely true, where there is no bill of exceptions showing the evidence, and it will be presumed that the evidence necessary to sustain the findings was presented to the court below. Mock v. Santa Rosa, 126 Cal. 330; 58 Pac. 326; Williams v. Savings and Loan Society, 133 Cal. 360; 65 Pac. 822; Alexander v. Welcker, 141 Cal. 302; 74 Pac. 845; Estate of Brown, 143 Cal. 450; 77 Pac. 160; Castagnetto v. Coppertown Mining etc. Co., 146 Cal. 329; 80 Pac. 74; Mahoney v. American Land etc. Co., 2 Cal. App. 185; 83 Pac. 267; Estate of Smith, 4 Cal. Unrep. 919; 38 Pac. 950. Further instructions, constituting error at law occurring at the trial, should have been excepted to, and embodied in the bill of exceptions provided for in § 650, ante: they cannot be embodied in an affidavit, or in another bill of exceptions, after the motion for a new trial is denied. Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84; 38 Pac. 627. An order sustaining a motion to set aside a judgment cannot be considered on appeal, where there is no bill of exceptions; for, whether the party excepted to the decision of the court in person at the time the decision was made, or is deemed in law to have excepted, he must, within the statutory or a reasonable time after his exception, avail himself of the right to reduce the same to writing, and take the steps required by law to have the bill of exceptions settled and signed by the judge. Nash v. Harris, 57 Cal. 242. Where there is no notice of intention to move for a new trial, that fact must be affirmatively shown, and must be included in a proper statement or bill of exceptions. Kahn v. Wilson, 120 Cal. 643; 53 Pac. 24. Papers used and evidence taken at the hearing of a motion to set aside service of summons by publication, must be authenticated by incorporating them in the bill of exceptions. San Diego Sav. Bank v. Goodsell, 137 Cal. 420; 70 Pac. 299.

Contents of bill of exceptions. A bill of exceptions cannot contain an order made after the bill was settled and authenticated. Mendocino County v. Peters, 2 Cal. App. 24; 82 Pac. 1122. On appeal from an order denying a motion to vacate a judgment, it devolves upon the appellant to have settled a bill of exceptions showing the evidence taken upon the hearing of such motion. Estate of Dean, 149 Cal. 487; 87 Pac. 13. Under § 952, post, the appellant, on an appeal from an order granting or refusing a new trial, must furnish the court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in § 661; and these copies, by the provision of § 953, post, must be certified to be correct by the

clerk or the attorneys: there is no occasion for incorporating, in a bill of exceptions, the papers constituting the judgment roll or the order denying the motion for a new trial. Estate of Kilborn, 162 Cal. 4; 120 Pac. 762. Where the notice of motion states that it was to be made on the minutes of the court, but it contains no specification of the insufficiency of the evidence, the motion must be denied, and it is not necessary to insert any evidence in the bill of exceptions settled after the order granting the motion. Estate of Cahill, 74 Cal. 32; 15 Pac. 364.

Amendment of bill of exceptions. The bill of exceptions cannot be amended by way of diminution of the record, since a record authenticated by the trial court cannot be changed on appeal. Mendocino County v. Peters, 2 Cal. App. 21; 82 Pac. 1122; and see Bonds v. Hickman, 29 Cal. 460; Boston v. Haynes, 31 Cal. 107; Satterlee v. Bliss, 36 Cal. 489; Boyd v. Burrel, 60 Cal. 280; Estate of Lamb, 95 Cal. 397; 30 Pac. 568.

Necessity for statement on appeal. An order granting a motion for a new trial, made on the minutes of the court, cannot be considered on appeal, where no statement was subsequently prepared (Oakland Gaslight Co. v. Dameron, 57 Cal. 292); nor can an order denying and dismissing the motion be considered. Davis v. Hurgren, 125 Cal. 48; 57 Pac. 684. Where no errors and particulars are specified in the notice of intention to move for a new trial on the minutes of the court, no subsequent statement of the case is required or authorized. Buckley v. Althorf, 86 Cal. 643; 25 Pac. 134.

Statement sufficient when. A statement, prepared, settled, authenticated by the judge, and filed in due time, will be presumed to have been used on the hearing of the motion, and hence is sufficient. Williams v. Southern Pacific R. R. Co., 2 Cal. Unrep. 613; 9 Pac. 152. A statement, which has never been settled, cannot be used on the hearing of a motion for a new trial. Mitchell v. Croake, 20 Cal. App. 643; 129 Pac. 946. The better practice is to incorporate in the settled statement a showing, in terms, that application for relief from default was made, and that the court granted the same; but it is enough if this substantially appears. King v. Dugan, 150 Cal. 258; 88 Pac. 925.

Contents and settlement of statement on appeal. The statement, whether made on motion for a new trial, or after motion made on the minutes of the court, need not embody the notice of the motion or its contents; and the presumption on appeal in either case is, that the notice was duly given, and that the specifications in the statement conform to those in the notice; and the requirement of this section, that the statement shall contain only the grounds argued before the court for a new trial, refers to specifications of the grounds mentioned in the fourth subdivision of § 659, ante, or such of them as are in fact argued; and when the specifications are set out in the statement, it will be presumed that they were contained in the notice, and were in fact argued. Schneider v. Market Street Ry. Co., 134 Cal. 482; 66 Pac. 734. In stating the specifications of errors and objections in the statement to be made after the hearing of the motion, the better practice is to make a formal statement of the causes relied on and argued at the hearing, and not merely to insert a copy of the notice of the motion containing such statement, as it is only the formal objection stated in the notice and argued at the hearing of the motion that is entitled to be included in the statement. Leonard v. Shaw, 114 Cal. 69; 45 Pac. 1012. Where the statement, made after the motion was decided, contains no copy of the notice of the motion or its specifications, and no copy of the motion itself, and no specification of errors, it is insufficient, and the order denying the motion will not be reviewed on appeal. Sprigg v. Barber, 122 Cal. 573; 55 Pac. 419; and see Kent v. Williams, 146 Cal. 3; 79 Pac. 572. A specification of the errors and objections in the statement to be made after the hearing on the motion, is not obviated by the fact that the notice is required to state the particular errors and objections relied upon. Leonard v. Shaw, 114 Cal. 69; 45 Pac. 1012. Where the motion is based on the minutes of the court, and the moving party relies on the recollection of the judge as to the evidence and proceedings, he can thereafter secure a statement of the case, including the evidence material to the motion, for the purposes of an appeal from the order made on the motion, and mandamus lies to compel the settlement of such statement. Malcolmson v. Harris, 90 Cal. 262; 27 Pac. 206. Where a document, purporting to be a statement made subsequently to the motion, though signed by the attorneys and filed with the clerk, does not appear to have been settled or authenticated by the judge, and does not contain any specifications of error, or purport to show what grounds were argued before the court on the motion, the order denying the new trial is not a subject of review. Kent v. Williams, 146 Cal. 3; 79 Pac. 527. A statement in the transcript, purporting to be minutes of the court, showing that the motion for a new trial was granted on the ground stated in the notice, authenticated only by the clerk's certificate, cannot be considered on appeal. Sprigg v. Barber, 122 Cal. 573; 55 Pac. 419; Kent v. Williams, 146 Cal. 3; 79 Pac. 527. A bill of exceptions in the record, in which the insufficiency of the evidence to sustain the

findings is specified, may be treated as a statement of the case. Dennis v. Gordon, 163 Cal. 427; 125 Pac. 1063.

Time to prepare statement. The service of notice of the making of an order denying a new trial is not necessary; hence, the time in which to prepare the statement begins to run from the making of the order. Vinson v. Los Angeles Pacific R. R. Co., 147 Cal. 479; 82 Pac. 53.

Service of statement. The statute does not, in terms, require an order extending the time within which to propose and serve a statement of the case to be filed, but the better practice is to file it. Dennis v. Crocker-Huffman Land etc. Co., 6 Cal. App. 58; 91 Pac. 425. Where a statement, made subsequently to the order denying the motion, is not served until after the expiration of the last extension of time, there is no statement which the court can be called upon to settle, or which can be used on appeal. Buckley v. Althorf, 86 Cal. 643; 25 Pac. 134. The court may settle the statement after the statutory period has expired, where the failure to file an order extending time for the proposal and service of the statement was due to the inadvertence of the judge. Dennis v. Crocker-Huffman Land etc. Co., 6 Cal. App. 58; 91 Pac. 425.

Latter of two judgments is final. Where two judgments have been entered in a cause, and the record is silent as to the reason therefor, the latter in point of time must be deemed the true and final judgment. Galvin v. Palmer, 134 Cal. 426; 66 Pac. 572.

Appeal from judgment. An appeal from the judgment, and from an order denying a new trial, where the record shows that the bill of exceptions used on the motion was not prepared and served in time, and shows no relief from the default, the bill cannot be considered on either appeal. Johnson v. German American Ins. Co., 150 Cal. 336; 88 Pac. 985. Where the appeal is from the judgment, on the judgment roll, without any bill of exceptions, the appellant necessarily admits that there are no errors in the admission or rejection of evidence, and that the evidence sustains the findings. Mock v. Santa Rosa, 126 Cal. 330; 58 Pac. 326; and see Poledori v. Newman, 116 Cal. 375; 48 Pac. 325. A bill of exceptions, settled to be used on motion for a new trial, is "used" on the motion, within the meaning of the law as to the "use" thereof on appeal from the judgment. Boin v. Spreckels Sugar Co., 155 Cal. 612; 102 Pac. 937.

Order authenticated how. The authentication of an order dissolving an attachment should be by a bill of exceptions. Smith v. Jordan, 122 Cal. 68; 54 Pac. 368. A certificate reciting that a true and correct copy of the order refusing a new trial is contained in the transcript, to which it is attached, is sufficient as an authentication. Mendocino County v. Peters, 2 Cal. App. 24; 82 Pac. 1122.

Record on appeal. A record on appeal from an order refusing a new trial, containing the judgment roll, the bill of exceptions, and a copy of the order, is sufficient. Mendocino County v. Peters, 2 Cal. App. 24; 82 Pac. 1122. When a motion for a new trial is made upon the ground of newly discovered evidence, the affidavits used on the hearing, with a copy of the order made, constitute the record to be used on appeal from the order granting or refusing a new trial. Schroeder v. Mauzy, 16 Cal. App. 443; 118 Pac. 459. An affidavit, not shown to have been used on the motion, cannot be considered a part of the record on appeal (Broads v. Mead, 159 Cal. 765; Ann. Cas. 1912C, 1125; 116 Pac. 46); nor an unauthenticated affidavit (Estate of Dean, 149 Cal. 487; 87 Pac. 13); nor an affidavit made subsequently to the denial of the motion (Williams v. Harter, 121 Cal. 47; 53 Pac. 405); nor an affidavit used on the hearing of the motion, merely certified by the clerk (Melde v. Reynolds, 120 Cal. 234; 52 Pac. 491); nor an unauthenticated paper in the transcript, in which there is no bill of exceptions (Nash v. Harris, 57 Cal. 242); nor the opinion of the trial judge in making an order granting a new trial, though printed in the transcript. Bouchard v. Abrahamsen, 4 Cal. App. 430; 88 Pac. 383. A bill of exceptions, settled after an order granting or refusing a new trial, except where the order was made on the minutes of the court, or was made of the court's own motion, is no part of the record on appeal. Frost v. Los Angeles Ry. Co., 165 Cal. 365; 132 Pac. 442. A notice of motion for relief from the effect of failing to serve a proposed statement on motion for a new trial in time, and a minute-order granting said motion, printed in the transcript, but not embodied in the statement or bill of exceptions, is no part of the record on appeal. King v. Dugan, 150 Cal. 258; 88 Pac. 925.

Record on appeal from motion on minutes. Where an appeal is taken from an order granting or refusing a new trial, on the minutes of the court, a statement, prepared subsequently to such ruling, with the judgment roll and a copy of the order, constitute the papers on which the appeal is to be heard; and a transcript of these papers is furnished to the appellate court, only in case of appeal from such orders. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. Where the record on appeal from an order denying a new trial shows that the statement, which contains no copy of the notice of intention, was settled and filed subsequently to the date on which the order was made, it must be inferred that the motion was made on the minutes of

the court. Blood v. La Serena Land etc. Co., 150 Cal. 764; 89 Pac. 1090.

Notice of intention to move for new trial no part of record. A notice of intention to move for a new trial is no part of the record on appeal (Hook v. Hall, 68 Cal. 22; 8 Pac. 596; Dominguez v. Mascotti, 74 Cal. 269; 15 Pac. 773; Pico v. Cohn, 78 Cal. 384; 20 Pac. 706; Richardson v. Eureka, 92 Cal. 64; 28 Pac. 102; Reclamation District v. Thisby, 131 Cal. 572; 63 Pac. 918; Williams v. Hawley, 144 Cal. 97; 77 Pac. 762; Power v. Fairbanks, 146 Cal. 611; 80 Pac. 1075); and a notice of intention, not embodied in the statement or bill of exceptions, and not certified in any way, cannot be considered on appeal: it is no part of the record on appeal (Leonard v. Shaw, 114 Cal. 69; 45 Pac. 1012; Williams v. Hawley, 144 Cal. 97; 77 Pac. 762; Hook v. Hall, 68 Cal. 22; 8 Pac. 596; Girdner v. Beswick, 69 Cal. 112; 10 Pac. 278; Dominguez v. Mascotti, 74 Cal. 269; 15 Pac. 773; Dennis v. Gordon, 163 Cal. 427; 125 Pac. 1063; Carver v. San Joaquin Cigar Co., 16 Cal. App. 761; 118 Pac. 92); nor is a notice of intention, improperly inserted in the record after the statement, a part of the record. Nye v. Marysville etc. Street Ry. Co., 97 Cal. 461; 32 Pac. 530. The notice of intention need not be incorporated in the statement or bill of exceptions (Pico v. Cohn, 78 Cal. 384; 20 Pac. 706; Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84; 38 Pac. 627; Reclamation District v. Thisby, 131 Cal. 52; 63 Pac. 918), unless the opposite party insists that it is insufficient (Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84; 38 Pac. 627); but it is essential for the purpose of reviewing the action of the trial court on motion for a new trial, that it should appear by the record that the ground for a new trial presented on appeal was presented by the motion in the lower court. Great Western Gold Co. v. Chambers, 153 Cal. 307; 95 Pac. 151. A notice of intention, not authenticated, and based on the minutes of the court, the record, and the evidence, without any statement or specifications of error in the minutes, cannot be considered on appeal. Sprigg v. Barber, 122 Cal. 573; 55 Pac. 419.

Changing record. While an order denying a new trial is in force, the record upon which it is based cannot be changed. Merced Bank v. Price, 152 Cal. 697; 93 Pac. 866.

Scope of inquiry on appeal. The scope of inquiry, on appeal from an order denying a new trial, is limited to the order appealed from, the judgment roll, and the affidavits or bill of exceptions or statement used on the hearing (Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418); and if a question is presented by specifications of errors of law and of insufficiency of the evidence, and is properly saved in the statement or bill of exceptions, the appellate court will presume that it was properly presented to the court, and passed upon in its ruling. Pico v. Cohn, 78 Cal. 384; 20 Pac. 706; Richardson v. Eureka, 92 Cal. 64; 28 Pac. 102. An order denying a motion for a nonsuit, findings alleged as not supported by the evidence, and alleged errors of law occurring at the trial, can be reviewed only on a properly authenticated statement or bill of exceptions. Wheeler v. Karnes, 125 Cal. 51; 57 Pac. 893. Where the notice of intention stated that the motion would be made on a bill of exceptions, but none was presented to the trial court or to the court on appeal, neither court can review the case as to alleged errors of law or as to the insufficiency of the evidence. Pereira v. City Savings Bank, 128 Cal. 45; 60 Pac. 524; Larkin v. Larkin, 76 Cal. 323; 18 Pac. 396. The appellate court is not restricted to an examination of the grounds upon which an order granting a new trial is based, but will examine the record to ascertain any other grounds (Thompson v. California Construction Co., 148 Cal. 35; 82 Pac. 367; Houghton v. Market Street Ry. Co., 1 Cal. App. 567; 82 Pac. 972; Weisser v. Southern Pacific Co., 148 Cal. 426; 83 Pac. 439; Martin v. Markarian, 1 Cal. App. 687; 82 Pac. 1072), except as to the insufficiency of the evidence, where it is conflicting (Thompson v. California Construction Co., 148 Cal. 35; 82 Pac. 367); and where the motion is made on several grounds, and the record does not disclose for which one, the order will not be reversed, if it could have been granted on any one of the grounds (Tibbetts v. Bower, 121 Cal. 7; 53 Pac. 359); and the limitation of the order to one ground precludes the defendant from contending that it may have been granted on another ground (McGinty v. Morgan, 122 Cal. 103; 54 Pac. 392); and where the motion was granted on a specified ground, the insufficiency of the evidence, though specified in the motion, will not be considered on appeal (Siemsen v. Oakland etc. Electric Ry., 134 Cal. 494; 66 Pac. 672; Kauffmann v. Maier, 94 Cal. 269; 18 L. R. A. 124; 29 Pac. 481); and only those matters considered by the court on the hearing of the motion can be considered. Marsteller v. Leavitt, 130 Cal. 149; 62 Pac. 384; Blood v. La Serena Land etc. Co., 150 Cal. 764; 89 Pac. 1090. An order, properly granting the motion on any one of the grounds assigned, will not be disturbed on appeal. Mock v. Los Angeles Traction Co., 139 Cal. 616; 73 Pac. 455; Swett v. Gray, 141 Cal. 63; 74 Pac. 439; Baldwin v. Napa etc. Wine Co., 1 Cal. App. 215; 81 Pac. 1037. The reasons given by the court for granting the motion are immaterial, since they may be bad, and yet the decision correct for other reasons. Power v. Fair-

banks, 146 Cal. 611; 80 Pac. 1075; Skinner v. Horn, 144 Cal. 278; 77 Pac. 904. Where there is no bill of exceptions or statement in the record, and where findings are waived by failure of the defendant to appear at the trial, the appeal must be determined upon the judgment roll alone. Johnston v. Callahan, 146 Cal. 212; 79 Pac. 870. Where the motion was submitted on the minutes of the court, no matters, other than those appearing on the judgment roll, by bill of exceptions or statement of the case subsequently prepared, can be considered on appeal (Buckley v. Althorf, 86 Cal. 643; 25 Pac. 134); and the only specifications of insufficiency of the evidence that can be considered are those embodied in the statement or bill of exceptions, which are presumably the only ones urged. Roberts v. Hall, 147 Cal. 434; 82 Pac. 66.

CODE COMMISSIONERS' NOTE. Articles I and II of this chapter are a substitute for the provisions of our old Practice Act relating to exceptions and motions for new trials. For all the statements and counter-statements and complicated machinery, there is substituted a simple practice by bills of exception. Under the old system, nearly one third of the time of sessions of the supreme court were devoted to hearing arguments addressed, not to the merits of the case, but as to whether the merits were before the court. We now have in our reports more decisions on points of practice, relative to that question, than can be found in the reports of the supreme court of the United States from its organization. By allowing an exception to be taken to the verdict or decision, we avoid, in eight cases out of ten, a resort to a motion for a new trial, and allow the question of sufficiency of the evidence to come directly to the supreme court as a question of law, as in criminal cases, thus leaving the motion for new trial, in most cases, but one office to perform: that of giving the court below an opportunity to review its own decision. If the new trial is moved for, then the papers used at the hearing are, by the judge, turned into a bill of exception, and constitute the only record on appeal from a decision granting or refusing the motion. The judge must decide every cause submitted to him within twenty days after its submission. Notice of filing of findings is dispensed with, but the party knows that they must be filed within twenty days, and the only diligence he is put to is to inquire at the end of that time, for if the findings are filed the next day after the cause was submitted, he will still have left eleven days of his thirty in which to move for a new trial.

§ 662. [New trial on court's own motion. Repealed.]

Legislation § 662. 1. Added by Code Amdts. **1873–74,** p. 319.

2. Repealed by Stats. **1915,** p. 202.

New trial, where jury disregard instructions or evidence. This section is a limitation upon the power of the court to grant a new trial, of its own motion, in cases where there has been: 1. Such a plain disregard, by the jury, of the evidence, as to satisfy the court that the verdict was rendered under a misapprehension, or under the influence of passion or prejudice; or 2. That there was such a plain disregard of the instructions as to satisfy the court that the verdict was so rendered. Townley v. Adams, 118 Cal. 382; 50 Pac. 550. A court may, of its own motion, vacate a verdict, where there has been a plain and palpable disregard of either the instructions or the evidence. Occidental Real Estate Co. v. Gantner, 7 Cal. App. 727; 95 Pac. 1042. A plain disregard of the evidence must be made to appear, in order to justify the court in setting aside a verdict of its own motion; and the rule applies only where the jury plainly, palpably, and grossly disregard the instructions or evidence. Eades v. Trowbridge, 143 Cal. 25; 76 Pac. 714; Townley v. Adams, 118 Cal. 382; 50 Pac. 550; Mizener v. Bradbury, 128 Cal. 340; 60 Pac. 928. A verdict, not supported by the evidence, and contrary to the instructions, is properly set aside. Hynes v. Nelson, 5 Cal. Unrep. 741; 2 Pac. 36. An order setting aside a verdict, on the ground that it is not justified by the evidence, and that it is against the law and the evidence, made by the court, of its own motion, is unauthorized and void. Townley v. Adams, 118 Cal. 382; 50 Pac. 550. In an action of unlawful detainer, the court may, of its own motion, set aside a verdict for the defendant, where ten months' rent was unpaid, and the plaintiff was clearly entitled to a verdict for the possession of the premises and for the whole rent due. Occidental Real Estate Co. v. Gantner, 7 Cal. App. 727; 95 Pac. 1042.

Judgment for costs. A judgment may be vacated, under this section, and judgment entered against the real party in interest for costs. Townsend v. Parker, 21 Cal. App. 317; 131 Pac. 766.

Grounds for action of court. Where the order setting aside a verdict was made on a formal written application, and the opinion of the court shows the grounds on which it acted, it will not be presumed that the court acted on other and different grounds. Estate of Cahill, 74 Cal. 52; 15 Pac. 364.

Res adjudicata. The denial of a motion, made under this section, is not res adjudicata as to a motion for a new trial under § 657, ante. Anglo-Nevada Assurance Corp. v. Ross, 123 Cal. 520; 56 Pac. 335.

Appeal. An order of the court, setting aside a verdict, of its own motion, is the equivalent of an order granting a new trial, and, being a matter within the legal discretion of the court, will not be interfered with on appeal, except for an abuse of discretion. Hynes v. Nelson, 5 Cal. Unrep. 741; 2 Pac. 36. An appeal on the ground that trial courts have no authority to set aside a verdict for prejudice of the jury, is frivolous. Foote v. Hayes, 4 Cal.

Unrep. 976; 39 Pac. 601. The recitals, in a settled statement on appeal, of the rendering of the verdict, and of the vacating of the judgment by the court on its own motion, are conclusive of such facts. Occidental Real Estate Co. v. Gantner, 7 Cal. App. 727; 95 Pac. 1042.

New trial must be by jury. Where the findings are directly contrary to the verdict, there is, in effect, a setting aside and vacating of the verdict; and it is the duty of the court to order a new trial by jury: it has no power to proceed to determine the cause without a jury. Montgomery v. Sayre, 91 Cal. 206; 27 Pac. 648.

Record on appeal from order granting or refusing new trial. See note ante, § 661.

Power of court to grant new trial of its own motion. See note 14 Ann. Cas. 65.

Power of court to open or vacate order determining motion for new trial. See note Ann. Cas. 1913B, 485.

Inadequacy of damages as ground for setting aside verdict. See note 47 L. R. A. 33.

Right of court to grant new trial on its own motion or on grounds other than those urged by the moving party. See note 40 L. R. A. (N. S.) 291.

§ 663. Vacation of judgment. A judgment or decree of a superior court, when based upon findings of fact made by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of such party and entitling him to a different judgment:

1. Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case when the judgment is set aside, the conclusions of law shall be amended and corrected.

2. A judgment or decree not consistent with or not supported by the special verdict.

Legislation § 663. Added by Stats. 1897, p. 58.

The original § 663, which provided when motions for new trial might be brought to hearing, was added by Code Amdts. 1873–74, p. 319; was amended by Code Amdts. 1877–78, p. 100; and was repealed by Code Amdts. 1880, p. 64.

Construction of section. This section authorizes, simply, the substitution of the judgment that should have been given as a matter of law upon the findings of fact in a case where the judgment already given is an incorrect conclusion from such findings. Dahlberg v. Girsch, 157 Cal. 324; 107 Pac. 616.

Procedure. There is nothing in this section, or in § 663a, post, that indicates that service of notice of intention to move for a new trial, and of the other steps in the preparation of a bill of exceptions, have been dispensed with; in this respect, there is no change in the law. Ford v. Braslan Seed Growers Co., 10 Cal. App. 762; 103 Pac. 946.

Judgment or conclusions inconsistent with findings. The superior court has jurisdiction, on motion, to vacate a judgment as entered, which is inconsistent with and not supported by the findings of fact, and to enter a proper judgment (Ballerino v. Superior Court, 2 Cal. App. 759; 84 Pac. 225; Tyrrell v. Baldwin, 67 Cal. 1; 6 Pac. 867; Colton Land etc. Co. v. Schwartz, 99 Cal. 278; 33 Pac. 878; Galvin v. Palmer, 134 Cal. 426; 66 Pac. 572); and also to vacate a judgment, where the conclusions of law are incorrect or erroneous, and not consistent with the findings of fact (Shafer v. Lacy, 121 Cal. 574; 54 Pac. 72; Swift v. Occidental Mining etc. Co., 141 Cal. 161; 74 Pac. 700; Sharp v. Bowie, 142 Cal. 462; 76 Pac. 62); and to vacate that part of the judgment disallowing costs, and to enter judgment for costs. Gibson v. Hammang, 145 Cal. 453; 78 Pac. 953. A question of law, as to whether or not the judgment is the correct legal conclusion from the facts found, may be raised and determined by motion in the court below, under this section. Fountain Water Co. v. Dougherty, 134 Cal. 376; 66 Pac. 316. Where the conclusion that the plaintiff is entitled to judgment is in conflict with the findings, the remedy is not by a new trial of an issue which has been correctly decided, but by a motion under this section, or by an appeal from the judgment. Sharp v. Bowie, 142 Cal. 462; 76 Pac. 62.

Findings cannot be changed. A motion to amend or change a finding of fact is not authorized under our practice. Hole v. Takekawa, 165 Cal. 372; 132 Pac. 445. The trial court cannot, on a motion under this section, change any finding of fact. Dahlberg v. Girsch, 157 Cal. 324; 107 Pac. 616.

Result of failure to move. A party does not waive his objection that the findings do not support the judgment, by a failure to proceed by motion under this section and § 663a, post. Worth v. Worth, 155 Cal. 599; 102 Pac. 663.

Substitution of proper judgment. This section authorizes, simply, the substitution of the proper judgment for the one given.

Dahlberg v. Girsch, 157 Cal. 324; 107 Pac. 616. On motion of a party entitled to judgment, the trial court has jurisdiction to vacate an improper judgment, and to enter the proper judgment. Ballerino v. Superior Court, 2 Cal. App. 759; 84 Pac. 225.

Appeal. The remedy provided by this section and § 663a, post, is merely cumulative, and is not designed to supersede the remedy by appeal provided in § 963, post. Patch v. Miller, 125 Cal. 240; 57 Pac. 986; Modoc Co-operative Ass'n v. Porter, 11 Cal. App. 270; 104 Pac. 710. An order denying a motion to vacate a judgment under this section and § 663a, is one made after final judgment, and is appealable under § 963, post. Taylor v. Darling, 19 Cal. App. 232; 125 Pac. 249; Condon v. Donohue, 160 Cal. 749; 118 Pac. 113; Bond v. United Railroads, 159 Cal. 270; Ann. Cas. 1912C, 50; 113 Pac. 366. The question of law, whether or not the judgment is the correct legal conclusion from the facts found, may be raised and determined on motion made under this section and § 663a, or by appeal from the judgment. Kaiser v. Dalto, 140 Cal. 167; 73 Pac. 828; Boggs v. Ganeard, 148 Cal. 711; 84 Pac. 195; Wutchumna Water Co. v. Ragle, 148 Cal. 759; 84 Pac. 162; Forsythe v. Los Angeles Ry. Co., 149 Cal. 569; 87 Pac. 24; Elizalde v. Murphy, 11 Cal. App. 32; 103 Pac. 904. The pendency of a motion, under this section, to vacate and change the judgment upon the findings does not excuse a failure to file the transcript on appeal within time. Modoc Co-operative Ass'n v. Porter, 11 Cal. App. 270; 104 Pac. 710. Upon appeal from an order vacating a judgment on the findings, the review is restricted to the case made by the findings of fact, taken in the light of the pleadings and the issues made thereon. Dahlberg v. Girsch, 157 Cal. 324; 107 Pac. 616. Upon appeal from an order denying a new trial, specifications in the bill of exceptions, that the conclusions of law embraced in the findings are erroneous, can be reviewed only on appeal from the judgment, or from an order under this and § 663a, post. Mentone Irrigation Co. v. Redlands etc. Power Co., 155 Cal. 323; 22 L. R. A. (N. S.) 382; 17 Ann. Cas. 1222; 100 Pac. 1082.

Notice of motion under this section. See note post, § 663a.

Vacating judgment. See note ante, § 662.

§ 663a. Notice of intention, service of. The party intending to make the motion mentioned in the last section must, within ten days after notice of the entry of judgment, serve upon the adverse party and file with the clerk of the court a notice of his intention, designating the grounds upon which, and the time at which the motion will be made, and specifying the particulars in which the conclusions of law are not consistent with the finding of facts, or in which the judgment or decree is not consistent with the special verdict. The time designated for the making of the motion must not be more than sixty days from the time of the service of the notice. An order of the court granting such motion may be reviewed on appeal in the same manner as a special order made after final judgment and a bill of exceptions to be used on such appeal may be prepared as provided in section six hundred and forty-nine.

Legislation § 663a. **1.** Added by Stats. **1897**, p. 59, as § 663½, (1) the first sentence (a) having the words "rendition of judgment or decree" instead of "entry of judgment" (the substitution being made in 1907), (b) but not having the words "and the time at which," before "the motion will be made" (the insertion thereof being made in 1907); (2) the second (and final) sentence (recast in 1907) reading, "The said party must, within sixty days after giving such notice of intention, make the motion to the court, after giving due notice of the time of making such motion to the adverse party; but the hearing or consideration of such motion may be further continued by the court."

2. Amendment by Stats. **1901**, p. 150; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 719, renumbering the section 663a (compare par. 1, supra, for changes made in first sentence), (1) the second sentence being recast to read as at present (1915), (3) a new (and final) sentence being added (recast in 1915), reading, "An order of the court granting such motion may be reviewed on appeal in the same manner as orders made on motions for a new trial, and a statement to be used on such appeal may be prepared in the same manner as statements after a motion is heard upon the minutes of the court, as provided in section six hundred and sixty-one." The code commissioner, in his note, says: "Renumbered thus instead of 663½. 'Rendition' is changed to entry, to correspond to the change in § 659; the last sentence of the old section is omitted [amended]; and the moving party is required to state the time when his motion will be made. The last sentence is an addition."

4. Amended by Stats. **1915**, p. 203, recasting the final sentence. Compare par. 3, supra.

Construction of section. This section does not, nor does § 663, ante, supersede,

in any way, § 963, post, providing for an appeal from a final judgment. Patch v. Miller, 125 Cal. 240; 57 Pac. 986.

Appeal from order. This section provides for an appeal from an order granting the motion under § 663, but makes no provision for an appeal from an order denying such motion. Modoc Co-operative Ass'n v. Porter, 11 Cal. App. 270; 104 Pac. 710. An order of the court below, refusing to render a new and different judgment, must be affirmed, where a reversal would require the appellate court to make new findings. McLean v. Baldwin, 150 Cal. 615; 89 Pac. 429.

Causes for vacating judgment. See note ante, § 663.

Amendment of findings. See note ante, § 663.

CHAPTER VIII.

MANNER OF GIVING AND ENTERING JUDGMENT.

§ 664. Judgment to be entered in twenty-four hours, etc.
§ 665. Case may be brought before the court for argument.
§ 666. When counterclaim established exceeds plaintiff's demand.
§ 667. In replevin, judgment to be in the alternative, and with damages. Gold coin or currency judgment.
§ 668. Judgment-book to be kept by the clerk.
§ 669. If a party die after verdict, judgment may be entered, but not to be a lien.
§ 670. Judgment roll, what constitutes.
§ 671. Judgment lien, when it begins and when it expires.
§ 672. Docket defined. How kept, and what to contain.
§ 673. Docket to be open for inspection without charge.
§ 674. Transcript to be filed in any county, and judgment to become a lien there.
§ 675. Satisfaction of a judgment, how made.
§ 675a. Satisfaction of mortgage recorded. Form of satisfaction.
§ 676. Undertaking in actions to set aside transfer of property.
§ 677. Conditions of undertaking.
§ 677½. Filing and serving undertaking.
§ 678. Objections to sureties.
§ 678½. Justification of sureties. Approval and disapproval of undertaking.
§ 679. Objection because estimated value in undertaking less than market value. New undertaking.
§ 679½. Justification of sureties.
§ 680. When undertaking becomes effective.
§ 680½. Judgment against sureties.

§ 664. Judgment to be entered in twenty-four hours, etc. When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings. If the trial has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such decision. In no case is a judgment effectual for any purpose until so entered.

Reserving, for argument or further consideration. Post, § 665.
Stay of proceedings by appeal. Post, § 949.
Arrest of defendant. Post, § 684.

Legislation § 664. 1. Enacted March 11, **1872**; based on Practice Act, § 197, which had the word "shall" instead of "must," in first line.

2. Amendment by Stats. **1901**, p. 150; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 719, by adding the last two sentences; the code commissioner saying, "The amendment consists in the addition of the last two sentences, and requires the clerk to enter judgment immediately upon filing the decision of the court, and declares the judgment non-effectual for any purpose until so entered."

Construction of section. This section is purely directory, and not mandatory. Bundy v. Maginess, 76 Cal. 532; 18 Pac. 668; Churchill v. Louie, 135 Cal. 608; 67 Pac. 1052.

Proceedings in suits in equity. Cases involving questions of purely equitable cognizance, where the issues are submitted to a jury, are not within this section, and the clerk has no power to enter judgment upon such verdicts. Churchill v. Louie, 135 Cal. 608; 67 Pac. 1052. The verdict in an equitable action is merely advisory, but when it is decisive of the action, is regularly returned and entered in the minutes of the court, and the court orally orders judgment to be entered thereon, such order is a verbal adoption of the verdict and a rendition of judgment; and the failure of the clerk to transcribe the verdict into the minute-book, and to enter judgment as ordered, is a failure to perform a ministerial duty, which can afterwards be performed at his own instance, or by the direction of the court, at any time. Holt v. Holt, 107 Cal. 258; 40 Pac. 390.

Rendition and entry of judgment. The terms "entry of judgment" and "rendition of judgment," as used in the code, have distinct meanings: the "rendition" is the pronouncement of the verdict of the jury or the decision of the court; the "entry" is but a ministerial act of the clerk. Gray v. Palmer, 28 Cal. 416. In entering judgment on a verdict or findings, the clerk performed a ministerial duty: he can neither enlarge nor abridge the scope of the judgment. McMahon v. Hetch-Hetchy

etc. Ry. Co., 2 Cal. App. 400; 84 Pac. 350. This section is equivalent to an express direction by the court to the clerk to enter the judgment in accordance with the verdict; and if, through the neglect or misprision of the clerk, the judgment actually rendered is not entered, the court may, even after the expiration of six months, order the judgment entered nunc pro tunc. Marshall v. Taylor, 97 Cal. 422; 32 Pac. 515. Where the action is tried by the court, judgment cannot be entered until after the decision has been rendered, and a writ of mandate will not be granted to compel the entry of judgment until after the court has tried the cause and rendered its decision. Broder v. Superior Court, 103 Cal. 121; 37 Pac. 143. The clerk may be compelled, on motion, to enter a proper judgment: the court will not require the party interested to resort to mandamus. Page v. Superior Court, 76 Cal. 372; 18 Pac. 385. Neglect of the clerk to enter and docket the judgment, and to prepare and file the judgment roll, where the decree is ordered and signed, does not destroy or impair the effect of the judgment. Baker v. Brickell, 102 Cal. 620; 36 Pac. 950. The provision of this section, that judgment must be entered within twenty-four hours, is directory. Waters v. Dumas, 75 Cal. 563; 17 Pac. 685. The failure of the clerk to enter the judgment within twenty-four hours does not affect the validity of a judgment afterward entered. First Nat. Bank v. Wolff, 79 Cal. 69; 21 Pac. 551, 748; Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218; Churchill v. Louie, 135 Cal. 608; 67 Pac. 1052. A judgment entered on a Monday, upon a verdict rendered on the night of the preceding Saturday, is not invalidated by reason of the delay in its entry. Bundy v. Maginess, 76 Cal. 532; 18 Pac. 668. Jurisdiction is not lost by failure of the clerk to enter judgment within twenty-four hours: the only penalty is that provided by the sixth subdivision of § 581, ante, authorizing a dismissal where the party entitled to judgment neglects for six months to demand and have the same entered (Waters v. Dumas, 75 Cal. 563; 17 Pac. 685); nor can the defendant against whom the judgment is entered invoke such failure for the purpose of annulling a judgment to which he has no other defense: such failure may render the clerk liable to an action by the judgment creditor. Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218. The judgment is binding on the parties and privies, when signed by the judge and filed: the clerk cannot, by failure to enter it, abridge the rights of any party interested. Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146; 16 Pac. 887. The action of the court does not depend upon the entry of its orders by the clerk, but upon the fact that the orders have been made; and when an order has been made by the court, it is as effective as if it had been entered of record by the clerk. Niles v. Edwards, 95 Cal. 41; 30 Pac. 134. The effect of an order setting aside a verdict is to grant a new trial, otherwise no judgment could be entered, there being no verdict; and no further trial can take place, because no such order was made in terms. Eades v. Trowbridge, 143 Cal. 25; 76 Pac. 714. It is immaterial who sets the clerk in motion to discharge his ministerial duty of entering the judgment, or who pays his fees therefor; and he may perform his duty of his own motion, or the court can direct him to do it, or any party interested in having it done may procure him to do it. Baker v. Brickell, 102 Cal. 620; 36 Pac. 950. Where the prevailing party pays the clerk the costs of the action after the verdict, and presents him with a form of the judgment, he has a right to assume that the clerk will perform the duty required of him: such party is not guilty of negligence, where the clerk fails to perform his duty. Marshall v. Taylor, 97 Cal. 422; 32 Pac. 515. The judgment in an action to quiet title becomes a muniment of title to a successor in interest of the prevailing party, and he may procure its entry at any time. Baker v. Brickell, 102 Cal. 620; 36 Pac. 950. Damages arising from personal injuries to a married woman are community property, and a judgment in favor of both her and her husband is properly entered upon a finding of injury to her alone. Paine v. San Bernardino Valley etc. Co., 143 Cal. 654; 77 Pac. 659. The preceding decisions were rendered prior to the amendment of this section in 1907. An entry in the so-called "rough minutes" by the clerk is not official: there is no law providing for "rough minutes." Brownell v. Superior Court, 157 Cal. 703; 109 Pac. 91.

Entry of judgment in justices' courts. See notes post, §§ 891–894.

Rendition of judgment, what constitutes. See note ante, § 632.

Entry of default judgment. A judgment by default, entered before the time for answering has expired, is erroneous merely, and can be attacked only upon motion or by appeal, and by the party aggrieved. Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146; 16 Pac. 887. Judgment may be entered upon failure to answer, after the overruling of a demurrer, against one defendant, without at the same time entering judgment against his co-defendant, who has not been served. Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218. Several judgments against defendants may be entered, in an action of ejectment against several defendants occupying different portions of the property; this may be done upon the trial, on separate findings or verdicts, and there is no objection to the same course or findings by the

court after default. Lick v. Stockdale, 18 Cal. 219.

Clerical errors in entry of judgment corrected how. A mistake made by the clerk in the entry of a judgment, not authorized by the decision, is apparent upon the face of the record, and may be rectified at any time, by reason of the inherent power of the court over its own proceedings, although more than six months have elapsed from the entry of the judgment. San Joaquin Land etc. Co. v. West, 99 Cal. 345; 33 Pac. 928. A mere clerical error in computation, appearing upon the face of the record, may be corrected at any time by the court, of its own motion, without vacating the judgment. Erickson v. Stockton etc. R. R. Co., 148 Cal. 206; 82 Pac. 961.

Findings and conclusions. Conclusions of law, based upon findings of fact, may be changed at any time before judgment; and the judgment is not final until recorded. Condee v. Barton, 62 Cal. 1. The rendition of judgment is the filing of the findings of fact and conclusions of law; prior to the code, findings were not essential to the entry or validity of the judgment, and therefore the entry of the decision in the clerk's minutes constituted a rendition of judgment, but, under the code, whenever findings are required, there can be no rendition of judgment until they are made and filed with the clerk; findings of fact, however, are required only upon the trial of a question of fact, and they may be waived, and whenever they are waived or are not required, the entry of the decision in the minutes constitutes a rendition of judgment, just as it did under the former system; the rendition of a judgment is a judicial act, while its entry upon the record is merely a ministerial one, which can be performed by the clerk after the expiration of the term of office of the judge who renders it, with as much effect as before. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074. A party is entitled, as a matter of right, to a decision from the judge or a verdict from the jury hearing the evidence: he cannot be compelled to accept a decision upon the facts from another judge and another jury. Guardianship of Sullivan, 143 Cal. 462; 77 Pac. 153.

Interest, how computed in judgment. Interest should be provided for in the judgment from the day of the rendition of the verdict; the clerk cannot include in the judgment a sum equal to interest from the rendition of the verdict to the entry of the judgment (Alpers v. Schammel, 75 Cal. 590; 17 Pac. 708); and interest may be included in the judgment as entered by the clerk, although the decision is silent upon that point. San Joaquin Land etc. Co. v. West, 99 Cal. 345; 33 Pac. 928.

Judgment must follow verdict. The judgment must conform to the verdict; and where the verdict passes upon extraneous facts not embraced within the issues raised by the pleadings, it is void pro tanto, and the surplus matter may be disregarded in entering judgment. Watson v. San Francisco etc. R. R. Co., 50 Cal. 523. Where the verdict is strictly within the issues, the clerk has no authority to enter a judgment at variance with the verdict as recorded. McMahon v. Hetch-Hetchy etc. Ry. Co., 2 Cal. App. 400; 84 Pac. 350.

Judgment must follow agreement of parties. Where it is stipulated that a decree shall be entered in conformity with an agreement between the parties, the court's power to enter a decree is strictly limited by the terms of the agreement: it cannot embody therein extraneous matters not covered by the agreement. People's Ditch Co. v. Fresno Canal etc. Co., 152 Cal. 87; 92 Pac. 77.

Judgment against defendant under fictitious name. A judgment is binding upon a party sued and served under a fictitious name, unless he comes in and sets up the misnomer and whatever defense he may have. Brum v. Ivins, 154 Cal. 17; 129 Am. St. Rep. 137; 96 Pac. 876.

Signature to judgment. The judgment need not be signed by the judge; nor does a judgment produced from the original records need a signature or authentication: the signature is merely to give the clerk a surer means of accurately entering what has been adjudged. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074.

Limitation to action on judgment. The statute of limitations runs from the entry of judgment, and not from its rendition. Trenouth v. Farrington, 54 Cal. 273; Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218; Herrlich v. McDonald, 104 Cal. 551; 38 Pac. 360. The judgment debtor may at any time cause judgment to be entered, and thus stop the running of the statute. Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218.

Records of sister state. A substantial compliance with the provisions of this section and § 668, post, must appear in the exemplification of the record of a sister state, where the laws of such state have not been proved. Wilson v. Durkee, 20 Cal. App. 492; 129 Pac. 617.

New trial. Where the verdict is against the evidence, the appellate court cannot correct it: the case will be remanded for a new trial. McMahon v. Hetch-Hetchy etc. Ry. Co., 2 Cal. App. 400; 84 Pac. 350.

Nunc pro tunc entry of judgment. See notes 4 Am. St. Rep. 828; 20 L. R. A. 143.

Right to enter judgment nunc pro tunc as of date of rendition, so as to affect intervening rights of third persons. See note 15 L. R. A. (N. S.) 682.

§ 665. Case may be brought before the court for argument. When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument.

Legislation § 665. Enacted March 11, **1872**; re-enactment of Practice Act, § 198, as amended by Stats. 1854, Redding ed. p. 62, Kerr ed. p. 88.

§ 666. When counterclaim established exceeds plaintiff's demand. If a counterclaim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

Counterclaim.
1. Generally. Ante, §§ 438, 439.
2. Dismissal or nonsuit, where none. Ante, § 581, subd. 1.
3. Exceeding plaintiff's demand. Ante, § 626.

Legislation § 666. Enacted March 11, **1872**; based on Practice Act, § 199 (New York Code, § 263), which (1) had the words "so established" after "demand," and (2) the word "shall" instead of "must," in both instances.

Counterclaim sufficient when. A counterclaim must exist in favor of the defendant and against the plaintiff, in order that judgment, as provided in this section, may be entered (Duff v. Hobbs, 19 Cal. 646); but the defendant is not compelled, by reason of this section, to set up and litigate new matter constituting a counterclaim. Ayres v. Bensley, 32 Cal. 620.

Nature of cross-complaint. The filing of a cross-complaint is not the commencement of an "action," but is a proceeding in an action to enable all matters in dispute therein to be determined by a single judgment. Lowe v. Superior Court, 165 Cal. 708; 134 Pac. 190.

§ 667. In replevin, judgment to be in the alternative, and with damages. Gold coin or currency judgment. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in all actions for the recovery of money, if the plaintiff allege in his complaint that the same was understood and agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff must be made payable in the kind of money or currency so received by such person.

Money.
1. How computed and stated. See Pol. Code, § 3274.
2. Specific, or currency. Fiduciary capacity. Post, § 1407.

Replevin.
1. Return to defendant. See ante, §§ 514, 627.
2. Judgment, verdict. Ante, § 627.
3. Value, correcting affidavit of. Ante, § 473.

Execution. Post, § 682, subd. 5.

Legislation § 667. Enacted March 11, **1872**; based on Practice Act, § 200, as amended by Stats. 1869–70, p. 295, which had, (1) in the first sentence, the word "damage" instead of "damages"; (2) in the last sentence, (a) the words "the same" instead of "it," after "whether," (b) the word "shall" before "allege in his," (c) the words "the same shall be" instead of "this fact is," (d) after "by evidence," the words "to the satisfaction of the court, referee or jury by whom the action shall be tried," (e) the word "shall" instead of "must," before "be made," (f) the word "specified" instead of "alleged," after "currency so," and (g) instead of the word "must," before "be made payable," the words "whether the same be by default or after verdict may."

Construction of section. This section confers a special authority to enter a peculiar judgment not known to the common law, or even to courts of equity in certain specified actions; it must be strictly construed, and cannot be extended beyond the case prescribed. Hathaway v. Brady, 26 Cal. 581. It applies to cases where judgment is entered after trial, but not to cases where the action is dismissed without trial (Kneebone v. Kneebone, 83 Cal. 645; 23 Pac. 1031); nor has it any application where the property is not delivered to the plaintiff. Black v. Hilliker, 130 Cal. 190; 62 Pac. 481.

Pleadings. It is not necessary to allege the particular facts upon which the plaintiff claims title and right of possession: it is sufficient to allege the same generally; but where both are alleged, a denial of either is sufficient. Nudd v. Thompson, 34 Cal. 39.

Value of property. The plaintiff is entitled primarily to the very property sued for, and the value he is to receive, where delivery cannot be had, is the value as of the day of trial: the money value is a substitute for the property, and the amount can be approximately fixed by ascertaining it as of the date nearest to the time when the property would be delivered. Phillips v. Sutherland, 2 Cal. Unrep. 241; 2 Pac. 32. Where the property is of a fluctuating market value, the value to be fixed is the highest price between the time of taking and the trial; the reason for the exception being, that, in the usual course of trade or business, it is likely the owner would have realized the enhanced value if he had not been deprived of his property. Page v. Fowler, 39 Cal. 412; 2 Am. Rep. 462. The market value of property unlawfully taken is to be ascertained at the place of conversion. Hamer v. Hathaway, 33 Cal. 117. The value which the plaintiff is entitled to recover in case a delivery cannot be had, is the value of the property, to be ascertained at the place where it is detained when the action is commenced; and evidence of its value in markets near by, the cost of marketing, etc., is admissible as tending to prove its value at the place of detention (Hisler v. Carr, 34 Cal. 641); and in fixing the value, evidence of what it would cost to purchase in open market and replace the property in controversy is admissible. Angell v. Hopkins, 79 Cal. 181; 21 Pac. 729; Levy v. Scott, 115 Cal. 39; 46 Pac. 892. The jury are to find the value of any specific portion of the property, only if so instructed; and error can therefore arise only in a case where such instruction would be pertinent and proper, and the instruction was asked and refused. Whetmore v. Rupe, 65 Cal. 237; 3 Pac. 851. Where the defendant takes issue only upon the aggregate value of the property, and no evidence of the value of each specific article is offered at the trial, the court need not instruct the jury to find the value of each specific article. Brenot v. Robinson, 108 Cal. 143; 41 Pac. 37. The separate value of each article need not be found, where the plaintiff alleges only the aggregate value of all the articles, and all the property is adjudged returned to the defendant: the finding of its aggregate value is all that is required. Black v. Hilliker, 130 Cal. 190; 62 Pac. 481.

Title to property. Where the plaintiff or the defendant in the original suit obtains judgment for the delivery of the property, or if it cannot be found, then for its value, the title to the property vests in the party against whom the judgment is given, subject to the right of the successful party to take it in discharge of so much of the judgment as is made up by the assessed value of the property; and where the property is accidentally lost or destroyed after judgment, and before possession by the sheriff, the loss falls upon the unsuccessful party, and he is bound to pay its value. Nickerson v. Chatterton, 7 Cal. 568; and see Hunt v. Robinson, 11 Cal. 262.

Findings. It is not necessary to make a finding as to a separate defense, where the matters therein alleged are all included in the general issue as to ownership. Black v. Black, 74 Cal. 520; 16 Pac. 311. The right of the plaintiff to the possession of the property is a material issue, upon which the court must find, in order that the findings shall sustain the judgment for the plaintiff. Cooke v. Aguirre, 86 Cal. 479; 25 Pac. 5. The finding of the right of possession at the time of the commencement of the action is immaterial, where the judgment is for the defendant for the return of the property, or its value in a stipulated sum. Banning v. Marleau, 133 Cal. 485; 65 Pac. 964. Where the jury finds the right of possession to be in the plaintiff, the conclusion of law follows, as provided in this section, that he is entitled to delivery if it can be had, and if not, to the value of the property as found by the jury, in the alternative: the judgment must contain this, but the verdict need not. Ryan v. Fitzgerald, 87 Cal. 345; 25 Pac. 546. The legal effect of a finding for the defendant, on the question of the plaintiff's right to the property, is to entitle the defendant, from whom it was taken, to its restoration: this right is not dependent upon any finding of the jury to that effect, but is a conclusion of law from the verdict for the defendants; and it is the right of the court to state this legal conclusion as a portion of its judgment. Waldman v. Broder, 10 Cal. 378. Contradictory findings, determining that both parties to the suit were in possession of the property at the commencement thereof, cannot support

the judgment. Carman v. Ross, 64 Cal. 249; 29 Pac. 510. Where the defendant, besides taking issue as to the alleged gross value of the property claimed, set forth the value of each specific article thereof, aggregating a less sum, the court is not required to find the value of each of the specific articles, if no reason appears therefor beyond the mere fact of such averments of the answer. Kellogg v. Burr, 126 Cal. 38; 58 Pac. 306.

Verdict. The code does not require the verdict to be special, except as to the value of the property; the sole object of this exception is to enable the court to render an alternative judgment, as required by this section; a verdict, special as to the value of the property, but general as to all the other issues, is sufficient to justify a judgment for the return of property, or for the value thereof in case delivery cannot be had: such a judgment would consist entirely of pure conclusions of law from the verdict. Etchepare v. Aguirre, 91 Cal. 288; 25 Am. St. Rep. 180; 27 Pac. 668. A general verdict for the defendant will support a judgment for the return of the property to him: failure to give an alternative judgment for the value thereof is no ground of complaint on the part of the plaintiff. Waldman v. Broder, 10 Cal. 378. In an action against a corporation and its manager, where the question at issue was, whether the plaintiff was the owner and entitled to the possession of the property, and no affirmative relief was sought by the defendants, a verdict "for the defendant" is not so uncertain and informal that it cannot form a basis for a judgment that the plaintiff take nothing, and that the defendants (named) recover from the plaintiff their costs. Butler v. Estrella Raisin etc. Co., 124 Cal. 239; 56 Pac. 1040; and see Willard v. Archer, 63 Cal. 33. Where the verdict is too informal to support the judgment, and the judgment is erroneous because omitting to describe specifically the property of which restitution is to be made, these defects are not cured by a stipulation of the defendant, that the verdict is a finding for the plaintiff, as to the title and right of possession of the property described in the complaint. Campbell v. Jones, 38 Cal. 507. Where a general averment of damages in the complaint is not challenged, and the evidence of the plaintiff in relation thereto is not objected to, and the mode of his estimation thereof is not inquired into on cross-examination, a verdict awarding damages for detention is sufficiently supported. Hickey v. Coschina, 133 Cal. 81; 65 Pac. 313.

Judgment, in general. A judgment for the recovery of possession of a note, or its value, may be rendered upon a complaint sufficiently stating a cause of action therefor, although a different relief is prayed: the relief to which the plaintiff may be entitled is to be determined by the court, and, after trial, any relief consistent with the case made by the complaint, and embraced within the issues, may be given. More v. Finger, 128 Cal. 313; 60 Pac. 933. A judgment for half of the property described in the complaint, entered on a verdict therefor, where all the material allegations of the complaint are in issue, is not responsive to the issues made, and is a nullity. Muller v. Jewell, 66 Cal. 216; 5 Pac. 84. Where there is nothing in the record to show that a delivery cannot be had, and the verdict implies that the property is not susceptible of delivery by the defendant, and finds for its return, or value in a specified sum, a judgment for the plaintiff, merely for the value of the property, and not for the possession, or the value thereof in case a delivery cannot be had, is not in conformity with the statute. Meads v. Lasar, 92 Cal. 221; 28 Pac. 935. The judgment must, of itself, or by reference to the complaint or other pleadings, contain a definite description of the property. Welch v. Smith, 45 Cal. 230. A judgment not containing a sufficiently definite description of the property, nor referring to any other pleading or paper for such description, is bad for uncertainty. Cooke v. Aguirre, 86 Cal. 479; 25 Pac. 5. A judgment, that the plaintiff recover the possession of the personal property in the complaint herein described, is not void for uncertainty, where the complaint specifically describes the property sued for. Hogue v. Fanning, 73 Cal. 54; 14 Pac. 560. A reference in the judgment to the findings, and in the findings to the complaint, for a description of the property sought to be recovered, is inexcusably circuitous, but not ambiguous or uncertain: the maxim, Certum est quod certum reddi potest, applies. Kelly v. McKibben, 54 Cal. 192. Where the plaintiff's verdict and judgment are limited to a recovery of part, only, of the property, and silent as to the remainder, he has no right to the possession of that remainder; and there being nothing to show but that the defendant is entitled thereto, it cannot be withheld from him; and the plaintiff is precluded from any further litigation as to the remainder. Ryan v. Fitzgerald, 87 Cal. 345; 25 Pac. 546. Where defendants are sued jointly, a joint judgment in their favor is not erroneous, although each of them answered separately. Myers v. Moulton, 71 Cal. 498; 12 Pac. 505. Where, in a suit against a defendant as an individual, he justifies as the assignee of the estate of an insolvent debtor, he cannot complain if judgment runs against him both in his individual and representative capacity, and not against the estate of the insolvent. O'Brien v. Ballou, 116 Cal. 318; 48 Pac. 130.

Judgment in the alternative. The judgment must follow the verdict, and be in the alternative, that the successful party shall have a delivery of the property, or if that cannot be had, shall recover its value as found by the jury, and stated in the judgment, with damages and costs. Nickerson v. Chatterton, 7 Cal. 568; McCue v. Tunstead, 66 Cal. 486; 6 Pac. 316; Brichman v. Ross, 67 Cal. 601; 8 Pac. 316; Cooke v. Aguirre, 86 Cal. 479; 25 Pac. 5; Stewart v. Taylor, 68 Cal. 5; 8 Pac. 605; and see Holmberg v. Hendy, 2 Cal. Unrep. 650; 10 Pac. 394; Campbell v. Jones, 38 Cal. 507; Cummings v. Stewart, 42 Cal. 230. A judgment not in the alternative form, as required by this section, is erroneous. Stewart v. Taylor, 68 Cal. 5; 8 Pac. 605. A statutory rule is laid down as to the judgment which shall be entered in actions to recover the possession of personal property; and a judgment cannot be entered for the alternative value, unless it is found that the plaintiff is entitled to recover the property sued for: if he is not entitled to recover the property, he is not entitled to a judgment; and if he is entitled to judgment, it must be in the form prescribed by this section. Washburn v. Huntington, 78 Cal. 573; 21 Pac. 305. The evident purpose of requiring a judgment in the alternative is, that if the plaintiff, after obtaining judgment for the possession of the property, is unable to obtain a delivery, he may, in the same action, have a judgment for its value: the primary object is to recover the possession; but if the plaintiff has obtained possession before judgment, there is no occasion for any judgment for its value, as the condition is wanting to authorize the clause in the judgment, "if delivery cannot be had"; the plaintiff need not avail himself of the provisional remedy for obtaining possession prior to judgment, or if he does, the defendant may have retaken the property, or, without retaking it, may obtain judgment for its return: in either of these cases, the judgment must be in the alternative, in order that, in case a delivery cannot be had, the prevailing party may recover the value of the property, or in order to determine the amount to be recovered from the sureties on the undertaking. Claudius v. Aguirre, 89 Cal. 501; 26 Pac. 1077. A judgment for the value, without the alternative for the delivery of the property, is not void, even though erroneous. Donovan v. Ætna Indemnity Co., 10 Cal. App. 723; 103 Pac. 365; Erreca v. Meyer, 142 Cal. 308; 75 Pac. 826. Where the goods were so confused and mixed with other goods belonging to the defendant as not to be distinguishable, it is not necessary that a judgment for the plaintiff shall be in the alternative. Seligman v. Armando, 94 Cal. 314; 29 Pac. 710; and see Caruthers v. Hensley, 90 Cal. 559; 27 Pac. 411. A purchaser from the defendant, with full notice, and after suit is commenced, who procures himself to be substituted as the defendant in the cause, takes the place of the defendant cum onere, and judgment for the recovery of the property, or its value if delivery cannot be had, may be entered against him. Wise v. Collins, 121 Cal. 147; 53 Pac. 640. A defendant, who recovers a judgment, where the property has been delivered to the plaintiff is entitled to a judgment for a return of all the property, and if it cannot be returned, then to a judgment for the value of the whole. Whetmore v. Rupe, 65 Cal. 237; 3 Pac. 851. The alternative judgment in favor of the defendant for the return of the property, or the value thereof, is proper, where the answer claims a return, and the court, jury, or referee finds the value of the property, and that the defendant is entitled to a return thereof. Pico v. Pico, 56 Cal. 453. A prayer, in the answer, for the return of the property, is sufficient to justify a judgment for its return, or its value in case a return cannot be had. Myers v. Moulton, 71 Cal. 498; 12 Pac. 505. To enable the defendant to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer relative to the change of possession from defendant to plaintiff: the judgment of return or value is in the nature of a cross-judgment, and must be based upon proper averments. Gould v. Scannell, 13 Cal. 430. Where there is no prayer, claim, or demand of any kind, in the answer, for a return of the property, or its value, a judgment for its return to the defendant, or its value in case a return cannot be had, cannot stand. Banning v. Marleau, 101 Cal. 238; 35 Pac. 772. Under § 627, ante, the jury are authorized to find the value of the property if their verdict is in favor of the plaintiff, only if the property has not been delivered to him, and, e converso, if the property has been delivered to him, they are not required to find the value; and in the absence of such finding, there is no verdict upon which to base an alternative judgment. Claudius v. Aguirre, 89 Cal. 501; 26 Pac. 1077. The defendant is entitled to the return of the property, when the action is dismissed; and it is a matter of no concern to the plaintiff whether the judgment is in the alternative or not, as he has no option as to whether he shall pay for or return the property. Kneebone v. Kneebone, 83 Cal. 645; 23 Pac. 1031. Where the plaintiff gives a bond, and takes possession of the property prior to the commencement of the action, an alternative judgment for value is immaterial, though for too large an amount. California Cured Fruit Ass'n v. Stelling, 141 Cal. 713; 75 Pac. 320. The alternative judgment for

value cannot be entered, unless it is found that the plaintiff is entitled to recover the property; and, in order that it may be so found, there must be a showing that the defendant had possession of the property at the time the suit was commenced. Ricciotto v. Clement, 94 Cal. 105; 29 Cal. 414. A judgment for the return of the property or the value thereof, but which omits from the judgment for value the dependent clause, "in case a return cannot be had," is not sufficient in form or substance. Etchepare v. Aguirre, 91 Cal. 288; 25 Am. St. Rep. 180; 27 Pac. 668; and see Washburn v. Huntington, 78 Cal. 573; 21 Pac. 305. Where the defendant disposes of a large portion of the property sued for, and appropriates the proceeds thereof, the court is not bound to find the value of the articles which can be returned, or to enter a judgment in the alternative: a judgment may be rendered for the value of the entire property. Burke v. Koch, 75 Cal. 356; 17 Pac. 228. The usual judgment in an action of detinue is in the alternative, that the plaintiff recover possession of the property, or its value in case delivery cannot be had; but where delivery cannot be had, the defendant is not prejudiced by a judgment for the value only, without the alternative. Faulkner v. First Nat. Bank, 130 Cal. 258; 66 Pac. 463; and see Brown v. Johnson, 45 Cal. 76; Thomas v. Witherby, 61 Cal. 92; 44 Am. Rep. 542; Burke v. Koch, 75 Cal. 356; 17 Pac. 228. A judgment for the value of the property, without the alternative for recovery of possession, may be had, where it is shown that the judgment for its delivery would be unavailing (Erreca v. Meyer, 142 Cal. 308; 75 Pac. 826; Donovan v. Ætna Indemnity Co., 10 Cal. App. 723; 103 Pac. 365); and where the delivery of all but a small portion is impossible, judgment for its value, without the alternative of delivery, is proper. Erreca v. Meyer, 142 Cal. 308; 75 Pac. 826. A lien-holder, in claim and delivery to recover the property upon which he has a lien, is not entitled to judgment for the full value of the property in case delivery cannot be had, but only for the amount of his lien or special property therein. Wilkerson v. Thorp, 128 Cal. 221; 60 Pac. 679. The judgment may be for more than the value of the goods, as alleged in the complaint, provided the damages alleged are larger than the judgment; and a mistake as to the value of goods, which is only one predicate of the recovery, does not estop the plaintiff from recovering a sum commensurate with the loss or injury sustained by him, if the amount so recovered be within the ad damnum of the writ. Coghill v. Boring, 15 Cal. 213. Where the jury, in rendering a verdict for the plaintiff, fails to find the value of the property, and the court does not order it to be corrected in that particular, a judgment entered for the value is erroneous (Stewart v. Taylor, 68 Cal. 5; 8 Pac. 605); and where the property is in the defendant's hands, a verdict for the plaintiff for its value is erroneous: under such verdict, and judgment thereon, the defendant cannot elect to deliver the property. Norcross v. Nunan, 61 Cal. 640.

Judgment for possession. Where the property was delivered to the plaintiff prior to the trial of the cause, judgment for the possession thereof, without the alternative for value, is not erroneous. Caruthers v. Hensley, 90 Cal. 559; 27 Pac. 411.

Damages for the detention. Under this section, when a delivery of the property cannot be had, the value of the property and damages for the detention are separate and independent items, and the damages which may be pleaded, proved, and recovered for the detention may be general or special, or both. Morris v. Allen, 17 Cal. App. 684; 121 Pac. 690. Damages amounting to the value of the property sued for may be had in an action for personal property or its value, although claim and delivery does not lie for the property, where the complaint is sufficiently broad to show such damage, and the same is within the issues framed by the pleadings. Dennison v. Chapman, 105 Cal. 447; 39 Pac. 61. The rule is, that, where the property converted has a fixed value, the measure of damages is that value, with legal interest from the time of the conversion; and when the value is fluctuating, the plaintiff may recover the highest value at the time of the conversion, or at any time afterwards. Douglass v. Kraft, 9 Cal. 562; Hamer v. Hathaway, 33 Cal. 117. The full value of goods at the time of the taking, and not what they cost the plaintiff, is the measure of damages. Pelberg v. Gorham, 23 Cal. 349.

Return of part of property as satisfaction of judgment. The return of part of the property sued for, by the sheriff, under execution, does not satisfy the judgment, and execution may be enforced for the value of the rest of the property. Black v. Black, 74 Cal. 520; 16 Pac. 311. That the plaintiff has the right to retain such articles sued for as he may choose, and pay to the defendant the value thereof, notwithstanding the court finds that the defendant is the owner thereof, is a proposition that cannot be sustained upon any principle of law. Black v. Hilliker, 130 Cal. 190; 62 Pac. 481. A wrong-doer may not, through his wrong-doing, acquire the privilege of restoring to its owner a particular article, or, instead, of paying its value as found by a jury: the judgment is primarily for the return of all the property wrongfully taken or withheld, and the judgment for its value comes into operation only in case a return cannot be

had. Whetmore v. Rupe, 65 Cal. 237; 3 Pac. 851.

Judgment payable in particular kind of money. At common law, the provision for the payment of the judgment in any specified kind of money was unknown, and was also unknown to our law until the enactment of the "Specific Contract Act," in April, 1863, which ingrafted a new remedy on the relief of a general nature that courts of common-law jurisdiction could afford, one of the remedies peculiar to courts of equity, which in its nature is analogous to a decree for a specific performance, and it restricted the relief to a specified class of cases: it cannot be extended beyond the cases expressly provided for by its terms, and therefore does not apply to an action upon a judgment rendered prior to its passage. Reed v. Eldredge, 27 Cal. 346. Where no contract to pay in a specific kind of money exists, the debtor may discharge his obligation by payment in lawful money; but the court cannot, by its judgment, say that the payment shall be made in any one kind of money in preference to another; and a verdict in an action for services, where no agreement in any specific kind of money was shown, may be based upon the value of the services in legal tender. Spencer v. Prindle, 28 Cal. 276. A debt secured by note and mortgage executed before the passage of the legal-tender act of 1862, may be discharged in legal-tender notes, if the instruments contain no stipulation requiring payment to be made in coin. Belloc v. Davis, 38 Cal. 242. A contract to pay money in gold coin of the United States, or the equivalent of such gold coin if paid in legal currency, is a contract to pay the given number of dollars in any kind of lawful money of the United States, and cannot be enforced in any specific kind of money; and the statute does not authorize the entry of an alternative judgment upon such contract, payable in gold coin, or its equivalent in legal-tender notes. Reese v. Stearns, 29 Cal. 273. A verbal promise to pay a partnership debt in gold coin may be enforced, if, thereafter, one of the partners, in behalf of the firm, in writing, agrees to make payment in such coin. Meyer v. Kohn, 29 Cal. 278. An agreement to pay a note and mortgage in gold coin, made subsequently to the execution thereof, to secure an extension of the time of payment, is based upon a sufficient consideration. Belloc v. Davis, 38 Cal. 242. The verdict need not provide for payment in gold coin, in order that a judgment for such may be entered, where it is admitted by the pleadings that the debt was so payable. Winans v. Hassey, 48 Cal. 634. The value of property in gold coin and in greenbacks, or legal-tender notes, must, by legal conclusion, be the same; and one unlawfully converting property is not injured by a judgment entered against him, payable in legal-tender notes. Tarpy v. Shepherd, 30 Cal. 180. A decree made by a probate court, requiring an executor to pay over to creditors or legatees money in his hands, may compel payment in the kind of money received by the executor. Magraw v. McGlynn, 26 Cal. 421. In an action of slander, where the jury assess the damages for the plaintiff in gold coin, the court may disregard so much of the verdict as relates to coin, and enter a judgment which does not specify any particular kind of money. Chamberlin v. Vance, 51 Cal. 75. In ejectment, if the court finds the value of the use and occupation of the premises in both gold coin and currency, a general judgment for an amount equal to the currency valuation is correct. Carpentier v. Small, 35 Cal. 346.

Judgment payable in gold coin proper when. A judgment for wages may be made payable in gold coin, where there was a promise to pay in gold coin (Bradbury v. Cronise, 46 Cal. 287); and a judgment payable in United States gold coin is proper, where the note on which it was rendered was payable in "U. S. gold coin." Sheehy v. Chalmers, 4 Cal. Unrep. 617; 36 Pac. 514. An account stated, signed by the party charged, and containing the clause, "payable in gold coin (United States), according to contract," is sufficient to support a judgment payable in gold coin. Carey v. Philadelphia etc. Petroleum Co., 33 Cal. 694. A verdict for a sum of money generally, will support a judgment payable in gold coin, where the obligation so to pay is admitted by the pleadings. Pinkerton v. Woodward, 33 Cal. 557; 91 Am. Dec. 657. A default judgment on a note payable in gold coin should be made payable in like gold coin. Harding v. Cowing, 28 Cal. 212. Where payments, promised and secured, are to be made in United States gold coin, or in default of that, then in legal-tender notes at their market value in gold coin, a judgment for gold coin is proper. Burnett v. Stearns, 33 Cal. 468. In an action for money had and received, a judgment payable in gold coin is proper, where such money was received in gold coin. Wendt v. Ross, 33 Cal. 650. A direct and specific contract to pay in gold coin is not vitiated by an independent promise to pay an additional sum if not paid in gold coin. Lane v. Gluckauf, 28 Cal. 288; 87 Am. Dec. 121; Reese v. Stearns, 29 Cal. 273.

Judgment payable in gold coin improper when. The plaintiff is not entitled to a judgment in gold coin, unless the complaint avers that there was a contract in writing, or that it was understood and agreed by the parties, that payment should be made in gold coin. Goldsmith v. Sawyer, 46 Cal. 209. Where there is no allegation in the complaint that there was an agreement

to pay in gold coin, the court cannot render a judgment payable in gold coin, even if the verdict of the jury is for gold coin. Watson v. San Francisco etc. R. R. Co., 50 Cal. 523. A judgment for gold coin only, is erroneous, where the note sued on specified payment to be made in United States gold and silver coin. Burnett v. Stearns, 33 Cal. 468. Where the note sued on was payable in money generally, the clerk of the court has no authority, after default, to enter a judgment payable in gold coin, although the complaint prays for such judgment. Wallace v. Eldredge, 27 Cal. 495. Where a promissory note has the words "in gold coin" after the words "value received," but does not contain the words "in gold coin" immediately after the amount promised to be paid, judgment should not be rendered payable in gold coin, although there is in the instrument a subsequent promise to pay the difference between the value of gold coin and the paper currency of the United States, if not paid in gold coin. Lamping v. Hyatt, 27 Cal. 99; Reese v. Stearns, 29 Cal. 273. A judgment payable in gold coin cannot be recovered upon an open account or account stated, unless there is a promise in writing to pay the balance in such coin. Howard v. Roeben, 33 Cal. 399. A general finding of value, without a specification that it is in gold coin, will not support a judgment payable in gold coin. North Pacific R. R. Co. v. Reynolds, 50 Cal. 90. A judgment against the sureties on the bond of a guardian should not be made payable in gold coin, where the bond does not so provide, although the principal was bound to pay in gold coin the sum for which the sureties were liable. Fox v. Minor, 32 Cal. 111; 91 Am. Dec. 566; Mendocino County v. Morris, 32 Cal. 145. The judgment on a contract made by a board of supervisors for street improvements, against the owner of the property, cannot be made payable in gold coin, it being on a liability founded upon a contract to which he was not a party, and by which he was bound only by force of the statute. Perine Contracting etc. Co. v. Quackenbush, 104 Cal. 684; 38 Pac. 533. Where an executor received legal-tender notes in payment for property of estate sold by him, it is error for the court to order payment to be made to creditors of the estate in gold coin. Estate of Den, 39 Cal. 70.

Costs. Where the plaintiff's complaint states the value of the property at a sum exceeding two hundred dollars, the defendant is entitled to costs if he recovers judgment, although the jury fails to find the value of the property. Edgar v. Gray, 5 Cal. 267. Costs may be allowed the plaintiff, where it is found that he is entitled to part of the property, and the defendant to part, and the part awarded the plaintiff is of a value exceeding three hundred dollars. Rohr v. McCaig, 33 Cal. 309. An act providing that the prevailing party shall be allowed a percentage on the amount recovered in litigated cases in San Francisco, did not include a judgment in the alternative in an action of replevin; the amount recovered not being the primary and absolute result of the judgment. Wheatland Mill Co. v. Pirrie, 89 Cal. 459; 26 Pac. 964. Where the defendant has come rightfully into the possession of the property, and has never manifested any disposition to claim title to it, and has shown a willingness to surrender it, he cannot be made to answer for costs, without proof of demand made upon him. California Cured Fruit Ass'n v. Stelling, 141 Cal. 713; 75 Pac. 320.

Bond staying execution. If a judgment is in the ordinary form of one upon claim and delivery, a bond to stay execution thereon must be as prescribed in § 943, post. United States Fidelity etc. Co. v. More, 155 Cal. 415; 101 Pac. 302.

Liability of surety on replevin bond. In an action upon a replevin bond, the surety is liable to pay a judgment for the value of the property. Donovan v. Ætna Indemnity Co., 10 Cal. App. 723; 103 Pac. 365.

Enjoining enforcement of judgment. The enforcement of an alternative judgment in replevin will be enjoined, where, during the pendency of the suit, and after issue joined therein, the property was all returned to the plaintiff in the replevin suit, and the defendant was prevented by the court from showing that fact under the pleadings, and after the judgment, and within the time allowed to move for a new trial, it was agreed between the parties that upon the payment of a specified sum the judgment should be satisfied, and, relying upon the agreement, no such motion was made, and the tender of the amount agreed upon was rejected after the time for such motion had elapsed. Thompson v. Laughlin, 91 Cal. 313; 27 Pac. 752. Where the defendant in claim and delivery obtained judgment for the return of the property, or its value, and the plaintiff tendered the property and costs in satisfaction of the judgment, which was refused, and the defendant issued execution for its value, which the court refused to recall on the plaintiff's motion, the plaintiff, who has appealed from the order denying such motion, may maintain an action in equity to enjoin further proceedings under the judgment, pending the appeal. Eppinger v. Scott, 130 Cal. 275; 62 Pac. 460.

Appeal, in general. A judgment in favor of the assignee of an insolvent, in claim and delivery, for possession of the property claimed, without costs, or an alternative judgment for value, may be appealed from by the insolvent, as a "party ag-

grieved," notwithstanding his disclaimer of all interest in the property sued for, since, if the denials of his answer were sustained, he would be entitled to judgment that the plaintiff take nothing, and that the defendant recover his costs. Martin v. Porter, 84 Cal. 476; 24 Pac. 109. A judgment for the plaintiff is immediately enforceable, unless the defendant gives a stay bond; and the fact that the defendant has given a bond for redelivery does not entitle him to an order of the appellate court staying proceedings on the judgment appealed from. Swasey v. Adair, 88 Cal. 203; 26 Pac. 83. Where the value alleged in the complaint is not denied by the answer, an objection to the admission of evidence of the value should be sustained; but error in admitting such evidence is without prejudice to the defendant, where the jury finds a lower value than that alleged. Tully v. Harloe, 35 Cal. 302; 95 Am. Dec. 102. Where the defendant went to trial upon the theory that the title or the right to the possession of the property was in issue, he cannot, upon appeal, be heard, for the first time, to say that there was no such issue. Flinn v. Ferry, 127 Cal. 648; 60 Pac. 434. Objections to the form of the verdict, or that excessive damages were thereby awarded, can only be made available on motion for a new trial, or on appeal from an order denying a new trial. Campbell v. Jones, 41 Cal. 515.

Direction of judgment on appeal. Where no finding is made on the issue of value and damage, the appellate court will not direct final judgment to be entered. Thompson v. Corpstein, 52 Cal. 653.

Presumptions on appeal. On an appeal from a judgment for the plaintiff for the possession of personal property, without the alternative for its value in case possession cannot be had, it will be presumed that possession was obtained by the plaintiff. Caruthers v. Hensley, 90 Cal. 559; 27 Pac. 411.

Modification of judgment on appeal. On appeal, the judgment will be modified to make it conform to the requirements of this section, where, to accomplish this, no other guide than the plain provisions of this section and the findings on file is necessary. Kelly v. McKibben, 54 Cal. 192. Where the defendant asked for a return of the property, and it does not appear that he gave bond and sureties for its return, it will be presumed, on appeal, that it was delivered to the plaintiff; and where the plaintiff was entitled to only part of the property, and no relief was awarded to the defendant, the judgment will be modified so as to require the return of the residue to the defendant. Ryan v. Fitzgerald, 87 Cal. 345; 25 Pac. 546.

Reversal of judgment on appeal. The mere failure to include in the judgment a clause which cannot have any operative effect, or confer any right or protection upon either the plaintiff or the defendant, such as for the delivery of the property to the plaintiff where he already has possession, does not affect the substantial rights of either party, and is not a sufficient ground for the reversal of the judgment. Claudius v. Aguirre, 89 Cal. 501; 26 Pac. 1077. Where, on the trial of an action of replevin, it appears that the property has been hopelessly lost or has been destroyed, so that a judgment for its delivery would be unavailing, a judgment for damages alone is, at most, a technical error, for which the judgment will not be reversed. Brown v. Johnson, 45 Cal. 76. A finding as to value, made upon conflicting evidence, will not be disturbed upon appeal. Roberts v. Burr, 135 Cal. 156; 67 Pac. 46.

CODE COMMISSIONERS' NOTE. 1. Actions to recover personal property. Damages. Nickerson v. Chatterton, 7 Cal. 568; Douglass v. Kraft, 9 Cal. 562; Hisler v. Carr, 34 Cal. 641. [The code commissioners quote pp. 419–427 of the opinion in the case of Page v. Fowler, 39 Cal. 412; 2 Am. Rep. 462.] **The plaintiff may recover** the value in legal-tender notes. Tarpy v. Shepherd, 30 Cal. 180.

2. **Judgments payable in coin.** Poett v. Stearns, 31 Cal. 78; Pinkerton v. Woodward, 33 Cal. 557; 91 Am. Dec. 657; Wendt v. Ross, 33 Cal. 650; Cowing v. Rogers, 34 Cal. 648. Costs follow the judgment. Carpentier v. Atherton, 25 Cal. 569. If the note is payable in gold and silver coin, it is error to enter judgment for gold coin alone. Burnett v. Stearns, 33 Cal. 468. In an action of forcible entry and detainer, judgment cannot be entered payable in coin. More v. Del Valle, 28 Cal. 170. In an action against the principal sureties, on an official bond containing no promise to pay in coin, judgment can only be rendered in money generally. Mendocino County v. Morris, 32 Cal. 145; Fox v. Minor, 32 Cal. 111; 91 Am. Dec. 566. If the jury, without instruction from the court, return a verdict payable in gold coin, there being no evidence that either on or after striking a balance between the parties the defendant promised in writing to pay in gold coin, the judgment cannot stand. Howard v. Roeben, 33 Cal. 399. In an action based on a general indebtedness without a written contract to pay, or on a written contract to pay money generally, without designating the kind, the court cannot render a judgment payable in coin. Curiac v. Abadie, 25 Cal. 502. If a promissory note has the words "in gold coin," after the words "value received," but does not contain the words "in gold coin" in the promise to pay, judgment cannot be rendered payable in gold coin, although there is in the instrument a subsequent promise to pay the difference between the value of gold coin and the paper currency of the United States, if not paid in gold coin. Lamping v. Hyatt, 27 Cal. 102; Fox v. Minor, 32 Cal. 111; 91 Am. Dec. 566; Mendocino County v. Morris, 32 Cal. 149. In an action upon a contract to pay in gold coin of the United States, or the equivalent of such gold coin, if paid in legal currency, judgment in the alternative cannot be entered, nor can a judgment payable in any specific kind of money. Reese v. Stearnes, 29 Cal. 273. Where the value of the premises is found both in coin and in currency, judgment may be general, and for the currency value. Carpentier v. Small, 35 Cal. 346; see also Spencer v. Prindle, 28 Cal. 276.

§ 668. Judgment-book to be kept by the clerk. The clerk must keep, with the records of the court, a book to be called the "judgment-book," in which judgments must be entered.

Register of actions. Post, § 1052.

Legislation § 668. Enacted March 11, **1872**; based on Practice Act, § 201 (New York Code, § 280), which read: "The clerk shall keep among the records of the court a book for the entry of judgments, to be called the 'judgment-book,' in which each judgment shall be entered, and shall specify clearly the relief granted, or other determination of the action."

Judgment-book. The direction of this section, to enter the judgment in the judgment-book, is mandatory: it imposes a public duty upon a ministerial officer. Page v. Superior Court, 76 Cal. 372; 18 Pac. 385. The entry of judgment is purely a ministerial act. Hoover v. Lester, 16 Cal. App. 153; 116 Pac. 382; Marshall v. Taylor, 97 Cal. 422; 32 Pac. 515. The judgment-book is part of the records of the court, and the final repository of the determination of the court upon every cause which passes to judgment, and the most permanent memorial of those matters ordained by law to be kept; being a judicial record, it is competent evidence of matters considered and passed upon by the court, and in case of the loss or absence of the judgment roll, it is competent evidence of the final adjudication in the suit: so its recitals, showing the acquisition of jurisdiction over the defendant are evidence of the facts recited, the judgment thus carrying on its face the evidence of its own validity. Simmons v. Threshour, 118 Cal. 100; 50 Pac. 312. The register of actions provided for by § 1052, post, is distinct from the judgment-book provided for by this section. Wolters v. Rossi, 126 Cal. 644; 59 Pac. 143.

Matters which should be entered. The final action of the court upon the issue made by the pleadings, and which is the judicial determination of that issue, is to be recorded by the clerk in the judgment-book. Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109. The determination by the court of the amount for which the defendant was liable to the plaintiff in an action to foreclose a lien, providing for the sale of property, is a judgment of the court, and is properly entered by the clerk in the judgment-book. Hines v. Miller, 126 Cal. 683; 59 Pac. 142. An action, directed by the plaintiff to be dismissed, is not dismissed until the judgment of dismissal is entered in the judgment-book. Page v. Superior Court, 76 Cal. 372; 18 Pac. 385. An entry in the clerk's register does not constitute a dismissal: the action is not dismissed, so as to deprive the court of control over the cause, until the judgment has been entered. Page v. Page, 77 Cal. 83; 19 Pac. 183; Wolters v. Rossi, 126 Cal. 644; 59 Pac. 143.

Entry valid when. To be valid, the clerk's entry of a judgment must conform strictly to the statute. Old Settlers Investment Co. v. White, 158 Cal. 236; 110 Pac. 922. The entry of judgment is sufficient if it contains the substance of the judgment. Hoover v. Lester, 16 Cal. App. 151; 116 Pac. 382. The entry of a judgment consists in the recording of it in the judgment-book; in a legal sense, there can be no record of a judgment until it is so entered. Wilson v. Durkee, 20 Cal. App. 492; 129 Pac. 617. It is not material whether the judge signs the judgment or not. Hoover v. Lester, 16 Cal. App. 151; 116 Pac. 382; Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074. A judgment spread in writing on the court-room blotter, on the register of actions, and on the minutes of the court, is not entered in the judgment-book. Wood v. Missouri Pacific Ry. Co., 152 Cal. 344; 92 Pac. 868.

False certificate of clerk. In the whole range of the duties of the clerk, there is none more important than the clerical duty of keeping a true history of the time of the entry of judgment and of the filing of the judgment roll, these matters being the initial point of many rights: willfully to make a false certificate as to these matters is a violation of official duty. Menzies v. Watson, 105 Cal. 109; 38 Pac. 641.

Appeal. A final determination, upon the pleadings, of the relative rights of the parties, must be entered in the judgment-book, and no appeal can be taken therefrom until its entry in such book. Wood v. Missouri Pacific Ry. Co., 152 Cal. 344; 92 Pac. 868. The time of the entry of judgment in the judgment-book, and not the time of its entry in the minutes of the court, is the period from which the time to appeal commences to run. Thomas v. Anderson, 55 Cal. 43; Tyrrell v. Baldwin, 72 Cal. 192; 13 Pac. 475. An appeal taken before the judgment is entered of record is premature, and must be dismissed (Home of Inebriates v. Kaplan, 84 Cal. 486; 24 Pac. 119); but where the notice of appeal from the judgment is filed on the day on which the judgment is entered, the appeal is not premature, and will not be dismissed, although the notice was served on the preceding day. Tyrrell v. Baldwin, 72 Cal. 192; 13 Pac. 475. An order of court dismissing an action for failure to return summons, though entered in the minutes of the court, and not in the judgment-book, is a final judgment, and appealable. Marks v. Keenan, 140 Cal. 33; 73 Pac. 751.

§ 669. If a party die after verdict, judgment may be entered, but not to be a lien. If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate.

Payable in course of administration. Post, § 1506; and see § 1504.

Death, suggestion of. Ante, § 385.

Judgment after death, not a lien. See post, §§ 1504, 1506.

Executor, etc., judgment against, form of. Post, § 1504.

Legislation § 669. Enacted March 11, **1872**; based on Practice Act, § 202, which had (1) the words "shall not be" instead of "is not," and (2) the words "shall be" instead of "is," before "payable."

Judgment entered how. If the code were silent regarding the procedure in case of the death of a party pending litigation, the court would be authorized to make its decision as complete as if it had become final prior to his death. Fox v. Hale etc. Mining Co., 108 Cal. 478; 41 Pac. 328. Under this section, the court is directed to render a judgment on the verdict, and the judgment is but the formal entry of the result of the litigation, the demand of the successful party having been liquidated and established by the verdict; the statute does not contemplate any substitution of executor or administrator prior to the entry of judgment; the judgment should be entered against the decedent by name, and its effect is the same as if it had been ordered as of a date anterior to his decease, except that it cannot be made to charge the estate with a lien which should have priority, and is payable only in due course of administration. Estate of Page, 50 Cal. 40.

Findings. Findings of fact and conclusions of law stand in the same relation, with regard to this section, as a judgment. Fox v. Hale etc. Mining Co., 108 Cal. 478; 41 Pac. 328.

Judgment nunc pro tunc. The effect of this section, in providing for the entry of a judgment payable out of the estate of the decedent, affords a statutory procedure unknown to the common law, and to that extent removes the necessity of directing the judgment to be entered upon the decision as of a date anterior to his death; it does not, however, do away with the rule that authorizes the court to direct that its decision, so far as the same shall be necessary to protect the rights of the parties, shall be entered nunc pro tunc, as of a day anterior to the death of the party. Fox v. Hale etc. Mining Co., 108 Cal. 478; 41 Pac. 328. The authority of a court to order its judgment to be entered nunc pro tunc is inherent in the court, and is to be exercised for the purpose of doing justice between the parties; and a court will always exercise this authority when it is apparent that the delay in rendering the judgment, or a failure to enter it after its rendition, is the result of some act or delay of the court, and is not owing to any fault of the party making the application. Fox v. Hale etc. Mining Co., 108 Cal. 478; 41 Pac. 328. Where the defendant dies after the court has filed a written opinion announcing its conclusions, and directing counsel to prepare the findings and decree in accordance therewith, the findings may be filed and judgment entered nunc pro tunc, as of a date anterior to the death. Fox v. Hale etc. Mining Co., 108 Cal. 478; 41 Pac. 328. The rights of the parties are to be determined as they existed at the time of the submission of the controversy; hence, after such submission, although at the time the defendant is dead or insane, findings may be signed and filed, and judgment be entered against him. San Luis Obispo County v. Simas, 1 Cal. App. 175; 81 Pac. 972; Fox v. Halo etc. Mining Co., 108 Cal. 478; 41 Pac. 328.

Defendant not served. A verdict and judgment against two defendants cannot stand as against a co-defendant, who died a few days after the commencement of the action, and who, so far as the record shows, was not served. Alpers v. Schammel, 75 Cal. 590; 17 Pac. 708.

Suits for divorce. Death does not impair the power of the court to enter final judgment for the plaintiff in a divorce suit, pending motions, after the lapse of a year without appeal. John v. Superior Court, 5 Cal. App. 262; 90 Pac. 53; Cook's Estate, 77 Cal. 220; 11 Am. St. Rep. 267; 1 L. R. A. 567; 17 Pac. 923.

Validity of judgment against deceased person. See note 52 Am. Dec. 107.

Effect of death of judgment debtor upon subsequent enforcement of judgment. See note 65 Am. Dec. 123.

Lien of judgment after death of defendant. See note 89 Am. Dec. 242.

Judgment where death occurs at certain stages of the action. See note 49 L. R. A. 161.

CODE COMMISSIONERS' NOTE. Gregory v. Haynes, 21 Cal. 443; Black v. Shaw, 20 Cal. 68; Judson v. Love, 35 Cal. 466.

§ 670. Judgment roll, what constitutes. Immediately after entering the judgment, the clerk must attach together and file the following papers, which constitute the judgment roll:

1. In case the complaint is not answered by any defendant, the summons, with the affidavit or proof of service; the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; and in case the service so made is by publication, the affidavit for publication of summons, and the order directing the publication of summons;

2. In all other cases, the pleadings, all orders striking out any pleading in whole or in part, a copy of the verdict of the jury, or finding of the court or referee, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment; if there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service, on such defendant; and if the service on such defaulting defendant be by publication, then the affidavit for publication, and the order directing the publication of the summons.

Judgment roll in criminal cases. See Pen. Code, § 1207.

Clerk's powers and duties. County clerk. See Pol. Code, §§ 4178, 4179.

Legislation § 670. 1. Enacted March 11, **1872**; based on Practice Act, § 203 (New York Code, § 281), as amended by Stats. 1865–66, p. 846, which (1) in the introductory paragraph, (a) had the word "shall" instead of "must," and (b) the word "shall" before "constitute"; (2) subd. 1 then ending with "copy of the judgment," and (3) subd. 2 reading, "Second. In all other cases, the summons, pleadings, verdict of the jury, or finding of the court, commissioner, or referee, all bills of exceptions taken and filed in said action, copies of orders sustaining or overruling demurrers, a copy of the judgment, and copies of any orders relating to a change of parties." When § 670 was enacted in 1872, (1) in the introductory paragraph, (a) the word "must" was changed from "shall," and (b) the word "shall" was omitted before "constitute"; (2) in subd. 2, (a) the word "summons" was omitted before "pleadings," and (b) the words "in said action" were omitted after "filed."

2. Amended by Code Amdts. **1873–74**, p. 319, (1) in subd. 1, substituting "thereon" for "upon the complaint," and (2) changing subd. 2 to read: "2. In all other cases, the pleadings, a copy of the verdict of the jury, or finding of the court, or referee, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service upon such defendant, must also be added to the other papers mentioned in this subdivision."

3. Amended by Code Amdts. **1875–76**, p. 93, adding, in subd. 2, after "court or referee," the words "all bills of exception taken and filed."

4. Amended by Stats. **1895**, p. 45, (1) in subd. 1, (a) omitting the word "and" before "the complaint," and (b) adding, after "copy of the judgment," the clause, "and in case where the service so made be by publication, the affidavit for publication of summons, and the order directing the publication of summons, must also be included"; (2) in subd. 2, (a) changing the word "a" to "the," before "change of parties," (b) changing the word "upon" to "on," and (c) adding, at end of section, after "this subdivision," the clause, "and if the service on such defaulting defendant be by publication, then the affidavit for publication, and the order directing the publication of the summons in such cases must also be included."

5. Amendment by Stats. **1901**, p. 151; **unconstitutional.** See note ante, § 5.

6. Amended by Stats. **1907**, p. 720.

Scope of section. The judgment roll, which is provided for by this section, contains all the essentials of the common-law record, but omits the formal parts, such as the placita, memorandum, continuances, and connecting links, some of which have been rendered unnecessary by changes in our procedure. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742 (Sawyer, J.). Prior to the amendment of this section in 1895, the affidavits of service and the recitals in the judgment were conclusive: the affidavit on application for an order of publication, and the order of publication, were not then part of the judgment roll. Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146; 16 Pac. 887. While this section prescribes what constitutes the judgment roll, yet it does not prescribe what shall constitute the record on appeal. Foley v. Foley, 120 Cal. 33; 65 Am. St. Rep. 147; 52 Pac. 122. In the United States, paper has universally supplied the place of parchment as the material of the record, and the roll form has, on that account, fallen into disuse; but in other respects the forms of the English records have, with some modifications, been generally adopted; but, whether in parchment or in paper, in the roll form or otherwise, this judgment roll is what is known in law as the record,—the technical record,—and is what is meant by courts and law-writers when they speak of records of superior courts, or courts of record. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742 (Sawyer, J.).

Judgment roll should be made up when. The judgment roll cannot be made up and filed until after the entry of the judgment in the judgment-book. Menzies v. Watson, 105 Cal. 109; 38 Pac. 641; Estate of Pichoir, 139 Cal. 694; 70 Pac. 214; Baker v. Brickell, 102 Cal. 620; 36 Pac. 950; Sharp v. Lumley, 34 Cal. 611; Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. A judgment by default need not be filed: it is only the judgment roll, in cases when there is an answer, these must be filed. Shirran v. Dallas, 21 Cal. App. 405; 132 Pac. 454.

Duties of clerk. This section provides for an authentic record of the date of the entry of the judgment; that the clerk shall immediately after entering the judgment, make up and file the judgment roll; that he shall indorse the roll as filed on a particular date, and authenticate the indorsement by his official signature: this, in the absence of other evidence, raises the presumption that official duty has been duly performed, and is authentic evidence that the judgment has been entered immediately before, on the same day. Estate of Pichoir, 139 Cal. 694; 70 Pac. 214; Baker v. Brickell, 102 Cal. 620; 36 Pac. 950. But the existence of the judgment roll does not depend upon the fact that the clerk has fastened the papers constituting the roll together; nor do any other papers which the clerk may have joined with those which the statute declares shall constitute the judgment roll, become part thereof by reason of having been so joined. Colton Land etc. Co. v. Swartz, 99 Cal. 278; 33 Pac. 878. The judgment roll is not to be made up until after the entry of judgment; and the neglect of the clerk to make up the roll does not vitiate the judgment, nor the proceedings under it. Sharp v. Lumley, 34 Cal. 611. The only authentication of the judgment roll and notice of appeal required is the certificate of the clerk or the stipulation of the attorneys: the only effect of the new method of appeal is to allow the use of typewritten instead of printed copies. Totten v. Barlow, 165 Cal. 378; 132 Pac. 749; Knoch v. Haizlip, 163 Cal. 20; 124 Pac. 997.

Proof of service of papers as part of judgment roll. By proof of service is meant the affidavit of the party making service; or the certificate of the officer, if service was made by an officer, showing his competency to make service, and that he in fact made it; or if service was made by publication, the affidavit of the printer, or his foreman or principal clerk, showing that publication was made; or if by mailing, an affidavit showing a deposit in the post-office. Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742. The affidavit or proof of service of summons is a necessary part of the judgment roll, where the defendant has not appeared in the action, and a personal judgment by default is rendered against him. Barney v. Vigourcaux, 75 Cal. 376; 17 Pac. 433. The proof of service of summons issued upon a cross-complaint should be contained in the judgment roll, with a memorandum indorsed thereon of the default of the defendants failing to answer the cross-complaint. Winter v. McMillan, 87 Cal. 256; 22 Am. St. Rep. 243; 25 Pac. 407. The proof of service of amended pleadings is not a part of the judgment roll (Riverside County v. Stockman, 124 Cal. 222; 56 Pac. 1027); nor is the proof of service of notice of appeal. Peck v. Agnew, 126 Cal. 607; 59 Pac. 125.

Affidavit and order for publication of summons as part of judgment roll. Prior to the amendment of this section in 1895, the affidavit and order for publication of the summons formed no part of the judgment roll; but since that amendment they must be included, and the facts necessary to be stated therein are, equally with the original summons itself, evidence of the steps by which jurisdiction of the person of the defendant is obtained. Kahn v. Matthai, 115 Cal. 689; 47 Pac. 698; Lake v. Bonynge, 161 Cal. 120; 118 Pac. 535. If the affidavit and order for the publication of summons are not a part of the judgment roll, they cannot, in a collateral attack upon the judgment, be examined; but, by the amendment of 1895, such affidavit and order were made a part of the judgment roll. Estate of McNeil, 155 Cal. 333; 100 Pac. 1086. This section provides that the affidavit for publication of summons, and the order directing its publication, shall form part of the judgment roll: these documents are therefore to be considered in determining whether the court obtained jurisdiction of the defendant in the action. Parsons v. Weis, 144 Cal. 410; 77 Pac. 1007. The affidavit to procure publication of summons and the affidavit showing service must now be made part of the judgment roll. San Diego Sav. Bank v. Goodsell, 137 Cal. 420; 70 Pac. 299; Kahn v. Matthai, 115 Cal. 689; 47 Pac. 698. The affidavit for publication of summons must be on file before trial commences to give the court jurisdiction. Zumbusch v. Superior Court, 21 Cal. App. 76; 130 Pac. 1070.

Pleadings part of judgment roll. An original complaint is a document on file in the action, and is therefore properly incorporated in the bill of exceptions: it can by no possibility be superseded by the amended complaint for all purposes. Redington v. Cornwell, 90 Cal. 49; 27 Pac. 40. A cross-complaint is part of the judgment roll, which must show proof of the service thereof, or judgment by default cannot be rendered against the cross-defendants. White v. Patton, 87 Cal. 151; 25 Pac. 270.

Appearance not part of judgment roll. An appearance is not required to be made a part of the judgment roll. Lyons v. Roach, 84 Cal. 27; 23 Pac. 1026; Western Lumber etc. Co. v. Merchants' Amusement Co., 13 Cal. App. 4; 108 Pac. 891.

Stipulations as part of judgment roll. A stipulation, entered in the minutes of the court, between the attorneys for the plaintiff and the attorneys for the defendant, that the answer of the latter, "now on file to plaintiff's amended complaint, be his answer to said amended complaint, when amended as hereinbefore specified," is a part of the judgment roll (Kent v. San Francisco Sav. Union, 130 Cal. 401; 62 Pac. 620); but a stipulation of the parties, that the cause be continued, that a

certain amount is due, that such amount shall be paid in installments, and that judgment may be entered in case of default, is not a part of the judgment roll (Spinetti v. Brignardello, 53 Cal. 281); neither is a stipulation, entered in the minutes of the court. Spreckels v. Ord, 72 Cal. 86; 13 Pac. 158.

Orders changing parties are part of judgment roll. An order striking names from the complaint becomes a part of the judgment roll, rendering it unnecessary to amend the complaint (Tormey v. Pierce, 49 Cal. 306); and an intermediate order relating to a change of parties is a part of the judgment roll. Harper v. Minor, 27 Cal. 107. An order substituting plaintiffs is an order relating to a change of parties, and becomes a part of the judgment roll, and imports the same verity as the other parts of the record. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074.

Notices, motions, and orders forming no part of judgment roll. The notice, affidavit, and motion upon which an order striking out a pleading is made, form no part of the judgment roll. Orange Growers' Bank v. Duncan, 133 Cal. 254; 65 Pac. 469; Ganceart v. Henry, 98 Cal. 281; 33 Pac. 92. Neither a motion to strike out parts of a complaint and to make the complaint more definite and certain, nor an order denying such motions, is a part of the judgment roll (Mock v. Santa Rosa, 126 Cal. 330; 58 Pac. 826; Spinetti v. Brignardello, 53 Cal. 283; Sichler v. Look, 93 Cal. 600; 29 Pac. 220); nor are the motion and the order to strike out portions of a complaint (Harper v. Minor, 27 Cal. 107; Dimick v. Campbell, 31 Cal. 238; Sharp v. Daugney, 33 Cal. 505; Sutter v. San Francisco, 36 Cal. 112); nor are intermediate orders, except orders relating to a change of parties (Harper v. Minor, 27 Cal. 107); nor is an order allowing an amended complaint (Carter v. Paige, 3 Cal. Unrep. 64; 20 Pac. 729); nor an order granting leave to file an amended pleading, or the proof of service of an amended pleading (Livermore v. Webb, 56 Cal. 489); nor an order granting leave to amend the answer (Segerstrom v. Scott, 16 Cal. App. 256; 116 Pac. 690); nor an order setting aside a default upon conditions, nor an order striking out an answer for failure to comply with the conditions (De Pedroreña v. Hotchkiss, 95 Cal. 636; 30 Pac. 787; Spence v. Scott, 97 Cal. 181; 31 Pac. 52, 939); nor an order refusing to strike out pleadings (South Yuba Water Co. v. Auburn, 16 Cal. App. 790; 118 Pac. 101); nor an order setting aside a default and judgment, and restoring an answer to the files (Von Schmidt v. Von Schmidt, 104 Cal. 547; 38 Pac. 361); nor are the petition, bond, and order for change of venue (Rough v. Booth, 2 Cal. Unrep. 270; 3 Pac. 91); nor is the notice of the overruling of a demurrer, and proof of service thereof (Jacks v. Baldez, 97 Cal. 91; 31 Pac. 899); nor the notice of intention to move for a new trial (Pico v. Cohn, 78 Cal. 384; 20 Pac. 706); nor the petition for the appointment of a guardian ad litem, nor the order of appointment (Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418; Batchelder v. Baker, 79 Cal. 266; 21 Pac. 754); nor a minute-order, the basis for entering a second judgment. Galvin v. Palmer, 134 Cal. 426; 66 Pac. 572. Until the amendment, in 1865, of the section of the Practice Act on which this section is based, an order sustaining or overruling a demurrer was not a part of the judgment roll. Abadie v. Carrillo, 32 Cal. 172.

Minutes are not part of judgment roll. The minutes of the clerk are not a part of the judgment roll. Harper v. Minor, 27 Cal. 107; Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109; Knowles v. Baldwin, 125 Cal. 224; 57 Pac. 988. The entries in the minutes are evidently intended for the guidance of the court in its further action in the cause, and cease to be of value upon the entry of the judgment: they form no part of the judgment roll, or "record" of the judicial action of the court, and they cannot be used to impeach that record. Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109.

Verdict is part of judgment roll. The verdict is a part of the judgment roll, and when it appears therein, and is sufficiently identified, it will be presumed to have been properly recorded and entered by the clerk in the minutes of the court, as required by § 628, ante. Goldman v. Rogers, 85 Cal. 574; 24 Pac. 782. A special verdict is also a part of the judgment roll. California Wine Ass'n v. Commercial Union Fire Ins. Co., 159 Cal. 49; 112 Pac. 858.

Findings as part of judgment roll. The finding of facts and conclusions of law, as contemplated by this section, is different from the opinion; the finding should consist of a concise, distinct, pointed, and separate statement of each specific, essential fact established by the evidence, in its proper order, without any of the testimony by which the facts are proved, followed by a similar statement of the conclusions of law drawn from the facts thus found: the finding forms a part of the judgment roll; the opinion does not, not being a finding. Hidden v. Jordan, 28 Cal. 301. A writing filed by the court as its "decision," or findings (a very different thing from the opinion), is a part of the judgment roll (Kimball v. Stormer, 65 Cal. 116; 3 Pac. 408); but a minute-entry, made by the clerk, as to findings, is not (Kritzer v. Tracy Engineering Co., 16 Cal. App. 287; 116 Pac. 700); nor are the findings of fact and conclusions of law, where there is no answer: they are not necessary.

Thomson v. Thomson, 121 Cal. 11; 53 Pac. 403; Mulcahy v. Glazier, 51 Cal. 626; Murray v. Murray, 115 Cal. 266; 56 Am. St. Rep. 97; 37 L. R. A. 626; 47 Pac. 37. The findings and report of a referee are part of the judgment roll, where he reports upon the whole case (Thompson v. Patterson, 54 Cal. 542; and see Faulkner v. Hendy, 103 Cal. 15; 36 Pac. 1021); but the report of a referee, simply the report of testimony upon which the judge based his findings, is not a part of the judgment roll (Harper v. Minor, 27 Cal. 107); so the finding of a referee appointed to determine a particular fact is not a part of the judgment roll. Faulkner v. Hendy, 103 Cal. 15; 36 Pac. 1021.

Bill of particulars no part of the judgment roll. A bill of particulars is no part of the judgment roll. Edelman v. McDonell, 126 Cal. 210; 58 Pac. 528.

Judgment as part of judgment roll. The papers designated in this section as forming the judgment roll are those elsewhere mentioned in this code as a part of the proceedings culminating in the judgment; and the judgment, a copy of which is to be included in the roll, is the judgment defined in § 577, ante, as the final determination of the rights of the parties in an action or proceeding; hence, if, during the proceedings in an action, a judgment is set aside, and another entered in its stead, only the latter judgment can form a part of the judgment roll. Colton Land etc. Co. v. Swartz, 99 Cal. 278; 33 Pac. 878. Whether a judgment is entered by default or after trial, a copy of the judgment is a part of the judgment roll. Thomas v. Anderson, 55 Cal. 43.

Exceptions are part of judgment roll. Exceptions taken during the trial should be written down, settled and signed by the judge, filed in the case, and afterward annexed to the judgment roll. More v. Del Valle, 28 Cal. 170. Exceptions taken and settled at the trial are annexed to and form part of the judgment roll, and therefore constitute a part of the record on appeal from the judgment on the judgment roll alone. Wetherbee v. Carroll, 33 Cal. 549. All bills of exceptions taken and filed are a part of the judgment roll, which the appellant is required to bring to the appellate court upon an appeal from the judgment; and if, upon a second appeal, there are found in the record matters which were not determined upon the first appeal, the appellant has the right to be heard thereon (Klauber v. San Diego Street Car Co., 98 Cal. 105; 32 Pac. 876); but the testimony, unless embodied in the bill of exceptions and filed, is not a part of the judgment roll. Lee Sack Sam v. Gray, 104 Cal. 243; 38 Pac. 85.

Judgment roll in probate proceedings and will contests. In probate proceedings there is no judgment roll, strictly speaking; but whenever such proceedings are so akin to a civil action as to necessitate the "papers" which are declared by this section to constitute the judgment roll in a civil action, they may be held to constitute the judgment roll referred to in § 661, ante. Estate of Ryer, 110 Cal. 556; 42 Pac. 1082. The settlement of the accounts of an executor, although sometimes called an order, is, in effect, a judgment, and, in a proceeding for the settlement of such an account, the petition and account, and the written objections filed to it, are the pleadings, which the clerk of the court is required to attach to a copy of the judgment, and these constitute the judgment roll. Miller v. Lux, 100 Cal. 609; 35 Pac. 345; Estate of Page, 57 Cal. 238; Estate of Isaacs, 30 Cal. 106. In a will contest, the judgment roll must include at least the petition for the revocation of the probate, the answer thereto, the verdict of the jury, and the judgment. Estate of Kilborn, 162 Cal. 5; 120 Pac. 762.

Admissibility of judgment roll in evidence. The admissibility of the judgment roll in evidence is to be determined by the court upon an inspection thereof. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074. Upon an application for a writ of assistance, the judgment roll is admissible in evidence, although an appeal is pending, where execution has not been stayed. California etc. Sav. Bank v. Graves, 129 Cal. 649; 62 Pac. 259. In actions involving adverse possession, judgment rolls in other actions are admissible to show that defendant, at various times, claimed title to the land, and as thus tending to prove adverse possession. Hines v. Good, 128 Cal. 38; 79 Am. St. Rep. 22; 60 Pac. 527. The judgment roll in another suit, brought by the same plaintiff, is not admissible in evidence against the defendant, to which suit he was not a party, and he is in no way bound or estopped by the judgment therein. Cloverdale v. Smith, 128 Cal. 230; 60 Pac. 851. The admissibility of the judgment roll of another county does not in any way depend upon the means by which it was brought to the court where it is sought to be used. People v. Alden, 113 Cal. 264; 45 Pac. 327.

Presumption as to what constitutes judgment roll. In the absence of a showing to the contrary, it will be presumed that the pleadings, order overruling the demurrer, minutes of the court, findings, and judgment, contained in the transcript, and mentioned in the certificate of the clerk attached thereto as being correct, constitute the judgment roll: it is not necessary that the certificate shall also state that they constitute the judgment roll. O'Shea v. Wilkinson, 95 Cal. 454; 30 Pac. 588. The statute provides that the judgment roll shall be filed in the county where the judgment is recovered; hence, it will be

presumed that the clerk, whose duty it was to make up and file the judgment roll, did so, where a writ of execution states the county in which the judgment was recovered. Van Cleave v. Bucher, 79 Cal. 600; 21 Pac. 954. A judgment of a foreign court of general jurisdiction is admissible in evidence, when duly authenticated, and is presumed to be correct; and where it contains a finding or recital of service by publication, it will be presumed that such service was made upon sufficient affidavit and order. McHatton v. Rhodes, 143 Cal. 275; 101 Am. St. Rep. 125; 76 Pac. 1036.

Presumptions. Upon an appeal from a judgment, upon the judgment roll alone, all intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the court below, which would have authorized the judgment, will be presumed to have been thus presented, if the record shows nothing to the contrary. Von Schmidt v. Von Schmidt, 104 Cal. 547; 38 Pac. 361. The presumption which the law implies in support of judgments of courts of general jurisdiction arises only with respect to jurisdictional facts concerning which the record is silent; and where the judgment recites service of process on the defendant, but the judgment roll shows insufficient and void service by publication, the recitals of the judgment do not control, and cannot be held to show jurisdiction. Latta v. Tutton, 122 Cal. 279; 68 Am. St. Rep. 30; 54 Pac. 844. Where nothing appears in the judgment roll to contradict recitals of due service of process found in the decree, they are deemed to be true, and to show that the court has jurisdiction of the subject-matter and of the parties; and the judgment of a court of general jurisdiction is conclusively presumed to be correct, unless the record itself shows that the court did not have jurisdiction; and when it has such jurisdiction, its record speaks absolute verity, because it is the court's record of its own acts, and such jurisdiction will be conclusively presumed, unless the contrary appears upon the face of the record. Butler v. Soule, 124 Cal. 69; 56 Pac. 601; Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074. Where, on appeal, a copy of a paper, instead of the original, appears in the judgment roll, it will be presumed that the original was lost and that the copy was properly substituted. Sichler v. Look, 93 Cal. 600; 29 Pac. 220. Findings bearing a date subsequent to the time the judgment roll is presumed to have been completed, and inserted in the judgment roll after the judgment, cannot be considered a part thereof: on appeal, all intendments are in favor of the regularity of the proceedings, and, in the absence of a statement or bill of exceptions, it will be presumed the findings were waived. Gordan v. Donahue, 79 Cal. 501; 21 Pac. 970.

Conclusiveness of finding or recital of service of process. The finding of the court, that the defendant was duly served with process, is sufficient to show jurisdiction; the judgment does not depend upon the performance of the clerical duty of making up the judgment roll or the preservation of the papers; it is enough if the facts exist which give the court jurisdiction, and the finding that they do exist, though the summons and return are lost or mislaid, is sufficient. Lick v. Stockdale, 18 Cal. 219. Recital of service in the judgment itself, where the judgment roll was lost, is conclusive on collateral attack, and parol testimony is not admissible to contradict the same after the lapse of many years. People v. Harrison, 84 Cal. 607; 24 Pac. 311. The finding or recital of due service of process is not conclusive, where the proof of service is a part of the judgment roll, and, as it appears in such roll, is not sufficient evidence of such service, as where it is not sworn to nor does it appear to be certified by any officer as his act. Reinhart v. Lugo, 86 Cal. 395; 21 Am. St. Rep. 52; 24 Pac. 1089. Where the summons is not included in the judgment roll, but it appears that it was issued, with evidence of its contents, showing that it was regular and sufficient in form, and that it was duly served, such a prima facie showing is made as to the jurisdiction of the person of the defendant, even in the absence of the original summons, as will support the judgment upon a direct attack; and such a showing is made by a judgment roll containing the affidavit for publication of summons, showing that it had issued; the order of publication, showing the same thing; the affidavit of the printer, showing publication containing a copy of the summons; the affidavit of mailing; and the decree, reciting due service on and the default of the defendant. Kahn v. Matthai, 115 Cal. 689; 47 Pac. 698. The recital of service in the judgment is only prima facie evidence of service, where the judgment is directly attacked, and is never conclusive, except where the attack is collateral. Whitney v. Daggett, 108 Cal. 232; 41 Pac. 471. To sustain a judgment directly attacked, the record must show that the court had jurisdiction of the person against whom the judgment was rendered, and that the judgment was warranted by the allegations of the pleadings of the party in whose favor it was rendered; and in determining that question, the recitals in the judgment cannot be regarded: the question is, whether the record sustains the judgment, and such recitals, therefore, will not be accepted as a substitute for the summons and the proof of service. McKinlay v Tuttle, 42 Cal. 570. Where

service is made by publication, the record must affirmatively show proper service, or, upon direct attack, it will be held that the court did not acquire jurisdiction. Weeks v. Garibaldi etc. Mining Co., 73 Cal. 599; 15 Pac. 302.

Correction of clerical errors in judgment. Clerical errors in a judgment, shown by the record, may be corrected at any time, so as to make the entry correspond with the judgment rendered; and this may be done even after an appeal and affirmance of the judgment. Dreyfuss v. Tompkins, 67 Cal. 339; 7 Pac. 732.

Validity of judgment. A judgment is void upon its face, only when that fact is made apparent upon an inspection of the judgment roll. People v. Thomas, 101 Cal. 571; 36 Pac. 9; and see Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742; Jacks v. Baldez, 97 Cal. 91; 31 Pac. 899; People v. Temple, 103 Cal. 447; 37 Pac. 414; Latta v. Tutton, 122 Cal. 379; 68 Am. St. Rep. 30; 58 Pac. 844. A judgment void upon its face is one that appears to be void upon an inspection of the judgment roll: the mere absence therefrom of a paper showing service of summons cannot invalidate the judgment, where the judgment itself shows that the defendant was duly served; and such recitals or findings are as conclusive upon the parties, in all collateral proceedings, as any adjudication of the court, and it must be presumed that they were supported by sufficient testimony not set forth in the record. People v. Harrison, 84 Cal. 607; 24 Pac. 311; Whitney v. Daggett, 108 Cal. 232; 41 Pac. 471. In determining whether or not the invalidity of a judgment by default is apparent from an inspection thereof, the affidavit for the publication of summons and the order directing publication may be considered. People v. Mulcahy, 159 Cal. 34; 112 Pac. 853. The findings and the judgment may be incorporated in the same document, and the judgment is not rendered ineffective for that reason. Hopkins v. Warner, 109 Cal. 133; 41 Pac. 868.

Vacating or setting aside judgment. A judgment, void on its face, which requires only an inspection of the judgment roll to show its invalidity, will be set aside, on motion, by the court rendering it, at any time after its entry; and a judgment void in fact for want of jurisdiction over the person of the defendant, but the invalidity of which does not appear from the judgment roll, may be set aside, upon motion, within a reasonable time after its entry. People v. Temple, 103 Cal. 447; 37 Pac. 414; and see People v. Greene, 74 Cal. 400; 5 Am. St. Rep. 448; 16 Pac. 197; People v. Davis, 143 Cal. 673; 77 Pac. 651. The court may at any time set aside a judgment, entered on default, by the clerk, when it appears from the judgment roll that the clerk had no authority to enter it. Wharton v. Harlan, 68 Cal. 422; 9 Pac. 727; People v. Greene, 74 Cal. 400; 5 Am. St. Rep. 448; 16 Pac. 197; Hyde v. Redding, 74 Cal. 493; 16 Pac. 380. To obtain an order vacating a judgment on the ground of a defect in the affidavit for publication of summons, the judgment must be void on the face of the record, or in other words, it should appear from the record that the affidavit was so defective as to confer no jurisdiction on the trial judge to make the order of publication. People v. Wrin, 143 Cal. 11; 76 Cal. 646. A judgment cannot be vacated or set aside, except upon application pursuant to § 473, ante, unless its invalidity is apparent from an inspection of the judgment roll; if its invalidity does not appear from such inspection, the sole remedy of the aggrieved party, who may not in fact have been served with process, must be found in a new action on the equity side of the court. People v. Davis, 143 Cal. 673; 77 Pac. 671. The record or judgment roll cannot be impeached for want of jurisdiction, by evidence aliunde; hence, the minutes and files of the court are inadmissible for that purpose. Ballerino v. Superior Court, 2 Cal. App. 759; 84 Pac. 225.

Appeal. The record of the judgment is the judgment roll, and the statute has provided of what this shall consist; and, upon an appeal from a final judgment, the only papers that can be considered, where there is no bill of exceptions, are the notice of appeal and the judgment roll. Sichler v. Look, 93 Cal. 600; 29 Pac. 220. On an appeal from a judgment, without a statement or bill of exceptions, the court will review the judgment roll only. McAbee v. Randall, 41 Cal. 136. A party is not precluded, on appeal, from using a bill of exceptions made up and settled pursuant to § 650, ante, by the mandate of this section, that the clerk shall make up the judgment roll immediately after the entry of judgment; and such bill may form part of the record on appeal from the judgment. Caldwell v. Parks, 47 Cal. 640; Berry v. San Francisco etc. R. R. Co., 47 Cal. 643. Where the only question that can arise upon appeal is a legal one, the appellate court is limited, in its examination, to the papers mentioned in the first subdivision of this section. Crackel v. Crackel, 17 Cal. App. 600; 121 Pac. 295. The amendment to this section in 1907, making orders striking out pleadings a part of the judgment roll, did not enlarge the scope of an appeal taken solely from an order denying a motion for a new trial. Stockton Iron Works v. Walters, 18 Cal. App. 373; 123 Pac. 240. On an appeal from an interlocutory decree in partition, it is the entry of the interlocutory decree, and not the mere ministerial act of the clerk in compiling the judgment roll, which, by the very contemplation of the law, is to be done after such

entry, which sets the statute of limitations running for the purpose of an appeal. Dore v. Klumpke, 140 Cal. 356; 73 Pac. 1064.

CODE COMMISSIONERS' NOTE. A judgment does not depend for its validity upon the clerk performing his duty in making up the judgment roll, or in preserving the papers. Lick v. Stockdale, 18 Cal. 219; Sharp v. Lumley, 34 Cal. 611; Sharp v. Daugney, 33 Cal. 505. An answer stricken out by order of the court is still entitled to a place in the judgment roll. Abbott v. Douglass, 28 Cal. 295. An order overruling a demurrer is part of the judgment roll. Abadie v. Carrillo, 32 Cal. 172. Bills of exceptions are part of the judgment roll. Wetherbee v. Carroll, 33 Cal. 549; More v. Del Valle, 28 Cal. 170. For judgment roll in cases of judgment by default, see Hahn v. Kelly, 34 Cal. 403, 94 Am. Dec. 742, cited and quoted at length in subd. 1 of note to § 415, ante. The affidavit on which a motion to strike out an answer is based does not form part of the judgment roll. Dimick v. Campbell, 31 Cal. 238. The motion and order to strike out portions of the original complaint are not parts of the judgment roll. Sutter v. San Francisco, 36 Cal. 114; Harper v. Minor, 27 Cal. 109; Dimick v. Campbell, 31 Cal. 239; Sharp v. Daugney, 33 Cal. 513. The action of the court on demurrer is part of the judgment roll, and no exception need be taken. Smith v. Lawrence, 38 Cal. 28, 99 Am. Dec. 344, overruling, to this extent, Bostwick v. McCorkle, 22 Cal. 669. An order sustaining the demurrer to defendant's cross-complaint constitutes part of the judgment roll. Packard v. Bird, 40 Cal. 378.

§ 671. Judgment lien, when it begins and when it expires. Immediately after filing the judgment roll, the clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases. The lien continues for five years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this code, in which case the lien of the judgment and any lien by virtue of an attachment that has been issued and levied in the action ceases.

Judgment-docket. See post, §§ 672–674.

Recording transcript of docket in another county. Post, § 674.

Judgment after decedent's death, on verdict, etc., before. Post, § 1506.

Undertaking on appeal. Post, §§ 941 et seq.

Legislation § 671. 1. Enacted March 11, **1872** (based on Practice Act, § 204), (1) changing "shall" to "must," in first line, (2) changing the words "shall become" to "becomes," before "a lien," (3) omitting the word "said" before "lien expires," and (4) changing the words "shall continue" to "continues," in the last sentence, which then read: "The lien continues for two years, unless the judgment be previously satisfied."

2. Amended by Code Amdts. **1873–74**, p. 320, (1) changing the word "expires" to "ceases," after "until the lien," and (2) changing the last sentence to read: "The lien continues for two years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking, as provided in this code, in which case the lien of the judgment ceases."

3. Amended by Stats. **1895**, p. 36.

Rendition of judgment. The making and filing of findings of fact and conclusions of law constitute the rendition of judgment, which is a judicial act; its entry is a ministerial act. Baum v. Roper, 1 Cal. App. 435; 82 Pac. 390.

Docketing of judgment. Docketing a judgment consists in the clerk's entering in the docket in the clerk's office a brief abstract of the judgment, as prescribed by § 672, post, and § 4178, subd. 3, Pol. Code, at the time prescribed by § 670, ante; and there is no judgment lien if the requirements of the law are not carried out. Eby v. Foster, 61 Cal. 282; Eldridge v. Wright, 55 Cal. 531. The docketing of a judgment is merely a ministerial act, for the purpose of creating a lien by the judgment upon the real property of the debtor. Los Angeles County Bank v. Raynor, 61 Cal. 145; and see Otto v. Long, 144 Cal. 144; 77 Pac. 885. The judgment cannot be docketed, nor can the judgment be created, before the entry of the judgment and the making up and filing of the judgment roll. Menzies v. Watson, 105 Cal. 109; 38 Pac. 641. The time of docketing must appear by the record; the commencement of the lien is the day of docketing; and being purely a statutory lien, neither its existence nor its commencement can be proved by parol. Eby v. Foster, 61 Cal. 282. The judgment is a lien from the time it is docketed; and to entitle a judgment creditor, having a lien, to redeem, he must produce a copy of the docket of the judgment: a copy of the judgment itself is not sufficient. Haskell v. Manlove, 14 Cal. 54.

Nature of judgment lien. The lien of a judgment is statutory: no such lien existed at common law. Boggs v. Dunn, 160 Cal. 285; 116 Pac. 743. The obvious intention is to charge the estate of the judgment debtor, and to give the creditor a certain time to get his money, and by the statute it is intended that this time shall run from the date of the judgment, or period at which the plaintiff is in a situation to take out execution and pursue his remedy to final satisfaction; the lien is but an incident of the judgment, and the statutory limitation of the lien commences to run only from the date of the remittitur from the appellate court. Dewey v. Latson, 6 Cal. 130; Englund v. Lewis, 25 Cal. 337. The judgment becomes a lien, only by

force of the statute, and depends for its existence upon conditions of statutory origin. Culver v. Rogers, 28 Cal. 520. The judgment lien amounts merely to a security against subsequent purchasers and encumbrancers; for the judgment creditor gets no estate in the lands, and, though he should release all his right to the land, he might afterwards extend it by execution. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256. The lien of a judgment is not a conveyance. Wilcoxson v. Miller, 49 Cal. 193.

Creation of judgment lien. A judgment for the foreclosure of a mortgage, and providing for any deficiency in the event that the mortgaged property is insufficient to pay the debts, does not create a judgment lien. Chapin v. Broder, 16 Cal. 403; cited in Englund v. Lewis, 25 Cal. 337. A judgment for the foreclosure of a mortgage does not become a lien on the real estate, but when the deficiency, if any, is ascertained after the sale of the mortgaged premises and docketed, the same becomes a lien from that time. Culver v. Rogers, 28 Cal. 520; Hibberd v. Smith, 50 Cal. 511; Carpenter v. Lewis, 119 Cal. 18; 50 Pac. 925. A judgment of a justice of the peace is made a lien, only by filing an abstract thereof in the office of the recorder, as provided by § 900, post. Beaton v. Reid, 111 Cal. 484; 44 Pac. 167. Any interval of time, however small, in which title vests in the judgment debtor, is sufficient for the lien of the judgment to attach. Marriner v. Smith, 27 Cal. 650; Hibberd v. Smith, 50 Cal. 511; Eby v. Foster, 61 Cal. 282.

Transcript of judgment. The production of a transcript of the judgment, by one seeking to redeem, is not equivalent to the production of a copy of the docket. Wilcoxson v. Miller, 49 Cal. 193.

Interests or estates affected by judgment lien. The judgment lien is purely statutory; and as the statute provides that the judgment shall become a lien from the time it is docketed, only upon the property of the judgment debtor not exempt from execution, that is, property not subject to forced sale, it does not attach to property declared a homestead (Ackley v. Chamberlain, 16 Cal. 181; 76 Am. Dec. 516; Bowman v. Norton, 16 Cal. 213; Dam v. Zink, 112 Cal. 91; 44 Pac. 331; Yardley v. San Joaquin Valley Bank, 3 Cal. App. 651; 86 Pac. 978; Hohn v. Pauly, 11 Cal. App. 724; 106 Pac. 266); it does not even attach to the excess above the statutory homestead valuation. Boggs v. Dunn, 160 Cal. 285; 116 Pac. 743; Hohn v. Pauly, 11 Cal. App. 724; 106 Pac. 266. Although a judgment for money is docketed against a judgment debtor, yet his subsequent discharge in bankruptcy releases his homestead, as no judgment lien attached thereto. Boggs v. Dunn, 160 Cal. 283; 116 Pac. 743. A judgment is a lien only upon the real property owned by the judgment debtor at the time of the docketing of the judgment, or afterwards, and before the expiration of the lien, acquired. Wolfe v. Langford, 14 Cal. App. 359; 112 Pac. 203. An heir or a devisee is, upon the death of his testator or ancestor, immediately vested with the interest in the real property inherited by or devised to him, subject to the rights of administration; hence, a judgment lien, as against him, immediately attaches to such property. Martinovich v. Marsicano, 137 Cal. 354; 70 Pac. 459; and see Hibernia Sav. & L. Soc. v. London etc. Fire Ins. Co., 138 Cal. 257; 71 Pac. 334; Gutter v. Dallamore, 144 Cal. 665; 79 Pac. 383. The lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person. Zenda Mining etc. Co. v. Tiffin, 11 Cal. App. 62; 104 Pac. 10. The statutory lien of a judgment upon the real estate of a judgment debtor can attach only upon property in which he has a vested legal interest; hence, where title to property has passed to and is vested in another, there is nothing upon which the lien of a judgment subsequently recovered can attach. People v. Irwin, 14 Cal. 428. A judgment duly docketed against a debtor, who makes a fraudulent conveyance prior to its rendition, becomes a lien on the real property so conveyed. First Nat. Bank v. Maxwell, 123 Cal. 360; 69 Am. St. Rep. 64; 55 Pac. 980. An unrecorded mortgage takes priority over a subsequent judgment lien. Bank of Ukiah v. Petaluma Sav. Bank, 100 Cal. 590; 35 Pac. 170. A judgment against a mortgagor, after the sale and foreclosure of the premises, is not a lien thereon, as the mortgagor's title is divested by the sale; the purchaser takes the entire beneficial interest in the property, except actual possession, and is considered in equity the owner, subject only to have his title divested by redemption. Robinson v. Thornton, 102 Cal. 675; 34 Pac. 120. The lien established by a judgment of divorce upon the real estate of the husband does not derive its force from this section. Gaston v. Gaston, 114 Cal. 542; 55 Am. St. Rep. 86; 46 Pac. 609. A leasehold interest is not such an estate in real property as is affected by the lien given by this section. Summerville v. Stockton Milling Co., 142 Cal. 529; 76 Pac. 243. A judgment operates as a lien only on the interest of the judgment debtor: a mere naked trustee has no interest in the land upon which a judgment lien can attach. Riverdale Mining Co. v. Wicks, 14 Cal. App. 526; 112 Pac. 896.

Lien of judgment for costs. A judgment for costs in partition proceedings may or may not be a lien upon the property of the judgment debtor, according as they are or

are not specified in the judgment, as provided by § 796, post; and where they are so specified, they constitute a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties, and such lien takes effect by relation at the time of the filing of the notice of lis pendens and without docketing the judgment; but in case costs are not allowed by and included in the judgment, but reserved, and, subsequently, a distinct judgment for costs is rendered, such judgment becomes a lien only upon being docketed, and in the same manner as other judgments. Lacoste v. Eastland, 117 Cal. 673; 49 Pac. 1046. The attachment lien is merged in the judgment lien, and ceases, except to maintain the priority of the lien upon the property attached, which priority is maintained and enforced under the judgment. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256.

How judgment lien may be affected. The judgment lien is suspended by appeal, only where execution of the judgment is stayed; if execution is not stayed, the life of the lien commences at the docketing of the judgment. Chapin v. Broder, 16 Cal. 403; Englund v. Lewis, 25 Cal. 337. The death of the judgment debtor does not destroy the judgment lien; nor do the presentation of the judgment as a claim against the estate, and the recovery of another judgment upon the rejected claim, merge the original judgment nor destroy its lien. Estate of Wiley, 138 Cal. 301; 71 Pac. 441; Morton v. Adams, 124 Cal. 229; 71 Am. St. Rep. 53; 56 Pac. 1038. The effect of the judgment lien cannot be destroyed by an act providing that a laborer doing work for a corporation shall, under certain circumstances, have a lien upon all the property of the corporation. Johnson v. Goodyear Mining Co., 127 Cal. 4; 78 Am. St. Rep. 17; 47 L. R. A. 338; 59 Pac. 304. Where the lien of an attachment has become merged in a subsequent judgment, the lien of the judgment, including that of the attachment so merged, ceases at the expiration of five years from the date of the judgment. Water Supply Co. v. Sarnow, 6 Cal. App. 586; 92 Pac. 667. The time during which the judgment lien runs commences at the docketing of the judgment, unless execution is stayed by an appeal with a stay bond, and the time during which execution is thus stayed is to be omitted from the computation; but any period of time between the docketing of the judgment and the stay of proceedings is to be included in the computation; a stay of proceedings, either by order of the court pending a motion for a new trial or by an appeal with a stay bond, merely suspends the running of the statutory time, but it does not postpone the commencement of the statutory limitation until after the stay has ceased. Barroilhet v. Hathaway, 31 Cal. 395; 89 Am. Dec. 193.

Execution under judgment lien. The judgment lien binds the lands, and the execution comes as a power to sell; the general lien is created by the judgment, and the execution is merely to give that lien effect, not by vesting a possessory right in the plaintiff to the land affected by it, but by designating it for a conversion into money by the operation of the fieri facias, and the act of the sheriff by virtue of it; and although a levy of the execution is unnecessary to give effect to the judgment lien, yet that course is usually pursued. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256. The levy of an execution, during the period of the lien, neither creates a new lien nor extends the judgment lien; and the judgment creditor must, in order to preserve his priority, sell the real property within the period of the statutory lien of the judgment. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256; Rogers v. Druffel, 46 Cal. 654. A sale under execution relates to the time of the levy only; and where execution is levied during the life of the lien, but is returned without sale, a second execution, levied after the expiration of the lien, relates back only to the time of the levy. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256. Execution may be issued and levied before the docketing of the judgment, and the sale and conveyance thereunder will pass all the interest held by the judgment debtor at the time of the levy. Hastings v. Cunningham, 39 Cal. 137; Los Angeles County Bank v. Raynor, 61 Cal. 145; Baum v. Roper, 1 Cal. App. 435; 82 Pac. 390. The relation of the judgment lienor to the property may be different, in some respects, after levy of execution, and new relations may arise thereby to the debtor and other creditors; but the issuance of levy and execution are not necessary to the lien. Estate of Wiley, 138 Cal. 301; 71 Pac. 441. The levy of the execution has not the effect of constituting a judgment, not otherwise such, a lien upon the premises: the lien of the execution is not that of the judgment, and the execution neither creates a judgment lien nor extends a judgment lien once created. Beaton v. Reid, 111 Cal. 484; 44 Pac. 167.

Sale of property under judgment lien. The sale must be made during the statutory period of the judgment lien, in order to preserve the priority thereby acquired (Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256); and where the lien is subordinate to another, the interest of the debtor in the land should be sold subject to the superior lien. Petaluma Sav. Bank v. Superior Court, 111 Cal. 488; 44 Pac. 177. The judgment creditor may petition the probate court for a sale of the property upon which he holds a judgment lien against the deceased; and the statute of limita-

tions is suspended on the judgment lien by the filing of such petition. Estate of Wiley, 138 Cal. 301; 71 Pac. 441. An order enjoining a sale under execution does not stop the running of the statute. Rogers v. Druffel, 46 Cal. 654.

Attachment lien in its relation to judgment lien. Land subject to attachment cannot be conveyed by a debtor so as to exempt it from a judgment lien. Riley v. Nance, 97 Cal. 206; 32 Pac. 315 (Beatty, C. J.); and see People v. Irwin, 14 Cal. 434. Where, before judgment, an attachment debtor conveys land, there is no judgment lien upon the property into which the attachment lien can merge, nor is the attachment lien released by the execution of a bond on appeal from the judgment. Riley v. Nance, 97 Cal. 203; 31 Pac. 1126; and see Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256. The effect of a stay bond on appeal is to extinguish only the liens resulting from the judgment, and from process thereunder. The attachment lien is not extinguished by such undertaking, and, although merged in the judgment lien, it may be revived, where the judgment lien, instead of expiring by lapse of time, is extinguished by acts of the defendant. Riley v. Nance, 97 Cal. 206; 32 Pac. 315 (Beatty, C. J.).

Finding as to exemption. A docketed judgment is not necessarily a lien; and where the land is a homestead, and therefore exempt from execution, it is not necessary that the court shall state that fact as a reason for finding that the defendant had no lien; the only purpose of findings being to answer the questions put by the pleadings, if the facts are stated in the findings in the same way in which they are stated in the pleadings, they are sufficient. Dam v. Zink, 112 Cal. 91; 44 Pac. 331.

Fraudulent conveyance. The fact that claims allowed by an administrator were upon a judgment which was a lien upon property prior to the fraudulent conveyance thereof, does not affect the right of the administrator to have such fraudulent conveyance declared void by judicial decree. Ackerman v. Merle, 137 Cal. 157; 69 Pac. 982.

Equitable relief. The enforcement of a judgment lien may be sought as affirmative relief in an action to foreclose another lien, to which the lien-holder is made a party defendant. Hibernia Sav. & L. Soc. v. London etc. Fire Ins. Co., 138 Cal. 257; 71 Pac. 334; and see Holmes v. Richet, 56 Cal. 307; 38 Am. Rep. 54. Equity will enforce a judgment lien, where there is no other adequate remedy, or where the holder of the judgment lien is made a party defendant in an action to foreclose a prior mortgage. Hibernia Sav. & L. Soc. v. London etc. Fire Ins. Co., 138 Cal. 257; 71 Pac. 334.

Lien of judgment on after-acquired lands. See notes 13 Am. Dec. 626; 42 L. R. A. 209.

Lien of judgment, whether continued by suing out execution. See notes 51 Am. Dec. 166; 99 Am. Dec. 267.

Estates and interests affected by judgment lien. See notes 93 Am. Dec. 345; 117 Am. St. Rep. 776.

Lien of judgment on homesteads. See note 34 Am. St. Rep. 496.

Deficiency judgment on execution sale as lien on property after conveyance by judgment debtor during redemption period. See note 13 Ann. Cas. 320.

Lien of judgment upon excess of homestead over statutory value. See note 16 Ann. Cas. 603.

Lien of judgment as to unrecorded conveyance. See note 16 L. R. A. 668.

Lien of judgment against one having legal title to land belonging to another. See note 22 L. R. A. 258.

Necessity and form of entry or record of judgment. See note 28 L. R. A. 621.

Lien of judgment on real property permitted to stand in debtor's name. See note 30 L. R. A. (N. S.) 10.

Judgment as lien from time of equity. See note 38 L. R. A. 248.

Judgment against individual as lien on interest of tenant by entirety. See notes 9 L. R. A. (N. S.) 1026; 42 L. R. A. (N. S.) 555.

CODE COMMISSIONERS' NOTE. 1. Generally. The lien of a judgment is the creature of statute; the statute provides that a judgment shall become a lien from the time it is docketed upon the property of the judgment debtor, "not exempt from execution," which means upon property not subject to forced sale. The homestead is not subject to such sale, either on execution, or on any other final process of the court. Ackley v. Chamberlain, 16 Cal. 181; 76 Am. Dec. 516. A conveyance made without authority does not affect the lien. Smith v. Morse, 2 Cal. 524. The lien attaches only upon property in which such debtor has a vested legal interest. People v. Irwin, 14 Cal. 428. A judgment recovered against the husband is a lien on the homestead, and a sale of the homestead, upon an execution issued on such judgment, is void. Ackley v. Chamberlain, 16 Cal. 181; 76 Am. Dec. 516; Bowman v. Norton, 16 Cal. 213. In a foreclosure suit, the judgment, in the usual form, ascertained the amount due, directed a sale of the mortgaged premises, the application of the proceeds to the payment of the debts, provided for the recovery of any deficiency, and authorized execution for the same. It was held that such a judgment did not become a lien on the real estate of the debtor from the time it was docketed. Chapin v. Broder, 16 Cal. 403. A person who has acquired a lien by virtue of judicial process occupies no better position than a purchaser without notice in a similar case. O'Rourke v. O'Connor, 39 Cal. 446. A judgment debtor cannot avail himself of errors in docketing the judgment, when the property has been sold under the judgment; if the property sold is his, the levy operated as a lien; if not, he has no right to complain. Low v. Adams, 6 Cal. 277.

2. Lien cannot be extended. Levying an execution before the lien of the judgment upon which the execution issued expires, does not operate to prolong the lien of the judgment beyond the time limited in § 204 of the code. The levy and sale must both be made within the period of two years limited by statute. Isaac v. Swift, 10 Cal. 71; 70 Am. Dec. 698. If an undertaking on appeal is insufficient in amount to stay proceedings, the lien of the judgment is not extended by the appeal beyond two years from the time of its docketing; and this, where the undertaking was excepted to, there being no effort to enforce the judgment, pending the appeal. Guy v. Du Uprey, 16 Cal. 195; 76 Am. Dec. 518; see Dewey v. Latson, 6 Cal. 130; Englund v. Lewis, 25 Cal. 350; Chapin v. Broder, 16 Cal. 404.

3. Judgment directing the sale of property not a lien. Englund v. Lewis, 25 Cal. 349; Culver v. Rogers, 28 Cal. 520.

4. What will or will not discharge the lien. Creating new counties, effect of. See People v. Hovious, 17 Cal. 471. The payment by a judgment debtor, after a sheriff's sale, extinguishes the lien; and the fact that he takes a transfer of

the certificate and the sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. McCarty v. Christie, 13 Cal. 79. The perfecting of an appeal does not discharge the lien. Low v. Adams, 6 Cal. 277.

5. Time. In foreclosure cases, if there is a personal judgment directing a sale of the property, and the undertaking on appeal only stays the sale, and provides for costs, the lien of the personal judgment on the judgment debtor's property, in the county where it is docketed, attaches at the time it is docketed, and expires at the end of two years from the time the personal judgment is docketed. Englund v. Lewis, 25 Cal. 350; but see Chapin v. Broder, 16 Cal. 404; Dewey v. Latson, 6 Cal. 130. The two years during which a judgment remains a lien on real estate commence to run from the docketing of the judgment, unless the judgment is stayed by an order of the court, pending a motion for new trial, or by an undertaking on appeal. Barroilhet v. Hathaway, 31 Cal. 395; 89 Am. Dec. 193. Said Justice Rhodes, in Bagley v. Ward, 37 Cal. 131, 99 Am. Dec. 256:

"The purpose of an attachment is to hold the property of the defendant as security for such judgment as may be rendered (Prac. Act, § 120), and when the judgment is rendered and becomes a lien upon the property attached, the lien of the attachment becomes merged in that of the judgment, and the only effect thereafter of the attachment lien upon the property is to preserve the priority thereby acquired, and this priority is maintained and enforced under the judgment. If it does not cease at that time, except as giving priority to the judgment lien, when does it cease? Does it continue after the judgment lien has expired by limitation? The attachment lien, as to its amount, depends upon the ex parte statement of the plaintiff, while that of the judgment is certain. The lien of the latter is of a higher order, if it is possible that there can be different ranks among the liens. We will hazard the assertion that the law does not contemplate the existence, at the same time, of two distinct liens, arising by operation of law in one action, for the security of one demand. If the position is correct that the attachment lien ceases, except as maintaining priority for the judgment lien upon the property attached, it does not revive on the expiration of the judgment lien. Our remarks are confined to real property, as the judgment does not constitute a lien upon personal property.

"The judgment being a lien for two years from the time it is docketed upon the real estate of the defendant within the county in which the judgment is docketed, and a lien for the same time upon the real estate in any county in which a transcript of the docket is filed with the recorder, such liens are enforced by executions. That is the only purpose of the execution in respect to real estate while the judgment lien subsists. Section 210, prescribing the form of the execution, provides that it shall require the sheriff to satisfy the judgment out of the personal property of the debtor, etc., 'or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript was filed in the office of the recorder of such county, stating such day, or at any time thereafter.' This section manifests the purpose of the execution, so far as respects the lands that are covered by the lien of the judgment. Under the execution, doubtless, lands not subject to the judgment lien may be levied upon. It is provided in § 217 that all property, both real and personal, of the judgment debtor, 'may be attached on execution in like manner as upon writs of attachment.' We are not required, in this case, to reconcile the apparent conflict between this section and § 210, which prescribes what the execution shall contain, but we shall hereafter recur to the subject of a levy of the execution upon real property not subject to the lien of the judgment.

"The doctrine of Wood v. Colvin, 5 Hill, 228, that the judgment being a lien upon the lands, a levy is unnecessary, that the judgment binds the lands, and the execution comes as a power to sell, is often cited with approbation, and is, we think, the correct rule. The same principle is stated in Catlin v. Jackson, 8 Johns. 548. The chancellor, in delivering the unanimous opinion of the court of errors, says: 'In several essentials the effect of the execution must be different from a fi. fa. levied on personal estate only. The delivery of the fi. fa. gives no new rights to the plaintiff, and vests no new interests. The general lien is created by the judgment, and the execution is merely to give that lien effect—not by vesting a possessory right to the land affected by it in the plaintiff, but by designating it for a conversion into money by the operation of the fi. fa., and the act of the sheriff by virtue of it.' Although a levy of the execution is unnecessary to give effect to the judgment lien, yet that course is usually pursued, and the question arises whether the levy creates a new lien distinct from that of the judgment.

"The statute has not declared that the levy shall constitute a lien. At common law, the levy did not constitute a lien upon lands, nor could the title to lands be affected by an execution in satisfaction of a money judgment. Under a levari facias, not even the possession of lands, but only the present profits, were transferred; and when the writ of elegit was given by statute, the possession of a moiety of the defendant's lands was given to the plaintiff. 3 Bla. Com., p. 417. Mr. Chancellor Kent, in discussing the subject of the lien of judgments, executions, etc., says: 'The lien, after all, amounts only to a security against subsequent purchasers and encumbrancers; for, as the master of rolls said, in Brace v. Duchess of Marlborough, it was neither jus in re nor jus in rem—the judgment creditor gets no estate in the land; and though he should release all his right to the land, he might afterwards extend it by execution': 4 Kent's Com., p. 437. A lien being a mere priority over subsequent purchasers and encumbrancers, it is a contradiction of terms to say that by the levy a new priority is acquired, which, instead of antedating, must, of necessity, post-date the priority already held.

"The doctrine in New York and in this state is, that, in order to preserve the priority acquired by the judgment lien, the sale must be made during the statutory period of the lien. Isaac v. Swift, 10 Cal. 81; 70 Am. Dec. 698; Roe v. Swart, 5 Cow. 294; Little v. Harvey, 9 Wend. 158: Tufts v. Tufts, 18 Wend. 621; Graff v. Kip, 1 Ed. Ch. 619; Pettit v. Shepherd, 5 Paige, 493; 28 Am. Dec. 437. This was so held, on the ground that the opposite rule would extend the lien beyond the time mentioned in the statute. It would seem unaccountable that the legislature should have been so particular in fixing the period of the existence of the judgment lien, and that the courts should have been so careful in maintaining it, if, at the same time, the plaintiff might have acquired a lien through the execution that would last for the lifetime of the judgment.

"In the cases cited, when the executions were issued, but the lands were not sold during the lien of the judgments, there was abundant room for the question now presented. The vice-chancellor said, in Graff v. Kip: 'A plaintiff must take care to sell the lands of the defendant before the expiration of ten years, in order to avoid the danger of other encumbrances intervening; or if he wishes to continue the lien without a sale, then he must have a fresh judgment docketed before the other creditors come in and obtain judgments.' His familiarity with the effect of the levy of executions would readily have suggested to him the lien of the execution, instead of that of a 'fresh judgment,' if, in his opinion, the former constituted a lien, pending the lien of the latter. Mr. Justice Harris says: 'The doctrine on the subject (dormant executions) does not apply to real estate, the lien upon which depends upon the docketing of the judgment, and not upon the execution or levy.' Muir v. Leitch, 7 Barb. 341.

"There are several provisions of the statute that throw light upon, and in some degree test, this question. Suppose a judgment is docketed and execution issued and levied upon the do-

fendant's lands, but no sale made within the two years of judgment lien, and that, one year subsequently to the docketing of the first, another creditor obtains and dockets his judgment and issues and levies his execution on the same lands. The senior judgment, after the two years of its lien, loses its priority; and we have seen that a sale upon execution, after that time, does not extend the lien of the judgment, and, during the third year after the docketing of the judgment, the levy, if it constituted a lien, became a dormant lien, for, during that year, the junior judgment has priority, and a sale under it would pass the title; and if, after the expiration of the third year, without sale under the junior judgment, the priority shifts back to the first levy, it must be worked out by a process of revivor, for which we find no warrant in the statute. Or, suppose the judgment defendant sells and conveys the lands during the existence of the judgment lien, and after the levy of the execution, but there is no sale under the execution until after the judgment lien expires, do the lands remain chargeable with the judgment? No one will so affirm, unless he is prepared to say that a judgment remains a lien as against subsequent purchasers for five years. Subsequent encumbrancers stand on the same footing with subsequent purchasers as to the operation of prior liens.

"The Practice Act (§ 230) provides for a redemption, and those entitled to redeem are the judgment debtor, his successors in interest, and a creditor having a lien by judgment or mortgage subsequent to that on which the property was sold. It is unaccountable that the legislature should have omitted those having liens by executions, if it was intended that the levy should create a lien. It is provided by § 231 that the redemptioner shall pay not only the purchase-money, with the percentage, etc., but also the amount of any lien prior to that of the redemptioner. Had the second creditor, in the case first supposed, sold the lands during the second year of his lien, the first creditor could not have redeemed, because he did not hold a subsequent judgment lien; but if the first creditor had purchased at that sale, and a third judgment creditor had come to redeem, he would not have been required to pay the amount of the first judgment, because it did not then constitute a lien; but he would have to satisfy the execution issued upon it, if the levy did, in truth, amount to a lien.

"Under our statutes, the period of the docket lien is less than that during which an execution may issue, and the same is the case in New York, as well as in many other states. According to the provisions of § 214 of the Practice Act in force up to 1861, an execution might issue, as of course, within five years from the entry of the judgment; and after that time, upon leave of the court, upon showing that the judgment, or some portion of it, remained unsatisfied and due. The shorter period of the judgment lien was adopted for the purpose of leaving real estate unencumbered, as far as possible, consistently with the just demands of creditors for adequate security. The brief time of the lien of a mortgage—four years—also indicates the same policy of the law. Not only would this purpose be defeated, if the creditor could, during the judgment lien, acquire a new lien, not merely coextensive with that of the judgment, but even extending to a time after a recovery upon the judgment itself was barred by the statute of limitations; and it would seem that the courts were trifling, in holding that the levy and proceedings for the sale did not extend the docket lien,—an operation that would be useless in the presence of a lien that might continue longer than was possible for the docket lien. If the defendant conveys his real estate, subject to the judgment lien, and an execution is thereafter issued during the period of that lien, such real estate may be levied on and sold under the execution, and if the levy produces a lien, it results that, by operation of law, a lien may be acquired to secure the satisfaction of the judgment upon property which the judgment debtor does not then own. No one would contend for such a principle. If there was no lien when the defendant sold the property, none could be produced by a levy; but if there was a judgment lien, and the property conveyed to the third person is levied upon and sold under execution, evidently the sale must be the enforcement of the judgment lien, as that was the only existing lien.

"Where there are several executions in the hands of the officer at the same time, under which the lands are sold, it is held that the money must be applied first to the satisfaction of the oldest existing judgment lien. Roe v. Swart, 5 Cow. 294; Barker v. Gates, 1 How. Pr. 77; Jackson v. Robert, 11 Wend. 422. It was held in Roe v. Swart, supra, that, although the execution upon the first judgment was issued within ten years from the docketing, yet, as the sale was not made within the ten years, the money must be applied to the satisfaction of the second judgment. And where an execution was sent to another county, and was received by the sheriff before the judgment was docketed in that county, the execution took priority from the date of the docketing. Stoutenberg v. Vandenburg, 7 How. Pr. 229."

The docketing creates and preserves a lien for two years; but, without docketing, execution may issue. Hastings v. Cunningham, 39 Cal. 137.

§ 672. Docket defined. How kept, and what to contain. The docket mentioned in the last section is a book which the clerk keeps in his office, with each page divided into nine columns, and headed as follows: Date of entry in docket; judgment debtors; judgment creditors; judgment; time of entry; where entered in judgment-book; appeals, when taken; judgment of appellate court; satisfaction of judgment, when entered. If the judgment is for the recovery of money, the amount must be stated in the docket under the head of judgment; if the judgment is for any other relief, a memorandum of the general character of the relief granted must be stated. The names of the defendants must be entered in alphabetical order.

Docketing judgment. Ante, § 671.

Duty of clerk to keep docket. Pol. Code, § 4178.

Legislation § 672. 1. Enacted March 11, **1872**; based on Practice Act, § 205, which had (1) the words "shall keep" instead of "keeps," after "clerk," (2) the word "shall" instead of "must," in all instances, and (3) the words "in the docket," before "in alphabetical order."

2. Amendment by Stats. **1901**, p. 151; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 720, (1) substituting "nine" for "eight," (2) inserting "Date of entry in docket," (3) inserting the word "the" after "If," (4) changing the word "be" to "is," in both instances, and (5) omitting the words "or damages" before "the amount"; the code commissioner saying, "The amendment requires the date of the docketing of the judgment to ap-

pear in the docket, in order that some means shall exist for determining when the judgment lien commences. The necessity for such an amendment is made apparent by the decision in Menzies v. Watson, 105 Cal. 109."

Docketing of judgment. Docketing a judgment consists in entering in the docket in the clerk's office a brief abstract of the judgment; and it is the duty of the clerk to enter in this docket the title of the cause, with the date of its commencement, and a memorandum of every subsequent proceeding therein, with the date thereof; and the docket, to create a prior statutory judgment lien, must, of itself, show the date of the docketing of the judgment. Eby v. Foster, 61 Cal. 282. Upon the filing of the findings and decree, it is the ministerial duty of the clerk to enter and docket the judgment, and to prepare and file the judgment roll; but he cannot, by neglecting to perform that duty, destroy or impair the effect of the judgment. Baker v. Brickell, 102 Cal. 620; 36 Pac. 950. The "docket" mentioned in this section is not the book in which judgments are to be entered. Old Settlers Investment Co. v. White, 158 Cal. 236; 110 Pac. 922. The date of the entry of the judgment is as important a part of the record as the entry itself. Estate of Scott, 124 Cal. 671; 57 Pac. 654; and see Estate of Pichoir, 139 Cal. 694; 70 Pac. 214; 73 Pac. 604. Surnames should precede christian names, and the omission of the christian name of the judgment debtor does not deprive the docket of its useful function of directing the attention of those interested to the existence of the judgment and to all its incidents. Hibberd v. Smith, 50 Cal. 511. To create a judgment lien, the judgment must be properly docketed: among other things, it must be docketed against the judgment debtor in his correct name. Huff v. Sweetser, 8 Cal. App. 689; 97 Pac. 705. A statement of the amounts of a judgment, entered in the judgment docket by placing the Arabic numerals indicating the amounts under the heading, "Amount of Judgment," one of such amounts being preceded by the word "Costs," the dollar-column being separated from the cent-column by a vertical red line, without any dollar or cent mark or any other designation of money, as is common where sums of money are written in columns, is a sufficient statement of the amount of the judgment to create a lien under this section. Dyke v. Bank of Orange, 90 Cal. 397; 27 Pac. 304. A complaint on a judgment need not allege that it was docketed. High v. Bank of Commerce, 95 Cal. 386; 29 Am. St. Rep. 121; 30 Pac. 556.

Docketing judgments. See note 87 Am. St. Rep. 665.

Index of judgment as part of record. See note 14 L. R. A. 393.

CODE COMMISSIONERS' NOTE. The docket is constructive notice of the lien to strangers to the judgment. Page v. Rogers, 31 Cal. 293; Hastings v. Cunningham, 39 Cal. 140.

§ 673. Docket to be open for inspection without charge. The docket kept by the clerk is open at all times, during office hours, for the inspection of the public, without charge. The clerk must arrange the several dockets kept by him in such a manner as to facilitate their inspection.

Public writings, open to inspection. Post, §§ 1892, 1893.

Legislation § 673. Enacted March 11, **1872**; based on Practice Act, § 206, which had (1) the words "shall be" instead of "is," before "open," and (2) the words "and it shall be the duty of the clerk to" instead of "The clerk must."

§ 674. Transcript to be filed in any county, and judgment to become a lien there. The transcript of the original docket of any judgment, the enforcement of which has not been stayed on appeal, certified by the clerk, may be filed with the recorder of any other county, and from such filing the judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien continues for two years unless the judgment is previously satisfied or the lien otherwise discharged.

Judgment.

1. **May be recorded without acknowledgment.** Civ. Code, § 1159.

2. **Recording, in county where land situated.** Ante, § 400; but see § 78.

3. **Of justice's court. Abstract creates lien.** Post, § 900.

Recording, generally. Civ. Code, §§ 1158 et seq.

Legislation § 674. 1. Enacted March 11, **1872**; based on Practice Act, § 207 (New York Code, § 282), which had (1) the words "shall become" instead of "becomes," before "a lien upon," (2) the words "acquire, until the said lien expires" instead of "and before the lien expires, acquire," and (3) the words "shall continue" instead of "continues." When enacted in 1872, § 674 read the same as now except for the amendments of 1907.

2. Amendment by Stats. **1901**, p. 151; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 720, (1) changing, in first line, "A" to "The," (2) adding, after "original docket," the words "of any judgment, the enforcement of which has not been stayed on appeal," (3) changing "the time of the" to "such," before "filing the judgment," and

(4) in last sentence, (a) changing "be" to "is," and (b) adding the words "or the lien otherwise discharged."

Duration of lien. Where there is a judgment in personam, in addition to a decree of foreclosure and order of sale, the lien of the personal judgment on the property of the judgment debtor, in the county where the judgment is docketed, attaches at the time such judgment is docketed, and expires at the end of two years from the date of such docketing. Englund v. Lewis, 25 Cal. 337. The levying of an execution is not essential to the existence or continuance of a judgment lien, under this section, which continues for two years, whether or not the execution has been taken out; and no execution can issue after the death of the judgment debtor. Estate of Wiley, 138 Cal. 301; 71 Pac. 441.

What property affected by filing transcript. This section and § 671, ante, make the judgment a lien only on real property not exempt from execution: homestead property is not subject to a judgment lien. Boggs v. Dunn, 160 Cal. 283; 116 Pac. 743.

CODE COMMISSIONERS' NOTE. Upon filing the transcript with a county recorder of another county, the judgment becomes a lien upon the debtor's real property in that county for two years from the date of the filing, notwithstanding a lien by virtue of the same judgment has previously existed, and expired by lapse of time, in another county. Donner v. Palmer, 23 Cal. 40. Filing the transcript with the recorder of any other county makes it a lien upon the real estate in that county, but it does not make it a judgment of the district court for that county. People v. Doe, 31 Cal. 220. But the mere contingent provision in a decree of foreclosure, for execution in case of deficiency, etc., does not amount to a personal judgment, and to such provision no effect can be given as a lien until the amount of the deficiency has been ascertained and fixed. The lien does not commence to run until the deficiency is ascertained, and an execution be issued therefor. Chapin v. Broder, 16 Cal. 420; see also notes to §§ 670, 671, ante.

§ 675. Satisfaction of a judgment, how made. Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or by his indorsement on the face, or on the margin of the record of the judgment, or by the attorney, unless a revocation of his authority is filed. Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment, or make such indorsement, and, upon motion, the court may compel it, or may order the entry of satisfaction to be made without it.

Acknowledgments, powers of judicial officers to take. Ante, § 179.

Attorney, power of, to bind client. Ante, §§ 283–285.

Legislation § 675. 1. Enacted March 11, **1872** (based on Practice Act, § 208), (1) changing, at end of first sentence, the words "be previously" to "is," before "filed," (2) in second sentence, (a) changing the words "shall be" to "is," before "satisfied," (b) omitting the words "it shall be the duty of," after "execution," and (c) changing the word "to" to "must," after "attorney."

2. Amended by Code Amdts. **1873–74**, p. 320, (1) in first sentence, adding the words "or by his indorsement on the face, or on the margin of the record of the judgment," and (2) in second sentence, adding the words "or make such indorsement."

Who may enter or acknowledge satisfaction. Only on payment of the whole amount due is one co-judgment creditor authorized to enter satisfaction without the consent of the other. Haggin v. Clark, 61 Cal. 1. The use of the name of a nominal plaintiff, by his assignee, or the agent of his assignee, in satisfying the judgment, is not improper. Cobb v. Doggett, 142 Cal. 142; 75 Pac. 785. The beneficial owners of a judgment on claims assigned for collection may enter satisfaction; and enforcement of the judgment by their assignee, after such satisfaction, will be enjoined. Meyer v. Tully, 46 Cal. 70. The assignment of a judgment to an attorney, with defeasance by him that he held half thereof in trust for his grantor, does not confer upon him authority to satisfy the judgment for less than the full amount. Cobb v. Doggett, 142 Cal. 142; 75 Pac. 785.

Effect of payment of judgment. The payment of a judgment does not always amount to a satisfaction: the rule is, that the mere payment of a judgment by one joint debtor does not operate as an accord and satisfaction of the judgment as to other joint judgment debtors, unless it plainly appears that the payment was intended to have such effect. Williams v. Riehl, 127 Cal. 365; 78 Am. St. Rep. 60; 59 Pac. 762. Where one of two defendants pays a joint judgment, but not with the intention of discharging it, he is entitled to use the judgment for his protection and indemnity, and may enforce it against his co-defendant for his legal proportion of the debt. Coffee v. Tevis, 17 Cal. 239; Williams v. Riehl, 127 Cal. 365; 78 Am. St. Rep. 60; 59 Pac. 762. A judgment debtor, pending an appeal by him from the judgment, may waive his right to prosecute the appeal, and may satisfy the judgment by paying the amount thereof on an execution levied thereon against

the judgment creditor; such a payment operates as a satisfaction of the judgment, as against a prior assignee of a part interest therein, if the judgment debtor, at the time of the payment, had no notice of the assignment, and the filing of the assignment is not constructive notice thereof. Buckeye Refining Co. v. Kelly, 163 Cal. 8; Ann. Cas. 1913E, 840; 124 Pac. 536. The payment of a judgment, unless by way of compromise, or with an agreement not to take or pursue an appeal, cannot prevent a party against whom a judgment was rendered from seeking a reversal on appeal. Warner v. Freud, 131 Cal. 639; 82 Am. St. Rep. 400; 63 Pac. 1017. A forced payment by execution sale, against a nonconsenting judgment debtor, cannot be held to abridge any of his rights upon or under appeal. Vermont Marble Co. v. Black, 123 Cal. 21; 55 Pac. 599; Kenney v. Parks, 120 Cal. 22; 52 Pac. 40. The payment of a judgment by an administratrix, for the purpose of protecting the rights of the estate in real property, which would otherwise be forfeited, should be deemed a compulsory payment: it does not affect the right of appeal. Warner v. Freud, 131 Cal. 639; 82 Am. St. Rep. 400; 63 Pac. 1017.

When court will compel entry of satisfaction. Where a judgment has been paid, but not satisfied of record, a remedy is provided by this section for entry of satisfaction, and, for that purpose, for the recall of any execution issued upon such judgment. Meredith v. Santa Clara Mining Ass'n, 60 Cal. 617; Mowry v. Heney, 3 Cal. Unrep. 277; 24 Pac. 301. Where, exclusive of keeper's fees under a writ of attachment forming no part of the judgment, the amount realized from the sale of the property under execution is sufficient to satisfy the judgment, including the amount of costs claimed in the cost-bill and accruing costs, the defendant is entitled to have the judgment satisfied. Hotchkiss v. Smith, 108 Cal. 285; 41 Pac. 304. The sureties on an appeal bond are not entitled to notice before the entry of judgment against them; but if the judgment is in fact satisfied, they may apply, under the provisions of this section, to have it satisfied of record. Meredith v. Santa Clara Mining Ass'n, 60 Cal. 617. Where the judgment determines the rights of the parties plaintiff as between themselves, the defendant, who has acquired the right of one plaintiff, may, upon tender of the amount due the other plaintiff, and the refusal thereof, compel the entry of satisfaction by proceeding under this section. Haggin v. Clark, 71 Cal. 444; 9 Pac. 736; 12 Pac. 478.

Use of motion to have judgment satisfied. A motion to have a judgment satisfied cannot be used as a means to reopen the case; that is, where the judgment has determined the respective rights of the parties plaintiff as between themselves, it cannot be shown by affidavits, on such motion, that their rights are in fact different. Haggin v. Clark, 71 Cal. 444; 9 Pac. 736.

Satisfaction of record, but not in fact. Where the judgment has been satisfied of record, but not in fact, it is the proper and regular practice to order the defendant to show cause why execution should not issue upon the judgment, thus giving him an opportunity to be heard upon the matter. McAuliffe v. Coughlin, 105 Cal. 268; 38 Pac. 730.

Satisfaction as to one defendant, effect of, as to others. The conditional release of one of two joint judgment debtors, "so far as the same can be done without releasing or discharging" the other from the payment of the balance, does not release or discharge the other. Barnum v. Cochrane, 139 Cal. 494; 73 Pac. 242. The satisfaction and release of judgment as to one of several joint tort-feasors, where the judgment was for joint damages, operates in law as a satisfaction and release of all. Chetwood v. California Nat. Bank, 113 Cal. 414; 45 Pac. 704. There can be but one satisfaction accorded for the same wrong; and while the plaintiff may sue individually or together persons guilty in common of a tort, yet he cannot, by suing each wrong-doer alone, secure more than one compensation for the same injury. Butler v. Ashworth, 110 Cal. 614; 43 Pac. 386.

Offset of judgment as satisfaction. Satisfaction may be made by the set-off of another judgment; and the court may decree this by virtue of its general jurisdiction over its judgments and suitors. Coonan v. Loewenthal, 147 Cal. 218; 109 Am. St. Rep. 128; 81 Pac. 527. A person may receive money due on a judgment rendered in favor of himself and several others, co-plaintiffs; but he cannot, without authority from his co-plaintiffs, set off a judgment due to him and then jointly against another judgment, held by the defendant in such joint judgment, against himself alone. Corwin v. Ward, 35 Cal. 195; 95 Am. Dec. 93.

Equitable relief. The equitable remedy of enjoining the execution of a judgment is not barred by this section, and especially not where the party seeking the relief has applied to the court rendering the judgment to declare satisfaction and recall the execution, but has been denied such relief. Eppinger v. Scott, 130 Cal. 275; 62 Pac. 460.

Appeal. The voluntary satisfaction of the judgment renders the question on appeal a moot question, and therefore the appeal will be dismissed. Moore v. Morrison, 130 Cal. 80; 62 Pac. 268. Where the attorney for a party enters satisfaction of a judgment for less than the amount thereof, and the testimony is conflicting.

as to whether such attorney had authority from his client to enter such satisfaction, and the motion of the client to have the satisfaction vacated is denied, the decision will not be set aside on appeal. Fuller v. Baker, 48 Cal. 632. Enforced satisfaction by execution cannot deprive the judgment debtor of his right to appeal, and he may require restitution in case of reversal. Kenney v. Parks, 120 Cal. 22; 52 Pac. 40. A judgment against a deceased person is not satisfied, so as to prevent or cause a dismissal of the appeal, by a sale of the property of the estate under execution, and the payment of the proceeds into court to await the result of the appeal. Vermont Marble Co. v. Black, 123 Cal. 21; 55 Pac. 599. The affirmance of the judgment will not affect the fact that the judgment has been in part satisfied. Ryland v. Heney, 130 Cal. 426; 62 Pac. 616.

Review. When a judgment is satisfied, it is beyond review: the satisfaction thereof is the last act and end of the proceeding; the payment produces a permanent and irrevocable discharge, after which the judgment cannot be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements. Estate of Baby, 87 Cal. 200; 22 Am. St. Rep. 239; 25 Pac. 405. A party cannot accept the benefit or advantage given him by a judgment or order, and then seek to have it reviewed; but there is a limitation of this rule, where a reversal could not affect the right of the party to the benefit he has secured, as where the only controversy relates to his right to a greater amount. San Bernardino County v. Riverside County, 135 Cal. 618; 67 Pac. 1047. A judgment, fully paid and satisfied, will not be reviewed upon certiorari; and a judgment of contempt for violation of an injunction will not be reviewed, where the injunction has been obeyed and the fine imposed voluntarily paid by the defendant. Morton v. Superior Court, 65 Cal. 496; 4 Pac. 489; and see Kenney v. Parks, 120 Cal. 22; 52 Pac. 40.

CODE COMMISSIONERS' NOTE. If the execution is levied on sufficient property to satisfy it, the levy is a satisfaction of the judgment. People v. Chisholm, 8 Cal. 30; Mulford v. Estudillo, 23 Cal. 94. Tender, or offer to perform, does not satisfy judgment. Redington v. Chase, 34 Cal. 666. In Deland v. Hiett, 27 Cal. 611, 87 Am. Dec. 102, it was held that payment of part of a money judgment, under an agreement that it should operate as satisfaction in full, will not discharge the judgment; but the rule of this case was changed by legislative action. See Stats. 1867–68, p. 31. See also Civ. Code, § 1524. Before action commenced, plaintiffs agreed with their attorneys, that if the latter brought the action and recovered they should have one third of the judgment and costs as compensation. After judgment, and execution issued, the plaintiffs compromised with the defendant for less than the amount of the judgment, and entered satisfaction upon the record. It was held, that the attorneys had no lien on the judgment, and could not disturb the satisfaction entered by the plaintiffs. Mansfield v. Dorland, 2 Cal. 507. The plaintiff in an execution may accept of promissory notes by a special agreement, as an absolute payment of the judgment, but the agreement must be proved by testimony other than the sheriff's return. Mitchell v. Hockett, 25 Cal. 538, 542; 85 Am. Dec. 151.

§ 675a. Satisfaction of mortgage recorded. Form of satisfaction. Whenever a mortgage on real property is foreclosed in this state and the property covered by such mortgage is sold under and pursuant to the decree of foreclosure entered in the action in which such foreclosure is had, it shall be the duty of the sheriff, or commissioner making the sale, as the case may be, within five days after the purchaser at the sale becomes entitled to a deed from such sheriff, or commissioner thereunder, to enter upon the margin of the county records where such mortgage is recorded, if the same be recorded, a satisfaction of the same.

Such satisfaction shall be substantially in the following form:

Full satisfaction and discharge of the within mortgage by foreclosure is hereby entered this —— day of ——, 19—. Decree of foreclosure entered the —— day of ——, 19—, in cause No. ——, entitled, —— vs. ——. Sale under such decree had the —— day of ——, 19—.

——, Sheriff (commissioner).

Legislation § 675a. Added by Stats. **1905,** p. 243.

§ 676. Undertaking in actions to set aside transfer of property. Where an action is commenced to set aside a transfer or conveyance of property on the grounds that such transfer or conveyance was made to hinder, delay or defraud a creditor or creditors, the transferee or grantee to whom it is alleged the property was transferred or conveyed to hinder, delay or defraud creditors or the successors or assigns of such transferee or grantee,

may give an undertaking as herein provided, and when such undertaking is given as herein provided, the transferee or grantee to whom it is alleged the property was transferred or conveyed to hinder, delay or defraud creditors, or the successors and assigns of such transferee or grantee, may sell, encumber, transfer, convey, mortgage, pledge or otherwise dispose of the property, or any part thereof, which is alleged to have been transferred or conveyed to hinder, delay or defraud creditors, so that the purchaser, encumbrancer, transferee, mortgagee, grantee or pledgee of such property, will take, own, hold and possess such property unaffected by such action and suit, or the judgment which may be rendered therein.

Legislation § 676. Added by Stats. **1903**, p. 98. **fraudulent transfer.** See note 75 Am. Dec. 359.
Form of judgment granting relief against

§ 677. **Conditions of undertaking.** Such undertaking with two sureties shall be executed by the transferee or grantee to whom it is alleged the property was transferred or conveyed to hinder, delay or defraud creditors, or the successor or assign of such transferee or grantee, in double the estimated value of the property so alleged to have been transferred or conveyed; provided, in no case need such undertaking be for a greater sum than double the amount of the debt or liability alleged to be due and owing to the plaintiff in such action, commenced to set aside said transfer and conveyance; and where such estimated value of the property alleged so to have been conveyed is less than the sum alleged to be due and owing to the plaintiff in the action, such estimated value shall be stated in the undertaking, and said undertaking shall be conditioned that, if it be adjudged in said action that the transfer or conveyance was made to hinder, delay or defraud a creditor or creditors, then that the transferee or grantee or the said successor or assigns of such transferee or grantee giving such undertaking, will pay to the plaintiff in said action a sum equal to the value, as the same is estimated in said undertaking, of said property alleged to have been transferred or conveyed to hinder, delay or defraud creditors, not exceeding the sum alleged to be due and owing to the plaintiff in the action.

Legislation § 677. Added by Stats. **1903**, p. 99.

§ 677½. **Filing and serving undertaking.** Said undertaking shall be filed in the action in which said execution issued and a copy thereof served upon the plaintiff or his attorney in said action.

Legislation § 677½. Added by Stats. **1903**, p. 99.

§ 678. **Objections to sureties.** Within ten days after service of the copy of undertaking the plaintiff may object to such undertaking on the ground of inability of the sureties, or either of them, to pay the sum for which they become bound in said undertaking, and upon the ground that the estimated value of the property therein is less than the market value of such property. Such objection to the undertaking shall be made in writing, specifying the ground or grounds of objection, and if the objection is made to the undertaking that the estimated value therein is less than the market value of the property, such objection shall specify the plaintiff's estimate of the market value of the property. Such written objection

shall be served upon the said transferee or grantee, or the successor or assigns of such transferee or grantee giving such undertaking.

Legislation § 678. Added by Stats. 1903, p. 99.

§ 678½. **Justification of sureties. Approval and disapproval of undertaking.** When the sureties or either of them, are objected to, the surety or sureties so objected to shall justify before the court in which the action is commenced, upon ten days' notice of the time when they will so justify being given to the plaintiff, or plaintiff's attorney. Upon the hearing and examination into the sufficiency of a surety, witness may be required to attend and evidence may be procured and introduced in the same manner as in trial of civil cases. Upon such hearing and examination the court shall make its order, in writing, approving or disapproving the sufficiency of the sureties or surety on such undertaking. In case the court disapproves of the surety or sureties on any undertaking, a new undertaking may be filed and served, and to any undertaking given under the provisions of this act the same objection to the sureties may be made and the same proceedings had as in case of the first undertaking filed and served.

Legislation § 678½. Added by Stats. 1903, p. 99.

§ 679. **Objection because estimated value in undertaking less than market value. New undertaking.** When objection is made to the undertaking upon the ground that the estimated value of the property, as stated in the undertaking, is less than the market value of the property, the transferee or grantee, or the successor or assigns of such transferee or grantee giving the undertaking may accept the estimated value stated by the plaintiff in said objection, and a new undertaking may at once be filed, with the plaintiff's estimate stated therein as the estimated value, and no objection shall thereafter be made upon that ground; if the plaintiff's estimate of the market value is not accepted, the transferee or grantee, or the successor or assigns of the grantee or transferee giving such undertaking, upon ten days' notice to the plaintiff, shall move the court in which the action is pending to estimate the market value of the property, and upon the hearing of such motion, witnesses may be required to attend and testify, and evidence may be produced in the same manner as in the trial of civil actions. Upon the hearing of the motion the court shall estimate the market value of the property, and if the estimated value of the property as made by the court exceeds the estimated value as stated in the undertaking, a new undertaking shall be filed and served with the market value determined by the stated value therein as the estimated value of the property.

Legislation § 679. Added by Stats. 1903, p. 100.

§ 679½. **Justification of sureties.** The sureties shall justify upon the undertaking as required by section one thousand and fifty-seven of the Code of Civil Procedure.

Legislation § 679½. Added by Stats. 1903, p. 100.

§ 680. **When undertaking becomes effective.** The undertaking shall become effective for the purpose stated in section one [section six hundred

and seventy-six] of this act, ten days after service of copy thereof on the plaintiff, unless objection to such undertaking is made as in this act provided, and in case objection is so made to the undertaking filed and served, the same shall become effective for such purpose when an order is made by such court approving the sureties, when the surety or sureties are objected to, or affirming the estimate of the value of property when objection is made thereto, or in case any objection to the undertaking is sustained by the court when a new undertaking is filed and served as required by this act, to which no objection is made, or if made is not sustained by the court.

Legislation § 680. Added by Stats. **1903**, p. 100.

§ 680½. **Judgment against sureties.** If judgment be rendered in said action that the alleged transfer or conveyance was made to hinder, delay or defraud creditors, then judgment shall be rendered in such action without further proceeding in favor of plaintiff and against the principal and sureties on said undertaking for the sum for which said undertaking was executed according to the conditions thereof.

Legislation § 680½. Added by Stats. **1903**, p. 101.

Effect of judgment against principal as evidence against surety. See note 83 Am. Dec. 380.

TITLE IX.

EXECUTION OF JUDGMENT IN CIVIL ACTIONS.

Chapter I. Execution. §§ 681–713½.
II. Proceedings Supplemental to Execution. §§ 714–721.

CHAPTER I.

EXECUTION.

§ 681. Within what time execution may issue.
§ 681a. Stay of execution.
§ 682. Who may issue the execution, its form, to whom directed, and what it shall require.
§ 683. When made returnable.
§ 684. Money judgments and others, how enforced.
§ 685. Execution after five years.
§ 686. When execution may issue against the property of a party after his death.
§ 687. Execution, how and to whom issued.
§ 688. What liable to be seized on execution. Property not affected until levy made.
§ 689. When property claimed by third party. Indemnity.
§ 690. What exempt from execution.
§ 691. Writ, how executed.
§ 692. Notice of sale under execution, how given.
§ 693. Selling without notice, what penalty attached.
§ 694. Sales, how conducted. Neither the officer conducting it nor his deputy to be a purchaser. Real and personal property, how sold. Judgment debtor, if present, may direct order of sale, and the officer shall follow his directions.
§ 695. If purchaser refuses to pay purchase-money, what proceedings.
§ 696. Officer may refuse such purchaser's subsequent bid.
§ 697. These two sections not to make officer liable beyond a certain amount.
§ 698. Personal property not capable of manual delivery, how delivered to purchaser.
§ 699. Personal property not capable of manual delivery, how sold and delivered.
§ 700. Sale of real property. What purchaser is substituted to and acquires.
§ 700a. When sales are absolute. What certificate must show.
§ 701. Real property so sold, by whom it may be redeemed.
§ 702. When it may be redeemed, and redemption-money.
§ 703. When judgment debtor or another redemptioner may redeem.
§ 704. In cases of redemption, to whom the payments are to be made.
§ 705. What a redemptioner must do in order to redeem.
§ 706. Until the expiration of redemption-time, court may restrain waste on the property. What considered waste.
§ 707. Rents and profits.
§ 708. If purchaser of real property be evicted for irregularities in sale, what he may recover, and from whom. When judgment to be revived. Petition for the purpose, how and by whom made.
§ 709. Party who pays more than his share may compel contribution.
§ 710. Collection of moneys due from judgment debtor. Procedure.
§ 710. Claimant of property may give undertaking and release property.
§ 710½. Claim of property. Undertaking, amount and conditions of.
§ 711. Claim of property. Undertaking, filing and serving.
§ 711½. Claim of property. Undertaking, objections to.
§ 712. Claim of property. Justification, approval and disapproval.
§ 712½. Claim of property. Undertaking, estimate of value, and new undertaking.
§ 713. Claim of property. Undertaking, justification of sureties.
§ 713½. Claim of property. Undertaking, when becomes effectual.

§ 681. Within what time execution may issue. The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement. If, after the entry of the judgment, the issuing of execution thereon is stayed or enjoined by any judgment or order of court, or by operation of law, the time during which it is so stayed or enjoined must be excluded from the computation of the five years within which execution may issue.

Time for execution, when extended. Post, § 685.

Appeal, stay of execution. Post, §§ 942–946.

Where money deposited by defendant, judgment to be satisfied thereon by clerk. Ante, § 500.

Attachment. If plaintiff obtains judgment, how satisfied. Ante, § 550.

Executor or administrator, no execution upon judgment against, when. Post, § 1504.

Receiver, in proceedings in aid of execution. Ante, § 564, subd. 4.

Death, no execution to issue after. See post, §§ 1504, 1505.

New execution, plaintiff may take out, where defendant discharged from prison. See post, § 1152.

Legislation § 681. 1. Enacted March 11, **1872**; based on Practice Act, § 209 (New York Code, § 283), which after "entry thereof," had, as the end of the section, the words "issue a writ of execution for its enforcement, as prescribed in this chapter." When enacted in 1872, these words were changed to read as at present, and then ended the section.

2. Amendment by Stats. **1901**, p. 152; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 682; the code commissioner saying, "The amendment consists in adding all after the word 'enforcement' [the second sentence]. The justice of the amendment is self-evident."

Scope of section. This section applies as well to a decree enforcing a lien by order of sale for an amount due, as to

personal judgments for the recovery of money. Dorland v. Hanson, 81 Cal. 202; 15 Am. St. Rep. 44; 22 Pac. 552; Jacks v. Johnston, 86 Cal. 384; 21 Am. St. Rep. 50; 24 Pac. 1057.

When party may have writ issued. A party in whose favor judgment is entered is entitled to execution immediately: he cannot be deprived of this right nor delayed in its exercise by any act of the opposite party. People v. Loucks, 28 Cal. 68. The right to execution for monthly allowances for the support of a wife during her lifetime does not accrue until such allowances respectively fall due. Gaston v. Gaston, 114 Cal. 542; 55 Am. St. Rep. 86; 46 Pac. 609; and see De Uprey v. De Uprey, 23 Cal. 352. The rule that execution cannot be issued in vacation has no existence in this state. Marysville v. Buchanan, 3 Cal. 212; McMillan v. Richards, 12 Cal. 467. The enforcement of a judgment by execution does not depend upon the entry or the docketing of the judgment: these are merely ministerial acts, the first of which is to put in motion the right of appeal from the judgment itself, and to limit the time within which the right may be exercised, or in which the judgment may be enforced, and the other to create a lien by the judgment upon the real property of the debtor. Los Angeles County Bank v. Raynor, 61 Cal. 145. Execution may be issued upon a judgment before the entry of such judgment in the judgment-book, and the sale of the property under such execution is effective to pass title. Los Angeles County Bank v. Raynor, 61 Cal. 145; Janes v. Bullard, 107 Cal. 130; 40 Pac. 108; Baun v. Roper, 1 Cal. App. 435; 82 Pac. 390. An execution on a judgment in an attachment suit is enforceable as soon as the judgment is entered, unless an appeal is taken at once and a stay bond given. Bailey v. Ætna Indemnity Co., 5 Cal. App. 740; 91 Pac. 416. This section restricts the absolute right to an execution to the five years after entry of judgment. Doehla v. Phillips, 151 Cal. 488; 91 Pac. 330. The five years of limitation within which an execution for an unsatisfied balance on a foreclosure sale may be taken out commences to run from the date of the judgment of foreclosure, and not from the date when the balance was docketed. Bowers v. Crary, 30 Cal. 621. A writ of execution, issued after the lapse of five years from the entry of judgment, is void, and subject to be recalled by any proper proceeding instituted for that purpose; and a writ of injunction restraining the judgment creditor from issuing the execution does not operate to suspend the running of the statute. Buell v. Buell, 92 Cal. 393; 28 Pac. 443; and see Solomon v. Maguire, 29 Cal. 227; Dorland v. Hanson, 81 Cal. 202; 15 Am. St. Rep. 44; 22 Pac. 552; Cortez v. Superior Court, 86 Cal. 274; 21 Am. St. Rep. 37; 24 Pac. 1011.

Who may have writ issued. A commissioner in partition, who is allowed a fee for his services, is a "party in whose favor judgment is given," within the meaning of this section. Cortez v. Superior Court, 86 Cal. 274; 21 Am. St. Rep. 37; 24 Pac. 1011; Thomas v. San Diego College Co., 111 Cal. 358; 43 Pac. 965.

How party may compel issuance of writ. Where a recorder erroneously directs an execution, issued under a valid judgment, to be returned unsatisfied, and his order is complied with, he may be compelled by mandamus to issue another execution: his duty to do so is purely ministerial. Hayward v. Pimental, 107 Cal. 386; 40 Pac. 545. Upon motion for an order that execution issue, it is proper and regular practice for the court, of its own motion, to order the defendant to show cause why the plaintiff's motion should not be granted, thus giving the defendant an opportunity to be heard in answer: the order to show cause is simply a notice of the motion, and a citation of the defendant to appear at a stated time and place and show cause why the plaintiff's motion should not be granted. McAuliffe v. Coughlin, 105 Cal. 268; 38 Pac. 730.

Effect of levy. The levy of an execution on land, where the judgment itself was not a lien, creates a lien upon the land from the date of the levy. Lean v. Givens, 146 Cal. 739; 106 Am. St. Rep. 79; 81 Pac. 128. A garnishment on execution fixes the rights of the judgment creditor so as to make his right to recover the debt from the garnishee superior to any claim or demand accruing subsequently. Nordstrom v. Corona City Water Co., 155 Cal. 206; 132 Am. St. Rep. 81; 100 Pac. 242.

Validity of execution. A variance from the judgment, as to the amount to be collected under an execution, simply renders the execution irregular: it does not make it void. Doehla v. Phillips, 151 Cal. 488; 91 Pac. 330.

Stay of execution. The court is not authorized to stay the execution of a judgment, where there is any infirmity in the judgment by reason of a defective complaint. Edwards v. Hellings, 103 Cal. 204; 37 Pac. 218.

Vacating execution. Jurisdiction. An order may be properly made by one department of a superior court vacating an execution wrongfully allowed by another department of the same court, after the lapse of five years: it is the same court acting in each instance. Dorland v. Hanson, 81 Cal. 202; 15 Am. St. Rep. 44; 22 Pac. 552.

Action on judgment. An action can be maintained in this state upon a domestic judgment, although the time within which execution might issue has expired. Ames

v. Hoy, 12 Cal. 11; Stuart v. Lander, 16 Cal. 372; 76 Am. Dec. 538; Rowe v. Blake, 99 Cal. 167; 37 Am. St. Rep. 45; 33 Pac. 864. The provision of this section, limiting the issue of execution for the enforcement of judgment to a term of five years, is but a limitation upon a certain mode for its enforcement, and does not purport to limit or qualify the right to its enforcement in any other mode; therefore an action may be maintained to enforce a judgment for the foreclosure of a mortgage, declaring the indebtedness therein ascertained to be a lien upon the mortgaged land and directing a sale thereof to satisfy the indebtedness. Rowe v. Blake, 99 Cal. 167; 37 Am. St. Rep. 45; 33 Pac. 864; and see Ames v. Hoy, 12 Cal. 11; Stuart v. Lander, 16 Cal. 372; 76 Am. Dec. 538.

Action for damages. Levy under satisfied judgment. The procuring of the levy of an execution issued upon a satisfied judgment is a tort, and constitutes a liability not founded upon an instrument in writing, and the statute begins to run, in such case, at the time of the levy, and subsequently accruing damages do not constitute separate causes of action, and do not postpone the operation of the statute. Wood v. Currey, 57 Cal. 208; McCusker v. Walker, 77 Cal. 208; 19 Pac. 382.

Whether lien of judgment continued by levy of execution. See note 99 Am. Dec. 267.

Effect of lapse of time on right to issue execution. See note 133 Am. St. Rep. 70.

Issuance of execution for part only of judgment debt. See note 19 Ann. Cas. 464.

Issuance of execution to enforce interlocutory order for payment of money. See note Ann. Cas. 1912D, 178.

Right to issue execution after death of judgment debtor. See note Ann. Cas. 1912D, 1047.

CODE COMMISSIONERS' NOTE. Generally. When execution may issue, etc. Effect of execution. Execution must be issued within five years from entry of judgment. White v. Clark, 5 Cal. 513; Bowers v. Crary, 30 Cal. 621. This applies to judgments in suits to foreclose mortgages. Stout v. Macy, 22 Cal. 647. And execution for an unsatisfied balance on judgment of foreclosure must be taken out within five years from date of judgment of foreclosure, and not from date of docketing balance remaining due after sale. Bowers v. Crary, 30 Cal. 621. The time during which execution was stayed by an order of the court is included in the five years, after the lapse of which an order of the court was necessary to take out execution. Solomon v. Maguire, 29 Cal. 227. Execution may be issued and enforced, whether the judgment roll has been entered up or not. Sharp v. Lumley, 34 Cal. 614. See, generally, Gray v. Palmer, 28 Cal. 417.

§ 681a. Stay of execution. The court or the judge thereof shall not have the power, without the consent of the adverse party, to stay, for a longer period than thirty days, the execution of any judgment or order the execution whereof would be stayed on appeal only by the execution of a stay bond.

Legislation § 681a. Added by Stats. **1911**, p. 400.

Constitutionality of stay laws. See note 6 Am. Dec. 540.

Stay of execution otherwise than by statutory proceedings. See note 127 Am. St. Rep. 707.

§ 682. Who may issue the execution, its form, to whom directed, and what it shall require. The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and be directed to the sheriff, and it must intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, and if it be for money, the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money or currency, as provided in section six hundred and sixty-seven, the execution must also state the kind of money or currency in which the judgment is payable, and must require the sheriff substantially as follows:

1. If it be against the property of the judgment debtor, it must require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or any time thereafter;

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants, or trustees, it must require the sheriff to satisfy the judgment, with interest, out of such property;

3. If it be against the person of the judgment debtor, it must require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged according to law;

4. If it be issued on a judgment made payable in a specified kind of money or currency, as provided in section six hundred and sixty-seven, it must also require the sheriff to satisfy the same in the kind of money or currency in which the judgment is made payable, and the sheriff must refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he must refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution. The sheriff collecting money or currency in the manner required by this chapter, must pay to the plaintiff or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal so to do, he shall be liable on his official bond to the judgment creditor in three times the amount of the money so collected;

5. If it be for the delivery of the possession of real or personal property, it must require the sheriff to deliver the possession of the same, describing it, to the party entitled thereto, and may at the same time require the sheriff to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered to be specified therein if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section.

Contempt in interfering with. Post, §§ 1209, 1210.

Judgments.

1. A lien. Ante, §§ 671, 674.

2. Interest on. See Civ. Code, §§ 1917, 1918, 1920.

Property leviable. Ante, § 542; post, § 688.

Levy without process, a misdemeanor. See Pen. Code, § 146.

Mandamus, execution may issue for costs and damages in. See post, § 1095.

Subd. 4. Judgment payable in specified kind of money. See ante, § 667.

Legislation § 682. **1.** Enacted March 11, **1872**; based on Practice Act, § 210 (New York Code, § 289), as amended by Stats. 1863, p. 688. When § 682 was enacted in 1872, (1) in the introductory paragraph, (a) in the first line, "shall" was changed to "must," (b) "shall" was omitted before "be directed," (c) "shall" was changed to "it must," before "intelligibly," (d) "section 200 of this act" was changed to "section 667," and (e) "shall" was changed to "must" after "execution" and before "require"; (2) in subd. 1, (a) "shall" was changed to "must" before "require," and (b) the words "or at any time thereafter" were added after "docketed"; (3) in subd. 2, (a) the words "of real property" were omitted after "tenants," and (b) "shall" was changed to "must" before "require"; (4) in subd. 3, "shall" was changed to "must"; (5) in subd. 4, (a) the words "section 200 of this act, it shall" were changed to "section 667, it must," (b) "said" was changed to "the" before "judgment is made," (c) "shall" was changed to "must" after "sheriff," (d) "shall" was changed to "must" before "refuse payment," and (e) "act shall" was changed to "chapter, must"; (6) in subd. 5, (a) "shall" was changed to "must" before "require," and (b) "particularly" was omitted before "describing."

2. Amendment by Stats. **1901**, p. 152; unconstitutional. See note ante, § 5.

Writ must be subscribed by clerk. Every execution, to be valid, must be subscribed by the clerk; if his term has expired, the execution, if signed by a deputy clerk, is void. O'Donnell v. Merguire, 6 Cal. Unrep. 423; 60 Pac. 981.

Statement of amount due in the writ. The provision in this section, that an execution for money shall state the amount actually due thereon, does not apply to an order of sale upon a judgment for the foreclosure of a mortgage. Hibernia Sav. etc. Soc. v. Behnke, 121 Cal. 339; 53 Pac. 812.

What may be levied upon. The only purpose of an execution, in respect to real estate upon which a judgment lien subsists, and while it subsists, is to enforce the lien by a sale of the property; and, doubtless, lands not subject to the judgment lien may be levied upon by virtue of the execution. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256.

Order in which property may be sold. The court may direct the order in which property may be sold, regardless of the order in which the parcels were enumerated by the pleader or set forth in the complaint; and the court may follow, by analogy, in a foreclosure sale, the requirements of this section for the terms of an ordinary writ of execution, and direct that the personal property be sold before resorting to the real estate. Bank of Ukiah v. Reed, 131 Cal. 597; 63 Pac. 921.

How writ may be attacked. A void writ of execution may be attacked by motion to vacate and set it aside, and also the sale made under it. Dorland v. Hanson, 81 Cal. 202; 15 Am. St. Rep. 44; 22 Pac. 552; Buell v. Buell, 92 Cal. 393; 28 Pac. 443. Although the complaint was demurrable, and the judgment founded upon it erroneous for that reason, yet it does not follow that such judgment can be reviewed or the error corrected on motion to quash the execution, unless the judgment is utterly void. Hayward v. Pimental, 107 Cal. 386; 40 Pac. 545. A motion to recall an execution is a new and original proceeding; and the fact that the notice of the motion is signed by attorneys other than those who appeared in the original action, and that no substitution is shown, does not render the notice illegal. Buell v. Buell, 92 Cal. 393; 28 Pac. 443; and see McDonald v. McConkey, 54 Cal. 143.

Amendment of writ. The power to amend an execution is limited to the amendment of the writs of the court, which can only be authenticated, under a statute such as ours, by the signature of the clerk, which signature is an essential part of the writ, without which there is no execution to be amended. O'Donnell v. Merguire, 131 Cal. 527; 82 Am. St. Rep. 389; 63 Pac. 847. Where an irregular or imperfect execution is amendable, it is not void, but only voidable, and it should be served and returned by the sheriff. Van Cleave v. Bucher, 79 Cal. 600; 21 Pac. 954; and see Hibberd v. Smith, 50 Cal. 511. A copy of a judgment of foreclosure of a mortgage, issued and attested by the clerk, but not issued in the name of the people, neither directed to the sheriff nor directing him to execute the judgment, is not void, but is amendable, and will be regarded as sufficient authority to the sheriff to sell and convey the mortgaged premises. Newmark v. Chapman, 53 Cal. 557; and see Granger v. Sheriff, 140 Cal. 190; 73 Pac. 816; Hager v. Astorg, 145 Cal. 548; 104 Am. St. Rep. 68; 79 Pac. 68.

Validity of execution. Whether an execution is void or only voidable, depends upon the question whether or not it is amendable. Hunt v. Loucks, 38 Cal. 372; 99 Am. Dec. 404. A sale to a bona fide purchaser under a voidable execution is valid, though the execution is afterwards set aside; but a sale under a void execution is invalid, and passes no title, even to a bona fide purchaser. Hunt v. Loucks, 38 Cal. 372; 99 Am. Dec. 404; and see Reynolds v. Harris, 14 Cal. 667; 76 Am. Dec. 459; Johnson v. Lamping, 34 Cal. 293. An execution directing the levy of more money than the judgment calls for is not void, but only voidable, and the sale thereunder is not invalid. Hunt v. Loucks, 38 Cal. 372; 99 Am. Dec. 404. A sale made on a void execution is void, in consequence of irregularity in the proceedings concerning the sale. Merguire v. O'Donnell, 139 Cal. 6; 96 Am. St. Rep. 91; 72 Pac. 337. A collateral attack can no more be made upon an erroneous execution, than upon an erroneous judgment; like an erroneous judgment, an erroneous execution is valid until set aside upon a direct proceeding proper for that purpose; and, until set aside, all the acts which have been done under it are also valid. Hunt v. Loucks, 38 Cal. 372; 99 Am. Dec. 404.

Amendment of writs of execution. See note 101 Am. St. Rep. 550.

Effect of variance of execution from judgment as regards collection of interest. See note 8 Ann. Cas. 169.

Constitutionality of imprisonment on execution. See note 34 L. R. A. 634.

Arrest under civil process for breach of warranty. See note 20 L. R. A. (N. S.) 844.

CODE COMMISSIONERS' NOTE. Hunt v. Loucks, 38 Cal. 372; 99 Am. Dec. 404. Where a remittitur has been issued to a district court, the clerk may issue an execution for the costs accrued thereon, without the order of the district court; nor can the district court prevent the immediate execution of the judgment. Marysville v. Buchanan, 3 Cal. 213. Where the clerk of the district court improperly refuses to issue execution on a judgment rendered in the court of which he is clerk, on the ground that the judgment has been attached at the suit of another person, a bill of equity cannot be sustained to release the attachment and compel the clerk to issue the execution by an action on the official bond of the clerk. Miller v. Sanderson, 10 Cal. 489. A writ of mandate will not lie to compel clerk to issue execution. Id.; Goodwin v. Glazer, 10 Cal. 333. An execution cannot exceed the judgment. Davis v. Robinson, 10 Cal. 411. If the execution authorize the levy of more money than the judgment calls for, it is voidable, but not void, and will not be set aside, but amended so as to correspond with the judgment. Hunt v. Loucks, 38 Cal. 373; 99 Am. Dec. 404. The clerk can issue execution for damages and costs. McMillan v. Vischer, 14 Cal. 232. Thus, if a judgment is against two, only one of whom appeals, and the appeal is dismissed with twenty per cent damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. Execution may issue for these damages and costs. McMillan v. Vischer, 14 Cal. 241. No execution can issue upon a judgment rendered against a county. When a judgment is rendered against a county, it is the duty of the supervisors to apply such funds in the treasury of the county as are not otherwise appropriated to its payment, or if there are no funds, and they possess the requisite power to levy a tax for that purpose, and if they fail or refuse to apply the funds or to execute the power, resort may be had to a mandamus. If there are no funds, and the power to levy the tax has not been delegated to them, the legislature must be invoked for additional authority. Emeric v. Gilman, 10 Cal. 404; 70

Am. Dec. 742. Issuing a second execution improperly is not a ground for equitable interference. The irregular proceeding must be corrected by the court issuing the writ. Gregory v. Ford, 14 Cal. 143; 73 Am. Dec. 639. If judgment by default be valid because of irregularities in the proceedings, the district court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie. Logan v. Hillegass, 16 Cal. 200.

Where a referee reported the existence and validity of a judgment more than five years old, and also reported a judgment that execution issue on the same, but stated that he had not passed on the question whether the judgment had been paid by an alleged accord and satisfaction, the order of the court confirming the report of the referee does not authorize the issuance of an execution on the judgment. Solomon v. Maguire, 29 Cal. 227.

§ 683. When made returnable. The execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment roll is filed. When the execution is returned, the clerk must attach it to the judgment roll. If any real estate be levied upon, the clerk must record the execution and the return thereto at large, and certify the same under his hand as true copies, in a book to be called the "execution-book," which book must be indexed, with the names of the plaintiffs and defendants in execution alphabetically arranged, and kept open at all times during office hours for the inspection of the public, without charge. It is evidence of the contents of the originals whenever they, or any part thereof, may be destroyed or mutilated.

Return, failure to make, without delay, liability of sheriff. See Pol. Code, § 4160.

Legislation § 683. Enacted March 11, **1872;** based on Practice Act, § 212 (New York Code, § 290), as amended by Stats. 1865–66, p. 703, which had (1) in lieu of the present second sentence, the clause "when the execution shall have been returned, it shall be the duty of the clerk to attach the same to the judgment roll"; (2) the word "shall" instead of "must" before "record" and before "be indexed"; (3) instead of the words "It is," in last sentence, had the words "and shall be"; and (4) the word "lost" before "or mutilated."

Levy and seizure. The levy is the essential act by which the property is taken into the custody of the law and set apart for the satisfaction of the judgment; and after it has been taken from the defendant, his interest is limited to its application to the judgment, irrespective of the time when it may be sold. Southern California Lumber Co. v. Ocean Beach Hotel Co., 94 Cal. 217; 28 Am. St. Rep. 115; 29 Pac. 627.

Application of proceeds of sale. The sheriff must show that the seizure of particular property is within the scope of his writ; and if, by the terms of the writ, such seizure is authorized only within a limited period of time, a seizure, after that time has expired, is unauthorized, and he is liable for trespass; but where he has taken the property within the lifetime of the writ, it has then become lawfully subject to be applied in satisfaction of the judgment, and a sale thereof may be made at any time thereafter. Southern California Lumber Co. v. Ocean Beach Hotel Co., 94 Cal. 217; 28 Am. St. Rep. 115; 29 Pac. 627.

Amendment of officer's return in regard to signature. See note 17 Ann. Cas. 459.

CODE COMMISSIONERS' NOTE. Where an execution on a judgment for money is not stayed by the statutory undertaking on appeal, a sale may be had under the execution, and the rights of purchasers are not affected by the subsequent reversal of the judgment. Farmer v. Rogers, 10 Cal. 335. A confession of judgment to a creditor, in good faith, and the issuance of execution, and making a levy under the same by the judgment debtor, without the knowledge of the judgment creditor, done with the knowledge that another creditor is about to attach, and for the purpose of defeating his attachment, is void as to the attaching creditor. Ryan v. Daly, 6 Cal. 238. A judge at chambers has authority to suspend proceedings under an execution until a motion before the court to recall or quash it can be heard. If a judgment upon which an execution issues, and the execution itself, are void upon their face, the court has power, on motion, to afford relief, and can arrest the process. Sanchez v. Carriaga, 31 Cal. 170. When a judgment is reversed, and the case remanded, and the clerk of the court below issues an execution for all the costs, as well those of appeal as those accruing before notice of appeal is filed, an order may be made staying the execution in the hands of the sheriff until an application can be made to the court to retax and adjust the costs. Ex parte Burrill, 24 Cal. 350. If, after a judgment recovered by an attaching creditor has been satisfied, he is proceeding to sell attached property under execution, the defendant in the execution may move to quash the writ. Domec v. Stearns, 30 Cal. 114. The writ of scire facias cannot issue for the revival or enforcement of a judgment. Humiston v. Smith, 21 Cal. 129; see also § 685, post. A sheriff's return is not traversable, and cannot be attacked collaterally, even if the officer is shown to have been guilty of fraud and collusion. Egery v. Buchanan, 5 Cal. 56. Nor can it be amended so as to postpone the rights of creditors attaching subsequently, but before the correction. Newhall v. Provost, 6 Cal. 87; Webster v. Haworth, 8 Cal. 25; 68 Am. Dec. 287. The term "appurtenances," used in the return of a levy by a sheriff, is too general, vague, and indefinite to embrace within its meaning any personal property as the subject of levy. Munroe v. Thomas, 5 Cal. 470.

Writ of assistance and restitution. A writ of assistance can only be issued against the defendants in the suit, and parties holding under them, who are bound by the decree. Burton v. Lies, 21 Cal. 87. A writ of assistance against the owner or parties holding under him will be refused, if the court, in an action of foreclosure of mortgage, had not acquired jurisdiction of the party owning the land at the time of foreclosure. Steinbach v. Leese, 27 Cal. 295. The sheriff, who has the writ of habere facias possessionem, must remove all persons who came upon the property after the suit was begun, except a per-

son, other than the defendant, who is in possession under a title adverse to defendant. Long v. Neville, 29 Cal. 135; see also Leese v. Clark, 29 Cal. 665; Le Roy v. Rogers, 30 Cal. 230; 89 Am. Dec. 88.

§ 684. Money judgments and others, how enforced. When the judgment is for money, or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor, after the return of an execution against his property unsatisfied in whole or part; when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith; when the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

Money, how computed and stated in judgment. See Pol. Code, § 3274.

Writ of possession or restitution. Ante, § 380; post, § 1174.

Re-entry after dispossession. Post, § 1210.

Execution against the person, discharge of prisoner. Post, §§ 1143–1154.

Sale of property. See post, §§ 694 et seq.

Performance of any other act. Enforcing obedience. Post, §§ 1209 et seq.

Legislation § 684. 1. Enacted March 11, **1872**; based on Practice Act, § 213, as amended by Stats. 1865–66, p. 703, which read: "Where the judgment requires the payment of money or the delivery of real or personal property, the same may be enforced by a writ of execution; when it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same; obedience thereto may be enforced by the court; and after a final judgment of partition the court shall have power to enforce a severance of the possession." When § 684 was enacted in 1872, the words "shall have," in last line, were changed to "has."

2. Amended by Code Amdts. **1873–74**, p. 321.

Scope of section. The only process provided in this state for the enforcement of a judgment foreclosing a lien upon specific property is that prescribed by this section. Southern California Lumber Co. v. Ocean Beach Hotel Co., 94 Cal. 217; 28 Am. St. Rep. 115; 29 Pac. 627. A writ of execution on a money judgment must require the sheriff to "satisfy" the judgment out of the property of the judgment debtor; but it is different with the execution of an order for the sale of property in satisfaction of a lien. Hooper v. McDade, 1 Cal. App. 733; 82 Pac. 1116.

Sale by sheriff. A writ of venditioni exponas is not necessary to justify a sale, as the writ itself is only a direction to perform a duty which already exists, and the sheriff acquires no additional authority from its issuance. Southern California Lumber Co. v. Ocean Beach Hotel Co., 94 Cal. 217; 28 Am. St. Rep. 115; 29 Pac. 627.

Sale of property in foreclosure suits. The process under which the judgment in foreclosure suits is enforced is provided for in this section and § 694, post. Ontario Land etc. Co. v. Bedford, 90 Cal. 181; 27 Pac. 39. The writ reciting the judgment, or the material parts thereof, and directing the officer to execute the judgment by making the sale, etc., is the proper course in foreclosure proceedings; and by analogy to the former equity practice, this writ is usually termed an order of sale. Tregear v. Etiwanda Water Co., 76 Cal. 537; 9 Am. St. Rep. 245; 18 Pac. 658. A judgment which directs the sale of specific property to satisfy a mortgage or other lien upon it falls within that class of judgments requiring the performance of any other act than the payment of money or the delivery of real or personal property, and is to be enforced by the proper officer, under a certified copy of the judgment. Heyman v. Babcock, 30 Cal. 367. In an action to foreclose a mortgage covering several adjoining tracts of land, the court has power to render judgment directing the property to be sold as one tract. Hopkins v. Wiard, 72 Cal. 259; 13 Pac. 687. The sale must be in conformity with the judgment, in a foreclosure suit, under a writ reciting the judgment, or the material parts thereof. Hopkins v. Wiard, 72 Cal. 259; 13 Pac. 687. Property which has been specifically impressed with the burden of satisfying the judgment may be sold after the return-day of the writ, under the order of the court, and the judgment debtor is not affected by the time within which such sale shall be made. Southern California Lumber Co. v. Ocean Beach Hotel Co., 94 Cal. 217; 28 Am. St. Rep. 115; 29 Pac. 627. An officer has no more authority to enforce a judgment of foreclosure without a certified copy of the judgment, than he has to enforce a simple money judgment without an execution. Heyman v. Babcock, 30 Cal. 367. The time within which a sale

is directed to be made to satisfy a judgment ordering a sale upon foreclosure of a lien is but directory, and under the control of the court; and the sale should not be set aside, merely because it was not made before the return-day of the writ. Southern California Lumber Co. v. Ocean Beach Hotel Co., 94 Cal. 217; 28 Am. St. Rep. 115; 29 Pac. 627.

Property and interests affected by execution sale. A judgment lien or a levy, or a subsequent sale, can in no event operate on any interest in land not in fact owned by a defendant. Lehnhardt v. Jennings, 119 Cal. 192; 48 Pac. 56. An after-acquired title does not pass by execution sale, nor is it affected by such sale. Rupert v. Jones, 119 Cal. 111; 51 Pac. 26. A sale of community property, made in pursuance of a decree granting a divorce, is effective and valid without being confirmed by the court, where the order for the sale does not expressly require a confirmation. Kimple v. Conway, 75 Cal. 413; 17 Pac. 546.

Relation between judgment and execution sale. Surplusage in a final judgment for money does not affect the right to execution thereunder. Hentig v. Johnson, 8 Cal. App. 221; 96 Pac. 390. The judgment remains unchanged, though the court sets aside the sale thereunder. Hopkins v. Wiard, 72 Cal. 259; 13 Pac. 687.

Enforcement of judgment for alimony. A final decree of divorce granted to a wife, containing a judgment in her favor for permanent alimony in a single sum of money, can only be regarded as an ordinary money judgment, to be enforced by writ of execution against the property of the husband. White v. White, 130 Cal. 597; 80 Am. St. Rep. 150; 62 Pac. 1062.

Notice. The process issued to enforce a judgment under this section is always executed without notice, other than that given to the general public by ordinary posting and advertisement. Lehnhardt v. Jennings, 119 Cal. 192; 48 Pac. 56.

How court may enforce obedience to judgment. Under this section, the court may resort to proceedings in contempt for the purpose of enforcing obedience to a judgment which requires the execution of a conveyance by a party thereto. Seventy-six Land etc. Co. v. Superior Court, 93 Cal. 139; 28 Pac. 813.

Rights of execution debtor. An execution debtor has the right of designating the property to be levied upon, but he cannot defeat a levy by neglecting or refusing to exercise the right. Frink v. Roe, 70 Cal. 296; 11 Pac. 820.

Presumption on appeal. The presumption on appeal is, that the execution in a foreclosure suit conformed with that portion of this section which provides that "when the judgment requires the sale of property the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith." Northern etc. Trust v. Cadman, 101 Cal. 200; and see Newmark v. Chapman, 53 Cal. 557.

CODE COMMISSIONERS' NOTE. Where an execution, commanding the sheriff to deliver possession of a chattel, has been finally and completely executed, the power of the sheriff under it, and the authority of the court to enforce it, cease; and a wrong-doer, afterwards trespassing upon the person thus put in possession, is not guilty of contempt for disobedience to the process of the court. Loring v. Illsley, 1 Cal. 24.

§ 685. Execution after five years. In all cases, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act.

Legislation § 685. 1. Enacted March 11, **1872**; re-enactment of Practice Act, § 214, as amended by Stats. 1865–66, p. 704, which had the words "other than for the recovery of money," after "In all cases," in first line, the section then ending with the words "supplemental pleadings."

2. Amended by Stats. **1895**, p. 38, (1) omitting the words noted supra, and (2) adding the limitation after the words "supplemental pleadings."

Construction of section. This section applies only to judgments of courts of record. White v. Clark, 8 Cal. 512. It provides a different period of limitation from that of § 336, ante, and, with § 925, post, does not authorize an independent action on a judgment rendered in a justice's court after the lapse of five years. John Heinlen Co. v. Cadwell, 3 Cal. App. 80; 84 Pac. 443. It applies to, and was evidently intended to apply to, judgments requiring the party against whom rendered to do some specific act, such as to deliver specific real or personal property; therefore the court can properly set aside and vacate a former order authorizing a writ of execution to issue upon a decree foreclosing a street assessment after the lapse of five years, and vacate the sale made thereunder. Dorland v. Hanson, 81 Cal. 202; 15 Am. St. Rep. 44; 22 Pac. 552; and see Cortez v. Superior Court, 86 Cal. 274; 21 Am. St. Rep. 37; 24 Pac. 1011; Jacks v. Johnston, 86 Cal. 384; 21 Am. St.

Rep. 50; 24 Pac. 1057; Buell v. Buell, 92 Cal. 393; 28 Pac. 443. The authority given by this section, conceding it to apply to judgments of justices of the peace, of extending the time for the issuance of an execution, is restricted to the court and to the original action in which the judgment was rendered. John Heinlen Co. v. Cadwell, 3 Cal. App. 80; 84 Pac. 443.

Nature of proceeding. The procedure contemplated by this section is neither an "action" nor a "special proceeding of a civil nature": it is a mere subsequent step in an action or special proceeding already commenced, and there is no limitation as to time. Doehla v. Phillips, 151 Cal. 488; 91 Pac. 330; Bredfield v. Hannon, 151 Cal. 497; 91 Pac. 334.

Constitutionality. This section, so far as it may be construed to permit an order to be made for the issuance of an execution upon motion without notice to the defendants, is constitutional; the legislature, undoubtedly, has power to provide that an execution may issue on a judgment at any time after its entry or rendition. Harrier v. Bassford, 145 Cal. 529; 78 Pac. 1038; Doehla v. Phillips, 151 Cal. 488; 91 Pac. 330; Bredfield v. Hannon, 151 Cal. 497; 91 Pac. 334.

Necessity for notice of application for execution. No notice to the opposite party is required on an application for execution on a judgment more than five years old. Bryan v. Stidger, 17 Cal. 270; Doehla v. Phillips, 151 Cal. 488; 91 Pac. 330; Bredfield v. Hannon, 151 Cal. 497; 91 Pac. 334. Notice of application for leave to issue an execution need be given, only where there is some statute expressly prescribing it; nor is service of notice of the time and place of making the motion for leave to issue the execution required. Harrier v. Bassford, 145 Cal. 529; 78 Pac. 1038. Previous notice of application under this section is unnecessary (Doehla v. Phillips, 151 Cal. 488; 91 Pac. 330; Water Supply Co. v. Sarnow, 6 Cal. App. 586; 92 Pac. 667), though the contrary was held in National Bank v. Los Angeles Iron etc. Co., 2 Cal. App. 659; 84 Pac. 466.

Motion to set aside execution. On a motion by a judgment debtor to set aside an order for execution made under this section, it is not error to permit the judgment creditor to file a counter-affidavit without previous notice or service upon the judgment debtor. Bredfield v. Hannon, 151 Cal. 497; 91 Pac. 334.

Showing necessary on application for execution. The loss of a judgment lien, because of the lapse of five years from the date of the judgment, does not preclude the issuance of execution after the lapse of five years upon a showing by affidavits. Water Supply Co. v. Sarnow, 6 Cal. App. 586; 92 Pac. 667. Before the order allowing an execution to issue can be regularly entered, it is necessary to make it appear to the satisfaction of the court that some portion of the judgment remains unsatisfied. Solomon v. Maguire, 29 Cal. 227.

Alias execution. The issuance and levy of a second execution does not waive rights acquired by the first levy, if that was complete and regular. Water Supply Co. v. Sarnow, 6 Cal. App. 586; 92 Pac. 667; Weldon v. Rogers, 157 Cal. 410; 108 Pac. 266.

Discretion of court. It is within the discretion of the court to grant or deny a motion for leave to issue an execution upon a judgment after the lapse of five years from the date of its entry; and its order denying the motion will not be disturbed upon appeal, where no abuse of discretion appears. Wheeler v. Eldred, 137 Cal. 37; 69 Pac. 619; 121 Cal. 28; 66 Am. St. Rep. 20; 53 Pac. 431. The court does not abuse its discretion in ordering execution to be issued on a money judgment, fourteen years after its entry, where nothing appears why, in equity and good conscience, the judgment debtor should not be compelled to pay it. Doehla v. Phillips, 151 Cal. 488; 91 Pac. 330. The court's discretion, under this section, must be guided by the circumstances arising after the entry of judgment. Weldon v. Rogers, 159 Cal. 700; 115 Pac. 464.

Jurisdiction of court. Under this section, the power of the court is limited to giving leave that the former judgment be carried into execution: there is no power to direct the payment of money, and a direction that the execution be for a named amount is useless and void. Weldon v. Rogers, 154 Cal. 632; 98 Pac. 1070. The time within which the court may act in authorizing the issuance of an execution upon a judgment, after the lapse of five years from its entry, is without limitation. Doehla v. Phillips, 151 Cal. 488; 91 Pac. 330. Where a valid order, made after final judgment, requires a husband, in an action of divorce, to pay a sum of money for the support of children, the court has power, at any time after the entry of the order, to direct execution to issue for the amount unpaid. Harlan v. Harlan, 154 Cal. 341; 98 Pac. 32. Execution may issue on a judgment duly rendered, although it has not been entered. Baum v. Roper, 1 Cal. App. 435; 82 Pac. 390. The fact that the court has made an order for the issuance of an execution, under which the judgment has been partially satisfied, does not deprive it of jurisdiction to make a subsequent order for execution for the deficiency (Weldon v. Rogers, 159 Cal. 700; 115 Pac. 464); nor does the fact that an attachment had once issued, the lien of which has ceased, preclude the court from ordering execution, upon a proper showing made by affidavits. Water Supply Co. v. Sarnow, 6 Cal. App. 586; 92 Pac. 667.

Effect of order for execution. An order for an execution on a judgment amounts

to an order for its enforcement. Water Supply Co. v. Sarnow, 1 Cal. App. 479; 82 Pac. 689.

Execution in foreclosure suits. A judgment of foreclosure is not barred by limitation until the period of five years and six months has elapsed after its entry: five years being the time provided in the statute of limitations, and six months the time in which an appeal may be taken; hence, an execution issued within this period is valid. Harrier v. Bassford, 145 Cal. 529; 78 Pac. 1038. An execution for the sale of mortgaged premises cannot issue after five years from the date of the rendition of judgment of foreclosure, even though a judgment for deficiency was expressly waived by stipulation of the parties. Jacks v. Johnston, 86 Cal. 384; 21 Am. St. Rep. 50; 24 Pac. 1057 (decision before the amendment of this section in 1895); and see Dorland v. Hanson, 81 Cal. 202; 15 Am. St. Rep. 44; 22 Pac. 552.

Revival of money judgments. A judgment for the recovery of money, previous to the amendment of this section in 1895, could not be enforced by execution after the lapse of five years from the entry thereof. Cortez v. Superior Court, 86 Cal. 274; 21 Am. St. Rep. 37; 24 Pac. 1011; and see Dorland v. Hanson, 81 Cal. 202; 15 Am. St. Rep. 44; 22 Pac. 552. The amendment to this section in 1895, which, in effect, allowed a judgment for the recovery of money to be enforced after five years from the date of its entry, applied to all such judgments which had not been barred. Weldon v. Rogers, 151 Cal. 432; 90 Pac. 1062; Doehla v. Phillips, 151 Cal. 488; 91 Pac. 330; Bredfield v. Hannon, 151 Cal. 497; 91 Pac. 334. The limiting clause of this section, to the effect that it is not to be construed to revive a judgment for the recovery of money, is not applicable to a case in which the judgment was rendered after the enactment of the section as amended, and where it could not have been barred by limitation at the time of the passage of the amendment. Harrier v. Bassford, 145 Cal. 529; 78 Pac. 1038. Old judgments, long since defunct, cannot be revived by an amendment to the section, the remedy on which had already been barred by the lapse of time. Mann v. McAtee, 37 Cal. 11.

Suspension of statute of limitations. An order staying proceedings does not operate to suspend the running of the statute, under this section. Cortez v. Superior Court, 86 Cal. 274; 21 Am. St. Rep. 37; 24 Pac. 1011.

CODE COMMISSIONERS' NOTE. Before April 8, 1861, execution could be taken out on judgment at any time within five years after the rendition of the judgment, and also after that time, upon leave of the court. Between April 8, 1861, and April 2, 1866, it could only be taken out within the five years after judgment rendered. Since April, 1866, however, an execution, in all cases, except for the recovery of money, may issue after five years, upon order of the court. Mann v. McAtee, 37 Cal. 11. The time during which plaintiff is stayed from issuing execution constitutes a part of the five years within which execution must issue, and after that time has elapsed, it must then be upon order of the court. Solomon v. Maguire, 29 Cal. 237.

§ 686. When execution may issue against the property of a party after his death. Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced, as follows:

1. In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest;

2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon.

Death of party.
1. Effect of, on action. Ante, § 385.
2. Judgment after. Ante, § 669.
3. Execution after. Post, § 1505.

Legislation § 686. Enacted March 11, **1872**; based on Practice Act, § 215, as amended by Stats. 1863–64, p. 452, which read: "Notwithstanding the death of a party after the judgment, execution thereon may be issued, in case of the death of the plaintiff, the same as if he were living, upon the application of his executor, or administrator, or successor in interest, by the court in which the judgment was rendered or exists. And in case of the decease of the defendant, if the judgment be for the recovery of real or personal property, execution may be issued and executed against the property recovered in the same manner and with the same effect as if he were still living."

Execution after death of debtor. Execution against the property of the judgment debtor, who died after judgment, might be issued, under the Practice Act, upon the permission of the probate court; but in a case where the judgment was in force when the amendment of 1864 went into effect, authority was given to issue such execution only in case of judgment for the recovery of real or personal property. Myers v. Mott, 29 Cal. 359; 87 Am. Dec. 49; and see Bank of Stockton v. Howland, 42 Cal. 129; Holladay v. Hare, 69 Cal. 517; 11 Pac. 28; Briggs v. Breen, 123 Cal. 657; 56 Pac. 633.

"Application" and "motion" compared. This section affords a simple and summary mode of enforcing a judgment by execution, without resorting to a civil action thereon; and the word "motion," in § 685, ante, is really the same as the word "application," in this section. Weldon v. Rogers, 151 Cal. 432; 90 Pac. 1062.

§ 687. Execution, how and to whom issued. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the state. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. If the judgment directs or authorizes the issuing of any process requiring the sale, or the delivery of possession of, or otherwise affecting specific real property, which is then, or subsequently becomes, a part of a county other than that in which such judgment was entered, such process may be issued to, and executed by, the sheriff of such other county, as to the property situate therein. Executions may be issued at the same time to different counties.

Any county in state, process extends to. Ante, § 78.

Execution requiring delivery of real and personal property. Ante, § 682, subd. 5.

Legislation § 687. 1. Enacted March 11, **1872**; based on Practice Act, § 216, which had the word "shall" instead of "must," in second sentence; otherwise the section read the same as at present, except for the addition of 1907.

2. Amendment by Stats. **1901**, p. 153; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 683, adding the sentence beginning "If the judgment" and ending "situate therein"; the code commissioner saying, "The amendment is directed to those cases in which a judgment is entered in one county affecting property then situated in, or which may subsequently become a part of, another county. The section as amended supersedes the provisions of the statute of 1873–74, p. 365, respecting execution of final process."

Execution directed to whom. The fact that the execution under which the sale was made was directed to a constable of the township, and that the return thereof shows that it was received and executed by the sheriff of the county, is, at most, an irregularity, and does not render the service void, nor make the execution and return inadmissible in evidence: the execution may be directed to the sheriff or any constable in the county, and each officer is vested with full power to serve the writ, and it is an indifferent matter to whom it is issued. Ross v. Wellman, 102 Cal. 1; 36 Pac. 402.

§ 688. What liable to be seized on execution. Property not affected until levy made. All goods, chattels, moneys, and other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be levied upon or released from levy in like manner as like property may be attached or released from attachment. Gold-dust must be returned by the officer as so [much] money collected at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.

Co-operative business association, property of, subject to execution. See Civ. Code, § 653f.

Building material, not subject to execution when. See post, § 1196.

Good-will. Civ. Code, §§ 992, 993.

Franchise. Civ. Code, §§ 992, 993.

Homestead. See Civ. Code, §§ 1241–1261.

Sole traders. See post, §§ 1811–1821.

Levy. Ante, § 542.

Estates at will not subject to execution. See Civ. Code, § 765.

Exemptions, generally. Post, § 690.

Legislation § 688. 1. Enacted March 11, **1872**; based on Practice Act, § 217, as amended by Stats. 1862, p. 568. When § 688 was enacted in 1872, (1) in first sentence, the words "shall be," before "liable," were changed to "are," (2) in the sentence beginning "Shares," the word "the" was omitted before "like," in the following clause (which was amended in 1907), "may be attached on execution in like manner as upon writs of attachments," (3) "shall" was changed to "must" after "Gold-dust," and (4) "shall not be" was changed to "is not," before "affected."

2. Amendment by Stats. **1901**, p. 153; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 683, in sentence beginning "Shares," changing, after the words "may be," that part of the sentence to read as at present, the original being printed supra; the code commissioner saying, "The amendment consists in substituting the words 'levied upon or released' for the word 'attached,' thus providing a mode of releasing a levy of execution. It adopts the method proposed for the release of attachments by § 560." The bracketed word "[much]," in the present section, was correctly used in the original code section

Property liable to seizure, in general. The principle as well as the policy of the law is to subject every species of property of a judgment debtor to the payment of his debts, and no species of property is exempt, except such as is especially exempted by law. Pacific Bank v. Robinson, 57 Cal. 520; 40 Am. Rep. 120. A levy of

execution on a homestead is ineffective. Hohn v. Pauly, 11 Cal. App. 724; 106 Pac. 266.

Real property. Where the judgment does not specify the property to be taken, none of the property of the defendant is affected thereby, nor charged with the lien of the judgment, until it is taken by the sheriff under the writ. Southern California Lumber Co. v. Ocean Beach Hotel Co., 94 Cal. 217; 28 Am. St. Rep. 115; 29 Pac. 627. Where the judgment is not a lien, the property is not taken on execution until there is a levy, and the lien does not begin until then. Lean v. Givens, 146 Cal. 739; 106 Am. St. Rep. 79; 81 Pac. 128; and see Summerville v. Stockton Milling Co., 142 Cal. 529; 76 Pac. 243. When valid, the judgment becomes a lien on the property when it is docketed, and it is immaterial whether it is called a vendor's lien or a judgment lien. Tilley v. Bonney, 123 Cal. 118; 55 Pac. 798. Where the judgment is a lien on the land, there is no real necessity for a formal levy: it adds nothing to the effect of the sale on execution. Lean v. Givens, 146 Cal. 739; 106 Am. St. Rep. 79; 81 Pac. 128; Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256; and see Lehnhardt v. Jennings, 119 Cal. 192; 48 Pac. 56; 51 Pac. 195. The levy of an execution is made in the same manner as upon an attachment, that is, by filing with the county recorder a copy of the writ, with a notice that the land described therein is attached, and serving a similar notice on the occupant. Lean v. Givens, 146 Cal. 739; 106 Am. St. Rep. 79; 81 Pac. 128. Although a levy of execution is unnecessary to give effect to a judgment lien, yet that course is usually pursued; but this does not extend the lien of the judgment, nor does it create a new lien upon the property. Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256. The rule at common law is in force in this state, except as modified by statute or the constitution; and it has been so far modified by the code, that the only means of enforcing a judgment for money is by a writ of execution, and that land may be taken on the execution, as well as personal property. Lean v. Givens, 146 Cal. 739; 106 Am. St. Rep. 79; 81 Pac. 128.

Interests in real property. Land liable to execution embraces all titles, legal or equitable, perfect or imperfect, including such rights as lie in contract, those executory as well as those executed; therefore any interest in land, legal or equitable, is subject to attachment or execution, levy, and sale. Fish v. Fowlie, 58 Cal. 373; and see Leese v. Clark, 20 Cal. 387; Kennedy v. Nunan, 52 Cal. 326; Le Roy v. Dunkerly, 54 Cal. 452; Godfrey v. Monroe, 101 Cal. 224; 35 Pac. 761. The purchase, under an execution sale, of the interest of the city of San Francisco in beach and water lots, and the sheriff's deed made thereunder, operated as an assignment of the equitable estate remaining in the city after the legal title vested in the commissioners of the funded debt under the act of May 1, 1851, subject to certain trusts in favor of the city and its creditors. Le Roy v. Dunkerly, 54 Cal. 452; Kennedy v. Nunan, 52 Cal. 326; and see Holladay v. Frisbie, 15 Cal. 631; Wheeler v. Miller, 16 Cal. 124. The title acquired by a pre-emption settler on public land, after a sale thereof under execution, does not pass by such sale, nor is it affected thereby. Rupert v. Jones, 119 Cal. 111; 51 Pac. 26.

Personal property. A promissory note and mortgage, of which the sheriff can obtain peaceable possession, is personal property capable of manual delivery, and is subject to seizure and sale under execution. Hoxie v. Bryant, 131 Cal. 85; 63 Pac. 153; and see Davis v. Mitchell, 34 Cal. 81; Donohoe v. Gamble, 38 Cal. 352; 99 Am. Dec. 399. The exemption from execution of the franchise of a street-railway corporation does not extend to or include its personal property, such as cars, trucks, electrical goods and supplies, fireproof safes, etc., used in the business of operating its line: such property is subject to attachment or execution in like manner as other property not exempt by statute. Risdon Iron etc. Works v. Citizens' Traction Co., 122 Cal. 94; 68 Am. St. Rep. 25; 54 Pac. 529; and see Lathrop v. Middleton, 23 Cal. 257; 83 Am. Dec. 112; Humphreys v. Hopkins, 81 Cal. 551; 15 Am. St. Rep. 76; 6 L. R. A. 792; 22 Pac. 892; Gregory v. Blanchard, 98 Cal. 311; 33 Pac. 199.

Interests in personal property. A pledgor's interest may be reached under execution, but it can only be done by serving a garnishment on the pledgee, and not by a seizure of the pledge. Treadwell v. Davis, 34 Cal. 601; 94 Am. Dec. 770.

Shares in corporations. This section expressly provides that shares in any corporation may be attached on execution, in like manner as upon writs of attachment; and it is not necessary to the sale of the interest of the judgment debtor in the shares that they shall be in the hands of the sheriff to be personally delivered to the purchaser. West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315; 85 Am. St. Rep. 171; 65 Pac. 622. The sale of the interest of a debtor in shares of corporate stock passes title without manual possession of the certificate by the sheriff when the execution is served; the certificate might at the time be in the hands of the owner, but the levy and sale would entitle the purchaser to have a certificate issued to him, and for that purpose the court would, upon appropriate proceedings, compel the surrender of the original certificate, in order that it might be reissued to the purchaser. West Coast Safety Faucet Co. v.

Wulff, 133 Cal. 315; 85 Am. St. Rep. 171; 65 Pac. 622. The purchaser at an execution sale of shares of stock of a corporation, standing on the books of the corporation in the name of the judgment debtor, is entitled to have the certificate of such shares reissued to him as such purchaser, if, at the time of such purchase, he acts in good faith, and without notice that the outstanding certificate has been assigned or pledged to some person other than the judgment debtor. West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315; 85 Am. St. Rep. 171; 65 Pac. 622. The shares of stock constitute the property which belongs to the shareholder in a corporation; otherwise the property would be in the certificate; but the certificate is only evidence of the property, and it is not the only evidence, for a transfer on the books of the corporation, without the issuance of a certificate, vests title in the shareholder. Payne v. Elliot, 54 Cal. 339; 35 Am. Rep. 80.

Credits. A promissory note is a credit, within the meaning of the statute, and is subject to sale under execution. Davis v. Mitchell, 34 Cal. 81. The delivery of an ordinary check upon a bank for part of the fund standing therein to the credit of the drawer, does not, prior to its presentation, operate as an assignment of the fund pro tanto, and a garnishment of the fund under execution as belonging to the drawer will prevail over all unpresented and unaccepted checks previously drawn thereupon. Donohoe-Kelly Banking Co. v. Southern Pacific Co., 138 Cal. 183; 94 Am. St. Rep. 28; 71 Pac. 93.

Judgments. A judgment is but the evidence of a debt, and, as such, is not subject to levy or sale under execution (Dore v. Dougherty, 72 Cal. 232; 1 Am. St. Rep. 48; 13 Pac. 621; McBride v. Fallon, 65 Cal. 301; 4 Pac. 17; Hoxie v. Bryant, 131 Cal. 85; 63 Pac. 153); and where the judgment, as such, is sought to be reached by execution, it can only be reached by the mode provided for reaching debts and credits and other property not capable of manual delivery. Latham v. Blake, 77 Cal. 646; 18 Pac. 150. The holder of the larger judgment, in cross-actions, cannot prevent the holder of the smaller judgment from having such smaller judgment set off pro tanto against the larger, and the holder of the smaller judgment cannot prevent the holder of the larger from having the smaller so set off and then have execution issue for the balance due on the larger; the rights of the parties, in this respect, are reciprocal; and neither of the parties, by assigning his judgment to a third party, can defeat the right of the other to have his judgment so set off: the assignee would take the demand cum onere, and with the right of set off still clinging to it. McBride v. Fallon, 65 Cal. 301; 4 Pac. 17.

Personal property not capable of manual delivery. The interest of a debtor in the shares of a corporation is regarded, under this section, as personal property not capable of manual delivery. West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315; 85 Am. St. Rep. 171; 65 Pac. 622. A chose in action, whether or not the subject of levy, must, when the paper evidencing the debt is not present to be assigned to the purchaser and exhibited to the bystanders, at least be accompanied by a full and accurate description of the particular interest and chose of action, with all of its conditions and covenants, and a full explanation of the facts which determine the value of such instrument or contract, sufficient to apprise the bystanders, with reasonable accuracy, of what is sold or offered. Crandall v. Blen, 13 Cal. 15.

Patent rights. A patent right is not tangible property, but is an incorporeal right, being a personal favor or monopoly granted to a particular person by the Federal government, and is created and regulated by Federal legislation, and is not subject to levy or sale upon execution; and if a creditor of the patentee can have the patent right subjected to the satisfaction of his judgment at all, it can be done only by a court of equity acting in personam, and compelling the patentee to make an assignment. Peterson v. Sheriff, 115 Cal. 211; 46 Pac. 1060.

Broker's seat in stock exchange. A broker's seat in a stock and exchange board is not property subject to execution and sale. Lowenberg v. Greenebaum, 99 Cal. 162; 37 Am. St. Rep. 42; 21 L. R. A. 399; 33 Pac. 794.

Effect of execution sale. A sale and conveyance under execution will pass all the interest held by the judgment debtor at the time of the levy; and the judgment need not have been docketed at the time of the issuance of the execution. Hastings v. Cunningham, 39 Cal. 137.

Liability of sheriff. The sheriff is a trespasser, and liable for the value of goods seized under execution, where such goods are in the hands of the pledgee, and where he fails to levy thereon by garnishment instead of by seizure of the pledge. Treadwell v. Davis, 34 Cal. 601; 94 Am. Dec. 770. An officer, who would justify the taking of property from a stranger to the writ, or who would assail the transfer as fraudulent and void as to creditors, must prove not only the execution, the levy, and that he was a creditor, but also the rendition of a judgment upon his debt, and that the execution was issued upon the judgment. Darville v. Mayhall, 128 Cal. 617; 61 Pac. 276; and see Thornburgh v. Hand, 7 Cal. 554; Paige v. O'Neal, 12 Cal. 483; Bickerstaff v. Doub, 19 Cal. 109; 79 Am. Dec. 204; Leszinsky v. White, 45

Cal. 279; Kane v. Desmond, 63 Cal. 464. Justification is not made out by the officer, where the bill of exceptions shows that it was admitted that the property was seized by virtue of an execution issued out of a justice's court, where no indebtedness or judgment is shown. Darville v. Mayhall, 128 Cal. 617; 61 Pac. 276.

Nature, purpose, and effect of execution lien. The common-law rule was, that an execution was a lien on personal property from the time of its issuance, although there was no levy; but neither a judgment nor an execution was a lien on land, and the method of applying the land of the judgment debtor to satisfy a judgment was by means of a writ of elegit, whereby the officer, after exhausting the personal property, could seize the land and apply the rents and profits of half thereof upon the writ. Lean v. Givens, 146 Cal. 739; 106 Am. St. Rep. 79; 81 Pac. 128. The purpose of a lien is to cut off the rights of third persons, which might otherwise accrue between the time of levy and the time of sale; and the filing of the notice in the office of the recorder is for no other purpose than to give notice to third persons of the prior charge. Lean v. Givens, 146 Cal. 739; 106 Am. St. Rep. 79; 81 Pac. 128. The purpose of attaching under the writ of execution, as permitted by this section, is to obtain security for the satisfaction of a judgment previously recovered; but when such judgment is already a lien, the main object of an attachment has been accomplished. Lehnhardt v. Jennings, 119 Cal. 192; 48 Pac. 56; 51 Pac. 195. The levy of an execution, pending a judgment lien, neither extends the existing lien nor creates a new lien; and the sales under the execution take effect, by relation, at the time they are respectively levied, and not at the date of the levying of previous executions. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256. The lien of the execution is not that of the judgment: the execution neither creates a judgment lien nor extends a judgment lien once created. Beaton v. Reid, 111 Cal. 484; 44 Pac. 167; and see Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256; Rogers v. Druffel, 46 Cal. 654; Eby v. Foster, 61 Cal. 282. The service of a copy of the execution and notice of garnishment upon a third party, constitutes no lien on the property of the debtor in his hands, capable of manual delivery. Johnson v. Gorham, 6 Cal. 195; 65 Am. Dec. 501. The execution affects property, only from the time of the levy. Johnson v. Gorham, 6 Cal. 196; 65 Am. Dec. 501; Nordstrom v. Corona City Water Co., 155 Cal. 206; 132 Am. St. Rep. 81; 100 Pac. 242.

Relation between attachment lien and execution lien. The lien of the attachment and the lien of the execution subserve a like purpose; the former to hold the property until judgment, and the latter until sale. Beaton v. Reid, 111 Cal. 484; 44 Pac. 167. A judgment does not operate so as to release or obliterate an attachment lien: the property attached is still, in contemplation of law, in the hands of the officer, subject to the judgment, and the attachment lien still exists so as to confer a priority in the lien of the judgment. Porter v. Pico, 55 Cal. 165; and see Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73. Where a judgment creditor, after a garnishment upon execution, proceeds by supplementary proceedings or creditor's bill to collect the debt, any judgment recovered by him relates back to the levy of the garnishment, and intervening rights are cut off. Nordstrom v. Corona City Water Co., 155 Cal. 206; 132 Am. St. Rep. 81; 100 Pac. 242. The lien of the attachment is merged in that of the judgment, when the judgment is rendered in the attachment suit and becomes a lien upon the property attached. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256; and see Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73. The garnishee is entitled to plead a set-off, but it must be one which existed at the time of the garnishment. Nordstrom v. Corona City Water Co., 155 Cal. 206; 132 Am. St. Rep. 81; 100 Pac. 242. An order of sale by the court is not necessary to authorize the sheriff to sell the attached property, and the lien of the attachment is not lost by taking a simple money judgment, without embodying therein directions for the sale of the attached property. Anderson v. Goff, 72 Cal. 65; 1 Am. St. Rep. 34; 13 Pac. 73; and see Low v. Henry, 9 Cal. 538.

Ejectment by purchaser at execution sale. In an action of ejectment to recover lands purchased at a sale under an execution issued upon a judgment against the defendant, and of which he was in possession at the time of the sale or at the date of the lien of the judgment or attachment, the defendant cannot, by showing that he had no title to the land, or that the true title is outstanding, defeat the plaintiff's right to recover. Robinson v. Thornton, 102 Cal. 675; 34 Pac. 120; and see McDonald v. Badger, 23 Cal. 393; 83 Am. Dec. 123; Blood v. Light, 38 Cal. 649; 99 Am. Dec. 441. As against the judgment debtor, the production of the judgment, execution, and sheriff's deed is prima facie evidence of the plaintiff's right to recover in ejectment; but if the action is against a stranger to the judgment, the plaintiff must also show that the judgment debtor had title to or possession of the land at the date of the lien or of the sale; the mere possession of the defendant, in such case, will then be deemed to have been taken subsequently to the sale. Robinson v. Thornton, 102 Cal. 675; 34 Pac.

120. The same rule applies to the vendee of a judgment debtor, or any other person coming in under him, subsequently to the creation of the lien, and who has no other title or claim to the land than that which he derived from the judgment debtor, or whose title is in effect the same as that which was sold under execution. Robinson v. Thornton, 102 Cal. 675; 34 Pac. 120.

Equitable assignment of debt. An order upon a debtor by his creditor, to pay money to a third party, operates as an equitable assignment of the debt. Curtner v. Lyndon, 128 Cal. 35; 60 Pac. 462.

When equity of redemption may be sold under execution. See note 11 Am. Dec. 193.

Franchises not subject to execution. See note 15 Am. Dec. 595.

Property or franchise of quasi-public corporation as subject to sale under execution. See note 5 Ann. Cas. 512.

Judicial sale of corporate franchise or property necessary for its enjoyment. See note 20 L. R. A. 737.

Interest of heir or legatee when subject to execution. See note 44 Am. Dec. 338.

Inchoate interest of croppers and others, when subject to execution. See note 51 Am. Dec. 410.

Crops that are subject to execution as personalty. See note 55 Am. Dec. 161.

Whether money in officer's hands is subject to execution. See note 55 Am. Dec. 264.

Execution against property in hands of receiver. See note 2 Am. St. Rep. 403; 71 Am. St. Rep. 370.

When life insurance policies subject to execution. See note 88 Am. Dec. 530.

When and how judgment subject to execution. See note 92 Am. Dec. 415.

Patent rights, when and how subject to execution. See note 40 Am. Rep. 123.

Trust estates, when and when not subject to execution. See note 97 Am. Dec. 303.

Liability of interest acquired by purchaser at execution sale to levy and sale under execution. See note 8 Ann. Cas. 475.

Interest of lessee as subject to levy under execution. See note 15 Ann. Cas. 867.

Execution against both partners for debt of one partner. See note 46 L. R. A. 495.

Effect of pledge or other transfer not made on books of company. See note 67 L. R. A. 656.

Officer's right to enter house for purpose of serving execution. See note 25 Am. Dec. 171.

Satisfaction of execution by levy on real or personal property. See note 58 Am. Dec. 350.

CODE COMMISSIONERS' NOTE. 1. "Property," defined. See § 17, ante, subds. 3, 4, 5. The term "property" includes a judgment. Adams v. Hackett, 7 Cal. 203; Crandall v. Blen, 13 Cal. 15; Davis v. Mitchell, 34 Cal. 88. "Property" is the exclusive right of possessing, enjoying, and disposing of a thing; it is the right and interest which a man has in lands and chattels, to the exclusion of others; and the word is sufficiently comprehensive to include every species of estate, real and personal. McKeon v. Bisbee, 9 Cal. 142; 70 Am. Dec. 642. The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any unsatisfactory interest, whether it be a leasehold or mere right of possession. State v. Moore, 12 Cal. 56. The term "property," as applied to lands, embraces all titles, legal and equitable, perfect or imperfect. Leese v. Clark, 20 Cal. 388; State v. Moore, 12 Cal. 56.

2. **What is subject of execution.** Where A has merchandise stored in the warehouse of B, and sold a portion of it to C, and gave an order for the merchandise sold on B, who accepted the same, and gave C, in exchange, a receipt for the same, and transferred it on his warehouse-books to the account of C, but did not separate any specific portion from the merchandise of A as belonging to B, and the whole was subsequently seized in an action against A, it was decided that the sheriff was not liable to C, in the absence of segregation of the merchandise, but that B was estopped by his receipt from denying his liability. Adams v. Gorham, 6 Cal. 68. Plaintiff was walking along the street with a bag of gold coin in his hand. Two of defendants, a deputy sheriff and constable, seized him, and by force took the bag of coin from him. Plaintiff sues for the seizure and conversion of the coin. Defendants produced three judgments and executions in their favor against G., brother of plaintiff, and proved that the bag of coin was the property of the brother, and was seized under these executions. On appeal, it was decided that plaintiff could claim no exemption from the seizure of coin held, as this was in his hand, though he might perhaps, in reference to money upon his person. The coin in the hand was, like a horse held by the bridle, subject to seizure on execution against its owner. Green v. Palmer, 15 Cal. 411; 76 Am. Dec. 492. Funds in the hands of a receiver, in an action for dissolution, are liable to attachment at any time before a final decree of dissolution and distribution. Adams v. Woods, 9 Cal. 24. Where the judgment debtor has property jointly with another, a sheriff, who has such execution, has the right to levy on such property and take it into possession, for the purpose of subjecting it to sale. Waldman v. Broder, 10 Cal. 378. F. purchased some yokes of oxen of H., the appellant, for a certain sum, paid part down, and gave his note, with C. as surety, for the balance; C. signed with the express condition that title to the oxen was to remain in H. till they were fully paid for. F. was to have the absolute use of them. The oxen were placed in the hands of a brother of H., who was in the employ of F., as a driver, with the intention of securing the title in H. The defendant, a constable, levied upon and sold the oxen, thus situated, as the property of F. And it was decided upon appeal that F. had such a right of property in them as was subject to execution, the sale by H. to F. being absolute. Helm v. Dumars, 3 Cal. 454. The interest of a partner in partnership goods, etc., subject to levy on execution against him. Jones v. Thompson, 12 Cal. 191. But is subject to prior rights and liens of other partners and joint creditors of firm. Id.; Eldridge v. See Yup Co., 17 Cal. 44. If a partnership, in embarrassed circumstances, converts its means (upon the strength of which it has obtained credit) into real estate to be held by one of the partners as a homestead for the purpose of defrauding creditors, the property, notwithstanding the declaration of homestead, is liable to levy on execution by partnership creditors. Bishop v. Hubbard, 23 Cal. 514; 83 Am. Dec. 132. Interest of mortgagor liable to sale on execution. Halsey v. Martin, 22 Cal. 645. A promissory note is liable to seizure and sale on execution against holder and payee. Davis v. Mitchell, 34 Cal. 88, and cases there cited. A purchaser on execution sale of real estate has an estate in the property purchased, both before and after the time when right of redemption expires, which is subject of attachment on execution against his property. Page v. Rogers, 31 Cal. 293. A ferry-boat, the property of private individuals, is not exempt from execution because it is used to carry the United States mails. Lathrop v. Middleton, 23 Cal. 257; 83 Am. Dec. 112.

3. **Property not liable to execution.** A delivered merchandise as security for payment of a debt from A to B, with the understanding that B should sell the merchandise and pay his debt out of the proceeds. The merchandise was afterwards levied upon by the defendants, under an execution in their favor against A, as his property. Held, that the merchandise was not subject to execution against A, without payment, in the first place, of his indebtedness to B. Swanston v. Sublette, 1 Cal. 123. A franchise is not the subject of levy and sale under execution. Thomas v. Armstrong, 7 Cal. 286; Wood v. Truckee Turnpike Co., 24 Cal. 474. Things in action may be levied upon on execution. Adams v. Hackett, 7 Cal. 187. Even where there is personal property sufficient to satisfy the execution, yet the sheriff may, on the request of the

defendant in execution, properly levy on real estate. Smith v. Randall, 6 Cal. 47; 65 Am. Dec. 475. Property in the custody of the law is not liable to execution, without an order from the court. Yuba County v. Adams, 7 Cal. 35; Clymer v. Willis, 3 Cal. 363; 58 Am. Dec. 414. Where money has been placed on general deposit in a bank, and negotiable certificates of deposit have been issued to the depositor for the amount, there is nothing left in the possession of the bankers, belonging to the depositor, which is liable to attachment. McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655. An execution cannot be levied upon a county's revenues in the hands of the treasurer. Gilman v. Contra Costa County, 8 Cal. 52; 68 Am. Dec. 290. Contingent and complicated contracts cannot be levied upon and sold, unless they are in the possession of the officer, exhibited to the bystanders, and assigned to the purchaser. A full and accurate description of the particular interest and chose in action, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose, must be given by the levy and announced at the sale. Crandall v. Blen, 13 Cal. 15; see also Davis v. Mitchell, 34 Cal. 88. A conveyed land to B, and allowed part of the purchase-money to remain unpaid. B afterwards sold part of the land to C, who had no notice of A's lien as a vendor, and gave a mortgage to B for part of the purchase-money. A obtained judgment against B for the unpaid purchase-money, and levied upon and sold B's interest in the land. The title to the mortgage debt due from C to B did not pass by the sale. Bryan v. Sharp, 4 Cal. 351. Simply because a judgment debtor was found upon the mining-ground of plaintiff, the sheriff, who had execution against such debtor, was not justified in going on the ground and digging up the soil, and taking the gold it contained. Rowe v. Bradley, 12 Cal. 226. If A sold property to B before C commenced a suit against A for the recovery of such property, the property cannot, on an execution on a judgment in favor of C, be taken from B. Peterie v. Bugbey, 24 Cal. 423.

4. What constitutes a levy. On personal property capable of manual delivery, a levy is made by taking possession of the property. A levy will not defeat subsequent execution on goods allowed to remain in the hands of the debtor. Dutertre v. Driard, 7 Cal. 549; Tafts v. Manlove, 14 Cal. 47; 73 Am. Dec. 610. Service of copy of execution and notice of garnishment on third party, constitutes no lien on property of debtor capable of manual delivery. Johnson v. Gorham, 6 Cal. 195; 65 Am. Dec. 501. Any act on the part of the officer, showing the intent to sell the specific land, and to subject it to the satisfaction of the judgment, constitutes a "levying" of the execution, as against the defendant in the execution, and the performance of the act described in the statute as a levying of execution is material only in reference to the rights of third parties, or persons who are not parties to the writ. The levy fixed the date of the commencement of the sheriff's title. Blood v. Light, 38 Cal. 649; 99 Am. Dec. 441.

§ 689. When property claimed by third party. Indemnity. If the property levied on is claimed by a third person as his property by a written claim verified by his oath or that of his agent, setting out his right to the possession thereof, and served upon the sheriff, the sheriff is not bound to keep the property unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnifies the sheriff against such claim by an undertaking by at least two good and sufficient sureties in a sum equal to double the value of the property levied on; and the sheriff is not liable for damages for the taking or keeping of such property to any such third person, unless such a claim is made.

Sureties liable on judgment, if sheriff give notice to them of action brought against him. Post, § 1055.

Legislation § 689. 1. Enacted March 11, **1872**; based on Practice Act, § 218, which read: "If the property levied on be claimed by a third person as his property, the sheriff shall summon from his county six persons qualified as jurors between the parties, to try the validity of the claim. He shall also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses shall be sworn by the sheriff, and if their verdict be in favor of the claimant, the sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon. The fees of the jury, the sheriff, and the witnesses, shall be paid by the claimant, if the verdict be against him; otherwise by the plaintiff. On the trial the defendant and the claimant may be examined by the plaintiff as witnesses." When § 689 was enacted in 1872, (1) "shall" was changed to "may," before "summon"; (2) "shall" was changed to "must," before "also give," before "be sworn," and before "be paid"; (3) the last sentence was stricken out, and a new one added, reading, "Each party must deposit with the sheriff, before the trial, the amount of his fees, and the fees of the jury, and the sheriff must pay the same to the prevailing party."

2. Amended by Stats. **1891**, p. 20, to read: "If the property levied on be claimed by a third person as his property by a written claim verified by the oath of said claimant, setting out his title thereto, his right to the possession thereof, and stating the grounds of such title, and served upon the sheriff, the sheriff is not bound to keep the property, unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnify the sheriff against such claim by an undertaking by at least two good and sufficient sureties; and no claim to such property is valid against the sheriff, or shall be received, or be notice of any rights, unless made as above provided."

3. Amendment by Stats. **1901**, p. 153; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 683; the code commissioner saying, "The amendment strikes out the words 'setting out his title thereto,' which subserve no useful purpose, and also inserts the amount of the undertaking near the end of the section 'in a sum equal to double the value of the property levied on,' which is the usual custom of sheriffs any way, and recasts the last sentence so as to make it more intelligible."

Construction of section. This section, both before and after its amendment in 1891, was intended for the protection of the officer, and is therefore matter of defense. Paden v. Goldbaum, 4 Cal. Unrep. 767; 37 Pac. 759. The provisions of this section prescribe only the manner in which the claimant is to make the demand. Brenot v. Robinson, 108 Cal. 143; 41 Pac. 37. The making or omitting to make a verified claim does not affect the ownership of the plaintiff; but if not made, the officer is exempted from liability in cer-

tain actions, and is matter of defense. Paden v. Goldbaum, 4 Cal. Unrep. 767; 37 Pac. 759. This section is intended primarily for the protection of the sheriff; and if claim is made, the sheriff is not bound to retain the property, unless he is indemnified, and may release it, without incurring a liability therefor to the plaintiff in attachment or execution: the sufficiency of the notice is therefore a question between the sheriff and the plaintiff in attachment. Kellogg v. Burr, 126 Cal. 38; 58 Pac. 306; Paden v. Goldbaum, 4 Cal. Unrep. 767; 37 Pac. 759; Brenot v. Robinson, 108 Cal. 143; 41 Pac. 37; Dubois v. Spinks, 114 Cal. 289; 46 Pac. 95. The phrase, "grounds of such title," in this section as amended in 1891, had reference to the reasons why the claimant averred his own title superior to that of the execution debtor; and an explanation of the manner in which such debtor acquired possession of the property from the claimant, coupled with a statement of the claimant's ownership, seemed to be all that should be required in such a case. Vermont Marble Co. v. Brow, 109 Cal. 236; 50 Am. St. Rep. 37; 41 Pac. 1031.

Sufficiency of claim. A claim or demand for a crop, served upon the officer, is not sufficient, where it does not claim ownership or title, but merely states that the claimant is entitled to the possession of the whole crop for the satisfaction of a certain sum secured by him for rent. Stockton Sav. & L. Soc. v. Purvis, 5 Cal. Unrep. 164; 42 Pac. 441. A notice of claim, that the claimant is entitled to the possession under a bill of sale, is sufficiently explicit, although the possession under the bill of sale was given by way of security. Dubois v. Spinks, 114 Cal. 289; 46 Pac. 95. A verified written claim, stating that the affiant acquired title to the property from two persons named, served upon the officer, is sufficient to apprise him of the source of title, whether the property was acquired from such persons jointly or severally. Henderson v. Hart, 122 Cal. 332; 54 Pac. 1110; and see Vermont Marble Co. v. Brow, 109 Cal. 241; 50 Am. St. Rep. 37; 41 Pac. 1031; Dubois v. Spinks, 114 Cal. 289; 46 Pac. 95. Where the plaintiff in attachment, as well as the sheriff, treated and regarded the notice as sufficient, and the sheriff, having acted upon the claim served upon him, procured the protection of an indemnity bond, the defendant could not have been misled or prejudiced by an alleged defect in the claim served upon him, and the judgment will not be reversed for such alleged defect. Kellogg v. Burr, 126 Cal. 38; 58 Pac. 306. An exception of certain property, in the notice of claim, does not vitiate the claim, where there is no question as to the ownership of the property excepted. Susskind v. Hall, 5 Cal. Unrep. 304; 44 Pac. 328.

Action by third person against sheriff. The right of action for the conversion of property seized by an officer is complete on the day of the seizure; and such right is not lost or impaired by an amendment to the section, that did not go into effect until after the seizure. Black v. Clashy, 97 Cal. 482; 32 Pac. 564. The complaint in an action against the sheriff, and the sureties on his official bond, for the conversion of property levied upon, is not defective in failing to allege a demand for the property in the manner and form prescribed by this section. Fuller Desk Co. v. McDade, 113 Cal. 360; 45 Pac. 694; and see Bell v. Peck, 104 Cal. 35; 37 Pac. 766; Brenot v. Robinson, 108 Cal. 143; 41 Pac. 37. An allegation, that, before the commencement of the action, the plaintiff made a demand upon the officer for the property, is, as a matter of pleading, a statement of the fact of demand; and if the form of the demand did not comply with the statute, the defendant could have traversed the allegation in his answer, and could also have objected to the proof when offered at the trial. Brenot v. Robinson, 108 Cal. 143; 41 Pac. 37. Where the form of the demand does not comply with the provisions of this section, the defendant should traverse the allegation in his answer, or object to the proof when offered. Richey v. Haley, 138 Cal. 441; 71 Pac. 499; and see Brenot v. Robinson, 108 Cal. 145; 41 Pac. 37. Where no issue was taken by the answer as to the demand and affidavit alleged in the complaint to have been served upon the constable, and no objection was made when they were offered in evidence, all objection thereto is waived, and it cannot thereafter be urged that the evidence shows that a copy of the affidavit, and not the original, was served. Hickey v. Cosehina, 133 Cal. 81; 65 Pac. 313. An omission in the findings, upon an averment of a demand by the plaintiff upon the sheriff, is not material, where there is no attempted denial of the allegation; and where it appears affirmatively by the defendant's answer that any kind of a demand would have been unavailing, an immaterial variance in proof relative to the demand introduced in evidence will not affect the case. Hunt v. Hammel, 142 Cal. 456; 76 Pac. 378; and see Richey v. Haley, 138 Cal. 441; 71 Pac. 499. It cannot be urged upon appeal, for the first time, that there was no proof of the service of the verified claim required by this section, where the allegation of demand in the complaint is not denied in the answer, and it appears affirmatively from the answer that any kind of a demand would have been unavailing. Richey v. Haley, 138 Cal. 441; 71 Pac. 499.

CODE COMMISSIONERS' NOTE. 1. When property is claimed by third party. Trial of right of property. P., in possession of a vessel, appointed H. as master. The plaintiff, who sets up a claim to the vessel, entered into a

charter-party with P., and by it acknowledges him to be the owner, and his appointee, H., to be the master. After the charter-party, the declared owner of the vessel became the debtor of the master, who attached the vessel. The plaintiff brought the action against the sheriff to recover the vessel under the attachment. It was decided, that where one allows another to deal with his property as if it belonged to the latter, and, by declarations, allows others to be misled, the party making such declarations is concluded by them. Hostler v. Hays, 3 Cal. 302. If the sheriff prove a trial by jury and verdict for claimant, the plaintiff must show that he rendered the bond of indemnity to the sheriff, required by law, in order to hold a sheriff liable for not levying the execution. Strong v. Patterson, 6 Cal. 156. Where several creditors levy, and those prior fail to indemnify the sheriff, he shall proceed only for the benefit of those who indemnify and incur responsibility, and relinquish the levy of those failing to indemnify. Davidson v. Dallas, 8 Cal. 227. A sheriff, in the sale of personal property, is not protected by the verdict of a jury on the trial of the right of property, under the provisions of this section of the code. The proceedings before a sheriff, in such a trial, are not judicial. Perkins v. Thornburgh, 10 Cal. 189. To estop a party from claiming goods as against the creditor of a third party, he must have stated to the creditor himself that he had sold the article to the third party, and the creditor must have parted with some right or advantage on the faith of the information. Goodale v. Scannell, 8 Cal. 27. An agreement to indemnify a sheriff for seizing property under execution is valid. Stark v. Raney, 18 Cal. 622. Where property is levied on by a sheriff, by virtue of execution as defendant's property, and is claimed by third party, and a jury trying the right of property decides against the claimant, the verdict does not protect the officer in a suit against him by defendant, nor can it be allowed as evidence in defense. Sheldon v. Loomis, 28 Cal. 122. The interest which a pledgor has in the thing pledged is liable to execution, and may be reached in the hands of a pledgee when a third party, but this can only be done by serving and enforcing a garnishment on the pledgee, and not by a seizure of the pledge. Treadwell v. Davis, 34 Cal. 607; 94 Am. Dec. 770; Pomeroy v. Smith, 17 Pick. 95. Liability of joint trespassers under legal process; property illegally seized under attachment. Lewis v. Johns, 34 Cal. 633. Sheriff is liable for value of property which he sells, if it was claimed as exempt from execution prior to the sale. Spencer v. Long, 39 Cal. 700. So, also, he is liable for sale of property when he is notified of issuance of writ commanding stay of proceedings. Id.

2. Notice and demand. In an action against a sheriff for seizure and conversion of the plaintiff's property, taken under process against a third person, a demand upon the defendant prior to the bringing of the suit is not necessary to a recovery. The sheriff having misapplied his process, and whether by mistake or by design will make no difference, stands in the position of every other trespasser, and is liable to an action the instant the trespass is committed. The circumstance that the property was in possession of the execution debtor at the date of the seizure amounts to nothing, except upon proof of fraud or commixture. The rule of the common law is correctly stated in Ledley v. Hays, 1 Cal. 160, and the correctness of that decision is impliedly recognized in Daumiel v. Gorham, 6 Cal. 44. The statement of facts in Taylor v. Seymour, 6 Cal. 512, is imperfect; but if that case is to be understood as laying down a different rule, then we prefer to follow Ledley v. Hays, 1 Cal. 160. Boulware v. Craddock, 30 Cal. 190; see also Codman v. Freeman, 3 Cush. 314, and Acker v. Campbell, 23 Wend. 372; see also Wellman v. English, 38 Cal. 583; Moore v. Murdock, 26 Cal. 514; Sargent v. Sturm, 23 Cal. 359; 83 Am. Dec. 118. A sheriff attaching goods under execution must have notice of the claim of a third party to the goods, and a demand for them, or he is not liable for damages for such seizure and detention. Taylor v. Seymour, 6 Cal. 512; Daumiel v. Gorham, 6 Cal. 43; Killey v. Scannell, 12 Cal. 73. The owner of property levied upon as belonging to another, is not estopped from showing title in himself because he has given an accountable receipt for its delivery to the officer, although the receipt admits that the property is levied upon as belonging to the debtor, if he notifies the officer of his claim at or before the time the receipt is given. But if he fails to make his claim known, and thus influences the conduct of the officer, he is estopped from afterwards asserting it, provided the facts and circumstances relating to his claim were then known to him. Bleven v. Freer, 10 Cal. 172.

§ 690. **What exempt from execution.** The following property is exempt from execution or attachment, except as herein otherwise specially provided:

1. Chairs, tables, desks and books, to the value of two hundred dollars belonging to the judgment debtor;

2. Necessary household, table, and kitchen furniture belonging to the judgment debtor, including one sewing-machine, stove, stovepipes and furniture, wearing-apparel, beds, bedding and bedsteads, hanging pictures, oil-paintings and drawings drawn or painted by any member of the family, and family portraits and their necessary frames, provisions and fuel actually provided for individual or family use, sufficient for three months, and three cows and their suckling calves, four hogs with their suckling pigs, and food for such cows and hogs for one month; also one piano, one shotgun and one rifle;

3. The farming utensils or implements of husbandry of the judgment debtor, not exceeding in value the sum of one thousand dollars; also two oxen or two horses or two mules, and their harness, one cart or buggy and two wagons, and food for such oxen, horses or mules, for one month; also all seed grain or vegetables actually provided, reserved or on hand for the purpose of planting or sowing at any time within the ensuing six months,

not exceeding in value the sum of two hundred dollars; and seventy-five beehives; one horse and vehicle belonging to any person who is maimed or crippled, and the same is necessary in his business;

4. The tools or implements of a mechanic or artisan, necessary to carry on his trade; the notarial seal, records and office furniture of a notary public; the instruments and chest of a surgeon, physician, surveyor or dentist, necessary to the exercise of their profession, with their professional libraries and necessary office furniture; the professional libraries of attorneys, judges, ministers of the gospel, editors, school teachers and music teachers, and their necessary office furniture; including one safe and one typewriter; also the musical instruments of music teachers actually used by them in giving instructions, and all the indexes, abstracts, books, papers, maps and office furniture of a searcher of records necessary to be used in his profession; also the typewriters or other mechanical contrivances employed for writing in type, actually used by the owner thereof for making his living; also one bicycle when the same is used by the owner for the purpose of carrying on his regular business, or when the same is used for the purpose of transporting the owner to and from his place of business;

5. The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars; also his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements, and appliances necessary for carrying on any mining operation, not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules or oxen with their harness, and food for such horses, mules or oxen for one month, when necessary to be used on any whim, windlass, derrick, car pump or hoisting gear; and also his mining claim, actually worked by him, not exceeding in value the sum of one thousand dollars;

6. Two horses, two oxen or two mules, and their harness, and one cart or wagon, one dray or truck, one coupé, one hack, or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster or other laborer habitually earns his living; and one horse with vehicle and harness or other equipments, used by a physician, surgeon, constable, or minister of the gospel, in the legitimate practice of his profession or business; with food for such oxen, horses or mules for one month;

7. One fishing boat and net, not exceeding the total value of five hundred dollars, the property of any fisherman, by the lawful use of which he earns his livelihood;

8. Poultry not exceeding in value seventy-five dollars;

9. The wages and earnings of all seamen, seagoing fishermen and sealers, not exceeding three hundred dollars, regardless of where or when earned, and in addition to all other exemptions otherwise provided by any law;

10. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit or otherwise, that such earnings are necessary for the use of his family, residing in this state, supported in whole or in part by his labor; but where debts are incurred by any such person, or his wife or family for the common necessaries of life, or have been incurred at a time when the debtor had no family resid-

ing in this state, supported in whole or in part by his labor, the one half of such earnings above mentioned is nevertheless subject to execution, garnishment or attachment to satisfy debts so incurred;

11. The shares held by a member of a homestead association duly incorporated, not exceeding in value one thousand dollars if the person holding the shares is not the owner of a homestead under the laws of this state;

12. All the nautical instruments and wearing-apparel of any master, officer, or seaman of any steamer or other vessel;

13. All fire-engines, hooks and ladders, with the carts, trucks and carriages, hose-buckets, implements, and apparatus thereunto appertaining, and all furniture and uniforms of any fire company or department organized under the laws of this state;

14. All arms, uniforms, and accouterments required by law to be kept by any person, and also one gun, to be selected by the debtor;

15. All court-houses, jails, public offices and buildings, lots, grounds and personal property, the fixtures, furniture, books, papers, and appurtenances belonging to the jail and public offices belonging and appertaining to any county of this state; and all cemeteries, public squares, parks, and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state;

16. All material not exceeding one thousand dollars in value, purchased in good faith for use in the construction, alteration or repair of any building, mining claim or other improvement as long as in good faith the same is about to be applied to the construction, alteration or repair of such building, mining claim or other improvement;

17. All machinery, tools and implements, necessary in and for boring, sinking, putting down and constructing surface or artesian wells; also the engines necessary for operating such machinery, implements, tools, etc., also all trucks necessary for the transportation of such machinery, tools, implements, engines, etc.; provided that the value of all the articles exempted under this subdivision shall not exceed one thousand dollars;

18. All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars, and if they exceed that sum a like exemption shall exist which shall bear the same proportion to the moneys, benefits, privileges, and immunities so accruing or growing out of such insurance that said five hundred dollars bears to the whole annual premiums paid;

19. Shares of stock in any building and loan association to the value of one thousand dollars;

20. All money received by any person, a resident of the state as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned or invested by him.

No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage or other lien thereon.

Building and loan corporation, exemption of shares of, from execution. See Civ. Code, § 643.

Contract, mutual-assessment, exemption from execution of moneys arising from. See Civ. Code, § 453k.

Homestead, liability of, to execution for debts. See Civ. Code, §§ 1240, 1241.

Homestead property, exemption of proceeds arising from sale of. See Civ. Code, § 1257.

Legislation § 690. 1. Enacted March 11, **1872;** based on Practice Act, § 219, as amended by Stats. 1869–70, p. 384, which read: "The following property shall be exempt from execution, except as herein otherwise specially provided: First. Chairs, tables, desks and books, to the value of one hundred dollars, belonging to the judgment debtor. Second. Necessary household, table and kitchen furniture, belonging to the judgment debtor, including stoves, stovepipe and stove furniture, wearing-apparel, beds, bedding and bedsteads, and provisions actually provided for individual or family use, sufficient for one month. Third. The farming utensils or implements of husbandry of the judgment debtor, also two oxen, or two horses, or two mules, and their harness, four cows, with their sucking calves, one cart or wagon, and food for such oxen, horses, cows or mules, for one month; also, all seed, grain or vegetables actually provided, reserved or on hand for the purpose of planting or sowing, at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars. Fourth. Tools or implements of a mechanic or artisan, necessary to carry on his trade; the instruments and chest of a surgeon, physician, surveyor and dentist, necessary to the exercise of their profession, with their scientific and professional libraries; the law libraries of attorneys and counselors, and the libraries of ministers of the gospel. Fifth. The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars; also, his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements and appliances necessary for carrying on any kind of mining operations, not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules or oxen, with their harness, and food for such horses, mules or oxen for one month, when necessary to be used for any whim, windlass, derrick, car, pump or hoisting gear. Sixth. Two oxen, two horses or two mules, and their harness, and one cart or wagon, one dray or truck, one coupé, one hack or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster or other laborer habitually earns his living, and one horse, with vehicle and harness or other equipments, used by a physician, surgeon or minister of the gospel in making his professional visits, with food for such oxen, horses or mules for one month. Seventh. All fire-engines, hooks and ladders, with the carts, trucks and carriages, hose, buckets, implements and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any law of this state. Eighth. All arms, uniforms and accouterments required by law to be kept by any person. Ninth. All court-houses, jails, public offices, and buildings, lots, grounds and personal property; the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the court-house, jail and public offices belonging to any county of this state, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of the fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state; but no article or species of property mentioned in this section shall be exempt from execution issued upon a judgment recovered for its price or upon a mortgage thereon. Tenth. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or levy of attachment, when it shall be made to appear by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family residing in this state, supported wholly or part by his labor." Subsequently to the enactment of the Code of Civil Procedure on March 11, 1872, Practice Act, § 219, was amended at the same session of the legislature, by an act approved April 1, 1872 (Stats. 1871–72, p. 864), (1) in the introductory paragraph, omitting the word "specially"; (2) in subd. 1, changing "one" to "two," before "hundred"; (3) in subd. 2, (a) adding "one sewing-machine" after "including," (b) changing "stoves, stovepipe" to "stove, pipes," (c) changing "one month" to "three months," and (d) adding, at end of subdivision, the words "and two cows and their sucking calves and food for such cows for one month"; (4) in subd. 3, (a) adding, after "calves," the words "five head of hogs, two dozen domestic fowls," (b) changing "cows or mules" to "mules, cows, hogs, or fowls," and (c) omitting the comma after "seed" (seed grain); (5) in subd. 4, (a) adding "The" as first word of subdivision, (b) adding, after "his trade," the words "the notarial seal and records of a notary public," (c) changing "chest" to "chests" before "of a surgeon," (d) changing "and" to "or" before "dentist," (e) adding, at end, after "gospel," the words "editors, school teachers, and professors of music, also the musical instruments of a professor of music"; (6) in subd. 5, (a) changing "for" to "in" before "any whim," and (b) adding, at end, after "gear," the words "and, also, his mining claim actually worked by him, not exceeding in value the sum of one thousand dollars"; (7) in subd. 8, adding, at end, after "person," the words "and one shot or rifle gun"; (8) in subd. 9, (a) omitting "parks" after "squares" and "the" before "fire," and (b) changing "shall be" to "is" before "exempt"; (9) in subd. 10, (a) omitting "of" before "execution," (b) changing "shall be made to appear" to "appears," and (c) adding "in" before "part"; (10) adding subd. 11, "Eleventh. The shares held by a member of a homestead association, duly incorporated, not exceeding in value one thousand dollars, if the person holding the shares is not the owner of a homestead under the laws of this state; all the nautical instruments and wearing-apparel of any master, officer, or seaman on any steamer or other vessel." When enacted in 1872, § 690 read: "The following property is exempt from execution, except as herein otherwise specially provided: 1. Chairs, tables, desks, and books, to the value of two hundred dollars, belonging to the judgment debtor; 2. Necessary household, table, and kitchen furniture belonging to the judgment debtor, including one sewing-machine and one piano, in actual use in a family, or belonging to a woman; stoves, stovepipe, and stove furniture, wearing-apparel, beds, bedding, and bedsteads, and provisions, actually provided for individual or family use, sufficient for one month; 3. The farming utensils or implements of husbandry of the judgment debtor; also, two oxen, or two horses, or two mules, and their harness, one cart or wagon, and food for such oxen, horses, or mules for one month; also, all seed grain or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars; 4. Tools or implements of a mechanic or artisan necessary to carry on his trade; the notarial seal and records of a notary public; the instruments and chest of a surgeon, physician, surveyor, and dentist, necessary to the exercise of their profession, with their

scientific and professional libraries; the law professional libraries and office furniture of attorneys, counselors, and judges, and the libraries of ministers of the gospel; 5. The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars; also, his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements, and appliances necessary for carrying on any kind of mining operations, not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules, or oxen, with their harness; and food for such horses, mules, or oxen for one month, when necessary to be used in any whim, windlass, derrick, car, pump, or hoisting gear; 6. Two oxen, two horses, or two mules, and their harness; and one cart or wagon, one dray or truck, one coupé, one hack or carriage for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living; and one horse, with vehicle and harness, or other equipments, used by a physician, surgeon, or minister of the gospel, in making his professional visits, with food for such oxen, horses, or mules for one month; 7. Four cows with their sucking calves, and four hogs, with their sucking pigs; 8. Poultry not exceeding in value fifty dollars; 9. The earnings of the judgment debtor for his personal services, rendered at any time within thirty days next preceding the levy of execution, or levy of attachment, when it appears, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of his family, residing in this state, supported wholly or in part by his labor; 10. The shares held by a member of a homestead association duly incorporated, not exceeding in value one thousand dollars—if the person holding the share is not the owner of a homestead under the laws of this state; 11. All moneys, benefits, privileges, or immunities accruing, or in any manner growing out of any life insurance on the life of the debtor, made in any company incorporated under the laws of this state, if the annual premiums paid do not exceed five hundred dollars; 12. All fire-engines, hooks and ladders, with the carts, trucks, and carriages, hose, buckets, implements, and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any law of this state; 13. All arms, uniforms, and accouterments required by law to be kept by any person; 14. All court-houses, jails, public offices and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the court-house, jail, and public offices belonging to any county of this state; and all cemeteries, public squares, parks, and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament, or public use, or for the use of any fire or military company organized under the laws of this state; but no article or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price, or upon a mortgage thereon."

2. Amended by Code Amdts. **1875–76**, p. 94, (1) in subd. 2, (a) omitting "and one piano, in actual use in a family, or belonging to a woman," (b) changing "stovepipe" to "stovepipes," (c) omitting "and" before "provisions," (d) changing "one month" to "three months," and (e) adding at end, after "three months," the words "and three cows and their sucking calves, four hogs with their sucking pigs, and food for such cows and hogs for one month" (a transposition and amendment of subd. 7; q. v., infra); (2) in subd. 3, adding a comma after "seed" (seed, grain); (3) in subd. 4, (a) adding "The" before "tools," as first word, (b) changing "and records" to "records and office furniture" before "of a notary," (c) changing "and" to "or" before "dentist," and (d) changing last part of subdivision, beginning "with their scientific," to read, "with their professional libraries and necessary office furniture; the professional libraries of attorneys, judges, ministers of the gospel, editors, school teachers, and music teachers, and their necessary office furniture; also, the musical instruments of music teachers actually used by them in giving instructions"; (4) in subd. 5, (a) omitting "kind of" before "mining operations," and (b) adding at end, after "hoisting gear," the words "and, also, his mining claim, actually worked by him, not exceeding in value the sum of one thousand dollars"; (5) in subd. 6, transposing words "Two oxen, two horses" (Two horses, two oxen); (6) in subd. 7, (a) amending and transposing subject-matter to end of subd. 2 (q. v., ante), and (b) transposing subject-matter of subd. 8 to this subdivision and changing "fifty" to "twenty-five"; (7) subd. 9 renumbered subd. 8, (a) omitting "levy of" before "attachment," (b) changing "wholly" to "in whole," and (c) adding at end, after "labor," the words "but where debts are incurred by any such person, or his wife or family, for the common necessaries of life, the one half of such earnings above mentioned are, nevertheless, subject to execution, garnishment, or attachment to satisfy debts so incurred"; (8) subd. 10 renumbered subd. 9, (a) changing "share" to "shares" after "holding the," and (b) adding at end, after "state," a new sentence (subd. 12 of present section), "All the nautical instruments and wearing-apparel of any master, officer, or seaman of any steamer or other vessel"; (9) subd. 11 renumbered subd. 10; (10) subd. 12 renumbered subd. 11; (11) subd. 13 renumbered subd. 12, adding at end, after "any person," the words "and also one gun, to be selected by the debtor" (thus making this subdivision the present subd. 14); (12) subd. 14 renumbered subd. 13, (a) omitting "court-house" before "jail," (b) adding "or to any city and county" after "county," (c) omitting, after "this state," the word "but," (d) beginning a new sentence with the words "No article," and adding "however" after these words, and (e) adding in last line, before "a mortgage thereon," the words "a judgment of foreclosure of"; subd. 13 then ending the section.

3. Amended by Code Amdts. **1877–78**, p. 101, (1) in subd. 2, (a) omitting "stove" before "furniture," and (b) adding, after "bedsteads," the words "hanging pictures, oil-paintings, and drawings drawn or painted by any member of the family, and family portraits and their necessary frames"; (2) in subd. 3, adding at end, after "dollars," the words "and seventy-five beehives, and one horse and vehicle belonging to any person who is maimed or crippled, and the same is necessary in his business"; (3) in subd. 4, adding at end, after "instructions," the words "and all the indexes, abstracts, books, papers, maps, and office furniture of a searcher of records, necessary to be used in his profession"; (4) in subd. 6, (a) adding "constable" after "surgeon," and (b) changing the words "in making his professional visits" to "in the legitimate practice of his profession or business"; (5) in subd. 10 (original code subd. 11), omitting, after "of the debtor," the words "made in any company incorporated under the laws of this state"; (6) in subd. 13, making a new paragraph of the sentence beginning "No article."

4. Amended by Stats. **1887**, p. 99, (1) adding subd. 7, which read same as at present, except that it had the word "a" instead of "his" before "livelihood"; (2) subd. 7 renumbered subd. 8 (its original code number); (3) subd. 8 renumbered subd. 9 (its original code number), changing "debtor's" to "debtors'"; (4) subds. 9 and 10 renumbered subds. 10 and 11, respectively (their original code numbers); (5) subd. 11 renumbered subd. 12 (its original code number), changing "law" to "laws" (sic); (6) subd. 12 renumbered subd. 13 (its original code number); (7) subd. 13 renumbered subd. 14 (its original code number), (a) omitting (sic) "any" before "fire or military," and (b) adding to end of section, as a sentence, the paragraph beginning "No article" (a retrogression).

5. Amended by Stats. **1897**, p. 180, (1) in subd. 2, (a) changing "stoves" to "stove," (b) omitting the comma after "stovepipes" (stovepipes and furniture), and (c) adding at end, after "one month," the words "also, one piano,

one shotgun, and one rifle"; (2) in subd. 3, adding, after "debtor," the words "not exceeding in value the sum of one thousand dollars"; (3) in subd. 4, adding at end, after "his profession," the last two divisions of the subdivision, beginning "also, the typewriters," which read as at present, except that the last division had the word "its" instead of "the" before "owner for the"; (4) adding subd. 9, reading, "Seamen and seagoing fishermen's wages and earnings, not exceeding one hundred dollars"; (5) subd. 9 (original code number) renumbered subd. 10, (a) restoring "debtors' " to "debtor's," and (b) adding, after "necessaries of life," the words "or have been incurred at a time when the debtor had no family, residing in this state, supported in whole or in part by his labor," this subdivision then reading as at present, except that it had the word "are" instead of "is" before "nevertheless"; (6) subds. 10, 11, 12, and 13 (original code numbers) renumbered subds. 11, 12, 13, and 14, respectively; (7) subd. 14 (original code number) renumbered subd. 15, (a) restoring the word "any" before "fire or military," (b) adding subd. 16, reading, "All material purchased in good faith for use in the construction, alteration, or repair of any building, mining claim, or other improvement, as long as in good faith the same is about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement," and (c) making a paragraph of the sentence beginning "No article" (a restoration).

6. Amended by Stats. **1899**, p. 19, (1) adding as a flush paragraph italic heading, the words "What exempt from execution"; (2) in subd. 2, omitting, in first line, the comma after "table" (table and kitchen furniture); (3) in subd. 14 (original subd. 13), changing "All arms, uniforms, and accouterments" to "All uniforms, arms, accouterments"; (4) adding subd. 17, reading the same as at present, down to the words "engines, etc.," but having, after these words, "to the value of one thousand dollars."

7. Amended by Stats. **1901**, p. 21, becoming a law, under constitutional provision, without governor's approval, the amendments being those of Stats. 1903 (q.v., infra), except that (1) in subd. 4, it had the pronoun "his" instead of "their" before "profession" and before "professional," and "library" instead of "libraries"; (2) in subd. 13, it had the word "any" instead of "the" before "laws."

8. Amendment by Stats. **1901**, p. 153; unconstitutional. See note ante, § 5.

9. Amended by Stats. **1903**, p. 114, (1) omitting the italic head added in 1899; (2) in subd. 2, (a) adding "and fuel" after "provisions," and (b) changing "sucking" to "suckling," in both instances (the subdivision then reading as at present); (3) in subd. 3, (a) substituting "buggy and two wagons" for "wagon," and (b) omitting "and" before "one horse"; (4) in subd. 4, adding the words "including one safe and one typewriter" (the subdivision then reading as at present); (5) in subd. 5, changing the word "in" to "on" before "any whim"; (6) in subd. 7, changing "a" to "his" before "livelihood" (the subdivision then reading as at present); (7) in subd. 8, changing "twenty-five" to "seventy-five" (the present reading of the subdivision); (8) changing subd. 9 (which was added in 1897) to read as at present; (9) in subd. 10 (original code subd. 9), changing "are" to "is" before "nevertheless" (the present reading of the subdivision); (10) in subd. 11 (original code subd. 10), making a new subdivision (subd. 12) of the sentence beginning "All the nautical," which was added in 1875–76, the phraseology of which has never been changed; (11) subd. 12 (original code subd. 11) renumbered subd. 18, and changed to read as at present (see infra, note to subd. 18); (12) in subd. 13 (original code subd. 12), the word "any" changed to "the" before "laws"; (13) in subd. 14 (original code subd. 13), changing words "All uniforms, arms, accouterments" to read as at present; (14) in subd. 15 (original code subd. 14), omitting, after "county," the words "or to any city and county"; (15) in subd. 16 (added in 1897), adding, in first line, "not exceeding one thousand dollars in value"; (16) in subd. 17 (added in 1897), changing the phraseology after "engines, etc.," to read as at present; (17) adding subd. 18, an amendment of original code subd. 11, reading as at present (see supra, note to subd. 12); (18) adding subd. 19, which read as at present; (19) adding "or other lien" in last line of final paragraph, making this paragraph read as at present.

10. Amended by Stats. **1907**, p. 882, (1) in introductory paragraph, adding "or attachment"; (2) in subd. 3, omitting the comma after "seed" (seed grain); (3) in subd. 5, (a) omitting a comma after "mining operations" (mining operations not exceeding in value, etc.), and (b) omitting a comma (sic) after "car" (car pump); (4) in subd. 13, omitting a comma (sic) after "hose" (hose buckets); (5) in subd. 15, (a) omitting the words "and pertaining" before "to the jail," and (b) adding "and appertaining" before "to any county"; (6) adding subd. 20.

Construction of statute. Statutes exempting property from execution are enacted on the ground of public policy, for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence; and the general rule now is, to construe such statutes liberally, so as to carry out the intention of the legislature, and the humane purposes designed by the law-makers. Holmes v. Marshall, 145 Cal. 777; 104 Am. St. Rep. 86; 2 Ann. Cas. 88; 69 L. R. A. 67; 79 Pac. 534; Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 749; 108 Pac. 717; and see Estate of McManus, 87 Cal. 292; 22 Am. St. Rep. 250; 25 Pac. 413; Spence v. Smith, 121 Cal. 536; 66 Am. St. Rep. 62; 53 Pac. 653. The first, second, and tenth subdivisions of this section probably apply to all vocations mentioned in the section. Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 749; 108 Pac. 717. The same person cannot claim both the farmer's and the teamster's exemption; and if he is entitled to an exemption either as a farmer or as a teamster, but is in doubt, he may plead both claims, and have the benefit of the one best established by proof. Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 749; 108 Pac. 717.

Nature of exemption. Exemption of property from execution is a personal privilege, which may be claimed or waived at the option of the debtor. Keybers v. McComber, 67 Cal. 395; 7 Pac. 838.

Provisions for family. Money with which to purchase provisions sufficient for family use is not exempt, under this section; but where the money has been used in good faith for that purpose, before the parties are called upon to account for it, and the amount is no more than would reasonably be required to support the family for three months, the claim to exemption will be sustained. Gray v. Brunold, 140 Cal. 615; 74 Pac. 303.

Farming utensils, etc. The Practice Act did not, in express terms, make the exemption under this section applicable only to such judgment debtors as were engaged in the business of farming at the date of the levy; but it is obvious that such was its intention. Robert v. Adams, 38 Cal.

383; 99 Am. Dec. 413; and see Brusie v. Griffith, 34 Cal. 302; 91 Am. Dec. 695. The third subdivision of this section relates exclusively to persons engaged in farming (Murphy v. Harris, 77 Cal. 194; 19 Pac. 377; Brusie v. Griffith, 34 Cal. 302; 91 Am. Dec. 695; Robert v. Adams, 38 Cal. 383; 99 Am. Dec. 413; Murphy v. Harris, 77 Cal. 194; 19 Pac. 377); and property used in farming cannot be claimed as exempt, unless the judgment debtor was, at the date of the levy, engaged in the business of farming. Howell v. Boyd, 2 Cal. App. 486; 84 Pac. 315. The exemptions of the third subdivision are to enable the judgment debtor to earn a support by farming, and secure to him the means appropriate to that end, and the exemption of oxen, horses, or mules applies to such only as are suitable and intended for the ordinary work conducted on a farm. Robert v. Adams, 38 Cal. 383; 99 Am. Dec. 413; Brusie v. Griffith, 34 Cal. 302; 91 Am. Dec. 695. The legislature, by the phrase, "farming utensils or implements of husbandry of the judgment debtor," meant such utensils or implements as are needed and used by the farmer in conducting his own farming operations: it was not intended that all farming machinery which a farmer may own should be exempt, because, while he uses it chiefly by renting it out, or in doing work on others' farms for hire, he still uses it to a small extent on his own land. Estate of Baldwin, 71 Cal. 74; 12 Pac. 44. A combined harvester is a farming utensil and an implement of husbandry, irrespective of its value, and if used chiefly for the farming purposes of the debtor, although occasionally used for others, is exempt from execution (Estate of Klemp, 119 Cal. 41; 63 Am. St. Rep. 69; 39 L. R. A. 340; 50 Pac. 1062; and see Spence v. Smith, 121 Cal. 536; 66 Am. St. Rep. 62; 53 Pac. 653); but an expensive thrashing outfit, consisting of a thrashing-engine, water-tanks, a thrasher, a derrick and forks, a seed-cleaner, a feeding-machine, a feeding-rack, and a cook-house, owned in common by several farmers, and used by them to a limited extent on their own lands, but principally in doing work for others for hire, is not exempt from execution. Estate of Baldwin, 71 Cal. 74; 12 Pac. 44. The debtor is not required to use the exempt farming implements or property exclusively in his vocation. Spence v. Smith, 121 Cal. 536; 66 Am. St. Rep. 62; 53 Pac. 653. Where the debtor has more horses than the number exempt by law, he has the right to elect which he shall claim as exempt, and it devolves upon him to do so within a reasonable time after notice of the levy. Keybers v. McComber, 67 Cal. 395; 7 Pac. 838. This section is restrictive only as to the number and use of the horses used in husbandry; and the exemption of two horses is allowed, where they are engaged in husbandry, and their value and sex is immaterial. McCue v. Tunstead, 65 Cal. 506; 4 Pac. 510. A stallion, not used as a work-horse on a farm, is not exempt from execution. Robert v. Adams, 38 Cal. 383; 99 Am. Dec. 413. It is not necessary, in order to make horses exempt, that the owner shall devote himself exclusively to husbandry: they are exempt because owned by a judgment debtor engaged in husbandry. McCue v. Tunstead, 65 Cal. 506; 3 Pac. 863. There is no ground for excluding an implement from the operation of the statute, merely because it is an improvement, and supplants a former implement used with less effectiveness for the same purpose. Estate of Klemp, 119 Cal. 41; 63 Am. St. Rep. 69; 39 L. R. A. 340; 50 Pac. 1062. The character and amount of exempt property is purely a matter of legislative policy; and where the legislature has determined that the farming utensils and implements of husbandry of a judgment debtor shall be exempt, the court is not authorized to refuse exemption because, in its opinion, they are not necessary for the judgment debtor, or because the farming operations are carried on on a greater scale than the court deems necessary. Spence v. Smith, 121 Cal. 536; 66 Am. St. Rep. 62; 53 Pac. 653; Estate of Klemp, 119 Cal. 41; 63 Am. St. Rep. 69; 39 L. R. A. 340; 50 Pac. 1062. The statute has fixed no limit to the amount of land which a judgment debtor may cultivate by farming; and if the farming utensils which he has are necessary for the proper cultivation of his land, they are exempt from execution, irrespective of whether he would need them for cultivating a smaller tract of land. Spence v. Smith, 121 Cal. 536; 66 Am. St. Rep. 62; 53 Pac. 653. Husbandry is the business of a farmer, comprehending the various branches of agriculture. McCue v. Tunstead, 65 Cal. 506; 4 Pac. 510. The law does not recognize classes of husbandry, nor limit its exemption of farming utensils and implements of husbandry to one particular class of several that may be followed by the farmer, and will not inquire whether they were used in agriculture, horticulture, or viticulture. Estate of Slade, 122 Cal. 434; 55 Pac. 158.

Tools or implements of mechanic or artisan. The law does not require that a mechanic shall be employed as a journeyman, in order to be entitled to the exemption; nor is the phrase, "necessary to carry on his trade," used in such a strict sense, that, because a journeyman machinist can secure employment with a manufacturer who will supply the instrument, it is not necessary to the trade; and a lathe and appliances, costing about $250, and used for shaping wood or metal, which are necessary to carry on the business of a mechanic

and machinist, is a tool, and may be properly set apart to him in insolvency proceedings as exempt from execution. In re Robb, 99 Cal. 202; 37 Am. St. Rep. 48; 33 Pac. 890. Whether a whole printing plant is exempt or not, or is necessary to the carrying on of the trade of a printer, conceding such printer to be a mechanic or artisan within the meaning of this section, is a question of fact to be submitted to the jury, under proper instructions: printing-presses operated by steam, a paper-cutting machine, etc., may be regarded as the tools or implements of a printer; but they are exempt only so far as they are necessary to carry on his trade and not all are exempt that he may have acquired and used in his business. In re Mitchell, 102 Cal. 534; 36 Pac. 840. A jeweler's safe, owned and used in the business of a jeweler and watch-repairer, is exempt from execution, and should be set apart as such to him in insolvency proceedings. Estate of McManus, 87 Cal. 292; 22 Am. St. Rep. 250; 10 L. R. A. 567; 25 Pac. 413.

Cabin and claim of miner. There is no inconsistency between the right to the exemption of the cabin or dwelling of a miner under the provisions of the fifth subdivision of this section, and the claim of a homestead provided elsewhere in the statute: the homestead is for the benefit and protection of the family, and the law providing for its selection should be liberally construed so as to effect this end; the exemption of the mining claim, under this subdivision, does not depend upon the residence thereon, but its selection as a homestead does; nor does the homestead right depend upon the character of the title held by the party claiming it: it is impressed upon the land to the extent of the interest of the claimant in it, not on the title merely. Gaylord v. Place, 98 Cal. 472; 33 Pac. 484; and see Heathman v. Holmes, 94 Cal. 291; 29 Pac. 404.

Horses, etc., of draymen and other laborers. To entitle a party to claim, as exempt from execution, two horses, he must show that he is a cartman, drayman, truckman, huckster, peddler, teamster, or other laborer, and that he habitually earns his living by the use of such horses, etc. Dove v. Nunan, 62 Cal. 399; and see Brusie v. Griffith, 34 Cal. 302; 91 Am. Dec. 695. The requirement of the sixth subdivision, that the party must "habitually" earn his living by the use of the articles claimed to be exempt, is imperative (Murphy v. Harris, 77 Cal. 194; 19 Pac. 377); but it is not necessary that a party claiming the exemption of two horses and a hack shall be actually using the same at the time of seizure: it is sufficient if he is engaged in the business as a means of livelihood, even though the horses are, at the time of seizure, temporarily at pasture, and the hack is undergoing repairs. Forsyth v. Bower, 54 Cal. 639. The fact that a person, with his wife, conducted a bakery upon a limited scale, and sold bread at the shop, while he daily peddled bread throughout the town and at the railroad depot upon the arrival of trains, etc., does not deprive him of his right as a peddler, under the sixth subdivision; but the debtor's right to exemption is limited by the express provisions of the statute; hence, a bread-box used by the debtor in his business as a peddler of bread, not being named in the statute as one of the articles exempt from execution, is not exempt therefrom. Stanton v. French, 91 Cal. 274; 25 Am. St. Rep. 174; 27 Pac. 657. Where the debtor gave notice to the officer, six days after the levy, that he claimed two horses and their harness as exempt from execution, this notice, in the absence of a showing to the contrary, was within a reasonable time. Keybers v. McComber, 67 Cal. 395; 7 Pac. 838. In claim and delivery against an officer for two horses, or their value, alleged to be exempt, and wrongfully taken by the sheriff under writs of attachment, where the great preponderance of the evidence was to the effect that the horses were not used habitually by the claimant as a huckster or peddler in earning his living, the judgment or order of the court refusing to allow the exemption will not be reversed on appeal. Paulson v. Nunan, 72 Cal. 243; 13 Pac. 626.

Earnings of judgment debtor. It is the relation, and dependence of the relation, and not the aggregation of the individuals, that constitutes a family: a man's wife and minor children, though residing in a different place, constitute "his family"; but the mother of an adult judgment debtor, who permanently resides apart from him, and to whose support he is under no legal obligation to contribute, is not a member of his "family," as that word is used in the tenth subdivision of this section. Lawson v. Lawson, 158 Cal. 446; 111 Pac. 354. The provisions of the tenth subdivision are not applicable in setting aside moneys exempt from execution, where there is no family. Winterhalter v. Workmen's etc. Ass'n, 75 Cal. 245; 17 Pac. 1.

Life insurance. Prior to the amendment of this section in 1903, where the statute provided that moneys accruing upon an insurance policy issued upon the life of a judgment debtor were exempt if the annual premiums paid thereon did not exceed five hundred dollars, it as plainly provided that if the annual premiums paid did exceed five hundred dollars, no part of the same was exempt, as though this had been added in words (Estate of Brown, 123 Cal. 399; 69 Am. St. Rep. 74; 55 Pac. 1055); and a life-insurance policy, by its terms payable to the administrator of the insured, the annual premiums of which did not exceed five hundred dollars,

although set apart under the statute, was administered upon, and until so set apart was a part of the estate; and the order setting it apart was a species of distribution to the widow, of part of the estate of the decedent. Estate of Miller, 121 Cal. 353; 53 Pac. 906. The words "exempt from execution," mean exempt from any execution; and the exemption from execution of life-insurance money extends not only against the debts of the person whose life was insured, and who paid the premiums, but also to the debts of the beneficiary to whom it is payable after the death of the insured. Holmes v. Marshall, 145 Cal. 777; 104 Am. St. Rep. 86; 2 Ann. Cas. 88; 69 L. R. A. 67; 79 Pac. 534. Where a life-insurance policy is made payable to the administrator generally, the heirs are not vested with any interest in or right in reference to the policy: such policy belongs to the estate. Estate of Miller, 121 Cal. 353; 53 Pac. 906. Insurance-money, coming to the surviving wife directly as beneficiary, is exempt from execution, as well as that coming to her indirectly through the estate and the order setting it apart: the statute provides that all property exempt from execution shall be set apart for the use of the surviving husband or wife. Holmes v. Marshall, 145 Cal. 777; 104 Am. St. Rep. 86; 2 Ann. Cas. 88; 69 L. R. A. 67; 79 Pac. 534.

Pension-money. Pension-money, being exempt from execution, no rights of creditors are to be considered in its distribution; and it is not subject to the fees and commissions of the public administrator and his attorney. Treadway v. Board of Directors, 14 Cal. App. 75; 111 Pac. 111.

Grain from homestead. Grain harvested from a homestead is not exempt from execution. Horgan v. Amick, 62 Cal. 401.

Patent rights. A patent right is not exempt from seizure and sale. Pacific Bank v. Robinson, 57 Cal. 520; 40 Am. Rep. 120.

Partnership property. Partnership property is not exempt; and where a person forms a partnership with one or more than one person, and fails to retain exclusive ownership of his tools and implements, and allows the use of them to his partners, he loses entirely the benefit of the statutory exemptions as to such property. Cowan v. Creditors, 77 Cal. 403; 11 Am. St. Rep. 294; 19 Pac. 755.

Insurance-money on exempt property. Where household goods and wearing-apparel, exempt from execution, are lost by fire, money due therefor upon a fire-insurance policy is also exempt. Langley v. Finnall, 2 Cal. App. 231; 83 Pac. 291.

Patent right. See note ante, § 688.

Burden of proof on party claiming exemption. Where a party sues to recover property on the ground that it is exempt from execution, the burden is upon him to show affirmatively that he is entitled to the exemption. Murphy v. Harris, 77 Cal. 194; 19 Pac. 377.

Power and duty of courts. Courts have power over their own process, and to set aside the levy of a writ of attachment or execution upon exempt property. Holmes v. Marshall, 145 Cal. 777; 104 Am. St. Rep. 86; 2 Ann. Cas. 88; 69 L. R. A. 67; 79 Pac. 534. It is the duty of the superior court, in insolvency proceedings, to exempt and set aside for the use of the insolvent such personal property as is exempt from execution. Noble v. Superior Court, 109 Cal. 523; 42 Pac. 155.

Homestead exemption. The homestead exemption is purely a statutory right, limited by statutory conditions; and the court cannot impose restrictions upon the right of the creditor to enforce a sale, in addition to those imposed by statute. Lean v. Givens, 146 Cal. 739; 106 Am. St. Rep. 79; 81 Pac. 128. The value of a homestead is finally determined by exposing the property for sale; and if a bid is not made in excess of the amount of the exemption, the proceedings are ended; but if a larger amount is offered, it conclusively proves that the value exceeds the exemption, and in that event the excess is, of right, applicable on the debt, and the claimant has no just cause to complain. Lean v. Givens, 146 Cal. 739; 106 Am. St. Rep. 79; 81 Pac. 128. A homestead right acquired subsequently to the attachment lien defeats such lien; and the levy of an execution, in like manner, does not have the effect to prevent the premises from being impressed with the homestead character at any time before sale. Beaton v. Reid, 111 Cal. 484; 44 Pac. 167; and see McCracken v. Harris, 54 Cal. 81; Sullivan v. Hendrickson, 54 Cal. 258; Wilson v. Madison, 58 Cal. 1. The title acquired by patent from the United States government by a homestead claimant is exempt from execution for any debt contracted prior to the issuance of the patent; but where the patentee conveys all his interest in such property, and subsequently acquires title by deed of grant from the grantee, he takes it, as he would in the case of a state homestead, divested of its homestead character and exemption, which do not revive upon his repurchase. De Lany v. Knapp, 111 Cal. 165; 52 Am. St. Rep. 160; 43 Pac. 598. The levy of an execution upon land, where the judgment is not a lien, creates a lien upon the land from that date, which will charge whatever interest in the land is, or may be made, subject to the execution, including the excess in value of the homestead property over the homestead exemption. Lean v. Givens, 146 Cal. 739; 106 Am. St. Rep. 79; 81 Pac. 128; and see Blood v. Light, 38 Cal. 657; 99 Am. Dec. 441; Beaton v. Reid, 111 Cal. 486; 44 Pac. 167; Lehnhardt v. Jennings, 119 Cal. 195; 48 Pac. 56; 51 Pac. 195; Summerville v.

Stockton Milling Co., 142 Cal. 529; 76 Pac. 243. But in Lubbock v. McMann, 82 Cal. 230, 16 Am. St. Rep. 108, 22 Pac. 1145, it appears to have been held that a judgment is not a lien on any part, either in extent or value, of the homestead premises, even in cases where there is an excess in value above the homestead exemption. The levy on property covered by the homestead exemption is imposed on the property conditionally, to become absolute in the event that it is determined in the proceeding that an excess exists, and a purchaser after the levy takes subject to the lien. Lean v. Givens, 146 Cal. 739; 106 Am. St. Rep. 79; 81 Pac. 128. A judgment obtained after the declaration and recording of a homestead is not a lien on the homestead; neither are shares of stock, purchased with money borrowed on a mortgage upon such homestead, subject to execution. Yardley v. San Joaquin Valley Bank, 3 Cal. App. 651; 86 Pac. 978.

Constitutionality of exemption statutes. See note 45 Am. Dec. 251.

Waiver of exemption by executory contract. See note 72 Am. Dec. 741.

Exemption of partnership property. See note 27 Am. Dec. 246.

Exemption of tools. See notes 21 Am. Dec. 545; 47 Am. Rep. 190.

What exempt as tools and who may claim exemption. See note 25 Am. Rep. 63.

When life-insurance policies subject to execution. See note 88 Am. Dec. 530.

Exemption of wages. See note 91 Am. Dec. 411.

Who is head of family within meaning of law allowing exemptions. See note 32 Am. Rep. 30.

When exemption of pension-money ceases. See note 41 Am. Rep. 411.

Exemption of pension or bounty. See note 17 Ann. Cas. 1191.

Construction of statutes exempting horses from execution. See note 6 Ann. Cas. 779.

Meaning of term "wearing-apparel" in exemption statutes. See note 15 Ann. Cas. 159.

Meaning of "apparatus" in exemption statute. See note Ann. Cas. 1912C, 610.

Actions to vindicate right of exemption. See note 75 Am. Dec. 645.

Whether exemption must be claimed. See note 31 Am. Rep. 44.

Right of debtor to claim successive exemptions. See note 4 Ann. Cas. 220.

Right of non-resident to claim exemption from execution or garnishment in absence of express restriction in statute. See note 10 Ann. Cas. 500.

Validity of statute extending or lessening exemption from execution. See note Ann. Cas. 1912B, 259.

Right of debtor to exemption as affected by preparation to remove from state. See note Ann. Cas. 1913C, 729.

CODE COMMISSIONERS' NOTE. Stats. 1866, p. 271; Stats. 1861, p. 567; Stats. 1862, p. 444; Stats. 1868, p. 500.

Sheriff is liable for sale of property exempt from execution. Sheriff is liable for sale of property which is exempt from execution, if such exemption is claimed before sale. Spencer v. Long, 39 Cal. 700. If judgment debtor was absent and sick at time property was sold, it is a sufficient excuse for not claiming exemption before sale. Haswell v. Parsons, 15 Cal. 266; 76 Am. Dec. 480.

Subd. 1. This and the next subdivision are for the benefit of all classes of judgment debtors, whatsoever may be their vocation, because these articles are essential to all families. Robert v. Adams, 38 Cal. 283; 99 Am. Dec. 413.

Subd. 2. See note to subd. 1. Certain household furniture being claimed as exempt from execution, the fact that the number of beds claimed —six in all—was greater than was required for the immediate and continued use of the family, is no objection. Although it is possible that a less number of beds might have answered, yet it would be a very narrow construction of the statute to limit the exemption to just the number required for immediate and constant use. Haswell v. Parsons, 15 Cal. 266; 76 Am. Dec. 480.

Subd. 3. In Borland v. O'Neal, 22 Cal. 506, the court rendered the following opinion: "The plaintiff was entitled to hold two horses, exempt from execution, under the third clause of § 219 of the Practice Act. When the debtor has more horses than the number exempt by law, he has the right to elect which he claims as exempt, and such election must be made at the time of the levy, or within a reasonable time after notice of the levy, by giving the officer notice of such election. The officer is under no obligation to hunt up the debtor in advance of the levy, in order to procure a selection by him. Seaman v. Luce, 23 Barb. (N. Y.) 240; Lockwood v. Younglove, 27 Barb. (N. Y.) 506. The debtor waives his right by failing to claim it; and a claim under one execution, when no sale was made under it, is not sufficient, when the property was levied upon and sold under a subsequent execution. Dodson's Appeal, 25 Pa. St. 232. The exemption of property from sale on execution is a personal right, which the debtor may waive or claim, at his election. State v. Meloque, 9 Ind. 196. Where the debtor has several horses, and one is exempt from execution, he may elect which shall be exempt; but if he has some not in the jurisdiction of the officer, and so beyond the reach of the execution, and there is only one within the reach of the execution, he cannot defeat the creditor's levy on that one by electing to keep it. Such a course would be using the statute, which was intended for beneficent purposes, as a means of evasion and fraud. Robinson v. Myers, 3 Dana (Ky.), 441. And where the officer levied on one horse, leaving another in the possession of the debtor as exempt, and the latter, on the day of sale, claimed the horse levied on as exempt, held, that his proceeding to sell under the execution was not wrongful, unless the debtor should tender him for sale, in lieu of the article levied on, such other articles as he might, in the first instance, have seized for the satisfaction of the debt, or so much as was certainly and palpably sufficient to discharge the debt, or was at least equal in vendible value to the article claimed to be exempt. McGee v. Anderson, 1 B. Mon. (Ky.) 187; 36 Am. Dec. 570." Borland v. O'Neal, 22 Cal. 506; affirmed in Gavitt v. Doub, 23 Cal. 82.

Subd. 3. Oxen, horses, and mules. This subdivision was intended to apply only to oxen, horses, or mules suitable and intended for the ordinary work conducted on a farm. Hence, it does not apply to a stallion not used as a workhorse on a farm, but kept for service of mares. Robert v. Adams, 38 Cal. 383; 99 Am. Dec. 413.

Subd. 4. See Brusie v. Griffith, 34 Cal. 306, 91 Am. Dec. 695, commented on in note to subd. 6. This subdivision (4), and also subds. 5, 6, are intended to exempt such articles as are used by the judgment debtor in earning a support for himself and family in his particular vocation. Robert v. Adams, 38 Cal. 384; 99 Am. Dec. 413; see note to subd. 3.

Subd. 5. See note to subd. 4. Robert v. Adams, 38 Cal. 384; 99 Am. Dec. 413.

Subd. 6. Where two mules are claimed as exempt, it must be shown that the party claiming the mules habitually earned his living by the use of the animals in question, or that he is one of the persons mentioned in the statute. Calhoun v. Knight, 10 Cal. 393. It was held, that the term "wagon" is intended to mean a common vehicle for the transportation of goods, wares, and merchandise; and that a hackney-coach, for the conveyance of passengers, was a different article, and did not come within the equity or literal meaning of the act. Quigley v. Gorham, 5 Cal. 418; 63 Am. Dec. 139. But the introduction of the words "coupé," "hack," "carriage," etc., obviates this distinction. In order to entitle a person to claim, as exempt from execution, two horses, etc., under this subdivision he must show that he is a cartman, drayman, truckman, huck-

ster, peddler, hackman, teamster, or other laborer, and that he habitually earns his living by the use of such horses, wagon, etc. By "other laborer" is meant one who labors by and with the aid of his team, and not by the aid of a pick and shovel, or an anvil, or a lapstone, or a jackplane, or a yardstick. In the sense of the statute, one is a "teamster," who is engaged with his own team, or teams, in the business of teaming; that is to say, hauling freight for a consideration. While he need not, perhaps, drive his team in person, yet he must be personally engaged in the business of teaming habitually for the purpose of making a living by that business. If a carpenter or other mechanic purchases a team or teams, and also carries on the business of teaming by the employment of others, he does not thereby become a "teamster," in the sense of the statute. Brusie v. Griffith, 34 Cal. 306; 91 Am. Dec. 695; see also Robert v. Adams, 38 Cal. 384; 99 Am. Dec. 413.

Subd. 10. See Spencer v. Geissman, 37 Cal. 97; 99 Am. Dec. 248.

Subd. 11. Insurance and endowment policies exempt from execution. See Briggs v. McCullough, 36 Cal. 543; see further McCullough v. Clark, 41 Cal. 298.

Homestead exempt from forced sale. See Civ. Code, §§ 1240, 1241.

§ 691. Writ, how executed. The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient; collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs.

Sheriff.

1. Debts, payment of, to. Ante, § 544; post, § 716.
2. Directions to, effect of. See Pol. Code, § 4166.
3. Justification of. See Pol. Code, § 4168.
4. Must execute writ. Pol. Code, § 4161.
5. Neglect of, to levy or sell, liability. See Pol. Code, § 4161.
6. Paying over proceeds. Pol. Code, §§ 4162, 4167.
7. Selling property. Post, §§ 692 et seq.

Legislation § 691. 1. Enacted March 11, **1872**; based on Practice Act, § 220, which, down to the words "satisfy the judgment," read the same as at present, except that, in the first line, it had the word "shall" instead of "must"; after "satisfy the judgment," the section read: "or depositing the amount with the clerk of the court; any excess in the proceeds over the judgment and the sheriff's fees shall be returned to the judgment debtor. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and the sheriff's fees, within the view of the sheriff, he shall levy only on such part of the property as the judgment debtor may indicate: Provided, That the judgment debtor be present at, and indicate at the time of the levy, such part; and provided, that the property indicated be amply sufficient to satisfy such judgment and fees." When § 691 was enacted in 1872, (1) in first line, "shall" was changed to "must"; (2) the words "or depositing the amount with the clerk of the court" were omitted; (3) the word "shall" was changed to "must," before "be returned" and before "levy"; and (4) the proviso was omitted.

2. Amended by Code Amdts. **1873–74**, p. 321.

Levy and sale. The levy of an execution is not necessary, where the judgment itself constitutes a lien upon the real property which is the subject of the execution sale; but where the judgment does not constitute a lien upon the property sold, and there is no levy, the sale takes effect upon the day of its date, and not before, or, at all events, not before the notices of the sale were posted. Summerville v. Stockton Milling Co., 142 Cal. 529; 76 Pac. 243; and see Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256; Blood v. Light, 38 Cal. 649; 99 Am. Dec. 441; Lehnhardt v. Jennings, 119 Cal. 192; 48 Pac. 56; 51 Pac. 195.

Purchaser's title. The title of a purchaser at a sheriff's sale does not depend upon the return to the writ of execution. Weldon v. Rogers, 157 Cal. 410; 108 Pac. 266.

Note may be sold. A promissory note is a credit, and is liable to seizure and sale under execution against the holder and payee. Davis v. Mitchell, 34 Cal. 81.

Sheriff's accruing costs. The keeper's fees and expenses are not a part of the sheriff's "accruing costs," under this section, and are not chargeable against the defendant without being included in the judgment; "accruing costs" are such fees and expenses, only, as are incurred in executing the judgment. Hotchkiss v. Smith, 108 Cal. 285; 41 Pac. 304.

Liability of sheriff. The default of the sheriff to execute a writ of execution renders him liable upon his bond. Sheehy v. Graves, 58 Cal. 449. If money in the hands of a county treasurer is sold without being delivered, the purchaser must look to the sheriff for its delivery. Magee v. Superior Court, 10 Cal. App. 154; 101 Pac. 532.

Check given on execution sale. The assignee of an insolvent corporation is entitled to be treated as the equitable assignee of a check given the officer upon the execution sale of property belonging to such insolvent corporation, where such officer fails and neglects to sue; and such

equitable assignee may maintain his right of action to recover the amount represented by the check. Meherin v. Saunders, 131 Cal. 681; 54 L. R. A. 272; 63 Pac. 1084.

Levy, defined. This section contemplates that levying is something different from selling, and makes the levying of the writ a part of the process of executing it; the term "levy," when employed to connote the acts by which an officer manifests his intent to appropriate land to the satisfaction of an execution, and when not defined by statute, has considerable elasticity of meaning; so, probably for the reason that as the common law permitted no levy of the writ on lands, it did not devise any procedure for that purpose. Lehnhardt v. Jennings, 119 Cal. 192; 48 Pac. 56; 51 Pac. 195.

Leaving debtor in possession after levy. See note 27 Am. Dec. 103.

Levy of execution on partnership property for partner's private debts. See note 29 Am. Dec. 663.

Levy of execution on property in use or possession of debtor. See note 38 Am. Dec. 709.

Necessity for levy to sustain sale. See note 33 Am. Dec. 697.

Levy effected by unlawful or fraudulent means. See note 93 Am. Dec. 466.

Diligence exacted of sheriff in serving execution. See note 95 Am. Dec. 423.

Duty of officers as to service of execution in the absence of directions. See note 95 Am. Dec. 425.

CODE COMMISSIONERS' NOTE. 1. Generally. See Blood v. Light, 38 Cal. 652; 99 Am. Dec. 441, and cases there cited; Wilson v. Broder, 10 Cal. 486; Smith v. Randall, 6 Cal. 47; 65 Am. Dec. 475.

2. Execution when satisfaction of judgment. The law is well settled, that, as a general rule, a levy under an execution upon sufficient personal property to satisfy the same, is a satisfaction of the judgment, sufficient, at least, to discharge third persons who were liable collaterally, or as sureties thereon. People v. Chisholm, 8 Cal. 29; Mickles v. Haskin, 11 Wend. 125; Morley v. Dickinson, 12 Cal. 561. The law does not deem such a levy a payment, but it is termed a satisfaction or discharge, and the facts thus set forth in the answer were properly new matter, and were to be taken as true, no replication denying the same having been filed. The defendants agreed to indemnify the plaintiff against the payment of costs in Boyreau v. Campbell, and they were in a manner collaterally liable therefor, in the nature of sureties. The levy upon sufficient personal property to satisfy the judgment and execution, in that case, operated as a satisfaction thereof, sufficient, at least, to discharge the collateral liability of these defendants. Neither the plaintiff in that action, nor Bray, one of the parties to the agreement, could do any act by which such discharge could be rendered ineffectual or nugatory without the consent of these defendants. Morley v. Dickinson, 12 Cal. 561. It follows, that neither the release of the property from the levy by the plaintiff in that action, nor the subsequent voluntary payment of the judgment by Bray, could revive the liability of these defendants which had been thus discharged, unless done with their consent, no evidence of which appears in this case. The rule, that a levy upon sufficient personal property is satisfaction of the judgment, is subject, however, to many qualifications as between the parties. Mulford v. Estudillo, 23 Cal. 100; 32 Cal. 135; see further, Clark v. Sawyer, 1 Cal. Unrep. 573; Kenyon v. Quinn, 41 Cal. 325; Howe v. Union Ins. Co., 42 Cal. 528.

3. Debtor may indicate real instead of personal property for the levy. This section was enacted rather for the benefit of the debtor than the creditor. The sheriff may, on the request of the debtor, levy on real estate instead of the personal property, although there may be sufficient of the latter to amply satisfy the execution. Smith v. Randall, 6 Cal. 47; 65 Am. Dec. 475.

4. Remedy against sheriff to compel payment over of money collected on execution. See Wilson v. Broder, 10 Cal. 486.

5. Execution against personal property. Under our statute, an execution affects property, only from the time of the levy; and service of a copy of an execution does not constitute a lien on property capable of manual delivery. Johnson v. Gorham, 6 Cal. 196; 65 Am. Dec. 501; Dutertre v. Driard, 7 Cal. 549; Taffts v. Manlove, 14 Cal. 47; 73 Am. Dec. 610; Herron v. Hughes, 25 Cal. 563. The mere fact that the judgment debtor (against whom execution had issued) was found upon the mining-ground of plaintiff, cannot be said to authorize the sheriff, who had the execution, in going on the ground and digging up the gold contained in the earth. Rowe v. Bradley, 12 Cal. 226. While the interest of the pledgor may be reached under an execution, it can only be done by serving a garnishment on the pledgee, and not by a seizure of the pledge. Treadwell v. Davis, 34 Cal. 601; 94 Am. Dec. 770. See case of Mulford v. Estudillo, 23 Cal. 100, 32 Cal. 135, commented on in note 2 to this section. Section 220, among other things, provides that the sheriff shall execute an execution "by collecting or selling the things in action." Section 228 provides that the sheriff shall execute and deliver to the purchaser of personal property, not capable of manual delivery, a certificate of sale and payment; and that such certificate shall convey to the purchaser all right, title, and interest which the debtor had in and to such property on the day the execution was levied. Under the foregoing provisions, there can be no doubt but that the note in suit was liable to seizure and sale under execution against the holder and payee, David Thomas. It was a "credit," within the meaning of the statute. Webster's Dict., word "Credit." By § 642 of the Code of Practice of Louisiana, the sheriff, under an execution, is required "to seize the property, real and personal, rights, and credits of the debtor, and to sell them to satisfy the judgment obtained against him." Under this provision it has been held, in that state, that the right of a defendant in a promissory note may be sold under an execution (Brown v. Anderson, 4 Mart. (N. S.) 416), and that an actual seizure by the sheriff is not required. Wilson v. Munday, 5 La. 483. In subsequent cases, however, this latter point seems to have been decided the other way. Goubeau v. New Orleans etc. R. R. Co., 6 Rob. (La.) 345; Simpson v. Allain, 7 Rob. (La.) 500; Fluker v. Bullard, 2 La. Ann. 338; Offut v. Mouquit, 2 La. Ann. 785; Taylor v. Stone, 2 La. Ann. 910; Stockton v. Stanbrough, 3 La. Ann. 390. In Adams v. Hackett, 7 Cal. 187, this doctrine was announced as a judgment. In Johnson v. Reynolds, which was decided about the same time as Adams v. Hackett, but does not seem to have been reported, it was applied to promissory notes. Johnson sued Reynolds upon two promissory notes, made by him in favor of Adams & Co., which he had purchased at a sheriff's sale, under an execution against Adams & Co., by virtue of which the sheriff had seized and taken the notes into his possession. These facts were set out at length in the complaint. The defendant demurred, on the ground that the plaintiff did not become the lawful owner and holder of the notes by reason of the sale and delivery to him by the sheriff. The court below sustained the demurrer, and the plaintiff appealed. This court reversed the judgment, holding that the notes were liable to seizure and sale under execution, and that by virtue of the sheriff's sale the plaintiff had become the lawful owner and holder of the notes, and therefore entitled to sue. Davis v. Mitchell, 34 Cal. 87.

6. Execution against real estate. See the elaborate opinion of Justice Rhodes in Bagley v. Ward, 37 Cal. 128, 99 Am. Dec. 256, and cases cited; also Blood v. Light, 38 Cal. 652; 99 Am. Dec. 441.

§ 692. Notice of sale under execution, how given. Before the sale of property on execution, notice thereof must be given as follows:

1. In case of perishable property: by posting written notice of the time and place of sale in three public places of the township or city where the sale is to take place, for such time as may be reasonable, considering the character and condition of the property.

2. In case of other personal property: by posting a similar notice in three public places in the township or city where the sale is to take place, for not less than five days nor more than ten days.

3. In case of real property: by posting a similar notice, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof, once a week for the same period, in some newspaper of general circulation, printed and published in the city or township, in which the property is situated, if there be one, or, in case no newspaper of general circulation be printed and published in the city or township, in some newspaper of general circulation, printed and published in the county.

4. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment.

Sale.

1. Of perishable property, under attachment. Ante, § 547.

2. Of vessels, notice of. Post, §§ 824, 827.

3. Without notice. Post, § 693.

Specified kind of money. Ante, § 682, subd. 4.

Legislation § 692. 1. Enacted March 11, **1872**; based on Practice Act, § 221, as amended by Stats. 1863, p. 689. When § 692 was enacted in 1872, (1) in the introductory paragraph, the word "shall" was changed to "must"; (2) in subd. 1, the word "a" was omitted after "for such"; (3) in subd. 4, the word "shall" was changed to "must," in both instances.

2. Amended by Code Amdts. **1873–74**, p. 322, (1) in subd. 2, (a) inserting the word "for" before "not less," and (b) omitting the word "successively" after "ten days"; (2) in subd. 3, (a) omitting the word "successively" after "twenty days," and (b) changing the word "when" to "where," subd. 3 then ending with the words "same period, in some newspaper published in the county, if there be one."

3. Amended by Stats. **1907**, p. 980, (1) adding, in subd. 2, the word "days" after "five," and (2) in subd. 3, changing the subdivision to read as at present, after the words "same period, in some newspaper."

Notice of sale. The requirement of notice of sales on execution is as much for the defendant's benefit and protection as for the plaintiff's. Northern Counties Investment Trust v. Cadman, 101 Cal. 200; 35 Pac. 557. Questions appertaining to notice, as well as all others which merely relate to irregularities, are between the officer selling and the parties to the execution. Kelley v. Desmond, 63 Cal. 517. A description in the notice is sufficient, where it is the same as that in the judgment, and identifies the land sold. Anglo-Californian Bank v. Cerf, 142 Cal. 303; 75 Pac. 902. Notice given by the officer, as required by this section, is an act manifesting the intent of the officer to appropriate the described property to sale for the satisfaction of the writ, and is a sufficient levy, in any case, where the judgment is a lien on the property to be sold. Lehnhardt v. Jennings, 119 Cal. 192; 48 Pac. 56; 51 Pac. 195.

Computation of time. Where the law fixes the time within which an act is to be done, all of the last day of that period is within the time, and a default for not doing the act can only be taken on the next day. Bellmer v. Blessington, 136 Cal. 3; 68 Pac. 111; and see Misch v. Mayhew, 51 Cal. 514; Hagenmeyer v. Board of Equalization, 82 Cal. 214; 23 Pac. 14; Landregan v. Peppin, 86 Cal. 122; 24 Pac. 859; Derby v. Modesto, 104 Cal. 515; 38 Pac. 900; Bates v. Howard, 105 Cal. 173; 38 Pac. 715.

Sales made after return-day. See notes 15 Am. Dec. 522; 76 Am. Dec. 83.

Judicial sale on other than appointed day. See note 38 L. R. A. (N. S.) 248.

Secret vices in notice of sale. See note 12 Am. Dec. 212.

Failure of or defects in notice of sale. See note 44 Am. Dec. 238.

Sufficiency of notice of sale. See note 75 Am. Dec. 704.

Power of officer to adjourn sale. See note 26 Am. Dec. 536.

CODE COMMISSIONERS' NOTE. See note to § 691, ante, and cases there cited.

§ 693. Selling without notice, what penalty attached. An officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment (if the judgment be satisfied before sale), forfeits five hundred dollars.

Legislation § 693. Enacted March 11, 1872; based on Practice Act, § 222, which had the words "shall forfeit" instead of "forfeits," in both instances.

Sheriff to determine place of publication of notice. Under this section and § 692, ante, it is the duty and right of the sheriff to publish the notice of sale under execution foreclosure decree, and he alone has the power to determine and select the places and newspapers in which to publish the required notice. Northern Counties Investment Trust v. Cadman, 101 Cal. 200; 35 Pac. 557. The penalty imposed upon the sheriff, and his responsibility for damages, are inconsistent with any alleged authority of the plaintiff in foreclosure to dictate the places or papers in which the notices are to be published, and are consistent only with his duty and power to select such places and newspapers. Northwestern Counties Investment Trust v. Cadman, 101 Cal. 200; 25 Pac. 557; and see Richardson v. Tobin, 45 Cal. 30; San Mateo County v. Maloney, 71 Cal. 205; 12 Pac. 53; Journal Pub. Co. v. Whitney, 97 Cal. 283; 32 Pac. 237; Estate of O'Sullivan, 84 Cal. 444; 24 Pac. 281.

Effect of sale without notice. The neglect of the officer making the sale to give the notice required by law does not affect the validity of the sale; but the party aggrieved has his remedy against the officer for any injury sustained by reason of such neglect. Smith v. Randall, 6 Cal. 47; 65 Am. Dec. 475; Harvey v. Fisk, 9 Cal. 93.

Sheriff's false return. The sheriff's return upon a writ of execution, certifying that he sold the property after due notice, is only prima facie evidence in his favor in an action against him for selling the property without notice, and the returns may be overcome by only slight evidence aliunde; and when it is not disputed that the sheriff has himself admitted the falsity of the return, a finding that the recitals are true, based upon no other evidence than the return itself, cannot be sustained. Raker v. Bucher, 100 Cal. 214; 34 Pac. 654.

False return, defined. The term "false return" was simply the specific name, probably derived from the forms of the original writ, for one of the numerous classes of actions on the case: it was not an action in rem for the purpose of canceling or setting aside the return, in order to pave the way for another action for damages, but was itself an action for damages founded upon the official misconduct of the sheriff. Raker v. Bucher, 100 Cal. 214; 34 Pac. 654.

Actions for damages or forfeiture. An action under this section being to enforce a penalty or forfeiture, the claim must be strictly construed, and the plaintiff must show clearly that his case comes within the statute. Askew v. Ebberts, 22 Cal. 263. A cause of action for damages for sale without notice is complete, under the statute, as soon as the officer delivers a certificate of sale to the purchaser at the execution sale. Raker v. Bucher, 100 Cal. 214; 34 Pac. 654. Under this section, the aggrieved party can only recover the forfeiture when the sale has been perfected and completed by at least the payment of the purchase-money by the purchaser; he cannot recover, where there was an attempted sale under a defective notice, by which nothing passed and no right to property vested in the purchaser, and where the purchaser did not pay the purchase-money, and where the officer afterwards rightfully sold the property after giving the proper notice. Askew v. Ebberts, 22 Cal. 263. An action to recover the penalty and damages for selling personal property under writ of execution, without giving the notice required, implies, and requires for its maintenance, a valid execution; and an objection by the plaintiff, that the execution was void because not dated, is felo de se as to the plaintiff's case. Bellmer v. Blessington, 136 Cal. 3; 68 Pac. 111.

Aggrieved party, who is. The party is not injured or aggrieved, unless by means of the sale, without notice, he has been deprived of his property. Askew v. Ebberts, 22 Cal. 263. The purchaser at an execution sale, without notice, is not an aggrieved party, within the meaning of this section; such a sale is either valid or invalid; it passes title, or it does not; if it is a nullity and passes no title, the purchaser sustains no injury, and no right of action for the forfeiture accrues; if authorized, the purchaser is entitled, after the time for redemption expires, to his deed, and may compel its execution and delivery. Kelley v. Desmond, 63 Cal. 517.

CODE COMMISSIONERS' NOTE. If the sheriff fails to give the required notice, this section prescribes the remedy against him therefor; but the failure to give the notice, it seems, is not sufficient cause for avoiding the sale. Smith v. Randall, 6 Cal. 47; 65 Am. Dec. 475. But if the attempted sale was a nullity, and no title

passed by the sheriff's sale, then no injury has been sustained by the judgment debtor, and the sheriff is not liable for damages, under this section, notwithstanding he did not give the required notice. Askew v. Ebberts, 22 Cal. 263.

§ 694. **Sales, how conducted. Neither the officer conducting it nor his deputy to be a purchaser. Real and personal property, how sold. Judgment debtor, if present, may direct order of sale, and the officer shall follow his directions.** All sales of property under execution must be made at auction, to the highest bidder, between the hours of nine in the morning and five in the afternoon. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser, or be interested in any purchase, at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff must follow such directions.

Auctioneer, sheriff as. Pol. Code, § 3291.

Legislation § 694. Enacted March 11, **1872** (based on Practice Act, § 223), (1) in first sentence, (a) changing "shall" to "must," before "be made," and (b) omitting the words "and shall be made," before "between"; (2) changing "shall" to "can," before "be sold" and before "become"; (3) in sentence beginning "When the sale," (a) changing "shall" to "must" before "be within," before "be sold,' and before "be thus," and (b) omitting the word "and" before "consisting"; (4) in last line, changing "shall be bound to" to "must."

Sale en masse. A sale en masse is not necessarily void, nor even irregular. Bechtel v. Wier, 152 Cal. 443; 15 L. R. A. (N. S.) 549; 93 Pac. 75. The rule, that sales en masse, of land consisting of separate tracts, will not be countenanced in courts of justice, does not go to the extent of allowing the debtor, by misleading the officer by means of a false description, or by withholding information, to invalidate a sale under execution, made in good faith in the entire absence of fraud. Smith v. Randall, 6 Cal. 47; 65 Am. Dec. 475. The sale of separate parcels en masse, in disregard of the requirements of the statute, is not void, but only voidable, and subject to be set aside on timely application, and such sale en masse is not forbidden, where the parcels cannot be separately sold; but while this rule is controlling and should be strictly followed, yet it cannot be held to apply where each distinct parcel is first offered for sale separately and no bids are received; in such case, the property may then be offered and sold as a whole, and the sale will be upheld, unless other reasons appear for setting it aside. Anglo-Californian Bank v. Cerf, 142 Cal. 303; 75 Pac. 902; and see San Francisco v. Pixley, 21 Cal. 56; Blood v. Light, 38 Cal. 649; 99 Am. Dec. 441; Browne v. Ferrea, 51 Cal. 552; Vigoureux v. Murphy, 54 Cal. 346; Marston v. White, 91 Cal. 37; 27 Pac. 588; Hibernia Sav. & L. Soc. v. Behnke, 121 Cal. 339; 53 Pac. 812; Connick v. Hill, 127 Cal. 162; 59 Pac. 832. Where the sheriff, on execution, sells separate tracts of land en masse, the creditor has his remedy by motion to set aside the sale, even if a stranger becomes the purchaser and pays the money for the property. Browne v. Ferrea, 51 Cal. 552. Where parcels of land are offered for sale separately at a foreclosure sale, and no bid is made, a sale of them en masse is void. Bechtel v. Wier, 152 Cal. 443; 15 L. R. A. (N. S.) 549; 93 Pac. 75.

Sale of parcels separately. The judgment debtor has the right to require that separate lots or parcels shall be sold separately, and may also direct the order in which they shall be sold. Ontario Land etc. Co. v. Bedford, 90 Cal. 181; 27 Pac. 39; and see Leviston v. Swan, 33 Cal. 480. A judgment debtor desiring property sold in separate parcels should proceed to that end in accordance with this section; and where one has any interest in any lands described in a complaint in foreclosure, that is not covered by a mortgage, or if he has any equity that he desires to have protected, he may present the matter to the trial court in a proper manner, and where he fails to present any such matter in any manner, he cannot, on appeal, be

heard to complain. County Bank v. Goldtree, 129 Cal. 160; 61 Pac. 785. The object of the statute in requiring the sale to be by parcels is to afford the judgment debtor an opportunity to redeem any of the parcels. Hibernia Sav. & L. Soc. v. Behnke, 121 Cal. 339; 53 Pac. 812. Where several water-ditches, and water rights appertaining thereto, constitute a single connected system of water-supply, so that some of the ditches would be useless if owned and held by different parties, they may be sold under execution as a single parcel; and the question whether such ditches constitute one parcel or several parcels is one of fact. Gleason v. Hill, 65 Cal. 17; 2 Pac. 413. Where separate known parcels of land are offered for sale separately in foreclosure proceedings, and no offer or bid is made for any one parcel, the property may be offered and sold in one parcel. Connick v. Hill, 127 Cal. 162; 59 Pac. 832; and see Marston v. White, 91 Cal. 37; 27 Pac. 588. The court, in a foreclosure suit, has jurisdiction to provide in the decree in what parcel or parcels the mortgaged premises shall be sold. Hopkins v. Wiard, 72 Cal. 259; 13 Pac. 687; Bank of Sonoma County v. Charles, 86 Cal. 322; 24 Pac. 1019.

Sale under decree of foreclosure. This section relates to sales under executions, in cases where there have been no contracts between the parties as to the manner of the sale; hence, where there is an express provision in the mortgage, that, in case a foreclosure shall be necessary, the land shall be sold in a certain manner, and the court, in its decree, followed that provision, there is no error. Bank of Sonoma County v. Charles, 86 Cal. 322; 24 Pac. 1019. The last sentence of this section is applicable to sales under a decree of foreclosure, only where the decree is silent as to the manner or order in which the separate parcels shall be sold. Marston v. White, 91 Cal. 37; 27 Pac. 588; Estudillo v. Security Loan etc. Co., 149 Cal. 556; 87 Pac. 19; and see Ontario Land etc. Co. v. Bedford, 90 Cal. 181; 27 Pac. 39. The parties to a mortgage or a deed of trust may contract that the premises shall be sold as a whole; and such agreement is enforceable. Humboldt Sav. Bank v. McCleverty, 161 Cal. 285; 119 Pac. 82; Bank of Sonoma County v. Charles, 86 Cal. 322; 24 Pac. 1019. Where a mortgage contains an express stipulation for the sale of the premises in one large parcel, and in several other smaller parcels, the decree of foreclosure may direct the sale to be made accordingly. Bank of Sonoma County v. Charles, 86 Cal. 322; 24 Pac. 1019. Where the trustees in a deed of trust have a discretion to sell as a whole or in parcels, they are bound to exercise it in good faith for the best interests of their beneficiaries, who include not only the creditor, but the debtor and his successors in interest. Humboldt Sav. Bank v. McCleverty, 161 Cal. 285; 119 Pac. 82.

Postponement of sale. A commissioner, appointed by the court to sell property in a foreclosure proceeding, is not guilty of an abuse of discretion in refusing to postpone the sale, where no reason appears why the sale should have been postponed. Connick v. Hill, 127 Cal. 162; 59 Pac. 832.

Injunction against sale. The owner in possession of land is entitled to enjoin a threatened sale thereof under the defendant's execution, where such sale would be sufficient to cast a doubt as to the validity of the plaintiff's title and to cast a cloud upon it, although the sale would be ineffectual to pass title to a purchaser. Porter v. Pico, 55 Cal. 165; and see Pixley v. Huggins, 15 Cal. 127; Fulton v. Hanlow, 20 Cal. 450; Marriner v. Swift, 27 Cal. 649; Ramsdell v. Fuller, 28 Cal. 37; 87 Am. Dec. 103; Thompson v. Lynch, 29 Cal. 189. An injunction will issue to restrain the sale of property levied on execution, on the ground that the sale, and the sheriff's deed in pursuance of it, will cast a cloud on the plaintiff's title, where the sale was threatened on a judgment for a deficiency. Simpson v. Castle, 52 Cal. 644.

Duty and liability of sheriff. The sheriff has no right to sell at private sale, or to authorize any one else to do so. Sheehy v. Graves, 58 Cal. 449. He is bound to follow the directions of the judgment debtor as to the order in which the property shall be sold. Vigoureux v. Murphy, 54 Cal. 346. Where there are several executions in the hands of the officer at the same time, under which the lands are sold, the proceeds must be applied first to the satisfaction of the oldest existing judgment lien. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256. Where the sale was set aside, the sheriff can be liable only for his failure to retake the property after the sale was so set aside; and whether he was liable for such failure involves questions of fact, the verdict of the jury upon which will not be disturbed, where there is a conflict in the evidence. Orton v. Brown, 113 Cal. 561; 45 Pac. 835. Where the plaintiff's property, exempt from execution, is seized and sold by the sheriff, and is repurchased by the plaintiff from the purchaser at the sheriff's sale, the measure of damages is the amount paid to repurchase the property. Blewett v. Miller, 131 Cal. 149; 63 Pac. 157. The legal presumption is, that the officer discharged the duty required of him according to law, and that the levy was made in compliance with the directions of the writ. Porter v. Pico, 55 Cal. 165.

Sheriff's deed. The execution upon the judgment is a sufficient authority to the

sheriff to sell the real property in his possession, and the deed which he makes relates back to the date of the lien perpetuated by the judgment. Porter v. Pico, 55 Cal. 165.

Validity of execution sales. The rule is, to consider every sale as final, where made by an officer of the court, under the mandate thereof. Connick v. Hill, 127 Cal. 162; 59 Pac. 832; and see Hopkins v. Wiard, 72 Cal. 259; 13 Pac. 687. The rule of caveat emptor applies to sales under execution (Meherin v. Saunders, 131 Cal. 681; 54 L. R. A. 272; 63 Pac. 1084); but the rule has never been carried to the extent that such sales could not be impeached on the ground of fraud or misrepresentation. Webster v. Haworth, 8 Cal. 21; 68 Am. Dec. 287. An execution sale on foreclosure is not void, unless conducted in a manner prohibited by statute, or by the terms of the decree: a sale en masse is not necessarily void, nor even irregular. Bechtel v. Wier, 152 Cal. 443; 15 L. R. A. (N. S.) 549; 93 Pac. 75. The purchaser at a sale on execution under a void judgment finds himself without title. Sullivan v. Mier, 67 Cal. 264; 7 Pac. 691; and see Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. Inadequacy of price is not a ground for setting aside a sale, particularly under our practice, where the judgment debtor is allowed to redeem (Connick v. Hill, 127 Cal. 162; 58 Pac. 832; Anglo-Californian Bank v. Cerf, 142 Cal. 303; 75 Pac. 902); but it is a fact which, in connection with other circumstances, may establish fraud in the officer making the sale. Smith v. Randall, 6 Cal. 47; 65 Am. Dec. 475. Where the plaintiff in the execution is the purchaser, the court will set aside the sale, upon motion, before he conveys to another; but after he conveys to a third person, and when the third person becomes a purchaser, the court will not determine, in this summary way, questions which may affect the rights of others, not before the court, and without the opportunity of explaining away those circumstances which might destroy his title. Bryan v. Berry, 8 Cal. 130; and see San Francisco v. Pixley, 21 Cal. 56. The burden is upon the party seeking to set aside the sale, to show such an irregularity or material departure from the statute as will justify such course. Connick v. Hill, 127 Cal. 162; 59 Pac. 832; Anglo-Californian Bank v. Cerf, 142 Cal. 303; 75 Pac. 902. The sale certainly cannot be disturbed, where the court found, upon conflicting evidence, that the full value of the property sold was less than the total purchase price. Connick v. Hill, 127 Cal. 162; 59 Pac. 832.

Redemption. The sale of personal property upon execution is not subject to confirmation by the court, nor has the execution defendant any right of redemption; such sale is completed by the payment of the sum bid, and the purchaser is then entitled to the immediate possession of the property. Orton v. Brown, 113 Cal. 561; 45 Pac. 835. Any redemption from the sale must be of the land sold, and according to parcels in which it was sold. Hibernia Sav. & L. Soc. v. Behnke, 121 Cal. 339; 53 Pac. 812.

Appeal. Where the sale is directed for the purpose of satisfying any lien other than a mortgage lien, the undertaking on appeal need not provide for the payment of any deficiency which the judgment may direct; to this extent, the statute discriminates in favor of the mortgage lien, and against all other liens. Englund v. Lewis, 25 Cal. 337.

Sale of more land than is necessary. See note 13 Am. Dec. 212.

Validity of sale en masse when judgment defendant owns an undivided interest in the land. See note 23 Am. St. Rep. 651.

Judicial or sheriff's sale en masse. See notes 8 Ann. Cas. 741; Ann. Cas. 1913B, 609.

Persons incapacitated from purchasing. See note 136 Am. St. Rep. 789.

Right of tenant in common to buy common property at judicial sale or sale under power in trust deed. See note 17 Ann. Cas. 1169.

Validity of sale under satisfied judgment. See note 137 Am. St. Rep. 1091.

CODE COMMISSIONERS' NOTE. 1. This section is merely directory, so far as it deals with the manner in which the officer is required to execute the writ. Blood v. Light, 38 Cal. 654; 99 Am. Dec. 441, and cases cited.

2. **Neither the officer nor his deputy can become a purchaser.** Jenkins v. Frink, 30 Cal. 591; 89 Am. Dec. 134.

3. **Right of pledgee to buy at sheriff's sale.** Wright v. Ross, 36 Cal. 415.

4. **Title of purchaser does not depend upon the return of the sheriff.** Blood v. Light, 38 Cal. 653; 99 Am. Dec. 441; Low v. Adams, 6 Cal. 281; Egery v. Buchanan, 5 Cal. 56.

5. **Execution sale, when set aside.** If property was sold to the judgment creditor, on execution, for the full amount of the judgment, and afterwards judgment was reduced in amount, on an appeal to the supreme court it was held, that, though the sale was valid when made, yet, upon modification of the judgment, the sale was liable to be set aside, on application of the owners, either by the supreme court, or the court below on return of the case, or by action against the purchasers by owners. But, unless some of these steps are pursued, the sale remains unaffected by the modification of judgment. Johnson v. Lamping, 34 Cal. 293.

6. **Execution sales. When valid, when void.** Sales to persons buying in good faith, under voidable executions, are valid, though the execution be afterwards set aside; but sales under void executions are invalid. See Hunt v. Loucks, 38 Cal. 373; 99 Am. Dec. 404.

7. **Sale where judgment is void.** Moore v. Martin, 38 Cal. 437. A sale under a void judgment does not pass title; but otherwise, if the judgment was only voidable. Gray v. Hawes, 8 Cal. 563.

8. **Land sold in gross.** Where the land consisted of separate but adjoining tracts, and debtor did not direct sale by separate parcels, and the purchaser and the sheriff were ignorant of the subdivisions, the sale in gross was held valid. Smith v. Randall, 6 Cal. 47; 65 Am. Dec. 475. Land should be sold in separate parcels. See Raun v. Reynolds, 11 Cal. 15. A sale in gross, under a writ of execution, of real estate, consisting of several known and distinct parcels, at a price greatly below the actual value of the property, cannot be sustained against the objec-

tion of the judgment debtor. Although not absolutely void, it is voidable, and will be set aside, upon reasonable and proper application, when there is reasonable ground for belief that it is less beneficial to the creditor or debtor than it would have been had a different mode been pursued. San Francisco v. Pixley, 21 Cal. 57.

9. Generally. McKenzie v. Dickinson, 43 Cal. 119.

§ 695. If purchaser refuses to pay purchase-money, what proceedings. If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction.

Legislation § 695. 1. Enacted March 11, **1872**; based on Practice Act, § 224, which, after the words "with costs," read: "by motion, upon previous notice of five days before any court, or before any justice of the peace, if the same shall not exceed his jurisdiction." When enacted in 1872, in last line, the word "shall" was changed to "does."

2. Amended by Code Amdts. **1873–74**, p. 323.

Misrepresentations excuse payment. Where a party purchases real estate at an execution sale, upon the faith of the representations of the judgment creditor that his judgment is the first upon the property, when in fact there are prior encumbrances on it for more than its value, he is entitled to relief, and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations, whether made ignorantly or willfully. Webster v. Haworth, 8 Cal. 21; 68 Am. Dec. 287.

Actions against bidders. The tender of a certificate of sale is not required as the basis of an action to recover the purchase-money. Harvey v. Fisk, 9 Cal. 93; People v. Hays, 5 Cal. 66; Williams v. Smith, 6 Cal. 91. In an action against a defaulting bidder, the complaint need not necessarily use the precise language of the statute: an averment of the amount of the bid and a resale at a specified smaller amount is sufficient. Johns v. Trick, 22 Cal. 511. A purchaser at an execution sale, who pays part in cash and part by check, and who afterwards procures the check from the officer and destroys it, is subject to a suit by the judgment debtor for the amount thereof, although the latter did not know of the check being received by the officer, since the judgment debtor may be treated as the equitable assignee of the rights of the officer. Meherin v. Saunders, 131 Cal. 681; 54 L. R. A. 272; 63 Pac. 1084. The question whether the purchaser at an execution sale paid his bid is to be decided upon the evidence, apart from the return of sale, where he is not a party to the action in which the execution issued, and is neither bound by the return nor protected by it. Meherin v. Saunders, 131 Cal. 681; 54 L. R. A. 272; 63 Pac. 1084.

CODE COMMISSIONERS' NOTE. The buyer at the sale must pay the whole amount down in cash, or he acquires no right whatever against the sheriff for property sold. People v. Hays, 5 Cal. 66; Williams v. Smith, 6 Cal. 91. If a party purchased real estate at a sheriff's sale, on the representation of a judgment creditor that his judgment was the first on the property, when, in fact, there were prior judgments, the purchaser should be relieved, and the judgment creditor estopped from claiming an advantage resulting from his own misrepresentations. Caveat emptor applies to judicial sales, but it has many limitations and exceptions. Webster v. Haworth, 8 Cal. 21; 68 Am. Dec. 287. In an action against a purchaser at sheriff's sale for not paying the amount of his bid, it is no defense that a sufficient notice of the sale was not given. If such be the fact, the purchaser has a remedy against the sheriff. Harvey v. Fisk, 9 Cal. 93. In an action to compel payment by delinquent purchaser at judicial sale, the statement of the sheriff, upon which the motion is based, need not state, in terms, "that loss was occasioned" by failure to pay the amount bid. An averment of the amount bid, and a resale at a specified smaller sum, is sufficient. Johns v. Trick, 22 Cal. 511. Caveat emptor—its application. See Boggs v. Fowler, 16 Cal. 560; 76 Am. Dec. 561.

§ 696. Officer may refuse such purchaser's subsequent bid. When a purchaser refuses to pay, the officer may, in his discretion, thereafter reject any subsequent bid of such person.

Legislation § 696. 1. Enacted March 11, **1872**; based on Practice Act, § 225, which read: "Such court or justice shall proceed in a summary manner and give judgment, and issue execution therefor forthwith, but the defendant may claim a jury. And the same proceedings may be had against any subsequent purchaser who shall refuse to pay, and the officer may, in his discretion, thereafter reject the bid of any person so refusing." When § 696 was enacted in 1872, (1) the words "or justice shall" were changed to "of justice must," and (2) the words "shall refuse" were changed to "refuses."

2. Amended by Code Amdts. **1873–74**, p. 323.

CODE COMMISSIONERS' NOTE. Askew v. Ebberts, 22 Cal. 264; Johns v. Trick, 22 Cal. 511.

§ 697. These two sections not to make officer liable beyond a certain amount. The two preceding sections must not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

Legislation § 697. Enacted March 11, 1872; based on Practice Act, § 226, which had the word "shall" instead of "must."

§ 698. Personal property not capable of manual delivery, how delivered to purchaser. When a purchaser of any personal property capable of manual delivery pays the purchase-money, the officer making the sale must deliver to the purchaser the property, and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

Certificate of sale. See post, § 699.

Legislation § 698. Enacted March 11, 1872 (based on Practice Act, § 227), (1) changing "shall pay" to "pays"; (2) changing "shall" to "must," before "deliver"; (3) omitting "shall" before "execute"; (4) omitting "and payment" after "sale," at end of first sentence; (5) changing "shall convey" to "conveys"; (6) omitting "title, and interest," after "right"; (7) omitting "and to" before "such property"; and (8) adding "or attachment," in last line.

Sale by court commissioner. The commissioner appointed to sell personal property upon the foreclosure of a chattel mortgage is simply a substitute for the sheriff, and he must make the sale in like manner as the sheriff would be required to do; and property capable of manual delivery must be taken into possession and delivered to the purchaser upon the sale. Pacific Investment Co. v. Ross, 131 Cal. 8; 63 Pac. 67.

Rights of purchaser who is execution creditor. Where the purchaser at an execution sale is the execution creditor, the rule that the sale under execution conveys to the purchaser all the right which the debtor has in the property on the day the execution is levied does not apply. Matteucci v. Whelan, 123 Cal. 312; 69 Am. St. Rep. 60; 55 Pac. 990.

CODE COMMISSIONERS' NOTE. See Wellington v. Sedgwick, 12 Cal. 469.

§ 699. Personal property not capable of manual delivery, how sold and delivered. When the purchaser of any personal property not capable of manual delivery pays the purchase-money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

Attachment. Personalty not capable of manual delivery. Ante, § 542.

Legislation § 699. Enacted March 11, 1872 (based on Practice Act, § 228), (1) changing "shall pay" to "pays"; (2) changing "shall" to "must" before "execute"; (3) omitting "and payment" after "certificate of sale"; (4) changing "shall convey" to "conveys"; (5) omitting "title and interest" after "right"; (6) omitting "and to" after "had in"; (7) adding "or attachment" in last line.

Buyer takes as innocent purchaser for value. An execution sale is simply a transfer of the debtor's title to the purchaser; and if the buyer, by reason of his ignorance of a prior assignment, takes a superior title, this favorable situation comes from the fact that he is an innocent purchaser for value, and not from the fact that he buys at execution sale. Widenmann v. Weniger, 164 Cal. 667; 130 Pac. 421.

Contracts. Contingent and complicated contracts cannot be levied upon and sold under execution without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all of its conditions and covenants, and a full explanation of the facts determining the value of the thing, be given by the levy and announced at the sale. Crandall v. Blen, 13 Cal. 15.

Unregistered stock. A transfer of unregistered stock is valid as against a mere levy of attachment or execution, by a creditor, against the person in whose name it stands upon the books. National Bank v. Western Pacific Ry. Co., 157 Cal. 573; 27 L. R. A. (N. S.) 987; 21 Ann. Cas. 1391; 108 Pac. 676.

CODE COMMISSIONERS' NOTE. The purchaser of a judgment on sale under execution and levy takes as assignee only. The judicial sale of a judgment passes no title, other than would pass by an assignment by the owner. Fore v. Manlove, 18 Cal. 436. The word "officer," in the two preceding sections, means the incumbent at the time of the act of sale; and if he be dead, his successor cannot perform the duty. People v. Boring, 8 Cal. 406; 68 Am. Dec. 331. A sheriff's bill of sale of personal property sold on execution need not contain all the formalities of a regular certificate. When a sheriff, without authority, sells personal property on an execution, if the judgment debtor was present, and assented to the sale, the purchaser will acquire a good title against the judgment debtor. Lay v. Neville, 25 Cal. 551; Woods v. Bugbey, 29 Cal. 469; generally, see Davis v. Mitchell, 34 Cal. 87, commented on in note to § 691, ante; see also Sargent v. Sturm, 23 Cal. 359; 83 Am. Dec. 118.

§ 700. Sale of real property. What purchaser is substituted to and acquires. Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto on the date of the levy of the execution thereon, where such judgment is not a lien upon such property; if the judgment is a lien upon the real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor on or at any time after the day such judgment became a lien on such property; and in case property, real or personal, has been attached in the action, the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor on or at any time after the day the attachment was levied upon such property.

Specified kind of money. Ante, § 682, subd. 4, § 692.

Certificate, recording. Pol. Code, § 4133.

Sheriff's deed, and what passes by it. Post, § 703.

Injunction to restrain person in possession from waste. Post, § 745.

Recovery of damages for waste. Post, § 746.

Writ of assistance. Post, § 1210.

Legislation § 700. 1. Enacted March 11, **1872**; based on Practice Act, § 229, as amended by Stats. 1863, p. 689, which read: "Upon a sale of real property, the purchaser shall be substituted to and acquire all the right, title, interest, and claim, of the judgment debtor thereto; and when the estate is less than a leasehold of two years[']] unexpired term, the sale shall be absolute. In all other cases, the property shall be subject to redemption, as provided in this chapter. The officer shall give to the purchaser a certificate of sale containing: First. A particular description of the real property sold. Second. The price bid for each distinct lot or parcel. Third. The whole price paid. Fourth. When subject to redemption, it shall be so stated. And when the judgment, under which the sale has been made, is made payable in a specified kind of money or currency, the certificate shall also state the kind of money or currency in which such redemption may be made, which shall be the same as that specified in the judgment. A duplicate of such certificate shall be filed by the officer in the office of the recorder of the county." When § 700 was enacted in 1872, (1) in first line, "shall be" was changed to "is"; (2) "acquire" was changed to "acquires"; (3) the words "shall be" were changed to "is" before "absolute" and before "subject"; (4) in the rest of the section "shall" was changed to "must," in all instances; (5) a new paragraph was made, beginning with the words "And when"; and (6) in the new paragraph the word "state" was changed to "show."

2. Amendment by Stats. **1901**, p. 156; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 684; the code commissioner saying, "The present § 700 of the Code of Civil Procedure is split into two sections, § 700 and § 700a. All of § 700 after the word 'thereto' is an addition thereto, and declares the effect of a sale of real property under execution, and that, when supported by a judgment lien or the levy of a writ, the title of the holder relates back to the date of such lien or levy. This simply codifies the present law on the subject under the decision of the supreme court. The part of the section omitted is made a new section to be numbered § 700a."

Construction of section. The corresponding section of the Practice Act was held sufficiently comprehensive to include within its design sales of real estate under decrees of foreclosure of mortgages. Kent v. Laffan, 2 Cal. 595. This section was intended to state the effect of a sale of any and all interests in real property, and to declare in what cases it should be subject to redemption; it applies alike to sales made to enforce the lien of the judgment, and to sales of chattels real to enforce liens created by the levy of an execution; and its language cannot be considered as a legislative construction of the words "real property," so as to fix the meaning of these words as used in § 671, ante, providing for judgment liens. Summerville v. Stockton Milling Co., 142 Cal. 529; 76 Pac. 243.

Effect of sheriff's deed. A sheriff's deed, in pursuance of an execution sale under a decree of foreclosure, conveys to the purchaser all the right, title, and interest of the judgment debtor in the property sold, and such title relates to the date of the mortgage. Freelon v. Adrian, 161 Cal. 13; 118 Pac. 220. The sheriff's deed does not transfer any after-acquired interest in the land; and the judgment debtor is not estopped from showing, in an ejectment suit against him, that, subsequently to the execution sale, he acquired a different title from that which was sold under the judgment. Emerson v. Sansome, 41 Cal. 552; Robinson v. Thornton, 102 Cal. 675; 34 Pac. 120. The transfer is not perfect until the execution and delivery of the sheriff's deed; but, by the doctrine of relation, the deed, when thus executed, is to be deemed and taken as though executed at the date when the lien originated. Foorman v. Wallace, 75 Cal. 552; 17 Pac. 680. The execution of the deed gives to the purchaser at the sheriff's sale no new title to the land purchased by him, but is merely evidence that his title has become absolute; upon the sale he acquires all the right, title, interest, and claim of the judgment debtor thereto, subject to be defeated by a redemption within the statutory period, and to the right of the judgment debtor to remain in the possession of the land until the execution of the sheriff's deed, and all that remains in the judgment debtor is the right to redemption, and to retain possession of the land until the expiration of the time therefor.

Robinson v. Thornton, 102 Cal. 675; 34 Pac. 120; Duff v. Randall, 116 Cal. 226; 58 Am. St. Rep. 158; 48 Pac. 66; Pollard v. Harlow, 138 Cal. 390; 71 Pac. 454.

Redemption. The right to redeem exists only by virtue of the statute. Eldridge v. Wright, 55 Cal. 531. A prior redemptioner, who has effected a valid redemption, succeeds to the rights of the purchaser at the execution sale, as the owner of an equitable estate in the lands, which, though conditional, may become absolute by mere lapse of time, to which rights are added those of a redemptioner; and he has such an estate in the land as entitles him to protection against an assumed junior redemption under a void judgment. Bennett v. Wilson, 122 Cal. 509; 68 Am. St. Rep. 61; 55 Pac. 390.

Vacating sale. An execution sale cannot be set aside on motion made fifteen months after the sale, and after the moving party had lost his right of redemption from the sale under a lien adjudged to be prior to his own; nor can a motion be entertained, where the moving party has himself, by execution sales, satisfied the judgments under which he claims the right to make the motion. Bonney v. Tilley, 123 Cal. 126; 55 Pac. 801.

Evidence in ejectment. In an action of ejectment to recover lands purchased at a sale under an execution issued upon a judgment against the defendant, the production of the judgment, execution, and sheriff's deed is, as against the judgment debtor, prima facie evidence of the plaintiff's right to recover; but if the action is against a stranger to the judgment, the plaintiff must also show that the judgment debtor had the title to or the possession of the land at the time of a judgment or attachment lien thereon, or of the sale; and this prior possession will then be prima facie evidence of a right to recover in ejectment, as against the mere possession of the defendant, which will be deemed to have been taken subsequently to the sale. Robinson v. Thornton, 102 Cal. 675; 34 Pac. 120.

Title acquired by execution purchaser. A purchaser of real property at an execution sale acquires the legal title thereto, which can only be divested by a valid redemption. Youd v. German Sav. & L. Soc., 3 Cal. App. 706; 86 Pac. 991. The language of this section, that, "Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto," saying unequivocally that he acquires the legal as well as the equitable title, was subject, as the section read prior to its amendment in 1907, to only three qualifications: 1. That, when not a leasehold of less than two years' unexpired term, the property should be subject to redemption; 2. That a deed should be subsequently given (post, § 703); and 3. That, pending the time for redemption, the possession should remain with the defendant (post, § 706); but no one of these qualifications is inconsistent with vesting title in the owner. Pollard v. Harlow, 138 Cal. 390; 71 Pac. 454; and see Robinson v. Thornton, 102 Cal. 680; 34 Pac. 120. The purchaser of real property at execution sale, whether his title is legal or equitable, is a "successor in interest" of the judgment debtor. Pollard v. Harlow, 138 Cal. 390; 71 Pac. 454. The sale of real property upon execution is conditional, and may be defeated by the payment of a certain sum by certain designated parties within a certain limited time; and if not paid within the time, the right to a conveyance becomes absolute, without any further sale, or other act to be performed by anybody. Page v. Rogers, 31 Cal. 293; Robinson v. Thornton, 102 Cal. 675; 34 Pac. 120; Duff v. Randall, 116 Cal. 226; 58 Am. St. Rep. 158; 48 Pac. 66; Breedlove v. Norwich etc. Fire Ins. Co., 124 Cal. 164; 56 Pac. 770; Reynolds v. London etc. Fire Ins. Co., 128 Cal. 16; 79 Am. St. Rep. 17; 60 Pac. 467. The purchaser at a sale under the judgment rendered in the foreclosure suit acquires the same interest in the property sold as does the purchaser of property sold under an ordinary money judgment; and only the right to redeem from this sale is left in the mortgagor. Duff v. Randall, 116 Cal. 226; 58 Am. St. Rep. 158; 48 Pac. 66; and see Reynolds v. London etc. Fire Ins. Co., 128 Cal. 16; 79 Am. St. Rep. 17; 60 Pac. 467; Robinson v. Thornton, 102 Cal. 675; 34 Pac. 120; Breedlove v. Norwich etc. Fire Ins. Co., 124 Cal. 164; 56 Pac. 770; Pollard v. Harlow, 138 Cal. 390; 71 Pac. 454. The interest of the purchaser at an execution sale may be seized and sold before the expiration of the time for redemption; he has the same quality of estate before the time for redemption expires as he has afterwards; only, in the former case, the title has not become consummate, and is subject to be defeated by a redemption; he has an equitable estate in the land in both cases, and not merely a lien before the period for redemption expires. Page v. Rogers, 31 Cal. 293. The title acquired by a plaintiff at a sale upon his own judgment is affected by any defect in the proceedings by virtue of which the judgment is reversed. Purser v. Cady, 120 Cal. 214; 52 Pac. 489. The purchase of mortgaged premises by a mortgagee, under foreclosure proceedings, for the full amount of the judgment, extinguishes the debt, and he is no longer a creditor or mortgagee; hence, he has no further interest in an insurance policy taken by the mortgagor, in which his interest was only as security for his debt; and an insurance company paying the insurance loss to the mort-

gagor, during the period of redemption, is not liable to the mortgagee. Reynolds v. London etc. Fire Ins. Co., 128 Cal. 16; 79 Am. St. Rep. 17; 60 Pac. 467.

Effect of order of sale. The function of the order of sale to enforce a judgment is equally efficacious to accomplish that object, whether the judgment gives a vendor's lien or a general lien prior to another. Tilley v. Bonney, 123 Cal. 118; 55 Pac. 798.

Statute of limitations. The rule that the statute of limitations does not begin to run against the judgment debtor, or one claiming under him, until the execution of the sheriff's deed, has no application to a stranger to the judgment, or to any title which is not received from the judgment debtor. Robinson v. Thornton, 102 Cal. 675; 34 Pac. 120.

When rule of caveat emptor applicable to execution sales. See note 14 Am. Dec. 131.

When execution sale passes interest of plaintiff as well as of defendant. See note 89 Am. Dec. 370.

Title acquired by creditor purchasing at sale. See note 79 Am. St. Rep. 947.

Nature of the title or estate of the holder of a sheriff's certificate before obtaining a deed. See note 15 L. R. A. 68.

Title acquired by purchaser. See note 21 L. R. A. 45.

Whether crops pass by execution sale of land. See note 19 Am. Dec. 752.

Rule of caveat emptor as precluding defenses by bidder at sheriff's sale. See note 18 Ann. Cas. 501.

CODE COMMISSIONERS' NOTE. 1. Generally. The decisions as to the estate of the judgment debtor after sale become authorities for determining the estate of the mortgagor after sale under the decree; and from them it will be found that the estate must remain in the mortgagor until a consummation of the sale by conveyance, as it does in the judgment debtor; and that the conveyance, when executed, will take effect, in the one case, from the date of the mortgage, as it does in the other from the time the lien of the judgment attached. McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655. This section comprehends sales of real estate under decrees of foreclosure of mortgage. A subsequent judgment creditor having lien has right to redeem real estate sold by foreclosure of previous mortgage. Kent v. Laffan, 2 Cal. 595. See, as to other general matters, People v. Hays, 4 Cal. 127; Duprey v. Moran, 4 Cal. 196.

2. Sheriff's certificate of sale. Purchaser receiving certificate has not a title to property, but a lien on the same. Assignment of certificate as security. See Baber v. McLellan, 30 Cal. 137; People v. Mayhew, 26 Cal. 655. When officer making sale dies, who makes out certificate, etc. See People v. Boring, 8 Cal. 406; 68 Am. Dec. 331.

3. Particular description of real property sold. Description of city lots by numbers, referring to official city map, held sufficient. Welch v. Sullivan, 8 Cal. 165.

4. What property may be redeemed. See, for general matters, Seale v. Mitchell, 5 Cal. 401; McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655; Montgomery v. Tutt, 11 Cal. 307; Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515; Whitney v. Higgins, 10 Cal. 554; 70 Am. Dec. 748; McDermott v. Burke, 16 Cal. 580; Frink v. Murphy, 21 Cal. 108; 81 Am. Dec. 149; Dutton v. Warschaner, 21 Cal. 609; 82 Am. Dec. 765; Stout v. Macy, 22 Cal. 649; Grattan v. Wiggins, 23 Cal. 16; Moore v. Martin, 38 Cal. 428; Carpentier v. Brenham, 40 Cal. 221. See note to next section.

5. What title acquired at sheriff's sale. An assignee of a sheriff's certificate of sale, as security against his liability for debts of the judgment debtor, with an agreement that he will cancel the same when the debts are paid and his liability is discharged, ceases to have any interest in the certificate when the debts are paid, and if he afterwards obtains a sheriff's deed, he does not acquire any title to the land. Baber v. McLellan, 30 Cal. 135. Where a duplicate of a sheriff's certificate of sale has been deposited by the sheriff with the recorder of the proper county, indorsed "Filed" by the latter officer, recorded as a deed in a book of records of deeds, and regularly indexed as a deed, and afterwards placed in a file of recorded deeds, but not with a file of certificates of sales, where it remained in said recorder's office till the time of the trial of the case, some ten years afterwards, it imparted notice to subsequent purchasers by the instrument thus deposited and preserved. Page v. Rogers, 31 Cal. 293. During the period which elapses between the sale of land on execution and the expiration of the time for redemption, the statute regards the purchaser as the equitable owner of the land, subject only to the right of redemption, and gives him the rents, profits, etc., in short, the entire beneficial interest in the property, except the actual possession. Page v. Rogers, 31 Cal. 293. If a plaintiff, in an action for foreclosure, purchases the property at sheriff's sale, he is deemed to buy with full knowledge of all defects in the proceedings relating to service of the summons. Steinbach v. Leese, 27 Cal. 297. Until the sheriff has given a deed of real property sold upon execution, the estate remains in the judgment debtor. Until then, the purchaser possesses only a right to an estate which may afterwards be perfected by conveyance. Cummings v. Coe, 10 Cal. 529. The title of a purchaser of real estate at sheriff's sale is not affected by the return of the officer. Cloud v. El Dorado County, 12 Cal. 128; 73 Am. Dec. 526; Clark v. Lockwood, 21 Cal. 220; Moore v. Martin, 38 Cal. 438; Blood v. Light, 38 Cal. 654; 99 Am. Dec. 441. Purchaser's title to property bought at sheriff's sale, discussed in Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441, and cases there cited; see also Kenyon v. Quinn, 41 Cal. 325. Tenant liable to purchaser for rent during period of redemption. Webster v. Cook, 38 Cal. 423; Harris v. Reynolds, 13 Cal. 516; 73 Am. Dec. 600; Henry v. Everts, 30 Cal. 425; Page v. Rogers, 31 Cal. 294. See also, further, as to what title is acquired at sheriff's sale, note to § 701, post.

§ 700a. When sales are absolute. What certificate must show. Sales of personal property, and of real property, when the estate therein is less than a leasehold of two years' unexpired term, are absolute. In all other cases the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale, and file a duplicate thereof for record in the office of the county recorder of the county, which certificate must state the date of the judgment under which the sale was made and the names of the parties thereto, and contain:

1. A particular description of the real property sold;

2. The price bid for each distinct lot or parcel;

3. The whole price paid;

4. If the property is subject to redemption, the certificate must so declare, and if the redemption can be effected only in a particular kind of money or currency, that fact must be stated.

Legislation § 700a. **1.** Addition by Stats. **1901**, p. 156; unconstitutional. See note ante, § 5.

2. Re-enactment of code commissioners' unconstitutional addition, by Stats. **1907**, p. 684; the code commissioner saying, "The only thing in this section is the requirement that the certificate of search shall include a statement of the date of the judgment and of the names of the parties thereto; the remainder of the change simply consists in recasting into more concise form what is clumsily expressed in the original section"; q.v., ante, Legislation § 700.

This section is an amendment of part of § 700, ante, as that section read prior to its amendment in 1907. See Legislation § 700, and note to that section; see also supra, Legislation § 700a.

Leasehold estates. The effect of the clause concerning leasehold interests, with respect to its bearing on the meaning of the words "real property," was merely to show, for the purposes of the section, that those words were used in a sense broader than their common-law meaning, and included chattels real as well as freehold estates; without that clause, the section could apply only to estates of inheritance and estates for life, or, by the common-law classification, freehold estates. Summerville v. Stockton Milling Co., 142 Cal. 529; 76 Pac. 243.

Certificate of sale. The certificate of sale, signed by the sheriff, is evidence of the sale, whereby the entire equitable title is conditionally vested in the purchaser, subject to be defeated by a redemption; but if not so redeemed, the certificate is evidence of the purchaser's right to a deed which shall vest in him the dry legal title which remained in the judgment debtor. Foorman v. Wallace, 75 Cal. 552; 17 Pac. 680. The sheriff's certificate to the purchaser is the evidence of the equitable interest which the purchaser has in the land, and is an instrument whereby an interest or title is created, within the meaning of § 1107 of the Civil Code. Foorman v. Wallace, 75 Cal. 552; 17 Pac. 680. The filing of a duplicate certificate of sale, in the mode prescribed by the statute, imparts constructive notice of the estate acquired under it, to subsequent purchasers. Page v. Rogers, 31 Cal. 293. This section does not require that the certificate issued by the sheriff shall be recorded, but simply that it be filed. Bristol v. Hershey, 7 Cal. App. 738; 95 Pac. 1040. The assignee of a certificate of sale, made under execution, may redeem from a sale made under the foreclosure of a prior mortgage executed by the judgment debtor. Pollard v. Harlow, 138 Cal. 390; 71 Pac. 454. The certificate of redemption need not state the capacity in which the redemption was made. Pollard v. Harlow, 138 Cal. 390; 71 Pac. 454.

§ 701. Real property so sold, by whom it may be redeemed. Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.

Redemption, mode of. Post, §§ 702 et seq.
Judgment creditor, redemption by. Post, § 1505.
Parties entitled to redeem. Ante, §§ 346, 347.

Legislation § 701. Enacted March 11, **1872**; re-enactment of Practice Act, § 230.

Construction of section. The inference, when redemption is effected under the provisions of this section and § 700, ante, is, that it is made of the whole property sold, and this inference is sustained by the provisions of §§ 702, 703, post. Eldridge v. Wright, 55 Cal. 531. The provision in § 1505, post, that a judgment creditor, who has a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution in like manner and with like effect as if the judgment debtor were still living, when read in connection with the definition of a redemptioner in the second subdivision of this section, is a recognition of the existence of the posthumous judgment lien; and the concurrent provisions of the general practice of the probate procedure leave no doubt of the intention of

the code not to extinguish the lien upon the death of the debtor. Morton v. Adams, 124 Cal. 229; 71 Am. St. Rep. 53; 56 Pac. 1038. The statutory right of redemption is equally applicable to sales under decrees in mortgage cases as to sales under ordinary judgments at law. McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655.

When judgment debtor may redeem. A defendant in execution can redeem from an execution sale, notwithstanding he has conveyed to another the property sold under the execution. Yoakum v. Bower, 51 Cal. 539. Where the plaintiff obtained a decree foreclosing a lien upon a block of land, ordering the whole block to be sold by the sheriff, and purchased the whole block at the sheriff's sale as the property of the defendant in the foreclosure suit, in satisfaction of his lien, and, after redemption attempted by a successor of the judgment debtor, seeks from the sheriff a deed of the whole block, by writ of mandate, he will not be heard to object to the redemption of the land on the ground that the defendant in the foreclosure suit never owned the whole block. Southern California Lumber Co. v. McDowell, 105 Cal. 99; 38 Pac. 627; and see Lorenzana v. Camarillo, 45 Cal. 125; Yoakum v. Bower, 51 Cal. 539; Eldridge v. Wright, 55 Cal. 531.

Successors in interest of the judgment debtor. Successors in interest stand in the place of judgment debtors; and when the statute uses the term "judgment debtors," as contradistinguished from "redemptioners," the words should be construed as broad enough to include successors in interest of judgment debtors. Phillips v. Hagart, 113 Cal. 552; 54 Am. St. Rep. 369; 45 Pac. 843. Whatever the nature of the purchaser's title at execution sale is, whether legal or equitable, he is a "successor in interest" of the judgment debtor, within the meaning of that term as used in this section. Pollard v. Harlow, 138 Cal. 390; 71 Pac. 454. The title of a plaintiff, which originated in the levy of a writ of attachment older than that claimed by the defendant, must prevail against a junior lien claimed by the defendant; and, as the successor in interest of the judgment debtor, the plaintiff is entitled to redeem the land conveyed to him upon execution sale, and the defendant, as a judgment creditor, has also the same right. Porter v. Pico, 55 Cal. 165. The filing, by a husband, of a declaration of homestead upon his separate property, vests the wife with an interest in the premises, of which she cannot be divested by any act of the husband alone, or by any action taken against him alone; and she has a right of redemption as his successor in interest. Watts v. Gallagher, 97 Cal. 47; 31 Pac. 626; and see Hefner v. Urton, 71 Cal. 479; 12 Pac. 486. The successors in interest of one or more of the judgment debtors, in some part of the property, may redeem the whole of the property from a foreclosure sale. Emerson v. Yosemite Gold Mining etc. Co., 149 Cal. 50; 85 Pac. 122. Successors in part can redeem, only by redeeming the whole. Eldridge v. Wright, 55 Cal. 531. During the time for redemption, the legal title is in the mortgagor, and the property may be conveyed by him, and the grantee becomes entitled to redeem, without paying to the mortgagee the unsatisfied portion of the judgment under which the property was sold to him, and the judgment for the deficiency is not a lien on the land. Simpson v. Castle, 52 Cal. 644. A successor in interest redeems in that capacity, where he presents his evidence of title to the commissioner, pays the money required, and receives the certificate of redemption. Pollard v. Harlow, 138 Cal. 390; 71 Pac. 454.

Redemption not fraudulent as to creditors of judgment debtor. The purchase, by an attorney, with his client's consent, of the client's property, sold under various executions, by procuring assignments to himself of the certificates of sale and deeds thereunder, in the absence of any showing that it was made for the benefit of the client, or was in fraud of his other creditors, must be presumed to have been fair and regular as between the attorney and the client, and not to have been, in effect, a redemption by the client, nor a fraud upon his creditors. Fisher v. McInerney, 137 Cal. 28; 92 Am. St. Rep. 68; 69 Pac. 622; and see dissenting opinion of Beatty, C. J.

Redemptioner, who is. The second subdivision of this section defines the class of persons who have a right to exercise the privilege of redemption; but it neither limits nor defines the extent of the right: the limitation of such extent is provided for elsewhere in the statute. Eldridge v. Wright, 55 Cal. 531. An action for slander of title is maintainable only by one who possesses an estate or interest in real or personal property; and to entitle the plaintiff to the status of a redemptioner in such action, it should be alleged in the complaint that he is a mortgagor, or judgment debtor, or the successor in interest of a judgment debtor, or a creditor having a lien by judgment or mortgage on the property sold. Edwards v. Burriss, 60 Cal. 157. A judgment creditor is not a redemptioner, where the judgment is not a lien on the land. Perkins v. Center, 35 Cal. 713; Bagley v. Ward, 27 Cal. 370. A deficiency judgment, which is not a lien upon the land, does not entitle the holder thereof to redeem. White v. Costigan, 6 Cal. Unrep. 641; 63 Pac. 1075. A judgment debtor is not a redemptioner, within the meaning of the second subdi-

vision of this section (Yoakum v. Bower, 51 Cal. 539); nor is his successor in interest. Phillips v. Hagart, 113 Cal. 552; 54 Am. St. Rep. 369; 45 Pac. 843.

Lien prior to that of redemptioner. A purchaser who, as member of a partnership, holds a prior lien on lands purchased at execution sale, is not a creditor having a lien prior to that of the redemptioner, within the meaning of the second subdivision of this section. Campbell v. Oaks, 68 Cal. 222; 9 Pac. 77. The interest or estate vested in a purchaser or redemptioner cannot be superseded by the lien of a void judgment, which would prejudice his pre-existing right. Bennett v. Wilson, 122 Cal. 509; 68 Am. St. Rep. 61; 55 Pac. 390.

Effect of redemption. The effect of a redemption of property sold subject to redemption depends upon the character of the person making the redemption: if made by a "redemptioner" as defined in the second subdivision of this section, and there is no further redemption within the statutory period, the redemptioner is entitled to a deed from the sheriff, conveying to him the interest of the judgment debtor therein; but if made by the judgment debtor, or his successor in interest, the effect of the sale is terminated, which fact is made to appear of record by a certificate of redemption, and a note thereof on the margin of the certificate of sale. Calkins v. Steinbach, 66 Cal. 117; 4 Pac. 1103. The reason for the distinction made between the judgment debtor and a redemptioner is, that, if the latter were permitted to redeem without paying the prior lien held by the purchaser, the title would pass to the redemptioner, and the lien of the purchaser would be defeated; but if the judgment debtor redeem, he is restored to his estate, and the lien held by the purchaser will be available. Sharp v. Miller, 47 Cal. 82. A redemption of land by a tenant in common, after a sale under a foreclosure of a mortgage executed by all the co-tenants, puts an end to the sale, and restores the parties to their original title; and the tenant in common making such redemption acquires thereby an equitable lien upon the interests of his co-tenants in the land, for their just proportion of the money paid by him in effecting the redemption; and a court of equity will enforce such lien, by decreeing that in default of payment the interests of the co-tenants be foreclosed. Calkins v. Steinbach, 66 Cal. 117; 4 Pac. 1103.

Who may redeem. See note 21 Am. St. Rep. 243.

Redemption from execution by one co-tenant. See note 95 Am. Dec. 766.

Right of tenant for years to redeem premises from mortgage. See note 4 Ann. Cas. 807.

Right of married woman to redeem mortgaged premises during life of husband. See notes 6 Ann. Cas. 475; 15 Ann. Cas. 315.

Right to redeem as incident of mortgage. See note Ann. Cas. 1912D, 959.

Whether a purchaser or mortgagee from the original owner after a sale under a prior mortgage and during the redemption period be a redemption. See note 29 L. R. A. (N. S.) 508.

Right of mortgagee who secures a deficiency decree to redeem from the sale. See note 35 L. R. A. (N. S.) 413.

CODE COMMISSIONERS' NOTE. A sale without any right of redemption is a valid and sufficient remedy for the enforcement of the contract, and an act denying a right of sale would probably be such a vital assault upon the obligation as practically to destroy it, and therefore be unconstitutional. But a repeal of a right of redemption—in other words, an act making a sale absolute instead of conditional—would not impair the contract. These regulations were mere provisions of sale, governing the course of the process and its effects. The contract of indebtedness is not touched by these provisions; it stands as it stood before, a valid obligation to pay money, with the sanctions furnished by law for its enforcement. The mere fact that the judgments of the plaintiff were recovered before the passage of the act of 1859, did not vest in the holders of them the right to redeem from a sale made after the passage of the act of 1859, upon any terms different from those prescribed by that act. If this right to redeem was an incident to the judgment, under the act of 1851, it was a portion of the remedy which might be taken away by the legislature at any time before the right had become vested by the party availing himself of it. Commenting on Whitney v. Higgins, 10 Cal. 554, 70 Am. Dec. 748, as to equitable right of redemption in favor of certain persons not made parties to a mortgage foreclosure. Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515. See also case of Moore v. Martin, 38 Cal. 439, sustaining the last-named case, and holding People v. Hays, 4 Cal. 127, to be overruled by Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515. Possession should not change to the purchaser until the expiration of the time limited for redemption. Guy v. Middleton, 5 Cal. 392; Stout v. Macy, 22 Cal. 647. The equitable right to redeem property sold under a decree of foreclosure held by subsequent encumbrancers is merged into a statutory right, not by any force given to the language of the decree, but by the fact that they have had their day in court, and an opportunity of setting up any equities they possessed. After the decree, they stand, as to their right of redemption, in the same position as ordinary judgment debtors. Montgomery v. Tutt, 11 Cal. 317. As to the right to redeem property sold on execution, the court say: "The statutory right, in some instances, exists where there is no equity, and in other instances, in connection with the equitable right. Parties to the suit in which the judgment is rendered, under which the sale is made, are restricted to the six months given by statute, for they have had their day in court, and their rights after decree depend entirely upon the statute. Parties acquiring interests pending suits to enforce previously existing liens, taking their interests in subordination to any decree which may be rendered, have no equity, and are confined to the rights given by the statute, and so, as a consequence, are those whose interests are acquired after judgment docketed or sale made; but parties obtaining interests subsequently to the plaintiff, and before suit brought, who are not made parties to such suit, possess both the equitable and the statutory right. They may redeem, under the statute, or they may file their bill in equity." Whitney v. Higgins, 10 Cal. 547; 70 Am. Dec. 748; see also Montgomery v. Tutt, 11 Cal. 317. The redemption should be beneficially construed. A subsequent judgment creditor, having a lien, may redeem real estate sold by foreclosure of a previous mortgage in the hands of the purchaser. Kent v. Laffan, 2 Cal. 595. On an execution sale, the buyer, before conveyance to him, has a right to redeem the property sold on the enforcement of a prior lien. After conveyance to him, he has the same right, as successor in interest to the debtor or mortgagor. McMillan v. Richards.

9 Cal. 365; 70 Am. Dec. 655. Courts of equity favor the right of redemption. Hickox v. Lowe, 10 Cal. 207. A person who has a right of redemption may have the price at which his interest was sold ascertained, in order that he may redeem. Raun v. Reynolds, 11 Cal. 20. A mortgagor may maintain an action to redeem the mortgage. Daubenspeck v. Platt, 22 Cal. 330. Redemption by tenant for years. See McDermott v. Burke, 16 Cal. 590. Who has a right of redemption. See Kirkham v. Dupont, 14 Cal. 563. When subsequent mortgagee could redeem premises from a sale under a judgment upon mechanics' liens. See Gamble v. Voll, 15 Cal. 510. A party who has no interest in mortgaged property when the action for foreclosure of the same was commenced, who buys pendente lite, and after notice of pendency of action has been filed, is not a necessary party to a foreclosure suit. See also, for other matters, Horn v. Jones, 28 Cal. 194; see Perkins v. Center, 35 Cal. 713. The right of a subsequent mortgagee, as against the purchaser at the foreclosure sale under the first mortgage, is a right to redeem. A suit of foreclosure, as against a younger mortgagee, is a suit to cut off the right of redemption. When, therefore, the younger mortgagee is not made a party, his right to redeem is unaffected by a decree of foreclosure and a sale under it. See, as to redemption generally, Carpentier v. Brenham, 40 Cal. 222; see also Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256; see also §§ 346, 347, ante.

§ 702. When it may be redeemed, and redemption-money. The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within twelve months after the sale on paying the purchaser the amount of his purchase, with one per cent per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount. And if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which said purchase was made, the amount of such lien with interest.

Legislation § 702. 1. Enacted March 11, **1872**; re-enactment of Practice Act, § 231, as amended by Stats. 1860, p. 302, which read: "The judgment debtor or redemptioner, may redeem the property from the purchaser within six months after the sale, on paying the purchaser the amount of his purchase, with twelve per cent thereon in addition, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase and interest on such amount; and if the purchaser be also a creditor having a prior lien to that of the redemptioner other than the judgment under which such purchase was made, the amount of such lien with interest."

2. Amended by Code Amdts. **1875–76**, p. 96, (1) adding "any time" before "within six months"; (2) changing "twelve per cent" to "two per cent per month"; (3) adding "up to the time of redemption" after "in addition"; and (4) omitting word "the" between words "after purchase."

3. Amended by Stats. **1895**, p. 225, changing "two" to "one" before "per cent."

4. Amended by Stats. **1897**, p. 41, (1) changing "six" to "twelve" before "months after the sale," and (2) changing the word "such" to "said" before "purchase was made."

Construction of section. Prior to the amendment of 1859, where real estate subject to a judgment lien was sold under execution on the judgment, to the judgment creditor, for a sum less than the whole amount of the judgment, he still continued to be a creditor having a lien for the unsatisfied portion of the judgment upon the property sold under the execution, and neither a judgment debtor, nor a redemptioner with a subsequent lien, could redeem without paying such judgment; but, by the amendment of 1860, the clause excusing the payment of the judgment for the deficiency, on redeeming, is equivalent to an explicit declaration, that, during the time for redemption, the unsatisfied portion of the judgment is not a lien on the land sold under the judgment. Simpson v. Castle, 52 Cal. 644.

What law governs. The amendment of this section in 1897, extending the time for redemption from sales under execution to one year, has no application to sales under the foreclosure of a mortgage executed prior to the enactment of such amendment. Savings Bank v. Barrett, 126 Cal. 413; 58 Pac. 914. The judgment debtor's right to redeem is governed by the law in effect when the contract was made and the judgment obtained, and not by the law in force under a subsequent amendment thereof. Welsh v. Cross, 146 Cal. 621; 106 Am. St. Rep. 63; 2 Ann. Cas. 796; 81 Pac. 229. The sale by the sheriff is regarded as a sale by the judgment debtor; and the purchaser is entitled to rely upon the statutory provisions for redemption existing at the time of the sale, to the same extent and in the same manner as if they were incorporated into a contract of sale executed by the debtor. Thresher v. Atchison, 117 Cal. 73; 59 Am. St. Rep. 159; 48 Pac. 1020; and see Blood v. Light, 38 Cal. 649; 99 Am. Dec. 441. The purchaser at a public sale, though protected against any future impairment of his rights by subsequent legislation, is wholly governed by the laws in force at the time of the sale, including the law of redemption therefrom, and of its incidents and rights then existing. Leet v. Armbruster, 143 Cal. 663; 77 Pac. 653. The amendment of this section in 1895, reducing the percentage to be paid upon a redemption, from two per cent to one per cent a month on the amount of the purchase, has no retrospective operation upon a sale made prior to its passage: the legislature, by the subsequent amendment, was powerless to diminish the amount which the purchaser should receive, in order to effect a redemption from the execution sale (Thresher v. Atchison, 117 Cal. 73; 59 Am. St. Rep. 159; 48 Pac.

1020); that amendment applies to sales made after its passage, and where the purchase at a foreclosure sale was made subsequently to the amendment, the fact that the mortgage under which the sale was made was executed prior to the amendment is immaterial; the rights of the mortgagor and the mortgagee are not adversely affected by the amendment, and it does not impair the obligation of the contract. Hooker v. Burr, 137 Cal. 603; 99 Am. St. Rep. 17; 70 Pac. 778.

Offer to redeem. An offer to redeem, which does not conform to the statute, is void. Youd v. German Sav. & L. Soc., 3 Cal. App. 706; 86 Pac. 991.

Time for redemption. The right of redemption, as to time, is expressly limited. Summers v. Hammell, 17 Cal. App. 493; 120 Pac. 63. The statutory right to redeem a homestead vests in the administrator or the surviving wife, or in both, upon the death of the husband, and is restricted to the time provided by statute. Collins v. Scott, 100 Cal. 446; 34 Pac. 1085. Prior to the amendment of this section in 1897, where the execution sale took place October 5, 1874, and the sheriff's deed was executed on April 5, 1875, the judgment debtor had the whole of the 5th of April in which to redeem, and a sheriff's deed executed before the expiration of that period was void. Perham v. Kuper, 61 Cal. 331; and see Gross v. Fowler, 21 Cal. 392; Bernal v. Gleim, 33 Cal. 668; Moore v. Martin, 38 Cal. 428; Hall v. Yoell, 45 Cal. 584. A court of equity may, upon a proper showing of fraud, mistake, etc., relieve a judgment debtor, whose property has been sold on execution, from a failure to redeem within the statutory period. Bunting v. Haskell, 152 Cal. 426, 93 Pac. 110. Where the purchaser at a foreclosure sale employs the mortgagor's attorney to make the bid for him, and, through such attorney, misrepresents to the mortgagor that he has one year in which to redeem, and he, relying thereon, neglects to redeem within the statutory period, but tenders full redemption within one year, a refusal to accept such tender operates as a fraud upon him, and entitles him to equitable relief, whether or not such misrepresentations were fraudulently or honestly made; and the purchaser is estopped from insisting upon the statutory period for redemption, although the assurances were not in writing and were made without consideration. Benson v. Bunting, 127 Cal. 532; 78 Am. St. Rep. 81; 59 Pac. 991. Though the certificate of sale incorrectly names one year as the time for redemption, yet where the mortgage was made prior to the amendment of this section in 1897, fixing the limit of one year, as matter of law the purchaser is entitled to a deed at the expiration of six months. Tuohy v. Moore, 133 Cal. 516; 65 Pac. 1107; Malone v. Roy, 134 Cal. 344; 66 Pac. 313; and see Savings Bank v. Barrett, 126 Cal. 413; 58 Pac. 914; Benson v. Bunting, 127 Cal. 532; 78 Am. St. Rep. 81; 59 Pac. 991; Haynes v. Tredway, 133 Cal. 400; 65 Pac. 892. A judgment creditor whose judgment is delayed from becoming a lien within the statutory period for redemption from an execution sale is not entitled to equitable relief as a redemptioner thereafter, on the ground that the delay was caused by the intervention of legal holidays specially declared by the governor. Summers v. Hammell, 17 Cal. App. 493; 120 Pac. 63.

Legal title during time for redemption. The legal title remains in the judgment debtor or mortgagor during the time for redemption. Simpson v. Castle, 52 Cal. 644. The purchaser may be both a creditor and a purchaser, and still have a lien prior to that of the redemptioner: this can be so, only upon the principle that the legal estate is still in the judgment debtor until the delivery of the sheriff's deed. Knight v. Fair, 9 Cal. 117.

Redemption-money. A judgment debtor is not a redemptioner, within the meaning of this section; and he may redeem by paying the purchaser the purchase-money, with the statutory percentage and the taxes: he is not obliged to pay other liens which the purchaser may have on the property; but if a redemptioner, or creditor, holding a subsequent lien on the property, redeems, he must also pay to the purchaser any lien he may have prior to that of the redemptioner, other than that for which the property was sold. Sharp v. Miller, 47 Cal. 82. A judgment debtor may redeem without paying the amount of a prior judgment against him, held by a partnership, of which the purchaser is a member. Campbell v. Oaks, 68 Cal. 222; 9 Pac. 77. The sheriff is the agent of the purchaser, merely for the purpose of receiving payment, and that payment, to bind his principal, must be made in the amount and kind of money to which the principal is entitled; he may refuse the tender of a check; but if, in a bona fide transaction, he accepts a check as a conditional payment, and that check is regularly paid, his principal has suffered no injury, and the transaction is quite within the scope of the agent's authority. Hooker v. Burr, 137 Cal. 663; 99 Am. St. Rep. 17; 70 Pac. 778. If, upon the foreclosure of a mortgage, the mortgagee purchases the land for a sum less than the amount of the judgment, and dockets a judgment for the deficiency, a purchaser from the mortgagor of the land, pending the time for redemption, is entitled as successor in interest to redeem from the mortgage, without paying the amount of the deficiency. Simpson v. Castle, 52 Cal. 644.

CODE COMMISSIONERS' NOTE. A party entitled to redeem may have the price at which his interest was sold ascertained, in order that he may redeem. Raun v. Reynolds, 11 Cal. 14. When land is sold at judicial sale, and the proceeds do not amount to the whole judgment, but a balance is left unpaid, and the land is afterwards redeemed under the statute, the party redeeming (who was an assignee of the judgment debtor) was bound to pay the whole of the plaintiff's judgment, and not merely his bid, with interest and twelve per cent. The lien of the judgment continues until the balance is paid. Van Dyke v. Herman, 3 Cal. 295. Strict compliance with the statute is required to be shown by a person claiming title by virtue of a statutory redemption. Haskell v. Manlove, 14 Cal. 54. A owes B a debt; to secure it, A and C jointly mortgage to B a piece of land owned by them in common. Afterwards, A mortgages his undivided interest in the land to secure a debt to D. B forecloses against A and C, and buys in the whole land, not making D a party. Period for redemption having gone, B gets a sheriff's deed. It was decided by the supreme court that D, as subsequent mortgagee, may redeem A's but not C's interest in the land, and that the sale is final as to C's interest, D not being a necessary party to the foreclosure. The redemption-money for A's interest is the amount of B's mortgage debt, with interest, etc., less one half of the purchase-money of the whole tract sold as the land of A and C under the foreclosure sale. Kirkham v. Dupont, 14 Cal. 559. Where a judgment is against two persons, one only of whom appeals, and the appeal is dismissed, with twenty per cent damages, the damages, with costs, do not become part of the original judgment, and the redemptioner is not obliged to pay them when he redeems from a sale under the judgment. Where a redemptioner pays to the sheriff an excess of money, under protest, the payment is not compulsory. The sheriff is the bailee of the redemptioner as to the excess, who may recover it back. A redemptioner is not required to pay interest on the purchaser's bid, over and above the twelve per cent, and he is not required to pay interest on the whole judgment of the purchaser, but only on the excess over and above the bid. McMillan v. Vischer, 14 Cal. 232. The legal estate exists in the judgment debtor after expiration of the time for redemption, until execution of the conveyance to the purchaser. McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655. The title to real estate passes only upon the execution and delivery of the deed. Anthony v. Wessel, 9 Cal. 103. A deed of a sheriff, which was executed before the expiration of the statutory period of redemption, is void, and not merely voidable. Gross v. Fowler, 21 Cal. 392; Savings and Loan Society v. Thompson, 32 Cal. 347; Bernal v. Gleim, 33 Cal. 668. Before the owner can be made to pay the purchaser taxes on redemption, the purchaser must show that the taxes were legally assessed and paid, and were a charge on the property before or at the time of the redemption, and the tax-collector's receipts are not sufficient proof. People v. Doane, 17 Cal. 476.

§ 703. When judgment debtor or another redemptioner may redeem. If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption, with two per cent thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and, in addition, the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with two per cent thereon in addition, and the amounts of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. Written notice of redemption must be given to the sheriff and a duplicate filed with the recorder of the county, and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the recorder; and if such notice be not filed, the property may be redeemed without paying such tax, assessment, or lien. If no redemption be made within twelve months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but, in all cases, the judgment debtor shall have the entire period of twelve months from the date of the sale to redeem the property. If the judgment debtor re-

deem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale.

Writ of assistance. Ante, § 682.
Certificate, recording. Pol. Code, § 4133.

Legislation § 703. 1. Enacted March 11, **1872;** based on Practice Act, § 232, as amended by Stats. 1860, p. 302, which read: "If property be so redeemed by a redemptioner, either the judgment debtor or another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with four per cent thereon in addition, and the amount of any assessment or taxes which the said last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest; provided, that the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as the debtor or a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, with four per cent thereon in addition, and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the said last redemptioner previous to his own, with interest. Notice of redemption shall be given to the sheriff; if no redemption be made within six months after the sale, the purchaser, or his assignee, shall be entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made and notice thereof given, the time for redemption shall have expired, and the last redemptioner or his assignee, shall be entitled to a sheriff's deed. If the debtor redeem at any time before the time for redemption expires, the effect of the sale shall be terminated and he be restored to his estate." When § 703 was enacted in 1872, (1) "said" was omitted before "last redemptioner may have paid"; (2) "provided, that" was omitted after "with interest," and a new sentence made, beginning with "The judgment"; (3) "said" was omitted before "last redemptioner previous"; (4) "shall" was changed to "must" after "Notice of redemption," and "shall be" was changed to "is" before "entitled to a conveyance"; (5) "and" was omitted before "the time" and inserted before "the last"; (6) "shall have" was changed to "has" before "expired"; (7) "shall be" was changed to "is" before "entitled" and before "terminated"; and (8) "be" was changed to "is" before "restored to his estate."

2. Amended by Code Amdts. **1873–74,** p. 323, (1) striking out "either the judgment debtor or" before "another redemptioner"; (2) adding "but" before "the judgment under which"; (3) striking out "the debtor or" after "as often as"; (4) affixing the suffix "(er)" to "redemption," and adding after this erroneous correction the words "on paying the sum paid on the last previous redemption"; (5) changing "assessments" to "assessment" before "or taxes"; (6) prefixing the sentence beginning "Notice" with the word "Written," and adding to the sentence that part beginning with the words "and a duplicate" and ending "assessment, or lien"; (7) adding, at end of sentence beginning "If no redemption," the last clause, "but in all cases," etc., and adding thereafter a new sentence, "If the judgment debtor redeem," etc.; (8) changing sentence beginning "If the debtor" to read as at present; (9) adding the last two sentences of the present section, beginning "Upon a redemption."

3. Amended by Stats. **1895,** p. 226, (1) in first sentence, changing "four per cent" to "two per cent," (2) in sentence beginning "The property may," changing (a) "four per cent" to "two per cent," and (b) "assessment" to "assessments."

4. Amended by Stats. **1897,** p. 41, (1) in sentence beginning "The property may," changing "amount" to "amounts" before "of any assessments"; and (2) in sentence beginning "If no redemption," changing "six months" to "twelve months," in both instances.

Successive redemptions. If the property sold be redeemed by the redemptioner defined in the second subdivision of § 701, ante, another redemptioner may, within sixty days after the redemption, again redeem it from the last redemptioner, on making the payments prescribed in this section. Calkins v. Steinbach, 66 Cal. 117; 4 Pac. 1103.

Redemption from foreclosure. The Practice Act made no distinction between judgments rendered in suits to foreclose mortgages and judgments of a different character; and sales under executions issued on judgments for foreclosure are subject to redemption, as in other cases. Stout v. Macy, 22 Cal. 647.

Sufficiency of redemption. Where the redemptioner presents evidence of title, pays the money required, and receives a certificate of redemption, the redemption is sufficient. Pollard v. Harlow, 138 Cal. 390; 71 Pac. 454.

Who is not a redemptioner. The grantee of an interest in lands subject to a life estate, who redeems property from foreclosure sale, is not a redemptioner as that term is used in this section, and is not substituted to the full rights of the purchaser and entitled to a deed without a resale; by such redemption, the sale is set at large, leaving the land subject to a lien in his favor, and he is entitled to contribution from the life tenant and several remaindermen for their several portions of the money paid to redeem the land. Warner v. Freud, 138 Cal. 651; 72 Pac. 345.

Estoppel to question validity of redemption. Whether a person seeking to redeem from sheriff's sale is authorized to make such redemption, is a question which concerns him and the purchaser alone; and if the purchaser is willing to consider him

as a redemptioner, and accepts and retains the redemption-money paid by him, he cannot thereafter question the effect of such redemption. White v. Costigan, 134 Cal. 33; 66 Pac. 78; and see Abadie v. Lobero, 36 Cal. 390.

Effect of redemption. The redemption is equivalent to a transfer or assignment of the certificate of sale; and although the redemptioner may not be entitled to demand the amount of his lien from a subsequent redemptioner because of his failure to comply strictly with the law, yet if he is entitled to redeem, and effects the redemption to the satisfaction of the purchaser, the sheriff's deed passes the same title as it would have done had it been executed to the purchaser without redemption. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256; White v. Costigan, 134 Cal. 33; 66 Pac. 78; and see Eldridge v. Wright, 55 Cal. 531. When a redemption is made, all interest to the realty possessed by the purchaser at the sale ceases, and the title of the judgment debtor stands as if no sale had ever been made. Phillips v. Hagart, 113 Cal. 552; 54 Am. St. Rep. 369; 45 Pac. 843; Warner v. Freud, 138 Cal. 651; 72 Pac. 345. The effect of a redemption by a successor in interest, holding the legal and equitable title, is a restoration to the original estate; but this does not apply to one holding only the equitable title under a certificate issued upon a second sale. Bristol v. Hershey, 7 Cal. App. 738; 95 Pac. 1040.

Certificate of redemption. It is not necessary that the certificate of redemption, where the redemption is made by the successor in interest, shall state the capacity in which such redemption is made. Pollard v. Harlow, 138 Cal. 390; 71 Pac. 454.

Sheriff's deed. A sheriff's deed is conclusive evidence of the facts of the sale as recited therein (Kelley v. Desmond, 63 Cal. 517; and see Hihn v. Peck, 30 Cal. 280; Blood v. Light, 38 Cal. 649; 99 Am. Dec. 441; Mayo v. Foley, 40 Cal. 281); and it vests in the purchaser the title of the execution debtor (Kelley v. Desmond, 63 Cal. 517); but a deed given by the sheriff, after redemption, is a nullity. Phillips v. Hagart, 113 Cal. 552; 54 Am. St. Rep. 369; 45 Pac. 843.

Reforming sheriff's deed. See note 78 Am. Dec. 136.

Effect of redemption. See note 67 Am. St. Rep. 510.

CODE COMMISSIONERS' NOTE. 1. Title under sheriff's deeds and certificates. Who may execute deed, etc. A sheriff who sells land under execution, and gives a certificate of the sale to the purchaser, is the proper person to make the deed, notwithstanding his term of office has in the mean time expired. Anthony v. Wessel, 9 Cal. 103; see Lewes v. Thompson, 3 Cal. 266. The legal estate is still in the judgment debtor until the delivery of the sheriff's deed. Knight v. Fair, 9 Cal. 117. Title of purchaser at judicial sale cannot be attacked in a collateral action. Nagle v. Macy, 9 Cal. 426. If parties claim under sheriff's deed, they are chargeable with notice of the defects in the judgment upon which execution issued. Wells v. Stout, 9 Cal. 479. If a person claims a sheriff's deed as having redeemed the property as successor in interest of the judgment debtor, his offer to redeem must be made in that character. A sheriff's certificate of the purchase of property as that of the defendant in execution, is not sufficient to entitle the holder to redeem as such successor, at least until the expiration of six months. Haskell v. Manlove, 14 Cal. 54. The officer who makes a sale of land by virtue of an execution, and executes to the purchaser a deed therefor, must recite in such deed the recovery of the judgment, the names of the judgment creditors and debtors, and the issuing of an execution on the judgment, and the levy and sale. The recital of such facts is essential to show the transmission of the debtor's title in the property to the purchaser. Donahue v. McNulty, 24 Cal. 411; 85 Am. Dec. 78; People v. Doe, 31 Cal. 220. A sheriff's deputy may execute a deed for property sold under execution, but it must be executed in the name of the sheriff. Lewis v. Thompson, 3 Cal. 266; Mills v. Tukey, 22 Cal. 373; 83 Am. Dec. 74. And if the sheriff's term of office had expired at the time of its execution, the authority of the deputy must be shown, to authorize such deed to be read in evidence in an action of ejectment. Cloud v. El Dorado County, 12 Cal. 128; 73 Am. Dec. 526. See also, for general matters in relation to sheriffs' deeds and certificates, Goodenow v. Ewer, 16 Cal. 462; 76 Am. Dec. 540; People v. Mayhew, 26 Cal. 655; Page v. Rogers, 31 Cal. 298; Moore v. Martin, 38 Cal. 438; Emerson v. Sansome, 41 Cal. 552.

2. Mandamus to compel sheriff to execute conveyance. When mandamus will not lie against a sheriff to compel him to make a deed to land to a purchaser at execution sale. Williams v. Smith, 6 Cal. 91; see Frink v. Murphy, 21 Cal. 111; 81 Am. Dec. 149.

3. Proof of payment of taxes by purchasers. Before the owner can be compelled on redemption to pay certain taxes paid on the property, the purchaser must show that the taxes were legally assessed and paid, and were a charge on the property at or before the time of redemption. The tax-collector's receipts are not sufficient proof. People v. Doane, 17 Cal. 477. A decree cannot order sheriff to execute deed to buyer on foreclosure sale, the land being sold subject to redemption in six months. Harlan v. Smith, 6 Cal. 173.

§ 704. In cases of redemption, to whom the payments are to be made. The payments mentioned in the last two sections may be made to the purchaser or redemptioner, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment.

Specified kind of money. Ante, §§ 682, subd. 4, 692.

Legislation § 704. Enacted March 11, **1872**; based on Practice Act, § 233, as amended by Stats. 1863, p. 690, which had (1) the words "as the case may be" after "redemptioner"; (2) "said" before "payments" and "shall" instead of "must" after "payments"; and (3) "shall be" instead of "is" before "equivalent."

Redemption-money paid to whom. The right to redeem after the expiration of the statutory period depends upon the conditions of the decree granting the privilege of redeeming; and where one of these is, that the money shall be paid to a person designated, and there is a refusal to comply therewith, the right to redeem is lost. Bunting v. Haskell, 152 Cal. 426; 93 Pac. 110.

Sheriff as agent of purchaser or redemptioner. The sheriff is not so far the agent of the purchaser or of a prior redemptioner as to bind or estop him from questioning the validity of a subsequent redemption upon which the money is paid to the sheriff. Bennett v. Wilson, 122 Cal. 509; 68 Am. St. Rep. 61; 55 Pac. 390.

Effect of tender. Tender and refusal are equivalent to performance in discharging all collateral and accessorial liens and rights, and, in the case of redemption of land, ipso facto work a restoration of the title to the judgment debtor or his successor in interest. Leet v. Armbruster, 143 Cal. 663; 77 Pac. 653. Tender is not required to be kept good for the purposes of the action: it is the tender itself, and its refusal, which instantaneously work the discharge of the purchaser's lien and the divestiture of his title, although the effect of the tender does not operate as a payment of the debt for all purposes, as the debt still remains due, with the sole right left in the purchaser of an action at law for the recovery of the money. Leet v. Armbruster, 143 Cal. 663; 77 Pac. 653; and see Hershey v. Dennis, 53 Cal. 77; Phillips v. Hagart, 113 Cal. 552; 54 Am. St. Rep. 369; 45 Pac. 843; Haile v. Smith, 113 Cal. 656; 45 Pac. 872. Where the law declares that an offer to redeem shall be, so far as the restoration of the estate is concerned, the equivalent of redemption, the purchaser buys with knowledge of this requirement, and takes his title subject to the condition that he may be divested of it either by redemption or by a valid offer to redeem. Leet v. Armbruster, 143 Cal. 663; 77 Pac. 653.

CODE COMMISSIONERS' NOTE. Generally. See People v. Hays, 4 Cal. 127, commented on in Moore v. Martin, 38 Cal. 439; McMillan v. Vischer, 14 Cal. 232; Mitchell v. Hackett, 14 Cal. 661; People v. Doane, 17 Cal. 476; People v. Mayhew, 26 Cal. 658; Baber v. McLellan, 30 Cal. 137. Payment in certain kind of money. Belloc v. Davis, 38 Cal. 243. Tender of sum due on mortgage, whether the tender must be kept good, etc. See Ketchum v. Crippen, 37 Cal. 223. By the phrase, "officer who made the sale," is meant the incumbent at the time of the acts of sale, and not the official character of the person; and if such officer is dead, his successor cannot receive the redemption-money. People v. Boring, 8 Cal. 406; 68 Am. Dec. 331; Anthony v. Wessel, 9 Cal. 103. Where a redemptioner, under the statute, pays to the sheriff an excess of money, under protest as to the excess, the payment is not compulsory. The sheriff is the bailee of the plaintiff as to the excess, who may recover it back on demand, the money not having been paid over to the redemptionee. McMillan v. Vischer, 14 Cal. 232; see also McMillan v. Richards, 9 Cal. 368; 70 Am. Dec. 655.

§ 705. What a redemptioner must do in order to redeem. A redemptioner must produce to the officer or person from whom he seeks to redeem and serve with his notice to the sheriff making the sale, or his successor in office;

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed; or, if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the recorder;

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto;

3. An affidavit by himself or his agent, showing the amount then actually due on the lien.

Legislation § 705. 1. Enacted March 11, **1872** (based on Practice Act, § 234), (1) changing, in the introductory paragraph, "shall" to "must," and (2) omitting "and" at end of subd. 2, and as thus enacted read as at present, except for the addition made in 1909.

2. Amended by Stats. **1909**, p. 967, in introductory paragraph adding the words after "sheriff."

Construction of section. This section applies to redemptioners only, as defined in the second subdivision of § 701, ante. Yoakum v. Bower, 51 Cal. 539; Phillips v. Hagart, 113 Cal. 552; 54 Am. St. Rep. 369; 45 Pac. 843. Judgment debtors and their successors in interest are not redemptioners, and therefore are not required to follow the demands of this section in making a redemption. Phillips v. Hagart, 113 Cal. 552; 54 Am. St. Rep. 369; 45 Pac. 843; Schumacher v. Langford, 20 Cal. App. 61; 127 Pac. 1057.

Production of required papers by redemptioner. The right to redeem is statutory, given only in the event of a tender and production of certain statutory proofs; and a valid redemption cannot be made, unless the creditor presents a copy of the docket of the judgment under which he claims, duly certified. Haskell v. Manlove, 14 Cal. 54. The production of the papers mentioned in the statute as necessary to

entitle one to redeem, as between the immediate parties to the redemption, may be waived. Bagley v. Ward, 37 Cal. 121; 99 Am. Dec. 256. The power of the sheriff is altogether statutory; and where the redemption is attempted to be effected through him, he has no authority either to receive the redemption-money from one claiming the right to redeem under the judgment or to execute a deed to him, unless the redemptioner produces a copy of the docket of his judgment. Wilcoxson v. Miller, 49 Cal. 193. The sheriff has no authority to convey, in the absence of a written assignment; but, where the intent is apparent, the transaction, interpreted in the light of the circumstances, and of the law and usage of the state, may be regarded, in equity, as an assignment of the purchaser's interest. White v. Costigan, 6 Cal. Unrep. 641; 63 Pac. 1075; Abadie v. Lobero, 36 Cal. 390; Eldridge v. Wright, 55 Cal. 531. Where the sheriff's deed does not recite that a copy of the docket of the judgment was produced to him by the party seeking to redeem, and it is not shown aliunde that such copy was produced, such deed does not transfer title. Wilcoxson v. Miller, 49 Cal. 193.

CODE COMMISSIONERS' NOTE. See Haskell v. Manlove, 14 Cal. 54; Reynolds v. Harris, 14 Cal. 667; 76 Am. Dec. 459.

§ 706. Until the expiration of redemption-time, court may restrain waste on the property. What considered waste. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family, while he occupies the property.

Waste, Post, §§ 745, 746.

Legislation § 706. Enacted March 11, 1872 (based on Practice Act, § 235), (1) after "But it," changing "shall not be deemed" to "is not," and (2) omitting "it" before "in the ordinary." Quære as to second change.

Court may restrain waste. The judgment debtor is entitled to remain in possession of the property, where the mortgage thereon is foreclosed, until the expiration of the time allowed for redemption; during that period the purchaser has and can assert no right to the possession thereof, though, on his application, the court may restrain the commission of waste on the property. People's Sav. Bank v. Jones, 114 Cal. 422; 46 Pac. 278; West v. Conant, 100 Cal. 231; 34 Pac. 705.

Court may appoint receiver. A receiver should be appointed for a mine, where, during the period of redemption, it is worked, and gold extracted therefrom, to such an extent as to constitute waste, or destruction of the property itself, or all that is of any essential value; and it is to the interest of all the parties that a receiver be appointed, rather than stop working the claims entirely. Hill v. Taylor, 22 Cal. 191.

When action may be commenced to recover house removed from mortgaged premises. Claim and delivery to recover a house moved from mortgaged premises after foreclosure sale, and before the commissioner's deed is executed, is prematurely brought, where the statutory time for redemption has not expired, and the plaintiff is therefore not entitled to immediate possession of the property. People's Sav. Bank v. Jones, 114 Cal. 422; 46 Pac. 278.

CODE COMMISSIONERS' NOTE. Purchaser of mining claim, where judgment debtor remains in possession, working the claim, may have a receiver appointed to take charge of the proceeds during the time allowed for redemption. Hill v. Taylor, 22 Cal. 191. Purchaser entitled to rents and profits of, from date of sale until time for redemption expires. Harris v. Reynolds, 13 Cal. 515; 73 Am. Dec. 600.

§ 707. Rents and profits. The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall

be a credit upon the redemption-money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns, to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor.

Legislation § 707. Enacted March 11, 1872 (based on Practice Act, § 236, as amended by Stats. 1869–70, p. 106), (1) changing "shall be" to "is" before "entitled"; (2) changing "provided that" to "But"; (3) omitting "provided further that" before "if the redemptioner," and adding after "redemptioner" the words "or judgment debtor"; (4) changing "shall make demand" to "demands" before "in writing"; (5) omitting (a) "or their" before "assigns" and (b) "for" before "a written"; (6) changing "amount" to "amounts"; (7) changing "shall be" to "is" before "extended" and before "given"; (8) adding "or debtor" after "redemptioner"; (9) omitting "and provided further, that" before "If"; (10) adding "or debtor" before "may bring"; (11) changing "shall be" to "is" and adding "or debtor" in last line.

Construction of section. The provisions of this section have no reference to tax sales. Mayo v. Woods, 31 Cal. 269.

Judgment creditor's right to rents. The judgment creditor does not become entitled to the value of the use and occupation of the premises until the sale is made. Englund v. Lewis, 25 Cal. 337.

Rents and profits pending redemption. Rents should be considered in dealing with the question of the judgment debtor's right to restitution in making redemption. Yndart v. Den, 125 Cal. 85; 57 Pac. 761.

Lessor's right to rents. A lessor, to whose title the plaintiff has succeeded, is not entitled to the rents accruing, nor to the value of the use and occupation of the property, subsequently to the sale under foreclosure, unless such lessor effected a redemption from the sale; and the payment of rents by the lessee to the lessor, for a period extending beyond the date of such sale, is made at the peril of the lessee. Harris v. Foster, 97 Cal. 292; 33 Am. St. Rep. 187; 32 Pac. 246.

Purchaser's right to rents. The purchaser of real property at an execution sale from the time of sale until a redemption, and a redemptioner from the time of his redemption until another redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof; and this right is not limited to cases where there is a redemption; it begins at the time of the purchase, and continues until a redemption is made, or if there is no redemption, then until the time allowed for redemption has expired. Walker v. McCusker, 71 Cal. 594; 12 Pac. 723; Berson v. Ewing, 84 Cal. 89; 23 Pac. 1112; and see Reynolds v. Lathrop, 7 Cal. 43; McDevitt v. Sullivan, 8 Cal. 592; Harris v. Reynolds, 13 Cal. 514; 73 Am. Dec. 600; Hill v. Taylor, 22 Cal. 191; Webster v. Cook, 38 Cal. 423; Duff v. Randall, 116 Cal. 226; 58 Am. St. Rep. 158; 48 Pac. 66; Yndart v. Den, 125 Cal. 85; 57 Pac. 761. Where the rent is payable annually, the purchasers at the foreclosure sales are entitled to an amount of rent in proportion as the time intervening between their purchases and the expiration of the year term bears to one year, providing the six months' term of redemption had not expired in the mean time. Clarke v. Cobb, 121 Cal. 595; 54 Pac. 74. The purchaser at a foreclosure sale is not entitled to receive any of the rents and profits which accrued prior to the time of his purchase; and he cannot sue for and recover rents and profits until they are collected by a receiver. Pendola v. Alexanderson, 67 Cal. 337; 7 Pac. 756. A sale under the foreclosure of a mortgage upon leased land, upon which a portion of the products of the soil was to be delivered annually as rent, and which became due and payable for the year after the purchase from the sheriff, and before the expiration of the time for redemption, does not entitle the purchaser to the whole of the rent, but he is entitled only to an apportionment of a share of the annual rent, in proportion to the unexpired part of the lease year existing after the purchase. Clarke v. Cobb, 121 Cal. 595; 54 Pac. 74. A purchaser of land at sheriff's sale may maintain an action for rent against a tenant in possession under the judgment debtor, before the expiration of the time allowed for redemption, and as often as the rent becomes due under the terms of the lease existing when he pur-

chased; the sale operates as an assignment of the lease for the time. Reynolds v. Lathrop, 7 Cal. 43.

Liability of tenant in possession for rents. The liability of a tenant in possession to the purchaser, for rents or use and occupation from the day of sale to the expiration of the time for redemption, is a statutory liability, and exists without the assent of the tenant: it is not a liability founded upon contract, express or implied, within the meaning of § 537, ante, authorizing the issuance of an attachment. Walker v. McCusker, 65 Cal. 360; 4 Pac. 206. The occupation of the premises from the time of the sheriff's sale to the execution of the sheriff's deed, render the tenant prima facie liable to the purchaser for the rent. Webster v. Cook, 38 Cal. 423. Where the judgment debtor remains in possession of the property during the redemption period, and collects the rents and profits, he is a trustee of the fund for the purchaser, and if the fund is in danger of loss, a bill in equity to account will lie. Harris v. Reynolds, 13 Cal. 514; 73 Am. Dec. 600. A tenant in possession, paying rent to an execution defendant after the sale, is not relieved from the liability cast upon him to pay the rent to the purchaser. Webster v. Cook, 38 Cal. 423.

Tenant in possession, who is. The term "tenant in possession" is generic, and is intended to designate the class of persons from whom the purchaser is to receive the rents, and embraces, within the natural and usual meaning of the words, a judgment debtor, as well as his lessee. Harris v. Reynolds, 13 Cal. 514; 73 Am. Dec. 600; Knight v. Truett, 18 Cal. 113. Where real property is sold at a foreclosure sale, a party to the foreclosure suit, who thereafter remains in possession under a claim of title which is subject to the mortgage, is a tenant in possession, and liable, as such, to account to the purchaser, in an action of assumpsit, for the value of the use and occupation. Walker v. McCusker, 71 Cal. 594; 12 Pac. 723. The owner in fee in possession is, in legal contemplation, no less a tenant than the man who occupies under him. Harris v. Reynolds, 13 Cal. 514; 73 Am. Dec. 600.

Liability of administrator for rents, etc. An administrator is not liable for the use and occupation of the premises belonging to the estate, after the sale thereof by the sheriff; from that time the purchaser is entitled to the value of the use and occupation, and neither the estate nor the parties interested therein have any claim thereto. Walls v. Walker, 37 Cal. 424; 99 Am. Dec. 290; and see McDevitt v. Sullivan, 8 Cal. 592; Harris v. Reynolds, 13 Cal. 514; 73 Am. Dec. 600; Kline v. Chase, 17 Cal. 596; Knight v. Truett, 18 Cal. 113. An administrator, who uses and occupies the premises belonging to the estate, after the sheriff's sale thereof, must account to the purchaser for the value of such use and occupation. Walls v. Walker, 37 Cal. 424; 99 Am. Dec. 290.

Pleading in actions for accounting for rents. The allegation that rent was payable monthly is not an averment that it was payable in advance. Webster v. Cook, 38 Cal. 423.

Possession of property. The judgment debtor, or his successor in interest in the property, is entitled to its possession until the time for a redemption from the sale has expired. Purser v. Cady, 120 Cal. 214; 52 Pac. 489.

Purchaser's interest in the land. The purchaser, by the mere fact of his purchase, does not get the title to the property sold at sheriff's sale: his right is rather the right to get a title in a given contingency, and the transaction is an executory, not an executed, contract; he may have a perfect statutory right to the profits, without having a right to the subject out of which the profits proceed. Harris v. Reynolds, 13 Cal. 514; 73 Am. Dec. 600. The purchaser has, before the period for redemption expires, a species of equitable conditional estate, which becomes absolute upon the expiration of the time for redemption, leaving thereafter only the barren legal title in the judgment debtor until the execution and delivery of the sheriff's deed, and, during this redemption period, the statute regards the purchaser as the owner in equity, and gives him the rents and profits. Page v. Rogers, 31 Cal. 294; and see Bennett v. Wilson, 122 Cal. 509; 68 Am. St. Rep. 61; 55 Pac. 390. The purchaser at an execution sale, who pays the purchase price, is entitled to be regarded as an innocent purchaser, though the judgment debtor has the right to redeem during the period specified in the statute; and such purchaser is not affected by equities of which he had no notice when he paid the purchase-money, although he had notice thereof before he became entitled to a deed. Duff v. Randall, 116 Cal. 226; 58 Am. St. Rep. 158; 48 Pac. 66.

Undertaking on appeal. An undertaking on appeal from a judgment which directs the delivery of possession of real property, must provide against waste, and for the payment of the value of the use and occupation, and for those only, where there is no question as to the deficiency, pending such appeal. Englund v. Lewis, 25 Cal. 337.

Rent, defined and explained. Rent to be paid in products of the soil after harvests is rent, within the meaning of this section; and contracts providing for such are in no sense cropping contracts. Clarke v. Cobb, 121 Cal. 595; 54 Pac. 74. Rent payable by the year is divisible. Clarke v. Cobb, 121 Cal. 595; 54 Pac. 74.

Right of purchaser at judicial sale with respect to rents. See note Ann. Cas. 1912B, 61.

CODE COMMISSIONERS' NOTE. 1. Not applicable to tax sales. This section was held not to apply to sales for taxes, in Mayo v. Woods, 31 Cal. 269.

2. Paying taxes on property. A party in possession of premises, under sheriff's sale, and receiving rents and profits during the time for redemption, should, as between him and defendant in execution, pay the taxes assessed. If the owner does not pay them, then the party in possession is required to pay. If the premises are sold for taxes, and the person in possession buys them in, he can derive no benefit from the sale, even though the premises were bid in by one of two partners, while the possession under the sheriff's sale was by both partners. The duty to pay the tax was several, as well as joint. Kelsey v. Abbott, 13 Cal. 609; see also Goodenow v. Ewer, 16 Cal. 472; 76 Am. Dec. 540.

3. Account of rents and profits. From the time of sheriff's sale the purchaser may receive the value of the use and occupation. Walls v. Walker, 37 Cal. 425; 99 Am. Dec. 290; McDevitt v. Sullivan, 8 Cal. 592; Harris v. Reynolds, 13 Cal. 514; 73 Am. Dec. 600; Kline v. Chase, 17 Cal. 596; Knight v. Truett, 18 Cal. 113; Reynolds v. Lathrop, 7 Cal. 43. The occupation of the land during the period for redemption renders the tenant in possession liable to the purchaser for rent. If the tenant had paid the rent in advance, that is a matter in avoidance of tenant's liability to purchaser for rent. But it will not avoid the liability to purchaser if the tenant pays the rent in advance to defendant in execution after sale. Webster v. Cook, 38 Cal. 424; see also McDevitt v. Sullivan, 8 Cal. 592. The words "tenant in possession" embrace the judgment debtor, as well as his lessee. Harris v. Reynolds, 13 Cal. 514; 73 Am. Dec. 600. As to who is a tenant in possession, see also Shores v. Scott River Co., 21 Cal. 135; Knight v. Truett, 18 Cal. 113. Even during the period which elapses between the sale and the expiration of the time for redemption, the statute regards the purchaser as the owner in equity, and gives him the rents and profits, or the value of the use and occupation—in short, the entire beneficial interest in the property, except the actual possession. Page v. Rogers, 31 Cal. 293; see also Guy v. Middleton, 5 Cal. 392; Henry v. Everts, 30 Cal. 425. The buyer at a judicial sale on a judgment recovered for taxes, is not entitled to receive the rents and profits during the period allowed for redemption. Mayo v. Woods, 31 Cal. 269. The mortgagor in possession is not, until a sale is made under the decree of foreclosure, accountable for rents or use and occupation, but he may be restrained from the commission of waste. Whitney v. Allen, 21 Cal. 233.

§ 708. If purchaser of real property be evicted for irregularities in sale, what he may recover, and from whom. When judgment to be revived. Petition for the purpose, how and by whom made. If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must, after notice and on motion of such party in interest, or his attorney, revive the original judgment in the name of the petitioner, for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more.

Warranty, what only implied on judicial sale. See Civ. Code, § 1777.

Legislation § 708. Enacted March 11, **1872**; based on Practice Act, § 237, as amended by Stats. 1860, p. 303, which read the same as at present, down to and including the words "jurisdiction thereof," after which the Practice Act section read: "shall, on petition of such party in interest or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon from the time of payment, at the same rate that the original judgment bore; and when so revived the said judgment shall have the same effect as an original judgment of the said court of that date, and bearing interest as aforesaid, and any other or after-acquired property, rents, issues, or profits, of the said debtor, shall be liable to levy and sale under execution in satisfaction of such debt; provided, that no property of such debtor sold bona fide before the filing of such petition, shall be subject to the lien of said judgment; and, provided further, that notice of the filing of such petition shall be made by filing a notice thereof in the recorder's office of the county where such property may be situated; and that said judgment shall be revived in the name of the original plaintiff or plaintiffs, for the use of said petitioner, the party in interest."

Construction of section. This section, being remedial in its character, is to be liberally construed. Cross v. Zane, 47 Cal. 602; Hitchcock v. Caruthers, 100 Cal. 100; 34 Pac. 627; Merguire v. O'Donnell, 139 Cal. 6; 96 Am. St. Rep. 91; 72 Pac. 337. The object of this section is, not to disturb the rule of the common law in relation to the validity of executions or judicial sales, but to guard against its mischievous consequences in certain cases, by affording a remedy which the common law does not; it does not deal with the question as to when an execution or a sale shall be deemed valid, but leaves it as it was before, and merely provides that when, for any of the reasons given by the common law, a sale shall be declared void, the pur-

chaser shall not be left, as at common law, without a remedy. Hunt v. Loucks, 38 Cal. 372; 99 Am. Dec. 404. There is nothing to indicate that the legislature intended to control the effect or operation of this section, or the remedy under it, by § 336, ante; the only statute of limitations applicable to the remedy under this section is § 343, ante, providing that "an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued"; this section was intended to give a remedy, by petition, in an action which has culminated in a judgment sought to be revived, and the remedy intended to be given under it is as broad as that in the corresponding action in equity. Merguire v. O'Donnell, 139 Cal. 6; 96 Am. St. Rep. 91; 72 Pac. 337; Doehla v. Phillips, 151 Cal. 488; 91 Pac. 330.

Action by purchaser. Where the homestead of a defendant is subjected to execution sale, but he succeeds, on appeal, in overthrowing the sale, the purchaser at that sale can recover from the judgment creditor the full amount paid. Turner v. Markham, 152 Cal. 246; 92 Pac. 485.

Revival of judgment. Though the statute does not expressly require notice, the court may, and generally should, require notice to the parties in possession, before reviving an old judgment. Hyde v. Boyle, 93 Cal. 1; 29 Pac. 247. Where the property sold under execution is not the property of the defendant therein, but wholly that of a stranger, there is a sale of property not subject to execution, within the meaning of the provision that the original judgment may be revived when "the property sold was not subject to execution and sale." Cross v. Zane, 47 Cal. 602; and see Hitchcock v. Caruthers, 100 Cal. 100; 34 Pac. 627. Although the original judgment may be entered against the sureties under their undertaking to stay execution without notice to them, yet the judgment against them cannot be revived upon revival of the judgment against the original defendant, without notice to the sureties and an opportunity to them to be heard. Hitchcock v. Caruthers, 100 Cal. 100; 34 Pac. 627. The revival of the judgment in favor of the purchaser, under this section, being conditioned upon the failure "to recover possession in consequence of irregularity in the proceedings concerning the sale," the statute of limitations, under § 343, ante, which is the only statute applicable to the case, does not begin to run until such failure; and where the motion to revive the judgment was made within a few days after the filing of the remittitur on appeal in an action to quiet title, in which the execution and sale were adjudged void, it cannot be barred by the statute. Merguire v. O'Donnell, 139 Cal. 6; 96 Am. St. Rep. 91; 72 Pac. 337.

Action by judgment debtor for damages. Money collected on a judgment subsequently reversed may be recovered in an action against the real parties plaintiff, where the suit had been prosecuted by the assignee of a chose in action in the name of the assignor. Reynolds v. Hosmer, 45 Cal. 616. An action is properly brought against the assignee of an erroneous judgment, who gives the plaintiff's property to be sold thereunder, and thereby produced the injury of which the plaintiff complained. Reynolds v. Hosmer, 45 Cal. 616.

Jurisdiction of court. The court has jurisdiction of the subject-matter of a motion for an order to issue execution on the judgment, and incidentally to determine whether or not the apparent satisfaction of the judgment is void. McAuliffe v. Coughlin, 105 Cal. 268; 38 Pac. 730. An original satisfaction, entered inadvertently, or under such circumstances as requires it to be set aside, may be set aside by the court, and an order made, designating the amount for which the judgment should be permitted to stand. Hitchcock v. Caruthers, 100 Cal. 100; 34 Pac 627.

Effect of reversal of judgment authorizing sale on title to land purchased at judicial sale by attorney of party to proceeding. See note 14 Ann. Cas. 185.

Amount of restitution where property is sold under judgment subsequently reversed. See note 15 Ann. Cas. 672.

Relief of purchaser on annulling sale. See note 69 L. R. A. 33.

CODE COMMISSIONERS' NOTE. Generally. Hunt v. Loucks, 38 Cal. 376; 99 Am. Dec. 404; Boggs v. Fowler, 16 Cal. 565; 76 Am. Dec. 561; see also Burton v. Lies, 21 Cal. 90; Sargent v. Strum, 23 Cal. 361; 83 Am. Dec. 118; Fowler v. Harbin, 23 Cal. 630; Branham v. Mayor and Common Council, 24 Cal. 607.

§ 709. Party who pays more than his share may compel contribution. When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such case, the person

so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice, the clerk must make an entry thereof in the margin of the docket.

Subrogation of surety on appeal bond. See post, § 1059.

Legislation § 709. Enacted March 11, 1872.

Construction of section. A proceeding under this section being statutory, the course pointed out therein must be strictly pursued. Davis v. Heimbach, 75 Cal. 261; 17 Pac. 199; and see Hansen v. Martin, 63 Cal. 282. The first sentence of this section lays down only fundamental rules as to the rights of sureties and joint judgment debtors to compel contribution; the second sentence contemplates giving to sureties or joint judgment debtors the right to an execution in the original proceedings; the section was, no doubt, enacted for the benefit of sureties and joint judgment debtors, in order to enable them, without bringing an action, to use the judgment and the writs of the court for the purpose of compelling, in the case of sureties, repayment from their principal or contribution from co-sureties, and in the case of joint judgment debtors, contribution from their co-debtors. Williams v. Riehl, 127 Cal. 365; 78 Am. St. Rep. 60; 59 Pac. 762. The legislature, in enacting this section, did not have in mind a case where the parties paying the judgment had procured a written assignment of it: assignees have a remedy independently of this section, and could enforce their judgment if it had never been enacted. Williams v. Riehl, 127 Cal. 365; 78 Am. St. Rep. 60; 59 Pac. 762.

Effect of payment of judgment by one joint debtor. The mere payment of a judgment by one joint debtor does not operate as an accord and satisfaction of the judgment as to the other joint judgment debtors, unless it plainly appears that the payment was intended to have such effect. Williams v. Riehl, 127 Cal. 365; 78 Am. St. Rep. 60; 59 Pac. 762; and see Coffee v. Tevis, 17 Cal. 239. The payment of a judgment against co-defendants, by one of them, extinguishes the judgment, where no proceedings specified in this section have been taken. National Bank v. Los Angeles Iron etc. Co., 2 Cal. App. 659; 84 Pac. 466.

Who may compel contribution. Where the plaintiff paid a deficiency judgment, entered against himself and the defendant jointly, in order to prevent the sale of his property on execution, but on which judgment the defendant was primarily liable, such payment is not voluntary, and the plaintiff is entitled to maintain an action against the defendant for the amount. Treat v. Young, 135 Cal. 91; 67 Pac. 7; and see Williams v. Riehl, 127 Cal. 369; 78 Am. St. Rep. 60; 59 Pac. 762. Where one person owes another money on a promissory note, and a person, for his own protection, is compelled to pay the debt, he is entitled to be subrogated to the rights of the creditor, to enforce payment of the note. Finnell v. Finnell, 159 Cal. 535; 114 Pac. 820. Sureties, who are compelled to pay a debt of their principal, have a legal demand for reimbursement, which they may enforce against him by personal action if he is alive, or against his estate if he is dead; but, in either case, reimbursement can be claimed only for what has been expended. Estate of Hill, 67 Cal. 238; 7 Pac. 664. A co-surety or a joint judgment debtor has the right, the moment he pays the debt of his principal, to recover his proportionate share from his co-surety or joint debtor; and the obligation of the co-surety to pay is as binding as if it were created by promissory note or contract. Williams v. Riehl, 127 Cal. 365; 78 Am. St. Rep. 60; 59 Pac. 762. Where a surety, by his contract, imposes the burden of the whole debt upon his own land, in case the security of the principal debtor fails, all that he may justly ask, in case he satisfies the obligation of the principal, is, that he may be subrogated to all the rights and remedies of the judgment creditor. Bechtel v. Wier, 152 Cal. 443; 15 L. R. A. (N. S.) 549; 93 Pac. 75. The rule that there is no right of contribution between joint tort-feasors, is not changed by this section. Forsythe v. Los Angeles Ry. Co., 149 Cal. 569; 87 Pac. 24; Dow v. Sunset Telephone etc. Co., 162 Cal. 136; 121 Pac. 379. This section simply announces a rule of procedure, and provides a convenient method of enforcing contribution by a judgment debtor, who has paid a judgment, as against a co-defendant liable for a proportion of the debt. Dow v. Sunset Telephone etc. Co., 162 Cal. 136; 121 Pac. 379.

Notice, what constitutes. Some notice to the parties interested is necessary, the period and the manner of giving which are provided elsewhere in this code; and although the statute does not specify the person to whom notice is to be given, or its period, or the manner in which it is to be given, yet the natural meaning of the word "notice," in the phrase, "file with the clerk of the court where the judgment

was rendered, notice of his payment and claim to contribution or repayment," is a notice to some one, and if the person is not indicated, the plain inference is, that the party intended is the person interested,—the party to be proceeded against. Davis v. Heimbach, 75 Cal. 261; 17 Pac. 199. The notice of motion for execution upon a judgment, for the purpose of compelling contribution or repayment under this section, should be served upon the party against whom such motion is directed; but it is not necessary that the notice filed with the clerk, to claim the right to contribution and repayment, shall be served on such party within ten days after the moving party pays more than his proportion of the judgment. Clark v. Austin, 96 Cal. 283; 31 Pac. 293.

Docket entry by clerk. The only purpose of the section in providing for the filing of the notice is to authorize and to enable the clerk to made the proper entry in the margin of the docket: without such notice, the clerk would have neither the authority nor the ability to make the proper docket entry. Clark v. Austin, 96 Cal. 283; 31 Pac. 293.

CODE COMMISSIONERS' NOTE. Kansas Code Civ. Proc., § 480.

§ 710. Collection of moneys due from judgment debtor. Procedure. The duly authenticated transcript of a judgment, for money, against a defendant, rendered by any court of this state may be filed with the controller of the state of California or the auditor of any county, city and county, city, or other municipal or public corporation, from which money is owing to the judgment debtor in such action (and in case there be no auditor then with the official whose duty corresponds to that of auditor), whereupon it shall be the duty of any such official, or of such public officer with whom such transcript shall have been filed, to draw his warrant in favor of or to pay into the court from the docket of which the transcript was taken, so much of the money, if sufficient there be, over which such state of California, county, city and county, city, or other municipal or public corporation of which he is an official, or over which said public officer has control and custody and which belongs to or is owing to the judgment debtor in the cause designated in said transcript as will cancel said judgment; the money so paid into court shall be a discharge pro tanto of any amount so due or owing to such judgment debtor. For filing such a transcript any such official or public officer may charge a fee of fifty cents. Upon the receipt by any court of money under the provisions of this act so much thereof as is not exempt from execution shall be paid to the judgment creditor, the balance to the judgment debtor. Such transcript when so filed, shall be accompanied by an affidavit on behalf of the person in whose interest the same is filed, stating the exact amount at the time due on such judgment, and that such person desires to avail himself of the provisions of this section.

Legislation § 710. Added by Stats. **1903,** p. 362; approved March 21, 1903. There are two sections numbered 710, both passed at the session of 1903. This section logically belongs at the end of the chapter, as those following it (§§ 710–713½) were passed in one act (Stats. 1903, c. XCII, p. 101) and relate to the same subject, which is different from this section.

Scope of section. This section is not unconstitutional as being special legislation, or as not being uniform in its operation. Lawson v. Lawson, 158 Cal. 446; 111 Pac. 354. It applies generally to all public corporations; and the fact that there has heretofore been no means by which moneys due from the state, or from its public corporations, could be reached and applied upon the debts of the persons to whom they are due, and that considerations of public policy require that public corporations and public officers and employees should not be held subject to the ordinary provisions and processes of law for the garnishment of debts and claims due or owing, sufficiently distinguishes the classes of persons and assets to which this section relates, to justify the legislature in making special regulations concerning such persons, and the mode of reaching such assets; and the fact that the provisions of this section differ somewhat from the ordinary processes of attachment and execution does not destroy its character as a general law. Ruperich v. Baehr, 142 Cal. 190; 75 Pac. 782. A construction of this section, which would require the transcript of judgment to be

filed after audit, and before delivery of the audited claim to the person entitled thereto, would practically nullify the remedy sought to be granted judgment creditors thereby. Payne v. Baehr, 153 Cal. 441; 95 Pac. 895. The purpose of this section is to afford means whereby money due from one municipal corporation to the debtor of another may be reached by his creditor, and is to be liberally construed. Ott Hardware Co. v. Davis, 165 Cal. 795; 134 Pac. 973.

Includes salaries and wages of public officials and employees. The salaries and wages of public officers and employees are within the meaning of this section, where it refers to moneys or amounts owing to or which belong to judgment debtors; and it necessarily follows that such officers and employees are subject to the garnishment authorized. Ruperich v. Baehr, 142 Cal. 190; 75 Pac. 782. This section is applicable to the salaries of all such public officers and employees as to whom its application is not inhibited by reason of some provision of the constitution, and is applicable to the salaries or fees of justices of the peace. Lawson v. Lawson, 158 Cal. 446; 111 Pac. 354.

Transcript of judgment, not abstract, required. The abstract of a judgment, prepared in accordance with the provisions of §§ 897, 900, post, and filed with the auditor of the county, is not sufficient to secure the benefits of this section, which requires a transcript or copy of the judgment to be filed. Erkson v. Parker, 3 Cal. App. 98; 84 Pac. 437.

Duty and liability of auditor. The auditor is liable in damages for a failure to perform his duty, and it is not essential to a cause of action against him that the plaintiff should have made any other demand than that embraced in the filing of the authenticated transcript of judgment and affidavit provided for in this section. Payne v. Baehr, 153 Cal. 441; 95 Pac. 895; and see Mock v. Santa Rosa, 126 Cal. 330; 58 Pac. 826. It is the official duty of the auditor to draw his warrant, for the benefit of a judgment creditor of a person to whom the municipality owes money, when the conditions specified in this section have been complied with. Payne v. Baehr, 153 Cal. 441; 95 Pac. 895.

Mandate to auditor. Mandamus lies, in a proper case, to compel the auditor to draw his warrant, under this section. Wilkes v. Sievers, 8 Cal. App. 659; 97 Pac. 677. A mandate cannot be issued requiring an auditor to audit and allow a demand in favor of an employee of the city, against whom garnishment provided for in this section has been served, where no demand was made except for the entire sum, as the auditor is entitled to proper demand before he becomes subject to a suit in mandamus. Ruperich v. Baehr, 142 Cal. 190; 75 Pac. 782. Mandamus lies to compel an auditor to draw his warrant in favor of the assignee of a claim as to an amount assigned prior to the filing of the transcript, and in favor of the court as to any amount involved in case the transcript is filed before the assignment. First National Bank v. Tyler, 21 Cal. App. 791; 132 Pac. 1053.

When jurisdiction of court attaches to money. After the salary of a public officer has been subjected to garnishment under this section, the court in which judgment was rendered is without power to make any order for the disposition of the money levied upon, until it has been paid into court, or the auditor's warrant therefor, drawn in favor of the court, has been delivered to the court. Lawson v. Lawson, 158 Cal. 451; 111 Pac. 354.

Assignment of unearned salary is void. An assignment of the unearned salary of a public officer is against public policy and void. Wilkes v. Sievers, 8 Cal. App. 659; 97 Pac. 677.

Approval of creditor's demand unnecessary. It is not necessary, under this section, that the judgment creditor's demand should have been approved by the city officers. Payne v. Baehr, 153 Cal. 441; 95 Pac. 895.

Right of officer to demand indemnity for enforcing execution. See note 16 Ann. Cas. 1045.

§ 710. Claimant of property may give undertaking and release property. Where property levied upon under execution to satisfy a judgment for the payment of money is claimed, in whole or in part, by a person, corporation, partnership or association, other than the judgment debtor, such claimant may give an undertaking as herein provided, which undertaking shall release the property in the undertaking described from the lien and levy of such execution.

Legislation § 710. Added by Stats. **1903**, p. 101; approved March 9, 1903. See supra, Legislation § 710.

§ 710½. Claim of property. Undertaking, amount and conditions of. Such undertaking, with two sureties, shall be executed by the person, corporation, partnership or association, claiming in whole or in part, the prop-

erty upon which execution is levied in double the estimated value of the property claimed by the person, corporation, partnership or association, provided, in no case need such undertaking be for a greater sum than double the amount for which the execution is levied; and where the estimated value of the property so claimed by the person, corporation, partnership or association is less than the sum for which such attachment is levied, such estimated value shall be stated in the undertaking, and said undertaking shall be conditioned that if the property claimed by the person, corporation, partnership or association is finally adjudged to be the property of the judgment debtor, said person, corporation, partnership or association will pay of said judgment upon which execution has issued a sum equal to the value, as estimated in said undertaking, of said property claimed by said person, corporation, partnership or association, and said property claimed shall be described in said undertaking.

Legislation § 710½. Added by Stats. **1903**, p. 102.

§ 711. **Claim of property. Undertaking, filing and serving.** Said undertaking shall be filed in the action in which said execution issued, and a copy thereof served upon the judgment creditor or his attorney in said action.

Legislation § 711. Added by Stats. **1903**, p. 102.

§ 711½. **Claim of property. Undertaking, objections to.** Within ten days after the service of the copy of undertaking, the judgment creditor may object to such undertaking on the ground of inability of the sureties, or either of them, to pay the sum for which they become bound in said undertaking, and upon the ground that the estimated value of property therein is less than the market value of the property claimed. Such objection to the undertaking shall be made in writing, specifying the ground or grounds of objection, and if the objection is made to the undertaking that the estimated value therein is less than the market value of the property claimed. Such objection shall specify the judgment creditor's estimate of the market value of the property claimed. Such written objection shall be served upon the person, partnership, corporation or association giving such undertaking and claiming the property therein described.

Legislation § 711½. Added by Stats. **1903**, p. 102.

§ 712. **Claim of property. Justification, approval and disapproval.** When the sureties, or either of them, are objected to, the surety or sureties so objected to shall justify before the court out of which such execution issued, upon ten days' notice of the time when they will so justify being given to the judgment debtor or his attorney. Upon the hearing and examination into the sufficiency of a surety, witnesses may be required to attend and evidence may be procured and introduced in the same manner as in trial of civil cases. Upon such hearing and examination, the court shall make its order, in writing, approving or disapproving the sufficiency of the surety or sureties on such undertaking. In case the court disapproves of the surety or sureties on any undertaking, a new undertaking may be filed and served, and to any undertaking given under the provisions of this act the same objection to the sureties may be made, and

the same proceedings had as in case of the first undertaking filed and served.

Legislation § 712. Added by Stats. **1903**, p. 102.

§ 712½. **Claim of property. Undertaking, estimate of value, and new undertaking.** When objection is made to the undertaking upon the ground that the estimated value of the property claimed, as stated in the undertaking, is less than the market value of the property claimed, the person, corporation, partnership or association may accept the estimated value stated by the judgment creditor in said objection, and a new undertaking may be at once filed with the judgment creditor's estimate stated therein as the estimated value, and no objection shall thereafter be made upon that ground; if the judgment creditor's estimate of the market value is not accepted, the person, corporation, partnership or association giving the undertaking shall move the court in which the execution issued, upon ten days' notice to the judgment creditor, to estimate the market value of the property claimed and described in the undertaking, and upon the hearing of such motion witnesses may be required to attend and testify, and evidence be produced in the same manner as in the trial of civil actions. Upon the hearing of such motion, the court shall estimate the market value of the property described in the undertaking, and if the estimated value made by the court exceeds the estimated value as stated in the undertaking, a new undertaking shall be filed and served, with the market value determined by the court stated therein as the estimated value.

Legislation § 712½. Added by Stats. **1903**, p. 103.

§ 713. **Claim of property. Undertaking, justification of sureties.** The sureties shall justify on the undertaking as required by section one thousand and fifty-seven of the Code of Civil Procedure.

Legislation § 713. Added by Stats. **1903**, p. 103.

§ 713½. **Claim of property. Undertaking, when becomes effectual.** The undertaking shall become effective for the purpose herein specified ten days after service of copy thereof on the judgment debtor, unless objection to such undertaking is made as herein provided, and in case objection is made to the undertaking filed and served, then the undertaking shall become effective for such purposes when an undertaking is given as herein provided.

Legislation § 713½. Added by Stats. **1903**, p. 103.

CHAPTER II.

PROCEEDINGS SUPPLEMENTAL TO EXECUTION.

§ 714. Debtor required to answer concerning his property, when.
§ 715. Proceedings to compel debtor to appear. In what cases he may be arrested. What bail may be given.
§ 716. Any debtor of the judgment debtor may pay the latter's creditor.
§ 717. Examination of debtors of judgment debtor, or of those having property belonging to him.
§ 718. Witnesses required to testify.
§ 719. Judge may order property to be applied on execution.
§ 720. Proceedings upon claim of another party.
§ 721. Disobedience of orders, how punished.

§ 714. **Debtor required to answer concerning his property, when.** When an execution against property of the judgment debtor, or of any one of

several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he does not reside in this state, to the sheriff of the county where the judgment roll is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the court, requiring such judgment debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides, or in which he has a place of business.

Conduct of examination. Ante, § 718.

Receiver, aiding proceedings. Ante, § 564, subd. 4.

Legislation § 714. 1. Enacted March 11, **1872**; based on Practice Act, § 238 (New York Code, § 292), which had (1) the words "shall be" instead of "is" before "entitled to an order," (2) the word "shall" instead of "must" before "be required," and (3) at end of section these words, "when proceedings are taken under the provisions of this chapter."

2. Amended by Code Amdts. **1880**, p. 5, (1) changing "the" to "a" before "judge of the court," and omitting, after these words, "or a county judge."

3. Amendment by Stats. **1901**, p. 157; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 685, (1) changing "do" to "does" before "not reside," and (2) adding "or in which he has a place of business" at end of section; the code commissioner saying, "The words 'or in which he has a place of business' are added to the section, thus making it possible to examine judgment debtors in supplementary proceedings in those counties in which they have a place of business."

Construction of sections. The difference between § 238 and § 239 of the Practice Act (the present § 714 and § 715, respectively, of this code) consists in this: that the latter allows the plaintiff to proceed earlier and in a more stringent manner; under one section the creditor can examine the judgment debtor only after execution returned, while under the other he can examine him before the return, and also have him arrested, upon a proper showing; but, under both sections, the same property may be made liable when ascertained. Adams v. Hackett, 7 Cal. 187. The distinction between this section and § 715, post, is, that, under the latter, supplementary proceedings may be commenced before the return of the execution, and an affidavit is necessary, showing that the judgment debtor has property which he refuses to apply to the satisfaction of the judgment; but, under this section, where the execution has been returned unsatisfied, the judgment creditor is entitled to the order without any affidavit. Collins v. Angell, 72 Cal. 513; 14 Pac. 135. Under the provisions of this chapter, a debtor of a judgment debtor may be fully examined as to property, credits, money, or other assets, in his possession or under his control; witnesses may be examined; and the judge may order any property of the judgment debtor, not exempt from execution, or due to the judgment debtor, to be applied towards the satisfaction of the judgment. Matteson etc. Mfg. Co. v. Conley, 144 Cal. 483; 77 Pac. 1042. This section and §§ 715–721, post, are, by § 905, post, made applicable to justices' courts. West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315; 85 Am. St. Rep. 171; 65 Pac. 622.

Nature of supplementary proceedings. A proceeding supplementary to execution is entirely statutory; it is a separate proceeding in the original action, in which the court where the action is pending is called upon to exercise its jurisdiction in aid of the judgment in the action; and unless the requirements of the statute are complied with, the proceeding cannot be sustained. Bryant v. Bank of California, 2 Cal. Unrep. 475; 7 Pac. 128; and see Hassie v. G. I. W. U. Congregation, 35 Cal. 378. It is a proceeding in the original case, auxiliary and supplementary thereto, and not a new action. Collins v. Angell, 72 Cal. 513; 14 Pac. 135. Such proceedings supplant proceedings in equity, unless some special ground exists upon which to invoke the power of chancery; hence, a complaint, as a substitute for the proceedings provided by this chapter, is entirely insufficient, where it does not show that the remedies at law have been exhausted or would be unavailing, and where there is not only a failure to aver the return of an execution nulla bona or at all, but there is an affirmative averment that the judgment debtor has always been fully able to pay the judgment and execution. Herrlich v. Kaufmann, 99 Cal. 271; 37 Am. St. Rep. 50; 33 Pac. 857. Proceedings supplementary to execution, under our code, are a substitute for a creditor's bill, as formerly used in chancery (Matteson etc. Mfg. Co. v. Conley, 144 Cal. 483; 77 Pac. 1042; and see Adams v. Hackett, 7 Cal. 187; McCullough v. Clark, 41 Cal. 298; Pacific Bank v. Robinson, 57 Cal. 520; 40 Am. Rep. 120; Habenicht v. Lissak, 78 Cal. 351; 12 Am. St. Rep. 63; 5 L. R. A. 713; 20 Pac. 874; High v. Bank of Commerce, 95 Cal. 386; 29 Am. St. Rep. 121; 30 Pac. 556; Herrlich v. Kaufmann, 99 Cal. 271; 37 Am. St. Rep. 50; 33 Pac. 857); and their purpose is to insure simplicity and economy; such proceedings, therefore, should receive a liberal construction, and

the main intention and spirit of the act should be fairly carried out. Adams v. Hackett, 7 Cal. 187.

What orders may be enforced under this chapter. Debts secured by mortgage, like other debts, may be attached by garnishment, but in no other way; and their payment may be enforced under provisions of this code relating to proceedings supplementary to execution. McGurren v. Garrity, 68 Cal. 566; 9 Pac. 839. The judgment debtor may be compelled, in proceedings supplementary to execution, to deliver a patent right in satisfaction of the judgment, to a receiver appointed to dispose of it in aid of the execution. Pacific Bank v. Robinson, 57 Cal. 520; 40 Am. Rep. 120.

Contempt. Where the judgment debtor, to defeat the process of the court, and the order directing him to turn over property to apply upon the judgment, procures delay in the proceedings, pending which he voluntarily and contumaciously disables himself from complying with the order he anticipates being made, the court rightfully adjudges him guilty of contempt. Ex parte Kellogg, 64 Cal. 343; 30 Pac. 1030; and see Galland v. Galland, 44 Cal. 475; 13 Am. Rep. 167.

Creditor's bill lies when. Where proceedings supplementary to execution afford an adequate legal remedy, a creditor's bill does not lie; otherwise, such a bill may still be had. Phillips v. Price, 153 Cal. 146; 94 Pac. 617. A complaint in an action against a garnishee to recover money due the plaintiff's judgment debtor, which fails to allege that an execution had been levied against the debtor and had been returned unsatisfied, cannot be treated as a creditor's bill, since it fails to show that the plaintiff has no adequate remedy at law. Matteson etc. Mfg. Co. v. Conley, 144 Cal. 483; 77 Pac. 1042.

Proceedings supplemental to execution. See note 100 Am. Dec. 500.

Creditors' bills and proceedings in equity in aid of execution. See note 90 Am. Dec. 288.

Exhausting remedies at law as a condition of right of judgment creditor to procure a receivership. See note 33 L. R. A. 546.

Effect of bankruptcy on supplementary proceedings. See note 45 L. R. A. 193.

Equitable remedies in aid of execution. See notes 63 L. R. A. 673; 15 L. R. A. (N. S.) 976.

CODE COMMISSIONERS' NOTE. McCullough v. Clark, 41 Cal. 298; Estate of Nerac, 35 Cal. 398; 95 Am. Dec. 111; Adams v. Hackett, 7 Cal. 187; Hathaway v. Brady, 26 Cal. 589.

Proceedings under this chapter, generally. Proceedings supplementary to execution, under § 294 of the code, may be taken to compel the treasurer of a joint-stock association to submit to an examination, upon the allegation that he is indebted to it, though the judgment is entered against him as treasurer of such association, and the action was commenced by the service of summons upon him under the act of 1849. Courtois v. Harrison, 1 Hilt. 109. An order in supplementary proceedings, directing that the defendant should "pay over to plaintiff's attorney the sum of eighteen dollars, being money that he has paid out and disposed of since the order made by me on the twenty-eighth day of April, restraining him from disposing of his said property, was duly served on him, and while the said order remained in full force and unrevoked, and that in default of payment of the said money aforesaid, the said M. be committed to the common jail," etc.: held, to show substantially a contempt, and the infliction of a fine, and sufficient to justify defendant's imprisonment. Reynolds v. McElhone, 20 How. Pr. 454. After a receiver of defendant's property had been appointed, in proceedings supplementary to execution against the defendant, instituted by plaintiff, the defendant's household furniture was destroyed by fire. The furniture was such as is exempt from execution, and therefore was not reached by the supplementary proceedings, but it was insured at the time of the fire. Held, that the claim for the insurance-moneys was subsequently acquired property, which did not pass to, and could not be enforced by, the receiver. Sands v. Roberts, 8 Abb. Pr. 343. Public moneys raised by a municipal corporation pursuant to law—e. g., by tax—for purposes of government, and in the hands of its fiscal officer, are not the property of the corporation, or a debt due to it, within the meaning of § 294 of the code, so as to entitle a judgment creditor of the corporation to an order requiring the officer to pay over the moneys in satisfaction of the judgment. Lowber v. Mayor etc. of New York, 7 Abb. Pr. 248. A judgment against a foreign corporation may be enforced by supplementary proceedings, under § 294 of the code, to reach property belonging to it in the hands of third parties, or debts due to it from third parties. McBride v. Farmers' Branch Bank, 7 Abb. Pr. 347. Form of affidavit and order in supplementary proceedings against third parties, under § 294 of the code. Seeley v. Garrison, 10 Abb. Pr. 460. The orders allowed to be made in supplementary proceedings—directing the application of property and money to the payment of a judgment, and to punish for contempt (Code, §§ 297, 302)—are entirely discretionary; and an order denying an application for them is not appealable. Joyce v. Holbrook, 7 Abb. Pr. 338. In order to put the debtor in contempt for interfering with his property after the order, it must be affirmatively shown that the property in question was acquired prior to the granting of the order. The order does not affect after-acquired property (Browning v. Bettis, 8 Paige Ch. 568; Stuyvesant v. Hall, 2 Barb. Ch. Pr. 153; Caton v. Southwell, 13 Barb. 335). Potter v. Low, 16 How. Pr. 549. The wife cannot be examined, under § 294 of the code, in supplementary proceedings against her husband. Andrews v. Nelson, 7 Abb. Pr. 3, note. It seems that the proper construction of § 294 would apply to the case of a judgment against any corporation. McBride v. Farmers' Branch Bank, 7 Abb. Pr. 347. It seems that proceedings under that section may be taken against a corporation. Courtois v. Harrison, 1 Hilt. 109. An order committing a party for contempt, and ordering that he be imprisoned until he comply with a previous order commanding him to pay into court a certain sum of money, is an excess of jurisdiction, and void, where the party had made affidavit, which was uncontradicted, that the money had passed from his possession and control before the proceedings in contempt were commenced. Adams v. Haskell, 6 Cal. 316; 65 Am. Dec. 517. A judgment not property. Adams v. Hackett, 7 Cal. 187. A, although being indebted to the judgment debtor, was not a necessary party to a proceeding, where the plaintiff examined his judgment debtor as to a judgment held by him against A, and after examination obtained an order to apply the same to the judgment of plaintiff. Adams v. Hackett, 7 Cal. 187. The right to the examination under the code is unqualifiedly given wherever an execution has been returned unsatisfied in whole or in part. Owen v. Dupignac, 9 Abb. Pr. 180. It appeared by the affidavit upon which the order for the examination of the defendant was founded, and the fact was recited in the order, that about fifteen years previously an execution had been issued upon the judgment, and had been returned wholly unsatisfied; and that an alias execution, issued shortly before the making of the affidavit, had

not been returned. Held, that the affidavit was sufficient, and that the judgment creditor was entitled to the order for the examination of the defendant. Id. In supplementary proceedings against judgment debtors, an order was made, forbidding them to dispose of their property. On the day fixed by the order for their appearance for their examination, they appeared at the office of the judge, and, after waiting some time, the office being unoccupied, went away. Within an hour after the appointed time, the judge appeared at his office, and the plaintiff also appeared, and, in the absence of the defendants, took an order appointing the referee, and continuing the injunction. In conformity with this order, the defendants appeared and submitted to an examination. Held: 1. That the original injunction had not become revoked nor inoperative, nor had the proceedings been suspended by the circumstances; and if they were, it was waived by the subsequent appearance of the defendants. 2. That the act of the defendants in paying over money subsequently to their attendance at the office of the judge was a contempt. Reynolds v. McElhone, 20 How. Pr. 454. It seems that the provisions of the code for proceedings supplementary to execution are limited to reaching property of the debtor, whether in his possession or in the possession of others for him, and which is conceded to be his; also, money due to the debtor when the order is obtained and served. But when property or money appears to belong to him, but is in the hands of others, who make claim thereto, it should be reached through a receiver. Stewart v. Foster, 1 Hilt. 505. Examinations on supplementary proceedings to a judgment can only be extended to the discovery of the property in the possession or control of the defendant, which he can deliver over. If the property is in the possession of another claiming title, no matter how fraudulent the transfer, no order can be made to compel him to deliver, and therefore no questions can be put to the debtor or witness to discover or prove the fraud. Town v. Safeguard Ins. Co., 4 Bosw. (N. Y.) 683. For general matters relating to proceedings supplementary to execution, see Hathaway v. Brady, 26 Cal. 586.

§ 715. Proceedings to compel debtor to appear. In what cases he may be arrested. What bail may be given. After the issuing of an execution against property, and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear, at a specified time and place, before such judge, or a referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the judge or referee, as may be directed during the pendency of proceedings and until the final termination thereof, and will not in the mean time dispose of any portion of his property not exempt from execution. In default of entering into such undertaking he may be committed to prison.

Witnesses may be required to appear and answer. Post, § 718.

Application of property of judgment debtor to satisfaction of judgment. Post, § 719.

Arrest of debtor as provisional remedy. Ante, §§ 478–504.

Discharge of persons imprisoned on civil process. Post, §§ 1143–1154.

Legislation § 715. 1. Enacted March 11, **1872**; based on Practice Act, § 239 (New York Code, § 292), as amended by Stats. 1854, p. 63 [90]. When § 715 was enacted in 1872, (1) "shall" was changed to "may" before "be directed," and (b) the prefix "de" was omitted (sic) before the word "termination."

2. Amended by Code Amdts. **1880**, p. 5, (1) adding "a judge of" before "the court," (2) omitting, after "the court," the words "or of a judge thereof, or county judge," and (3) omitting "court or" before "judge may, by an order."

Construction of sections. The judgment creditor may reach any property liable to execution, when proceedings are had under this section; and a judgment is property, within the meaning of this section. Adams v. Hackett, 7 Cal. 187. It is provided by this section, that, where it is sought to subject the property of the judgment debtor to the levy of the execution, the same proceedings may be had as those provided after the return of execution: and this expressly refers to §§ 717 et seq., post. Carter v. Los Angeles Nat. Bank, 116 Cal. 370; 48 Pac. 332.

Nature of proceedings. The proceeding is only a summary method of purging the debtor's conscience, and compelling the disclosure of any property he may have which is subject to the execution; no formal issues are required to be framed; for the very object of the proceeding is to compel the judgment debtor to give information concerning his property, and until disclosure is made, there is nothing upon

which an issue can be framed. McCullough v. Clark, 41 Cal. 298; and see Lyons v. Marcher, 119 Cal. 382; 51 Pac. 559.

The affidavit. An affidavit, under this section and § 717, post, as the basis for commencing proceedings supplementary to execution, takes the place of a creditor's bill in chancery, and must not only contain the necessary averments to give the court jurisdiction, but must also be filed in the court, or delivered to the court for that purpose. Bryant v. Bank of California, 2 Cal. Unrep. 475; 7 Pac. 128.

Practice and procedure. Proceedings under this section and § 719, post, can only be taken after a judgment is rendered and an execution issued thereon. Wells v. Torrance, 119 Cal. 437; 51 Pac. 626. The judgment creditor and the judgment debtor are parties to the proceeding, and each is at liberty to call and examine witnesses in respect to any contested fact which may be brought in issue. McCullough v. Clark, 41 Cal. 298. It is not incumbent upon the court to make express findings in special proceedings in aid of execution. Lyons v. Marcher, 119 Cal. 382; 51 Pac. 559.

Decision, and its effect. After hearing the case, the court or referee is to decide what property, if any, the judgment debtor has that is subject to be applied to the satisfaction of the judgment, and to direct its application accordingly; and its decision in the proceedings concludes both parties to the action and proceedings. McCullough v. Clark, 41 Cal. 298.

Appeal. The judgment debtor cannot again litigate the same matters in an independent action; and if he claims that the property was exempt from execution, and that the court erred in ordering it to be applied in satisfaction of the judgment, he has a plain and adequate remedy by appeal. McCullough v. Clark, 41 Cal. 298.

CODE COMMISSIONERS' NOTE. As to commitment for contempt, see Ex parte Cohen, 6 Cal. 318. Courts are exclusive judges of their own contempts, but a person cannot be imprisoned for refusing to do what is out of his power. Adams v. Haskell, 6 Cal. 316; 65 Am. Dec. 517; see also Adams v. Hackett, 7 Cal. 201; see cases cited in § 714, ante.

§ 716. Any debtor of the judgment debtor may pay the latter's creditor. After the issuing of an execution against property, and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount so paid.

Attachment. Compare ante, § 544.

Legislation § 716. Enacted March 11, **1872**; based on Practice Act, § 240 (New York Code, § 293), and (1) adding "and before its return" after "property," and (2) changing "shall be" to "is" after "receipt," when adopted in the code.

Construction of section. This section in no way trenches upon the sovereignty of the state, nor does it impose upon any officer of the state any duties which can embarrass his performance of official duties. Skelly v. Westminster School District, 103 Cal. 652; 37 Pac. 643.

Payment by debtor of judgment debtor. A person indebted to a judgment debtor has the right to pay to the sheriff, holding an execution, the amount of his debt; and where an execution has been regularly issued, a judgment debtor has the right to satisfy the same, without a formal levy, and is entitled to have the judgment against him satisfied of record, where the money has gone to the persons entitled to receive it. Buckeye Refining Co. v. Kelly, 163 Cal. 8; Ann. Cas. 1913E, 840; 124 Pac. 536.

Rights of assignee of judgment. Where the judgment creditor assigns the judgment, and the judgment debtor, without notice of the assignment, afterwards pays the same voluntarily to the sheriff by reason of the service of garnishee process upon him, the rights of the assignee are not affected, and he may still enforce the judgment. Brown v. Ayres, 33 Cal. 525; 91 Am. Dec. 655.

CODE COMMISSIONERS' NOTE. B. recovered a judgment against A. and others, and thereafter assigned it, for a valuable consideration, to C. Subsequently to the assignment, and before notice thereof to the defendants, they paid the amount of the judgment, less $29.50, to the sheriff, who had served a garnishment upon them in V. v. B., and to a constable upon an execution held by him in V. v. B. Action brought by B. against A. and others to recover the amount of his judgment against them. Held, that the case came within the provisions of this section, and that, as the defendants were not in fact debtors of B., but of C., at the time of the payments, they were not discharged from liability on the judgment against them in favor of B. There must be a judgment and an execution thereon against property, and the person making the payment must be indebted, at the instant, to him against whom the execution runs, in order to come within the provisions of this section. Brown v. Ayres, 33 Cal. 528; 91 Am. Dec. 655. The plaintiff, after a verdict in his favor, and before judgment was entered, assigned the cause of action and verdict; judgment was afterwards entered, defendant was garnished under the execution issued on other judgments against the plaintiff, and paid the amount of the judgment in favor of the plaintiff against him, which was applied upon the executions. The assignment was void, and the payment by defendant to the sheriff was a satisfaction of the judgment. Lawrence v. Martin, 22 Cal. 173; see also cases cited in notes to §§ 714, 715, ante.

§ 717. Examination of debtors of judgment debtor, or of those having property belonging to him. After the issuing or return of an execution

against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof, by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

Receiver. Ante, § 564.
Referee. Ante, § 714.

Legislation § 717. 1. Enacted March 11, **1872**; re-enactment of Practice Act, § 241 (New York Code, § 294), except that the code commissioners evidently did not pay any attention to the "Errata" in Stats. 1851, and used the word "or" instead of "and" before "upon proof by affidavit." See infra, this paragraph.

2. Amendment by Stats. **1901**, p. 157; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 685, substituting "and" for "or" before "upon proof"; the code commissioner saying, "The word 'and' is substituted for 'or' after 'judgment' and before 'upon,' to make the section conform to what was evidently the intent of the legislature at the time of its passage."

Constitutionality. The provisions of this section and of § 719, post, are not unconstitutional, because not providing for notice to the judgment debtor, nor giving him an opportunity to be heard. Coffee v. Haynes, 124 Cal. 561; 71 Am. St. Rep. 99; 57 Pac. 482.

Affidavit as basis of proceedings. The affidavit serves no other purpose than as a basis to set the proceedings in motion: it is not a pleading, like a complaint, to which the party summoned is to plead, and in default of pleading thereto, to be taken in the proceeding as true. Hathaway v. Brady, 26 Cal. 581. No default can be entered upon the affidavit: it is simply the basis for the order, for the purpose of acquiring jurisdiction of a party who previously was a stranger to the case. Hathaway v. Brady, 26 Cal. 581.

Service on garnishee. A garnishee, being no party to the original action against the judgment debtor, need not be served with process therein: it is sufficient, to give the court jurisdiction of his person in supplementary proceedings, that copies of the order, and of the affidavit on which it was based, requiring him to appear for examination, were duly served on him, and that he appeared and was examined in obedience thereto. Bronzan v. Drobaz, 93 Cal. 647; 29 Pac. 254. No showing is required to the effect that a notice of garnishment has been served upon a person alleged to have property of the judgment debtor. Carter v. Los Angeles Nat. Bank, 116 Cal. 370; 48 Pac. 332.

Necessity for the examination. No judgment can be rendered without the examination of the garnishee. Hibernia Sav. & L. Soc. v. Superior Court, 56 Cal. 265. A court is not authorized to make an order for the application of property of the judgment debtor, in the hands of a third party, to the satisfaction of the judgment, without first ascertaining, by an examination of the party alleged to have the property in his possession, the truth of the allegation. Hathaway v. Brady, 26 Cal. 581.

What may be reached by garnishment. Moneys held by a chief of police, not in his official capacity, but procured at the request and by the direction of the owner, a prisoner charged with murder, may be reached by garnishment, upon proceedings supplementary to execution. Coffee v. Haynes, 124 Cal. 561; 71 Am. St. Rep. 99; 57 Pac. 482.

Debt includes what. The word "debt," as used in the law of garnishment, includes only legal debts, and not mere equity claims. Hassie v. G. I. W. U. Congregation, 35 Cal. 378; Redondo Beach Co. v. Brewer, 101 Cal. 322; 35 Pac. 896.

Construction of sections. The creditor has his election to proceed against the debtor of the judgment debtor, under the provisions of this section, or he may proceed against his immediate debtor, either under § 714 or § 715, ante. Adams v. Hackett, 7 Cal. 187. There is nothing in this and the succeeding section that authorizes the court to make an order for the application of property of the judgment debtor, in the hands of a third party, to the satisfaction of the judgment, without first ascertaining, by an examination of the party alleged to have the property in his possession, the truth of such allegation. Hathaway v. Brady, 26 Cal. 581. Even though it be admitted that this section and § 720, post, have any application to an officer holding property of a judgment debtor by virtue of legal process issued against him, neither section, however, confers on the court the power to order such property sold, nor to direct that the proceeds thereof be paid to the clerk of the court. Brown v. Moore, 61 Cal. 432. Proceedings under this and the succeeding sections can reach everything that could formerly be made to contribute to the payment of the judgment by the aid of the creditors' bill, and such proceedings would reach choses in action arising from torts committed on the property of the judgment debtor, to which his creditor would have a right to resort (Staples v. May, 87 Cal. 178; 25 Pac. 346); but such proceedings do not imply any notice of garnishment: they are special, and can be inaugurated only after execution has been issued, and returned unsatisfied in whole

or in part; and may be commenced by affidavit or other proof that any person has property of the judgment debtor. Carter v. Los Angeles Nat. Bank, 116 Cal. 370; 48 Pac. 332. Property or credits in the hands of a debtor of a judgment debtor cannot be applied to the satisfaction of the judgment in a separate action, as the party cannot be sued upon the debt by one to whom he is not indebted: the proceedings provided by law must be followed, where such property is sought to be applied on the judgment. Matteson etc. Mfg. Co. v. Conley, 144 Cal. 483; 77 Pac. 1042.

CODE COMMISSIONERS' NOTE. See cases cited in notes to §§ 714, 715, and 716, ante. Sections 717, 718, and 719 of this code do not allow the court to make an order for the application of property of the judgment debtor in the hands of a third party to the satisfaction of a judgment, upon the mere affidavit of the plaintiff. The person said to have such property in his possession must first be examined. See Hathaway v. Brady, 26 Cal. 586.

§ 718. Witnesses required to testify. Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this chapter, in the same manner as upon the trial of an issue.

Witnesses, rights and duties of. Post, §§ 2064–2070.

Legislation § 718. Enacted March 11, **1872**; re-enactment of Practice Act, § 242 (New York Code, § 295).

CODE COMMISSIONERS' NOTE. See cases cited in notes to §§ 714, 715, 716, and 717, ante.

§ 719. Judge may order property to be applied on execution. The judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment; but no such order can be made as to money or property in the hands of any other person or claimed to be due from him to the judgment debtor, if such person claims an interest in the property adverse to the judgment debtor or denies the debt.

Exempt from execution, what is, generally. Ante, § 690.

Wages, etc., preference of. Post, § 1206.

Legislation § 719. 1. Enacted March 11, **1872**; based on Practice Act, § 243 (New York Code, § 297), which read the same as the present section, except for the limitation, which then read: "except that the earnings of the debtor for his personal services, at any time within thirty days next preceding the order, shall not be so applied, when it shall be made to appear by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor." When § 719 was enacted in 1872, (1) the word "the" was changed to "a" after "property of," and (b) the exception was omitted.

2. Amendment by Stats. **1901**, p. 157; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 685, (1) restoring the word "a" to "the" after "property of," and (2) adding the limitation beginning "but no such order"; the code commissioner saying, "The amendment consists in adding the last clause, thus limiting the right of the judge or referee to order the delivery of property to those cases in which no adverse interest is claimed thereto."

Scope of section. The supplementary proceedings provided for in this section are only one of the three remedies of judgment creditors who seek to recover against third persons (Finch v. Finch, 12 Cal. App. 274; 107 Pac. 594); and payment of debts secured by mortgage may be enforced by such proceedings. McGurren v. Garrity, 68 Cal. 566; 9 Pac. 839.

Basis of order. The order to apply property to the satisfaction of the judgment must be based upon the answers of the party summoned, and such other testimony as may be adduced in connection with the answer: the statutory proceedings must be strictly pursued. Hathaway v. Brady, 26 Cal. 581.

What orders may be made. In supplementary proceedings, it is proper to order the execution debtor to assign to a receiver his patent right to an invention. Pacific Bank v. Robinson, 57 Cal. 520; 40 Am. Rep. 120. A judgment by default cannot be entered in supplementary proceedings; and a writ of review will issue, where default is entered, upon such proceedings, in the superior court, upon a judgment rendered in a justice's court. Hibernia Sav. & L. Soc. v. Superior Court, 56 Cal. 265.

When order shall be set aside. Upon the reversal of judgment in the main proceeding, the lower court should set aside an unexecuted order in proceedings supplementary to execution. Turner v. Markham, 156 Cal. 68; 103 Pac. 319.

Property in custodia legis. An officer, holding property of a judgment debtor by virtue of legal process issued against him, cannot be compelled by the court to sell such property and pay to the clerk the proceeds of the sale; and for disobedience of such a void order the officer cannot be punished for contempt. Brown v. Moore, 61 Cal. 432; Williams v. Dwinelle, 51 Cal. 442.

Adverse claim of title by garnishee. A fund cannot be reached by proceedings supplementary to execution, where the garnishee denies possession or control of

any credits or other property of the judgment debtor, and asserts title to such assets in himself: in such a case, supplementary proceedings do not supersede the remedy by action, for the reason that they are not adequate to accomplish the purpose of the action. Rapp v. Whittier, 113 Cal. 429; 45 Pac. 703; and see Swift v. Arents, 4 Cal. 390; Herrlich v. Kaufmann, 99 Cal. 271; 37 Am. St. Rep. 50; 33 Pac. 857; Lewis v. Chamberlain, 108 Cal. 525; 41 Pac. 413. A complaint in the nature of a creditor's bill is the proper procedure, where an adverse claim or title is set up by the garnishee to funds sought to be subjected to the satisfaction of the judgment against the debtor. Rapp v. Whittier, 113 Cal. 429; 45 Pac. 703.

Denial of debt. The mere denial, by the garnishee, of the indebtedness which the other averments and admissions of the parties show to be an erroneous conclusion from the whole transaction, should not be deemed sufficient to divest the court of jurisdiction to make the order provided for in this section. Finch v. Finch, 12 Cal. App. 274; 107 Pac. 594.

Lien acquired by service of notice in supplementary proceedings. See note 3 L. R. A. (N. S.) 123.

CODE COMMISSIONERS' NOTE. See cases cited in notes to §§ 714, 715, 716, 717, ante; see also Parker v. Page, 38 Cal. 522.

§ 720. Proceedings upon claim of another party. If it appears that a person or corporation, alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the judgment creditor may maintain an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

Receiver. Ante, § 564.
Wages, etc. Post, § 1206.

Legislation § 720. 1. Enacted March 11, **1872**; based on Practice Act, § 244 (New York Code, § 299), which had, (1) in first line "appear" instead of "appears," and (2) did not have the words "to be," which were added in 1872.

2. Amendment by Stats. **1901**, p. 157; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 686, (1) omitting, after "denies the debt," the words "the court or judge may authorize, by an order made to that effect," and (2) changing the words "to institute" to "may maintain"; the code commissioner saying, "The amendment consists in striking out the words 'the court or judge may authorize by an order made to that effect,' thus enabling the judgment creditor to sue for property to be subject to his execution without first obtaining an order of court."

Constitutionality of section. This section is not unconstitutional, in that the judgment debtor has, under it, no notice of the supplementary proceeding after judgment affecting his rights of property (High v. Bank of Commerce, 95 Cal. 386; 29 Am. St. Rep. 121; 30 Pac. 556); but see Bryant v. Bank of California, 2 Cal. Unrep. 567, 8 Pac. 644, holding that a law purporting to authorize a judge, by order, to permit the judgment creditor to institute and maintain an action against the debtor of the judgment debtor, as in this section, is unconstitutional and void, where no notice of such proceeding to the judgment debtor is provided for.

Jurisdiction of court. The court may make an order authorizing the judgment creditor to institute an action against the garnishee, only when the garnishee, in good faith, denies that he has property of the judgment debtor, or is in any way indebted to him; but where it is evident that the garnishee is acting in bad faith in denying his indebtedness to the judgment debtor, and makes the denial only in form, and for purposes of vexation and delay, the court may treat it as fraudulent, and disregard it. Parker v. Page, 38 Cal. 522. Where the garnishee denies that he is indebted to the judgment debtor, neither the referee nor the court has power to compel him to pay to the sheriff the amount of his alleged indebtedness; but the court may enter an order authorizing the judgment creditor to institute an action against the garnishee to determine the question of indebtedness. Hartman v. Olvera, 51 Cal. 501. If a third person has received money from a judgment debtor, which is claimed in good faith to be his own, the power of the court, in a proceeding supplementary to execution, is limited to authorizing the judgment creditor to institute an action against such third person to recover the money, and to forbid a transfer of it until such action shall be prosecuted to judgment. Union Collection Co. v Snell, 5 Cal. App. 130; 89 Pac. 859. The order of the judge on supplementary proceedings, where the garnishee claims the property, is not an adjudication of the rights of the parties: the only power the judge has in the premises, is to make an order authorizing the judgment creditor to institute an action in the proper court, and, should he choose to do so, to forbid a transfer, pending the action. High

v. Bank of Commerce, 103 Cal. 525; 37 Pac. 508; McDowell v. Bell, 86 Cal. 615; 25 Pac. 128. Where certain property, claimed by the judgment creditor to be the property of the judgment debtor, was conveyed to a third party upon the same day that the affidavit was filed for the institution of the supplementary proceedings, the court has no jurisdiction to take possession of the property by a receiver, but can only make an order authorizing the judgment creditor to institute an action against the parties claiming it, for its recovery and subjection to the satisfaction of the debt, and forbidding its transfer until such action could be commenced and prosecuted to judgment. McDowell v. Bell, 86 Cal. 615; 25 Pac. 128; and see Hartman v. Olvera, 51 Cal. 501. Where a fund, claimed to be due to the judgment debtor, is garnished, and, before the judgment is rendered, the judgment debtor assigns the fund to another creditor, the proper procedure is, not to order the garnishee to pay the fund into court, but to authorize the judgment creditor to sue the garnishee. Schino v. Cinquini, 7 Cal. App. 244; 94 Pac. 83. The court has no jurisdiction to order the grantee of the judgment debtor, who claims title to the property mentioned in the affidavit, to surrender it, or to subject it to the satisfaction of the judgment. Lewis v. Chamberlain, 108 Cal. 525; 41 Pac. 413. To make an order in relation to property which the garnishee claims to own in his own right, requiring its application in satisfaction of the judgment of another, is to deprive the garnishee of his property upon a summary proceeding and without due process of law. Lewis v. Chamberlain, 108 Cal. 525; 41 Pac. 413; and see McDowell v. Bell, 86 Cal. 615; 25 Pac. 128. Where there are other persons claiming liens upon money in the possession of a garnishee, the court cannot properly order that the garnishee shall pay such money to the plaintiff, but is authorized only to make an order that an action be brought against the garnishee, to which action other persons claiming liens upon the fund may be made parties, to the end that all adverse claims might be adjusted, and conclusively settled in such action. Deering v. Richardson-Kimball Co., 109 Cal. 73; 41 Pac. 801; and see Roberts v. Landecker, 9 Cal. 262; Parker v. Page, 38 Cal. 522; Robinson v. Tevis, 38 Cal. 612; Hartman v. Olvera, 51 Cal. 501; Ex parte Hollis, 59 Cal. 406. The garnishee may pay the moneys into court, and thereby relieve himself of all responsibility; and the court may order that an action be instituted, wherein all parties interested should be made parties. Deering v. Richardson-Kimball Co., 109 Cal. 73; 41 Pac. 801.

Right of action under this section. One of the three remedies in favor of judgment creditors against third persons is a separate action to establish the indebtedness, if it is denied, and to recover the debt as authorized by this section. Finch v. Finch, 12 Cal. App. 274; 107 Pac. 594. A creditor making a garnishment under execution must first obtain an order under proceedings supplementary to execution before suing the garnishee, unless the garnishee waives such proceedings by interpleader or otherwise. Water Supply Co. v. Sarnow, 1 Cal. App. 479; 82 Pac. 689. In an action based upon an order under this section, the plaintiff must aver and prove the existence of the order, and of the proceedings upon which it was founded; without the proceedings, the order is a nullity, and without the order, no action can be maintained. Bryant v. Bank of California, 2 Cal. Unrep. 475; 7 Pac. 128. No equitable circumstances need be shown, in order to justify the suit. Carter v. Los Angeles Nat. Bank, 116 Cal. 370; 48 Pac. 332. Where judgment creditors have prosecuted their proceedings supplementary to execution so far as to secure a denial by the garnishee of any indebtedness to their judgment debtor, they have the right to bring an action against their garnishee without any order of court. Nordstrom v. Corona City Water Co., 155 Cal. 206; 132 Am. St. Rep. 81; 100 Pac. 242. An order of court, authorizing an action under this section, need not follow the precise language of the statute: it is sufficient, to permit the action, if it is in substantial compliance with the law. Nordstrom v. Corona City Water Co., 155 Cal. 206; 132 Am. St. Rep. 81; 100 Pac. 242.

Adverse claims of, or denial of debt by, garnishee. In proceedings supplementary to execution, the denial of the debt, or the adverse claim to the property, by the garnishee, is a claim or denial in good faith, and not one of mere pretense; but when it is evident that the garnishee is acting in bad faith in denying his indebtedness or asserting his claim, the referee may treat it as fraudulent, and disregard it, and, in the absence of explicit findings upon material points, it will be presumed that the referee found the facts necessary to support the judgment. Parker v. Page, 38 Cal. 522. An adverse claim of the garnishee is expressly set forth and interpleaded, where, upon examination, he fully informs the court of all such adverse claims. Deering v. Richardson-Kimball Co., 109 Cal. 73; 41 Pac. 801. Where the referee or the court disregards the adverse claim or denial on the ground of bad faith, the better practice is so to state in the finding, in order that it may be subject to review on appeal; but where the statement of the garnishee is so meager and unsatisfactory that the referee may well have treated

his denial of the debt as evasive and made in bad faith, it will be presumed, in support of the judgment, to have been so found. Parker v. Page, 38 Cal. 522. Where a third person receives money from a judgment debtor, claimed in good faith to be his own, his title thereto cannot be litigated in supplementary proceedings. Union Collection Co. v. Snell, 5 Cal. App. 130; 89 Pac. 859.

Creditor's bill lies when. Statutory supplementary proceedings were designed to take the place of the equitable remedy by creditor's bill, formerly the only method of reaching assets which could not be seized on execution (Nordstrom v. Corona City Water Co., 155 Cal. 206; 132 Am. St. Rep. 81; 100 Pac. 242; Pacific Bank v. Robinson, 57 Cal. 520; 40 Am. Rep. 120); but they have not superseded or abolished the right to bring a suit in the nature of a creditor's bill. Union Collection Co. v. Snell, 5 Cal. App. 130; 89 Pac. 859; Rapp v. Whittier, 113 Cal. 429; 45 Pac. 703. When supplementary proceedings afford an adequate legal remedy, a creditor's bill does not lie; on the contrary, a creditor's bill may be had, where supplementary proceedings are inadequate. Phillips v. Price, 153 Cal. 146; 94 Pac. 617; Herrlich v. Kaufmann, 99 Cal. 271; 27 Am. St. Rep. 50; 33 Pac. 857; Rapp v. Whittier, 113 Cal. 429; 45 Pac. 703. Before equity can be invoked in a creditor's bill, it must be shown that the remedies at law are unavailing, and the bill must aver that an execution has been returned unsatisfied. Herrlich v. Kaufmann, 99 Cal. 271; 27 Am. St. Rep. 50; 33 Pac. 857.

Other actions by creditors. Creditors who are entitled to a trust fund under an arrangement between the judgment debtor and the garnishee, are not concluded by a supplementary proceeding: they are not parties to it, and may, by an action in the nature of a bill of interpleader, settle the rights of all the parties interested. Parker v. Page, 38 Cal. 522. The remedy of the creditor against a fraudulent assignee is by direct action, where the good faith of an assignment is in issue. Hartman v. Olvera, 51 Cal. 501.

CODE COMMISSIONERS' NOTE. See Parker v. Page, 38 Cal. 524; Estate of Nerac, 35 Cal. 398; 95 Am. Dec. 111; see cases cited in notes to §§ 714, 715, 716, ante.

§ 721. Disobedience of orders, how punished. If any person, party, or witness disobey an order of the referee, properly made, in the proceedings before him under this chapter, he may be punished by the court or judge ordering the reference, for a contempt.

Contempt. Post, §§ 1209 et seq.

Legislation § 721. Enacted March 11, **1872**; re-enactment of Practice Act, § 245 (New York Code, § 302).

Contempt, punishable by justice of the peace. A justice of the peace may punish for contempt a person refusing to obey an order directing him to deliver property subject to execution. Ex parte Latimer, 47 Cal. 131.

CODE COMMISSIONERS' NOTE. See Estate of Nerac, 35 Cal. 398; 95 Am. Dec. 111; see cases cited in notes to §§ 714, 715, 716, ante.

TITLE X.

ACTIONS IN PARTICULAR CASES.

Chapter I. Actions for Foreclosure of Mortgages. §§ 726–729.
II. Actions for Nuisance, Waste, and Willful Trespass, in Certain Cases, on Real Property. §§ 731–735.
III. Actions to Determine Conflicting Claims to Real Property, and Other Provisions Relating to Actions concerning Real Estate. §§ 738–751.
IV. Actions for Partition of Real Property. §§ 752–801.
V. Actions for Usurpation of an Office or a Franchise. §§ 802–810.
VI. Actions against Steamers, Vessels, and Boats. §§ 813–827.

CHAPTER I.

ACTIONS FOR FORECLOSURE OF MORTGAGES.

§ 726. Proceedings in foreclosure suits.
§ 727. Surplus money to be deposited in court.
§ 728. Proceedings when debt secured falls due at different times.
§ 729. Oath and undertaking of commissioner. Report and account of sale. Compensation of commissioner.

§ 726. Proceedings in foreclosure suits. There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct the sale of the encumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage. The court may, by its judgment, or at any time after judgment, appoint a commissioner to sell the encumbered property. It must require of him an undertaking in an amount fixed by the court, with sufficient sureties, to be approved by the judge, to the effect that the commissioner will faithfully perform the duties of his office according to law. Before entering upon the discharge of his duties he must file such undertaking, so approved, together with his oath that he will faithfully perform the duties of his office. If it appear from the sheriff's return, or from the commissioner's report, that the proceeds are insufficient, and a balance still remains due, judgment must then be docketed by the clerk in the manner provided in this code for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action. If the court appoints a commissioner for the sale of the property, he must sell it in the manner provided by law for the sale of like property by the sheriff upon execution; and the provisions of chapter one, title nine, part two, of this code are

hereby made applicable to sales made by such commissioner, and the powers therein given and the duties therein imposed on sheriffs are extended to such commissioner. In all cases heretofore, now or hereafter pending in the courts of this state, in the event of the death, absence from the state, other disability or disqualification of the commissioner appointed to sell encumbered property under the foregoing provisions of this section, the court may, upon the happening of either the death, absence from the state, other disability or disqualification of the commissioner, appoint an elisor to perform the duties of such commissioner which are then to be performed in such action. The elisor so appointed shall give the undertaking, and take the oath hereinbefore provided to be given and taken by a commissioner, before entering upon the discharge of his duties, and shall thereafter perform all duties left unperformed by the commissioner whom he is appointed to succeed, with like effect as if such duties had been performed by the commissioner. If the land mortgaged consist of a single parcel, or of two or more contiguous parcels, situated in two or more counties, the court may, in its judgment, direct the whole thereof to be sold in one of such counties by the sheriff, commissioner or elisor, as the case may be, and upon such proceedings, and with like effect, as if the whole of the property were situated in that county.

Assistance, writ of. See post, § 1210.
Injunction to restrain waste by party in possession. Post, § 745.
Judgment by default. Ante, § 585. Relief. Ante, §§ 580, 585.
Personal property, mortgage or pledge of. Remedies. See Civ. Code, §§ 2967, 2986–3011; post, § 2967.
Place of trial. Ante, § 392.
Pleading written document. Ante, §§ 447–449.
Foreclosure necessary to obtain possession. Post, § 744.
Receiver. Ante, § 564.
Lis pendens. Ante, § 409.
Several mortgages or debts, installments, etc. Post, § 728.
Tender. Post, § 997.

Legislation § 726. 1. Enacted March 11, **1872**; based on Practice Act, § 246, as amended by Stats. 1865–66, p. 704. When § 726 was enacted in 1872, (1) in first sentence, "shall" was changed to "must"; (2) the beginning of the second sentence, before the words "direct the sale," was changed from "In such action, the court may"; (3) in the same sentence, (a) "to" was omitted before "direct a sale," (b) "the" was added before "expenses of the sale," (c) "shall" was changed to "can" before "then be," and (d) "shall then" was changed to "it becomes" before "a lien"; (4) in sentence beginning "No person," (a) "shall be" was changed to "are" before "as conclusive," and (b) "said" was changed to "the" before "action," the section then ending with this latter word; (5) omitting from end of section the words "and shall in all respects have the same force and effect."

2. Amended by Stats. **1893**, p. 118, (1) in sentence beginning "In such action," the words "to the" were omitted after "amount due," and the word "plaintiff" was changed to "plaintiffs," changing the semicolon after this word to a period; (2) a new sentence was added, beginning "The court" and ending "property"; (3) "and" was omitted before "If it appear," and a new sentence was begun with these words, adding, in the same, after "sheriff's return," the words "or from the commissioner's report"; (4) in sentence beginning "No person," the word "made" was omitted after "he had been"; (5) a new sentence was added, reading, "If the court appoint a commissioner for the sale of the property, he shall sell it in the manner provided by law for the sale of like property by the sheriff upon execution, and the provisions of chapter one, title nine, part two, of the Code of Civil Procedure, are hereby made applicable to sales made by such commissioners, and the powers therein given and the duties therein imposed on sheriffs are extended to such commissioners"; the section then ending with this sentence.

3. Amended by Stats. **1895**, p. 98, (1) in sentence beginning "In such action," (a) "the" was omitted after "costs of," and (b) "plaintiffs" was changed to "plaintiff"; (2) a new sentence was added, reading, "In the event of the death, or absence from the state, or other disability or disqualification of the commissioner so appointed to sell encumbered property, the court may, after the time for redemption has expired, appoint an elisor to make the deed or deeds due to the purchaser or purchasers, or his or their assigns, of the property so sold by said commissioner."

4. Amended by Stats. **1901**, p. 48, (1) in first sentence, omitting "estate" after "real"; (2) in sentence beginning "In such action," (a) changing "a" to "the" before "sale of," and (b) adding, after "due plaintiff," from word "including" to end of sentence; (3) adding two new sentences, beginning "It must require" and ending "duties of his office"; (4) in sentence beginning "If it appear," (a) changing "can" to "must," (b) after "docketed," adding the words "by the clerk in the manner provided in this code," and (c) changing "on" to "in" after "other cases"; (5) changing and adding to section, after "If the court appoint," to read as at present.

5. Amendment by Stats. **1901**, p. 158; unconstitutional. See note ante, § 5.

Procedure before adoption of codes. Before the adoption of the codes, the parties were at liberty to adopt, in the foreclosure of mortgages, the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises and the application of the proceeds to its payment, and apply, after sale, for the ascertainment of any deficiency, and execution for the same, or take a formal judgment for the amount due in the first instance

(Rowland v. Leiby, 14 Cal. 156; Englund v. Lewis, 25 Cal. 337); and legal and equitable relief could be had in the same action, the result being, that, in foreclosure cases, a formal judgment in personam could be rendered against the defendant for the amount found due, with a provision for its enforcement against the property upon which the lien was established (Englund v. Lewis, 25 Cal. 337); and a personal money judgment in favor of all parties holding notes against the defendant could be rendered before sale of the property. Cormerais v. Genella, 22 Cal. 116.

Construction of section. Three essentials provided for by this section are: 1. To make the mortgaged property the primary fund out of which satisfaction is to be had; 2. To give the plaintiff a personal judgment for such balance as may remain due after the exhaustion of the mortgaged property; and 3. To confine a recovery to one action. Toby v. Oregon Pacific R. R. Co., 98 Cal. 490; 33 Pac. 550. This section was not intended to prohibit the ordinary transaction of putting up mortgages as collaterals to secure an indebtedness, nor to limit such collaterals to mortgages which can be foreclosed in the same action. Merced Security Sav. Bank v. Casaccia, 103 Cal. 641; 37 Pac. 648. It must be construed to have reference to the enforcement of those rights, only, which are necessary to the recovery of the debt and the foreclosure of the lien given to secure it, and not to any collateral contract in the mortgage which does not affect the interests of the parties in the mortgaged property. Ely v. Williams, 6 Cal. App. 455; 92 Pac. 393. A trust deed, given as security for a debt, is within the policy of this section, and may be foreclosed. Herbert Kraft Co. v. Brian, 6 Cal. Unrep. 923; 68 Pac. 1020. This section refers to persons having a lien on the mortgaged premises, as well as a conveyance thereof. Wemple v. Yosemite Gold Mining Co., 4 Cal. App. 78; 87 Pac. 280.

Mortgagee may become owner how. The mortgagee can, in no case, become the owner of the mortgaged premises, except by purchase upon sale under judicial decree. Warner v. Freud, 138 Cal. 651; 72 Pac. 345; and see McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655; Goodenow v. Ewer, 16 Cal. 461; 76 Am. Dec. 540; Lord v. Morris, 18 Cal. 482.

Merger of mortgage in deed of trust. A deed of trust does not necessarily supersede or merge a prior mortgage: such merger is a question of intention. Crisman v. Lanterman, 149 Cal. 647; 117 Am. St. Rep. 167; 87 Pac. 89.

Bank cannot apply deposit on mortgage debt. A bank, holding a debt secured by a mortgage, cannot apply, in reduction or cancellation of the debt, a claim due by it to the mortgagor, founded upon a general and ordinary deposit of money with it by the mortgagor. McKean v. German-American Sav. Bank, 118 Cal. 334; 50 Pac. 656; John M. C. Marble Co. v. Merchants' Nat. Bank, 15 Cal. App. 347; 115 Pac. 59.

Payments on account of mortgage debt. Moneys paid by the mortgagor to the mortgagee between the filing of the complaint in foreclosure and the sale, which, by the terms of the contract between them, should have been credited on the mortgage indebtedness, but for which no credit was given, may be recovered back by the mortgagor. Maddux v. County Bank, 129 Cal. 665; 79 Am. St. Rep. 143; 62 Pac. 264.

Liability of surety, guarantor, and indorser. One who is a mere surety, as distinguished from a guarantor, has the right to demand that the creditor shall first apply the property of the principal debtor to the discharge of the debt; but the creditor has the right to sue a guarantor, upon default of the principal debtor, without proceeding first to realize upon other securities, or to foreclose a mortgage given by such debtor. Adams v. Wallace, 119 Cal 67; 51 Pac. 14. Sureties and indorsers are not released by the failure of the creditor to enforce the mortgage which he has taken to secure the debt; and it does not prevent the maintenance of an action by the mortgagee against the sureties or indorsers of the mortgagor because their promise is not secured by the mortgage. Carver v. Steele, 116 Cal. 116; 58 Am. St. Rep. 156; 47 Pac. 1007; Adams v. Wallace, 119 Cal. 67; 51 Pac. 14. The indorser of a note secured by mortgage may be sued upon his obligation, without a foreclosure of the mortgage. Kinsel v. Ballou, 151 Cal. 760; 91 Pac. 620.

Liability of grantee who assumes mortgage debt. The agreement of a grantee to discharge the mortgage debt is an obligation in the hands of the mortgagor, which the mortgagee may enforce for his own benefit when he seeks to obtain satisfaction of the mortgage debt, to the same extent that it could be enforced by the mortgagor. Hopkins v. Warner, 109 Cal. 133; 41 Pac. 868. The grantee who assumes payment of the mortgage as part of the purchase price, becomes, as to the mortgagor, the principal debtor, with the mortgagor as surety. Williams v. Naftzger, 103 Cal. 438; 37 Pac. 411; Hopkins v. Warner, 109 Cal. 133; 41 Pac. 868; Roberts v. Fitzallen, 120 Cal. 482; 52 Pac. 818. A formal promise by the grantee to pay the mortgage debt is not necessary, in order to render him liable therefor, if his intention to assume the debt appears from a consideration of the entire instrument; the obligation may be made orally, or in a separate instrument; it may be implied from the transaction of the parties, or

shown by the circumstances under which the purchase was made. Hopkins v. Warner, 109 Cal. 133; 41 Pac. 868. The liability of the mortgagor is contingent on the fact that a sale of the mortgaged premises shall fail to satisfy the debt and costs; and it is against this contingency that the purchaser, who agrees to pay the mortgage debt, indemnifies him. Biddel v. Brizzolara, 64 Cal. 354; 30 Pac. 609. The mortgagor is discharged from personal liability, where the mortgagee extends the time of payment to the grantee of the mortgagor, who has assumed payment of the mortgage debt. Herd v. Tuohy, 133 Cal. 55; 65 Pac. 139. The agreement of the grantee to pay the mortgage debt may be abandoned at any time by the parties to it, and they may mutually agree to release each other from its performance, and the mortgagee, being a stranger to the contract, can have no greater rights than the mortgagor himself would have. Biddel v. Brizzolara, 64 Cal. 354; 30 Pac. 609. The statute of limitations runs against the mortgage obligation, for that is the grantee's liability, and not against the promise to pay the mortgage as a new and independent agreement. Hopkins v. Warner, 109 Cal. 133; 41 Pac. 868. Where the mortgagor grants the mortgaged property, and dies so shortly before the outlawing of the debt that no administration can be secured before the statute would run in favor of the grantee, the mortgagee may at once sue the grantee, and may subsequently, after the issuance of letters of administration, by amendment or supplemental pleadings, bring in the representatives of the deceased, and thus in one action secure all the remedies to which he may be entitled. California Title Ins. etc. Co. v. Miller, 3 Cal. App. 54; 84 Pac. 453. An agreement by the grantee to pay the mortgage debt upon the granted premises, renders the grantee liable therefor to the mortgagee, and, upon foreclosure of the mortgage, judgment may be rendered against such grantee, as well as against the mortgagor, for any deficiency. Williams v. Naftzger, 103 Cal. 438; 37 Pac. 411; Hopkins v. Warner, 109 Cal. 133; 41 Pac. 868; Roberts v. Fitzallen, 120 Cal. 482; 52 Pac. 818. Equity, to avoid circuity of action, permits the joinder of the mortgagor and his grantee, who has agreed to assume the mortgage, in the action to foreclose the mortgage; but the only personal judgment that can be rendered against either of them is for the deficiency after the sale of the mortgaged premises. Hopkins v. Warner, 109 Cal. 133; 41 Pac. 868. The mortgagee, in his action to foreclose, may proceed against the mortgagor alone for any deficiency in the proceeds of the sale, or he may avail himself of his right to proceed, in the same action, against the mortgagor and his grantee, who has assumed the payment of the mortgage debt; if he proceed against the mortgagor alone, and judgment is docketed against him for any deficiency, the mortgagor has a right of action over against his grantee, upon his agreement to assume the mortgage debt. Hopkins v. Warner, 109 Cal. 133; 41 Pac. 868. The right of the mortgagee to recover a deficiency judgment directly against the grantee of the mortgagor, who has assumed to pay the mortgage debt, springs from the rule of equity, that a creditor is entitled to the benefit of any obligation or security given by his debtor to one who has become the surety of such debtor for the payment of the debt; but this rule is applicable only where the mortgagor is personally liable for the mortgage debt. Ward v. De Oca, 120 Cal. 102; 52 Pac. 130.

Conclusiveness of foreclosure sale. The judgment in a foreclosure suit, and all the proceedings therein, are conclusive against the grantee of the mortgagor, who fails to record his conveyance; in such case, the grantee, by standing idly by and permitting foreclosure proceedings to be prosecuted without intervention upon his part, consents to be represented by the mortgagor, and the legal effect of the foreclosure sale is to divest his title as completely as though he himself were a party to the foreclosure suit. Breedlove v. Norwich etc. Fire Ins. Soc., 124 Cal. 164; 56 Pac. 770.

Object of foreclosure. The object of a foreclosure suit is to subject to a judicial sale, and to vest in the purchaser thereunder, the same title or estate in the mortgaged property that the mortgagor had at the time of the execution of the mortgage. Beronio v. Ventura County Lumber Co., 129 Cal. 232; 79 Am. St. Rep. 118; 61 Pac. 958.

Mortgage covering real and personal property. A mortgage covering real and personal property is valid, and may be foreclosed in the same proceedings; and both the real and the personal property may be sold under the same decree. San Francisco Breweries v. Schurtz, 104 Cal. 420; 38 Pac. 92; and see Tregear v. Etiwanda Water Co., 76 Cal. 537; 9 Am. St. Rep. 245; 18 Pac. 658. The fact that some of the personal property included in a mortgage of real and personal property is not mortgageable does not render the mortgage void as to the other property covered by it. San Francisco Breweries v. Schurtz, 104 Cal. 420; 38 Pac. 92.

Mortgaged property in two or more counties. Where the mortgaged property lies in different counties, the mortgagee may commence an action of foreclosure in either county, and in the single action obtain a judgment for the foreclosure of his mortgage upon the property in both

counties. Kent v. Williams, 146 Cal. 3; 79 Pac. 527; and see Murphy v. Superior Court, 138 Cal. 69; 70 Pac. 1070.

Other remedies in case of personal property. Where the mortgage provides that the mortgagee shall be entitled to possession of the chattels upon default, he has the right to bring an action of replevin after default; and such action does not contravene the provision of this section allowing but one action to enforce the debt or lien of the mortgage. Harper v. Gordon, 128 Cal. 489; 61 Pac. 84. The limitation upon the form of action, declared in this section, extends only to "mortgages"; and, as a stockholder's agreement that the corporation shall have a lien upon his stock is not a mortgage, the corporation may enforce payment of the indebtedness by action, without any foreclosure of the lien. People's Home Sav. Bank v. Sadler, 1 Cal. App. 189; 81 Pac. 1029. Where a chattel mortgage gives a right to take possession upon default in payment, the mortgagee, after electing to foreclose, may sue in replevin to recover possession: such remedy is ancillary and auxiliary to foreclosure. Ely v. Williams, 6 Cal. App. 455; 92 Pac. 393. A pledgee may have his action to recover the debt without first exhausting the subject of his pledge. Jones v. Evans, 6 Cal. App. 88; 91 Pac. 532; John M. C. Marble Co. v. Merchants' Nat. Bank, 15 Cal. App. 347; 115 Pac. 59.

One action for recovery of debt secured by mortgage. There is but one form of action to recover a debt secured by mortgage. Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192; 21 Ann. Cas. 1279; 106 Pac. 715. The plaintiff cannot waive the security, and bring an action on the indebtedness: he must bring his action of foreclosure, and exhaust the security before he can have recourse to the personal responsibility of the debtor. Barbieri v. Ramelli, 84 Cal. 154; 23 Pac. 1086; Gnarini v. Swiss-American Bank, 162 Cal. 181; 121 Pac. 726. To an action at law upon a promissory note, it is a complete defense to set up the fact that the note is secured by mortgage; the mortgagee cannot bring an action and have judgment upon the note without foreclosure of the mortgage. Hibernia Sav. & L. Soc. v. Thornton, 109 Cal. 427; 50 Am. St. Rep. 52; 42 Pac. 447; 117 Cal. 481; 49 Pac. 573. The intention of the legislature in enacting the provision that there can be but one action for the recovery of any debt secured by mortgage, was to prevent a multiplicity of suits: if one suit could be maintained upon a note, and another upon the mortgage by which it is secured, no change was effected by this enactment, because a mortgagee was previously limited to these two actions. Ould v. Stoddard, 54 Cal. 613. The provision of this section, that there shall be but one action for the recovery of any debt, relates to civil actions commenced and prosecuted in the courts of this state: it does not embrace and control proceedings sanctioned by the common law, which cannot, in any legal sense, be called actions at law or suits in equity. Wilson v. Brannan, 27 Cal. 258. Where a mortgagee has prosecuted an action in another state to final judgment, upon a note secured by mortgage on real property in this state, he cannot afterwards maintain an action for foreclosure in this state. Ould v. Stoddard, 54 Cal. 613. There can be no attachment, in any case, where the debt is secured by mortgage; and no action can be maintained, in such case, without a foreclosure of the mortgage. Barbieri v. Ramelli, 84 Cal. 174; 24 Pac. 113. A separate action cannot be brought for the recovery of a debt for which a mortgage security has been given, though such security was originally valueless, or totally inadequate by reason of prior mortgages to the full value of the premises. Barbieri v. Ramelli, 84 Cal. 154; 23 Pac. 1086. There is no difference between commencing and enforcing an attachment suit while there is a valid mortgage existing to secure the debt, and prosecuting an action already commenced after a mortgage is given to secure the debt which is the subject of that action: the mortgage subserves the same purpose in both cases, which is, to secure the debt, and, after it is given, the law steps in and limits the action to foreclosure proceedings to enforce the debt. Commercial Bank v. Kershner, 120 Cal. 495; 52 Pac. 848. Where a mortgage was given as an additional security for a debt then being enforced by an action pending, the plaintiff may not proceed with such action and then foreclose on the balance, if there should be any. Commercial Bank v. Kershner, 120 Cal. 495; 52 Pac. 848. A mortgagee may attach property for an unsecured debt, although he can maintain only one action for the recovery of the debt secured by the mortgage. Flores v. Stone, 21 Cal. App. 105; 131 Pac. 348, 351. The holder of a note secured by a second mortgage cannot, after foreclosure of the prior mortgage by a suit to which he was made a party defendant, and in which all his rights might have been settled, maintain an action on the note against the maker. Brown v. Willis, 67 Cal. 235; 7 Pac. 682. An action cannot be maintained on a note alone, unless its security is valueless. Bartlett v. Cottle, 63 Cal. 366. A personal action upon a note secured by a second mortgage is not prohibited by this section, after the security of the mortgage has been lost without the fault of the mortgagee, and through the failure of the mortgagor to pay the first mortgage, resulting in the foreclosure thereof, and sale of the mortgaged premises to pay the same. Sav-

ings Bank v. Central Market Co., 122 Cal. 28; 54 Pac. 273; and see Toby v. Oregon Pacific R. R. Co., 98 Cal. 490; 33 Pac. 550. Where, by mistake, the mortgagee does not secure a lien upon anything, he may be allowed a personal action on the note alone; the rule that the mortgagee is personally liable for the entire debt should be the same where no lien is created as where it has been lost without the fault of the mortgagee. Otto v. Long, 127 Cal. 471; 59 Pac. 895. A mortgage of property in which the mortgagor neither has nor acquires any interest creates no lien, and cannot properly be foreclosed; and, in such case, it does not violate the policy established by this section to allow a personal action upon the note. Otto v. Long, 127 Cal. 471; 59 Pac. 895. Where the mortgagor had neither possession, nor any estate, title, or interest of any kind or character, in the mortgaged premises, when he executed the mortgage, and never, at any time, acquired any, the debt is not one secured by a lien upon real property; if the mortgagor in good faith asserts a claim to the property, or has color of title, or asserts an equity in it, the mortgagee should foreclose; but where the mortgagor has no claim of title, and there is no mistake which can be corrected in a court of equity, it does not violate the policy established by this section to allow a personal action on the note. Otto v. Long, 127 Cal. 471; 59 Pac. 895. To inquire whether there is such property as that which the mortgage purports to cover, or whether, for any reason, it fails to create a lien, is not to violate the policy of the statute, nor the rule that, so long as there is an unexecuted lien on property to secure the debt, a personal action cannot be maintained. Otto v. Long, 127 Cal. 471; 59 Pac. 895. The relation of mortgagor and mortgagee is not created, where the vendor of the property retains a lien on the land for portion of the purchase-money remaining unpaid; and there is no statutory prohibition upon the right to a personal action to enforce the debt when it becomes due. Longmaid v. Coulter, 123 Cal. 208; 55 Pac. 791.

Action where mortgage is on property outside of state. This section refers solely to debts secured by mortgages of property in this state: it has no application to mortgages of property situated in another state or country. McGue v. Rommel, 148 Cal. 539; 83 Pac. 1000; Felton v. West, 102 Cal. 266; 36 Pac. 676. An action can be maintained here, upon a note secured by a mortgage on property out of the state, without a foreclosure of the mortgage. McGue v. Rommel, 148 Cal. 539; 83 Pac. 1000.

Action may be commenced when. A written agreement by a mortgagee to extend the time of payment of a note, in consideration of the payment of a large portion of the principal, and of a promise to pay interest on the balance monthly thereafter, is virtually a renewal of the note and mortgage for the new principal to the date agreed upon; and an action to foreclose, commenced prior to that date, is properly dismissed as premature. Seaton v. Fiske, 128 Cal. 549; 61 Pac. 666.

Foreclosure as to part of mortgaged premises. A mortgagee, by foreclosing on one piece of land, of two pieces covered by the same mortgage, waives his lien on the excluded piece; by the foreclosure, the mortgage is merged in the judgment, and a new action cannot be maintained. Mascarel v. Raffour, 51 Cal. 242; Hall v. Arnott, 80 Cal. 348; 22 Pac. 200; Stockton Sav. & L. Soc. v. Harrold, 127 Cal. 612; 60 Pac. 165; Commercial Bank v. Kershner, 120 Cal. 495; 52 Pac. 848. Where a loan is secured by a mortgage upon different pieces of real property, the lender may foreclose as to one of the securities only, if he does not seek a personal judgment against the defendant; and while the effect of this would be to waive the omitted security, yet the lender is at liberty to make such waiver if he chooses. Bull v. Coe, 77 Cal. 54; 11 Am. St. Rep. 235; 18 Pac. 808.

Successive actions to foreclose. This section does not prohibit successive foreclosures, when required by the circumstances, for distinct debts secured by the same mortgage: the power of a court of equity, in a proper case, to direct a sale of the property on foreclosure of the mortgage, saving from the effect of such sale a further lien secured by the same or some other encumbrance, is fully established. Stockton Sav. & L. Soc. v. Harrold, 127 Cal. 612; 60 Pac. 165. Where a previous attempt to foreclose a mortgage was void, it does not operate as a waiver of the mortgage lien, nor of the right to foreclose the same in a second action. Ludwig v. Murphy, 143 Cal. 473; 77 Pac. 150. Where two successive mortgages are given to secure the same debt, and, by mistake, the first alone is foreclosed, which covers less property than the second, and is insufficient to pay the debt, the holder of the mortgage can maintain a suit to set aside the judgment of foreclosure, and for a foreclosure of the second mortgage, as against a subsequent judgment creditor. Gerig v. Loveland, 130 Cal. 512; 62 Pac. 830.

Rights of and actions by junior mortgagees. The second mortgagee is not required to bring suit to recover his debt at such time as the first mortgagee may see fit to do so, especially where it is apparent that, should he foreclose, he would receive nothing; and the mortgagor cannot be heard to complain that the second mortgagee did not so bring suit. Savings

Bank v. Central Market Co., 122 Cal. 28; 54 Pac. 273. The holder of a second mortgage upon two distinct tracts may come in by way of cross-complaint in an action to foreclose the first mortgage upon one of such tracts only, and have his mortgage on the other and separate tract foreclosed in the same action. Stockton Sav. & L. Soc. v. Harrold, 127 Cal. 612; 60 Pac. 165; Newhall v. Bank of Livermore, 136 Cal. 533; 69 Pac. 248. Where a subsequent mortgagee, made a party defendant in an action to foreclose the prior mortgage, filed an answer setting up his mortgage covering the tract of land involved in the action, and also another tract, and prayed that if any surplus should remain after applying the proceeds of the sale of the tract involved in the action to the payment of the first mortgage, it be applied to the payment of the second mortgage, a judgment foreclosing the first mortgage is not a bar to another action by him to foreclose his mortgage as against the other tract not involved in the first action. Brill v. Shively, 93 Cal. 674; 29 Pac. 324; Pauly v. Rogers, 121 Cal. 294; 53 Pac. 808. A junior mortgagee, made a party defendant in foreclosure, may plead his mortgage, and ask that any surplus derived from the sale of the property subject to both mortgages be applied as a credit upon his note; and by so doing he in no sense brings an action to foreclose his mortgage, and is not barred from thereafter bringing an action to foreclose the mortgage upon other property included therein, which was not subject to the prior mortgage. Pauly v. Rogers, 121 Cal. 294; 53 Pac. 808; and see Brill v. Shively, 93 Cal. 674; 29 Pac. 324. A junior mortgagee need not answer or set up his claim, by cross-complaint or otherwise, in foreclosure proceedings brought by the holder of a prior lien, although made a party defendant. Greenebaum v. Davis, 131 Cal. 146; 82 Am. St. Rep. 338; 63 Pac. 165; Savings Bank v. Central Market Co., 122 Cal. 28; 54 Pac. 273.

Action on assigned mortgage. An action to foreclose a mortgage which has been assigned as collateral security for the principal debt, is not an action for the recovery of the principal debt, but to preserve and enforce the security, which is a duty imposed upon the creditor by the contract of hypothecation, and the principal debt need not be enforced in such action. Merced Security Sav. Bank v. Casaccia, 103 Cal. 641; 37 Pac. 648; McArthur v. Magee, 114 Cal. 126; 45 Pac. 1068.

Negotiability of note secured by mortgage. A note, though negotiable in form, is, in law, not negotiable, if secured by a mortgage of even date, which makes it payable primarily out of a peculiar fund, at least as against one having knowledge of the mortgage. Hays v. Plummer, 126 Cal. 107; 77 Am. St. Rep. 153; 58 Pac. 447. A note secured by mortgage, which provides for attorneys' fees in case of foreclosure, is not negotiable, within the law merchant, nor was it so under the Civil Code, until the amendment to § 3088 of that code in 1905. Meyer v. Weber, 133 Cal. 681; 65 Pac. 1110. A note secured by a mortgage on land, both executed at the same time, is not negotiable, where a purchaser takes it with knowledge of the mortgage; and a recital in the note that it is so secured is notice of the fact. National Hardware Co. v. Sherwood, 165 Cal. 1; 130 Pac. 881.

Jurisdiction of court. The court has no jurisdiction to render judgment in foreclosure proceedings on lands lying outside of the county in which suit is brought, although the description of the lands in the mortgage erroneously recites that they are in such county. Rogers v. Cady, 104 Cal. 288; 43 Am. St. Rep. 100; 38 Pac. 81. The jurisdiction of the court, in actions of foreclosure, over the parties and the subject-matter continues until the foreclosure is completed by failure to redeem; and it has power to vacate an irregular sale before the expiration of the time for redemption, as against the purchaser, who, by his bid, submits himself to it. Van Loben Sels v. Bunnell, 131 Cal. 489; 63 Pac. 773. In an action for the foreclosure of a mortgage, the court has merely jurisdiction to foreclose the mortgage sued on and the rights of all parties holding under and subject thereto: it has no jurisdiction to reach over into a separate partition suit, begun prior to the execution of the mortgage by one of the tenants in common who were parties to the suit, and to take control and jurisdiction thereof in the interest of the mortgagee. Towle v. Quinn, 141 Cal. 382; 74 Pac. 1046. Where the maker of a note or bill of exchange resides in a remote country, or in a different state, and it is not shown that he has any property subject to seizure and sale within this state, such special circumstances are presented as to authorize the holder of the instruments given in pledge to resort to a court of equity for a foreclosure and sale. Donohoe v. Gamble, 38 Cal. 340; 99 Am. Dec. 399.

Allegation of complaint. A note and mortgage, set out in full as an exhibit in the complaint, are sufficiently referred to by the allegation that the defendant executed to the plaintiff a certain promissory note and a certain mortgage to secure the same, and that a copy of said note is set out in said mortgage, and said mortgage is hereto attached and marked "Exhibit B." Savings Bank v. Burns, 104 Cal. 473; 38 Pac. 102; and see Ward v. Clay, 82 Cal. 502; 23 Pac. 50; Whitby v. Rowell, 82 Cal. 635; 23 Pac. 40. A complaint upon a promissory note is not rendered insuffi-

cient to state a cause of action, merely because of a recital contained in the copy of the note set out in the complaint, that the note is secured by a mortgage of even date therewith, there being no averment in the complaint that the note was secured by a mortgage, and the recital not being the equivalent of such an averment. Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481; 49 Pac. 573. An averment that the plaintiff is the owner of the note is but the averment of a conclusion of law, and not the averment of an issuable fact; it is immaterial, and may be omitted, where the conclusion of law necessarily follows from the other facts stated, and the denial of this averment of a conclusion of law does not raise a material issue. Wedderspoon v. Rogers, 32 Cal. 569; Poorman v. Mills, 35 Cal. 118; 95 Am. Dec. 90; Monroe v. Fohl, 72 Cal. 568; 14 Pac. 514; Bank of Shasta v. Boyd, 99 Cal. 604; 34 Pac. 337. In an action to foreclose a mortgage securing a note, the breach of the contract to pay the note is of the essence of the cause of action, and must be alleged: an averment that "there is now due and owing to the plaintiff" a specified sum is but the averment of a conclusion of law, and not of a fact, and is not the equivalent of an averment of non-payment. Ryan v. Holliday, 110 Cal. 335; 42 Pac. 891. Where the complaint merely avers that "the whole of said note is owing from said defendant to said plaintiff," without any averment of the fact of non-payment, it does not state facts sufficient to constitute a cause of action. Knox v. Buckman Contracting Co., 139 Cal. 598; 73 Pac. 428; and see Penrose v. Winter, 135 Cal. 289; 67 Pac. 772. An averment in the complaint, that a specified sum "is now due and owing," though the statement of a legal conclusion, in which the material fact of non-payment is implied, is sufficient to sustain a judgment by default. Penrose v. Winter, 135 Cal. 289; 67 Pac. 772. A complaint which sets out the note and mortgage, showing on their face that the principal was due and payable long before the commencement of the action, and which avers that no part of the principal sum has been paid, and that it is unpaid, and is owing by defendant to the plaintiff, sufficiently shows that the principal sum was due at the commencement of the action. Luddy v. Pavkovich, 137 Cal. 284; 70 Pac. 177. In an action to foreclose a mortgage, by the indorsee of a note payable "on or before two years after date," with interest payable semi-annually, a complaint which shows an indorsement and delivery by the payee to the plaintiff less than thirty days after the date of the note and continuous ownership of the note and mortgage by the plaintiff thereafter, and alleges payment of the interest for one year, and that the principal and interest thereafter accruing according to the terms of the note "still remains due and unpaid from the defendant (the mortgagor) to this plaintiff," is sufficient to support a judgment for the plaintiff against the mortgagor. Schwind v. Hall, 129 Cal. 40; 61 Pac. 573.

Counsel fees alleged how. The complaint need not aver that the counsel fee claimed is reasonable, nor need there be a finding to that effect: the fee is a mere incident to the action. McNamara v. Oakland Bldg. etc. Ass'n, 131 Cal. 336; 63 Pac. 670; and see Carriere v. Minturn, 5 Cal. 435; Monroe v. Fohl, 72 Cal. 568; 14 Pac. 514; Rapp v. Spring Valley Gold Co., 72 Cal. 532; 16 Pac. 325; First Nat. Bank v. Holt, 87 Cal. 158; 25 Pac. 272; White v. Allatt, 87 Cal. 245; 25 Pac. 420. Nor is it necessary to allege non-payment of counsel fees which have neither been earned in full nor yet fixed by the court: the amount of the fees, within the limits of the contract contained in the mortgage, is to be determined by the court. Damon v. Quinn, 143 Cal. 75; 76 Pac. 818. A prayer that the proceeds of the sale be applied to the payment of the amount due on the note and mortgage, with interest, disbursements, costs, and counsel fees, where the complaint alleges that the mortgage provides that in case of foreclosure the plaintiff shall be entitled to a certain per cent as counsel fees, is sufficient, and counsel fees should be allowed thereon, though the defendant suffers default. Thrasher v. Moran, 146 Cal. 683; 81 Pac. 32.

Demurrer. In an action brought on the note alone, the defendant may demur to the complaint, on the ground that it is doubtful or uncertain therefrom whether in fact the note, which was set forth by copy, and which stated that it was secured by mortgage, was in fact secured by mortgage; but, in the absence of such demurrer, the complaint is sufficient to sustain a judgment by default for the amount of the note; the allegations of the answer cannot be considered in determining the matter. Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481; 49 Pac. 573.

Parties defendant. The only proper or necessary parties defendant to a suit of foreclosure are the mortgagor and those claiming an interest in the property, derived subsequently to the date of the mortgage; and titles adverse to that of the mortgagor, or superior to that covered by the mortgage, are not proper subjects for determination in such action. Beronio v. Ventura County Lumber Co., 129 Cal. 232; 79 Am. St. Rep. 118; 61 Pac. 958; and see San Francisco v. Lawton, 18 Cal. 465; 79 Am. Dec. 187; Croghan v. Minor, 53 Cal. 15; Marlow v. Barlew, 53 Cal. 456; Cody v. Bean, 93 Cal. 578; 29 Pac. 223; Sichler v. Look, 93 Cal. 600; 29 Pac. 220;

Williams v. Cooper, 124 Cal. 666; 57 Pac. 577; Murray v. Etchepare, 129 Cal. 318; 61 Pac. 930; Peachy v. Witter, 131 Cal. 316; 63 Pac. 468. Where the interest of a defendant in foreclosure proceedings is adverse or superior to that covered by the mortgage, the proper action of the court is to dismiss him from the suit. Beronio v. Ventura County Lumber Co., 129 Cal. 232; 79 Am. St. Rep. 118; 61 Pac. 958; and see Ord v. Bartlett, 83 Cal. 428; 23 Pac. 705; Cody v. Bean, 93 Cal. 578; 29 Pac. 223; Hoppe v. Hoppe, 104 Cal. 94; 37 Pac. 894. Under a statute allowing a creditor to enforce a mortgage against the mortgagor alone, the owner of the mortgaged property at the time of foreclosure must be made a party. Skinner v. Buck, 29 Cal. 253. A prior lien-holder is a proper though not a necessary party to an action to foreclose a mortgage; and when made a party, he may seek the foreclosure of his lien by cross-complaint. Van Loben Sels v. Bunnell, 131 Cal. 489; 63 Pac. 773. The holders of junior liens must be made parties defendant in foreclosure proceedings, in order to make the foreclosure effectual; and this implies that their rights, when brought into court, shall be adjudicated, and provision made for them in the decree of foreclosure by a proper disposition of the surplus proceeds of the sale of the mortgaged premises. Hibernia Sav. & L. Soc. v. London etc. Fire Ins. Co., 138 Cal. 257; 71 Pac. 334. The indorsers of a note secured by mortgage are properly joined as parties defendant in foreclosure proceedings. Hubbard v. University Bank, 125 Cal. 684; 58 Pac. 297. Those acquiring title to the mortgaged property subsequently to the commencement of the foreclosure proceedings, in the face of the recorded lis pendens, or with actual notice of the suit, are not necessary parties to such proceedings. Hibernia Sav. & L. Soc. v. Cochran, 141 Cal. 653; 75 Pac. 315. A purchaser who acquires title under a sale to satisfy the lien of a street assessment, is not a necessary party to an action to foreclose a mortgage on the property; the title acquired by him is superior and hostile to the mortgage, and cannot be litigated in the action of foreclosure. Wilson v. California Bank, 121 Cal. 630; 54 Pac. 119. The heirs of a deceased mortgagor are not necessary parties defendant in an action to foreclose: it is sufficient to make the administrator a party defendant. Finger v. McCaughey, 119 Cal. 59; 51 Pac. 13; and see Bayly v. Muehe, 65 Cal. 345; 3 Pac. 467; 4 Pac. 486; Monterey County v. Cushing, 83 Cal. 507; 23 Pac. 700; Collins v. Scott, 100 Cal. 446; 34 Pac. 1085. In foreclosure proceedings, only those persons need be made defendants whose interests appear of record. Spaulding v. Howard, 121 Cal. 194; 53 Pac. 563. The holder of a deed, not recorded when the action to foreclose was commenced, is not necessary party defendant, although such deed was executed prior to the commencement of the action. Hibernia Sav. & L. Soc. v. Cochran, 141 Cal. 653; 75 Pac. 315. The holder of an unrecorded deed, made subsequently to the mortgage, need not be made a party to foreclosure proceedings; but such proceedings are conclusive against him, as though he had been made a party to the action. Breedlove v. Norwich Union Fire Ins. Soc., 124 Cal. 164; 56 Pac. 770. The record of the deed, and not actual notice, determines the right of the grantee to be made a party to foreclosure proceedings, in order to be bound by the decree. Filipini v. Trobock, 134 Cal. 441; 66 Pac. 587. A purchaser of the mortgaged property, prior to the action of foreclosure, and subject to the mortgage, who fails to record his deed prior to the commencement of such action, and of whose interest the mortgagee had no notice at such time, is not a necessary party, in the sense that it is necessary to bring him in so that a foreclosure decree effectual as against him may be rendered, as, for all the purposes of obtaining jurisdiction, he is fully represented by the mortgagor. Hibernia Sav. & L. Soc. v. Cochran, 141 Cal. 653; 75 Pac. 315. A party, who was the holder of an unrecorded deed from the mortgagor when foreclosure suit was commenced, need not be made a party thereto, and is concluded by the decree; and evidence is inadmissible, in his behalf, to show that the plaintiff had actual knowledge of the unrecorded deed before such suit was commenced. Hager v. Astorg, 145 Cal. 548; 104 Am. St. Rep. 68; 79 Pac. 68; Shurtleff v. Kehrer, 163 Cal. 24; 124 Pac. 724. A subsequent purchaser, whose deed was duly recorded prior to the commencement of an action to foreclose an antecedent mortgage, but who was not made a party to the action, is not bound by the foreclosure decree. Shurtleff v. Kehrer, 163 Cal. 24; 124 Pac. 724. In an action to foreclose a mortgage given by an heir upon his interest in certain real property owned by the deceased, which was thereafter sold under order of probate court, the purchaser at such probate sale, being made a party, is entitled to recover his costs, having taken the property, by such sale, discharged from encumbrance. Gutter v. Dallamore, 144 Cal. 665; 79 Pac. 383.

Answer. Where the complaint in an action of foreclosure contains a copy of the note and mortgage sued upon, and the answer is unverified, the genuineness and due execution of those instruments are admitted. Waldrip v. Black, 74 Cal. 409; 16 Pac. 226. An answer denying that the plaintiff was the owner and holder of the note and mortgage, raises no issue; that being the only denial, judgment upon the pleadings is proper. Clemens v. Luce, 101

Cal. 432; 35 Pac. 1032; and see Bank of Shasta v. Boyd, 99 Cal. 604; 34 Pac. 337.

Cross-demand against mortgagor. A simple contract debt, due from a mortgagee to the mortgagor, is not available as a cross-demand: such indebtedness cannot be mutually compensated under this section. Moore v. Gould, 151 Cal. 723; 91 Pac. 616.

Intervention. An intervention is not permissible to set up an adverse claim of title to part of the mortgaged property, in opposition to that of the mortgagor and the mortgagee, in an equitable action of foreclosure. Peachy v. Witter, 131 Cal. 316; 63 Pac. 468; and see McComb v. Spangler, 71 Cal. 418; 12 Pac. 347; Ord v. Bartlett, 83 Cal. 428; 23 Pac. 705; Emeric v. Alvarado, 90 Cal. 444; 25 Pac. 356; Cody v. Bean, 93 Cal. 578; 29 Pac. 223; Sichler v. Look, 93 Cal. 600; 29 Pac. 220; Williams v. Cooper, 124 Cal. 666; 57 Pac. 577; Murray v. Etchepare, 129 Cal. 318; 61 Pac. 930.

Evidence. In an action of foreclosure against the original mortgagor, an acknowledgment of the mortgage is not necessary to give it validity, and the note and unacknowledged mortgage are admissible in evidence against him. West v. Mears, 17 Cal. App. 718; 121 Pac. 700. The fact that the original note was surrendered, and marked "Paid" on its face, is not conclusive of the extinguishment of the debt which the mortgage was given to secure, where the original note was replaced by a new note, and where the mortgage given to secure it was allowed to stand as before; it may be shown that the original debt was not, in fact, extinguished. Bonestell v. Bowie, 128 Cal. 511; 61 Pac. 78; and see Welch v. Allington, 23 Cal. 322; Steinhart v. National Bank, 94 Cal. 362; 28 Am. St. Rep. 132; 29 Pac. 717.

Judgment to contain what. The judgment in foreclosure proceedings need only contain a statement of the amount due the plaintiff, a designation of the defendants who are personally liable for the payment of the debt, and a direction that the mortgaged premises, or so much thereof as may be necessary, be sold according to law, and the proceeds applied to the payment of the expenses of the sale, the costs of the action, and the debt: everything else is ministerial, and is expressly regulated by statute, which is not made clearer or more binding by being copied in the judgment. Leviston v. Swan, 33 Cal. 480; Hooper v. McDade, 1 Cal. App. 733; 82 Pac. 1116. In a foreclosure suit, where judgment is taken by default, the decree can give no relief beyond that demanded in the bill. Raun v. Reynolds, 11 Cal. 14.

Judgment on the pleadings. A judgment for the defendant, on the pleadings, cannot be granted in an action brought on the note alone, although the note was secured by mortgage, where the complaint does not set forth facts showing that the note was so secured: an answer setting forth such facts is not sufficient. Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481; 49 Pac. 573.

Judgment for costs. The action of the clerk in inserting, in a decree of foreclosure, the amount of costs as claimed by the plaintiff, before the same have been taxed and ascertained, is a mere clerical misprision, not affecting the validity of the decree in other respects, nor invalidating the order of sale issued thereon, nor affecting the validity of the sale thereunder. Janes v. Bullard, 107 Cal. 130; 40 Pac. 108.

Interest. Interest due and payable on a note secured by mortgage, is a debt secured by the mortgage. Van Loo v. Van Aken, 104 Cal. 269; 37 Pac. 925. That a mortgagee cannot foreclose for interest in arrears, because there is no express agreement that he may do so, is opposed to the current of authority and to the reasonable construction of the statute. Van Loo v. Van Aken, 104 Cal. 269; 37 Pac. 925; and see Yoakam v. White, 97 Cal. 286; 32 Pac. 238. Where the note provides for the payment of interest semi-annually, and the mortgage provides that upon default in the payment thereof the mortgagee may cause the premises to be sold, the mortgagee has the right to bring an action of foreclosure upon default in the payment of interest, although the note does not provide for such default. Phelps v. Mayers, 126 Cal. 549; 58 Pac. 1048; and see Yoakam v. White, 97 Cal. 286; 32 Pac. 238. Where the provision of the note is, that, upon a default in paying interest, the principal shall become due at the election of the holder, the assertion of such election merely puts the holder in the position of the holder of a note which declares that upon default in interest the whole principal shall immediately become due; and the bringing of a foreclosure suit by the holder does not put it out of his power to waive the penalty, by accepting a payment of all interest due and dismissing the action. California Sav. & L. Soc. v. Culver, 127 Cal. 107; 59 Pac. 292.

Judgment for interest only. Where a foreclosure suit is begun upon default in payment of interest, in accordance with a provision therefor in the mortgage, which did not provide for maturity of the debt upon such default, the judgment can only provide for a sale to pay the interest then found to be due; and the remedy for subsequent defaults in the payment of principal or interest is, under § 728, post, to move for a subsequent order or orders of sale of the mortgaged premises therefor. Byrne v. Hoag, 126 Cal. 283; 58 Pac. 688. A judgment for the principal of a promissory note secured by mortgage, before it

became due, and an order for the sale of the mortgaged premises for its payment, is erroneous; judgment may be had for the sale of so much of the premises as may be necessary to satisfy the interest due. Hunt v. Dohrs, 39 Cal. 304.

Counsel fees fixed and allowed how. Attorneys' fees are properly allowed, for the same reason that costs are allowed, as a necessary incident to the judgment. Rapp v. Spring Valley Gold Co., 74 Cal. 532; 16 Pac. 325. Counsel fees are not recoverable as costs; and a special prayer for costs does not include counsel fees, nor does a stipulation in the mortgage, making counsel fees a charge secured by the mortgage, make such charge part of the costs of the action. Brooks v. Forrington, 117 Cal. 219; 48 Pac. 1073. It is not necessary to the allowance of counsel fees that the plaintiff should have actually paid or expressly agreed to pay such to his counsel: an implied agreement is sufficient. Rapp v. Spring Valley Gold Co., 74 Cal. 535; 16 Pac. 325. Where an attorney received a regular salary for all his services rendered to the plaintiff, and the plaintiff has not agreed or become liable to pay him any compensation for his services in foreclosure proceedings, the plaintiff is not entitled to an allowance for counsel fees, the attorney not being entitled to receive such fees for himself. Bank of Woodland v. Treadwell, 55 Cal. 379; Rapp v. Spring Valley Gold Co., 74 Cal. 532; 16 Pac. 325. Where the note secured by the mortgage provides for the payment of attorneys' fees not provided for in the mortgage, and does not provide in terms for the right to bring an action before its maturity, that right being created by the mortgage alone, and limited to a foreclosure of the mortgage, the holder cannot recover judgment for the attorneys' fees provided for in the note, without giving notice of his option to claim the whole amount to be due before bringing suit. Clemens v. Luce, 101 Cal. 432; 35 Pac. 1032. The court has no power to make a greater allowance for counsel fees than that specified in the mortgage (Monroe v. Fohl, 72 Cal. 568; 14 Pac. 514); or in the note secured by the mortgage. Hewitt v. Dean, 91 Cal. 5; 27 Pac. 423. Where the mortgage provides for a reasonable counsel fee to be fixed by the court in case of foreclosure, the duty of fixing the amount of compensation is cast on the court, and no evidence of the value of the services is necessary. Woodward v. Brown, 119 Cal. 283; 63 Am. St. Rep. 108; 51 Pac. 2; Hotaling v. Monteith, 128 Cal. 556; 61 Pac. 95. In fixing an attorney's fee in foreclosure proceedings, the extent of the responsibility assumed by the attorney, by reason of the amount involved, is to be considered. Patten v. Pepper Hotel Co., 153 Cal. 460; 96 Pac. 296.

Counsel fees lien on mortgaged premises when. Where the mortgage merely provides security for the payment of the principal and interest specified in the note, and does not provide for securing the payment of any attorney's fee, such fee cannot become a lien on the land nor be provided for in the decree of foreclosure. Clemens v. Luce, 101 Cal. 432; 35 Pac. 1032. In an action to foreclose a mortgage, a provision for counsel fees therein contained cannot be charged as a lien upon the land, unless expressly so charged by the terms of the mortgage; and if not so charged, the fees are in the nature of special damage, which may be pleaded and recovered against the mortgagor. Klokke v. Escailler, 124 Cal. 297; 56 Pac. 1113. Where a note, secured by deed of grant, contains an agreement for attorneys' fees in case suit is brought, and a copy of the note is set out in the complaint, following which is an allegation that the conveyance of the land was made to secure the payment of the "said note," the term "said note" includes the contract to pay attorneys' fees, as well as the principal and interest of the note; and it is proper not only to give judgment for attorneys' fees, but also to make them a lien upon the mortgaged premises. County Bank v. Goldtree, 129 Cal. 160; 61 Pac. 785. Where the note set out in the complaint, and appearing to have been secured by mortgage, contains a provision for reasonable counsel fees as part of the note, it is proper to embody an allowance for counsel fees in the decree of foreclosure of the mortgage. Peachy v. Witter, 131 Cal. 316; 63 Pac. 468. A provision in a mortgage, to the effect that, in case of a suit for its foreclosure, a decree may be had for the sale of the mortgaged premises, and out of the proceeds there may be retained the costs and charges of making such sale and of suit for foreclosure, including counsel fees, authorizes the court to include such counsel fees in its decree as a part of the obligation secured by the mortgage. O'Neal v. Hart, 116 Cal. 69; 47 Pac. 926; and see Haensel v. Pacific States Savings etc. Co., 135 Cal. 41; 67 Pac. 38. Where the obligation for the payment of counsel fees is included in the note, but is not secured by the mortgage, the plaintiff may recover judgment for counsel fees, but such judgment is not a lien upon the real estate secured by the mortgage. Clemens v. Luce, 101 Cal. 432; 35 Pac. 1032. Where the mortgage provides for reasonable counsel fees, to be fixed by the court in case of foreclosure, and for all payments made by the mortgagee for specified purposes, which payments were to be deemed as secured by the mortgage, the mortgagee is not entitled to have such fees included in the mortgage lien, but must rely upon a per-

sonal judgment. Klokke v. Escailler, 124 Cal. 297; 56 Pac. 1113; and see Irvine v. Perry, 119 Cal. 352; 51 Pac. 544; Cortelyou v. Jones, 132 Cal. 131; 64 Pac. 119; Haensel v. Pacific States Savings etc. Co., 135 Cal. 41; 67 Pac. 38; Luddy v. Pavkovich, 137 Cal. 284; 70 Pac. 177.

Appointment of commissioner. The court is authorized to appoint a commissioner to make a sale under foreclosure, by its judgment, or at any time after judgment; no notice is required of the appointment, which may be made ex parte; and the appointment does not go to the substance of the decree. Granger v. Sheriff, 140 Cal. 190; 73 Pac. 816. The proceedings for the foreclosure of a street assessment are quite analogous to those for the foreclosure of a mortgage upon real property; and as no mode is specifically pointed out for the sale of real property under the judgment therein, it cannot be held that the appointment of a commissioner to sell the property under such judgment is beyond the jurisdiction of the court, or even erroneous. Crane v. Cummings, 137 Cal. 201; 69 Pac. 984.

Liability for deficiency. A mortgagor has the right to insist that the mortgagee shall not, by releasing the land, which should be made to pay the debt, throw upon him a personal liability therefor. Crisman v. Lanterman, 149 Cal. 647; 117 Am. St. Rep. 167; 87 Pac. 89. Where the mortgagor quitclaims to a third person, without reference to the mortgage on the property, and such third person afterward conveys the premises by a deed reciting that the grantee assumes and agrees to pay such mortgage, the last-named grantee is not liable to the mortgagee for any deficiency judgment: there is no privity between the grantees and the mortgagee. Ward v. De Oca, 120 Cal 102; 52 Pac. 130. Where a mortgage is released after the mortgagee's death, to make a sale under a deed of trust effective, in being clear of all encumbrances, the mortgagee's estate, not having consented to such release, cannot be made liable for any deficiency arising in the application of the proceeds of sale to the mortgage debt. Crisman v. Lanterman, 149 Cal. 647; 117 Am. St. Rep. 167; 87 Pac. 89. The rule that the mortgagor undertakes to pay only the deficiency remaining after the return of the result of the sale on foreclosure, is not altogether nor literally true: he undertakes to pay the debt; but should there exist a valid lien to secure its payment, the result is the same as though his contract had been to pay only the deficiency; if, however, without fault on the part of the mortgagee, the lien is lost, the mortgagor may be held for the entire debt. Otto v. Long, 127 Cal. 471; 59 Pac. 895. A judgment imposing a personal liability for a debt upon a person, not a party to the note, is erroneous, and should be modified, as, under such judgment, the plaintiff could enter a deficiency judgment against such person; and the plaintiff cannot be heard to say that he will not avail himself of this power. Garretson Investment Co. v. Arndt, 144 Cal. 64; 77 Pac. 770.

Deficiency judgment may be given when. The provision of this section for a deficiency judgment is constitutional; and the court is warranted in providing, in the decree of foreclosure, for the entry of a deficiency judgment for any residue of the note left unpaid after the sale. County Bank v. Goldtree, 129 Cal. 160; 61 Pac. 785. The mortgaged property constitutes a fund which must first be exhausted before a personal judgment can be had against the mortgagor. Bull v. Coe, 77 Cal. 54; 11 Am. St. Rep. 235; 18 Pac. 808; Lavenson v. Standard Soap Co., 80 Cal. 245; 13 Am. St. Rep. 147; 22 Pac. 184; Hall v. Arnott, 80 Cal. 348; 22 Pac. 200. It is not necessary to give effect to the evident intent of the legislature, that there can be no deficiency judgment without a sale under a decree of foreclosure and a formal return by the sheriff, but whenever an application of the primary fund and a deficit remaining exist, and can only be reasonably ascertained by other means, these facts are not to be ignored because made apparent in another way. Toby v. Oregon Pacific R. R. Co., 98 Cal. 490; 33 Pac. 550. In foreclosure proceedings, it is error for the court to enter a mere money judgment against the defendant for the amount ascertained to be due on the note; until after a sale of the mortgaged premises, there can be no personal judgment docketed against him. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074; Toby v. Oregon Pacific R. R. Co., 98 Cal. 490; 33 Pac. 550; Hibernia Sav. & L. Soc. v. Thornton, 109 Cal. 429; 50 Am. St. Rep. 53; 42 Pac. 447; Savings Bank v. Central Market Co., 122 Cal. 36; 54 Pac. 273; Meyer v. Weber, 133 Cal. 684; 65 Pac. 1110. Until the decree is entered for the sale of the mortgaged premises, the mortgagor cannot legally be compelled to pay any part of it, no matter what the form of the debt, and the liability which then accrues to him is a liability to pay only the deficiency, which appears on the sheriff's return. Biddel v. Brizzolara, 64 Cal. 354; 30 Pac. 609; Brown v. Willis, 67 Cal. 235; 7 Pac. 682; McKean v. German-American Sav. Bank, 118 Cal. 334; 50 Pac. 656. The return of the sheriff fixes the amount for which the deficiency judgment shall be rendered, which must always follow and depend upon the decree for the sale of the premises. Biddel v. Brizzolara, 64 Cal. 354; 30 Pac. 609. The judgment creditor is not concluded by the sheriff's report from having a deficiency

computed and docketed against his judgment debtor after the sheriff's return. Hooper v. McDade, 1 Cal. App. 733; 82 Pac. 1116. Where a receiver was appointed in an action to foreclose a mortgage on a steamer, and afterwards sold the same pendente lite, under authority of the court on a showing that the steamer was deteriorating in value, the court is warranted in awarding a personal judgment against the mortgagor and execution for the deficiency, without the necessity of a sale under a decree of foreclosure. Toby v. Oregon Pacific R. R. Co., 98 Cal. 490; 33 Pac. 550. The mortgagee may not, without the consent of the mortgagor, release part of his security to a purchaser from the mortgagor, at less than its value, and then look to the mortgagor to make up the deficiency: a personal judgment is not authorized for a deficiency arising from a sale of part of the mortgaged premises; if the mortgagee could release part of the security, he could release all of it, and thus defeat the purpose of the law, which is to confine him to one action and to his security as a primary fund for the payment of his debt. Woodward v. Brown, 119 Cal. 283; 63 Am. St. Rep. 108; 51 Pac. 2. If, in an action to foreclose a mortgage, a partnership is sued originally as one of the parties defendant, but in an amended complaint the members of such partnership are named individually as defendants, and the partnership is not named therein as a defendant, a deficiency judgment against the partnership is erroneous, and the fact that the original complaint and summons were served upon the partnership is immaterial. La Société Française v. Wiedmann, 97 Cal. 507; 32 Pac. 583. A personal judgment for a deficiency cannot be docketed against a defendant served by publication only; though no valid judgment can be entered for a deficiency against a nonresident mortgagor, yet the deficiency constitutes a subsisting indebtedness, upon which an action may be brought after the mortgage security has been exhausted by a foreclosure sale. Blumberg v. Birch, 99 Cal. 416; 37 Am. St. Rep. 67; 34 Pac. 102. A note secured by mortgage on property in another state may be sued on in this state, and a personal judgment recovered after foreclosure of the mortgage in such state, and deficiency entered. Felton v. West, 102 Cal. 266; 36 Pac. 676. The particular mode of entering a personal judgment for a deficiency is not an important matter in the policy embodied in this section, which is designed to prevent a multiplicity of suits and to compel the creditor to exhaust his security first; and such mode is a privilege given to the mortgagee. Savings Bank v. Central Market Co., 122 Cal. 28; 54 Pac. 273.

Docketing of judgment for deficiency. Until the judgment is docketed for the balance due the plaintiff, it does not become a lien on the real property of the judgment debtor. Culver v. Rogers, 28 Cal. 520; and see Chapin v. Broder, 16 Cal. 403; Hibberd v. Smith, 50 Cal. 511; Frost v. Meetz, 52 Cal. 664. An adjudication of personal liability is necessary to authorize the clerk to docket a judgment for a deficiency. Herd v. Tuohy, 133 Cal. 55; 65 Pac. 139; Scamman v. Bonslett, 118 Cal. 93; 62 Am. St. Rep. 226; 50 Pac. 272. It is not the duty of the clerk, when the sheriff files a report of his sale showing a deficiency, to docket a judgment for such deficiency, without any request so to do from the party interested. Hooper v. McDade, 1 Cal. App. 733; 82 Pac. 1116.

Action for deficiency. When a deficiency exists after a sale regularly made under a trust deed to secure a promissory note, the payee thereof, after having credited upon the note the amount received from the sale, less the costs of sale, may maintain an action at law against the maker to recover the balance due upon the note. Sacramento Bank v. Copsey, 133 Cal. 663; 85 Am. St. Rep. 242; 66 Pac. 8; Herbert Kraft Co. v. Bryan, 140 Cal. 73; 73 Pac. 745. Where a mortgage is given to secure the entire payment of notes, pending an attachment suit upon them, in which a portion of the mortgaged property is levied upon, by the terms of which mortgage the time for the payment of the notes was extended for one year, if the mortgagee continues to enforce the notes in the attachment suit, and sells the attached property thereunder, he waives the right to foreclose the mortgage, and cannot maintain a separate suit to foreclose it for any deficiency remaining after the sale of the attached property. Commercial Bank v. Kershner, 120 Cal. 495; 52 Pac. 848.

Attacks on judgment. In an action to set aside a judgment for the foreclosure of a mortgage on land, the failure of the complaint to allege, specifically, the name of the court in which the judgment was given, or the date of the judgment, does not render the complaint insufficient. Flood v. Templeton, 152 Cal. 159; 13 L. R. A. (N. S.) 579; 92 Pac. 78. Any defect in a judgment of foreclosure, in using the word "referee," instead of "commissioner," employed in this section, is not available to the defendant upon a collateral attack. Hibernia Sav. & L. Soc. v. Boyd, 155 Cal. 193; 100 Pac. 239.

Equitable relief from judgment. Equity will give relief from a judgment in foreclosure proceedings, obtained by extrinsic or collateral fraud, but not where the fraud charged relates to matters upon which the judgment was regularly obtained, and where an opportunity was given to the party against whom it was entered to contest the matters in issue, or to present any available defense. Flood

v. Templeton, 152 Cal. 148; 13 L. R. A. (N. S.) 579; 92 Pac. 78. A mistake in a mortgage, though the mortgage has been foreclosed, and the mistake has been carried into the judgment and the deed, may be corrected by a suit in equity. Bacon v. Bacon, 150 Cal. 477; 89 Pac. 317; Busey v. Moraga, 130 Cal. 586; 62 Pac. 1081.

Validity of order of sale. The direction of an order of sale, to the sheriff, is a harmless irregularity, where it plainly appears that the court intended its order to be executed by a commissioner, as in fact it was: the commissioner has the same powers as the sheriff. Taylor v. Ellenberger, 6 Cal. Unrep. 725; 65 Pac. 832. The omission of the seal of the court from an order of sale under a decree of foreclosure is, at the most, erroneous. Hager v. Astorg, 145 Cal. 548; 104 Am. St. Rep. 68; 79 Pac. 68.

When sale should be made. Where a trust mortgage to secure bondholders is foreclosed by the trustees, and there is no provision in the decree for delaying the sale of the mortgaged property, the trustees should proceed without unreasonable delay to have the decree executed; and upon their failure to do so, the court should, upon the application of a defendant, who is a large bondholder, and the owner of the mortgaged property, and interested in the execution of the decree, direct that its execution be proceeded with. Thomas v. San Diego College Co., 111 Cal. 358; 43 Pac. 965; Rowe v. Blake, 112 Cal. 637; 44 Pac. 1084.

Sale by commissioner. It is not an abuse of discretion for the commissioner, appointed to make a sale in foreclosure proceedings, to postpone the sale, where no reason appears why it should be postponed. Connick v. Hill, 127 Cal. 162; 59 Pac. 832. Where the decree follows the description in the mortgage, and is assented to by the defendant's attorney, and the order of sale follows the decree, it is the duty of the commissioner, in making the sale, to follow the decree and the order of sale. Meux v. Trezevant, 132 Cal. 487; 64 Pac. 848.

How property should be sold. The court may, under its power to direct the sale, direct how it shall be made; and where the judgment contains specific directions, they must be followed by the officer; the question is, not what the decree should have been, but what it is, and any sale made under it, not authorized by its terms, cannot stand. Hopkins v. Wiard, 72 Cal. 259; 13 Pac. 687. In an action of foreclosure upon several parcels of land, where the pleadings contain no allegation concerning the order in which the parcels should be sold, and the prayer of the complaint is a general one, it is error for the court, in its decree, to prescribe a particular order in which the parcels shall be sold. Carmichael v. McGillivray, 57 Cal. 8. In an action to foreclose a mortgage covering several adjoining tracts of land, the court has jurisdiction to provide, in the judgment, for a sale of the mortgaged premises in one parcel; and a sale so made, if in other respects fair, will not be set aside on the ground that the mortgagor requested the sheriff, at the time of the sale, to sell the land in separate tracts. Hopkins v. Wiard, 72 Cal. 259; 13 Pac. 687. The foreclosure of three mortgages, and a general judgment for the aggregate of the amounts due on them, where two of such mortgages were on the same real estate and the other was on personal property, is unauthorized: the real and the personal property should be ordered to be sold separately for the amounts ascertained to be due upon each. Taylor v. Ellenberger, 128 Cal. 111; 60 Pac. 1034. Where each distinct parcel is first offered for sale separately, and no bids are received, the property may then be offered and sold as a whole, and the sale will be upheld, unless other reasons appear for setting it aside. Marston v. White, 91 Cal. 37; 27 Pac. 588; Hibernia Sav. & L. Soc. v. Behnke, 121 Cal. 339; 53 Pac. 812; Connick v. Hill, 127 Cal. 162; 59 Pac. 832; Anglo-Californian Bank v. Cerf, 142 Cal. 303; 75 Pac. 902. It must be assumed from the fact that the sheriff was unable to sell the several parcels separately, and could only sell them as a whole that the lands were more valuable taken together than separately. Hibernia Sav. & L. Soc. v. Behnke, 121 Cal. 339; 53 Pac. 812. Lessees, whose rights are subsequent to the mortgage, have the right, upon foreclosure proceedings, to set up their lease, and to ask, in their answer, that the portion of the mortgaged premises unaffected by the lease be sold first, and that the lessees be allowed to redeem from any sale of the leased premises, or any part thereof. Mack v. Shafer, 135 Cal. 113; 67 Pac. 40. The owner of a right of way over mortgaged premises, subordinate to the mortgage, has the right, upon foreclosure of the mortgage, to have it explicitly ordered that the portion of the mortgaged premises not covered by the right of way shall be first sold, and that the right of way shall only be sold in case of deficiency. Merced Security Sav. Bank v. Simon, 141 Cal. 11; 74 Pac. 356. Where trustees have, by the terms of a deed of trust, a discretion to sell as a whole or in parcels, a manifest abuse of such discretion authorizes the disaffirmance of a sale made by them. Humboldt Sav. Bank v. McCleverty, 161 Cal. 285; 119 Pac. 82. Where the parties to the action of foreclosure consent that the officer making the sale shall disregard the express directions of the judgment as to the form and manner of the sale, they will not afterwards be

permitted to object to such disregard. Humboldt Sav. & L. Soc. v. March, 136 Cal. 321; 68 Pac. 968. A discretion, given in a deed of trust, to sell the property as a whole or in parcels, must be exercised in good faith, for the best interests not only of the creditor, but also of the debtor and his successors in interest. Humboldt Sav. Bank v. McCleverty, 161 Cal. 285; 119 Pac. 82.

Proceeds of sale. The proceeds of the sale of the mortgaged premises constitute the primary fund out of which the mortgage debt must be paid. Porter v. Muller, 65 Cal. 512; 4 Pac. 531. In an action for an indebtedness secured by mortgage, the mortgaged premises must first be applied to the satisfaction of the debt, and there is no personal liability on the part of the mortgagor, unless the security proves insufficient to satisfy the debt. Moore v. Gould, 151 Cal. 723; 91 Pac. 616; Kinsel v. Ballou, 151 Cal. 754; 91 Pac. 620.

When sales will be vacated. A party to an action cannot claim an absolute right to have a sale on foreclosure vacated, unless he shows that he has sustained some injury by reason of the irregularity complained of. Humboldt Sav. & L. Soc. v. March, 136 Cal. 321; 68 Pac. 968. A sale under a foreclosure decree is void, only when it is conducted in a manner prohibited by the statute or by the directions of the decree. Bechtel v. Wier, 152 Cal. 443; 15 L. R. A. (N. S.) 549; 93 Pac. 75. When a party comes into court and asks to set aside a sale, the burden is upon him to show such an irregularity or material departure from the statute as will justify the court in setting it aside. Connick v. Hill, 127 Cal. 162; 59 Pac. 832. A stranger to the action will not be permitted to intrude himself into the controversy, unless he clearly shows that he has some interest in the property sold, and also that, by reason of the manner in which the sale was conducted, he will be injuriously affected if the sale is permitted to stand. Humboldt Sav. & L. Soc. v. March, 136 Cal. 321; 68 Pac. 968. The rule undoubtedly is, to consider every fair sale as final; and upon an application for a resale, the rights of the purchaser will be taken into account, and will prevail when the sale has been fair and free from fraud. Hopkins v. Wiard, 72 Cal. 259; 13 Pac. 687. The fact that a commissioner made an invalid sale, which the court set aside for insufficiency of notice, cannot invalidate a sale afterwards made upon due notice; and the fact that a wrong date was first published cannot affect the sale, where an amended notice was sufficiently published prior to the sale. May v. Hatcher, 130 Cal. 627; 63 Pac. 33. Whether a motion to vacate a sale of property, made in execution of a judgment, on account of some irregularity on the part of the officer making the sale, should be granted, rests very largely in the discretion of the court before which the motion is made; and it is immaterial whether such irregularity consists in disregarding the provisions of the statute for making the sale or in failing to observe and follow some express direction in the judgment. Humboldt Sav. & L. Soc. v. March, 136 Cal. 321; 68 Pac. 968. Upon a motion to set aside a sale of property in one parcel, where it is shown that the property was sold for its full cash value, and that it would not have brought so much if sold in separate lots, the motion is properly denied. Meux v. Trezevant, 132 Cal. 487; 68 Pac. 848. The statute requiring separate sales of separate parcels of real property under execution applies to sales under a decree of foreclosure, where the decree is silent as to the manner or order in which the separate parcels shall be sold; it does not render a sale of separate parcels en masse, in disregard of its requirements, absolutely void, but merely voidable, and, on timely application, such sale will ordinarily be set aside. Marston v. White, 91 Cal. 37; 27 Pac. 588; Bechtel v. Wier, 152 Cal. 443; 15 L. R. A. (N. S.) 549; 93 Pac. 75. Inadequacy of price is not a sufficient ground for setting aside a judicial sale, the judgment creditor being allowed to redeem. Connick v. Hill, 127 Cal. 162; 59 Pac. 832; and see Smith v. Randall, 6 Cal. 47; 65 Am. Dec. 475; Central Pacific R. R. Co. v. Creed, 70 Cal. 497; 11 Pac. 772; Humboldt Sav. & L. Soc. v. March, 136 Cal. 321; 68 Pac. 968; Anglo-California Bank v. Cerf, 142 Cal. 303; 75 Pac. 902; Summerville v. March, 142 Cal. 554; 100 Am. St. Rep. 145; 76 Pac. 388.

Duty and power of sheriff. It is no part of the duty of a sheriff, as such, in the absence of statutory provision, to sell property under a foreclosure sale. McDermot v. Barton, 106 Cal. 194; 39 Pac. 538. The sheriff may, by virtue of his office and the general powers given him, execute a foreclosure decree under a writ issued to him, without other appointment by the court, and he may do so even without any writ; naming him in the decree confers no new powers upon him, but merely authorizes the exercise, in the particular case, of such powers as he already possesses. Granger v. Sheriff, 140 Cal. 190; 73 Pac. 816. The sheriff has no duty to perform in the case of a sale of real property under foreclosure, where the court appoints a commissioner to make such sale. McDermot v. Barton, 106 Cal. 194; 39 Pac. 538.

Statute of limitations. To establish a new contract for the purpose of taking a case out of the statute, there must be a promise to pay, or an acknowledgment from which a promise is necessarily im-

plied, and such promise or acknowledgment must be made to the creditor himself. Biddel v. Brizzolara, 64 Cal. 354; 30 Pac. 609. The running of the statute begins on the maturity of the note, and not on default in payment of the interest, where the mortgage provides that on default in payment of interest the whole sum shall become due. Richards v. Daley, 116 Cal. 336; 48 Pac. 220. Where the debt secured by the mortgage is barred by the statute of limitations, the mortgage is also barred. Newhall v. Sherman, 124 Cal. 509; 57 Pac. 387. A mortgage barred by the statute is not renewed by a renewal of the note secured. Wells v. Harter, 56 Cal. 342. The renewal of the note by the mortgagor, who has sold the mortgaged property to a purchaser who agrees to pay the mortgage debt, and who thereafter retransfers such property to the mortgagor, does not give the mortgagee the right to foreclose his mortgage against such property, after the statute of limitations has run against such mortgage, although such note was not barred by the statute: the mortgagee could not take a decree for the sale, because of the statute; he could not take a personal judgment for a deficiency, because such deficiency could be ascertained only after a decree for the sale of the premises and the return of such sale. Biddel v. Brizzolara, 64 Cal. 354; 30 Pac. 609. Where a second foreclosure suit is begun much less than four years after the cause of action accrues, no question can arise as to the effect of laches, or as to the sufficiency of any excuses therefor. Ludwig v. Murphy, 143 Cal. 473; 77 Pac. 150. Although a mortgage sought to be foreclosed may not be barred, as between the mortgagor and the mortgagee, by reason of the absence of the mortgagor from the state, yet where it appears to be barred by the statute, the holders of subsequent judgment liens may plead the statute as to their liens, and may enforce them as superior and paramount to the lien of the mortgage. Brandenstein v. Johnson, 140 Cal. 29; 73 Pac. 744. Where a husband and wife executed a mortgage upon their homestead declared on community property, the presentation of a claim against the estate of the deceased husband, and the allowance thereof, has only the effect of suspending the running of the statute as against the estate, but does not have that effect as against the surviving wife, upon whom the title to the homestead devolved absolutely upon the death of her husband; and both she and her successor in interest may plead the bar of the statute in foreclosure proceedings against them, if not brought within four years after the maturity of the mortgage. Vandall v. Teague, 142 Cal. 471; 75 Pac. 35. The right of the mortgagor to redeem is barred by the statute at the same time that the right of the mortgagee to foreclose is barred. Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722. The manner of enforcing a judgment of foreclosure is prescribed by this section, and every process that may be required to enforce it must be taken out within five years after its entry: a judgment for a deficiency does not become a new and independent judgment by being docketed. Bowers v. Crary, 30 Cal. 621.

Res adjudicata. The only issue tendered to a junior mortgagee by making him a party to a suit to foreclose, brought by the prior mortgagee, is in the allegation that the right or claim of the junior mortgagee is subject to the lien claimed by the plaintiff in the foreclosure suit; and as to any possible defense such junior mortgagee may have to that issue so tendered, he is concluded by the decree, whether he appears or not. Savings Bank v. Central Market Co., 122 Cal. 28; 54 Pac. 273. Where the complaint in foreclosure sets forth the facts upon which an adverse claimant, made defendant, bases his claim of title, and he allows issues to be tried thereon without objection, he is concluded by the judgment. Beronio v. Ventura County Lumber Co., 129 Cal. 232; 79 Am. St. Rep. 118; 61 Pac. 958. Where parties having a title prior, adverse, and paramount to that of the mortgage were made parties defendant to the foreclosure thereof, under the usual allegations of the complaint that the defendants, other than the mortgagor, claim some interest in the premises, and that such interest is subsequent and subordinate to that created by the mortgage, without setting forth the particulars of the defendant's claim, or showing that it was prior in time to the mortgage, the judgment of foreclosure does not become res adjudicata as to the prior adverse title of the plaintiffs. Beronio v. Ventura County Lumber Co., 129 Cal. 232; 79 Am. St. Rep. 118; 61 Pac. 958.

Appeal. A stay bond in double the amount for which the premises are to be sold is unreasonable, on appeal by the mortgagee from the decree of foreclosure: a bond for waste, use and occupation, and deficiency, is all that is required, other than the three-hundred-dollar bond, on appeal. Boob v. Hall, 105 Cal. 413; 38 Pac. 977. On appeal from a judgment for the foreclosure of a mortgage upon personal property, an undertaking in the sum of three hundred dollars is sufficient to stay the execution of the judgment, pending the appeal. Snow v. Holmes, 64 Cal. 232; 30 Pac. 806. Where the decree, as entered by the court, ordered the encumbered property to be sold by the sheriff, while the order made and entered on the same day appointed a commissioner to discharge the same duty, there is a mere oversight by the court, not calling for an

appeal, which may be remedied by a motion to amend and correct the decree. McDermot v. Barton, 106 Cal. 194; 39 Pac. 538. The appellate court will not, in the first instance, allow counsel fees to the respondent mortgagee, none having been fixed by the court below on account of the appeal. Fender v. Robinson, 135 Cal. 26; 66 Pac. 969.

Terms defined, distinguished, and explained. A trust deed has no feature in common with a mortgage, except that it is executed to secure an indebtedness; and a suit for foreclosure and sale does not lie, if the contract is, that, upon default, the trustee shall sell upon the happening of a certain event: there is no equity to foreclose. Koch v. Briggs, 14 Cal. 256; 73 Am. Dec. 651; Fuquay v. Stickney, 41 Cal. 583; Whitmore v. San Francisco Sav. Union, 50 Cal. 145; Grant v. Burr, 54 Cal. 298; Durkin v. Burr, 60 Cal. 360; Savings and Loan Society v. Deering, 66 Cal. 281; 5 Pac. 353; Partridge v. Shepard, 71 Cal. 470; 12 Pac. 480; More v. Calkins, 95 Cal. 435; 29 Am. St. Rep. 28; 30 Pac. 583; Savings etc. Soc. v. Burnett, 106 Cal. 514; 39 Pac. 922; Herbert Kraft Co. v. Bryan, 140 Cal. 73; 73 Pac. 745. The distinction between a mortgage and a pledge is clearly recognized by the Civil Code: in the case of a pledge, the pledgee may resort to a judicial sale, or he may sell on notice without suit, the latter remedy not being given in the case of mortgage. This section refers, in terms, to mortgages only, and contains nothing to prevent a pledgee from having his action to recover the debt without first exhausting the subject of the pledge. Ehrlich v. Ewald, 66 Cal. 97; 4 Pac. 1062; Savings Bank v. Middlekauff, 113 Cal. 463; 45 Pac. 840. A lien on personal property may exist in many forms, other than by way of mortgage; and although every mortgage is a lien, yet every lien is not a mortgage: the essential element of a mortgage is a transfer or conveyance of the mortgaged property from the mortgagor to the mortgagee. People's Home Sav. Bank v. Sadler, 1 Cal. App. 189; 81 Pac. 1029. The word "security," as used in this section, does not import that the security shall be adequate, but has reference only to the purport of the mortgage as it appears on its face. Barbieri v. Ramelli, 84 Cal. 154; 23 Pac. 1086. Where the judgment on foreclosure provides for the appointment of a "referee" to make the sale, the so-called "referee" is practically the "commissioner" provided for in this section. Hibernia Sav. & L. Soc. v. Boyd, 155 Cal. 193; 100 Pac. 239.

Power of sale in mortgage. See note 14 Am. Dec. 473.

Release of part of mortgaged land. See note 29 Am. Dec. 747.

Foreclosure by exercise of power of sale. See notes 92 Am. St. Rep. 573; 103 Am. St. Rep. 51.

Whether lien of mortgage terminated by sale under mortgage. See note 58 Am. Dec. 569.

Appointment of receiver for mortgaged property in foreclosure. See notes 64 Am. Dec. 492; 27 Am. St. Rep. 794; 72 Am. St. Rep. 74.

Litigation of paramount titles in foreclosure proceedings. See note 68 Am. St. Rep. 354.

Constitutionality of statutes allowing attorney's fees. See note 79 Am. St. Rep. 178.

Concurrent remedies of holders of mortgages. See note 73 Am. St. Rep. 559.

Effect upon prior mortgage of foreclosure of subsequent mortgage. See note 80 Am. Dec. 714.

Purchaser of property subject to mortgage, when may not contest validity of mortgage. See note 22 Am. Rep. 290.

Subsequent purchasers or encumbrancers as necessary parties in foreclosure. See note 1 Am. St. Rep. 189.

Parties defendant in foreclosure. See note 36 Am. St. Rep. 574.

Proper parties in foreclosure. See note 63 Am. St. Rep. 130.

Mortgagor who has conveyed interest in premises as necessary or proper party to foreclosure. See note Ann. Cas. 1913A, 83.

Who is real party in interest by whom foreclosure action must be brought. See note 64 L. R. A. 618.

Necessity of making junior encumbrancer a party to a suit for foreclosure of a senior mortgage. See note 36 L. R. A. (N. S.) 426.

Parties to proceedings to foreclose mortgage for part of debt. See note 37 L. R. A. 741.

Remedy of one improperly omitted as party to foreclosure proceedings. See note 4 Ann. Cas. 848.

Order of sale of land transferred by mortgagor. See note 41 Am. St. Rep. 627.

Assumption of payment of mortgage debt by grantee of mortgagor. See notes 78 Am. Dec. 72; 26 Am. Rep. 660; 40 Am. Rep. 232.

Proper place of sale under mortgage containing power of sale "at court-house" where court-house is removed or destroyed or there is more than one. See note 11 Ann. Cas. 166.

Necessity of notice by mortgagee to mortgagor of intention to exercise power of sale in mortgage. See note 11 Ann. Cas. 170.

Waiver by mortgagee of rights acquired by foreclosure. See note Ann. Cas. 1913A, 858.

Right of debtor to require creditor to satisfy mortgage out of non-exempt property. See note Ann. Cas. 1913B, 394.

Deficiency judgment against non-resident served constructively. See note 50 L. R. A. 583.

Foreclosure of mortgage on land in another state. See note 4 L. R. A. (N. S.) 986.

Right to proceeds of insurance where loss occurs after foreclosure sale but during the period of redemption. See note 6 L. R. A. (N. S.) 448.

Effect of sale en masse by sheriff directed to sell parcels of land, separately mortgaged, separately. See note 15 L. R. A. (N. S.) 549.

Right to foreclose deed intended as security for debt as an equitable mortgage. See note 22 L. R. A. (N. S.) 572.

CODE COMMISSIONERS' NOTE. 1. **Mortgage, defined.** Civ. Code, § 2920, and note.

2. **Must be in writing.** Civ. Code, § 2922, and note.

3. **Lien, when special.** Civ. Code, § 2923, and note.

4. **What transfer is deemed a mortgage.** Civ. Code, § 2925, and note.

5. **Conveyance absolute may be shown by parol to have been intended as a security.** Civ. Code, § 2925, and note; Espinosa v. Gregory, 40 Cal. 61; Jackson v. Lodge, 36 Cal. 28; Hughes v. Davis, 40 Cal. 119.

6. **Mortgage is a lien upon everything that would pass by grant.** Civ. Code, §§ 2926, 2947, and notes.

7. **Right of the mortgagee to possession.** Civ. Code, § 2927, and note.

8. **Power of sale in mortgage.** Civ. Code, § 2932, and note; Cormerais v. Genella, 22 Cal. 116; Blockley v. Fowler, 21 Cal. 326; 82 Am. Dec. 747.

9. Assignment of mortgage carries debt. Civ. Code, § 2936, and note.

10. Mortgage does not pass the title. Civ. Code, § 2888; Carpentier v. Brenham, 40 Cal. 221.

11. Parties to the action. The foreclosure of the first mortgage, in an action to which the holder of a junior mortgage was not a party, does not affect the right of the latter; but the purchaser at the sale under the first mortgage acquires the legal title, subject only to the lien of the junior mortgage. Carpentier v. Brenham, 40 Cal. 221. If one purchase the mortgaged premises, pending the foreclosure action, before or after final judgment, with notice, the judgment is binding upon him, and there is no ground for setting aside the sale or opening the judgment. Abadie v. Lobero, 36 Cal. 391. The grantee of mortgaged premises is not affected by the sale under the mortgage, if the foreclosure action was commenced after the conveyance to the grantee, unless he is a party to the action. Bludworth v. Lake, 33 Cal. 265. Subsequent encumbrancers are proper but not necessary parties. Carpentier v. Brenham, 40 Cal. 221. Where one partner executes a mortgage upon his separate property to secure a debt of the firm, an action to foreclose the mortgage may, after the death of the mortgagor, be maintained against his executor, without any showing by the plaintiff that the partnership is insolvent, or that he has pursued his remedy upon the debt against the surviving partner. Savings and Loan Society v. Gibb, 21 Cal. 595. If the real holders of the title are not parties to the action, a court of equity will allow them to be made such by a supplemental complaint, if application be made within a reasonable time. Heyman v. Lowell, 23 Cal. 106; see notes to §§ 369, 378, 379, ante.

12. Actions against executors and administrators. The creditor of the estate of a deceased person, whose debt is secured by mortgage, may, after having presented his claim for allowance to the executor, whether it be allowed or rejected, proceed to foreclose his mortgage in the district court. Willis v. Farley, 24 Cal. 499; Fallon v. Butler, 21 Cal. 24; 81 Am. Dec. 140; Pechaud v. Rinquet, 21 Cal. 76.

13. Action on a debt payable in installments. In a foreclosure suit, the debt being evidenced by a promissory note not due, but upon which the interest was payable monthly, a judgment directing the sale of the premises and the application of the proceeds to the payment of the principal and interest, was held erroneous; the judgment should have been for the sale of so much of the premises as might be necessary to satisfy the interest then due. Hunt v. Dohrs, 39 Cal. 305. If the debt is payable in installments, the mortgagee or his assignee may maintain an action to foreclose the mortgage when the first installment falls due and is not paid. Grattan v. Wiggins, 23 Cal. 16; see § 728, post; Taggart v. San Antonio Ridge etc. Mining Co., 18 Cal. 460.

14. Form of judgment. All that a judgment under this section need or should contain is:

1. A statement of the amount due the plaintiff;

2. A designation of the defendants who are personally liable for the payment of the debt;

3. A direction that the mortgaged premises (describing them), or so much thereof as may be necessary, be sold according to law, and the proceeds applied to the payment of the expenses of the sale, the costs of the action, and the debt.

Nothing further is required. All else is ministerial, and is expressly regulated by statute, which is not made clearer or more binding by being copied into the judgment. There is, under our system, no master in chancery,—no master's report.—and no confirmation of the sale by the court. That mode of procedure is wholly foreign to our system. Under our system, the sheriff is furnished with a certified copy of the judgment. Armed with this process, he proceeds to sell the mortgaged premises in the mode and manner, and at the place, designated in the code, for the sale of real property under judicial process, and makes return of his proceedings, as in case of an execution upon a money judgment. If it appears from his return that the amount due the plaintiff has not been fully paid by the sale, the clerk then dockets judgment for the balance due against those defendants named in the judgment as being personally liable for the debt, without any order from the court. Per Sanderson, J., in Leviston v. Swan, 33 Cal. 483. A personal judgment cannot be rendered against a defendant until the balance due is ascertained by the sheriff's return. Hunt v. Dohrs, 39 Cal. 304. Cases in which it was held that a personal judgment might be taken (but compare these with cases cited, supra, and statutes existing at the time of the decisions): Rowland v. Leiby, 14 Cal. 156; Englund v. Lewis, 25 Cal. 348; Comerais v. Genella, 22 Cal. 116; Chapin v. Broder, 16 Cal. 403. The omission of the words "be sold" will not affect the judgment. Moore v. Semple, 11 Cal. 360. A judgment for the sale of the premises, where the mortgagor has transferred his estate in the premises previous to the institution of the suit, and his grantee was not made a party, is void, so far as it orders a sale. Bogga v. Fowler, 16 Cal. 559; 76 Am. Dec. 561. Where defendants claiming adversely are in possession, a judgment directing upon the sale a conveyance of the fee and a delivery of possession to the purchaser, and conferring upon him, until redemption made, the right to recover the rents, issues, and profits of the land, is erroneous. In such case, the decree must be limited to a sale of the rights and interests which the mortgagor possessed at the date of his mortgage, leaving the purchaser to assert his right to the possession, after receiving his conveyance by action. San Francisco v. Lawton, 21 Cal. 589; 18 Cal. 465; 79 Am. Dec. 187; Elias v. Verdugo, 27 Cal. 420; Kelsey v. Abbott, 13 Cal. 609. The judgment should not apportion the debt among the several co-tenants of the land who acquired undivided interests therein at the same time, and subsequently to the execution of the mortgage. Perre v. Castro, 14 Cal. 531; 76 Am. Dec. 444. Where the proceedings were delayed by agreement, in consideration of the execution of a second mortgage on other property, in which third parties joined as additional security, and, subsequently, plaintiff filed a supplemental complaint, setting up the second mortgage, and asking a sale of the premises described in both mortgages, judgment was taken by default for the debt, and the court decreed a foreclosure of the several mortgages and a sale of the property conveyed, and directed that the property described in the mortgage executed by Reynolds should be first offered for sale; but that no bid should be received for a less sum than the full amount of judgment and costs. If this sum was not bid, then the whole property included in the two mortgages—from Reynolds and from Kirk and Reynolds—was to be sold together. The judgment was, on appeal, held erroneous. Raun v. Reynolds, 11 Cal. 14. A was indebted to B, to secure which indebtedness the latter held the promissory note of the former, and it was agreed that A should give a mortgage upon real estate to secure the indebtedness, and that B should give up and cancel the notes, and waive all claim upon the personal responsibility of A. It was held, that, in an action to foreclose the mortgage, B was not entitled to a personal judgment against A for any balance which should remain unpaid after the sale of the mortgaged premises. Moore v. Reynolds, 1 Cal. 351. The judgment should not direct that the sheriff execute a deed to the purchaser on the sale, the land sold being subject to redemption in six months. Harlan v. Smith, 6 Cal. 174. If the judgment is by default, the relief given should not exceed that demanded in the complaint. Raun v. Reynolds, 11 Cal. 14. A referee may be appointed to compute the amount due. Guy v. Franklin, 5 Cal. 416.

15. Special cases in which relief from erroneous or void judgments were granted. Goodenow v. Ewer, 16 Cal. 461; 76 Am. Dec. 540; Burton v. Lies, 21 Cal. 87; Boggs v. Fowler, 16 Cal. 566; 76 Am. Dec. 561; Leviston v. Swan, 33 Cal. 483; Phelan v. Olney, 6 Cal. 478; Raun v. Reynolds, 15 Cal. 468.

16. Effect of judgment. See subd. 11 of this note. Goodenow v. Ewer, 16 Cal. 461; 76 Am. Dec. 540; Shores v. Scott River Co., 21 Cal. 135; Montgomery v. Middlemiss, 21 Cal. 103; 81 Am. Dec. 146; Branham v. Mayor and Common

Council, 24 Cal. 585; San Francisco v. Lawton, 18 Cal. 465; 79 Am. Dec. 187; Bludworth v. Lake, 33 Cal. 265; Skinner v. Buck, 29 Cal. 253; Burton v. Lies, 21 Cal. 87; Christy v. Dana, 34 Cal. 548.

17. **Effect of death of mortgagor after judgment.** Nagle v. Macy, 9 Cal. 426; Cowell v. Buckelew, 14 Cal. 640.

18. **Order of sale.** Sheriff cannot make the sale without an order of sale. Heyman v. Babcock, 30 Cal. 367. Copy of judgment constitutes the order. Leviston v. Swan, 33 Cal. 483. Alias order may issue. Shores v. Scott River Water Co., 17 Cal. 626. Statute of limitations, how far applicable. Bowers v. Crary, 30 Cal. 621.

19. **Sale.** Property must be sold in parcels, and property included in the first mortgage should be exhausted before recourse is had to the second. Raun v. Reynolds, 11 Cal. 14; Shores v. Scott River Water Co., 17 Cal. 629. Sale should be made by the sheriff, unless the judgment contains directions to the contrary. Heyman v. Babcock, 30 Cal. 367.

20. **Costs and counsel fees.** Where the mortgage provided for the payment of costs and counsel fees, not exceeding five per cent on the amount due, it was held that the limitation applied to counsel fees alone. Gronfier v. Minturn, 5 Cal. 492. See Carrière v. Minturn, 5 Cal. 435.

21. **Redemption. Generally.** Montgomery v. Tutt, 11 Cal. 307; Dewey v. Latson, 6 Cal. 609; McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655; McDermott v. Burke, 16 Cal. 580; Goodenow v. Ewer, 16 Cal. 461; 76 Am. Dec. 540; Daubenspeck v. Platt, 22 Cal. 330; Bludworth v. Lake, 33 Cal. 255–265; Alexander v. Greenwood, 24 Cal. 506; Cowing v. Rogers, 34 Cal. 648; Espinosa v. Gregory, 40 Cal. 61; Jackson v. Lodge, 36 Cal. 28; Hughes v. Davis, 40 Cal. 119; Cunningham v. Hawkins, 24 Cal. 403; 85 Am. Dec. 73; 27 Cal. 603.

22. **Writs of assistance.** A writ of assistance is the proper remedy to place the purchaser in possession, after sheriff's deed. Reynolds v. Harris, 14 Cal. 677; 76 Am. Dec. 459; Montgomery v. Tutt, 11 Cal. 190; Wolf v. Fleischacker, 5 Cal. 244; 63 Am. Dec. 121; Skinner v. Beatty, 16 Cal. 156; Montgomery v. Middlemiss, 21 Cal. 103; 81 Am. Dec. 146. When it will be issued. Frisbie v. Fogarty, 34 Cal. 11; Skinner v. Beatty, 16 Cal. 156; Montgomery v. Middlemiss, 21 Cal. 103; 81 Am. Dec. 146; Montgomery v. Byers, 21 Cal. 107. It will be issued, although the judgment contain no direction to that effect. Horn v. Volcano Water Co., 18 Cal. 141; Montgomery v. Middlemiss, 21 Cal. 103; 81 Am. Dec. 146. When it will not be issued. Burton v. Lies, 21 Cal. 87; Harlan v. Rackerby, 24 Cal. 561; Steinbach v. Leese, 27 Cal. 295; Chapman v. Thornburg, 23 Cal. 48.

23. **Receivers in mortgage cases.** See subd. 3 of note to § 564 of this code.

24. **Collateral attacks.** The title acquired by the purchaser under a foreclosure sale cannot be impeached collaterally for irregularity in the proceedings on sale. Nagle v. Macy, 9 Cal. 426. Generally. Alderson v. Bell, 9 Cal. 321; Hayes v. Shattuck, 21 Cal. 51.

25. **Grantees of the mortgagor may plead statutes of limitations.** Grattan v. Wiggins, 23 Cal. 16; McCarthy v. White, 21 Cal. 495; 82 Am. Dec. 754; Low v. Allen, 26 Cal. 141; Lent v. Shear, 26 Cal. 361.

26. **Caveat emptor. How far applicable to foreclosure sales.** Boggs v. Fowler, 16 Cal. 564; 76 Am. Dec. 561.

27. **Generally.** Mortgage of public lands, when title is subsequently acquired. Christy v. Dana, 34 Cal. 548. If, through inadvertence or mistake, satisfaction of mortgage has been entered of record, a judgment, foreclosing the mortgage without first setting aside the satisfaction, is erroneous. Russell v. Mixer, 39 Cal. 504. Whether a tender by a subsequent mortgagee, of the sum due on the prior mortgage, if made after the law-day of the mortgage, without keeping the tender good, was discussed, but not decided, in Ketchum v. Crippen, 37 Cal. 223. If, at the time of the making of a promissory note, the maker also gives the payee a bill of sale of personal property by way of mortgage to secure the note, and also delivers possession of the property, the maker has a right to have the property mortgaged applied in satisfaction of the debt; and if the payee sells any of the property, he has a right to have the proceeds or value applied toward the satisfaction of the debt. McGarvey v. Hall, 23 Cal. 140. A commenced an action against B to foreclose a mortgage given to secure a debt. On motion of A's attorney, the prayer for foreclosure of the mortgage and sale of the property was stricken out and a money judgment taken. On appeal, it was held that this was an abandonment and waiver of A's right to a foreclosure and sale of the mortgaged property. Ladd v. Ruggles, 23 Cal. 232. The mortgagee of real estate can maintain an action to recover damages for wrongful and fraudulent injuries done to the mortgaged property, by which security of the mortgage has been impaired. Robinson v. Russell, 24 Cal. 472; Buckout v. Swift, 27 Cal. 434; 87 Am. Dec. 90.

§ 727. Surplus money to be deposited in court. If there be surplus money remaining, after payment of the amount due on the mortgage, lien, or encumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the mean time may direct it to be deposited in court.

Deposit in court. Ante, §§ 572, 573, 574.

Legislation § 727. Enacted March 11, **1872**; re-enactment of Practice Act, § 247.

§ 728. Proceedings when debt secured falls due at different times. If the debt for which the mortgage, lien, or encumbrance is held is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

Legislation § 728. 1. Enacted March 11, **1872**; based on Practice Act, § 248, changing (1) "be" to "is" before "not all due," and (2) "shall" to "must" before "cease."

2. Amendment by Stats. **1901**, p. 159; unconstitutional. See note ante, § 5.

Construction of section. The failure to sell any portion of the mortgaged property, under a decree of sale for a first installment of interest, will not prevent a sale of the whole property, on motion, when the unmatured portion of the note falls due: the provisions of this section make for the benefit of the debtor, to prevent the sale of more of his property than is necessary to pay the amount due, and not to impose upon him the cost of several sales. Bank of Napa v. Godfrey, 77 Cal. 612; 20 Pac. 142. This section does not apply to a case where an installment secured by the mortgage falls due after the mortgage has been enforced for an installment due at an earlier date. McDougal v. Downey, 45 Cal. 165; Higgins v. San Diego Sav. Bank, 129 Cal. 184; 61 Pac. 943. Where the judgment fails to provide for the sale of any portion of the mortgaged premises upon a subsequent default in principal or interest, this section supplies such omission, and authorizes further orders of the court until the entire mortgaged premises are sold in satisfaction of the debt; and the action of the court in ordering a sale of the property to satisfy installments as they become due, subsequently to decreeing foreclosure in amount originally found due, is not a further judgment in such action, but is only an order after judgment. Byrne v. Hoag, 126 Cal. 283; 58 Pac. 688.

Maturity of principal or interest of mortgage debt. Where the mortgage is given to secure the payment of the principal sum of a note five years after its maturity, with interest at the specified rate, according to the terms and conditions of a promissory note, which make the interest payable annually, and if interest is not so paid, to draw interest the same as the principal, but no provision is made for the collection of the note, or for the foreclosure of the mortgage before the maturity of the note, the mortgagee has no right to foreclose until its maturity. Van Loo v. Van Aken, 104 Cal. 269; 37 Pac. 925; and see Yoakam v. White, 97 Cal. 286; 32 Pac. 238. Where the first mortgagee commenced his action to foreclose his mortgage, making the second mortgagee defendant, and, pending the action, assigned his mortgage to the second mortgagee, who was substituted as plaintiff, and who sought to foreclose both mortgages in an amended complaint, the court, in its decree, may properly provide for the sale of the premises to satisfy the second mortgage, although it did not become due until after the amended complaint was filed, but was due when the case was tried and the decree entered. Orange Growers' Bank v. Duncan, 133 Cal. 254; 65 Pac. 469; Windt v. Gilleran, 135 Cal. 94; 66 Pac. 970. Where some of the notes secured by mortgage are not due at the commencement of the suit, but become due before trial, the court has jurisdiction to decree a foreclosure to satisfy all of them. Bostwick v. McEvoy, 62 Cal. 496. A judgment for the principal of a promissory note secured by mortgage, and an order for the sale of the mortgaged premises for its payment, is erroneous, where the note was not due when the action was commenced, but judgment may be had for the sale of so much of the mortgaged premises as may be necessary to satisfy the interest due. Hunt v. Dohrs, 39 Cal. 304. Where the mortgage provides for the payment of the note "according to the terms and conditions thereof," and that, "in default of the payment of the note by its terms," the mortgagee may foreclose, and the terms of the note were, that the interest should be payable annually and the principal at the end of five years, the mortgagee has the right to foreclose it, upon a default in the payment of the interest, for the amount of interest due, and need not wait until a default in the payment of the whole note, principal and interest. Yoakam v. White, 97 Cal. 286; 32 Pac. 238; Phelps v. Mayers, 126 Cal. 549; 58 Pac. 1048.

Default in payment of installments. A decree of the court is proper, which provides for a sale of so much of the mortgaged premises as may be necessary to pay the installment due, and that thereafter, as more shall become due, the plaintiff may apply for a decree that more of the mortgaged premises shall be sold. Bank of Napa v. Godfrey, 77 Cal. 612; 20 Pac. 142. Where a note, secured by mortgage, provides for the payment of the principal in installments, and the mortgage provides that in case of failure to make the payments as in the note provided, the property may be sold and the proceeds applied to pay the whole amount of the note, the mortgagee is entitled to foreclose for the full amount of the unpaid installments upon default in the payment of any of them, although, by the terms of the note, some are not due. Maddox v. Wyman, 92 Cal. 674; 28 Pac. 838.

Motion for order of sale. Upon a subsequent default in the payment of principal or interest, the proper practice is to apply by motion, and not by petition, for a sale of more of the mortgaged premises: an amended petition is not authorized, but may be treated as a motion. Bank of Napa v. Godfrey, 77 Cal. 612; 20 Pac. 142; Byrne v. Hoag, 126 Cal. 283; 58 Pac. 688. Where the court does not determine that any sums will be due in the future, and no provision is made in the decree for any future sales of property to meet the installments to become due, a new and independent action should be brought to sell other portions of the land for portions of the debt which subsequently become due; but

where the court makes provision for future sales to enforce the payment of further installments, which it determines will be due in future, the simpler and less expensive mode of procedure is provided by motion, by this section. Higgins v. San Diego Sav. Bank, 129 Cal. 184; 61 Pac. 943.

Priority of liens. Where some liens are superior to a mortgage and also to other liens, and the rest are inferior to the mortgage, the decree should provide that prior claimants be paid as if there were no mortgage, and that the residue be applied, first to the mortgage and then to the inferior liens. Burnett v. Glas, 154 Cal. 249; 97 Pac. 423.

Right to successive foreclosures of mortgages payable in installments. See note Ann. Cas. 1912C, 846.

Proceedings to enforce mortgage for part of debt. See note 37 L. R. A. 737.

Decree in proceeding to enforce mortgage for part of debt. See note 37 L. R. A. 743.

Effect of foreclosure by taking possession before all of mortgage debt due. See note 3 L. R. A. (N. S.) 343.

Effect of foreclosure of one of several simultaneous mortgages upon the others. See note 39 L. R. A. (N. S.) 524.

CODE COMMISSIONERS' NOTE. Grattan v. Wiggins, 23 Cal. 16. See subd. 13 of note to § 726, ante.

§ 729. Oath and undertaking of commissioner. Report and account of sale. Compensation of commissioner. The commissioner, before entering upon his duties, must be sworn to perform them faithfully, and the court making the appointment shall require of him an undertaking, with sufficient sureties, to be approved by the court, in an amount to be fixed by the court, to the effect that he will faithfully perform the duties of commissioner, according to law. Within thirty days after such sale, the commissioner must file with the clerk of the court in which the action is pending, a verified report and account of the sale, together with the proper affidavits, showing that the regular and required notice of the time and place of the sale was given, which report and account shall have the same force and effect as the sheriff's return in sales under execution. In all cases of sales made by a commissioner, the court in which the proceedings are pending shall fix a reasonable compensation for the commissioner's services, but in no case to exceed the sum of ten dollars.

Legislation § 729. 1. Added by Stats. **1893,** p. 119.

2. Amendment by Stats. **1901,** p. 159; unconstitutional. See note ante, § 5.

Written affidavit of commissioner unnecessary. A motion to vacate a judgment, not void on its face, foreclosing a mortgage, made after the judgment had become final, cannot be entertained upon the ground that no written oath or affidavit of the commissioner who made the sale is on file in the clerk's office: the law does not require the commissioner to make a written affidavit, or to file it anywhere, and it is sufficient if the record shows that he was sworn. May v. Hatcher, 130 Cal. 627; 63 Pac. 33.

Commissioner's return is evidence of sale. A return of the sale of land, made by a commissioner, under this section, is prima facie evidence of such sale. Hibernia Sav. & L. Soc. v. Boyd, 155 Cal. 193; 100 Pac. 239.

CHAPTER II.

ACTIONS FOR NUISANCE, WASTE, AND WILLFUL TRESPASS, IN CERTAIN CASES, ON REAL PROPERTY.

§ 731. Nuisance defined. Abatement of. Actions instituted, by whom.
§ 732. Waste, actions for.
§ 733. Trespass for cutting or carrying away trees, etc., actions for.
§ 734. Measure of damages in certain cases under the last section.
§ 735. Damages in actions for forcible entry, etc., may be trebled.

§ 731. Nuisance defined. Abatement of. Actions instituted, by whom. An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the state of California to abate a public nuisance, .

as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

"Nuisance." definition. Compare Civ. Code, §§ 3470, 3480, 3481; see also Civ. Code, §§ 3482, 3483, 3490.

Public nuisance.

1. **Damages.** Civ. Code, § 3484.
2. **Lapse of time cannot legalize.** Civ. Code, § 3490.
3. **Private action for.** Civ. Code, § 3493.
4. **Common-law remedy.** Ante, § 18.
5. **Power of board of health to abate, in San Francisco.** See Pol. Code, § 3028.

Legislation § 731. 1. Enacted March 11, **1872** (re-enactment of Practice Act, § 249), and then read: "Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered."

2. Amendment by Stats. **1901**, p. 159; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1905**, p. 130.

Sic utere tuo ut alienum non lædas. A person may not use his own property, even in a business lawful in itself, in such a manner as to interfere with another in the legitimate use of his property. Tuebner v. California Street R. R. Co., 66 Cal. 171; 4 Pac. 1162. Accompanying the ownership of every species of property is the corresponding duty so to use it as that such use shall not be an abuse of the right of others. People v. Gold Run etc. Mining Co., 66 Cal. 138; 56 Am. Rep. 80; 4 Pac. 1152. A franchise from a municipality to a railroad company, to run its cars along the streets of a city does not authorize the company to injure materially the adjoining proprietors in their property rights. Tuebner v. California Street R. R. Co., 66 Cal. 171; 4 Pac. 1162.

Nuisance, what constitutes. The unwarrantable use of property by one person, which works an injury to the right of another in the enjoyment of his own property, produces thereby such material annoyance, discomfort, and inconvenience as, in law, imports damage to such party. Meyer v. Metzler, 51 Cal. 142. Where a business is necessary or useful, it is always presumable that there is a proper place and a proper manner for carrying it on; but it can hardly be said that that is a lawful business which cannot be carried on without detriment to the surrounding population. Tuebner v. California Street R. R. Co., 66 Cal. 171; 4 Pac. 1162. Where one of two owners of adjoining lots erects a brick building on his lot, one wall of which leans so as to prevent the other owner from raising and repairing his own building, such brick wall is a nuisance, and its maintenance imports damage to the other owner, notwithstanding the fact that it is safe and secure. Meyer v. Metzler, 51 Cal. 142. Wrongfully causing water to flow upon another's land, which would not flow there naturally, is to create a nuisance per se: it is an injury to the right in the land, and it cannot be continued because others may have a low estimate of the damage which it causes; and especially is this so, where the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude. Learned v. Castle, 78 Cal. 454; 18 Pac. 872; 21 Pac. 11; and see Merced Mining Co. v. Fremont, 7 Cal. 317; 68 Am. Dec. 262; Hicks v. Michael, 15 Cal. 107; Leach v. Day, 27 Cal. 643; More v. Massini, 32 Cal. 590; Richards v. Dower, 64 Cal. 62; 28 Pac. 113. A legitimate business, founded upon a local custom, which develops into such a force as to threaten the safety of the people, and destruction to public and private rights, becomes unreasonable, because dangerous to public and private rights, and such custom cannot be invoked to justify the continuance of the business in an unlawful manner. People v. Gold Run Ditch etc. Co., 66 Cal. 138; 56 Am. Rep. 80; 4 Pac. 1152. The fact that the acts complained of are made a misdemeanor, and punishable as such, does not make them any the less a nuisance, nor imply that the legislature intended to make the criminal remedy exclusive of the civil. People v. Truckee Lumber Co., 116 Cal. 397; 58 Am. St. Rep. 183; 39 L. R. A. 581; 48 Pac. 374. Neither the existence of a nuisance nor the right to have it abated depends upon the depreciation in the value of neighboring property. Meek v. De Latour, 2 Cal. App. 261; 83 Pac. 300.

Private action for private nuisance. Where a nuisance in a highway affects only the plaintiff in common with the public at large in the use of the highway, he cannot have his private action; but if the free use of his private property is interfered with by such nuisance, he may have his private action to abate the same, and

the question whether such obstructions amount to a nuisance is one of fact for the jury. Blanc v. Klumpke, 29 Cal. 156. A private individual may maintain an action to abate an obstruction, which, while obstructing the public highway, also cuts off access from his premises to the public highway, and thus becomes, as to him, a private nuisance; his complaint being, not that it obstructs the street or road, but that it prevents him from reaching it. Hargro v. Hodgdon, 89 Cal. 623; 26 Pac. 1106; and see Aram v. Schallenberger, 41 Cal. 449; San José Ranch Co. v. Brooks, 74 Cal. 463; 16 Pac. 250. An obstruction of a private right of way is a nuisance, and an action may be maintained by the owner of such right of way, and for the abatement of such nuisance, against all persons who participate in maintaining the same, regardless of any interest in the land over which the right of way is claimed; and the special administrators of a deceased owner of such land may be joined as parties defendant, notwithstanding the obstruction was originally placed there by the decedent, of whose estate they are special administrators. Hardin v. Sin Claire, 115 Cal. 460; 47 Pac. 363. A nuisance, the effect of which extends to the dwellings or places of business of other persons to such an extent as to render their occupancy materially uncomfortable, is a private nuisance as to each of them, for which each one thus injured may have a private action, though there are many persons thus affected, and the result will be to promote a multitude of suits. Fisher v. Zumwalt, 128 Cal. 493; 61 Pac. 82; and see Lewiston Turnpike Co. v. Shasta etc. Wagon Road Co., 41 Cal. 562; Payne v. McKinley, 54 Cal. 532; Sullivan v. Royer, 72 Cal. 248; 1 Am. St. Rep. 51; 13 Pac. 655; McCloskey v. Kreling, 76 Cal. 511; 18 Pac. 433; Gardner v. Stroever, 89 Cal. 26; 26 Pac. 618; Hargro v. Hodgdon, 89 Cal. 623; 26 Pac. 1106; Lind v. San Luis Obispo, 109 Cal. 340; 42 Pac. 437; Siskiyou Lumber etc. Co. v. Rostel, 121 Cal. 511; 53 Pac. 1118; Spring Valley Water Works v. Fifield, 136 Cal. 14; 68 Pac. 108. Multiplicity of actions affords no good reason for denying a person all remedy for actual loss and injury which he may sustain in his person or property by the unlawful acts of another, although it may be a valid ground for refusing redress to individuals for a mere invasion of a common and public right. Lind v. San Luis Obispo, 109 Cal. 340; 42 Pac. 437. A private nuisance may be abated by an individual, notwithstanding a city charter authorizes the common council to abate the same. Humphrey v. Dunnells, 21 Cal. App. 312; 131 Pac. 761. Under this section, a lot-owner abutting on an alley may maintain an action to restrain the owner of the legal title from obstructing the way. Smith v. Smith, 21 Cal. App. 378; 131 Pac. 890.

Private action for public nuisance. A prescriptive right cannot be maintained against a public nuisance, where the action is brought by a private party who has suffered special injury in consequence thereof. Bowen v. Wendt, 103 Cal. 236; 37 Pac. 149. A private person may maintain an action for a public nuisance, where it is specially injurious to himself; and where a public sewer of a city is so constructed as to cause disagreeable and offensive odors to residents along a creek into which the sewage is emptied, and sewage matter is deposited upon the plaintiff's lot and near his house, and remains there the greater part of the year, the plaintiff suffers a special injury to his private property and private rights, which is not common to the public generally, and he may maintain an action to abate the nuisance. Lind v. San Luis Obispo, 109 Cal. 340; 42 Pac. 437. A complaint for special injury to plaintiff's property from a public nuisance is fatally defective, where it fails to show that other and adjacent property-owners in the town will not suffer a like injury; the complaint is to be construed most strongly against the pleader; and the failure to aver therein that there are other property-owners will not preclude the presumption that there are such, when the premises are designated in the complaint as being in a town, which implies an aggregation of inhabitants and a collection of occupied dwellings. Siskiyou Lumber etc. Co. v. Rostel, 121 Cal. 511; 53 Pac. 1118. The mere allegation that an alleged nuisance is specially injurious to the plaintiff is insufficient, in an action by a private person to abate a public nuisance, being a mere conclusion of law: the specific facts must be alleged, showing that the maintenance of the nuisance results in a special injury to him. Spring Valley Water Works v. Fifield, 136 Cal. 14; 68 Pac. 108.

Injunction to prevent or abate nuisance. An alleged nuisance ought not, in an ordinary case, to be abated by a preliminary injunction, since it may appear on the trial that the alleged nuisance was not such, or that the plaintiff had no right to sue for its abatement in his own name. Gardner v. Stroever, 89 Cal. 26; 26 Pac. 618. Where a private nuisance is created, which results in the depreciation of adjoining property owned by the plaintiff, he may recover damages, and also enjoin the further commission of the nuisance, or have it abated. Farmer v. Behmer, 9 Cal. App. 773; 100 Pac. 901; Melvin v. E. B. & A. L. Stone Co., 7 Cal. App. 327; 94 Pac. 390. An obstruction to the free use of property, so as to interfere with its comfortable enjoyment, is a nuisance, and, notwithstanding it existed before the com

menecement of the action to abate it, it may be abated by a mandatory injunction, or by a judgment that the obstruction be removed and the nuisance abated. Gardner v. Stroever, 89 Cal. 26; 26 Pac. 618. The owner of an incorporeal hereditament, though he may have no estate in the land, shows a sufficient case in equity to sustain an injunction, where the complaint avers possession and the right to the possession of a toll-road for the purpose of collecting tolls thereon, and that the county, through its board of supervisors, interferes with and obstructs the free use and enjoyment of his property by depriving him of his tolls. Welsh v. Plumas County, 80 Cal. 338; 22 Pac. 254. The right to an injunction to prevent a nuisance does not depend upon the extent of the damage, measured by a money standard: the maxim, De minimis non curat lex, does not apply: the main object of the action is to declare a nuisance, and to prevent the continuance by a mandatory injunction. Learned v. Castle, 78 Cal. 454; 18 Pac. 872.

Public actions to abate public nuisances. A county has a special interest in the preservation of county roads, which authorizes it to resort to such remedial measures as will preserve them for the free and unobstructed use of the public. Sierra County v. Butler, 136 Cal. 547; 69 Pac. 418; and see People v. Holladay, 93 Cal. 241; 27 Am. St. Rep. 186; 29 Pac. 54; San Francisco v. Buckman, 111 Cal. 25; 43 Pac. 396. Where the cause of obstructions in a public highway is remote from such highway, and the road-overseer has no authority to remove it, and the obstructions can only be prevented by closing defendant's mining operations, a bill in equity is proper to enjoin the defendant from committing the acts complained of, and such action is properly brought in the name of the county. Sierra County v. Butler, 136 Cal. 547; 69 Pac. 418. An action brought by a county to abate a nuisance caused by the obstruction of a public highway cannot be supported: such action must be brought in the name of the road-overseer. San Benito County v. Whitesides, 51 Cal. 416; Bailey v. Dale, 71 Cal. 34; 11 Pac. 804; Hall v. Kauffman, 106 Cal. 451; 39 Pac. 756. The attorney-general has authority to institute an action in the name of the people to enjoin or abate a public nuisance caused by obstructions upon a public street in a city (People v. Beaudry, 91 Cal. 213; 27 Pac. 610); and a city has the same right to maintain an action to prevent the unlawful obstruction of a street as the people of the state have. People v. Holladay, 93 Cal. 241; 27 Am. St. Rep. 146; 29 Pac. 54; San Francisco v. Buckman, 111 Cal. 25; 43 Pac. 396.

Recovery of damages. An owner of property may recover damages for any interference with the comfortable enjoyment thereof. Coates v. Atchison etc. Ry. Co., 1 Cal. App. 441; 82 Pac. 640. At common law, an action on the case for damages was the usual remedy for injuries occasioned by a nuisance, but in that action the nuisance could not be ordered to be abated; and where the injury could not be adequately compensated by damages at law, or was likely to be a recurring grievance, resort could be had to equity; and thus a suit to prevent a threatened nuisance was brought in equity, as that court alone had jurisdiction. This section, defining a nuisance, declares it to be the subject of an action, and that it may be enjoined or ordered to be abated, and that the judgment may also award damages for the injury. The relief that was obtainable in equity must still be sought in that forum, for the statute makes no change in that respect, but simply permits the recovery of damages in the same action without resorting to a separate action at law, the claim for damages being treated as a mere incident to the main action. Courtwright v. Bear River etc. Mining Co., 30 Cal. 573. An action to abate a nuisance is an action in equity, and the demand for damages is but incidental to the main purpose of the suit. Meek v. De Latour, 2 Cal. App. 261; 83 Pac. 300. The fact that the defendant remedied the evil complained of after the commencement of the action does not affect the right of the plaintiff to recover damages for injuries sustained prior to that time. Tuebner v. California Street R. R. Co., 66 Cal. 171; 4 Pac. 1162. Where the evidence clearly shows that the plaintiff was largely and seriously damaged by water flowing over his land, and that a very large part of the water was caused to flow there by the acts of the defendant, though mingled with a larger volume of water flowing from other sources, a finding that the damage caused by the acts of the defendant was to the extent of only one dollar is not supported by the evidence. Learned v. Castle, 78 Cal. 454; 18 Pac. 872. The use of an open sewer by a city, in the vicinity of the plaintiff's land, constitutes a nuisance which he is entitled to have abated; and although the plaintiff was damaged by the nuisance, yet where he failed to show that he was damaged in the amount found, or in any other ascertainable amount, that part of the judgment awarding damages cannot be sustained on appeal. Adams v. Modesto, 131 Cal. 501; 63 Pac. 1083. In an action to recover special damages caused by placing an obstruction, in the nature of a nuisance, in the street, opposite the residence of the plaintiff, if the decreased value of the premises could be con-

sidered, it would be their decreased market value, and not their decreased value as a family residence; so that evidence of the latter is not admissible. Hopkins v. Western Pacific R. R. Co., 50 Cal. 190. The penalty prescribed by the Political Code as damages for the obstruction of a highway, is to be enforced only as provided for in that code; hence, where an action is brought in the name of a county to abate such an obstruction as a nuisance, and thus resting upon the general equity powers of the court, and not on the sections of the Political Code, the penalty cannot be recovered. Sierra County v. Butler, 136 Cal. 547; 69 Pac. 418. A wrongdoer who contributes to a damage cannot escape liability because his proportional contribution to the result cannot be accurately measured. Learned v. Castle, 78 Cal. 454; 18 Pac. 872.

Landlord's liability for nuisance. A landlord is not liable for the consequences of a nuisance in connection with a building in the possession and control of his tenant, unless such nuisance existed at the time the premises were demised, or the building was in a condition likely to become a nuisance in the ordinary and reasonable use of the same for the purpose for which it was constructed or let, and the landlord failed to repair it. Kalis v. Shattuck, 69 Cal. 593; 58 Am. Rep. 568; 11 Pac. 346; Riley v. Simpson, 83 Cal. 217; 7 L. R. A. 622; 23 Pac. 293.

Negligence, nuisance resulting from. The duty of exercising ordinary care to prevent injury to children is imposed upon one who places an attractive but dangerous contrivance in a place frequented by children, knowing or having reason to believe that they will be attracted to it and subjected to injury thereby; such doctrine is not confined to cases of turntables. Pierce v. United Gas etc. Co., 161 Cal. 176; 118 Pac. 700. The process of blasting, without reference to locality, is not so intrinsically dangerous as to be ipso facto a nuisance, rendering the blaster liable for injury; his liability depends upon whether or not he was guilty of any negligence. Houghton v. Loma Prieta Lumber Co., 152 Cal. 500; 14 Ann. Cas. 1159; 14 L. R. A. (N. S.) 913; 93 Pac. 82; Houghton v. Loma Prieta Lumber Co., 152 Cal. 574; 93 Pac. 377. Where a highway is obstructed under license and by authority, the person who placed the obstruction is chargeable only with ordinary care to see that such obstruction does not become a cause of injury to any person lawfully traveling the highway; but where a superintendent of streets, after knowledge that a contractor has obstructed a street, whether rightfully or wrongfully, fails to see that proper precautions are taken to abate the obstruction, or to warn the public of the danger of its presence, he is answerable for injuries caused by such obstruction. Stockton Automobile Co. v. Confer, 154 Cal. 402; 97 Pac. 881.

Jurisdiction. The prevention or abatement of a nuisance is accomplished by means of an injunction, either prohibitive or mandatory; and an action therefor is within the equitable jurisdiction of the court, and is to be governed by the principles prevailing in that jurisdiction. McCarthy v. Gaston Ridge etc. Mining Co., 144 Cal. 542; 78 Pac. 7. The constitution has conferred upon the superior court original jurisdiction in all cases in equity, and also of actions to prevent or abate a nuisance; and a plaintiff, seeking judgment for the damages sustained, may bring his action either in the superior court or in a justice's court, according to the amount of damages claimed; or, seeking the abatement or prevention of the nuisance, he may bring his action only in the superior court, and this, whether he seeks, in addition thereto, to recover damages in excess of three hundred dollars, or even if no damages are claimed. McCarthy v. Gaston Ridge etc. Mining Co., 144 Cal. 542; 78 Pac. 7.

Parties to action for abatement. Where different persons separately appropriate the waters of a stream, and are severally using the same under certain regulations as to the time and manner of such use, they are tenants in common, and each of them may maintain an action to enjoin a trespasser from obstructing or diverting such waters. Lytle Creek Water Co. v. Perdew, 65 Cal. 447; 4 Pac. 426. Any person creating or assisting to create or maintain a nuisance is liable to be sued for its abatement and for damages. Hardin v. Sin Claire, 115 Cal. 460; 47 Pac. 363.

Joinder of causes of action for. Any number of separate causes of action for distinct nuisances may be set up in the same complaint, without being subject to demurrer for misjoinder: different elements of damage, arising from the same nuisance, do not constitute different causes of action. Astill v. South Yuba Water Co., 146 Cal. 55; 79 Pac. 594.

Evidence. In an action in behalf of the people to abate a nuisance on a street, proof is necessary that such street is a public highway. People v. Dreher, 101 Cal. 271; 35 Pac. 867; and see People v. Sausalito etc. Ferry Co., 106 Cal. 621; 40 Pac. 11.

Res adjudicata. The nature of an action cannot be changed by changing the name of the thing objected to: an action to abate a gate as a nuisance is of the same nature as an action to remove the same gate as an obstruction, and a judgment in one action is a bar to an action in the other. Phelan v. Quinn, 130 Cal. 374; 62 Pac. 623.

Appeal. Pending an appeal from a judgment enjoining the operation of a cement plant, because of injury arising to adjoining owners of property from the dust produced in the processes of manufacture, the supreme court will not, upon an original application made to it, stay the operation of the injunction, although the defendant offers to furnish a bond of indemnity to the plaintiffs. Hulbert v. California etc. Cement Co., 161 Cal. 239; 38 L. R. A. (N. S.) 436; 118 Pac. 928.

Abatement of nuisances by destruction. See notes 26 Am. Dec. 443; 44 Am. Rep. 111.

When abatement of private nuisance is justifiable. See note 43 Am. Rep. 24.

Summary destruction of private property in abating nuisance. See note 1 Ann. Cas. 345.

Injunction against threatened nuisance. See notes 73 Am. Dec. 113; 2 Ann. Cas. 250; 20 Ann. Cas. 933.

Right of municipal corporations to create nuisances. See note 84 Am. St. Rep. 916.

Private action for public nuisance. See notes 31 Am. Dec. 132; 25 Am. Rep. 533.

When private citizens may obtain injunctions against public nuisances. See note 52 Am. Rep. 574.

Right of private citizen to destroy liquor illegally kept for sale. See note 26 L. R. A. (N. S.) 996.

Who may obtain injunction against public nuisance. See note 67 Am. Dec. 203.

Abatement of public nuisances. See note 124 Am. St. Rep. 595.

Suits by private citizens to enjoin nuisances. See notes 1 Ann. Cas. 38; 17 Ann. Cas. 1128.

Power of boards of health as to abatement of nuisances. See note 80 Am. St. Rep. 214.

Power of municipal corporations to determine what is and to remove nuisances. See notes 27 Am. Dec. 98; 120 Am. St. Rep. 372.

Liability for nuisance due to the act or negligence of an independent contractor. See note 76 Am. St. Rep. 399.

Action by other than property owner for damages by nuisance. See note 1 Ann. Cas. 272.

Right of state to enjoin act which is both public nuisance and crime. See notes 13 Ann. Cas. 794; 33 L. R. A. (N. S.) 25.

Right of state to enjoin or abate nuisance in city street. See note 16 Ann. Cas. 486.

Right of municipality to maintain suit to abate nuisance. See note 51 L. R. A. 657.

Right of one in possession to maintain action for nuisance without proving title. See note 34 L. R. A. (N. S.) 560.

Basis of recovery by abutter for injury to property from railroad in street. See note 36 L. R. A. 756.

Persons liable for nuisances. See note 118 Am. St. Rep. 872.

Liabilities of erecters and continuers of nuisances. See note 14 Am. Dec. 336.

Respective liabilities of landlord and tenant for nuisances to each other and to third persons. See note 50 Am. Dec. 776.

When vendee of property not liable for nuisance. See note 59 Am. Rep. 351.

Liability of property owner for a nuisance which he did not create. See note 86 Am. St. Rep. 508.

Liability of purchaser of property for continuing nuisance. See note 13 Ann. Cas. 108.

Liability of owner of vacant property for using it or permitting it to be used in such a way as to collect crowds, to the injury of the neighborhood. See note 11 L. R. A. (N. S.) 463.

Liability of one erecting or creating nuisance upon his land for continuance of same after he has parted with the title. See note 25 L. R. A. 731.

Liability of contractor to third persons for nuisance caused by defect in his work after its completion and acceptance. See note 26 L. R. A. 506.

Liability of employer for nuisance committed by independent contractor. See notes 65 L. R. A. 751; 66 L. R. A. 146, 948; 14 L. R. A. 833.

What connection with or participation in nuisance is essential to liability. See note 32 L. R. A. (N. S.) 890.

Liability of municipalities for maintaining nuisances. See notes 15 Am. St. Rep. 845; 30 Am. St. Rep. 395.

Injunction against nuisance maintained by municipal corporation. See note 23 L. R. A. 301.

Liability of municipality for failure to abate nuisance. See note 1 Ann. Cas. 964.

Right of landlord to recover damages to premises caused by nuisance existing at commencement of tenancy. See note 6 Ann. Cas. 150.

Right of lessee to maintain suit to abate a nuisance affecting possession. See note 3 L. R. A. (N. S.) 448.

Obstructions in highway preventing access to property except by a circuitous route as a special injury entitling owner to maintain action for damages, or to abate the nuisance. See notes 8 L. R. A. (N. S.) 227; 21 L. R. A. (N. S.) 75.

Interference with one's use of a highway as a special damage which will sustain an action by him against the wrong-doer. See note 28 L. R. A. (N. S.) 1053.

Right as against public, as to nuisance created by damming back water of stream. See note 59 L. R. A. 818.

Limitations against nuisances. See note 20 Am. St. Rep. 176.

Joinder of parties plaintiff in suits to abate nuisances. See note 71 Am. Dec. 311.

Suits and actions against two or more persons creating or maintaining nuisance. See note 118 Am. St. Rep. 868.

Judgment in suit to abate nuisance as bar to action for damages therefor. See note 58 L. R. A. 735.

Damages for nuisances, when not severable. See note 53 Am. Rep. 123.

Number of recoveries for nuisance. See note 128 Am. St. Rep. 959.

Doctrine of comparative injury in suit to enjoin nuisance. See notes 31 L. R. A. (N. S.) 881; 39 L. R. A. (N. S.) 580.

CODE COMMISSIONERS' NOTE. 1. Nuisance, defined. "A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: 1. Annoys, injures, or endangers the comfort, repose, health, or safety of others; or, 2. Offends decency; or, 3. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, or navigable river, bay, stream, canal, or basin, or any public park, square, street, or highway; or 4. In any way renders other persons insecure in life, or in the use of property." Civ. Code, Ann. Ed., vol. II, p. 475, § 3479.

"This definition corresponds with that given of public nuisance, in the Penal Code, § 371, except that it is modified to embrace private nuisance also. Numerous authorities on the different branches of the definition are collected in a note to the section of the Penal Code referred to, which is also given here, pointing to the subdivisions. See also People v. Vanderbilt, 26 N. Y. 287; 25 How. Pr. 139; 38 Barb. 282; Niagara Falls International Bridge Co. v. Great Western Ry. Co., 39 Barb. 212. The following are the leading decisions which support the several clauses of the definition in the text.

"Subd. 1. Rex v. Wigg, Salk. 460; 2 Ld Raym. 1163; Rex v. Pierce, 2 Show. 327; Rex v. Wharton, 12 Mod. 510; Rex v. Smith, 1 Stra. 704; Rex v. Moore, 3 Barn. & Ad. 184; Rex v. White, 1 Burr. 333; Rex v. Davey, 5 Esp. 217; Rex v. Lloyd, 4 Esp. 200; Rex v. Neil, 2 Car. & P. 485; Putnam v. Payne, 13 Johns. (N. Y.) 312; Hinckley v. Emerson, 4 Cow. (N. Y.) 351; 15 Am. Dec. 383; State v. Baldwin, 1 Dev. & B. (N. C.) 195, Commonwealth v. Brown, 13 Mete. (Mass.) 365; Reg. v. Lester, 3 Jur. (N. S.) 570; Douglass v. State, 4 Wis. 387.

"Subd. 2. State v. Bertheol, 6 Blackf. (Ind.) 474; 39 Am. Dec. 442; State v. Purse, 4 McCord (S. C.), 472; Crane v. State, 3 Ind. 193.

"Subd. 3. Hall's Case, Vent. Law, 196; 1 Mod. 76; 2 Keb. 846; Rex v. Leach, 6 Mod. 145, 155; Rex v. Grosvenor, 2 Stark. 511; Rex v. Hollis, 2 Stark. 536; Rex v. Webb, 1 Ld. Raym. 737; Rex v. Russell, 6 Barn. & C. 566; Rex v. Trafford, 1 Barn. & Ad. 874; Rex v. Watts, 2 Esp. 675; Rex v. Tindall, 1 Nev. & P. 719; 6 Ad. & El. 143; W. W. & D. 316; Rex v. Ward, 4 Ad. & El. 384; 1 Har. & W. 703; Rex v. Pease, 4 Barn. & Ad. 30; Rex v. Morris, 1 Barn. & Ad. 441; Reg. v. Botfield, 1 Car. & M. 151; Rex v. Smith, 4 Esp. 109; Rex v. Canfield, 6 Esp. 136; Rex v. Sarmon, 1 Burr. 516; Rex v. Cross, 3 Camp. 224; Rex v. Russell, 6 East, 427; 2 Smith, 424; Rex v. Jones, 3 Camp. 230; Rex v. Carlile, 6 Car. & P. 637; Rex v. Gregory, 2 Nev. & M. 478; 5 Barn. & Ad. 555; Reg. v. Scott, 2 Gale & D. 729; 3 Ad. & El. (N. S.) 543; 3 Railw. Cas. 187; Reg. v. Betts, 22 Eng. L. & Eq. 240; People v. Lawson, 17 Johns. (N. Y.) 277; People v. Cunningham, 1 Denio (N. Y.), 524; 43 Am. Dec. 709; Renwick v. Morris, 7 Hill (N. Y.), 575; Harlow v. Humiston, 6 Cow. (N. Y.) 189; Lansing v. Smith, 8 Cow. (N. Y.) 146; Dygert v. Schenck, 23 Wend. (N. Y.) 446; 35 Am. Dec. 575; Drake v. Rogers, 3 Hill (N. Y.), 604; People v. Lambier, 5 Denio (N. Y.), 9; 47 Am. Dec. 273; Moshier v. Utica etc. R. R. Co, 8 Barb. (N. Y.) 427; Hart v. Mayor, 9 Wend. (N. Y.) 571; 24 Am. Dec. 165; Hecker v. New York Balance Dock Co., 13 How. Pr. 549; and see Hecker v. New York Balance Dock Co., 24 Barb. 215; Peckham v. Henderson, 27 Barb. (N. Y.) 207; People v. Vanderbilt, 24 How. Pr. (N. Y.) 301; Wetmore v. Atlantic White Lead Co., 37 Barb. (N. Y.) 70; Commonwealth v. Wright, Thach. Cr. Cas. 211; Commonwealth v. Gowen, 7 Mass. 378; State v. Spainhour, 2 Dev. & B. Law (N. C.), 547; Commonwealth v. Tucker, 2 Pick. (Mass.) 44; Commonwealth v. Webb, 6 Rand. (Va.) 726; State v. Godfrey, 12 Me. 361; Commonwealth v. Ruggles, 10 Mass. 391; State v. Mobley, 1 McMullan L. (S. C.) 44; State v. Brown, 16 Conn. 54; Elkins v. State, 2 Humph. (Tenn.) 543; Simpson v. State, 10 Yerg. (Tenn.) 525; State v. Miskimmons, 2 Carter (Ind.), 440; Commonwealth v. Rush, 14 Pa. 186; State v. Morris etc. R. R. Co., 23 N. J. L. 360; Commonwealth v. Bowman, 3 Pa. 202; Commonwealth v. Milliman, 13 Serg. & R. (Pa.) 403; Commonwealth v. Chapin, 5 Pick. (Mass.) 199; 16 Am. Dec. 386; State v. Hunter, 5 Ired. (N. C.) 369; 44 Am. Dec. 41; State v. Commissioners, 3 Hill (S. C.), 149; State v. Yarrell, 12 Ired. (N. C.) 130; State v. Duncan, 1 McCord (S. C.), 404; State v. Thompson, 2 Strobh. (S. C.) 12; 47 Am. Dec. 588; Commonwealth v. Alburger, 1 Whart. (Pa.) 469; State v. Atkinson, 24 Vt. 448; Newark Plankroad etc. Co. v. Elmer, 9 N. J. Eq. 754; Attorney-General v. Paterson etc. R. R. Co., 9 N. J. Eq. 526; Works v. Junction R. R. Co., 5 McLean, 425; Fed. Cas. No. 18046; State v. Phipps, 4 Ind. 515; State v. Freeport, 43 Me. 198.

"Subd. 4. Rex v. White, Burr. 333; Rex v. Smith, Stra. 703; White v. Cohen, 19 Eng. L. & Eq. 146; Catlin v. Valentine, 9 Paige (N. Y.), 575; Brady v. Weeks, 3 Barb. (N. Y.) 157; Prescott's Case, 2 City Hall Rec. (N. Y.) 161; Prout's Case, 4 City Hall Rec. (N. Y.) 481; Lynch's Case, 6 City Hall Rec. (N. Y.) 61; People v. Townsend, 3 Hill (N. Y.), 479; Hackney v. State, 8 Ind. 494; State v. Wetherall, 5 Har. (Del.) 487; 3 Bla. Comm. 216; Bell's Sc. Law Dict., tit. 'Nuisance.'

"The following are intended to be excluded from the definition, because they have been decided not to be nuisances, upon grounds deemed to be sufficient: Exercising banking privileges without authority. Attorney-General v. Bank of Niagara, 1 Hopk. Ch. (N. Y.) 354. An immigrant depot, if not kept in an improper manner. Phœnix v. Commissioners, 1 Abb. Pr. (N. Y.) 466. A person sick of a contagious disease, if not needlessly exposed so as to endanger the public. Boom v. Utica, 2 Barb. (N. Y.) 104. Several offenses which, in the Penal Code, are made the subject of specific provisions, have been held indictable under the common-law definition of nuisance. See: As to throwing gas-tar into public streams, Rex v. Meadley, 6 Car. & P. 292. As to obstructing railways, Pen. Code, § 587; Rex v. Holroyd, 2 M. & Rob. 339. As to keeping gunpowder, Pen. Code, § 375; Rex v. Taylor, 2 Stra. 1167; People v. Sands, 1 Johns. (N. Y.) 78; 3 Am. Dec. 296; Myers v. Malcolm, 6 Hill (N. Y.), 292; 41 Am. Dec. 744. As to establishment for gaming and other useless sports, Pen. Code, §§ 330–335; Tanner v. Trustees of Albion, 5 Hill (N. Y.), 121; 40 Am. Dec. 337; Updike v. Campbell, 4 E. D. Smith (N. Y.), 570; State v. Doon, R. M. Charlt. (Ga.) 1; State v. Haines, 30 Me. 65. As to other disorderly houses, Pen. Code, § 316; Smith v. Commonwealth, 6 B. Mon. (Ky.), 21; Bloomhuff v. State, 8 Blackf. (Ind.) 205; State v. Bailey, 21 N. H. 343; Rex v. Williams, 1 Salk. 384; Hackney v. State, 8 Ind. 494. As to dangerous driving through public streets, Pen. Code, § 396; United States v. Hart, Pet. C. C. 390; Fed. Cas. No. 15316. As to exposure of the person, Pen. Code, § 311; Regina v. Webb, 1 Den. C. C. R. 338; 13 Jur. 42; 18 Law J. (M. C.) 39. As to digging up or injuring highways, Pen. Code, § 588; Regina v. Sheffield Gas Consumer's Co., 22 Eng. L. & Eq. 200; State v. Peckard, 5 Har. (Del.) 500. As to neglect to keep ferry in repair, State v. Willis, 44 N. C. 223. As to profane swearing, State v. Graham, 3 Sneed (Tenn.), 134. Consult also, upon other branches of the criminal law relative to what are nuisances, the following: Rex v. Wigg, 1 Ld. Raym. 737; Rex v. Village of Hornsey, 1 Ro. 406; Anonymous, 12 Mod. 342; Rex v. Record, 2 Show. 216; Rex v. Dunraven, W. W. & D. 577; Rex v. Cross, 2 Car. & P. 483; Rex v. Neville, Peake, 93; Rex v. Watts, Mood. & M. 281; Wetmore v. Tracy, 14 Wend. 250; 28 Am. Dec. 525; Harris v. Thompson, 9 Barb. 350; Plant v. Long Island R. R. Co., 10 Barb. 26; Leigh v. Westervelt, 2 Duer (N. Y.), 618; Williams v. New York Central R. R. Co., 18 Barb. (N. Y.) 222; Lynch's Case, 6 City Hall Rec. (N. Y.) 61; Dygert v. Schenck, 23 Wend. 446; 35 Am. Dec. 575; People v. Cunningham, 1 Denio (N. Y.), 524; 43 Am. Dec. 709; Renwick v. Morris, 7 Hill (N. Y.) 575; Peckham v. Henderson, 27 Barb. 207; State v. Commissioners, Riley (S. C.), 146; Ellis v. State, 7 Blackf. (Ind.) 534; Works v. Junction Railroad Co., 5 McLean, 425; Fed. Cas. No. 18046; Douglass v. State, 4 Wis. 387; Commonwealth v. Upton, 6 Gray (Mass.), 473.

"What constitutes a technical nuisance is hardly capable of a precise definition; the law is best explained by particular instances of annoyance or injury adjudged to be or not to be a nuisance. An action may be maintained where the enjoyment of property is destroyed or substantially injured or depreciated. Cropsey v. Murphy, 1 Hilt. (N. Y.) 126; and per Knight Bruce, V. C., in Walter v. Telfe, 4 De G. & S. 315, this language is held: 'Is the convenience more than fanciful, or one of mere delicacy and fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among the English people.' See Garrison v. State, 14 Ind. 287; Columbus Gaslight etc. Co. v. Freeland, 12 Ohio St. 392. In regard to the remedy by injunction, it is true, the loss of health, the enjoyment of quiet and repose, and the comforts of home, cannot be restored or compensated in money. 1 Hilliard on Torts, pp. 549, 550 et seq. A private action may not be sustained for a public nuisance, without proving special and peculiar damages. Harrower v. Ritson, 37 Barb. (N. Y.) 301; Crommelin v. Coxe, 30 Ala. 318; 68 Am. Dec. 120; Mechling v. Kittanning, 1 Grant, 416. Finding a proposed railroad 'will be specially injurious to the property of the plaintiffs, and other property similarly situated,' shows a special and direct injury to each of the plaintiffs, severally, not a remote one, and not merely a public nuisance. Milhau v. Sharp, 27 N. Y. (13 Smith) 612; 84 Am. Dec. 314. The case of Silton v.

De Held, 2 Sim. 145, elaborately and exhaustively discusses the whole subject. Such nuisances equity will restrain by injunction. Hamilton v. Whitridge, 11 Md. 128; 69 Am. Dec. 184; Pennsylvania v. Wheeling etc. Co., 13 How. (U. S.) 518; 14 L. Ed. 249. Some instances are here given of what are adjudged nuisances (see 1 Hilliard on Torts, p. 557), public and private, or either: An offensive smell; anything offensive to decency, as a distillery, with sties and hogs, or offal, rendering waters unwholesome, etc. Acts rendering waters less pure, which are used for the ordinary purposes of life, fat-boiling establishments, soap-boiling, stables, sties, and slaughter-pens, though not necessarily nuisances, may be so built and so kept as to become such. So a livery-stable near a hotel, powder-magazine in a large city, slaughter-houses, and melting-houses in cities; so dwelling-houses, cut up into small apartments and crowded with poor people in filthy condition, calculated to breed disease; and it may, by those thereby annoyed, be abated by tearing it down, especially during prevalence of disease like Asiatic cholera. But a person sick in his own house or at suitable apartments in a hotel or boarding-house is not a nuisance. These are a few instances of the great many nuisances which may be abated and enjoined. A more extended enumeration of adjudged nuisances may be found by consulting 1 Hilliard on Torts, pp. 557 et seq., and California Digest of Decisions, tit. 'Nuisance.' Any one of a community injured by a nuisance may abate it, he being presumed to be aggrieved by it, whether he is or not. Gunter v. Geary, 1 Cal. 462. House on fire, a nuisance to those near it, and may be abated on special grounds. Surocco v. Geary, 3 Cal. 69; 58 Am. Dec. 385. Overflowing mining claim by a dam of defendants, a nuisance, which may be abated entirely, or lowered to prevent overflow. Ramsay v. Chandler, 3 Cal. 90.

"Adjudged nuisances in California cases: Erecting house in highway. Vol. I, p. 467. Diversion of watercourse, a private nuisance. Tuolumne Water Co. v. Chapman, 8 Cal. 392. To turn aside a useful, or on a destructive, element. Parke v. Kilham, 8 Cal. 77; 68 Am. Dec. 310. Whether wharf public nuisance, question of fact. People v. Davidson, 30 Cal. 379. Toll-gate on public way. El Dorado County v. Davison, 30 Cal. 520. House on fire. Surocco v. Geary, 3 Cal. 69; 58 Am. Dec. 385. What not nuisance (mill when built) Middleton v. Franklin, 3 Cal. 238. Burden of proof of nuisance, in street-railroad case, regarding switches. Carson v. Central R. R. Co., 35 Cal. 325. Public may be private nuisance, and the injured party may maintain action therefor. Yolo County v. Sacramento, 36 Cal. 193. When not responsible for. Brown v. McAllister, 39 Cal. 573. Jurisdiction of county court, in Grigsby v. Clear Lake Water Co., 40 Cal. 396; see Code Civ. Proc., § 731 (§ 249); Stone v Bumpus, 40 Cal. 428." See also Civ. Code, §§ 3480, 3481.

2. **Nothing done under express authority of statute is a nuisance.** Civ. Code, Ann. Ed., vol. II, p. 481, § 3482:

"Harris v. Thompson, 9 Barb. (N. Y.) 350; Plant v. Long Island R. R. Co., 10 Barb. 26; Leigh v. Westervelt, 2 Duer (N. Y.), 618; Williams v. New York Central R. R. Co., 18 Barb. (N. Y.) 222; compare Renwick v. Morris, 7 Hill (N. Y.), 575; Clark v. Mayor, 13 Barb. (N. Y.) 32. A municipal corporation may commit a nuisance. 2 Hilliard on Torts, p. 405. Particular instances are enumerated in the following cases: Delmonico v. New York, 1 Sandf. (N. Y.) 222; Brewer v. New York, 30 Barb. (N. Y.) 254; Stein v. Burden, 24 Ala. 130; 60 Am. Dec. 453; Akron v. McComb, 18 Ohio, 229; 51 Am. Dec. 453; Howell v. Buffalo, 15 N. Y. 512; Ross v. Madison, 1 Ind. 281; 48 Am. Dec. 361; Dayton v. Pease, 4 Ohio St. 80; Stone v. Augusta, 46 Me. 127; Conrad v. Trustees, 16 N. Y. 158; Weightman v. Washington, 1 Black (U. S.), 39; 17 L. Ed. 52; Lloyd v. New York, 5 N. Y. 369; 55 Am. Dec. 347; Lacour v. New York, 3 Duer, 406. On the other hand, the general rule is stated to be, that an action does not lie against a municipal corporation for neglect of duty imposed by a general law, and not by its charter, unless authorized by statute, etc. See 2 Hilliard on Torts, p. 406, § 2a, text and notes with cases; see also 1 Hilliard on Torts, pp. 550–552, §§ 4–4a. 'The principle is laid down, that if one carry on a lawful business in such a manner as to prove a nuisance to his neighbor, he is answerable for the damages. Fish v. Dodge, 4 Denio (N. Y.), 311; 47 Am. Dec. 254. But it is also said, that which is authorized by an act of the legislature cannot be a nuisance.' Per Hand, J.; First Baptist Church v. Utica etc. R. Co., 6 Barb. (N. Y.) 313; Stoughton v. State, 5 Wis. 291; Hatch v. Vermont etc. R. Co., 28 Vt. 142; see Commonwealth v. Reed, 34 Pa. St. 275; 75 Am. Dec. 661; Samuels v. Mayor, 3 Sneed (Tenn.), 298; People v. Law, 34 Barb. 494; Call v. Allen, 1 Allen (Mass.), 137; Butler v. State, 6 Ind. 165; and other notes there to be found."

3. **Successive owners, who neglect to abate a continuing nuisance, liable.** Civ. Code, Ann. Ed., vol. II, p. 481, § 3483.

"1 Hilliard on Torts, p. 572, § 15a, it is said: 'One who demises premises for carrying on a business necessarily injurious to adjacent proprietors, is liable as the author of the nuisance.' Fish v. Dodge, 4 Denio (N. Y.), 311; 47 Am. Dec. 254; Brady v. Weeks, 3 Barb. 157. Writs of nuisance held in New York to be obsolete. Klintz v. McNeal, 1 Denio (N. Y.), 436. The action must be brought against the party erecting the nuisance, or if he has transferred the land to another, then against both these parties. An action against the alienor alone for keeping up and continuing a nuisance erected by his grantor was unknown to the common law. Brown v. Woodworth, 5 Barb. 550; and note (a), p. 572, 1 Hilliard on Torts. In this respect, however, the text changes the common-law rule. It is sufficient to show the nuisance was caused by authority of the defendant, or that, having acquired the title to the land after the nuisance was erected, he has continued it. 2 Greenleaf on Evidence, p. 527, § 472; (2) Pennruddock's Case, 5 Co., p. 100; Davenport v. Lamson, 21 Pick. (Mass.) 72. So if the injury is caused by a wall erected partly on defendant's land, case lies for the nuisance, though the wall is erected partly on plaintiff's land, by an act of trespass. Wells v. Ody, 1 M. & W. 452; Winter v. Charter, 3 Y. & J. 308. See cases in point: Brown v. Cayuga etc. R. R. Co., 12 N. Y. 486; compare Terry v. Mayor, 8 Bosw. (N. Y.) 504."

4. **A private person may maintain an action for a public nuisance, if it is specially injurious to himself; but not otherwise.** Civ. Code, Ann. Ed., vol. II, p. 484, § 3493: "When injurious to himself (Pierce v. Dart, 7 Cow. (N. Y.) 609), but not otherwise. Davis v. Mayor, 14 N. Y. 506; 67 Am. Dec. 186; Dougherty v. Bunting, 1 Sandf. (N. Y.) 1; Myers v. Malcolm, 6 Hill (N. Y.), 292; 41 Am. Dec. 744; see Lansing v. Smith, 8 Cow. (N. Y.) 146; 4 Wend. (N. Y.) 9; 21 Am. Dec. 89; First Baptist Church v. Schenectady etc. R. R. Co., 5 Barb. (N. Y.) 79; First Baptist Church v. Utica etc. R. R. Co., 6 Barb. 313; Pierce v. Dart, 7 Cow. (N. Y.) 609; Yolo County v. Sacramento, 36 Cal. 193; Grigsby v. Clear Lake Water Works, 40 Cal. 396."

§ 732. Waste, actions for. If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

Waste. Post, § 746.
Enjoining. Post, § 745.

Legislation § 732. 1. Enacted March 11, **1872**; re-enactment of Practice Act, § 250.
2. Repeal by Stats. **1901**, p. 159; unconstitutional. See note ante, § 5.

Construction of section. This section is not penal, but remedial, although providing for treble damages; it presents an instance in which no new right of action or remedy for private injury is created, but the damages authorized to be recovered are enhanced. Jahns v. Nolting, 29 Cal. 507.

Waste, what constitutes. At common law, acts which, if committed by a tenant for life or years, would constitute waste, would not be waste if committed by a tenant in common; but, by statute, a co-tenant is now liable for acts which would constitute waste if committed by a tenant for life or years, and resort must now be had to the common law to ascertain what acts would constitute waste. McCord v. Oakland Quicksilver Mining Co., 64 Cal. 134; 49 Am. Rep. 686; 27 Pac. 863. A vendee of mines, under a contract of sale, with a right to prospect and develop the mines, has no right to commit waste or remove from its situs that which constitutes a part of the realty, other than ore-bodies or minerals, or to make such use of timber, and the like, as may be necessary in the working of the mines. Conde v. Sweeney, 14 Cal. App. 20; 110 Pac. 973; 16 Cal. App. 157; 116 Pac. 319. A tenant for years, taking ore from a mine, the sole subject of the demise, during his term, is not guilty of waste: the extraction of the ore is that for which he pays rent. McCord v. Oakland Quicksilver Mining Co., 64 Cal. 134; 49 Am. Rep. 686; 27 Pac. 863.

Tenant in common may be sued for waste. An action for waste may be brought against a tenant in common (Scarborough v. Woodill, 7 Cal. App. 39; 93 Pac. 383); but one of several tenants in common of a mine, who does not exclude his co-tenants, may work the mine in the usual way, and extract ore therefrom, without being chargeable with waste, or liable to the other co-tenants for damages; and an injunction will not be granted, at their instance, to prevent the working of the mine. McCord v. Oakland Quicksilver Mining Co., 64 Cal. 134; 49 Am. Rep. 686; 27 Pac. 863.

Damages. Damages are not necessarily confined to compensation for waste and injury only, but the value of the rents and profits may enter into the estimate of damages. Tewksbury v. O'Connell, 25 Cal. 262.

Treble damages. Where an act of waste is done under an honest claim of right, or as the result of an honest mistake as to the defendant's right, it would not be just to inflict the penalty of treble damages, and no strained construction of words should be allowed to have this effect; hence, the court does not abuse its discretion, where it refuses to treble the damages where the waste was not committed willfully, wantonly, or maliciously. Isom v. Rex Crude Oil Co., 140 Cal. 678; 74 Pac. 294.

Injunction to prevent waste. Where cypress-trees between orange-orchards are owned in co-tenancy, and one of the tenants in common commits waste by cutting down some of such line-trees, an injunction will lie, at the suit of the other co-tenant, to prevent the cutting down, injuring, or destroying of any of the remaining trees growing on the line. Scarborough v. Woodill, 7 Cal. App. 39; 93 Pac. 383. Where a lease of land for sugar-beet farming provides against waste, and that the land is to be farmed in accordance with custom, one fourth of the crop to go to the lessor as yearly rental, but does not provide for any division of the tops, which, by custom, are left on the ground, to be plowed under for fertilization, the lessor is entitled to enjoin the lessee from waste by diverting three fourths of the tops, under a claim of right thereto. Corey v. Struve, 16 Cal. App. 310; 116 Pac. 975.

Terms defined and explained. The common law must apply to the definition of "waste," as that term is not defined by the code. Scarborough v. Woodill, 7 Cal. App. 39; 93 Pac. 383. The word "waste" is not an arbitrary term, to be applied inflexibly, without regard to the quantity or quality of the estate, the nature and species of the property, or the relation to it of the person charged to have committed the wrong. McCord v. Oakland Quicksilver Mining Co., 64 Cal. 134; 49 Am. Rep. 686; 27 Pac. 863. The word "may," as used in this section, is not mandatory, and is not to be construed to mean "must," where there is nothing in the connection of the language, or in the sense or policy of the provision, to require an unusual interpretation. Isom v. Rex Crude Oil Co., 140 Cal. 678; 74 Pac. 294; Isom v. Book, 142 Cal. 666; 76 Pac. 506.

Remedy of remainderman for waste. See note 14 Am. St. Rep. 632.

Right of tenant in common to maintain action for waste against co-tenant. See note 15 Ann. Cas. 271.

Remedy of contingent remainderman for waste. See note Ann. Cas. 1912A, 543.

Alteration of building by tenant for years as waste. See note Ann. Cas. 1912C, 392.

CODE COMMISSIONERS' NOTE. Chipman v. Emeric, 3 Cal. 283. Demand for triple damages must be inserted in the complaint. Chipman v. Emeric, 5 Cal. 239; Rees v. Emerick, 6 Serg. & R. (Pa.) 288; Newcomb v. Butterfield, 8 Johns. (N. Y.) 342; Livingston v. Platner, 1 Cow. (N. Y.) 175; Benton v. Dale, 1 Cow. 160. Injunction to restrain waste. Hicks v. Michael, 15 Cal. 116.

§ 733. Trespass for cutting or carrying away trees, etc., actions for. Any person who cuts down or carries off any wood or underwood, tree, or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction.

Treble damages for injuries to trees. See Civ. Code, § 3346.

Legislation § 733. 1. Enacted March 11, **1872** (based on Practice Act, § 251), changing (1) "shall cut" to "cuts," (2) "girdle" to "girdles," (3) "injure" to "injures," and (4) "shall be" to "is" before "liable."

2. Repeal by Stats. **1901**, p. 159; unconstitutional. See note ante, § 5.

Construction of section. This section is not mandatory. Isom v. Rex Crude Oil Co., 140 Cal. 678; 74 Pac. 294.

Treble damages allowed when. To recover treble damages under this section, the plaintiff must allege and prove that the defendant's act was willful and malicious. Stewart v. Sefton, 108 Cal. 197; 41 Pac. 293. A complaint, not averring that the trespass was willful, but only that the entry and cutting of timber was wrongful and without the plaintiff's leave, does not come within the purview of this section, and, though stating an action good at common law, entitling the plaintiff to recover his actual damages, does not state a case in which the damages can be trebled. Barnes v. Jones, 51 Cal. 303; Stewart v. Sefton, 108 Cal. 197; 41 Pac. 293; Isom v. Rex Crude Oil Co., 140 Cal. 678; 74 Pac. 294. Where timber is cut down through an innocent mistake as to the true boundary line of the land, the plaintiff cannot recover treble damages. Barnes v. Jones, 51 Cal. 303.

Statutory penalties for cutting, destroying or carrying away timber. See note 1 Am. St. Rep. 480.

Measure of damages for injury to or destruction of trees or shrubbery not valuable for their timber or firewood. See notes 11 L. R. A. (N. S.) 930; 28 L. R. A. (N. S.) 757; 37 L. R. A. (N. S.) 1115.

Damages for injury to, destruction of, or wrongful cutting of trees. See notes 19 L. R. A. 653; 18 L. R. A. (N. S.) 244.

CODE COMMISSIONERS' NOTE. Sampson v. Hammond, 4 Cal. 184; Buckelew v. Estell, 5 Cal 108.

§ 734. Measure of damages in certain cases under the last section. Nothing in the last section authorizes the recovery of more than the just value of the timber taken from uncultivated woodland for the repair of a public highway or bridge upon the land, or adjoining it.

Legislation § 734. 1. Enacted March 11, **1872** (based on Practice Act, § 252), changing "authorizes" from "shall authorize."

2. Repeal by Stats. **1901**, p. 159; unconstitutional. See note ante, § 5.

CODE COMMISSIONERS' NOTE. Chipman v. Hibberd, 6 Cal. 162.

§ 735. Damages in actions for forcible entry, etc., may be trebled. If a person recover damages for a forcible or unlawful entry in or upon, or detention of any building or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

Treble damages.

1. **Forcible entry and unlawful detainer.** Post, § 1174.

2. **Tenant willfully holding over.** See Civ. Code, § 3345.

Legislation § 735. 1. Enacted March 11, **1872**; re-enactment of Practice Act, § 253.

2. Repeal by Stats. **1901**, p. 159; unconstitutional See note ante, § 5.

Construction of section. The construction to be given to this section, in connection with § 1174, post, and § 3294 of the Civil Code, is, that the power of the jury extends only to the assessment of damages actually sustained, and that the court has power to treble the damages or rent, only by way of punishment, upon evidence that the tortious act charged against the defendant has been committed by him wantonly, or by oppression, or with malice. San Francisco etc. Bldg. Society v. Leonard, 17 Cal. App. 254; 119 Pac. 405.

Treble damages are allowed by court. The complaint need not contain a claim for treble damages, but rather a claim for the damages which the jury is competent to assess: the office of trebling the damages belongs to the court. Tewksbury v. O'Connell, 25 Cal. 265. The court may render judgment for the rent due at the

trial, and award treble damages for the whole amount of rent then unpaid, without amendment of the complaint. Nolan v. Hentig, 138 Cal. 281; 71 Pac. 440.

Mandamus and appeal. Mandamus does not lie to compel the trial court to render judgment for treble damages: the party has a plain, speedy, and adequate remedy by appeal. Early v. Mannix, 15 Cal. 149.

CODE COMMISSIONERS' NOTE. It is the duty of the court to treble the damages, although treble damages are not demanded in the complaint. Tewksbury v. O'Connell, 25 Cal. 262. But mandamus will not lie to compel the court to treble the damages. The remedy is by appeal. Early v. Mannix, 15 Cal. 149.

CHAPTER III.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE.

§ 738. Parties to action to quiet title. Wills in evidence. Right to jury trial.
§ 739. When plaintiff cannot recover costs.
§ 740. Where plaintiff's right terminates pending suit, what he may recover.
§ 741. When value of improvements can be allowed as a set-off.
§ 742. An order may be made to allow a party to survey and measure the land in dispute.
§ 743. Order, what to contain, and how served. If unnecessary injury done, the party surveying to be liable therefor.
§ 744. A mortgage must not be deemed a conveyance, whatever its terms.
§ 745. When court may grant injunction; during foreclosure; after sale on execution, before conveyance.
§ 746. Damages may be recovered for injury to the possession after sale and before delivery of possession.
§ 747. Action not to be prejudiced by alienation pending suit.
§ 748. Mining claims, actions concerning, to be governed by local rules.
§ 749. How service may be made in actions relating to real property. [Repealed.]
§ 749. Determination of adverse claims to real property. Unknown defendants. Lis pendens.
§ 750. Summons; service, and proof of service. Publication of summons.
§ 751. Judgment must not be entered by default. When entered, is conclusive. Remedy is cumulative.

§ 738. Parties to action to quiet title. Wills in evidence. Right to jury trial. An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim; provided, however, that whenever in an action to quiet title to, or to determine adverse claims to, real property, the validity of any gift, devise, or trust, under any will, or instrument purporting to be a will, whether admitted to probate or not, shall be involved, such will, or instrument purporting to be a will, is admissible in evidence; and all questions concerning the validity of any gift, devise, or trust therein contained, save such as under the constitution belong exclusively to the probate jurisdiction, shall be finally determined in such action; and provided, however, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given.

Determining claim to personalty. Post, § 1050.
Parties. Ante, §§ 379, 380, 381.

Legislation § 738. 1. Enacted March 11, **1872** (based on Practice Act, § 254), (1) omitting the words "in possession, by himself or his tenant, of real property," after "any person," (2) changing "any" to "another," and (3) at end of section, omitting "estate, or interest."
2. Amended by Stats. **1895**, p. 72, adding the provisos.
3. Amendment by Stats. **1901**, p. 159; unconstitutional. See note ante, § 5.

Construction of section. The action provided by this section to determine adverse claims is an improvement upon the old bill of peace; the class of cases in which equitable relief could formerly be sought in quieting title is enlarged; and it is not now necessary that the plaintiff shall first establish his right by an action at law; nor is it necessary that the adverse claim shall be of any particular character. Castro v. Barry, 79 Cal. 443; 21 Pac. 946; and see Curtis v. Sutter, 15 Cal. 259. Under this section, one having the legal title is not required to bring his action at law, and then, after recovery of the possession, to file a bill to quiet his title or possession against equitable claims asserted by the defendant in ejectment, and to have such claims decreed to be invalid, but may secure both ends in one proceeding. People v. Center, 66 Cal. 551; 5 Pac. 263. There is no difficulty in so conducting a suit, under this section, as to protect fully the legal rights of the parties, and at the same time to secure the beneficial result afforded by a court of equity in bills of peace, which is, repose from further litigation. People v. Center, 66 Cal. 551; 5 Pac. 263; Donahue v. Meister, 88 Cal. 121; 22 Am. St. Rep. 283; 25 Pac. 1096; Curtis

v. Sutter, 15 Cal. 259. The purpose of this section is to afford a remedy similar in character to that of the old bill of peace, but extending it to cases which the latter remedy did not reach. Angus v. Craven, 132 Cal. 691; 64 Pac. 1091. In a suit under this section, the complaint is to be treated as a bill in equity, and a general verdict of the jury, therefore, is to be disregarded. Brandt v. Wheaton, 52 Cal. 430; Hancock v. Plummer, 66 Cal. 337; 5 Pac. 514; Reynolds v. Lincoln, 71 Cal. 183; 9 Pac. 176; 12 Pac. 449. An action, under this section, to cancel a void tax deed, can accomplish, in effect, nothing more or nothing less than an action under § 3412 of the Civil Code. Guptill v. Kelsey, 6 Cal. App. 35; 91 Pac. 409. The McEnerney Act, to quiet title, is remedial in its nature, and is to be liberally construed to effect its main purpose. Hynes v. All Persons, 19 Cal. App. 185; 125 Pac. 253.

Possession by plaintiff as prerequisite to action. Possession in plaintiff is not now required, in order to maintain an action to quiet title (People v. Center, 66 Cal. 551; 5 Pac. 263; Brusie v. Gates, 80 Cal. 462; 22 Pac. 284; Landregan v. Peppin, 94 Cal. 465; 29 Pac. 771; Casey v. Leggett, 125 Cal. 672; 58 Pac. 264; Reiner v. Schroeder, 146 Cal. 411; 80 Pac. 517); but, prior to the adoption of the codes, possession by the plaintiff, at the time of the commencement of the action, was essential. Rico v. Spence, 21 Cal. 504; Lyle v. Rollins, 25 Cal. 437; Ferris v. Irving, 28 Cal. 645; Sepulveda v. Sepulveda, 39 Cal. 13. It is sufficient, under this section, if, while the plaintiff is in possession of the property, a party out of possession claims an estate or interest adverse to him: he can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined, and the question of title be thus forever quieted. Curtis v. Sutter, 15 Cal. 259; People v. Center, 66 Cal. 551; 5 Pac. 263; 6 Pac. 481. This section always allows an action to be brought by any person against another who claims an estate or interest adverse to him; its language is very broad; if the plaintiff is out and the defendant is in possession, nevertheless the action can be maintained; and so, where the plaintiff as well as the defendant claims to be the owner in fee, the question as to who has the better right may be tried in an action of ejectment, but it may also be tried in an action under this section. People v. Center, 66 Cal. 551; 5 Pac. 263; Hyde v. Redding, 74 Cal. 493; 16 Pac. 380. This section, giving a right of action to the party in possession, does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable title; but it embraces every description of claim whereby the plaintiff might be deprived of the property, or its title be clouded, or its value be depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held or to grow out of the adverse condition. Head v. Fordyce, 17 Cal. 149; Joyce v. McAvoy, 31 Cal. 273; 89 Am. Dec. 172. A plaintiff out of possession is authorized, under this section, to maintain an action to quiet title; and the defendant in such action may assert a legal estate, or any equity which he may claim to have enforced; and the judgment, if in favor of the plaintiff, may provide for a restitution of the possession, and decree the claims of the defendant to be invalid. People v. Center, 66 Cal. 551; 5 Pac. 263. In quieting title under the McEnerney Act, proof of actual possession by the plaintiff is essential to judgment. Vanderbilt v. All Persons, 163 Cal. 507; 126 Pac. 158. The actual possession required to be had to invoke the benefit of the McEnerney Act, to quiet title, must be such as is required to sustain title by adverse possession, when such title is founded upon a written instrument. Loftstad v. Murasky, 152 Cal. 64; 91 Pac. 1008.

Title, estate, or interest required of plaintiff. Whatever interest the plaintiff has in real property may be quieted. German-American Sav. Bank v. Gollmer, 155 Cal. 683; 24 L. R. A. (N. S.) 1066; 102 Pac. 932; Mentry v. Broadway Bank etc. Co., 20 Cal. App. 388; 129 Pac. 470. Whether the plaintiff, in an action under this section, is the owner in fee or not, he is entitled to have defendant's adverse claim determined. Stoddart v. Burge, 53 Cal. 394. The owner of an estate for years is entitled to have any claim adverse to his interest determined. German-American Sav. Bank v. Gollmer, 155 Cal. 683; 24 L. R. A. (N. S.) 1066; 102 Pac. 932. The owner of an estate or interest in land, less than an estate in fee, can maintain an action to determine an adverse claim made by another person. Pierce v. Felter, 53 Cal. 18. The owner of a leasehold interest in real property may maintain an action against the person owning the fee in the demised premises, to quiet his title under the lease against any adverse claim asserted thereto by the owner in fee. German-American Sav. Bank v. Gollmer, 155 Cal. 683; 24 L. R. A. (N. S.) 1066; 102 Pac. 932. A party who has been in the exclusive adverse possession of lands for a period of time which, under the statute of limitations, vests him with a title thereto, may maintain an action against a party claiming under a record title, to have the claim determined and adjudged null and void as against him. Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722; Liebrand v. Otto, 56 Cal. 242. A

plaintiff, entitled to the possession of the premises, may bring an action against the defendant to obtain a judgment that the plaintiff is legally the owner of such premises, that the defendant has no legal estate, or any such equities as would entitle him to retain possession as against the title of the estate under which he claims, and that he has no equities which would justify a decree in his favor as against the legal owner in possession. People v. Center, 66 Cal. 551; 5 Pac. 263. To maintain a suit to quiet title, by a party in possession, it is sufficient that he claims under a deed which creates an equitable estate, or even a right of possession. Smith v. Brannan, 13 Cal. 107. The trustor in a deed of trust can maintain an action to quiet title, under the McEnerney Act. Charles A. Warren Co. v. All Persons, 153 Cal. 771; 96 Pac. 807. In an action to quiet title, the question is, Has the plaintiff established a right, under the allegation of ownership, such as will entitle him to the relief asked? and where the plaintiff's title is merely an option to purchase, the action will not lie. San José Land etc. Co. v. San José Ranch Co., 129 Cal. 673; 62 Pac. 269. The interest of a vendee, under a contract for the sale of land, is merely equitable, and he cannot maintain an action to quiet title against a subsequent grantee of the legal title. Los Angeles County v. Hannon, 159 Cal. 37; Ann. Cas. 1912B, 1065; 112 Pac. 878. This section was not designed to enable one who has an executory contract for the purchase of land to obtain a judicial construction of his contract, and it cannot be construed as enabling such person to call in those claiming adversely to his vendor, and compel them to try their claim of title, when a judgment in their favor would not bind the vendor. Cooper v. Birch, 137 Cal. 472; 70 Pac. 291. The grantees of a toll-road, constructed pursuant to an act of the legislature, have a sufficient estate or interest in the land upon which the wagon-road rests to enable them to sue the county, under this section, to determine an adverse claim by it to the ownership of the road as a free public highway: the right of way for the road is private property, though held for a public use, and is incident and necessary to the privilege of collecting tolls thereon, and constitutes an interest in the land upon which the wagon-road rests. Welch v. Plumas County, 80 Cal. 338; 22 Pac. 254. An action cannot be brought to quiet title to land, where the plaintiff deraigns title under a deed from the state tide-land commissioners, the state not having any title to the land, which was within the limits of the pueblo of San Francisco. United Land Ass'n v. Pacific Improvement Co., 139 Cal. 370; 69 Pac. 1064. In an action to quiet title to land, against a defendant in possession, where the plaintiff counts upon title alone, he can prevail only on the strength of his own title; and where he deraigns title by conveyance from a grantor subsequently to a conveyance made by such grantor to a third party, and not through such third party, he can derive no support from the title of such grantor, whether it was valid or invalid. McGrath v. Wallace, 116 Cal. 548; 48 Pac. 719. A plaintiff, who purchases the title of an owner who is estopped to claim title as against the defendant, with knowledge of the facts upon which the estoppel is based, is in no better situation than his grantor, and is bound by the estoppel. Ions v. Harbison, 112 Cal. 260; 44 Pac. 572. An action lies to quiet title to a city lot, the sale of which is void, as having been made under a void assessment for street-work, the contract for which unlawfully delegated power to the superintendent of streets greatly to increase or lessen the expense of the work, and was thereby rendered invalid. Chase v. Scheerer, 136 Cal. 248; 68 Pac. 768. The mere fact that the defenadnt in an action to quiet title is shown to have some valid interest or estate in the property in controversy, does not warrant the denial of all relief to the plaintiff, who has also shown a valid interest therein. Peterson v. Gibbs, 147 Cal. 1; 109 Am. St. Rep. 107; 81 Pac. 121. Where the title of the plaintiff is the entry of the land in controversy as a homestead under the laws of the United States, it is a material question in the case, whether, at the date of the entry or homestead filing, the land was known as mineral land, within the meaning of the Federal statute, and so not subject to entry as a homestead. Austin v. Gagan, 3 Cal. Unrep. 533; 30 Pac. 790. Where the plaintiff makes his proof of citizenship, and that he made a discovery of gold-bearing quartz in the land, and shows a location according to the requirements of the law, and that the land is public land, he establishes his case prima facie, and he is not called upon to make further proof that the land was unoccupied mineral land of the United States: the presumption is that all public land is unoccupied. Goldberg v. Bruschi, 146 Cal. 708; 81 Pac. 23. In an action to quiet title to a mining claim, if it is shown and found that the plaintiff has no title, it becomes immaterial to inquire into the rights of the defendant, or as to whether he has failed to prove that the original locators of his claims were qualified, or that he had properly marked the boundaries of his claims by monuments. Schroder v. Aden Gold Mining Co., 144 Cal. 628; 78 Pac. 20.

Title to what property or rights may be quieted. Water flowing in its natural channel is real property, and while flow-

ing, by right, through a canal or pipe, which is real property, and owned by the owner of the water, it is appurtenant to the canal or pipe, and therefore real property, and an action to quiet the title to such water right will lie. Fudickar v. East Riverside Irrigation Dist., 109 Cal. 29; 41 Pac. 1024. An action may be brought, under this section, to determine conflicting claims to the use of water (Inyo Cons. Water Co. v. Jess, 161 Cal. 516; 119 Pac. 934; Merritt v. Los Angeles, 162 Cal. 47; 120 Pac. 1064; Shurtleff v. Kehrer, 163 Cal. 24; 124 Pac. 724); and to quiet title to a claim of a right of way for a water-ditch, alleged to have existed as an easement upon the land, which had been obviously and permanently used by the plaintiff, "whose estate was transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed" (Riverside etc. Irrigation Co. v. Jensen, 73 Cal. 550; 15 Pac. 131); and to determine conflicting interests in mining claims (Madison v. Octave Oil Co., 154 Cal. 768; 99 Pac. 176; Riley v. North Star Min. Co., 152 Cal. 549; 93 Pac. 194; New England etc. Oil Co. v. Congdon, 152 Cal. 211; 92 Pac. 180; Bernard v. Parmelee, 6 Cal. App. 537; 92 Pac. 658; Garibaldi v. Grillo, 17 Cal. App. 540; 120 Pac. 425); and to determine the validity of tax titles (Holland v. Hotchkiss, 162 Cal. 366; 123 Pac. 258; Campbell v. Canty, 162 Cal. 382; 123 Pac. 266; Boyer v. Gelhaus, 19 Cal. App. 320; 125 Pac. 916); and the owner of a right to cut growing timber, and of easements in connection therewith, may maintain an action to quiet title. Gazos Creek Mill etc. Co. v. Coburn, 8 Cal. App. 150; 96 Pac. 359. Where, in the allegations of the complaint in an action to quiet title, the pleader denominates his claim as a mere right of way, but on the trial the language of conveyances, which are part of the complaint and which control as to description, shows that there is a definite interest or estate in a canal or pipe line, that interest is a corporeal estate, and not an easement or servitude, and to that estate the water right is appurtenant, and the right to which may be determined in an action under this section. Fudickar v. East Riverside Irrigation Dist., 109 Cal. 29; 41 Pac. 1024.

Adverse claim, what constitutes. Under the maxim, Omne majus continet in se minus, an adverse claim to a right of way situated across land adversely possessed is necessarily included in the general adverse claim to the land; and where the title to the land is not vested in the adverse claimant by prescription or otherwise, and the intention is apparent to appropriate the land to the use of the right of way, the claim thus to use part of it will, as part of the general claim to the land, be adverse to the owner. Cavanaugh v. Wholey, 143 Cal. 164; 76 Pac. 979. Where one is the owner and in possession of land, and another asserts a claim to the same property, which is founded neither in law nor in equity, the asserted claim is necessarily adverse. McNeil v. Morgan, 157 Cal. 373; 108 Pac. 69. Where the title to the land becomes vested in the party in possession, either by prescription or otherwise, all adverse claims to easements must, from the nature of the case, cease, for one cannot have an adverse claim against one's self; but this reason does not apply to the case before user, and hence, unless there is a merger, if the intention to appropriate the land to the use be shown, the claim to the land will include the claim to the use of part of it, and this, as a part of the general claim, will be adverse to the owner. Cavanaugh v. Wholey, 143 Cal. 164; 76 Pac. 979. The owner's denial of the existence of any leasehold interest in real property is the assertion of an adverse claim against the lessee. German-American Sav. Bank v. Gollmer, 155 Cal. 683; 24 L. R. A. (N. S.) 1066; 102 Pac. 932.

Adverse possession, what constitutes. Title to land may be acquired by adverse possession for five years, within the limits of an inclosure, although the inclosure was made under a mistaken belief as to the boundary of the land, where it is claimed, as matter of fact, that the fences were upon the line; but if the inclosure was made without claiming that the fences were upon the line, but with the expectation of moving them to the true line when it should be determined, the possession would not be adverse, and the statute would not run. Woodward v. Faris, 109 Cal. 12; 41 Pac. 781.

Adverse claims, action to determine. The object of an action, brought under this section, is to settle finally and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein to which he may be entitled. Peterson v. Gibbs, 147 Cal. 1; 109 Am. St. Rep. 107; 81 Pac. 121. This section authorizes an action for the purpose of determining any adverse claim that may be asserted therein by a defendant to the land in controversy; but this does not mean that the court shall simply ascertain, as against a plaintiff shown to have a legal interest, whether or not such defendant has some interest, but that the court shall also declare and define the interest held by the defendant, if any, so that the plaintiff may have a decree finally adjudicating the extent of his own interest in the property in controversy. Peterson v. Gibbs, 147 Cal. 1; 109 Am. St. Rep. 107; 81 Pac. 121. The plaintiff has a right to be quieted in his title, whenever any claim is made to real estate, of which

he is in possession, the effect of which claim might be litigation, or the loss of his property. Head v. Fordyce, 17 Cal. 149; Horn v. Jones, 28 Cal. 194; Joyce v. McAvoy, 31 Cal. 273; 89 Am. Dec. 172. An action may be brought by any person against another who claims an interest in real property adverse to him; and this applies to the claim of a city in the flow in a watercourse. Amestoy Estate Co. v. Los Angeles, 5 Cal. App. 273; 90 Pac. 42. A contract for the sale of real estate, which, for any reason, is incapable of specific enforcement, is not a valid claim to an interest in the land, and, if asserted, the owner has a right to have his title quieted against such claim. Jolliffé v. Steele, 9 Cal. App. 212; 98 Pac. 544. After the right to possession is proved, the court may, under this section, determine the adverse claims of the defendant; and if the plaintiff's right to possession is under a legal title, the rights of the parties are to be adjudicated as if the plaintiff had been in possession at the commencement of the action. Hyde v. Redding, 74 Cal. 493; 16 Pac. 380. One tenant in common of real estate, in the actual possession thereof, may maintain an action to determine the validity of an adverse claim of title by a co-tenant. Ross v. Heintzen, 36 Cal. 313. An action to determine an adverse claim may be maintained, under this section, although such claim rests on proceedings which are void on their face. Kittle v. Bellegarde, 86 Cal. 556; 25 Pac. 55. Under this section, it is unnecessary for the plaintiff to delay seeking the equitable interposition of the court until he is disturbed in his possession by the institution of a suit against him, and until judgment in such suit is passed in his favor; he can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined, and the question of title be thus forever quieted. Curtis v. Sutter, 15 Cal. 259; Donahue v. Meister, 88 Cal. 121; 22 Am. St. Rep. 283; 25 Pac. 1096. This section is very broad in its terms, and includes all adverse claims, from claims of title in fee to the smallest leasehold; and it is the duty of the defendant to set out his interest, when called upon; and if he has an adverse claim which will support an issue at law, upon which he desires a jury trial, it is his duty to set out that claim, make that issue, and demand a jury trial. Landregan v. Peppin, 94 Cal. 465; 29 Pac. 771. An action lies to quiet the title of the plaintiff against an asserted right of the defendant, based upon a fraudulent transfer. Dorris v. McManus, 3 Cal. App. 576; 86 Pac. 909. Where general relief is demanded, and the allegations of the complaint to quiet title are true, the plaintiff's title is paramount to that of a defendant claiming a lien by mortgage made by the plaintiff, obtained by fraud; and whether his deed to the defendant was procured by fraud and without consideration, or whether it was in fact a mortgage, he is entitled to have his rights determined. Leonis v. Hammel, 1 Cal. App. 390; 82 Pac. 349. Where the plaintiff proves his title, and no affirmative defense is shown, the defendant's claim is without right, whether adverse or not. Dorris v. McManus, 4 Cal. App. 147; 87 Pac. 287. Where the plaintiff has the legal title to the premises, subject to a contract made by his predecessor, giving the defendant the right to remove timber therefrom, it is error to grant a nonsuit: the plaintiff has the right to have the adverse claim of the defendant, under the timber contract, defined and determined. Peterson v. Gibbs, 147 Cal. 1; 109 Am. St. Rep. 107; 81 Pac. 121. The distinction between suits to determine adverse claims under the old chancery practice, and actions under the provisions of this section, is clear; the difference is not merely in form, but in purpose: in the former, the proceeding is aimed at a particular instrument, or piece of evidence, dangerous to the plaintiff's rights, and which may be ordered to be destroyed in the hands of whomsoever it may happen to be; while in the latter, the proceeding is for the purpose of stopping the mouth of a person who has asserted, or who is asserting, a claim to the plaintiff's property, whether such claim is founded upon evidence or is utterly baseless. Castro v. Barry, 79 Cal. 443; 21 Pac. 946; Dranga v. Rowe, 127 Cal. 506; 59 Pac. 944. One claiming title to mining-ground may bring an action, under this section, to quiet title, against a defendant denying his title, and claiming title thereto by a former judgment of the court in which the action is brought, the former action being of the same nature, to determine the adverse claim of the defendants to the property described in the complaint. Russell v. Brosseau, 65 Cal. 605; 4 Pac. 643. An action may be brought, under this section, to determine an adverse title, claimed by the defendant, to mineral lands, veins, lodes, and ledges, of which plaintiff claims to be the owner. Bulwer Consol. Mining Co. v. Standard Consol. Mining Co., 83 Cal. 613; 23 Pac. 1109.

Cloud upon title, what constitutes. An apparently good record title constitutes a cloud upon the title acquired by adverse possession, under the statute of limitations; it is of record, and, when produced, makes out a prima facie case, which can only be defeated by evidence of adverse possession which is not of record, unless established in a judicial proceeding, but rests in parol, and is liable to be lost and established with difficulty. Arrington v. .

Liscom, 34 Cal. 365; 94 Am. Dec. 722. Where the sale of land, made by a tax-collector, is void because for a sum greater than that authorized by law, as § 3776 of the Political Code does not require that the certificate shall specify the particulars of the "amount paid," or the "amount of assessment," non constat that the deed would necessarily do so, if executed, and if it did not, evidence would be required dehors the recitals of the deed to ascertain the illegality of any of the items, to collect which the sale was made, and a cloud would thus be cast upon the title. Axtell v. Gerlach, 67 Cal. 483; 8 Pac. 34; Roman Catholic Archbishop v. Shipman, 69 Cal. 586; 11 Pac. 343; Chase v. City Treasurer, 122 Cal. 540; 55 Pac. 414.

Cloud upon title, action to quiet. Where the cause of action set up is adverse possession of some twelve years, under a conveyance which gives a title under the statute of limitations, and an outstanding conveyance from the same source of title, which, under the circumstances alleged, become a cloud, the plaintiff has the right to have the same adjudged to be a cloud and to have it removed. Arrington v. Liscom, 34 Cal. 365; 94 Am. Dec. 722. An adverse claim, estate, or interest, which has no just foundation in law or equity, is a cloud upon the title, and impairs the market value of the property and obstructs its alienation, and is the basis of a suit brought by one of the defendants against the plaintiff and against his tenants, and title may be quieted in such action, under this section. Brooks v. Calderwood, 34 Cal. 563. The plaintiff has a right of action against defendants who pretend and give out in speeches that he has no valid title to the land, and that the legal title is in themselves, and that they are entitled to the possession thereof, and thereby cast a cloud upon his title, and cause many persons to believe it to be worthless, and thereby greatly impair its market value. Ayres v. Bensley, 32 Cal. 620. Where an alcalde made a grant to two persons jointly, and delivered possession and completed the proceedings, the title vested in the two jointly, and the claim of a defendant to a title under one of the grantees was a cloud upon the title, to clear which a suit was properly brought, under this section. Lick v. Diaz, 37 Cal. 437. The object of this section, and of § 739, post, is to enable the plaintiff, in an action to determine an adverse claim, to dispel it as a cloud upon his title; for, even though the defendant makes no adverse claim, third persons may regard the plaintiff's title as subject to the adverse claim of the defendant, which would thus be a cloud upon the plaintiff's title, depreciating its value, and this claim he is entitled to have removed by the decree of the court, so that his record title may appear perfect. Bulwer Consol. Mining Co. v. Standard Consol. Mining Co., 83 Cal. 589; 23 Pac. 1102. An action may be maintained by the owner of property subject to an invalid street assessment, to have it adjudged invalid, where there is nothing upon the face of the assessment to show that the lien is not valid, and where, by reason of matters outside of the assessment as it is recorded, the apparent lien may be shown not to be a valid encumbrance; in such case the assessment constitutes a cloud upon the title, which the property-owner is entitled to have removed by a court of equity, although the same matters may be asserted as a defense to an action for the enforcement of the assessment. Bolton v. Gilleran, 105 Cal. 244; 45 Am. St. Rep. 33; 38 Pac. 881. Where, if the plaintiff succeed, it must be on the ground that no title passed from Spain to the defendant by mesne conveyance, and, in that event, a conveyance from the defendant would not cast any cloud upon the plaintiff's title, and the circumstances would not justify an action under this section: the conveyance would be like any other conveyance from a stranger to the title, and be of no effect. Curtis v. Sutter, 15 Cal. 259. A plaintiff, holding title by virtue of a sheriff's deed, made upon a decree of foreclosure, may maintain an action against a defendant claiming under an invalid mortgage lien, such lien being a cloud upon the plaintiff's title, which he has the right to have quieted. Withers v. Jacks, 79 Cal. 297; 12 Am. St. Rep. 143; 21 Pac. 824. Where the judgments under which the defendant is said to claim are void upon their face, they constitute no cloud, and no basis for an action to quiet title, under this section. Hyde v. Redding, 74 Cal. 493; 16 Pac. 380.

Form of action. An owner of land, who verbally permits a railroad company to enter thereon and construct and operate its railroad, in consideration of its verbal promise to erect a passenger-depot thereon, at which all such trains should stop, cannot, after the default of the company in erecting such depot and stopping its trains as agreed, maintain an action to quiet his title to the land: the remedy is an action for the value of the land taken, and damages arising therefrom. Southern California Ry. Co. v. Slauson, 138 Cal. 342; 94 Am. St. Rep. 58; 71 Pac. 352. Where the plaintiff avers ownership and right of possession in a mining claim, and that defendants are in possession, wrongfully and unlawfully withholding the same, and taking ore therefrom, and prays for an injunction, and for a decree for the restitution of the lands and the mining claims, the fact that the complaint asks for an injunction does not make the action one of an equitable nature: the action is one at law, and in form ejectment. Haggin v.

Kelly, 136 Cal. 481; 69 Pac. 140. An action to quiet title does not lie in favor of the owner of an equitable title, for whom the defendant holds the legal title in trust: the only proper remedy for such plaintiff is an action to enforce the trust, and to compel a conveyance of the legal title. Harrigan v. Mowry, 84 Cal. 456; 22 Pac. 658. Where a wife purchases property with the earnings of her husband, after marriage, and takes title in her own name, as her separate property, without his knowledge or consent, and holds it adversely to him, she takes it in trust for the marital community; and the husband cannot maintain an action against the wife's vendee to quiet his title thereto: he is merely entitled to have it adjudged, in a proper action, that the vendee holds the legal title in trust for the marital community. Shanahan v. Crampton, 92 Cal. 9; 28 Pac. 50. An action to quiet title cannot be maintained by the owner of an equitable estate against the holder of the legal title, under a complaint containing only the usual averments commonly made in such actions; but where the facts upon which the plaintiff's claim is based are alleged, there is authority to grant any proper relief within the limitations of § 580, ante, and appropriate remedies, such as cancellation, reconveyance, or decrees quieting title, or establishing or enforcing trusts, or determining the priorities of opposing equities, may be had, as between proper parties, under our system, whenever they are required upon equitable considerations, and are justified by the pleadings and proof. Leonis v. Hammel, 1 Cal. App. 390; 82 Pac. 349.

Parties. All the property of the deceased, real and personal, remains in the possession of the administrator until administration of the estate is had, or a decree of distribution is made by the probate court: the administrator, until then, is the proper party plaintiff in a suit to quiet title to the estate. Curtis v. Sutter, 15 Cal. 259. An administrator may maintain a suit to quiet the title of the estate against any adverse claim; and a suit to set aside and cancel a deed of the decedent, for want of capacity of the grantor, is, in effect, a suit to quiet the title of the estate against the pretended grantee. Collins v. O'Laverty, 136 Cal. 31; 68 Pac. 327. An administrator may bring an action to quiet title to real estate which belonged to his decedent: such action may be brought by any one who has the right of possession, against any one who claims an estate or interest adverse to such right. Pennie v. Hildreth, 81 Cal. 127; 22 Pac. 398. Under this section, an action may be brought by the people of the state, not only to annul a patent to swamp-lands, but also for a decree that the plaintiffs, out of possession, are the legal owners, entitled to the possession, and that the defendants have acquired no rights under the act of the legislature; and the question whether they have acquired rights under the act is to be determined upon evidence that the defendants, or their predecessors, did or did not reclaim the lands, or, at least, that the governor and the surveyor-general had so certified, as required by the act of the legislature. People v. Center, 66 Cal. 551; 5 Pac. 263. Without any statute conferring the power, the attorney-general may file an information in the nature of a bill in chancery to annul a patent for lands granted by the state to an individual, where the matter involved in the suit immediately concerns the interests of the state. People v. Stratton, 25 Cal. 242. An action may be brought by the attorney-general, in the name and in behalf of the people of the state, to determine adverse claims to real property owned by the state, and for other incidental relief; and he may institute an action to quiet the title of the state to lands in the navigable waters constituting the harbor of the cities of Oakland and Alameda, and to determine adverse claims made thereto; the authority which he has to institute such proceedings is derived from the constitution and the laws of the state, which give him authority to institute an action in any case in which the rights and interests of the state are directly involved, without any new authority expressly conferred by law. People v. Oakland Water Front Co., 118 Cal. 234; 50 Pac. 305. The grant, by the state, of the soil under navigable waters carries with it no right to obstruct navigation, and the state may enjoin its grantees, or their successors, from erecting or maintaining structures which will impair or interfere with the exercise of the public right of navigation, so as to constitute a public nuisance; and where each of several defendants is acting independently of the others in the erection and maintenance of separate structures, obstructing navigation, each may be sued in a separate action by the attorney-general to quiet title of the state. People v. Oakland Water Front Co., 118 Cal. 234; 50 Pac. 305. Under this section, the holder of an equitable title has the right to come before the court, in an action to quiet title, and have his equities declared superior to any and all opposing equities; although, as a general rule, the possessor of an equitable title cannot bring an action to quiet such title against the holder of a legal title. Tuffree v. Polhemus, 108 Cal. 672; 41 Pac. 806. An action to quiet title to land may be maintained to determine which party has the superior equity. Buehner v. Malloy, 155 Cal. 253; 100 Pac. 687. An action to quiet title does not lie, in any case, in favor of the holder of a merely equitable

title or interest in land as against the holder of the legal title (Robinson v. Muir, 151 Cal. 118; 90 Pac. 521; Buchner v. Malloy, 155 Cal. 253; 100 Pac. 687; Los Angeles County v. Hannon, 159 Cal. 37; Ann. Cas. 1912B, 1065; 112 Pac. 878); nor in favor of the owner of an equitable title, for whom the defendant holds the legal title in trust. Harrigan v. Mowry, 84 Cal. 456; 22 Pac. 658. If an action for partition lies in a given case, then an action by the holder of an equitable title against parties claiming adverse equities should be recognized and countenanced, under this section. Tuffree v. Polhemus, 108 Cal. 670; 41 Pac. 806. In an action to quiet title, wherein the defendant was a purchaser under an execution, and the plaintiff was a person who took title in his own name, to defraud a creditor, the title is in such purchaser. Clifton v. Herrick, 16 Cal. App. 484; 117 Pac. 622. An action may be brought, under this section, by the owner of land, to quiet his title thereto, against the person who holds a unilateral contract for the purchase of the land, but who, for more than four years after the execution of the option, has failed to make tender of performance (Levy v. Lyon, 153 Cal. 213; 94 Pac. 881); and an action may be brought, under this section, by the owners in possession of real property, to determine an adverse claim against the assignee of a mortgage encumbrance thereon, without any previous tender or offer to pay the amount due on the mortgage. Mentry v. Broadway Bank and Trust Co., 20 Cal. App. 388; 129 Pac. 470. The equitable owner of swamp-land, who has paid the state fully therefor, has a sufficient title to support an action to quiet title against a subsequent patentee from the state. Pioneer Land Co. v. Maddux, 109 Cal. 633; 50 Am. St. Rep. 67; 42 Pac. 295. An action, under this section, may be maintained by a plaintiff claiming under two certificates of purchase from the state, as against a defendant claiming under certificates of purchase under a judgment against the defendant in an action foreclosing and annulling his interest in certain certificates of purchase. Hyde v. Redding, 74 Cal. 493; 16 Pac. 380. Where the trustee of a resulting trust conveyed land to the purchaser by an unrecorded deed, which was afterwards delivered back, and then destroyed with the consent of the purchaser, the legal title vested in the purchaser, and did not return to the trustee by the subsequent destruction of the deed: the fact that the record title remained in the name of the grantor is not sufficient to create a trust, and the purchaser may maintain an action to quiet his title to the land so conveyed to him, as against the grantor. Weygant v. Bartlett, 102 Cal. 224; 36 Pac. 417. One claiming to be the owner of premises may bring an action, under this section, against a settler upon public lands, who claims title thereto under the pre-emption laws of the United States. Byers v. Neal, 43 Cal. 210. An action may be brought, under this section and § 380, ante, to try title to and recover possession of land, by a plaintiff who derives title under a patent from the United States, against a defendant holding under an imperfect and unconfirmed Mexican grant, and who has a right to plead the statute of limitations. Anzar v. Miller, 90 Cal. 342; 27 Pac. 299. One who was in adverse possession of premises from 1853 to 1867, at which time the defendant claims that the plaintiff obtained possession through collusion with his tenant, is subject to an action to quiet title. Walsworth v. Johnson, 41 Cal. 61. Where a mortgage, made to a husband and wife jointly, was foreclosed by the husband and the wife's administrator, as co-plaintiffs, and the title under foreclosure was taken in trust for the benefit of the husband and of the wife's estate, according to their respective interests in the decree, by one who afterwards became administrator of the wife's estate, the husband cannot maintain an action to quiet title against the trustee, either individually or as administrator of the wife's estate. Yoakam v. Kingery, 126 Cal. 30; 58 Pac. 324. A gift to a wife, by her husband, of an undivided half of real estate becomes her separate property. Lapique v. Geantit, 21 Cal. App. 515; 132 Pac. 78.

Joinder of plaintiffs. Devisees in severalty, of distinct tracts of land, under the same will, have a common source of title, and may unite, as plaintiffs, to remove from their title the cloud of a fraudulent deed, executed by their testator, which affects the whole land. Gillespie v. Gouly, 152 Cal. 643; 93 Pac. 856. A portion of the owners of a mining claim may bring an action to quiet their title against opposing claimants, without joining the other owners as co-plaintiffs: the rule is, that tenants in common may, but need not, join as plaintiffs. McCleary v. Broaddus, 14 Cal. App. 60; 111 Pac. 125.

Joinder of defendants. In an action to quiet title to a water right, the plaintiff may join as defendants all persons who claim title from a common source adversely to that claimed by him; and it is immaterial whether they are a voluntary association or are copartners, or whether they hold whatever rights they may have as individuals. Senior v. Anderson, 115 Cal. 496; 47 Pac. 454.

Joinder of causes of action. Three causes of action, to wit, an action to annul and set aside a fraudulent conveyance from one of the defendants, an action under this section to determine adverse claims to the real property, and an action of ejectment to recover possession of said

land, with the rents and profits thereof, cannot be united and joined in one statement, without being separately set forth as distinct causes of action. Pfister v. Dascey, 65 Cal. 403; 4 Pac. 393. A cause of action to acquire title to lands cannot be united with a cause of action against a surviving trustee to compel a conveyance: a demurrer for misjoinder of actions, in such case, should be sustained. Reynolds v. Lincoln, 71 Cal. 183; 9 Pac. 176.

Complaint, sufficiency of. A complaint which avers that the plaintiff is the owner and in possession of certain land, that defendant claims an interest therein adverse to the plaintiff, and that such claim is without right, has every element of a complaint to quiet title. Gray v. Walker, 157 Cal. 381; 108 Pac. 278. An allegation in the complaint, that the plaintiff is "the owner in fee" of the premises, is a sufficient statement of his right to maintain an action to quiet title. Davis v. Crump, 162 Cal. 513; 123 Pac. 294. A complaint alleging the title of the plaintiff in fee to the real property described, and averring that the defendant, without right, makes some claim thereto, adversely to the plaintiff's title and estate, states a cause of action under this section, and not under §§ 749–751, post. Los Angeles v. Los Angeles Farming etc. Co., 150 Cal. 647; 89 Pac. 615. In an action under this section, it is not essential that the complaint shall aver the plaintiff to be the owner in fee: it is sufficient if it appears that the plaintiff claims an interest in the land, and that the defendant asserts a claim of title adverse to the plaintiff's claim. Stoddart v. Burge, 53 Cal. 394. A complaint alleging that the plaintiff is in possession of and claims title in fee to the described premises, and that the defendant claims an estate or interest adverse to him, is sufficient. Butterfield v. Graves, 138 Cal. 155; 71 Pac. 510. No allegation of possession is necessary, under this section: the maintenance of an action by any person, whether in or out of possession, is authorized. Davis v. Crump, 162 Cal. 513; 123 Pac. 294. It is not necessary to allege in the complaint the nature of the estate or interest claimed by the defendant. People v. Center, 66 Cal. 551; 5 Pac. 263; 6 Pac. 481; Hyde v. Redding, 74 Cal. 493; 16 Pac. 380; Stratton v. California Land etc. Co., 86 Cal. 353; 24 Pac. 1065; McNeil v. Morgan, 157 Cal. 373; 108 Pac. 69. An action, not averring that the defendant claims any estate or interest in real property adverse to the plaintiff, is not an action under this section. Berry v. Ivanice, 53 Cal. 653. The only purpose of averring an adverse claim is to notify the defendant of the nature of the action, and that he is required to set forth and litigate any adverse title he may have, or to disclaim it, either expressly or by default. Bulwer Consol. Mining Co. v. Standard Consol. Mining Co., 83 Cal. 589; 23 Pac. 1102. In an action to quiet title to a mining claim, located on public lands, a possessory title is sufficient to maintain the action by a party in possession, as against one out of possession; and where the plaintiff alleges that by reason of the defendant's adverse claim he is greatly embarrassed in the use and disposition of the claim, and that thereby its value is greatly depreciated, there is a sufficient averment of injury to sustain the action. Pralus v. Pacific Gold etc. Mining Co., 35 Cal. 30. A complaint, under this section, having no averments inconsistent with the scope thereof, presents, on its face, a case for equitable relief: it seeks to have something done which a court of law cannot do; it invokes a decree in equity, not a mere judgment at law, which, in its nature, is only for the recovery of the possession of specific real or personal property, or for damages. Angus v. Craven, 132 Cal. 691; 64 Pac. 1091. In an action to quiet title, an averment that the plaintiff is the owner of a right to purchase from the defendant certain described real estate, is of a conclusion of law, and is a mere argumentative averment, which is not the equivalent of an averment of the ultimate fact of title to the land, and renders the complaint insufficient. Cooper v. Birch, 137 Cal. 472; 70 Pac. 291. The fact that a claim for moneys is included in the complaint to quiet title cannot affect the result of the trial of the issue of ownership, especially where such claim was ignored by the jury, and only nominal damages of one dollar were awarded. Reiner v. Schroeder, 146 Cal. 411; 80 Pac. 517. A company, made defendant in an action to quiet title, under which the plaintiff derives no right, need not be alleged in the complaint to be a corporation; and where such company appears and answers under the name by which it is sued, it will not be allowed to say that it was not properly named in the complaint, or that the complaint does not show how it came to bear that name. Butterfield v. Graves, 138 Cal. 155; 71 Pac. 510.

Sufficiency of complaint. See note post, § 749.

Amendment of complaint. Where the evidence tends strongly to suggest that, though the legal title is in the defendant, the plaintiff is equitably entitled to a conveyance from the defendant, as purchaser with notice of the plaintiff's equity, the ends of justice are best subserved by permitting the plaintiff, who has filed a sufficient complaint, to amend, so as to avail himself of his equities. Pioneer Land Co. v. Maddux, 109 Cal. 633; 50 Am. St. Rep. 67; 42 Pac. 295.

Defenses and answers. The owner of a mere equitable title to land, if of such a

character as to entitle him to possession in equity, may set up such title as a sufficient defense to an action for the possession, brought even by the holder of the legal title. Doherty v. Courtney, 150 Cal. 606; 89 Pac. 434. The defendant, in an action to quiet title, is not called upon to do more than to negative the plaintiff's cause of action, unless, by alleging title, he wishes to avail himself of a jury trial, or unless he seeks to avail himself of an equitable title against the legal title of the plaintiff, which he must specifically plead. United Land Ass'n v. Pacific Improvement Co., 139 Cal. 370; 69 Pac. 1064. A defendant, in an action to quiet title, who does not, himself, claim some right, title, interest, or possession, has no status to question the validity of a conveyance of the property by a third person to the plaintiff. Williams v. San Pedro, 153 Cal. 44; 94 Pac. 234. A Mexican grant, whether perfect or not, which was not presented to nor confirmed by the United States board of land commissioners, is forfeited, and confers no title, although judicial possession was given thereunder to the original grantee, and is no defense in an action to try title and recover possession. Anzar v. Miller, 90 Cal. 342; 27 Pac. 299. Where the defendant's title is dependent solely upon the question of the payment of taxes upon the land in controversy, he having been in the exclusive possession thereof under a claim of right for a term longer than that required by statute, his claim cannot be defeated by failure to pay taxes, when the assessment thereof was absolutely void. Harvey v. Meyer, 117 Cal. 60; 48 Pac. 1014. In an action to quiet title, against a city, a defense of a lien for delinquent taxes cannot be sustained, where the right of action for the collection of the taxes is lost under the statute of limitations: in such case, the lien therefor is lost, and the plaintiff's title is quieted accordingly. Clark v. San Diego, 144 Cal. 361; 77 Pac. 973. A claim to mining-ground may be determined by showing that the claimant never performed any of the acts necessary to the location of the claim, or by showing, if such acts were performed, that a prior location existed, which precluded the possibility of a valid location having been made by the plaintiff; such proof can properly be made under a general denial of the plaintiff's title and right of possession. Adams v. Crawford, 116 Cal. 495; 48 Pac. 488. A discovery of oil, subsequently to the location of the lands as oil-lands, will relate back to and perfect the location, except so far as the rights of others may intervene, and the rights of the locators are the subject of sale and transfer as well before as after discovery; and a prior discovery, upon an adjoining claim, which perfects a prior location of eighty acres of oil-lands, cannot be used to support a consolidated location of the whole quarter-section so as to interfere with the first locators of the adjoining eighty acres, who are in possession by their lessees, preparing to drill a well, with proper diligence and in good faith, for the purpose of discovering oil, where the consolidated location is made; and in an action by the consolidated claimants to quiet title to the lands in controversy, against the prior locators in possession, judgment is properly rendered for the defendants, upon the facts. Weed v. Snook, 144 Cal. 439; 77 Pac. 1023. If the answer in an action to quiet title admits plaintiff's ownership in fee-simple and possession, the rightfulness of the possession follows the admission; and even if the plaintiff went into possession by leave of the defendant's tenant, he is not estopped from denying the defendant's title. Reed v. Calderwood, 32 Cal. 109. In an action to quiet title, where the answer sets up a deed from the plaintiff to the defendant, and alleges the delivery of the deed by the plaintiff, the allegation is deemed to be controverted by the plaintiff, and he may disprove such delivery. Drinkwater v. Hollar, 6 Cal. App. 117; 91 Pac. 664. Answers, though not denying the possession of the plaintiff, which denied that the plaintiff was at any time the owner of any right, title, or interest in or to the premises, or any part or parts thereof, and denied that the defendants had no estate, right, title, or interest in the lands, and affirmatively alleged that at the commencement of the action two of the defendants named own, and still own, the title in fee to the premises, raise issues upon which the defendants are entitled to be heard. Butterfield v. Graves, 138 Cal. 155; 71 Pac. 510. In an action to quiet title to land, the answer of the defendant, denying the plaintiff's ownership, and denying that he himself claims any interest in the land, except the right to maintain a dam in a creek which flows over the land, and to maintain pipes connecting with said creek at the said dam for the purpose of conducting the waters thereof to lands below for the purposes of irrigation and for domestic use, sets up a valid defense. San José Land etc. Co. v. San José Ranch Co., 129 Cal. 673; 62 Pac. 269.

Cross-complaint. In a suit to quiet title to a tract of land, the defendant may, by cross-complaint, enforce the specific performance of a contract between the plaintiff and the defendant's assignor, which provided that, upon the performance of conditions specified in the contract, such assignor should be entitled to a conveyance of a certain number of acres, where the cross-complaint shows that the condi-

tions were fully performed by the defendant and his assignor. Fleishman v. Woods, 135 Cal. 256; 67 Pac. 276.

Consolidation of actions. Consolidation of actions may be ordered, where, pending an action for partition, one of the parties commences an action against other parties to the action to enforce a trust relative to the property involved. Bixby v. Bent, 59 Cal. 522.

Issues. Whether an action involves legal issues, or issues of equitable cognizance, must depend upon the facts alleged in the particular case. Davis v. Judson, 159 Cal. 121; 113 Pac. 147. Until the answer comes in, in an action under this section, setting forth the defendant's claim, it need not appear that the issues to be tried are legal, as distinguished from equitable, issues; a proceeding by which one may compel another to expose and have adjudicated the nature of the interest on which he is asserting an adverse claim against the estate of the former, is one to be conducted in a court of equity, and the discovery of the nature of the adverse claim precedes its adjudication. People v. Center, 66 Cal. 551; 5 Pac. 263; 6 Pac. 481; Hyde v. Redding, 74 Cal. 493; 16 Pac. 380. The main effect of this chapter is to give the parties the right to compel others, by suit, to litigate and determine controversies in cases where such right did not before exist; but if, in such a suit, legal issues arise, the right to have such issues tried by a jury is not taken away. Donahue v. Meister, 88 Cal. 121; 22 Am. St. Rep. 283; 25 Pac. 1096. Because a suit is brought in equity, it does not follow that the determination of questions, purely of a legal character, in relation to the title, will necessarily be withdrawn from the ordinary cognizance of a court of law: the court, sitting in equity, may direct, whenever it may become proper, an issue to be framed upon the pleadings and submitted to the jury. Curtis v. Sutter, 15 Cal. 259; Donahue v. Meister, 88 Cal. 121; 22 Am. St. Rep. 283; 25 Pac. 1096. An action, brought by a claimant to real estate, to remove the claim of the defendant, who also claimed that the plaintiff had wrongfully and unlawfully entered on such premises and ousted the defendant therefrom, formerly could not be maintained at all; the plaintiff was compelled to wait until the defendant chose to disturb his possession by an action; now the code enables him to commence the legal contest; but when he thus brings the defendant into court, he must be prepared to meet any pertinent issues which the latter may tender, and to try them in the way in which the defendant has the right to have them tried. Donahue v. Meister, 88 Cal. 121; 22 Am. St. Rep. 283; 25 Pac. 1096. In an action to quiet the title of the plaintiff to all the waters of a creek, where the complaint does not allege the nature of the plaintiff's right to the water, whether riparian or prescriptive, and the answer sets up riparian rights of the defendants in the creek, on land several miles above the lands of the plaintiff, and also a prescriptive right to use all of the waters flowing through their lands for irrigation, domestic use, and the watering of stock, upon the issues thus joined it is the duty of the court to determine and declare the extent of the right of the defendants, as well as that of the plaintiff. Southern California Investment Co. v. Wilshire, 144 Cal. 68; 66 Pac. 767.

Jury trial, right to. Whether, when brought under the code, an action be called an action at law, in which the statute authorizes a judgment determining the estate or interest claimed by the plaintiff, or be called a suit in equity to quiet the plaintiff's title against the adverse claim, the superior court has jurisdiction; and if it be considered an action at law, the defendant may demand a jury. People v. Center, 66 Cal. 551; 5 Pac. 263. The right to a jury trial of legal issues cannot be avoided by calling an action equitable; nor can the plaintiff, by bringing an equitable action, deprive the defendant of a jury trial, to which he would have been entitled if the parties had been inverted, and the defendant had sued the plaintiff. Donahue v. Meister, 88 Cal. 121; 22 Am. St. Rep. 283; 25 Pac. 1096; McNeil v. Morgan, 157 Cal. 373; 108 Pac. 69. Whether either party is entitled to a jury must depend greatly upon the facts of the particular case. McNeil v. Morgan, 157 Cal. 373; 108 Pac. 69. Although an equitable action to quiet title to land is, in form, brought under this section, yet if it is, in reality, an action to recover specific real property, the substance must control the form, and a party has the right to a jury trial, under § 592, ante. Davis v. Judson, 159 Cal. 121; 113 Pac. 147. Where an action is brought, under this section, by the heirs of a deceased woman, who sought to avoid a title claimed by the defendants under an execution sale had as the result of a litigation begun while she was mentally unsound, and was not represented by guardian, such sale passing no title to purchasers with knowledge, in view of the fact that the cause possesses elements of an action at law, it should be submitted to the jury upon the evidence offered. Gillespie v. Gouly, 120 Cal. 515; 52 Pac. 816. Where the defendant is in possession, claiming adversely to the plaintiff, the obviously proper action to bring is an action of ejectment, that is, an action for the recovery of specific real property, in which case the defendant is clearly entitled to a jury; and where the plaintiff endeavors to accomplish the same result,

that is, the restitution of possession, in the form of a statutory action under this section, it is evident that by simply framing his complaint in a particular way he cannot deprive the defendant of a jury trial of the issues raised by his answer. Newman v. Duane, 89 Cal. 597; 27 Pac. 66. The essential allegations necessary to an action in ejectment are, the estate of the plaintiff, possession by the defendant at the commencement of the action, and his wrongful withholding of the same; and even if the action is regarded as an action under this section, still the plaintiff is entitled to a jury; the equitable relief of a restraining order against waste, during the pendency of the action, does not change the nature of the action, but is ancillary merely, and permissible under the pleading. Haggin v. Kelly, 136 Cal. 481; 69 Pac. 140. Courts, in guarding the constitutional rights to a jury trial, have repeatedly held, that, where the suit should have been, and in substance is, an action for the recovery of the possession of land, the right of a defendant to a jury cannot be defeated by the mere device of bringing the action in an equitable form. Angus v. Craven, 132 Cal. 691; 64 Pac. 1091. This section must not be construed as intending to violate that provision of the constitution which says that the right to trial by jury shall be secured to all, and remain inviolate, unless such construction is unavoidable: issues about titles to land were triable at law at the time the constitution was adopted, and therefore either party has the right to have such issues tried by a jury. Donahue v. Meister, 88 Cal. 121; 22 Am. St. Rep. 283; 25 Pac. 1096. If, in an action under this section, the plaintiff avers a legal title against a defendant in possession, the latter is perhaps entitled, under the constitution, to a trial by jury of the issue at law thus presented. Hyde v. Redding, 74 Cal. 493; 16 Pac. 380. Where the pleadings show that the plaintiff is in possession, and the answer sets up as a defense a cause of action in ejectment, averring that the defendant was rightfully in possession and was ousted by the plaintiff before the commencement of the action, and that the plaintiff wrongfully withholds the possession, the defendant is entitled to a jury trial upon those issues. Donahue v. Meister, 88 Cal. 121; 22 Am. St. Rep. 283; 25 Pac. 1096. In an action under this section, brought by a party out of possession, against one claiming title and in possession, and asking for a restitution of the premises, either party is entitled to a jury trial, as a matter of right. Gillespie v. Gouly, 120 Cal. 515; 52 Pac. 116. In a suit to quiet title, as in other suits, a denial of the allegations of the complaint is a sufficient answer, and a finding upon the issues thus raised, if adverse to the plaintiff, is a sufficient finding; this implies, that, if possession be alleged, the fact of possession, as well as that of title, must be negatived; and it may be, also, that a defendant, in order to avail himself of his right to a jury trial, if he have such right, should allege his title. United Land Ass'n v. Pacific Improvement Co., 139 Cal. 370; 69 Pac. 1064; 72 Pac. 988. Where the plaintiff is in possession, an action to quiet title, under this section, against a defendant who is alleged to claim under a forged deed from the plaintiff's testator, is of an equitable nature; and where the defendant has never been in possession, nor ousted therefrom, the equitable character of the action cannot be overthrown by the defendant's claim of title and prayer to be let into possession, either by answer or by cross-complaint; and the defendant is not entitled to a jury trial of the action by reason of such claim of title and possession. Angus v. Craven, 132 Cal. 691; 64 Pac. 1091. Where the defendant admits the legal title to the land to be in the plaintiff, and claims a right to the possession thereof under an alleged agreement for the sale of the land, made by the predecessor of the plaintiff, to which he claims to have succeeded by assignment, and which he, in effect, asks to have specifically performed, he is not entitled to a jury for the trial of the equitable issues thus presented. Crocker v. Carpenter, 98 Cal. 418; 33 Pac. 271. Where an action to quiet title was set for trial, and no jury had been demanded or ordered, and a jury was first demanded by the plaintiff after the cause was called for trial and the parties had announced themselves ready, and no deposit of jury fees was made or offered by the plaintiff, it is not error to refuse a jury trial on account of the failure of the plaintiff to comply with the reasonable rule of the court requiring the party demanding a jury trial to deposit such fees with the clerk. Adams v. Crawford, 116 Cal. 495; 48 Pac. 488. In an action under this section, it is not necessary to determine whether or not the pleadings are sufficient to entitle either party to a jury as to any of the issues created; if not sufficient, the defendant should make them so, if his adverse claim of interest justifies such a course, and where he does not do so, he cannot afterwards be heard to complain that he was deprived of his right to a jury trial. Landregan v. Peppin, 94 Cal. 465; 29 Pac. 771. The fact that the record is erroneous in stating that the parties waived a jury, cannot be shown by an affidavit of the judge who tried the cause; a party cannot try his cause before a judge without objection, and after losing it, complain that the case was not tried by a jury. Smith v. Brannan, 13 Cal. 107.

Admissibility of evidence. One claiming title to property under a sheriff's deed, executed on the foreclosure of a mortgage, may, in an action brought by him to quiet his title against one who claims under a sheriff's deed executed on the foreclosure of a mechanic's lien, in which foreclosure he was not a party, show that no such lien existed. Horn v. Jones, 28 Cal. 194. A prior lien-holder, who was not made a party to an action of foreclosure by subsequent lien-holders, is not in privity with the defendant in such action, within the meaning of the rule making those in privity with parties to an action bound by the judgment therein; and, after acquiring title of such defendant under his lien, he may show, in an action to quiet title as against such subsequent lien-holders, that the liens which were foreclosed by them, and which resulted in the sheriff's deed under which they claim title, were invalid, although his foreclosure and sale were subsequent in time to theirs. Brady v. Burke, 90 Cal. 1; 27 Pac. 52. Where the plaintiff obtained his title from the successor of the stipulated owner by commissioner's deed on foreclosure sale, evidence of the record in the foreclosure action, and the commissioner's deed, and a writ of assistance issued by the court, with the return of the sheriff thereon, showing the delivery of the property, is admissible to show the title and possession, so far as it can be obtained as against the judgment debtor, but not to show an ouster of the defendants as third parties. Nathan v. Dierssen, 146 Cal. 63; 79 Pac. 739. Where the defendant, in an action to quiet title, sets up title through a sale by a trustee under a deed of trust, executed by the plaintiff's predecessor in interest, the plaintiff, in avoidance of such defense, may offer evidence to show that the trustee's sale and deed were fraudulent, without pleading the fraud in his complaint. José Realty Co. v. Pavlicevich, 164 Cal. 613; 130 Pac. 15. Where the parties stipulated, prior to the first trial of an action to quiet title, that a person named had died seised and possessed of the land in controversy, the stipulation was available to both parties; and where the court, on the second trial, ruled out the stipulation as not binding at such second trial, it had discretion to change its ruling, and admit the stipulation in evidence in favor of the plaintiff and against the defendant, in the absence of anything limiting its effect or any change of the issues. Nathan v. Dierssen, 146 Cal. 63; 79 Pac. 739. Since the passage of § 2324, U. S. Rev. Stats., providing that the location of a mining claim must be distinctly marked on the ground, so that its boundaries can be readily traced, a party can show a right to the possession of a mining claim, where no patent has been issued, only by showing an actual pedis possessio as against a wrong-doer, or by showing a compliance with the requisites of the act. Funk v. Sterrett, 59 Cal. 613. In an action to quiet title to a mining claim, evidence of abandonment is admissible, under a denial of title. Trevaskis v. Peard, 111 Cal. 599; 44 Pac. 246. In an action to quiet title to a specified lot and block in a certain rancho, "according to the official map thereof on file in the office of the county recorder," which map was proved by plaintiff in deraigning his title, where the defendant claimed under a deed from the collector of an irrigation district comprising the same rancho, executed for non-payment of an assessment by the plaintiff, and giving the same description of lot and block as in the complaint, without referring to the map, and the admission of which was objected to for that omission, parol evidence was admissible for the defendant to show that at the time of the assessment there was but one such lot and block in that rancho, and that that fact was then well known, as tending to identify the lot and block deeded with that described in the complaint, and that plaintiff was not misled by the assessment, but was fully informed that his lot was chargeable therewith. Best v. Wohlford, 144 Cal. 733; 78 Pac. 293.

Sufficiency of evidence. In an action to quiet title to real property, the plaintiff must establish a legal, as distinguished from a merely equitable, title (Fudickar v. East Riverside Irrigation Dist., 109 Cal. 29; 41 Pac. 1024); and where the plaintiff claims under an execution sale based upon a judgment against the judgment debtor, it is only necessary for him, in making out a prima facie right to recover as against the defendant, to show the judgment of a court of competent jurisdiction, the execution thereon and the sale thereunder, and transmission of the title to the plaintiff. Reilly v. Wright, 117 Cal. 77; 48 Pac. 970. As against the judgment debtor, the production of the judgment, execution, and sheriff's deed is prima facie evidence of the plaintiff's right to recover; but if the action is against a stranger to the judgment, the plaintiff must also show that the judgment debtor had the title or possession of the land at the date of the lien or of the sale. Robinson v. Thornton, 102 Cal. 675; 34 Pac. 120.

Burden of proof. In an action to quiet title, the burden rests upon the plaintiff to show title in himself, and if he fails to make out a case, he cannot recover; possession was also formerly necessary, in such case, but is not now required. Heney v. Pesoli, 109 Cal. 53; 41 Pac. 819. The rule that a plaintiff is not entitled to recover, where he fails to show title in himself, does not require that he shall, in opening his case, show that the title which

the defendant may plead in his answer has been forfeited: he may not, and often does not, know what the adverse interest is, against which he seeks to quiet his title. Goldberg v. Bruschi, 146 Cal. 708; 81 Pac. 23. Where the plaintiff acquired title under the stipulated owner, the burden of proof is upon the defendant to show title by adverse possession, and the burden is not sustained where the defendant does not show payment of all taxes assessed on the land in controversy, and did not protect it by an inclosure within five years, nor show any continuous or uninterrupted possession thereof. Nathan v. Dierssen, 146 Cal. 63; 79 Pac. 739.

Presumptions. In an action to quiet title, proof of the legal title in a party raises a presumption of the right of possession in him, and establishes a prima facie case in his favor. Flood v. Templeton, 152 Cal. 148; 13 L. R. A. (N. S.) 579; 92 Pac. 78.

Extrinsic evidence affecting writings. Where the statute makes an assessment a lien upon the property of the plaintiff, and so, also, a bond issued upon non-payment, and there is nothing upon the face of either the assessment or the bond to show that the lien is not in all respects valid, it is obvious that, to defeat such assessment and bond, or a deed thereunder, the plaintiff must resort to evidence extraneous of any recitals to be found in it, which is the test of his right to invoke the aid of equity to restrain the sale. Chase v. City Treasurer, 122 Cal. 540; 55 Pac. 414.

Competency of witnesses. In an action by a husband to quiet title to land jointly conveyed to him and his deceased wife, against the administrator of her estate, as being community property belonging to the husband and not to the estate, the husband is a competent witness: the controversy is concerning the property of the plaintiff, and to quiet a claim or demand or title asserted by the estate to such property. Bollinger v. Wright, 143 Cal. 292; 76 Pac. 1108.

Findings. In an action to quiet title, the absence of a finding that the defendants asserted a claim adverse to the plaintiff is immaterial. Title etc. Restoration Co. v. Kerrigan, 150 Cal. 289; 119 Am. St. Rep. 199; 8 L. R. A. (N. S.) 682; 88 Pac. 356. Where the plaintiff's ownership of the land in controversy is established, an averment in the answer, that the defendant made valuable improvements upon the land while in possession thereof, is immaterial, and a finding thereupon is not required. Eshleman v. Malter, 101 Cal. 233; 35 Pac. 860. An action to determine adverse claims to mining-ground is equitable in its nature, whether considered as an action for trespass coupled with an injunction, or an action to quiet title coupled with an injunction to prevent further claims, and where the plaintiff has been ousted from possession, and the question of ownership is in issue, the parties are entitled to a jury trial upon that issue, and their general verdict thereupon is conclusive upon the court, and no findings are required thereupon. Reiner v. Schroeder, 146 Cal. 411; 80 Pac. 517. Possession is not essential to the maintenance of an action by the owner of land to quiet his title thereto; and a finding upon that question is immaterial, and it is immaterial whether it is supported by the evidence. Casey v. Leggett, 125 Cal. 664; 54 Pac. 264. Where the defendant was the only witness as to possession prior to a certain date, and his testimony shows that he was not possessed of sufficient knowledge to state whether or not the possession of one of the claimants of any part of the land was continuous or uninterrupted between certain dates, the burden being upon the defendant to show such adverse possession, upon this condition of the evidence the court was not bound to find that the action was barred, and its finding that it was not barred is therefore sustained by the evidence. Nathan v. Dierssen, 146 Cal. 63; 79 Pac. 739. Where the owner of the legal title brings an action to quiet title, proof of a mere equity in the defendant will not sustain a finding that such defendant is the owner of the property. Robinson v. Muir, 151 Cal. 118; 90 Pac. 521. Where the defendant, in an action to quiet title, is not equitably entitled to any interest, it is not error for the court to refuse to make a finding fixing the cash value of the property. Estate of Munroe, 161 Cal. 10; Ann. Cas. 1913B, 1161; 118 Pac. 242.

Costs. In an action to quiet title, the appellate court has jurisdiction of an appeal from an order striking out a cost-bill in a sum less than three hundred dollars, the appealability of an order made before or after final judgment not being controlled or affected by the amount involved in such order; and where the plaintiff has any judgment in his favor in such an action, though it is only for a part of the property, and though the defendant has judgment in his favor for the residue, the plaintiff is entitled, under the terms of the statute, to recover his costs, as of course. Sierra Union etc. Mining Co. v. Wolff, 144 Cal. 430; 77 Pac. 1038.

Judgment may provide for what. Where the plaintiff was in possession of the premises at the time the action was commenced, but, during its pendency, was turned out of possession, the judgment in his favor may provide for a restitution of the premises; and such action is not thereby changed into one for the recovery of the possession of the land, but remains an equitable one. Polack v. Gurnee, 66 Cal. 266; 5 Pac. 229. Where the plaintiff

brought an action to quiet title to land which had been conveyed to the defendant as a mortgage security to pay a note barred by the statute of limitations, the court may decree that, upon the failure of the plaintiff to pay the amount remaining unpaid upon the mortgage debt, within a time specified by the court, the action shall be dismissed; and it is erroneous to adjudge that, upon the failure of the plaintiff to pay that amount, all his title to the property shall cease, and the defendant's title shall be good and valid, since the defendant can have no affirmative remedy for the debt barred by the statute. Boyce v. Fisk, 110 Cal. 107; 42 Pac. 473. If the rights of parties depend upon the terms of a written contract, and modifications thereof, and the vendor seeks to claim a forfeiture of the contract by an action to quiet title against the purchaser, the defendant may be relieved from the forfeiture upon the payment of full compensation into court; the plaintiff then holds the legal title subject to the contract and agreement of purchase, and it may be so decreed. McDonald v. Kingsbury, 16 Cal. App. 244; 116 Pac. 380. It is not essential that the judgment itself, in an action to quiet title, shall direct the issuance of the writ of possession: the law is fully satisfied by a supplemental order to that effect. Landregan v. Peppin, 94 Cal. 465; 29 Pac. 771.

Who entitled to judgment. In an action under this section, the plaintiff cannot have a judgment in direct contradiction of the material allegations of his complaint; if any cause of action can be brought to determine an adverse claim upon an equitable interest, which is doubted, it cannot be brought against the holder of the legal title. Von Drachenfels v. Doolittle, 77 Cal. 295; 19 Pac. 518; Chase v. Cameron, 133 Cal. 231; 65 Pac. 460; Leonis v. Hammel, 1 Cal. App. 390; 82 Pac. 349. Where, in his complaint, the plaintiff distinctly claimed ownership and right of possession to mining lands, but did not allege that the defendant claimed some interest therein, nor call upon the defendant to set forth his title, but the defendant met the complaint by a denial of the plaintiff's ownership and an assertion of title in himself, and where the issues thus formed were tried by jury and decided in the plaintiff's favor, the court properly gave judgment accordingly. Reiner v. Schroeder, 146 Cal. 411; 80 Pac. 517. Occupancy sufficient to bar an action to recover property confers a title thereto, denominated a title by prescription, sufficient against all, and no title can be better or more absolute; and the plaintiff is not entitled to a decree quieting the title to his estate in the land in controversy. Woodward v. Faris, 109 Cal. 12; 41 Pac. 781. In an action to quiet title, the plaintiff must obtain judgment upon the strength of his own title; and if it is shown that he has no title, it becomes immaterial to inquire into the defendant's rights. Schroder v. Aden Gold Mining Co., 144 Cal. 628; 78 Pac. 20. Standing timber is part of the realty, and it may be transferred to a third party, who is not the owner of the land; and the grantee is entitled, in an action by the owner to quiet his title to the land, to have the timber granted reserved from the operation of any decree that may be made therein. Peterson v. Gibbs, 147 Cal. 1; 109 Am. St. Rep. 107; 81 Pac. 121. If the plaintiff claims under a deed, for which there was no consideration, the defendant is not required to demand, by cross-complaint, that the deed be canceled and delivered up; in such a case, judgment should be for the defendant. Stanton v. Freeman, 19 Cal. App. 464; 126 Pac. 377.

Judgment on constructive service. Publication of summons may be made in an action to quiet title, and judgment against a non-resident, based thereon, is not void, although he does not appear: the judgment, so far as it settles the title, is in the nature of one in rem. Perkins v. Wakeham, 86 Cal. 580; 21 Am. St. Rep. 67; 25 Pac. 51.

Effect of judgment. A decree, in a suit under this section, that the defendant has no right, title, or interest in certain land, would be more effective as a final adjudication with respect to the legal rights of the parties, than a mere judgment for the recovery of the possession: the latter, to some extent, leaves open to be proved, by evidence dehors the record, what rights might have been asserted in the action of ejectment. People v. Center, 66 Cal. 551; 5 Pac. 263. A judgment in favor of the plaintiff, in an action to quiet title, becomes a muniment of title to his successor in interest, and he cannot impair its effect by withholding consent or authority for the entry of judgment by the clerk. Baker v. Brickell, 102 Cal. 620; 36 Pac. 950. The defendant in an action at law to recover lands, against whom judgment has passed, cannot subsequently, in a distinct suit, assert a legal right which existed when the ejectment was commenced, nor subsequently claim relief based upon an equity which was pleaded by cross-complaint in the ejectment; so far, the judgment in favor of the plaintiff in the action of ejectment is conclusive of the defendant's rights. People v. Center, 66 Cal. 551; 5 Pac. 263; 6 Pac. 481. When it has been adjudicated that the defendant has no adverse claim or interest in the property in controversy, the subject of litigation is exhausted; and if the plaintiff is out of possession, the judgment necessarily entitles him to possession. Landregan v. Peppin, 94 Cal. 465;

29 Pac. 771. One who is not a party or privy to a judgment is not affected by it, and neither the judgment nor an execution sale of the land affected by it can change his rights in the land or create a cloud upon his title. Roman Catholic Archbishop v. Shipman, 69 Cal. 586; 11 Pac. 343. A judgment of dismissal of an action of ejectment, brought by the plaintiff in an action to quiet title against the same defendant for the recovery of the premises, upon the same day, but dismissed by stipulation of the parties, after judgment in favor of the plaintiff in the action to quiet title, each party paying his own costs, cannot be set up to defeat a motion for the writ of possession, whatever its effect may be as a defense to another claim afterwards brought upon the same cause of action. Landregan v. Peppin, 94 Cal. 465; 29 Pac. 771. "Adverse claimants" must be made parties to an action to quiet title, whether the service is personal or by publication; and where the virtual representation of unborn remaindermen is precluded, such unborn persons, not parties to the action, cannot be bound by the decree therein. Los Angeles County v. Winans, 13 Cal. App. 234; 109 Pac. 640.

Priority of liens. A title to land, under a judgment of foreclosure of a street-assessment lien, relates back to the date of the original liens foreclosed; and a sheriff's deed, based upon a judgment of foreclosure of such a lien, conveys a superior title to a sheriff's deed based upon a prior judgment of the same character, where the liens under which the prior judgment was rendered are invalid. Brady v. Burke, 90 Cal. 1; 27 Pac. 52.

Mining claims. Relation between Federal and state laws. An action to quiet title to mining property is not an action brought under § 2326 of the Revised Statutes of the United States, to determine which of the parties is best entitled to purchase from the United States, but only an ordinary action to quiet title; the proceedings in the land-office of the United States are utterly immaterial in the state court, unless they tend to show title or right of possession in one of the parties. Altoona Quicksilver Mining Co. v. Integral Quicksilver Mining Co., 114 Cal. 100; 45 Pac. 1047. An action to quiet title to a mining claim, not involving a contest in the United States land-office, is to be governed and determined by the practice and the rules of pleading governing in state courts in ordinary suits brought to settle disputes as to interests in land; and want of title in the plaintiff renders it unnecessary to examine the title of the defendant. Schroder v. Aden Gold Mining Co., 144 Cal. 628; 78 Pac. 20. Under state laws, either party may bring an action to determine an adverse claim to mining property, but the jurisdiction and the procedure governing the action depend entirely upon the state constitution and laws; this action seems well adapted to the object sought to be accomplished by the Federal law, for the rights of the parties are wholly determined by act of Congress, and involve the same questions, as to the relative rights of the parties, which the officers of the land-office would otherwise be required to pass upon. Altoona Quicksilver Mining Co. v. Integral Quicksilver Mining Co., 114 Cal. 100; 45 Pac. 1047. The rights of the parties to the possession of a mining claim are entirely determined by the laws of the United States granting the right to enter upon mineral lands and to extract metals therefrom and to acquire title thereto; but the suit must be tried in every respect as if no contest were pending in the land-office of the United States in regard to the right to purchase the same. Altoona Quicksilver Mining Co. v. Integral Quicksilver Mining Co., 114 Cal. 100; 45 Pac. 1047.

Mining-lands, title to, by prescription. Where the defendant disclaims any interest, but alleges that the plaintiff conveyed to him the claim in controversy, and he, in turn, conveyed to other defendants, and the evidence at the trial showed that the defendant wished to develop and work the mine, and in exchange for the right to do so, purported to convey to the plaintiff the same right to work other mines, so that the transaction practically amounted to an exchange of a right to work separate mining claims, the conveyance from the plaintiff to the defendant does not preclude the plaintiff from afterwards acquiring title to the land by prescription, as against the grantee of the mining right, and those claiming under it. Baker v. Clark, 128 Cal. 181; 60 Pac. 677.

Mining-lands. Rights of agriculturists subject to those of miners. The maxim, Qui prior in tempore, potior in jure, cannot be applied in protection of a person who settles upon lands reserved from settlement by the policy of the law, as against one entering for a purpose encouraged wherever minerals may be found; if it were otherwise, persons without any right but that of possession could, under the pretense of agriculture, invade the mineral districts of the state, and swallow up the entire mineral wealth by settlements upon quarter-section tracts of land, and thus destroy, for his own benefit, the business of a neighborhood, and put the government, as well as the mining public, at defiance. McClintock v. Bryden, 5 Cal. 97; 63 Am. Dec. 87; Stoakes v. Barrett, 5 Cal. 37. Where a person settles for agricultural purposes, upon any of the mining-lands of this state, such settlement is subject to the rights of miners, who may

proceed, in good faith, to extract therefrom any valuable metals found in such lands, in the most practicable manner, and with the least injury to the occupying claimant. McClintock v. Bryden, 5 Cal. 97; 63 Am. Dec. 87.

Location of mining claims. The laws of the state constitute a part of the laws by which a mining right is determined; therefore, where possession has continued for five years before the adverse right exists, it is equivalent to a location, under the Federal law. Altoona Quicksilver Mining Co. v. Integral Quicksilver Mining Co., 114 Cal. 100; 45 Pac. 1047. The discovery of a mining claim vests no right or title to the property, and is but one step in acquiring title thereto, and must be followed by a location, which consists of the marking of the claim by monuments so that its boundaries can be readily traced, the posting of a notice thereon, and, where the state or district law requires it, the recording of such notice. Adams v. Crawford, 116 Cal. 495; 48 Pac. 488. Where, at the date of the location of a mining claim, the land was vacant public land of the United States, open to exploration and location, and the plaintiff performed the various acts necessary to effect an effectual location, he is entitled to judgment in an action to quiet title. Mitchell v. Hutchinson, 142 Cal. 404; 76 Pac. 55. Where the plaintiff first made the discovery of a mining claim, but left without making a location, and a valid location of claims extending each way from the point of plaintiff's discovery is first made by other persons, the title of such locators will prevail as against the first discoverers. Adams v. Crawford, 116 Cal. 495; 48 Pac. 488. A location of a mining claim is not invalid because it conforms only partially to the United States system of public-land surveys: such conformity is required, only in so far as it is reasonably practicable. Mitchell v. Hutchinson, 142 Cal. 404; 76 Pac. 55. The statutes and mining laws of the United States do not contemplate the forcible or clandestine entry and location of lands in the peaceable possession of other parties, who have located the same in good faith, and who are endeavoring to secure their claims; and in an action to quiet title thereto, the claim of parties under such entry cannot be sustained. Weed v. Snook, 144 Cal. 439; 77 Pac. 1023.

Recording notice of location of mining claim. Where an act provided that a copy of the notice of location should be recorded within six days from the date of posting, and that a notice posted without being so recorded should not be considered notice to subsequent locators, a substantial compliance with the requirements of the act is sufficient; and if the description contained in the notice is complete enough to enable any one examining it to ascertain therefrom that the land actually claimed is included therein, there is such a substantial compliance as will satisfy the statute, for such a description gives full notice that the land has been in fact appropriated by others. Mitchell v. Hutchinson, 142 Cal. 404; 76 Pac. 55.

Development-work on mines. To hold that possession is enough to remove a mining claim from the category of unoccupied land, or that it is sufficient to prevent one from making a valid location thereon, would be to permit a locator to hold it against all the world for an indefinite time without doing any development-work whatever. Goldberg v. Bruschi, 146 Cal. 708; 81 Pac. 23. Where a mine is idle, the services of a watchman in looking after the property and taking care of the same may constitute work upon the claim sufficient to hold it, if such care is necessary to preserve tunnels, buildings, or structures erected to work the mine; but if there is only the naked claim to be looked after, and the watchman is placed there merely to warn prospectors, and thus prevent a relocation, it is not labor upon the mine, in the sense of the statute. Altoona Quicksilver Mining Co. v. Integral Quicksilver Mining Co., 114 Cal. 100; 45 Pac. 1047. Where the defendant did no work on a mining claim at any time subsequent to its location, as required by law, it ceases to have any validity as against a valid relocation by the plaintiff, and the mere possession of the claim by the defendant, whether actual or constructive, without development-work, cannot prevent such relocation. Goldberg v. Bruschi, 146 Cal. 708; 81 Pac. 23. Where the defendant proves a prior location, the burden is on the plaintiff to prove a failure of the defendant to do the required annual work; and this he has a right to do in rebuttal, without any averment to that effect in his complaint. Goldberg v. Bruschi, 146 Cal. 708; 81 Pac. 23.

Statute of limitations, and laches. A plea of the statute of limitations may be interposed in a suit in equity, as well as in an action at law; and this, without changing the character of the action; one of the defenses peculiar to a court of equity is the lapse of time. Hancock v. Plummer, 66 Cal. 337; 5 Pac. 514. As between the parties to a suit in partition, the statute of limitations does not run while the suit is pending. Christy v. Spring Valley Water Works, 97 Cal. 21; 31 Pac. 1110. Where the plaintiff asserts no equitable rights, the statute of limitations, and not the doctrine of laches, plainly furnishes the rule by which to determine whether the delay to assert the right is fatal to the action. Anzar v. Miller, 90 Cal. 342; 27 Pac. 299. Where the plaintiff claimed title derived from the heirs of a grantee under a Mexican grant,

the statute of limitations did not begin to run against his action for the recovery of possession until the patent was issued by the board of land commissioners. Valentine v. Sloss, 103 Cal. 215; 37 Pac. 326. The statute of limitations did not commence to run against parties claiming under a patent confirming a Mexican grant until the date of the issuance of the patent, where the adverse claimant did not show the existence of a perfect grant prior to the issuance of the patent. Tuffree v. Polhemus, 108 Cal. 670; 41 Pac. 806. The time to commence an action, by the people of the state, under this section is limited, by § 315, ante, only by a continuous adverse possession of the lands for ten years, on the part of the defendant; the mere assertion of an adverse claim, without possession, or any proceeding to enforce it, can never ripen into a legal or equitable right as against one seised of legal estate when the adverse claim was first asserted; each day's assertion of an adverse claim gives a cause of action to quiet title, until such action has been brought. People v. Center, 66 Cal. 551; 5 Pac. 263. A plaintiff, who has been in the possession of land, cannot be guilty of laches in the bringing of an action to remove a cloud, at any time before an action has been brought to disturb his possession, or to deprive him of any enjoyment of his right; the continued assertion of the adverse claim constitutes, from day to day, a new cause of action. Hyde v. Redding, 74 Cal. 493; 16 Pac. 380. A wife who executed and acknowledged a deed of her separate property to her husband, and retained the same without delivery, is equitably estopped to deny the delivery and to claim the premises in an action to quiet title against a bona fide purchaser deriving title through her husband, who wrongfully obtained possession of the deed and sold the property, where, instead of promptly repudiating the act of her husband, she, with full knowledge of the facts, allowed such purchaser to make permanent improvements upon the property, without notice of her claim thereto prior to the commencement of the action, which was nearly three years after acquiring such knowledge. Baillarge v. Clark, 145 Cal. 589; 104 Am. St. Rep. 75; 79 Pac. 268. An action to correct a mistake in a conveyance, to compel the defendant to execute a deed conveying to the plaintiff land included by mistake in another conveyance, and to quiet the plaintiff's title thereto, is not barred, except by the five years' limitation statute. Murphy v. Crowley, 140 Cal. 141; 73 Pac. 820. Where the deceased executed deeds of distinct parcels of land to his daughter, which were absolute and unlimited, an action begun more than five years after the execution of the deeds, by the widow of the deceased, against the daughter and other children and the administrator, to quiet her title to one third of the property, and to have it adjudged that the defendants have no other title or interest therein than as heirs of the deceased, on the ground that the deeds were made upon certain alleged trusts which were invalid and contrary to law, is barred by the statute of limitations; and where the deceased, at the time of the execution of the deeds, assigned and delivered to his son, one of the defendants, certain notes, bonds, and other evidence of indebtedness, upon like trusts, such assignment is also barred by the statute, as against the widow. Page v. Page, 143 Cal. 602; 77 Pac. 452. In an action to quiet title to city lots, the defense that the lots were assessed and taxes levied more than three years prior to the beginning of the action, and demanding their payment as a condition of plaintiff's recovery, is barred by the statute; and where the record in the case shows that the assessment and the levy were not made as directed by law, they were invalid and void. Dranga v. Rowe, 127 Cal. 506; 59 Pac. 944.

"He who seeks equity must do equity." The rule that he who seeks equity must do equity applies to actions under this section. Holland v. Hotchkiss, 162 Cal. 366; 123 Pac. 258; Campbell v. Canty, 162 Cal. 382; 123 Pac. 265. Where the purchaser of land pays a deposit on account of the sale, under an agreement with the vendor, by which he was to have the deposit returned to him if the title should not be satisfactory, and it appears that the purchaser is entitled to a return of the deposit, the vendor cannot have his title quieted against the purchaser until he first restores the money received. Benson v. Shotwell, 87 Cal. 49; 25 Pac. 249; Heney v. Pesoli, 109 Cal. 53; 41 Pac. 819.

Appeal. In an action to quiet title, counsel will not be allowed to try the case upon the theory that the issue was properly before the court below, and thus entice his adversary into a trap to be sprung in the appellate court at the last moment: technical objections to pleadings will not be countenanced on appeal, when the case was tried in the court below upon the theory that the issues were properly made. Casey v. Leggett, 125 Cal. 664; 58 Pac. 264. In an action to determine the right to a mining claim, where the burden rested upon the plaintiff to satisfy the court that his contention as to the location of the monuments was correct, the finding of the court should not be disturbed, as, on appeal, interference with the findings is only warranted where they are contrary to all the evidence, and there is no substantial evidence to support them. Schroder v. Aden Gold Mining Co., 144 Cal. 628; 78 Pac. 20. In an action to quiet title,

alleged error in the admission of a certain judgment roll in evidence will not be considered, where the roll is not incorporated in the record. Robinson v. Muir, 151 Cal. 118; 90 Pac. 521.

What is color of title. See notes 14 Am. Dec. 580; 88 Am. St. Rep. 701.

Bills to remove clouds on title. See note 67 Am. Dec. 110.

What is and who may maintain suit to remove cloud on title. See note 45 Am. St. Rep. 373.

Sufficiency of unrecorded deed to give color of title. See note 1 Ann. Cas. 761.

Condemnation proceedings as furnishing color of title to land claimed by adverse possession. See note 19 Ann. Cas. 402.

Power of court of equity to cancel restrictive covenant in deed as cloud on title. See note Ann. Cas. 1912A, 765.

Invalid tax deed as color of title. See note 11 L. R. A. (N. S.) 772.

Action to quiet title against numerous persons holding under common source where each claims a separate and distinct tract of the land. See note 126 Am. St. Rep. 991.

Judgments or decrees sufficient to constitute cloud on title. See note 7 Ann. Cas. 334.

Instrument executed by stranger to title as constituting cloud thereon. See note Ann. Cas. 1912C, 834.

Sufficiency of possession by agent or tenant to enable principal or landlord to maintain suit to quiet title. See note 18 Ann. Cas. 860.

Right of personal representative to maintain action to quiet title to decedent's real estate. See note Ann. Cas. 1913A, 996.

Right of holder of equitable title to land to maintain action to quiet title against holder of legal title. See note Ann. Cas. 1913B, 89.

Right of purchaser at judicial or execution sale to bring suit to quiet title. See note Ann. Cas. 1912B, 380.

Right of one who has placed a purchaser in possession to maintain a bill to quiet title against an outstanding title. See note 12 L. R. A. (N. S.) 652.

Right of one holding a bond for title to maintain a bill against a third person to remove cloud. See note 15 L. R. A. (N. S.) 413.

Injunction to prevent cloud on title. See note 62 Am. Dec. 523.

Necessity that plaintiff in action to quiet title allege title or possession at time of commencement of action. See note Ann. Cas. 1913D, 386.

Running of statute of limitations against action to quiet title. See note 20 Ann. Cas. 43.

Right to jury trial in action to quiet title. See notes 3 Ann. Cas. 248; 18 Ann. Cas. 245.

Effect of remedy at law on right to maintain suit to quiet title. See note 12 L. R. A. (N. S.) 50.

CODE COMMISSIONERS' NOTE. Section 380 of this code provides that "in an action brought by a person out of possession of real property to determine an adverse claim of an interest or estate therein, the person making such adverse claim and all persons in possession must be joined as defendants." Section 381 provides that "persons claiming an interest in lands under a common source of title may unite as plaintiffs in an action against any person claiming an adverse interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or for removing a cloud thereon." And § 384, ante, that "all persons holding as tenants in common, joint tenants or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such property." See also Ross v. Heintzen, 36 Cal. 313. This section enlarges the class of cases in which equitable relief could be formerly sought to quiet title. Curtis v. Sutter, 15 Cal. 259. This action does not lie to determine an adverse claim to the use of water. Nevada County etc. Canal Co. v. Kidd, 37 Cal. 283. But does not lie to determine an adverse claim to mining claims. Merced Mining Company v. Fremont, 7 Cal. 319; 68 Am. Dec. 262. The "adverse claim, estate, or interest" need not be of a legal or equitable title; the terms include every description of claim whereby the plaintiff might be deprived of the property, or its title be clouded, or value depreciated, etc. Head v. Fordyce, 17 Cal. 149. The test by which the question whether a deed would cloud title, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; otherwise not. Pixley v. Huggins, 15 Cal. 128. If it is adjudged that the defendant has no title, the judgment will not be reversed because it restrains the defendant from setting up the title or claim declared invalid. Brooks v. Calderwood, 34 Cal. 563.

§ 739. When plaintiff cannot recover costs.

If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs.

Costs. Post, §§ 1022 et seq.

Legislation § 739. Enacted March 11, **1872** (based on Practice Act, § 255), changing "shall not" to "cannot."

Where judgment will be without costs. Even where the defendant makes no claim, he must file a disclaimer, and judgment may be entered against him, though in case of a disclaimer the judgment must not be for costs. Castro v. Barry, 79 Cal. 443; 21 Pac. 946. When, in an action to quiet title to land, the defendant disclaims any interest or estate in the premises, it is immaterial whether or not he had ever before claimed an interest or estate therein adversely to the plaintiff; in either event, the plaintiff would be entitled simply to a judgment quieting his title, without costs. Bulwer Consol. Mining Co. v. Standard Consol. Mining Co., 83 Cal. 589; 23 Pac. 1102. Where the defendant disclaims as to part of the premises, the dismissal of the action as to such part is not erroneous: in such case the judgment for the plaintiff would, in any event, be merely formal, and without costs. Packer v. Doray, 4 Cal. Unrep. 297; 34 Pac. 628. In an action to quiet title, the plaintiff is entitled to judgment, although the defendant makes a disclaimer, but without costs, the same as in case of default: it would be strange if the plaintiff were entitled to judgment on disclaimer, and not entitled to judgment where the answer shows no legal defense. Dranga v. Rowe, 127 Cal. 506; 59 Pac. 944.

When judgment will be set aside. An order setting aside a judgment quieting the title of the plaintiff to city lots, to which the defendant disclaimed title, and

allowing the grantees of the defendant to come in and defend, will not be disturbed, where it is shown, on the part of the defendant and his grantees, that the disclaimer was made through an inadvertence and mistake of fact of the defendant's attorney in supposing that the property had been conveyed by the defendant before the commencement of the suit, whereas, in fact, the conveyances were made pending the suit, and after a notice of lis pendens had been filed by the plaintiff. Underwood v. Underwood, 87 Cal. 523; 25 Pac. 1065.

CODE COMMISSIONERS' NOTE. If the defendant, while disclaiming, denies the possession of plaintiff and compels him to prove it, plaintiff is entitled to costs. Brooks v. Calderwood, 34 Cal. 563.

§ 740. Where plaintiff's right terminates pending suit, what he may recover. In an action for the recovery of property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.

Pendency of action. Post, § 1049.

Legislation § 740. 1. Enacted March 11, 1872 (based on Practice Act, § 256), changing "shall" to "must."

2. Amendment by Stats. 1901, p. 160; unconstitutional. See note ante, § 5.

3. Amended by Stats. 1907, p. 686; the code commissioner saying, "The word 'real' is omitted before the word 'property,' the amendment thus extending the benefit of the section to all classes of property."

Pleading. If the defendant has acquired title to the demanded premises pending the litigation, evidence of this fact cannot be introduced, unless it is pleaded as a defense in a supplemental answer. McMinn v. O'Connor, 27 Cal. 238. A denial of the allegations of the complaint puts in issue the title of the plaintiff at the date alleged, or at the commencement of the action; and any title acquired subsequently to the issue thus joined must be set up by a supplemental answer in the nature of a plea puis darrein continuance. Moss v. Shear, 30 Cal. 468.

Defense. Where judgment has been rendered in favor of the plaintiff in an action to quiet title, the fact that the defendant, since the date of the judgment, has purchased an outstanding title, is no defense to an application for a writ of possession, nor can the merits of the claim be considered upon such application. Landregan v. Peppin, 94 Cal. 465; 29 Pac. 771.

Findings. In an action to quiet title, where the defendant disclaims any other interest than that the lands were situated within the boundaries of an irrigation district, and that the same were sold to him on account of an assessment, levy of tax, and delinquent sale thereunder, for the benefit and at the instance of the irrigation district, it is error for the court to find that the plaintiff is the owner in fee, and that there is no adverse claim of defendant to be determined in the action, and that any rights which the defendant may have acquired through his purchase at the delinquent sale cannot be determined in the action. Quint v. McMullen, 103 Cal. 381; 37 Pac. 381.

Damages. Where a successor to title, in ejectment, recovers, the resultant damages for the value of the use and occupation, during the period of the unlawful detention, are properly awardable to him. Cassin v. Nicholson, 154 Cal. 497; 98 Pac. 190.

CODE COMMISSIONERS' NOTE. Moore v. Tice, 22 Cal. 513; Moss v. Shear, 30 Cal. 467; Gee v. Moore, 14 Cal. 472.

§ 741. When value of improvements can be allowed as a set-off. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damages.

Counterclaim.
1. Generally. Ante, § 438.
2. Waived, unless defendant sets it up. Ante, § 439.

Legislation § 741. Enacted March 11, 1872 (based on Practice Act, § 257), changing (1) "claims" to "claim" and (2) "shall" to "must."

Set-off of improvements. The value of improvements upon the premises, even where the defendant holds under color of title adversely to the plaintiff, in good faith, can only be allowed as a set-off to the damages. Yount v. Howell, 14 Cal. 465. The defendant cannot have his improvements set off against the mesne profits, where they were made after the plaintiff's title accrued, or where the holding of the defendant is not adverse, within this section. Bay v. Pope, 18 Cal. 694. The right to set off the value of improvements, against the claim for damages,

comes from the statute, and, as a matter of pleading, all the facts upon which the right is by the statute made to hinge should be alleged. Carpentier v. Small, 35 Cal. 346. The right of a defendant to set off the value of improvements made by him, against the claim of the plaintiff for damages, depends upon whether they were made by him or his grantors holding under color of title adverse to the plaintiff, in good faith, and upon whether they were permanent or not. Carpentier v. Small, 35 Cal. 346; Love v. Shartzer, 31 Cal. 487; Wise v. Burton, 73 Cal. 174; 14 Pac. 683. The provisions of this section for the set-off of improvements apply only to improvements made in good faith, under color of title, where the holding is adverse; and the holding of such purchaser is not adverse to his vendor until after the demand for possession. Hannan v. McNickle, 82 Cal. 122; 23 Pac. 271. Under this section, allowances for improvements can only be made as an offset for damages claimed for withholding possession, where the court finds that the value of the improvements placed on the land is in excess of the value of the rents and profits, and therefore allowed no judgment for rents or damages. Huse v. Den, 85 Cal. 390; 20 Am. St. Rep. 232; 24 Pac. 790.

Damages for improvements. Although the owner is entitled to full compensation for the land taken, and for all permanent improvements thereon made by himself, or by those from whom he derived title, yet he is not entitled to damages for improvements made by the party at whose suit the land is afterwards condemned, without authority of law or the consent of the owner of the land. Stewart v Sefton, 108 Cal. 197; 41 Pac. 293.

Right to allowance for improvements made before color of title. See note 37 L. R. A. (N. S.) 918.

CODE COMMISSIONERS' NOTE. 1. Value of improvements can only be allowed as a set-off to the damages. Yount v. Howell, 14 Cal. 465; Ford v. Holton, 5 Cal. 319. Such set-off must be claimed in the answer. Carpentier v. Gardiner, 29 Cal. 160. The defendant cannot have his improvements set off against the mesne profits, if the improvements were made after plaintiff's title accrued, or where the holding of the defendant is not adverse. Bay v. Pope, 18 Cal. 694. One who entered under a bond for a deed from the plaintiff, can set off his improvements against the damages for use and occupation. Kilburn v. Ritchie, 2 Cal. 145; 56 Am. Dec. 326. Where the defendant occupied and improved the land, under color of title, the improvements erected by him constitute a set-off, to the extent of their value, to the damages recovered by the plaintiff for the withholding of possession. Welch v. Sullivan, 8 Cal. 165. But the improvements must have been made in good faith. Carpentier v. Mitchell, 29 Cal. 330; Carpentier v. Small, 35 Cal. 347; Love v. Shartzer, 31 Cal. 488; Carpentier v. Mendenhall, 28 Cal. 485; 87 Am. Dec. 135.

2. **Damages.** In ejectment, if the court finds the value of the use and occupation in both gold and United States treasury notes, judgment may be rendered for the currency value. Carpentier v. Small, 35 Cal. 347. If the defendant pleads the statute of limitations, the plaintiff can only recover the rents and profits (Carpentier v. Mitchell, 29 Cal. 330), or damages for the detention for three years next before the commencement of the action. Love v. Shartzer, 31 Cal. 488. Plaintiff is entitled to recover damages measured by the value of the rents and profits up to the time of judgment. Love v. Shartzer, 31 Cal. 488.

§ 742. An order may be made to allow a party to survey and measure the land in dispute. The court in which an action is pending for the recovery of real property, or for damages for an injury thereto, or a judge thereof may, on motion, upon notice by either party for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, and of any tunnels, shafts, or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action.

Order for survey, where title to land in two counties disputed. See Pol. Code, § 4216.

Legislation § 742. 1. Enacted March 11, **1872** (based on Practice Act, § 258), (1) adding "or for damages for an injury thereto," (2) adding "and of any tunnels, shafts, or drifts thereon," (3) changing "purposes" to "purpose," and (4) adding last clause, beginning "even though."

2. Amended by Code Amdts. **1880**, p. 11, (1) striking out "or a county judge" after "judge thereof," and (2) changing "thereon" to "therein."

§ 743. Order, what to contain, and how served. If unnecessary injury done, the party surveying to be liable therefor. The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done to the property he is liable therefor.

Legislation § 743. Enacted March 11, **1872** (based on Practice Act, § 259), changing (1) "shall" to "must" in both instances, (2) "measurements" to "measurement," and (3) "shall be" to "is."

§ 744. A mortgage must not be deemed a conveyance, whatever its terms. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.

Conveyance deemed mortgage. Civ. Code, §§ 2924, 2925.
Proof. Civ. Code, § 2925.
Mortgagee's possession. Civ. Code, § 2927.

Legislation § 744. 1. Enacted March 11, **1872**; re-enactment of Practice Act, § 260.
2. Repeal by Stats. **1901**, p. 160; unconstitutional. See note ante, § 5.

Construction of section. This section was adopted in full view of the fact that mortgages were in common use and recognized by law, whether enforced in a court of law or of equity, in various forms, some with a condition of defeasance in the instrument itself, others in a separate instrument, and still others without any defeasance in writing at all; and the provision covers all these cases, whatever the terms of the instrument; it was intended to put them all on a common footing, and treat them, as the parties intended, as securities for the performance of the thing to be performed, and not as transferring either the title or the right of possession, without an express agreement that possession might be taken by the party secured. Jackson v. Lodge, 36 Cal. 28. The words, "whatever its terms," in this section, do not prohibit separate stipulations between the parties for the possession, or for the sale of premises upon default; but were intended merely to control the terms of grant, bargain, and sale generally employed in mortgages. Fogarty v. Sawyer, 17 Cal. 589. The provision of this section, prohibiting a recovery, has reference to an action at law, and it necessarily assumes that the fact which shall defeat the recovery may be shown in the very action in which the recovery is sought; if it cannot be thus shown, then, as to a large number of cases embraced within the provisions of the statute, the purpose of the legislature is defeated; but courts of equity exercise no arbitrary powers; they simply administer, in forms peculiarly their own, one branch of the municipal law; there must be a right recognized by the municipal law, before even a court of equity can enforce it; their mode of proceeding was different; but now, under our system, there is no difference in the forms of proceeding. Jackson v. Lodge, 36 Cal. 28.

Nature of mortgage. The original character of mortgages has undergone a complete change: they have ceased to be conveyances, except in form; they are no longer understood as contracts of purchase and sale between the parties, but as transactions by which a loan is made on the one side and a security is given for its repayment on the other, and default in the payment of the money secured does not change their character; they create only a lien on the land, which is an incident of the secured debt, and passes by a similar assignment of the debt (Savings and Loan Society v. McKoon, 120 Cal. 177; 52 Pac. 305); and payment after default operates to discharge the lien, equally with payment at maturity of the debt. Jackson v. Lodge, 36 Cal. 28. This section changes the common-law character of the mortgage, and, under it, the mortgage creates a mere lien for the purposes of security, and, as in other cases of lien upon real property, can only be enforced by judicial proceedings, except by the authority of the owner of the property; by virtue of the mortgage alone, the mortgagee can neither acquire the possession nor dispose of the premises, but the existence of the mortgage does not prevent the owner from making an independent contract for the possession, nor from authorizing a sale of the premises, the mortgagee consenting thereto, to pay off the debt. Fogarty v. Sawyer, 17 Cal. 589.

Mortgage does not pass title. A mortgage is not a conveyance, and does not pass title. Adams v. Hopkins, 144 Cal. 32; 77 Pac. 712. All mortgages, whether in the usual form, or absolute conveyances on their faces, stand upon the same footing in the respect that neither conveys a title in fact. Jackson v. Lodge, 36 Cal. 28. The mortgagee is not regarded as ever having the title of the mortgagor until judicial foreclosure and sale: the title remains with the mortgagor, whether possession be taken or otherwise. Jackson v. Lodge, 36 Cal. 28; Johnson v. Sherman, 15 Cal. 287; 76 Am. Dec. 481.

Deed deemed a mortgage when. A deed, absolute in form, if intended as a mortgage, does not transfer title as between the parties to it. Cunningham v. Hawkins, 27 Cal. 603; Taylor v. McLain, 64 Cal. 513; 2 Pac. 399; Healy v. O'Brien, 66 Cal. 517; 6 Pac. 386; Turner v. McDonald, 76 Cal. 177; 9 Am. St. Rep. 189; 18 Pac. 262. No title passes to the grantee by a deed, absolute in form, without any defeasance, if the purpose of the deed is to secure a debt; and, in this respect, a conveyance, absolute on its face, stands on the same footing as a conveyance with a defeasance. Jackson v. Lodge, 36 Cal. 28. A deed, absolute on its face, made to a creditor of the grantor, as security for a sum of money due from the grantor to the grantee, in pursuance of an understanding that the

grantee will sell the land, pay off a mortgage held by a third party, retain the sum of money due himself, and pay the residue to the grantor, is a mortgage, and conveys no title to the creditor, though sufficient to pass title as between the grantor and a purchaser from the grantee in good faith and for a valuable consideration, without notice. Wenzel v. Schultz, 100 Cal. 250; 34 Pac. 696. Where a deed was intended as, and was in fact, a mortgage, made to a party formerly the agent of the grantor, but who did not continue as such agent after the execution of the deed, nor continue to receive and disburse moneys and render services subsequently to that time, as was the case previously, the legal title does not pass by the deed, and subsequent encumbrancers or purchasers with notice acquire no rights as against the plaintiff. Leonis v. Hammel, 1 Cal. App. 390; 82 Pac. 349.

Evidence proving deed to be a mortgage. Testimony is admissible to show that a deed, absolute on its face, was intended as a mortgage. Cunningham v. Hawkins, 27 Cal. 603. Parol evidence is admissible at law, as well as in equity, to show that a deed, absolute on its face, was given as security for money, and is in fact a mortgage. Jackson v. Lodge, 36 Cal. 28; Gay v. Hamilton, 33 Cal. 686. A clear case should be made, in order to justify a court or jury in finding, upon parol testimony, that a deed, absolute on its face, is a mortgage. Hopper v. Jones, 29 Cal. 18.

Mortgagee's power to sell, and right to possession. The right to dispose both of the possession and the estate follows necessarily from the ownership of the property; this being so, no valid objection can be urged against incorporating the contract and the power in the same instrument with the mortgage: they do not become, in that way, any part of the mortgage, but are as much independent of it as though contained in separate instruments. Fogarty v. Sawyer, 17 Cal. 589. The power given in a mortgage, "to proceed to sell in the manner prescribed by law," is, in substance, the same as a power to proceed to sell by means of an action to foreclose. Brickell v. Batchelder, 62 Cal. 623. Where the mortgage is in the usual form, and conveys the property, but provides that if certain payments shall be made, the instrument is to be void, but if default shall be made in their payment, the property may be sold, until default and a consequent foreclosure and sale, the mortgagee has no right to enter upon or take possession of the premises, and where he does so, he may be ejected, the same as any other intruder. Kidd v. Teeple, 22 Cal. 255. Possession taken with the consent of the owner, or by contract with him, may confer rights as to third parties, but they are independent and distinct from any rights springing from the mortgage, from which they derive no support. Johnson v. Sherman, 15 Cal. 287; 76 Am. Dec. 481.

Deed of trust conveys title. A deed of trust conveys the legal title: the contract is, that the party in whom the debtor has seen fit to vest the legal title may, in case of default, sell the property and transfer the legal title to the purchaser; such is the meaning and intention of the contract, and there is nothing therein to make it invalid, nor is there any reason, under this section, why its provisions should not be carried out. Bateman v. Burr, 57 Cal. 480.

Deed with defeasance is not mortgage. Where the plaintiff borrowed a sum of money, and to secure the payment thereof made a deed conveying real property to a second party, with the lender named as party of the third part in the deed, which recited that it was made to secure the indebtedness, and provided that upon default in payment, and on the request of the third party, the party of the second part should sell the premises, the instrument is not a mortgage, but a deed of trust, and conferred a power of sale upon the party of the second part. Bateman v. Burr, 57 Cal. 480.

CODE COMMISSIONERS' NOTE. It was held in Hughes v. Davis, 40 Cal. 117, that an absolute deed, though shown by parol evidence to have been intended as a mortgage, does convey the legal title. In Jackson v. Lodge, 36 Cal. 28, upon a review of all the authorities, the reverse was held. See also Civ. Code, §§ 2888, 2920, 2924, and notes.

§ 745. When court may grant injunction; during foreclosure; after sale on execution, before conveyance. The court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or, after a sale on execution, before a conveyance.

Injunction, generally. Ante, §§ 525–533.
Receiver. Ante, § 564, subd. 2.
Waste. Civ. Code, § 2929.
Foreclosure of mortgage. Ante, § 726.
Execution sales. Ante, §§ 694 et seq.

Legislation § 745. 1. Enacted March 11, **1872**; re-enactment of Practice Act, § 261.

2. Repeal by Stats. **1901**, p. 160; unconstitutional. See note ante, § 5.

CODE COMMISSIONERS' NOTE. In Sands v. Pfeiffer, 10 Cal. 258, it was held that this remedy was only preventive, and did not exclude any other remedy.

§ 746. Damages may be recovered for injury to the possession after sale and before delivery of possession. When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale, and before possession is delivered under the conveyance.

Lis pendens. Ante, § 409.

Legislation § 746. Enacted March 11, 1872 (based on Practice Act, § 262), changing "shall have" to "has" in first line.

Damages in ejectment. Resultant damages for the value of the use and occupation of property, during the period of an unlawful detention thereof, may properly be awarded to the plaintiff in ejectment. Cassin v. Nicholson, 154 Cal. 497; 98 Pac. 190.

§ 747. Action not to be prejudiced by alienation pending suit. An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

Legislation § 747. Enacted March 11, 1872; re-enactment of Practice Act, § 263.

§ 748. Mining claims, actions concerning, to be governed by local rules. In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this state, must govern the decision of the action.

Legislation § 748. Enacted March 11, 1872 (based on Practice Act, § 621), (1) omitting "constitution and" before "laws," and (2) changing "shall" to "must."

Construction of section. There seems to be implied, from the language of this section, a permission, upon the part of the state, to the miner, to seek, whenever he chooses, in the gold-bearing districts, for the precious metals, and that the state extends to him whatever right it has to the mineral when found: it is the policy of both the Federal and the state governments to reserve public lands containing precious metals from settlement for agricultural purposes; and the entry, for mining purposes, upon public lands already settled, is not tortious. McClintock v. Bryden, 5 Cal. 97; 63 Am. Dec. 87.

Possession proved how. In ascertaining the limits of a mining possession, the same common-law principles are to be relied upon as those which regulate the right to the possession of agricultural lands, although the indicia of possession are not necessarily the same; the possession, in such case, may be proved by satisfactory evidence of notorious acts of occupation, reference being had to the nature of the lands, the uses to which they can be put, and to the general practices or customs of the region with respect to the occupation of lands of the particular character; but the possession, however proved, being established, the presumption of grant arises. Lux v. Haggin, 69 Cal. 255; 10 Pac. 674.

Local usage and customs as to mining customs. Local usages and customs, demanded by new necessities, by which persons engaged in mining pursuits were governed in the acquisition, use, and forfeiture or loss, of mining-ground, having received the sanction of the legislature, have become as much a part of the law of the state as the common law itself, which was not adopted in a more solemn form. When the provisions of this section became a part of the laws of this state, there had sprung up, throughout the mining regions, local customs and usages, by which persons engaged in mining pursuits were governed in the acquisition and use, and forfeiture or loss, of mining-ground (the word "forfeiture" being used here in its mining-law sense); these customs, differing in different localities, and varying according to the character of the mines, and prescribing the acts by which the right to mine a particular piece of ground could be secured, and its use and enjoyment preserved, were few, plain and simple, and well understood by those with whom they originated, and well adapted to secure the end designed to be accomplished, and were adequate to the judicial determination of all controversies touching mining rights. Morton v. Solambo Copper Mining Co., 26 Cal. 527.

Proof of mining customs, usages, and regulations. A local mining regulation or custom, adopted after the location of a claim, cannot be given in evidence to limit the extent of a claim previously located; nor, in order to show reasonableness of extent, is evidence admissible of local

usages and customs in different counties in the mineral regions, varying from each other as to the size of claims; a general uniform custom, as to size, should be proved, if one exist; but where there are no local customs or regulations in force in the district where the claim is located, at the time of its location, general customs then in force are admissible in evidence upon the question of reasonableness of extent. Table Mountain Tunnel Co. v. Stranahan, 31 Cal. 387. The customs, usages, and regulations accepted by the miners of a particular district are binding only as to possessory rights within that district, and they must be proved as facts. Lux v. Haggin, 69 Cal. 255; 10 Pac. 674. No distinction is made, by this statute, between the effect of a "custom" or "usage," the proof of which must rest in parol, and a "regulation," which may be adopted at a miners' meeting and embodied in a written local law. Harvey v. Ryan, 42 Cal. 626.

Abandonment pleaded and proved how. Abandonment of a mining claim need not be especially pleaded, but may be given in evidence under a denial of title, and may be proved by the plaintiff in an action to quiet title, to rebut a title set up by the defendant under an earlier location; if the intention to abandon has been formed and once acted upon, the abandonment is as absolute, if it exists for a moment, as though it continued for years. Trevaskis v. Peard, 111 Cal. 599; 44 Pac. 246.

Forfeiture proved how. Forfeiture of a mining claim cannot be established, except upon clear and convincing proof of the failure of the owner to perform the work or to make the improvements to the amount required by law. Goldberg v. Bruschi, 146 Cal. 708; 81 Pac. 23.

Sale proved how. The entry of the sale of a mining claim, made by the recorder of a mining district, in a book kept for the record and transfers of claims, and authorized by the mining customs and laws in force in the district where the claim is situated, is admissible in evidence to prove the sale of the claim, unless objected to: such entry is at least secondary evidence of the sale. St. John v. Kidd, 26 Cal. 263.

Terms defined. The term "forfeiture," as used in our mining customs and codes, means the loss of a right, previously acquired, to mine a particular piece of ground, by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situated; and "abandonment," in its common-law sense, is merely a question of intention, and takes place when the ground is left by the locator, without any intention of returning or making any future use of it, independently of any mining rule or regulation. A right to hold and work a mining claim, when acquired, may be lost by a failure or neglect to comply with the rules and regulations of the miners, relative to the acquisition and tenure of claims, in force in the bar or diggings where the claim is located; and if such rules and regulations are not complied with by those holding claims in the district, the ground becomes once more open to the occupation of the next comer. St. John v. Kidd, 26 Cal. 263.

CODE COMMISSIONERS' NOTE. The power of miners to make rules and regulations was sustained in English v. Johnson, 17 Cal. 107; 76 Am. Dec. 574; see also Pralus v. Jefferson Gold etc. Mining Co., 34 Cal. 558; Pralus v. Pacific Gold etc. Mining Co., 35 Cal. 30. The act of 1859 (chap. 97), respecting the mines; the Practice Act of 1851 (§ 621), relative to proof in actions respecting mining claims; the act of 1852, relative to possessory actions, commented on, and the conclusion reached, that, so far as they touched the question of a license from the state to mine, they relate to public lands alone. Biddle Boggs v. Merced Mining Co., 14 Cal. 279. Where parol evidence is given of certain regulations of miners, and it does not appear until the cross-examination of the witness that the regulations were in writing, the course to pursue, if any objection is taken to the evidence, is by motion to strike it out. Kiler v. Kimbal, 10 Cal. 267. Mining laws are to be construed by the court, and the question whether by such laws a forfeiture had accrued, is a question of law, and cannot be properly submitted to a jury. Fairbanks v. Woodhouse, 6 Cal. 433. Where a party's rights to a mining claim are fixed by the rules of property, part of the general law of the land, they cannot be divested by any mere neighborhood custom or regulation. Waring v. Crow, 11 Cal. 366. The quantity of ground a miner can claim by location or prior appropriation, for mining purposes, may be limited by the mining rules of the district. Prosser v. Parks, 18 Cal. 47; English v. Johnson, 17 Cal. 107; 76 Am. Dec. 574. But the quantity he can acquire by purchase cannot be limited. Prosser v. Parks, 18 Cal. 47. The fact that mining laws and regulations were passed on a different day from that advertised for a meeting of miners, does not invalidate them. The court will not inquire into the regularity of the modes in which these local legislatures or primary assemblages act. They must be the judges of their own proceedings. It is sufficient that the miners agree, whether in public meeting or after due notice, upon their local laws, and that these are recognized as the rules of the vicinage, unless fraud be shown or other like cause for rejecting the laws. Gore v. McBrayer, 18 Cal. 582. If a mining custom allows one to locate a lode or vein for himself and others, by placing thereon a notice, with his own name and the names of the others appended thereto, designating the extent of his claim; and one person thus locates a lode for himself and several others, some of whom have no knowledge of the location, the persons who have no knowledge of the location by the same become tenants in common with the locator and the others, and cannot be divested of their interest by the locators afterwards tearing down the notice and posting up another, omitting their names, unless this is done with their knowledge and consent. Morton v. Solambo Copper Mining Co., 26 Cal. 527; Gore v. McBrayer, 18 Cal. 582. A local mining regulation or custom, adopted after the location of a mine, cannot limit the extent of a claim previously located. Table Mountain Tunnel Co. v. Stranahan, 31 Cal. 387. Where the original records have been destroyed by fire, and the miners, by a resolution subsequently passed, requiring the claims to be re-recorded in a new book, such book is admissible in evidence in the trial of an action for a mining claim, to show that the rules of the vicinage have been

complied with. McGarrity v. Byington, 12 Cal. 426. Plaintiffs having offered in evidence the book where mining claims are recorded according to mining rules, to show title in the original locators, then offered the entry in that book of the transfer of said claims from such locators to the lessors of plaintiffs, as proof of the fact of transfer. The court properly excluded this entry until proof aliunde of the transfer. Attwood v. Fricot, 17 Cal. 37; 76 Am. Dec. 567. Upon the question of reasonableness of the extent of a mining location, a general custom, existing anterior to the location, may be given in evidence. Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198. Controversies affecting a mining right must be solved and determined by the customs and usages of the bar or diggings embracing the claim to which such right is asserted or denied, whether such customs and usages are written or unwritten. Morton v. Solambo Copper Mining Co., 26 Cal. 527.

§ 749. [Related to mode of service in actions relating to real property. Repealed.]

Legislation § 749. **1.** Added by Stats. **1891,** p. 278 (erroneously numbered 149), approved March 31, 1891.

2. Repeal by Stats. **1901,** p. 160; unconstitutional. See note ante, § 5.

3. Repealed by Stats. **1907,** p. 686; the code commissioner saying, "This section is hereby repealed because it has been made superfluous by the late amendments to § 412 of the Code of Civil Procedure. Moreover, there are two sections 749 in the code, one enacted in 1891 and the other in 1900 [1901]. They do not supersede each other[,] under the principle of Ex parte Ruffin, 119 Cal. 487. The superfluous one is here repealed, leaving the other in force."

§ 749. Determination of adverse claims to real property. Unknown defendants. Lis pendens. An action may be brought to determine the adverse claims to and clouds upon title to real property by a person who, by himself or by himself and his predecessors in interest, has been in the actual, exclusive and adverse possession of such property continuously for twenty years prior to the filing of the complaint, claiming to own the same in fee against the whole world, and who has paid all taxes of every kind levied or assessed against the property during the period of five years continuously next preceding the filing of the complaint. Said action shall be commenced by the filing of a verified complaint averring the matters above enumerated. The said complaint may include as defendants in such action, in addition to such persons as appear of record to have, all other persons who are known to the plaintiff to have, some claim or cloud on the lands described in the complaint adverse to plaintiff's ownership, or other persons unknown claiming any right, interest or lien in such lands, or cloud upon the title of plaintiff thereto, and the plaintiff may describe such unknown defendants in the complaint as follows: "also all other persons unknown, claiming any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto." Within ten days after the filing of the complaint, plaintiff shall file, or cause to be filed, in the office of the county recorder of the county where the property is situated, a notice of the pendency of the action, containing the matters required by section four hundred and nine of this code.

Legislation § 749. **1.** Added by Stats. **1901,** p. 579, and then read: "If, in an action to determine an adverse claim to real property, it appears by a verified complaint that the plaintiff, or the plaintiff and his predecessors in interest, have been for twenty years prior to filing such complaint, in the actual and exclusive possession of such property in his or their own right, holding and claiming the same adversely to all other persons, and that, in addition to the defendant named in the complaint, there is or may be some other person or persons whose names are unknown to him, who claim some estate or interest in such property adversely to him, the clerk must issue a summons which must contain the matters required by section four hundred and seven, and, in addition thereto, a description of the property, and a direction that all persons claiming any estate or interest therein, appear and answer the complaint within thirty days after the service thereof."

2. Amended by Stats. **1903,** p. 104. See ante, Legislation § 749.

Construction of section. Whether or not an action is a proceeding under this section and §§ 750 and 751, post, is to be determined from the terms of the sections. Los Angeles v. Los Angeles Farming etc. Co., 150 Cal. 647; 89 Pac. 615.

Service by publication, effect of. In an action relating to real property, summons may be served by publication, but the jurisdiction acquired is in rem. Murray v. Murray, 115 Cal. 266; 56 Am. St. Rep. 97; 37 L. R. A. 626; 47 Pac. 37.

Substituted service as to unknown claimants. Courts have jurisdiction to declare

title to real property within the state to be vested in the plaintiff as against other claimants, known or unknown, upon substituted service: unknown claimants cannot be dealt with by personal service. Title etc. Restoration Co. v. Kerrigan, 150 Cal. 289; 119 Am. St. Rep. 199; 8 L. R. A. (N. S.) 692; 88 Pac. 356.

Estoppel against defendant voluntarily appearing. A defendant sued under a fictitious name, who appears and answers, is bound by the judgment, although his true name was never inserted in the record; and one who voluntarily appears in an action to quiet title cannot complain that a notice of lis pendens was not filed; and such omission cannot affect the court's jurisdiction over the subject-matter of the action. Blackburn v. Bucksport etc. R. R. Co., 7 Cal. App. 649; 95 Pac. 668. A complaint to determine adverse claims to realty, in the usual form, alleging that the title to the land is in the plaintiff, and that the defendants, without right, make some claim thereto adversely to the plaintiff's title and estate, but which does not have the necessary allegations required by this section and §§ 750 and 751, post, sufficiently states a cause of action under § 738, ante, but not under this section and §§ 750, 751, post. Los Angeles v. Los Angeles Farming etc. Co., 150 Cal. 647; 89 Pac. 615.

Action to quiet title against unknown owners. See note 87 Am. St. Rep. 366.

Whether ancestor must have been in possession to give heirs the benefit of his color of title. See note 42 L. R. A. (N. S.) 403.

§ 750. Summons; service, and proof of service. Publication of summons. Within one year after the filing of the complaint, as required by the preceding section, a summons must be issued, which shall contain the matters required by section four hundred and seven of this code, and in addition a description of the property and a statement of the object of the action. In said summons the said unknown defendants shall be designated as in the complaint. Within thirty days after the issuance of the summons, the plaintiff shall post or cause to be posted a copy thereof in a conspicuous place on the property. All defendants residing in the state of California, whose place of residence is known to the plaintiff, shall be served personally. After service on all such defendants has been made, the plaintiff, or his agent, or attorney, shall make and file an affidavit wherein there shall be stated the names of the defendants who have been served personally, the names of the defendants who reside out of the state and their places of residence, if known to the plaintiff, and the names of the defendants residing in or out of the state whose place of residence is unknown to the plaintiff, and thereupon the court or a judge thereof shall make an order directing the said summons to be served upon the defendants residing out of the state, whose place of residence is known to the plaintiff and upon the defendants residing in or out of the state, whose place of residence is unknown to the plaintiff, and upon all the unknown defendants as stated in the complaint and summons, by publication in some newspaper of general circulation printed and published in the county where the property is situated, and if there be no such paper in such county, then in some adjoining county, to be designated by the court or judge thereof, which publication shall be for once a week for two successive months. A copy of the summons and complaint, within ten days after the making of said order, properly addressed and with the postage thereon fully prepaid, shall be mailed to each of the defendants who reside out of the state, at their place of residence, if known, and also to the defendants residing in or out of the state whose place of residence is unknown to plaintiff, addressed to them at the county seat of the county where the action is commenced. All such unknown persons so served shall have the same rights as are provided by law in cases of all other defendants named, upon whom service is made by publication, or personally, and the action shall proceed against such unknown

persons in the same manner as against the defendants who are named upon whom service is made by publication or personally and with like effect; and any such unknown person who has or claims to have any right, title, estate, lien or interest in the said property, or cloud on the title thereto, adverse to plaintiff, at the time of the commencement of the action, who has been duly served as aforesaid, and any one claiming under him, shall be concluded by the judgment in such action as effectually as if the action was brought against the said person by his or her name and personal service of process was obtained, notwithstanding any such unknown person may be under legal disability. Service shall be deemed complete upon the completion of the publication.

Publication of summons. See ante, § 412.

Legislation § 750. 1. Added by Stats. **1901,** p. 579, and then read: "The court, at any time after the issuing of the summons mentioned in the preceding section, may make an order that it be served as against all unknown owners and all persons not named in the complaint who claim any estate or interest in the property, by posting a copy thereof in a conspicuous place on such property, and by publication for the time and in the manner designated in section four hundred and thirteen. With respect to the defendants whose names are stated in the complaint, the summons must be served as in other cases."

2. Amended by Stats. **1903,** p. 105.

Jurisdiction upon constructive service of process against a non-resident as to lands within state. See note 29 L. R. A. (N. S.) 625.

§ 751. Judgment must not be entered by default. When entered, is conclusive. Remedy is cumulative. When the summons has been served as provided in the preceding section and the time for answering has expired, the court shall proceed to hear the case as in other cases and shall have jurisdiction to examine into and determine the legality of plaintiff's title and of the title and claim of all the defendants and of all unknown persons, and to that end must not enter any judgment by default, but must in all cases require evidence of plaintiff's title and possession and hear such evidence as may be offered respecting the claims and title of any of the defendants and must thereafter direct judgment to be entered in accordance with the evidence and the law. The court before proceeding to hear the case must require proof to be made that the summons has been served and posted as hereinbefore directed and that the required notice of pendency of action has been filed. The judgment after it has become final is conclusive against all the persons named in the summons and complaint who have been served and against all unknown persons as stated in the complaint and summons who have been served by publication, but shall not be conclusive against the state of California or the United States. Said judgment shall have the effect of a judgment in rem except as against the state of California and the United States; and provided further, that the said judgment shall not bind or be conclusive against any person claiming any estate, title, right, possession or lien to the property under the plaintiff or his predecessors in interest, which claim, lien, estate or right of possession has arisen or been created by the plaintiff or his predecessors in interest within twenty years prior to the filing of the complaint. The remedy provided in this and the two preceding sections shall be construed as cumulative and not exclusive of any other remedy, form or right of action or proceeding now allowed by law.

Decrees affecting realty, to be recorded. See Pol. Code, § 4134.

Legislation § 751. 1. Added by Stats. **1901,** p. 579, and then read: "When summons has been served as provided in the preceding section and the time for answering has expired, the court has jurisdiction to examine into and determine the legality of plaintiff's title and of the title and claim of all unknown claimants and of all other persons, and to that end must not enter any judgment by default, but must, in all cases, require evidence of the plaintiff's title and possession and hear such evidence as may be offered respect-

ing the claim and title of any other person and must thereafter direct judgment to be entered in accordance with the evidence. The judgment when entered is conclusive against all the parties named in the summons and upon whom it has been served, and also against all unknown claimants and all other persons, other than this state or the United States, and excepting persons whose title or estate is disclosed by the records in the office of the county recorder of the county wherein the property is situated, and who have not been made parties to the action."

2. Amended by Stats. **1903**, p. 106.

Judgment in suit to quiet title. See note 1 Am. St. Rep. 265.

CHAPTER IV.

ACTIONS FOR PARTITION OF REAL PROPERTY.

§ 752. Who may bring actions for partition.
§ 753. Interests of all parties must be set forth in the complaint.
§ 754. Lienholders not of record need not be made parties.
§ 755. Plaintiff must file notice of lis pendens.
§ 756. Summons. To whom directed, and must contain what.
§ 757. Unknown parties may be served by publication.
§ 758. Answer of defendants. What to contain.
§ 759. Rights of all parties may be put in issue and determined in action.
§ 760. Partial partition.
§ 761. Rights of lienholders. Appointment of referee.
§ 762. Lienholders must be notified to appear before the referee appointed.
§ 763. Partition of real property. Referees. In incorporated city. Action of court. Sale. Deed. In case of death of party. Attorney's fees.
§ 764. Partition must be according to rights of parties. Sale of undivided interests. Allotment of shares of each party.
§ 765. Referees must make a report of their proceedings.
§ 766. Court may confirm, etc., report. Judgment binding on whom.
§ 767. Judgment not to affect tenants for years to the whole property.
§ 768. Expenses of partition must be apportioned among the parties.
§ 769. A lien on an undivided interest of any party is a charge only on the share assigned to such party.
§ 770. Estate for life or years may be set off in a part of the property not sold, when not all sold.
§ 771. Application of proceeds of sale of encumbered property.
§ 772. Party holding other securities may be required first to exhaust them.
§ 773. Proceeds of sale, disposition of.
§ 774. When paid into court, cause may be continued for determination of claims of parties.
§ 775. Sales by referees may be public or private.
§ 776. Court must direct terms of sale or credit.
§ 777. Referees may take securities for purchase-money.
§ 778. Tenant whose estate has been sold shall receive compensation.
§ 779. Court may fix such compensation.
§ 780. Court must protect tenants unknown.
§ 781. Court must ascertain and secure the value of future contingent or vested interests.
§ 782. Terms of sale must be made known at the time. Lots must be sold separately.
§ 783. Who may not be purchasers.
§ 784. Referees must make report of sale to court. Confirmation or rejection of sale.
§ 785. If sale confirmed, order must be made to execute conveyances.
§ 786. Proceeding if a lienholder becomes a purchaser.
§ 787. Conveyances must be recorded, and will be a bar against parties.
§ 788. Proceeds of sale belonging to parties unknown must be invested for their benefit.
§ 789. Investment must be made in the name of the clerk of the county.
§ 790. When the interests of the parties are ascertained, securities must be taken in their names.
§ 791. Duties of the clerk making investments.
§ 792. When unequal partition is ordered, compensation may be adjudged in certain cases.
§ 793. The share of an infant may be paid to his guardian.
§ 794. The guardian of an insane person may receive the proceeds of such party's interest.
§ 795. Guardian may consent to partition without action, and execute releases. [Repealed.]
§ 796. Costs of partition a lien upon shares of parceners.
§ 797. Court, by consent, may appoint single referee. [Repealed.]
§ 798. Apportionment of expenses of litigation.
§ 799. Abstract of title in action for partition. When cost of, allowed.
§ 800. Abstract, how made and verified.
§ 801. Interest allowed on disbursements made under direction of the court.

§ 752. Who may bring actions for partition. When several co-tenants hold and are in possession of real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners.

Partition of dominant tenements. Easements. Civ. Code, § 807.

Intervention. Ante, § 387.

Legislation § 752. 1. Enacted March 11, **1872**; re-enactment of Practice Act, § 264, as amended by Stats. 1865–66, p. 704.

2. Amendment by Stats. **1901**, p. 160; unconstitutional. See note ante, § 5.

Construction of section. The operation of the action of partition, as known at the common law, has been greatly enlarged. Buhrmeister v. Buhrmeister, 10 Cal. App. 392; 102 Pac. 221. The whole scope and tenor of the statute relating to the parti-

tion of lands show that the intention was to make the one judgment of partition final and conclusive on all persons interested in the property, or any part of it, of whom the court could acquire jurisdiction; such actions, though regulated to a great extent by the statute, partake more fully of the principles and rules of equity than those of law, both in respect to the mode of procedure prescribed and the remedies provided. Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139. There is nothing in the law that requires the whole of a Mexican grant to be included in a partition suit: all that is required is, that the land sought to be partitioned comes within the description given in this section. Adams v. Hopkins, 144 Cal. 19; 77 Pac. 712; 69 Pac. 228.

Purpose of proceeding. The purpose of an action for partition is to enable the co-tenants to enjoy the possession in severalty, and not to be compelled to submit to joint possession. Mills v. Stump, 20 Cal. App. 84; 128 Pac. 349. The provision of the code being that the title of the respective parties of any portion of the land may be determined in an action of partition, there is no reason why the determination should not be as conclusive as it would be if made in an action brought for the sole purpose of its determination. Martin v. Walker, 58 Cal. 590. The action of partition was not intended to try the title to the land, and where possession cannot be effected as the result of the partition, there is no necessity for making it. Mills v. Stump, 20 Cal. App. 84; 128 Pac. 349. A proceeding in partition answers the double purpose of dividing the land and settling the title; and the mere fact of an adverse holding by the defendant constitutes no objection to the proceeding. Martin v. Walker, 58 Cal. 590.

Jurisdiction. The probate court has no jurisdiction to make partition of real estate, except in the course of the settlement of the estates of deceased persons, and for the purpose of distribution to the heirs or devisees of such estates. Richardson v. Loupe, 80 Cal. 490; 22 Pac. 227. Where persons are tenants in common with an estate, or its distributees, and they do not deraign their title through the estate, the superior court only has jurisdiction to make partition. Richardson v. Loupe, 80 Cal. 490; 22 Pac. 227.

Who may bring action. Only the co-tenants mentioned in this section, who hold and are in possession, can bring an action for partition, and only the real property thus held by them can be partitioned; the co-tenancy is that which gives the right to a partition; several persons together may own a thing without being co-tenants thereof, and, in such a case, under a statute like ours, no partition can be had. Jameson v. Hayward, 106 Cal. 682; 46 Am. St. Rep. 268; 39 Pac. 1078. A co-tenant not in possession can maintain a suit in partition against a co-tenant whose possession is adverse and hostile. Martin v. Walker, 58 Cal. 590; Varni v. Devoto, 10 Cal. App. 304; 101 Pac. 934. The right of a tenant in common to maintain an action for partition is not affected by the lien of a mortgage upon his share, which may be discharged at any time by payment of the debt secured; nor is it affected by a prior trust in the land, created by all of the tenants in common, which, if valid, has terminated in the cessation of the estate of the trustee therein. Gardiner v. Cord, 145 Cal. 157; 78 Pac. 544. Where there is no adverse possession against a tenant in common by any of his co-tenants, or if possession was had by a trustee, it was as much the possession of the plaintiff as of the other co-tenants, and there was no possession such as to put the plaintiff on inquiry, and no open repudiation of any trust by the trustee to the knowledge of the plaintiff, he is not barred from bringing his action in partition. Watson v. Sutro, 86 Cal. 500; 24 Pac. 172; 25 Pac. 64. This section gives to any one or more of several co-tenants of real property a right of action for its partition according to the respective rights of the persons interested therein, and for a sale of said property if partition cannot be had; and in the succeeding sections provision is made for ascertaining the respective rights of the parties to the action, and for the satisfaction or other disposition of any liens thereon; and, although a party may, by some act or agreement on his part, estop himself from enforcing his right to a partition, the mere fact that his interest in the land is subject to a lien or encumbrance will not, of itself, operate as such estoppel. Gardiner v. Cord, 145 Cal. 157; 78 Pac. 544. An action in partition should be brought in the name of the real party in interest; and a holder under a conveyance by one tenant in common of a specific parcel of the common lands, as well as the co-tenants of his grantor, should be made a party to such action. Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139. An action for partition may be maintained by the owner of an equitable title; such a title is real property and an estate of inheritance, which may descend or be conveyed by the owner; and as legal and equitable remedies may be had in the same case, the owner of the equitable title to an undivided interest in land may sue to establish his right, and to obtain a partition of the common estate. Watson v. Sutro, 86 Cal. 500; 24 Pac. 172; 25 Pac. 64. The owner of an equitable title to an undivided interest may sue to establish

his right, and to obtain a division of the common estate. Varni v. Devoto, 10 Cal. App. 304; 101 Pac. 934. The administrator of an estate has no such interest in the land of the deceased as to entitle him to institute partition proceedings; he cannot represent either side in a contest between heirs, devisees, or legatees; and the language of the court in Bath v. Valdez, 70 Cal. 350, is clearly obiter dictum, where it is said that actions may be maintained by the administrator of an estate for the partition thereof; the intent of § 1581, post, is, not to give the administrator the right to sue for partition of the estate, but to give to the heirs and devisees the benefit of the administrator's possession for the purpose of their maintaining the actions described in that section, including suits by them for partition of the estate. Ryer v. Fletcher Ryer Co., 126 Cal. 482; 58 Pac. 908. If a purchaser of timber standing on land has ten years in which to remove it, but fails to do so, a court of equity, upon a showing by the owner that the land is valueless to him so long as the timber remains thereon, but would be valuable if it were removed, has power to accomplish a segregation and beneficial appropriation of the respective interests in the property to the respective owners. Gibbs v. Peterson, 163 Cal. 758; 127 Pac. 62.

Necessary parties. Where partition is had of several tracts in one action, all parties must be co-tenants of each tract; otherwise there would be a misjoinder of causes of action. Middlecoff v. Cronise, 155 Cal. 185; 17 Ann. Cas. 1159; 100 Pac. 232. A mortgagee, who has no lien when an action of partition is commenced, need not be made a party. Towle Bros. v. Quinn, 141 Cal. 382; 74 Pac. 1046. The grantee of a special location occupies, as to such location, the identical position that his grantor held immediately before the execution of the conveyance; hence, the holder of such special location is a necessary party to an action for the partition of the general tract. Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139.

Complaint, sufficiency of. A complaint in an action for partition must aver that the co-tenants hold and are in possession of the real property as joint tenants or as tenants in common, in which property one or more of them have an estate of inheritance, or for life or lives, or for years; and if these averments are not made, it does not state facts sufficient to constitute a cause of action. Bradley v. Harkness, 26 Cal. 69.

Action when defendant is out of possession. The fact that the defendant was out of possession when the action was commenced, is not material, where the judgment, under the authority of § 759, post, determines the rights of the parties, as though each were in possession. Buhrmeister v. Buhrmeister, 10 Cal. App. 392; 102 Pac. 221.

Partition in one or several actions. Partition may be had, in one action, of two or more tracts of land, though such tracts are situated in different counties; such suit being maintainable in any county in which a part of the property is situated. Middlecoff v. Cronise, 155 Cal. 185; 17 Ann. Cas. 1159; 100 Pac. 232. Real and personal property may be partitioned separately, where it does not appear that such a course will greatly prejudice the owners. Woodward v. Raum, 3 Cal. Unrep. 734; 31 Pac. 930. The fact that the rights of adverse occupants of the land sought to be partitioned may be put in issue, tried, and determined, does not affect the question of joinder as to different tracts of land. Middlecoff v. Cronise, 155 Cal. 185; 17 Ann. Cas. 1159; 100 Pac. 232.

Estate or interest not subject to partition. The grant of an undivided interest in mining-ground, expressly conditioned that no rights are conveyed, except a mining right upon the premises, vests in the vendee only the right of taking from the land any minerals contained in it to the extent of the interest granted; the vendee does not, by virtue of the conveyance, become a coparcener, joint tenant, or tenant in common, with the vendor, in the land itself; and his interest is not an estate which can be the subject of an action for partition. Smith v. Cooley, 65 Cal. 46; 2 Pac. 880. A right to the use of state lands for oyster-beds is not a subject of partition. Darbee & Immel Oyster etc. Co. v. Pacific Oyster Co., 150 Cal. 392; 119 Am. St. Rep. 227; 88 Pac. 1090. There can be no partition of a homestead by either party. Hannon v. Southern Pacific R. R. Co., 12 Cal. App. 350; 107 Pac. 335; Mills v. Stump, 20 Cal. App. 84; 128 Pac. 349.

Effect of conveyance by co-tenant. One co-tenant cannot, by a conveyance of his interest in a portion of the property held in common, prejudice the rights of his co-tenants. Middlecoff v. Cronise, 155 Cal. 185; 17 Ann. Cas. 1159; 100 Pac. 232. One tenant in common cannot appropriate to himself any particular parcel of the general tract; as, upon a partition, which may be claimed by the co-tenants at any time, the parcel may be set apart in severalty to a co-tenant; he cannot defeat this possible result whilst retaining his interest; not being able to invest his grantee with rights greater than his own, such grantee would take subject to the contingency of the loss of the premises, if, upon the partition of the general tract, they should not be allotted to the grantor. Stark v. Barrett, 15 Cal. 362; Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139. A conveyance by one tenant in common,

or any number of them less than the whole, of a specific portion of the common lands, is not void, but cannot be made to the prejudice of the tenants not uniting in the conveyance; the grantee at such sale acquires all the interest of his grantor in such special tract, which interest is a tenancy in the special tract with the co-tenants of his grantor. Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139.

Tenants in common, who are. The joint proprietors of water-ditches in the mining districts, in the absence of any special facts constituting them something else, are tenants in common of real estate, and their rights in the ditches and in sales of water are governed by the laws of tenancy in common. Bradley v. Harkness, 26 Cal. 69.

Co-tenancy and copartnership differentiated. A tenancy in common results from a rule of law, by which it is controlled and governed, and each co-tenant sells or encumbers his interest at pleasure, regardless of the knowledge or consent or wishes of co-proprietors, without affecting the legal relation existing between them, beyond the going out of one and the coming in of another; a copartnership is the result of an agreement between the parties, and one of the firm cannot sell his interest in the same, nor can a stranger buy the same, at pleasure; and where such purchase or sale is made with the consent of the firm, it works a dissolution of the partnership, and necessitates the final closing out and settlement of the old firm. Bradley v. Harkness, 26 Cal. 69.

Real property, defined. The "real property" referred to in this section, is that as to which such unity of title exists as authorizes a single action. Middlecoff v. Cronise, 155 Cal. 185; 17 Ann. Cas. 1159; 100 Pac. 232.

Who may compel partition. See note 67 Am. Dec. 703.

Partition of mines. See note 9 Am. St. Rep. 884.

Whether partition must include all the lands of the co-tenancy. See note 114 Am. St. Rep. 80.

Right to partition more than one parcel of realty in single action. See note 17 Ann. Cas. 1163.

Power of court to partition land in another jurisdiction. See notes Ann. Cas. 1912B, 991; 69 L. R. A. 692; 23 L. R. A. (N. S.) 924; 27 L. R. A. (N. S.) 420.

Right of tenant in common to partition of property in which he has life estate only. See note 11 Ann. Cas. 1040.

Right to partition of property held in trust. See note Ann. Cas. 1912C, 327.

Right of one out of possession to partition. See note 20 L. R. A. 624.

Partition between tenants by entireties. See notes 30 L. R. A. 335; 42 L. R. A. (N. S.) 98.

Right of partition among remaindermen pending life estate. See note 28 L. R. A. (N. S.) 125.

CODE COMMISSIONERS' NOTE. 1. Generally. See Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139. The right may be exercised at any time. Stark v. Barrett, 15 Cal. 361. The proceeding is a special one, and the statute prescribes its course and effect; and though, after jurisdiction has attached, errors in the course of the cause cannot be collaterally shown to impeach a judgment, yet, so far at least as the rights of infants are involved, the court has no jurisdiction except over the matter of partition. Waterman v. Lawrence, 19 Cal. 210; 79 Am. Dec. 212. Rule for partition in respect to improvements. Seale v. Soto, 35 Cal. 102. Partition among tenants in common must be of the whole tract. One tenant cannot have partition of part only of the entire common property. Sutter v. San Francisco, 36 Cal. 112. If the court finds that the parties hold and are in possession as joint tenants or as tenants in common, and that one or more of them have an estate of inheritance, or for life, or lives, or for years, the partition should be made, although the findings may also show that the plaintiff, in his complaint, has incorrectly set forth the title or interest of the parties, or of one or more of them, in the land. De Uprey v. De Uprey, 27 Cal. 331; 87 Am. Dec. 81. A tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his co-tenant in possession to account for rents and profits received by him from tenants of premises. State v. Poulterer, 16 Cal. 514. Corporations cannot together hold as joint tenants. De Witt v. San Francisco, 2 Cal. 289.

2. **Water.** Where the action is for partition of a water-ditch, an account of the proceeds for water rates can be taken, and if one of the tenants in common holds a mortgage on the interests of his co-tenants, that can be adjusted in the action, by an application of the proceeds of the mortgagor's interest towards the payment of the same. Bradley v. Harkness, 26 Cal. 69. Water flowing in a ditch cannot be partitioned mechanically. McGillivray v. Evans, 27 Cal. 96.

3. **Mining claims** may be partitioned as other real property, and the fact that a mining claim is owned and worked by several persons as partners, is no valid objection to a partition of the same, if the answer does not set up, and it is not shown, that a suit in equity is necessary to settle the accounts and adjust the business of the partnership; and all the material allegations in a complaint for partition of real property, which are not denied by the answer, are deemed admitted for the purpose of the trial. Hughes v. Devlin, 23 Cal. 501.

4. **Parol partition.** A parol partition may be made by co-owners under the Mexican law, as well as by tenants in common under the common law. In order to uphold a parol partition under both the Spanish and common law, it must satisfactorily appear that there was not only an agreement to make the partition, but that it was executed and followed up by a several possession, by either the parties themselves or their grantees. Long v. Dollarhide, 24 Cal. 222; Elias v. Verdugo, 27 Cal. 420; Carpentier v. Thirston, 24 Cal. 280. If an attorney in fact, not authorized, make partition, the principal may ratify it, either expressly or by implication. Borel v. Rolins, 30 Cal. 408.

§ 753. Interests of all parties must be set forth in the complaint. The interests of all persons in the property, whether such persons are known or unknown, must be set forth in the complaint, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, is unknown to the plaintiff, or is uncertain or contingent, or the ownership of the inheritance depends upon an executory

devise, or the remainder is a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

Complaint in partition.
1. Generally. Ante, § 426.
2. Parties. Post, § 754; ante, §§ 384, 387.
Unknown persons.
1. Use of fictitious names. Ante, § 474.
2. Summons. Post, § 756.
Abstract of title, procured before suit. Post, § 799.

Legislation § 753. **1.** Enacted March 11, **1872** (based on Practice Act, § 265), changing "shall" to "must," in both instances.
2. Amendment by Stats. **1901**, p. 160; unconstitutional. See note ante, § 5.
3. Amended by Stats. **1907**, p. 603, changing (1) "be" to "are" before "known," and to "is" before "unknown," before "uncertain," and after "remainder"; (2) changing "depend" to "depends"; and (3) omitting the words "specifically and particularly" after "in the complaint"; the code commissioner saying, "Omits the words 'specifically and particularly,' so that a general statement of the interests of the respective parties will be sufficient."

Setting forth interests of all parties. An action for partition, under our statute, is, to some extent, sui generis: the parties named in the complaint, whether as plaintiffs or defendants, are all actors, each representing his own interest. Morenhout v. Higuera, 32 Cal. 289. In an action under this section, the plaintiff is required to set forth the interests of all parties, known or unknown, so far as they are known to him, and each defendant is required to set forth in his answer, fully and particularly, the nature and extent of his interests (De Uprey v. De Uprey, 27 Cal. 330; 87 Am. Dec. 81); but it would be idle to require the plaintiff to set forth interests specifically, of the character and extent of which he is ignorant. Morenhout v. Higuera, 32 Cal. 289. All the interests of all persons in the property must be set forth, as far as known to the plaintiff: the nature of the action makes the bringing in of a new party matter of substance. San Diego Sav. Bank v. Goodsell, 137 Cal. 420; 70 Pac. 299. Where a wife claims a homestead right or an interest in the premises, she is not only a proper but a necessary party to partition proceedings. De Uprey v. De Uprey, 27 Cal. 330; 87 Am. Dec. 81.

Sufficiency of complaint. In a complaint to obtain a partition of land, a general allegation, that the premises cannot be divided by metes and bounds without prejudice, is sufficient; a complaint is good, which is silent upon the subject of the mode of partition; and whether partition can or cannot be made by metes and bounds, is the only necessary averment in the complaint, as that is purely a question of fact, and the ultimate fact to be found; the constituent facts, or those which lie behind, are probative, and need not be averred. De Uprey v. De Uprey, 27 Cal. 329; 87 Am. Dec. 81.

Persons interested. All interested persons, to be bound by the judgment, must be made parties in partition. Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139; Hancock v. Lopez, 53 Cal. 362; Martin v. Walker, 58 Cal. 590. Where an action is brought as authorized by this section, for the benefit of all persons interested in the estate, all are actors from its commencement. Adams v. Hopkins, 69 Pac. 228.

Joinder of several parcels. Where one co-tenant has conveyed his interest, the whole property originally held in common by the co-tenants may be partitioned, although a necessary party defendant may be a co-tenant as to only one of the parcels involved. Middlecoff v. Cronise, 155 Cal. 185; 17 Ann. Cas. 1159; 100 Pac. 232. The question of joinder, in partition, as to different tracts of land, is not affected by the fact that the rights of adverse occupants of the land sought to be partitioned may be put in issue, tried, and determined. Middlecoff v. Cronise, 155 Cal. 185; 17 Ann. Cas. 1159; 100 Pac. 232.

CODE COMMISSIONERS' NOTE. If the complaint does not fully state the origin, nature, or extent of the interest of the plaintiff, the objection must be taken by demurrer, or it is waived. Broad v. Broad, 40 Cal. 493. An action for partition under our code is to some extent sui generis. The parties named in the complaint, whether as plaintiffs or defendants, are all actors, each representing his own interest. Whether plaintiffs or defendants, they are required to set forth fully and particularly the origin, nature, and extent of their interests in the property, and the interests of each and all may be put in issue by the others and tried. Morenhout v. Higuera, 32 Cal. 295; Senter v. Bernal, 38 Cal. 642. All the tenants in common should be made parties. All grantees of original owners should be joined as parties. Sutter v. San Francisco, 36 Cal. 112. If the wife claim a homestead right, she is a proper party. De Uprey v. De Uprey, 27 Cal. 331; 87 Am. Dec. 81. A tenant in common of part of a tract of land is a proper party in a suit for partition of the whole. Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139; Dutton v. Warschauer, 21 Cal. 609; 82 Am. Dec. 765; Hathaway v. De Soto, 21 Cal. 191. The complaint must aver that the co-tenants hold and are in possession of real property as joint tenants, or as tenants in common, in which property one or more of them have an estate of inheritance, or for life or lives, or for years; and if these averments are not made, it does not state facts sufficient to constitute a cause of action. Bradley v. Harkness, 26 Cal. 76. A general allegation of "the premises cannot be divided by metes and bounds without prejudice," is sufficient, without an allegation of the facts upon which the plaintiff is to obtain a particular mode of partition. De Uprey v. De Uprey, 27 Cal. 331; 87 Am. Dec. 81.

§ 754. Lienholders not of record need not be made parties. No person having a conveyance of or claiming a lien on the property, or some part of it, need be made a party to the action, unless such conveyance or lien appear of record.

Legislation § 754. Enacted March 11, **1872**; re-enactment of Practice Act, § 266, as amended by Stats. 1866, p. 704.

Scope of section. This section is confined to an action for partition. Unger v. Roper, 53 Cal. 39.

Mortgagee not necessary party when. The plaintiff in a partition suit is not called upon to make a mortgagee a party thereto, where his lien was not of record when the suit was commenced. Towle v. Quinn, 141 Cal. 382; 74 Pac. 1046.

§ 755. Plaintiff must file notice of lis pendens. Immediately after filing the complaint in the superior court, the plaintiff must record in the office of the recorder of the county, or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record all persons shall be deemed to have notice of the pendency of the action.

Lis pendens. Ante, § 409.

Legislation § 755. 1. Enacted March 11, **1872** (based on Practice Act, § 267, as amended by Stats. 1865–66, p. 705), changing "shall" to "must" after "plaintiff," the last sentence then reading, "From the time of the filing, it shall be deemed notice to all."

2. Amended by Code Amdts. **1873–74**, p. 325, (1) after "plaintiff must," the words "file with" were changed to "record in the office of"; (2) the words "either a copy of such complaint or" were omitted before "a notice"; and (3) the last sentence was changed to read as at present.

3. Amended by Code Amdts. **1880**, p. 11, changing "district court" to "superior court."

§ 756. Summons. To whom directed, and must contain what. The summons must contain a description of the property sought to be partitioned, and must be directed to all of the persons named as defendants in the complaint, and when it shows that some person has or claims an interest in or lien upon the property whose name is unknown to the plaintiff, the summons must also be directed to all persons unknown who have or claim any interest in or lien upon the property.

Summons in partition.
1. Generally. Ante, §§ 405–416.
2. Contents. See ante, § 407.

Legislation § 756. 1. Enacted March 11, **1872**; based on Practice Act, § 268, which read: "The summons shall be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise, upon the property, or upon any particular portion thereof; and generally, to all persons unknown, who have or claim any interest in the property." When § 756 was enacted in 1872, "shall" was changed to "must."

2. Amendment by Stats. **1901**, p. 160; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 604; the code commissioner saying, "Simplifies the summons in partition, so as to make it clear that it need not be directed to 'persons unknown,' when the complaint refers to known persons only."

Validity of summons. A summons in an action of partition is not void upon a collateral attack, though it was not issued until after the expiration of a year. Baldwin v. Foster, 157 Cal. 643; 108 Pac. 714.

CODE COMMISSIONERS' NOTE. Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139.

§ 757. Unknown parties may be served by publication. If a party having a share or interest is unknown, or any one of the known parties reside out of the state, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

Service by publication. Ante, §§ 412, 413.

Legislation § 757. 1. Enacted March 11, **1872** (based on Practice Act, § 269), changing "shall" to "must."

2. Amendment by Stats. **1901**, p. 160; unconstitutional. See note ante, § 5.

§ 758. Answer of defendants. What to contain. If the defendant fails to answer within the time allowed by law, he is deemed to admit and adopt the allegations of the complaint. Otherwise, he must controvert such of the allegations of the complaint as he does not wish to be taken as admitted, and must set forth his estate or interest in the property, and if he claims a

lien thereon must state the date and character of the lien and the amount remaining due, and whether he has any additional security therefor, and if so, its nature and extent, and if he fails to disclose such additional security, he must be deemed to have waived his lien on the property to be partitioned.

Answer in partition.
1. Generally. Ante, § 437.
2. Pleading disbursements. Post, § 798.
Notice. Abstract of title. Post, § 799.

Legislation § 758. 1. Enacted March 11, **1872**; based on Practice Act, § 270, as amended by Stats. 1865–66, p. 705, which read: "The defendants who have been personally served with the summons and a copy of the complaint, or who shall have appeared without such service, shall set forth in their answers, fully and particularly, the origin, nature, and extent of their respective interests in the property; and if such defendants claim a lien on the property by mortgage, judgment, or otherwise, they shall correctly state the original amount and date of the same, and the true sum remaining due thereon; also, whether the same has been secured in any other way or not; and if secured, the nature and extent of such security, or they shall be deemed to have waived their right to such lien." When § 758 was enacted in 1872, (1) "shall" was omitted before "have appeared"; (2) "shall" was changed to "must" before "set forth"; (3) "shall correctly" was changed to "must" before "state"; (4) "true" was omitted before "sum"; and (5) "are" was changed from "shall be" before "deemed."

2. Amendment by Stats. **1901**, p. 161; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 604; the code commissioner saying, "The amendment provides that if the defendant fails to answer within the time allowed by law, he is deemed to admit and adopt the allegations of the complaint, thus excusing the defendant from alleging his interest by way of answer, if the complaint sufficiently discloses such interest."

Disclaimer. In an action of partition, a defendant cannot claim that the action be dismissed as to him, on the ground that his answer disclaims any interest in the land, unless he has made the disclaimer in absolute and unconditional terms; his answer disclaiming all interest in the land in dispute, except such as he may have under the homestead law, by virtue of the dedication of the land to homestead uses by himself and his wife, is not a disclaimer. De Uprey v. De Uprey, 27 Cal. 330; 87 Am. Dec. 81.

CODE COMMISSIONERS' NOTE. A defendant is not entitled to have the action dismissed by reason of any defense which he may set up in his answer, or on the ground that his answer disclaims any interest in the land, unless he has made the disclaimer in absolute and unconditional terms. De Uprey v. De Uprey, 27 Cal. 331; 87 Am. Dec. 81. Guardians ad litem, representing infants in a case of partition, have power to defend solely against the claim set up for partition of the common estate. Waterman v. Lawrence, 19 Cal. 210; 79 Am. Dec. 212. See also subd. 1 of note to § 752.

§ 759. Rights of all parties may be put in issue and determined in action. The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court before the sale can be ordered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

Final judgment. Post, § 766.
Parties. Ante, §§ 381, 384; post, § 761.
Intervention. Ante, § 387.

Legislation § 759. 1. Enacted March 11, **1872**; based on Practice Act, § 271, which read: "The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried and determined by such action; and when a sale of the premises is necessary, the title shall be ascertained by proof to the satisfaction of the court, before the judgment of sale shall be made; and where service of the complaint has been made by publication, like proof shall be required of the right of the absent or unknown parties, before such judgment is rendered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves." When § 759 was enacted in 1872, (1) "plaintiff" was substituted for "plaintiffs" and "defendant" for "defendants," (2) "in" for "by" before "such action," (3) "must" for "shall" before "be ascertained," (4) "can" for "shall" before "be made," and (5) "must" for "shall" before "be required."

2. Amendment by Stats. **1901**, p. 161; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 604; the code commissioner saying, "Substituting the words 'sale can be ordered' in place of 'judgment of sale can be made,' and omitting the requirement that proof must be made of the title of absent and unknown parties before judgment can be entered, to avoid the conflict between this section and § 774, referred to in Grant v. Murphy, 116 Cal. 433."

Jurisdiction. The court, in partition proceedings, has jurisdiction to try and determine all issues, whether at law or in equity, and must determine them as part of the proceeding itself. Emeric v. Alvarado, 64 Cal. 529, 629; 2 Pac. 418. This section, and § 774, post, so far as applying to the determination by the court of questions of title as between hostile claimants to any share or parcel, or to the proceeds of the sale thereof, are to be construed as limited to the determination of issues over which the court in which the partition proceedings are pending has jurisdiction, and not as applicable to the determination of hostile claims to the estate of a deceased co-tenant, over which the probate court has exclusive jurisdiction. Grant v. Murphy, 116 Cal. 427; 58 Am. St. Rep. 188; 48 Pac. 481.

Interests, rights, and claims that may be determined. Any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in such action. De Uprey v. De Uprey, 27 Cal. 335; 87 Am. Dec. 81; Morenhout v. Higuera, 32 Cal. 289; Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139; Hancock v. Lopez, 53 Cal. 362; Martin v. Walker, 58 Cal. 590. Where the plaintiffs have set forth the origin, nature, and extent of their interests, the interest of each or all may be put in issue by the others; and if so, such issues are to be first tried and determined, and no partition can be made until the respective interests of all the parties have been ascertained and settled by a trial. Morenhout v. Higuera, 32 Cal. 289. In partition, where the requisite unity of title as to the co-tenants exists, the claims of any and all persons adverse to the co-tenants may be determined and settled: a determination of adverse claims is merely incidental to the action. Middlecoff v. Cronise, 155 Cal. 185; 17 Ann. Cas. 1159; 100 Pac. 232. Even where partition is not maintainable, the proceeding may be retained to settle a dispute as to title. Buhrmeister v. Buhrmeister, 10 Cal. App. 392; 102 Pac. 221.

Mortgage claims. In an action for the partition of a water-ditch, a mortgage claim can be settled and adjusted, and, as collateral to the main question, an account of the water rates can be taken, and the rights of the parties therein respectively ascertained. Bradley v. Harkness, 26 Cal. 69.

Rights of what persons may be determined. In partition, the rights of all parties may be fully inquired into and determined (Martin v. Walker, 58 Cal. 590; Emeric v. Alvarado, 90 Cal. 444; 27 Pac. 356; Buhrmeister v. Buhrmeister, 10 Cal. App. 392; 102 Pac. 221; Varni v. Devoto, 10 Cal. App. 304; 101 Pac. 934); as may also the rights of adverse occupants of land sought to be partitioned. Middlecoff v. Cronise, 155 Cal. 185; 17 Ann. Cas. 1159; 100 Pac. 232; Varni v. Devoto, 10 Cal. App. 304; 101 Pac. 934; Adams v. Hopkins, 144 Cal. 19; 77 Pac. 712; 69 Pac. 228. Where, if a trust was invalid from the beginning, the title and estate of the owners of the land was not affected thereby, and if it was valid, it had terminated, and the estate of the trustee had ceased, the rights of the owners of the land can be adjudicated in a court of equity, or in a proceeding for partition under this section, without the necessity of an actual reconveyance thereof from the trustee. Gardiner v. Cord, 145 Cal. 157; 78 Pac. 544. In an action for partition, where two or more have entered into a fraudulent scheme for the purpose of obtaining property, in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere in behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves. Mitchell v. Cline, 84 Cal. 409; 24 Pac. 164.

Necessary parties defendant. Where a mortgagee had no lien when an action for partition was begun, the plaintiff therein is not bound to make him a party thereto; but such mortgagee may intervene in the suit and set up his mortgage lien, and have it adjusted in the partition decree. Towle v. Quinn, 141 Cal. 382; 74 Pac. 1046.

Averments necessary in answer. Where the defendant in partition proceedings has two deeds, each purporting to convey an undivided two-thirds of the property, and one of them was given as a substitute for the other, that fact must be averred: the statute does not provide that rights such as these may be tried or determined without being put in issue. Miller v. Sharp, 48 Cal. 394.

Findings. In partition proceedings, it is not necessary to find specifically whether there has been an ouster of their co-tenants, on the part of those who successfully plead the statute of limitations: the finding of the ultimate fact, that the statute had run in their favor, is all that is necessary. Adams v. Hopkins, 144 Cal. 19; 77 Pac. 712; 69 Pac. 228.

Possession as affecting proceeding. In partition, if one party is in possession and the other out of possession, the judgment determines the rights of the parties as though each were in possession. Buhrmeister v. Buhrmeister, 10 Cal. App. 392; 102 Pac. 221. An action for partition is not affected by the fact that the complaint shows the adverse possession of a co-tenant. Varni v. Devoto, 10 Cal. App. 304; 101 Pac. 934. Partition may be had subject to temporary possession under a lease. Buhrmeister v. Buhrmeister, 10 Cal. App. 392; 102 Pac. 221.

Effect of conveyance by tenant in common. A tenant in common, after a conveyance of a specific parcel of the general tract, is often mentioned as a tenant in common of the general tract, but this is not true in any sense, nor for any purpose: the remaining tenants in common, in applying for a partition, are entitled to the same relief, in every respect, that they could demand were the special locations remaining in the hands of the tenant in common who conveyed them; and the same would be the case, if, instead of special locations, the tenant in common had conveyed portions of his undivided interest. Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139.

Statute of frauds. An oral agreement, prior to partition, for a right of way across

one of the pieces, concerns an interest in real estate, and is void, under the statute of frauds. Oliver v. Burnett, 10 Cal. App. 403; 102 Pac. 223.

CODE COMMISSIONERS' NOTE. See note to § 753, ante; Morenhout v. Higuera, 32 Cal. 289; De Uprey v. De Uprey, 27 Cal. 331; 87 Am. Dec. 81. Title may be tried in this action. Bollo v. Navarro, 33 Cal. 459.

§ 760. Partial partition. Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties, and sole parties, in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire.

Legislation § 760. Enacted March 11, **1872** (based on Practice Act, § 272, as amended by Stats. 1865–66, p. 705), substituting (1) "is" for "shall have become" before "in the opinion of the court," and (2) "the court may" for "it shall be lawful for the court to"; (3) omitting "to" before "adjudge"; (4) substituting "may" for "to" before "proceed"; and (5) inserting "may" before "allow."

Construction of section. This section makes provision for cases where, by reason of the impracticability or inconvenience of doing otherwise, the court may set apart portions or parcels to co-tenants, subsequently segregating the interests of such co-tenants. Baldwin v. Foster, 157 Cal. 643; 108 Pac. 714. After the court has ascertained who are tenants in common, between whom the land is to be partitioned, it must ascertain and determine the respective rights and interests of each of the tenants in common, and adjudge partition between them according to their respective rights. Emeric v. Alvarado, 64 Cal. 529, 629; 2 Pac. 418; 90 Cal. 444; 27 Pac. 356. This section is intended to allow, and does allow, two partitions,—one between the original co-tenants, and the other between all the parties to the action; after the first partition is made, which is allowed as an aid to accomplish the second one, the court is authorized to proceed, in like manner, to adjudge and make partition separately of each share or portion so ascertained and allotted as between those claiming under the original tenant, to whom the same shall have been so set apart; but there is but one judgment. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418.

Interlocutory decree. Whether, in proceedings by co-tenants for a partition of real property, a partition is to be ordered or a sale directed, it is indispensable that a decree, interlocutory in its character, be first entered, definitely ascertaining the rights and interests of the respective parties in the subject-matter; in case a sale is to be directed, it is impossible for any party, in the absence of such an interlocutory decree, to know whether he is interested in maintaining or in resisting the proceedings. Lorenz v. Jacobs, 53 Cal. 24. In an action for partition, only one interlocutory decree or judgment is provided for by the code; under this section, the court may, as preliminary and ancillary to the judgment, and as an aid in reaching it, ascertain and determine the shares and interests respectively held by the original co-tenants, and cause a partition to be made as if such original co-tenants were the sole parties in interest; it must then proceed to adjudge and determine the share or portion of each party to the cause; an interlocutory decree or judgment may then be made and entered, which shall adjudge and clearly set forth the rights and shares of each of the parties to the action; these shares must be so specified and declared in the decree, that the referees who may be appointed to make the partition may divide and allot the several portions to each of the parties without having to determine any question of title; all such questions must be determined by the court. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. The effect of an interlocutory decree is merely to determine the relative rights of the respective parties to the action in the entire tract, but it does not accomplish any severance of possession: it is thereafter necessary that a partition according to these respective rights shall be made, and the particular share of each party allotted to him; and, until this is done by final judgment, it cannot be known to which of the parties any particular parcel will fall, and therefore, prior to such segregation, there can be no adverse holding of any portion by either party to the action against any of the other parties thereto. Christy v. Spring Valley Water Works, 97 Cal. 21; 31 Pac. 1110.

§ 761. Rights of lienholders. Appointment of referee. If it appears to the court that there are outstanding liens or encumbrances of record upon such real property, or any part thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action, by an amended or supplemental complaint, or appoint a referee to ascertain whether or not such liens or encumbrances have been paid, and if not paid, what amount remains due thereon, and their order among the liens or encumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security.

Legislation § 761. 1. Enacted March 11, **1872** (based on Practice Act, § 273, as amended by Stats. 1862, p. 88), (1) substituting (a) "appears" for "shall appear," in first line, (b) "the" for "said" before "action," (c) "must" for "shall" after "court," (d) "such" for "the said" before "persons," and (2) omitting "said" before "action."

2. Amendment by Stats. **1901**, p. 161; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 604, (1) omitting "by the certificate of the county recorder or county clerk, or by the sworn or verified statement of any person who may have examined or searched the records" after "If it appears to the court"; (2) omitting "or portion" before "thereof"; (3) substituting (a) "amended" for "amendment," and (b) "and" for "or" before "if not paid"; the code commissioner saying, "Omitting after 'court' the words 'by the certificate of the county recorder or of the county clerk, or by the sworn or verified statement of any person who may have searched the records,' leaving the existence of the liens to be established by any competent evidence."

§ 762. Lienholders must be notified to appear before the referee appointed. The plaintiff must cause a notice to be served, a reasonable time previous to the day for appearance before the referee appointed as provided in the last section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due, or to become due, contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require.

Legislation § 762. Enacted March 11, **1872**; based on Practice Act, § 274, (1) substituting "must" for "shall," in all instances, and (2) omitting "true" before "amount due."

§ 763. Partition of real property. Referees. In incorporated city. Action of court. Sale. Deed. In case of death of party. Attorney's fees. If it appears by the evidence, whether alleged in the complaint or not, that the property or any part of it is so situated that partition cannot be made without great prejudice to the owners, the court may order the sale thereof; otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained; or the court, with the consent of the parties, may appoint one referee instead of three, and he when appointed, has all the powers and may perform all the duties required of three referees; and the court must appoint as referee any person or persons to whose appointment all the parties have consented, and no person shall be appointed as referee who is disqualified from acting as an appraiser under the provisions of section fourteen hundred

forty-four of the Code of Civil Procedure. When the site of an incorporated city or town is included with the exterior boundaries of the property to be partitioned, the court must direct the referees to survey and appraise the entire property to be partitioned by actual lots and subdivisions then existing in the actual possession of the several tenants in common, exclusive of the value of improvements thereon, first setting apart necessary portions of the property for ways, roads, and streets, as in section seven hundred sixty-four provided, and to report such survey and separate appraisement on each lot and subdivision to the court. The court may confirm, change, modify, or set aside the report in whole or in part, and if necessary appoint new referees. When, after the final confirmation of the report of such survey and appraisement, it appears by evidence to the satisfaction of the court that an equitable partition of the whole property is impracticable, and a sale of the site of such city or town, or any portion thereof, will be for the best interests of the owners of the whole property, it must order a sale thereof; provided, that within sixty days thereafter any tenant in common, or tenants in common, having improvements erected on any town or city lot or subdivision included in such order of sale, shall have the prior right to purchase the same at such appraised valuation, and may pay into court the amount so appraised as the value thereof, and upon such payment the title shall vest in such purchaser or purchasers, and the court shall cause to be executed by such referees a deed for such lot or subdivision in fee and in severalty to such purchaser or purchasers; such further proceedings shall then be had as to the remainder of the property, and the money so paid to the court, as by this chapter provided. If, during the pendency of the action, any of the parties die, or become insane, or otherwise incompetent, the proceedings shall not for that cause be delayed or suspended, but the attorney who has appeared for such party may continue to represent such interest; and in case any such party has not appeared by an attorney, the court must appoint an attorney to represent the interest which was held by such party, until his heirs or legal representatives, or successors in interest, shall have appeared in the action; and an attorney so appointed must be allowed by the court a reasonable compensation for his services, which may be taxed as costs against the share or interest represented by such attorney, and may be adjudged a lien thereon in the discretion of the court.

Sale, proceedings on. Post, §§ 770–795.
Partition of dominant tenement, burden must be apportioned. Civ. Code, § 807.
Referees. Post, § 797.
Modifying decree. Post, § 766.

Legislation § 763. 1. Enacted March 11, **1872;** based on Practice Act, § 275, which read: "If it be alleged in the complaint, and be established by evidence, or if it appear by the evidence without such allegation, in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof. Otherwise, upon the requisite proofs being made, it shall order a partition, according to the respective rights of the parties, as ascertained by the court, and appoint three referees therefor; and shall designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained." When § 763 was enacted in 1872, (1) "be" was omitted before "established," and (2) "must" substituted for "shall," in both instances.

2. Amended by Code Amdts. **1880,** p. 60, (1) the first sentence, before "that the property," reading, "If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint to the satisfaction of the court"; (2) the same sentence had the word "a" instead of "the," before "sale thereof"; and (3) after "or are not ascertained" and before "direct the referees," the section read, "provided, that when the site of an incorporated city or town is included within the exterior boundaries of the property to be partitioned, then on said fact being established by evidence the following proceedings shall be had. The court shall thereupon"; (4) in sentence beginning, "The court must," after "section seven hundred [and] sixty-four," the words "of this code" were used; (5) the sentence beginning "When, after," (a) "shall appear" instead of "appears," (b) "shall" instead of "must," before "order a sale," and (c) "said" instead of "such," before

"referees"; (6) the sentence beginning "If, during," had "shall" instead of "must," in both instances.

3. Amendment by Stats. **1901**, p. 161; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 605; the code commissioner saying, "The changes are omitting the words 'If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint to the satisfaction of the court,' and substituting therefor, 'If it appears by the evidence, whether alleged in the complaint or not'; and inserting the matter in former § 797, authorizing the court to appoint one referee instead of three."

5. Amended by Stats. **1913**, p. 235, (1) inserting at the end of the first sentence, after "duties required of three referees," the clause, "and the court must appoint as referee a new person or persons to whose appointment all the parties have consented, and no person shall be appointed as referee who is disqualified from acting as an appraiser under the provisions of section fourteen hundred forty-four of the Code of Civil Procedure"; (2) in second sentence, striking out the conjunction "and" in the section number.

Consent to appointment of a single referee. The parties may consent to the appointment of a single referee to make partition, and a decree reciting such consent is not objectionable because certain of the parties were minors, if the record shows that they appeared by general guardian. Richardson v. Loupe, 80 Cal. 490; 22 Pac. 227. The objection that a single referee was appointed, instead of three, cannot be collaterally urged; when the interlocutory decree recites that the appointment of one referee was made with the consent of all the parties, that is sufficient to sustain it, even if the appointment were in fact irregularly made. Baldwin v. Foster, 157 Cal. 643; 108 Pac. 714.

Irregular appointment of a single referee. In partition proceedings, the irregular appointment of but one referee will not, upon a collateral attack, avoid the judgment. Baldwin v. Foster, 157 Cal. 643; 108 Pac. 714.

Proof of necessity for sale. Whether or not a partition can be made without great prejudice to the owners, is a question of fact, the decision of which is not to be aided by judicial notice of any fact or circumstance not proved; and the party asking for a sale, instead of a partition, has the burden of proving that a partition cannot be made without great prejudice to the owners. Mitchell v. Cline, 84 Cal. 409; 24 Pac. 164.

Complaint not alleging necessity for sale. From the language of this section, it seems to be contemplated that the court may investigate the question as to whether a sale is requisite to avoid great prejudice to the owners, even in the absence of any allegation in the complaint to that effect. Bartlett v. Mackey, 130 Cal. 181; 62 Pac. 482.

Discretion of court. The power of the court, where a sale is necessary, is not greater than where a partition is to be made, nor is the discretion to be exercised different in such case; and if the court orders a partition of the rights of the parties to the property as tenants for years, it is not incumbent upon it, nor even proper, to award either to the plaintiff or to a defendant any share or interest with another defendant in the reversion. Jameson v. Hayward, 106 Cal. 682; 46 Am. St. Rep. 268; 39 Pac. 1078.

Partition ordered when. Courts favor a partition in kind, where it is practicable; owners of real estate should not be deprived of their title, unless a sale thereof is necessary to prevent great prejudice to the owners. Muller v. Muller, 14 Cal. App. 347; 112 Pac. 200. Partition cannot be allowed where injustice and wrong would result from it, on account of part of the land being subject to a homestead. Mills v. Stump, 20 Cal. App. 84; 128 Pac. 349.

Decree of sale leaving certain rights undetermined. Where the court has determined all matters over which it has jurisdiction, and has definitely ascertained all the interests of all the co-tenants, except only the issues between the contesting claimants in the probate court of the interest of a deceased co-tenant, over which issues it has no jurisdiction, and the premises must be sold in order to effect a just division, a decree of sale leaving the rights of such contesting claimants to be determined in the court having jurisdiction thereof, is proper, is warranted by the general law of partition, and is not violative of any provision of the code. Grant v. Murphy, 116 Cal. 427; 58 Am. St. Rep. 188; 48 Pac. 481.

Merger. In an action for a partition, equity will prevent or permit a merger, as will best subserve the purposes of justice and the actual and just intent of the parties, and, in the absence of an expression of intention, if the interest of the person in whom the several estates have united would be best subserved by keeping them separate, the intent to do so will ordinarily be implied; and the interest of a tenant in common in an estate for years, which is subject to the partition, will not be held to have been merged in the reversion owned by the same person. Jameson v. Hayward, 106 Cal. 682; 46 Am. St. Rep. 268; 39 Pac. 1078.

Appeal. An appeal from a decree in partition, pending proceedings for its modification, is premature: the modified decree is the only appealable judgment. Bixby v. Bent, 59 Cal. 522. Under this section, a notice of appeal in an action for partition may be served upon the attorney of record of another party, notwithstanding the death of such party prior to the appeal; and such notice may be served upon the original attorney of record, where there has been no substitution, notwith-

standing another attorney may have appeared and signed an amended pleading for such party. Lacoste v. Eastland, 117 Cal. 673; 49 Pac. 1046.

Allowance for improvements in partition. See notes 62 Am. Dec. 484; 81 Am. St. Rep. 185.

CODE COMMISSIONERS' NOTE. See subd. 3 of note to § 752, ante.

§ 764. Partition must be according to rights of parties. Sale of undivided interests. Allotment of shares of each party. In making partition, the referees must divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them. Before making partition or sale, the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart must not be assigned to any of the parties or sold, but must remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way. Whenever the referees have laid out on any tract of land roads sufficient in the judgment of said referees to accommodate the public and private wants, they must report that fact to the court, and upon the confirmation of their report all other roads on said tract cease to be public highways. Whenever it appears, in an action for partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury of the rights and interests of the other co-tenants who may not have joined in such conveyance. In all cases it is the duty of the referees, in making partition of land, to allot the share of each of the parties owning an interest in the whole or in any part of the premises sought to be partitioned, and to locate the share of each co-tenant, so as to embrace as far as practicable the improvements made by such co-tenant upon the property, and the value of the improvements made by the tenants in common must be excluded from the valuation in making the allotments, and the land must be valued without regard to such improvements, in case the same can be done without material injury to the rights and interests of the other tenants in common owning such land.

Legislation § 764. 1. Enacted March 11, **1872**; based on Practice Act, § 276, as amended by Stats. 1865–66, p. 705, which read: "In making the partition the referees shall divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them." When § 764 was enacted in 1872, "shall" was changed to "must."

2. Amended by Code Amdts. **1873–74**, p. 325, (1) in first sentence, changing "assistants" to "assistance," and (2) adding sentence beginning "Before making" and ending "private way," which then had the words "shall" instead of "must," in both instances.

3. Amended by Code Amdts. **1875–76**, p. 96, making another addition, beginning with the words "Whenever the referees," and reading as at present, except for the changes of 1907.

4. Amendment by Stats. **1901**, p. 162; unconstitutional. See note ante, § 5.

5. Amended by Stats. **1907**, p. 606, (1) in first sentence, changing "assistance" to "assistants"; (2) in sentence beginning "Before making," changing "shall" to "must" before "not be" and before "remain"; (3) in sentence beginning "Whenever the referees," (a) changing "shall" to "must" after "they," and (b) omitting "shall" before "cease"; (4) changing "appears," in words "Whenever it appears," from "shall appear"; (5) beginning a new sentence with the words "In all cases," and changing the first words to read as at present, from "provided, that in all cases the court shall direct the referees," and, in this sentence, (a) adding the word "the" before "allotments," (b) changing "improvement" to "improvements," and (c) changing "to" to "of" after "interests"; the code commissioner saying, "The amendment consists in declaring what shall be the duties of the referees, instead of requiring those duties to be inserted in each decree."

Agreement for partition, validity of. A partial agreement for the partition of lands is void, under the statute of frauds, and cannot be enforced; but, where consummated and ratified by the parties thereto, it will be upheld. Gordon v. San Diego, 101 Cal. 522; 40 Am. St. Rep. 73; 36 Pac. 18.

Title and rights of purchaser of specific parcel from co-tenant. The title of the purchaser of a specific parcel is good against all the world, except the other tenants in common, and as to them, it is subject to the contingency of being taken by them, if it should be found necessary to do so, in order to make a proper partition of the general tract. Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139. All the authorities are to the effect that a sale by a tenant in common, by specific bounds, of a portion of the land held in common, is not binding upon his co-tenant, unless ratified by him. Gordon v. San Diego, 101 Cal. 522; 40 Am. St. Rep. 73; 36 Pac. 18.

Partition where moieties are specified. Where the moieties in which a partition is to be made are specified in the first judgment, and a writ de partitione faciendo issued thereon in the action at law and in the first judgment, and a commission issued thereon in the suit in chancery, in neither case are the shares of interest of the parties nor any matter of title to be determined by the sheriff in the one case nor by the commissioners in the other. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418.

CODE COMMISSIONERS' NOTE. See subd. 2 of note to § 752, ante.

§ 765. Referees must make a report of their proceedings. The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share. Any party to the action, after giving at least ten days' notice in writing to the other parties who have appeared therein of his intention to do so, may move the court to confirm, change, modify, or set aside such report.

Legislation § 765. 1. Enacted March 11, **1872**; based on Practice Act, § 277, which read: "The referees shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided, and the shares allotted to each party, with a particular description of each share." When § 765 was enacted in 1872, it read the same as the first sentence of the present section.

2. Amendment by Stats. **1901**, p. 163; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 607; the code commissioner saying, "The amendment consists in declaring that either party may, upon ten days' notice to the others, move to confirm, change, modify or set aside the report."

Report on valuation. A referee, appointed to make partition after an interlocutory decree, whose sole duty it is to apportion and allot the land between the co-tenants according to their respective interests as determined by the court, and to report their proceedings to the court, is not required to go further, and report any valuation, nor are the parties entitled to any hearing before him. Richardson v. Loupe, 80 Cal. 490; 22 Pac. 227.

§ 766. Court may confirm, etc., report. Judgment binding on whom. The court may confirm, change, modify, or set aside the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive.

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the prop-

erty, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. On all persons not in being at the time said judgment is entered, who have any interest in the property divided, or any part thereof, as entitled to the reversion, remainder or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property; provided, that in case sale has been made under the provisions of this chapter the judgment shall provide for keeping intact the share of the proceeds of said sale, to which said party or parties not in being at the time are or may be entitled until such time as such party or parties may take possession thereof;

3. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication;

4. On all other persons claiming from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent, as if it had been entered before his death. If during the pendency of the action, and before final judgment therein, any of the co-tenants has conveyed to another person his interest, or any part of his interest, such conveyance, whatever its form, shall be deemed to have passed to the grantee any lands which, after its execution, may have been set aside to the grantor in severalty, or such proportionate interest in such lands as the interest so conveyed bears to the whole interest of the grantor.

Decrees partitioning realty to be recorded. See Pol. Code, § 4134.

Record of decree as notice. See Pol. Code, § 4135.

Legislation § 766. 1. Enacted March 11, **1872**; based on Practice Act, § 278, as amended by Stats. 1867–68, p. 630, which had (1) in introductory paragraph, (a) "shall" instead of "must" before "be rendered," and (b) "shall be" instead of "is" before "binding"; (2) in subd. 2, "shall have" instead of "has"; (3) in last paragraph, (a) "shall be," instead of "is," before "invalidated" and before "as conclusive," (b) "decease," instead of "death," before "of any party," and (c) "as if such final judgment were entered before such decease," instead of the words at end of first sentence of present paragraph. The changes from the original code section are noted infra.

2. Amendment by Stats. **1901**, p. 164; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 607, (1) in subd. 1, striking out the word "of" in the phrase "or of any part thereof," and (2) adding the last sentence of the final paragraph; the code commissioner saying, "The amendment consists of the last sentence, providing that a grantee of lands[,] pending the suit[,] takes the part set aside to his grantor."

4. Amended by Stats. **1911**, p. 366, (1) at end of introductory paragraph, substituting a period for a colon (a clerical or typographical error); (2) adding subd. 2; (3) renumbering the old subds. 2 and 3, subds. 3 and 4, respectively.

Construction of section. The words, "any part thereof," in the first subdivision of this section, necessarily mean, in the connection in which they are used, any part of the property, and not any portion of an undivided interest in the property: it would be very inconsistent, if not absurd, that the judgment should be conclusive on those who were not proper parties to the action. Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139.

Referee's report, power of court over. It is not required that a referee shall report a valuation of the whole, or of any allotment, or for any hearing of the parties before him; but if any contest should arise as to the relative value of the several allotments, or as to the justice of the referee's report in any other respect, the settlement of such dispute is to be had before the court, which has full power to confirm, change, modify, or set aside his report. Richardson v. Loupe, 80 Cal. 490; 22 Pac. 227.

Confirming sale, discretion of court in. The purchaser at a judicial sale in a partition suit, while assuming legal obligations, acquires legal rights, which are to be protected and enforced just as the rights of others; he is entitled to ask for and to have confirmation of the sale, if there is no valid reason in law for setting it aside; and the court has no arbitrary power to confirm, or to refuse to confirm, but only a sound legal discretion, which must be exercised with a just regard to

the rights of all concerned. Dunn v. Dunn, 137 Cal. 51; 69 Pac. 847.

Judgment binding and conclusive upon all the parties to the action. The force and effect of a final judgment in partition proceedings are clearly and explicitly stated in this section; and such judgment is declared to be binding and conclusive upon all persons named in the complaint as parties to the action, who have been served with summons, and their legal representatives. Morenhout v. Higuera, 32 Cal. 289. The judgment is binding and conclusive, as to title, upon all parties served with summons or who appear, and is a bar to a new action. Martin v. Walker, 58 Cal. 590. Where, in action for partition, the complaint avers that a defendant has, or claims to have, some interest in the land, which interest is unknown to the plaintiff, and a summons is served on such defendant, and he fails to appear, and the judgment does not give such defendant any interest, it is res adjudicata, and estops him from recovering in a new action. Morenhout v. Higuera, 32 Cal. 289. In an action of ejectment for a parcel of lands of a tract, brought by one of the defendants in a partition suit, and against persons who were parties to that action, or who claimed title under them, the judgment in that action is admissible in evidence to prove title in the plaintiff in the action of ejectment, and is conclusive upon that issue in respect to the title held or claimed by the parties to that action at the time of its commencement. Hancock v. Lopez, 53 Cal. 362. Where partition was adjudged between tenants in common, and their respective shares set apart in severalty, and before partition the plaintiff was accustomed to pass over the defendant's land, but there never was a right of way appurtenant to the parcel allotted to the plaintiff, a decree in partition, entered upon the report of the referee, which laid out several new roads and made changes in old ones, is conclusive against the plaintiff's claim of right of way. Carey v. Rae, 58 Cal. 159.

Judgment conclusive on all persons interested. Many intricate questions may have to be settled between the holders of special locations and those claiming undivided interests in a large tract; but complete partition, where the parties desire it, should be made in one action, instead of in many new actions, and thus the rights of all the parties, when put in issue, tried and determined: the whole scope and tenor of the statute relating to partition show that the intention was to make the one judgment of partition final and conclusive on all persons interested in the property, or any part of it, on whom the court can acquire jurisdiction, and not to permit the matter to be taken up piecemeal. Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139.

Final judgment operates from its date. The final judgment in partition operates as an adjudication as to the co-tenancy and unity of possession of the parties from its date, and not from the date of the interlocutory decree; and a party to the proceedings cannot avail himself of any adverse possession between the date of the interlocutory decree and the date of the final decree. Christy v. Spring Valley Water Works, 97 Cal. 21; 31 Pac. 1110.

Appeal. The court may appoint new referees in an action of partition, in place of those who have resigned, in order to carry its interlocutory decree into effect, and their action, and the action of the court upon their report, may be reviewed upon appeal from the final judgment, but no direct appeal can be taken from the order appointing such new referees. Fallon v. Brittan, 84 Cal. 511; 24 Pac. 381.

Effect of judgment in partition. See note 40 Am. Dec. 640.

Effect of compulsory partition. See note 101 Am. St. Rep. 864.

Decree in partition. See note 124 Am. St. Rep. 713.

Effect of judgment in partition upon rights of defendants, as between themselves, which were not brought to the attention of the court. See note 14 L. R. A. (N. S.) 333.

Effect of partition to create easement as between separate parcels. See note 26 L. R. A. (N. S.) 342.

CODE COMMISSIONERS' NOTE. The effect of the judgment in this action is determined by the code, not by the common law. It is binding and conclusive upon all parties properly before the court. Morenhout v. Higuera, 32 Cal. 289; see also Gates v. Salmon, 35 Cal. 576; 95 Am. Dec. 139. In Tormey v. Allen, 45 Cal. 119, the supreme court say: "We held in Regan v. McMahon, 43 Cal. 625, that the practice prescribed in the Practice Act as to the granting of new trials in civil actions was applicable to the review of decrees rendered in proceedings on partition. Section 193 defines the grounds upon which, and § 195 the procedure by which, such motions may be made and determined, and there is hardly a conceivable case in which, under the provisions of the act, relief may not be had, if irregularity, accident, or surprise, or any other misfortune by which the substantial rights of the parties, or of any of them, have been sacrificed, have intervened. An action for a partition is as completely within the operation of the act as any other civil action for the conduct of which rules of procedure are therein prescribed."

§ 767. Judgment not to affect tenants for years to the whole property.

The judgment does not affect tenants for years less than ten to the whole of the property which is the subject of the partition.

Legislation § 767. Enacted March 11, 1872; based on Practice Act, § 279, which had as the introductory words, "But such judgment and partition shall not."

Order striking out answer reviewable. The old § 279 of the Practice Act required the appellate court to review an interlocutory order in an action in partition, when it involved the merits and necessarily affected judgment; and an order striking out an answer regularly on file, and rendering judgment without trial, falls within this class. Stevens v. Ross, 1 Cal. 94.

Compensation of referee. In fixing the compensation of a referee in an action for partition, the court is not limited to a compensation of five dollars a day, but has a wide discretion to determine what is a proper compensation to the referee, and its action will not be disturbed upon appeal, if there is no plain abuse of discretion. Mesnager v. De Leonis, 140 Cal. 402; 73 Pac. 1052.

Costs as general lien. In partition, where a share has been set off to co-tenants, the award of costs as a general lien on the property, including the interests of all the owners therein, without segregation, does not render the judgment void or collaterally assailable for errors. Baldwin v. Foster, 157 Cal. 643; 108 Pac. 714.

§ 768. Expenses of partition must be apportioned among the parties. The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court, in its discretion, to the referees, must be apportioned among the different parties to the action, equitably.

Fees of referees. See post, § 1028.

Legislation § 768. Enacted March 11, **1872**; based on Practice Act, § 280, as amended by Stats. 1865–66, p. 706, which read: "The expenses of the referees, including those of a surveyor and his assistant or assistants, when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court in its discretion to the referees, shall be apportioned among the different parties to the action, equitably." By an act approved March 4, 1872 (Stats. 1871–72), the session at which the codes were adopted, Practice Act, § 280, supra, was amended, (1) omitting the words "or assistants" after "assistant"; (2) substituting "law" for "the court in its discretion"; (3) adding, after "to the referees," the words "and such attorneys' fees expended for the common benefit, both for plaintiff and defendants, as the court shall deem just and proper"; and (4) omitting the word "equitably" from end of section.

§ 769. A lien on an undivided interest of any party is a charge only on the share assigned to such party. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must first be charged with its just proportion of the costs of the partition, in preference to such lien.

Legislation § 769. Enacted March 11, **1872**; based on Practice Act, § 281, which had the words "shall be first" instead of "must first be."

§ 770. Estate for life or years may be set off in a part of the property not sold, when not all sold. When a part of the property only is ordered to be sold, if there be an estate for life or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

Legislation § 770. Enacted March 11, **1872**; re-enactment of Practice Act, § 282.

Contingent or future estates when subject to partition. See note 32 Am. St. Rep. 778.

Partition of reversions and remainders. See note 113 Am. St. Rep. 55.

§ 771. Application of proceeds of sale of encumbered property. The proceeds of the sale of encumbered property must be applied under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action;
2. To pay the costs of the reference;
3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment;
4. The residue among the owners of the property sold, according to their respective shares therein.

Legislation § 771. Enacted March 11, **1872**; based on Practice Act, § 283, which had (1) the word "the" after "sale of," and (2) "must" instead of "shall."

§ 772. Party holding other securities may be required first to exhaust them. Whenever any party to an action, who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property, on account thereof.

Legislation § 772. Enacted March 11, **1872**; re-enactment of Practice Act, § 284.

§ 773. Proceeds of sale, disposition of. The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into court, or deposited therein, or as directed by the court.

Deposit in court. Ante, §§ 572–574.

Legislation § 773. Enacted March 11, **1872**; based on Practice Act, § 285, which had (1) "shall" instead of "must" in both instances, and (2) "all such" instead of "all of such."

Referee is custodian, not bailee, of fund. A referee in a partition suit, with respect to the proceeds of a sale of lands involved in the action, is the custodian of funds held by him for the use of the co-owners, according to their interests, to be paid when the precise amounts due shall be determined: he is not, as to the proceeds of the sale of lands involved in the action, a mere bailee of a special fund, or the custodian of earmarked money belonging to the co-owners of the land. Widenmann v. Weniger, 164 Cal. 667; 130 Pac. 421.

Assignment of claim against referee. A claim against a referee in partition, for the proceeds of a sale of lands involved in the suit, is a pure chose in action, and if such chose in action is assigned, it becomes the duty of the assignee to notify the debtor. Widenmann v. Weniger, 164 Cal. 667; 130 Pac. 421.

Liability of transferee of fund. Where the referee in partition, being the custodian of the proceeds of a sale of lands involved in the action, transfers the fund without an order of court, the transferee, having knowledge of its source and character, and of the duty of its possessor to pay it over to the persons entitled, becomes liable to pay to the persons entitled. Widenmann v. Weniger, 164 Cal. 667; 130 Pac. 421.

Form of action against referee. Where the referee in partition has received the proceeds of a sale of lands involved in the proceeding, the only appropriate action that one of the co-owners, or his agents, can maintain against him, or his successor, for the recovery of his share of the money when due, is either an action of debt, or for money had and received to the use of the plaintiff in the action. Widenmann v. Weniger, 164 Cal. 667; 130 Pac. 421.

Conclusiveness of order. An order confirming a sale in partition is appealable by the purchaser, who becomes a quasi party to the suit, and is conclusive upon him, upon his failure to appeal therefrom. Hammond v. Cailleaud, 111 Cal. 206; 52 Am. St. Rep. 167; 43 Pac. 607.

Deposit in court. See notes ante, §§ 572–574, and note post, § 2104.

§ 774. When paid into court, cause may be continued for determination of claims of parties. When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, whether known or unknown, are paid into courts, the action may be continued as between such parties, for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings, as in an original action.

Legislation § 774. 1. Enacted March 11, **1872**; based on Practice Act, § 286, which had (1) in first line, the words "sales of any shares or parcels," instead of "the sale," etc., and (2) "shall" instead of "must."

2. Amendment by Stats. **1901**, p. 164; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 607, substituting (1) "whether known or unknown" for "and who are known," and (2) "courts" (sic) for

"court" after "paid into"; the code commissioner saying, "The words 'whether known or unknown' are substituted for 'and who are known,' to avoid the difficulty suggested in Grant v. Murphy, 116 Cal. 433."

Construction of section. This section and § 759, ante, are to be construed, in determining title as between hostile claimants to any share or parcel, or to the proceeds of the sale thereof, as limited to the determination of issues over which the court in which the partition proceedings are pending has jurisdiction. Grant v. Murphy, 116 Cal. 427; 58 Am. St. Rep. 188; 48 Pac. 481.

Liability of custodian of fund. Where a fund, arising from the sale of land in a partition suit, is not paid into court in such suit, and the action is not continued for its disposition, as provided in this section, the custodian of the fund is not protected by an ex parte order of court for its payment, where he makes payment to a person not entitled. Widenmann v. Weniger, 164 Cal. 667; 130 Pac. 421.

§ 775. Sales by referees may be public or private. All sales of real property made by referees under this chapter must be made at public auction to the highest bidder, upon notice given in the manner required for the sale of real property on execution unless in the opinion of the court it would be more beneficial to the parties interested to sell the whole or some part thereof at private sale; the court may order or direct such real property, or any part thereof, to be sold at either public auction or private sale as the referee shall judge to be most beneficial to all parties interested. If sold at public auction the notice must state the terms of sale and if the property or any part thereof is to be sold subject to a prior estate, charge or lien, that must be stated in the notice. If the sale is ordered made at either public auction or private sale, the sale at private sale shall be conducted in the manner required in private sales of real property of estates of deceased persons.

Terms, distinct lots. Post, § 782.
Notice of execution sales. Ante, §§ 692, 693.
Proceedings. Ante, §§ 694 et seq.

Legislation § 775. **1.** Enacted March 11, **1872**; based on Practice Act, § 287, which had (1) "shall" instead of "must," in the three instances, and (2) "by" instead of "at" before "public auction." When enacted in 1872, § 775 read: "All sales of real property, made by referees, under this chapter, must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property or any part of it is to be sold subject to a prior estate, charge, or lien, that must be stated in the notice."

2. Amendment by Stats. **1901**, p. 164; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 608, substituting "given" for "published" after "notice"; the code commissioner saying, "'Published' is changed to 'given,' thus requiring the notice of a sale in partition to be the same as when under execution."

4. Amended by Stats. **1909**, p. 1001.

§ 776. Court must direct terms of sale or credit. The court must, in the order for sale, direct the terms of credit which may be allowed for the purchase-money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase-money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the state.

Legislation § 776. Enacted March 11, **1872**; based on Practice Act, § 288, which had the word "shall" instead of "must."

§ 777. Referees may take securities for purchase-money. The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase-money, of such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for other shares, in the name of the clerk of the county and his successors in office.

Legislation § 777. Enacted March 11, **1872**; re-enactment of Practice Act, § 289, as amended by Stats. 1854, Redding ed. p. 64, Kerr ed. p. 90.

§ 778. Tenant whose estate has been sold shall receive compensation. The person entitled to a tenancy for life, or years, whose estate has been

sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court.

Legislation § 778. Enacted March 11, 1872 (based on Practice Act, § 290), substituting (1) "has" for "shall have" before "been sold," (2) "is" for "shall be" before "entitled," and (3) "must" for "shall" after "clerk."

Right to partition of property subject to lease for term of years. See note 9 Ann. Cas. 1029.

§ 779. Court may fix such compensation. If such consent be not given, filed, and entered as provided in the last section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party, or deposited in court for him, as the case may require.

Legislation § 779. Enacted March 11, 1872 (based on Practice Act, § 291), substituting "must" for "shall," in both instances.

§ 780. Court must protect tenants unknown. If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared.

Legislation § 780. Enacted March 11, 1872 (based on Practice Act, § 292), substituting "must" for "shall."

§ 781. Court must ascertain and secure the value of future contingent or vested interests. In all cases of sales, when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties.

Legislation § 781. Enacted March 11, 1872 (based on Practice Act, § 293), substituting "must" for "shall," in both instances.

§ 782. Terms of sale must be made known at the time. Lots must be sold separately. In all cases of sales of property the terms must be made known at the time; and if the premises consist of distinct farms or lots, they must be sold separately.

Legislation § 782. Enacted March 11, 1872 (based on Practice Act, § 294), substituting "must" for "shall," in both instances.

§ 783. Who may not be purchasers. Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

Legislation § 783. Enacted March 11, 1872 (based on Practice Act, § 295), (1) substituting "can" for "shall," in both instances, and (2) "are" for "shall be."

§ 784. Referees must make report of sale to court. Confirmation or rejection of sale. After completing a sale of property, or any part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and condi-

tions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the county in which the action is brought. Thereafter any purchaser, or any party to the action, may, upon ten days' notice to the other parties who have appeared therein, and also to the purchaser if he be not the moving party, move the court to confirm or set aside any sale or sales so reported. Upon the hearing, the court must examine the return and report and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appears that a sum exceeding such bid at least ten per cent, exclusive of a new sale may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale conducted in all respects as if no previous sale had taken place. If an offer of ten per cent more in amount than that named in the return be made to the court, in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale.

Legislation § 784. 1. Enacted March 11, **1872**; based on Practice Act, § 296, which had the word "shall" instead of "must," in both instances, the section then containing only the first two sentences. When enacted in 1872, § 784 read: "After completing a sale of the property, or any part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the county where the property is situated."

2. Amendment by Stats. **1901**, p. 165; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 608, adding the sentence of the 1909 amendment, beginning "Thereafter"; the code commissioner saying, "The amendment adds the last sentence, providing that the purchaser at a partition sale or any party to the suit may move to confirm or vacate it, and the notice to be given of the motion."

4. Amended by Stats. **1909**, p. 1002.

Purchaser's refusal to pay amount of his bid. The purchaser is not bound to accept an imperfect title; but where, without cause or excuse, he refuses to take the property after the sale in partition, and deliberately intends to suffer all the legal consequences of such refusal, a resale cannot be either a just or a legal mode of ascertaining his liability, unless made upon the same terms and conditions as those under which he purchased the property. Hammond v. Cailleaud, 111 Cal. 206; 52 Am. St. Rep. 167; 43 Pac. 607. Where the purchaser refuses to pay the price bid and take a deed, and a resale is made at a less price, the first purchaser is liable for the difference. Dunn v. Dunn, 137 Cal. 51; 69 Pac. 847. Where, without a resale, the referee brings suit against the defendant to recover the unpaid purchase-money, the action can be sustained, because the order confirming the sale, not being appealed from, absolutely fixes the defendant's liability as a purchaser; but he is not concluded, by his failure to appeal, from showing that the terms of the first sale were different from those of the second sale. Hammond v. Cailleaud, 111 Cal. 206; 52 Am. St. Rep. 167; 43 Pac. 607.

Unfairness in making sale, refusal of court to confirm. Where the referee, in making the sale in an action of partition, makes any error, irregularity, or misrepresentation, whether intentional or not, whereby the purchaser is misled to his prejudice to such an extent as to make it unconscionable that his contract of purchase should be enforced against him, the sale will not be confirmed. Hammond v. Cailleaud, 111 Cal. 206; 52 Am. St. Rep. 167; 43 Pac. 607.

Resale for inadequacy of price. There is not an entire agreement by appellate tribunals as to when mere inadequacy of price will justify an order of resale, although the weight of authority seems to hold to the rule, that there must be something more than mere inadequacy, that is, that the inadequacy must be such as to justify the inference of fraud, or is so gross as to shock the conscience. The court must look to the value of the property at the time of the sale, and not to the time when the question of confirmation is before the court, unless these periods so nearly coincide as to justify the presumption that no change in values has taken place. Dunn v. Dunn, 137 Cal. 51; 69 Pac. 847.

Discretion of court. The court, doubtless, has power to confirm or to refuse to confirm the sale; but this is not an arbitrary power: it is neither more nor less than a sound judicial discretion, and must be exercised with a just regard to the rights of all concerned. Dunn v. Dunn, 137 Cal. 51; 69 Pac. 847.

Confirmation of resale. Where a larger price was bid upon an original sale, owing to the terms of sale expressly providing for a perfect and valid title, and the price bid upon a resale, which was confirmed,

was much less, owing to the terms of sale being expressly at the purchaser's risk, and no fact or circumstance, other than the differing conditions of sale, tends to account for the difference in price, it must be presumed that all the difference between the two bids was induced by the terms of the second sale; and where the owners did not object to the confirmation of the second sale, upon the ground that the price obtained was inadequate, they are estopped from denying the adequacy of the price obtained under the conditions of sale; nor can the referee making the sales deny the terms and conditions of the contract made by him with such purchaser. Hammond v. Cailleaud, 111 Cal. 206; 52 Am. St. Rep. 167; 43 Pac. 607.

§ 785. If sale confirmed, order must be made to execute conveyances. If the sale is confirmed by the court, an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale. If the purchaser, after the confirmation of the sale, refuses to pay the amount of his bid, the referees may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby the referees may recover the amount of such loss and the cost from the bidder so refusing, or the referees, without making a resale, may maintain an action against the purchaser for the amount of his bid.

Legislation § 785. **1.** Enacted March 11, **1872** (based on Practice Act, § 297), substituting "must" for "shall," the section then having only the first two sentences.

2. Amendment by Stats. **1901**, p. 165; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 608, (1) changing "be" to "is," in first line, and (2) adding the last sentence; the code commissioner saying, "The amendment adds the last sentence, giving referees who have sold property in partition the right to sue for the amount of the bid, or to make a resale and recover the amount of deficiency, if any."

No sale valid until confirmed. No sale in partition is valid until reported to and confirmed by the court. Schoonover v. Birnbaum, 150 Cal. 734; 89 Pac. 1108.

Correction of referee's mistake. Where, by reason of the mistake of the referee in using the wrong map in making a partition, land not included in the complaint, which is adversely possessed by one who is not a party to the action, is set off and confirmed to one of the parties, the final decree may be set aside, as to such property, by a suit in equity. Sullivan v. Lumsden, 118 Cal. 664; 50 Pac. 777.

Purchaser's refusal to pay amount of his bid. See note ante, § 783.

Applicability of rule of caveat emptor to partition sales. See note 33 L. R. A. (N. S.) 409.

§ 786. Proceeding if a lienholder becomes a purchaser. When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

Legislation § 786. Enacted March 11, **1872**; re-enactment of Practice Act, § 298.

§ 787. Conveyances must be recorded, and will be a bar against parties. The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.

Legislation § 787. **1.** Enacted March 11, **1872** (based on Practice Act, § 299), (1) in first line, changing "shall" to "must," (2) changing "have been" to "was" after "summons," and (3) changing "from" to "under" after "claiming"; the section then ending with the words "or either of them."

2. Amended by Code Amdts. **1873–74**, p. 326, adding the last clause, beginning "and against all."

§ 788. Proceeds of sale belonging to parties unknown must be invested for their benefit. When there are proceeds of a sale belonging to an un-

known owner, or to a person without the state, who has no legal representative within it, the same must be invested in bonds of this state or of the United States, for the benefit of the persons entitled thereto.

Legislation § 788. Enacted March 11, 1872; based on Practice Act, § 300, which had (1) the word "shall" instead of "must," and (2) instead of "bonds of this state or of the United States," the words "securities on interest."

§ 789. **Investment must be made in the name of the clerk of the county.** When the security of the proceeds of sale is taken, or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the county where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court.

Legislation § 789. Enacted March 11, 1872 (based on Practice Act, § 301), substituting "must" for "shall," in both instances.

§ 790. **When the interests of the parties are ascertained, securities must be taken in their names.** When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing, under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of and payable to the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the clerk.

Legislation § 790. Enacted March 11, 1872 (based on Practice Act, § 302), substituting "must" for "shall," in the three instances.

§ 791. **Duties of the clerk making investments.** The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must deposit with the county treasurer all securities taken, and keep an account in a book provided and kept for that purpose, in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

Deposit in court. Ante, §§ 572–574.

Legislation § 791. Enacted March 11, 1872 (based on Practice Act, § 303), substituting (1) "must" for "shall" before "receive," and (2) "must deposit with the county treasurer" for "shall file in his office."

§ 792. **When unequal partition is ordered, compensation may be adjudged in certain cases.** When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases the court has power to make compensatory adjustment between the respective parties, according to the ordinary principles of equity.

Legislation § 792. Enacted March 11, 1872; based on Practice Act, § 304, as amended by Stats. 1865–66, p. 706, substituting (1) "appears" for "shall appear," and (2) "has" for "shall have" before "power."

§ 793. The share of an infant may be paid to his guardian. When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.

General guardian. Post, §§ 1747–1809.
Guardian ad litem, generally. Ante, §§ 372, 373.

Legislation § 793. Enacted March 11, **1872**; re-enactment of Practice Act, § 305.

§ 794. The guardian of an insane person may receive the proceeds of such party's interest. The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive in behalf of such person his share of the proceeds of such real property from the referees, on executing with sufficient sureties an undertaking approved by a judge of the court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled or to his legal representative.

Legislation § 794. 1. Enacted March 11, **1872** (based on Practice Act, § 306), substituting "has" for "shall have."

2. Amended by Code Amdts. **1880**, p. 11, omitting "or by a county judge" after "judge of the court."

§ 795. [Provided that guardian could consent to partition without action, and execute releases. Repealed.]

Legislation § 795. 1. Enacted March 11, **1872**; re-enactment of Practice Act, § 307.

2. Repeal by Stats. **1901**, p. 165; unconstitutional. See note ante, § 5.

3. Repealed by Stats. **1907**, p. 608; the code commissioner saying, "Repealed, because it authorized guardians of infants and insane persons to consent to partitions without any action, and did not provide for any notice of the proceedings to be given either to the persons or their relatives, or otherwise."

Consent to partition. It is provided by this section that the general guardian of an infant may consent to a partition without action; and as such guardian has also authority to appear for the minor in an action for a partition, it would seem that, in the action, the guardian might consent to a mere course of procedure authorized by statute, and coming within the purview of the action itself. Richardson v. Loupe, 80 Cal. 490; 22 Pac. 227.

§ 796. Costs of partition a lien upon shares of parceners. The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them.

Referees' fees, etc. Ante, § 768; post, § 1028.

Legislation § 796. 1. Enacted March 11, **1872**; based on Practice Act, § 308, which, as amended by Stats. 1871–72, p. 230, read: "The costs of partition, including fees of referees, and such attorneys' fees expended for the common benefit, both for plaintiffs and defendants, as the court shall deem just and proper, and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them." The original Practice Act section did not contain the words "and such attorneys' fees expended for the common benefit, both for plaintiff and defendants, as the court shall deem just and proper." When enacted in 1872, § 795 read as at present, except for the amendments of 1874.

2. Amended by Code Amdts. **1873–74**, p. 326, (1) inserting "or either of the defendants" after "plaintiff," and (2) omitting "a" before "litigation."

Construction of section. The lien referred to in this section is one that takes

effect by relation at the time of the filing of the notice of lis pendens, and without docketing the judgment; and the express provision, that such lien may be acquired in a particular mode, negatives the right to acquire it in any other mode. Lacoste v. Eastland, 117 Cal. 673; 49 Pac. 1046. It is contemplated by this section that costs may or may not become a lien upon the several shares of the parties, as the parties to whom they are due may elect, and the solution of the question as to whether they become a lien depends upon whether they are specified and included in the judgment of partition; the statute does not say that the costs shall in all cases become a lien, but that "in that case," that is, when they are "included and specified in the judgment," they become a lien. Lacoste v. Eastland, 117 Cal. 673; 49 Pac. 1046.

Liability for costs. The right of the plaintiff, in an action for partition, to the proceeds arising from the sale, must be limited by the extent of the interest he acquires in the premises under his conveyance, and from this his proportionate share of the costs and expenses of the action and the subsequent proceedings must be deducted. Goodenow v. Ewer, 16 Cal. 461; 76 Am. Dec. 540. Where plaintiff conveys his interest to defendants, pending an action for partition, the defendants, being the only parties entitled to share in the lands divided, are liable for costs. Wickersham v. Denman, 68 Cal. 383; 9 Pac. 723.

Counsel fees. The amount of an attorney's fee to be allowed in an action for partition is a question of fact, to be determined by the trial court from the evidence, and its findings will not be disturbed, where there is a substantial conflict in the evidence, if there is sufficient evidence to support the allowance, and there is no clear abuse of discretion. Watson v. Sutro, 103 Cal. 169; 37 Pac. 201.

Costs allowed when and how. Costs in partition cannot be allowed until the final judgment is entered. Harrington v. Goldsmith, 136 Cal. 168; 68 Pac. 594. In partition, where a share has been set off to co-tenants, the award of costs, as a general lien on the property, including the interests of all the owners therein, without segregation, does not render the judgment void or collaterally assailable for errors. Baldwin v. Foster, 157 Cal. 643; 108 Pac. 714.

Appeal. In partition, a defendant's consent to the allowance of attorneys' fees estops him, on appeal, from objecting to such allowance. Seale v. Carr, 155 Cal. 577; 102 Pac. 262.

Allowance of attorney's fees in partition. See note 12 Ann. Cas. 854.

§ 797. [Provided that court, by consent, could appoint single referee. Repealed.]

Referees. Ante, § 763.

Legislation § 797. **1.** Enacted March 11, **1872**; re-enactment of Practice Act, § 309.
2. Repeal by Stats. **1901**, p. 165; unconstitutional. See note ante, § 5.
3. Repealed by Stats. **1907**, p. 608; the code commissioner saying, "Repealed, because its provisions have been included in the amendment to § 763."

§ 798. **Apportionment of expenses of litigation.** If it appear that other actions or proceedings have been necessarily prosecuted or defended by any one of the tenants in common, for the protection, confirmation, or perfecting of the title, or setting the boundaries, or making a survey or surveys of the estate partitioned, the court shall allow to the parties to the action, who have paid the expense of such litigation or other proceedings, all the expenses necessarily incurred therein, except counsel fees, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making the said expenditures, and in the same kind of money expended or paid, and the same must be pleaded and allowed by the court, and included in the final judgment, and shall be a lien upon the share of each tenant respectively, in proportion to his interest, and shall be enforced in the same manner as taxable costs of partition are taxed and collected.

Legislation § 798. **1.** Enacted April 1, **1872**, and then read: "If it appears to the court that other actions or proceedings have been prosecuted or defended by any of the tenants in common, for the protection, confirmation, or perfecting of the title, or settling the boundary, or making a survey or surveys of the estate partitioned, the court must allow to the parties who have paid the expense of such necessary litigation, or other proceedings, all the expenses necessarily so incurred therein, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making the expenditures; and the same must be allowed and taxed, and included in the final judgment as costs are allowed, taxed, and included in the judgment."

2. Repealed by Code Amdts. **1873–74**, p. 326.
3. Re-enacted and amended by Code Amdts. **1875–76**, p. 98.

Costs of partition. See note ante, § 796.

CODE COMMISSIONERS' NOTE. This section was added by act of April 1, 1872.

§ 799. Abstract of title in action for partition. When cost of, allowed. If it is necessary to have an abstract of title of the property to be partitioned, the plaintiff may procure one before commencing the action, and may, in his complaint, state that he has done so, and that the abstract is subject to the inspection and use of all the parties to the action, designating a place where it will be kept for such inspection. Otherwise the court may, upon application of any one of the parties, authorize him to procure an abstract, which, when made, shall be kept at some place designated by the court for the inspection and use of all parties, any of whom is entitled to make a copy thereof. The expense reasonably incurred in procuring such abstract must be allowed to the party incurring it, with interest thereon from the commencement of the action, if it had been procured before that time, otherwise from the time of payment.

Legislation § 799. 1. Enacted April 1, **1872**, and then read: "If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the commencement of the action, and any one of the defendants shall have had such abstract afterwards made, the cost of the abstract, with interest thereon from the time the same is subject to the inspection of the respective parties to the action, must be allowed and taxed. Whenever such abstract is produced by the plaintiff, before the commencement of the action, he must file with his complaint a notice that an abstract of the title has been made, and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff shall have failed to procure such abstract before commencing the action, and any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action with the clerk of the court, stating who is making the same, and where it will be kept when finished. The court, or the judge thereof, may direct from time to time, during the progress of the action, who shall have the custody of the abstract."

2. Amendment by Stats. **1901**, p. 165; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 608; the code commissioner saying, "The amendment corrects an error by striking out the word 'produced' and inserting the word 'procured.'"

CODE COMMISSIONERS' NOTE. This section was added by act of April 1, 1872.

§ 800. Abstract, how made and verified. The abstract mentioned in the last preceding section may be made by any competent searcher of records, and need not be certified by the recorder or other officer, but instead thereof it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct; but the same may be corrected from time to time if found incorrect, under the direction of the court.

Legislation § 800. Enacted April 1, **1872**.

CODE COMMISSIONERS' NOTE. This section was added by act of April 1, 1872.

§ 801. Interest allowed on disbursements made under direction of the court. Whenever, during the progress of the action for partition, any disbursements shall have been made, under the direction of the court or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making such disbursements.

Legislation § 801. Enacted April 1, **1872**.

CODE COMMISSIONERS' NOTE. This section was added by act of April 1, 1872.

CHAPTER V.

ACTIONS FOR USURPATION OF AN OFFICE OR A FRANCHISE.

§ 802. Sire facies [scire facias] abolished.
§ 803. Action may be brought against any party usurping, etc., any office or franchise.
§ 804. Name of person entitled to office may be set forth in the complaint. If fees have been received by the usurper, he may be arrested.
§ 805. Judgment may determine the rights of both incumbent and claimant.
§ 806. When rendered in favor of applicant.
§ 807. Damages may be recovered by successful applicant.
§ 808. When several persons claim the same office, their rights may be determined by a single action.
§ 809. If defendant found guilty, what judgment to be rendered against him.
§ 810. Actions on information. Undertaking.

§ 802. Sire facies [scire facias] abolished. The writ of sire facies [scire facias] is abolished.

Corporations, dissolution of. See Civ. Code, Legislation, § 399.

Receivers, upon dissolution of corporation. Ante, § 565.

Legislation § 802. 1. Enacted March 11, **1872,** and then read: "The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished. The remedies obtainable in these forms may hereafter be obtained by civil actions, under the provisions of this chapter."

2. Amended by Code Amdts. **1880,** p. 11.

Writ of scire facias. Scire facias was the remedy by means of which a government patent for land might be attacked by a subsequent patentee of the same land, no collateral attack upon such patent being permissible. O'Connor v. Frasher, 56 Cal. 499. The writ of scire facias was formerly used by government as a mode to ascertain and to enforce the forfeiture of a corporate charter, in cases where there was a legal existing body capable of acting, but which had abused its power; it did not lie in case of a mere de facto corporation; it was necessary that the government should be a party to the suit, for the judgment was, that the parties be ousted and the franchise seized into the hands of the government. People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277.

§ 803. Action may be brought against any party usurping, etc., any office or franchise. An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor.

Complaint. Post, § 804.

Security by relator. Post, § 810.

Co-operative business association, attorney-general may inquire into right of, to do business. See Civ. Code, § 653k.

Franchise. Civ. Code, § 358.

Dissolution of corporations. Civ. Code, §§ 399, 400.

Quo warranto, what court may issue. Ante, § 76, subd. 5.

Office, title to. Contest. Post, §§ 1111–1127.

Mandamus to compel admission to office. Post, § 1085.

Legislation § 803. 1. Enacted March 11, **1872** (based on Practice Act, § 310), (1) in the last sentence, (a) omitting the words "it shall be the duty of" after "and," and (b) changing "to" to "must" before "bring."

2. Amendment by Stats. **1901,** p. 165; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907,** p. 600, (1) in first sentence, (a) changing "the" to "a" before "complaint," (b) omitting, after "franchise," the words "within this state," and adding, in lieu thereof, the clause beginning "or against" and ending "this state"; the code commissioner saying, "The amendment suggested by the commissioner simply added to the original section as it was enacted March 11, 1872, the following sentence: 'And if it is claimed that a corporation, either de jure or de facto, is exercising a franchise which it is not authorized to exercise, or is exercising corporate functions when not authorized to do so, such corporation must be made a party defendant.' This was struck out on the floor of the senate, January 31, 1907, and the following inserted after the word 'franchise,' where it first appears: 'or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise.' "

Constitutionality of section. Whether § 5 of article VI of the constitution of 1879, and the amendment to § 76, ante, in 1880, reviving the writ of quo warranto, abolished by § 802 on the adoption of the codes in 1872, have or have not had the effect of repealing this section, can make but little difference, as the power under a writ of quo warranto is quite as broad as under the statute, and an information or complaint sufficient under this chapter will be sustained as in support of a writ of quo warranto, if the proper parties are before the court. People v. Dashaway Asso-

ciation, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277. The statute embodied in this chapter is constitutional; first, it may be considered as a mode of procedure for the exercise of the jurisdiction in quo warranto conferred by the constitution; and second, it is an action, and the legislature is not prohibited by the constitution from providing for such an action. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693; People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277.

Construction of section. A proceeding under this chapter is substantially equivalent to that by quo warranto; it is the same as quo warranto, with something added. People v. Perry, 79 Cal. 105; 21 Pac. 423; People v. Superior Court, 114 Cal. 466; 46 Pac. 383. Proceedings in the nature of quo warranto furnish an appropriate and adequate remedy for the usurpation of an office or franchise. Barendt v. McCarthy, 160 Cal. 680; 118 Pac. 228; People v. Sacramento Drainage District, 155 Cal. 373; 103 Pac. 207; People v. Rodgers, 118 Cal. 393; 46 Pac. 740; 50 Pac. 668; People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277; Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121; People v. Bingham, 82 Cal. 238; 22 Pac. 1039; People v. Perry, 79 Cal. 105; 21 Pac. 423; People v. Henshaw, 76 Cal. 436; 18 Pac. 413; Kelly v. Edwards, 69 Cal. 460; 11 Pac. 1; People v. Lawley, 17 Cal. App. 331; 119 Pac. 1089. This section provides for an action against one who unlawfully exercises any public office or any franchise. Ex parte Henshaw, 73 Cal. 486; 15 Pac. 110. This chapter, relating to actions for usurpation of an office or a franchise, provides, in effect, for an information in the nature of quo warranto, the remedy or proceeding being extended to usurpations of or intrusions into any office or franchise, and is constitutional. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693. Proceedings under this chapter were maintained in the following cases to question the validity of the election, appointment, or right to hold office or to exercise a franchise, but no ruling as to the character of the franchise was made. People v. Brenham, 3 Cal. 477; People v. Hoge, 55 Cal. 612; People v. Pfister, 57 Cal. 532; People v. Newman, 96 Cal. 605; 31 Pac. 564; People v. Hecht, 105 Cal. 621; 45 Am. St. Rep. 96; 27 L. R. A. 203; 38 Pac. 911; People v. Knight, 116 Cal. 108; 47 Pac. 925; People v. Shaver, 127 Cal. 317; 59 Pac. 784; People v. Williamson, 135 Cal. 415; 67 Pac. 504; People v. Golden Gate Lodge, 128 Cal. 257; 60 Pac. 865. The action under this section is in the form of a civil action, and, as to the procedure therein, follows the rules prescribed for civil cases, but the judgment rendered therein, adjudging the defendant guilty of usurping the franchise, and imposing a fine therefor, is penal in its nature. People v. Sutter Street Ry. Co., 129 Cal. 545; 79 Am. St. Rep. 137; 62 Pac. 104.

Quo warranto. The definition of the process of quo warranto is, that it is in the nature of a writ of right of the public against him who usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right. People v. Woodbury, 14 Cal. 43. Quo warranto, at common law, was a writ which issued to bring the defendant before the court to show by what authority he claimed an office or franchise, and was applicable alike to cases where the defendant never had a right, or where, having a right or franchise, he had forfeited it by neglect or abuse. People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277. Quo warranto was a case at law; it afforded the legal remedy for the usurpation of an office. Buckner v. Veuve, 63 Cal. 304; People v. Perry, 79 Cal. 105; 21 Pac. 423; People v. Bingham, 82 Cal. 238; 22 Pac. 1039; Wheeler v. Donnell, 110 Cal. 655; 43 Pac. 1. A proceeding by quo warranto is, in form, a criminal proceeding, though, in substance, a civil one in most cases; it seems to be, and generally is, a mixed action for the double purpose of vindicating public policy and enforcing a private remedy. People v. Gillespie, 1 Cal. 342. Proceedings by quo warranto, like writs of mandamus and other prerogative writs, rest in the discretion of the court; the exercise of the power is had only in cases where the public convenience and welfare requires it; the writ is the state's right, and is only to be issued for the state's benefit. Searcy v. Grow, 15 Cal. 117.

Information in nature of quo warranto. Informations in the nature of quo warranto existed at common law; in England, they were filed by the attorney-general, or by the king's coroner, of his own authority; afterwards, by the king's coroner, under the direction of the court of king's bench, and still later, in certain cases, by leave of the court; the latter, which was under the statute of Anne, introduced a more convenient mode of proceeding to inquire into a usurpation of or an intrusion into certain enumerated offices and franchises. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693. The office of a writ issued upon an information in the nature of quo warranto is to prevent the usurpation of any office, franchise, or liberty, as also to afford a remedy against corporations for a violation of their charters tending to a forfeiture thereof. Ex parte Attorney-General, 1 Cal. 85. An information in the nature of quo warranto, which has succeeded the writ of that name,

was originally, in form, a criminal proceeding to punish the usurpation of a franchise by a fine, as well as to seize the franchise; and this information has now become, in substance, a civil proceeding to try the mere right to the franchise or office. People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277.

Attorney-general may bring action. An action may be brought by the attorney-general for the usurpation of an office or a franchise. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693. The attempt of a municipal corporation to govern and tax the inhabitants of territory annexed to that described in its charter, and outside of its charter limits, is the usurpation of a franchise, for which the attorney-general is authorized to bring an action in the name of the people. People v. Oakland, 92 Cal. 611; 28 Pac. 807. A city has no power to institute an action to secure a forfeiture of a street-railway franchise: that power is vested in the attorney-general. People v. Sutter Street Ry. Co., 117 Cal. 604; 49 Pac. 736.

Action upon complaint of private party. The attorney-general has control of an action of quo warranto, although it is brought upon the relation of a private party. People v. Sutter Street Ry. Co., 117 Cal. 604; 49 Pac. 736. It is in no legal sense under the control of the relator; and a stipulation made by the relator or his counsel is not binding on the state. People v. Holden, 28 Cal. 123. Where the term of office of an incumbent has expired, quo warranto lies in the name of the people, upon relation of one claiming to have been elected as his successor, to remove him from an unlawful holding over; it cannot concern the defendant whether the relator is entitled to the office, as against an intervening claimant, nor whether the court, in the contest between the relator and the other claimant, erred in its decision in favor of the relator. People v. Campbell, 138 Cal. 11; 70 Pac. 918. The relator need not be shown to be entitled to the office usurped (People v. Bingham, 82 Cal. 238; 22 Pac. 1039; People v. Superior Court, 114 Cal. 466; 46 Pac. 383); and the proceeding is not properly by relation, unless the relator has an interest in the proceeding. People v. Sutter Street Ry. Co., 117 Cal. 604; 49 Pac. 736. The fact that the attorney-general has unnecessarily added the name of a relator in an action to forfeit a franchise, does not convert the proceeding into a private action. People v. Sutter Street Ry. Co., 117 Cal. 604; 49 Pac. 736. Assuming that the courts have power to control the discretion of the attorney-general in refusing leave to a private person to sue under this section, that power should be exercised only where the abuse of discretion by the attorney-general, in refusing such leave, is extreme and clearly indefensible; otherwise the order of the court is an abuse of its own discretion. Lamb v. Webb, 151 Cal. 451; 91 Pac. 102.

Subject-matter of action. The dissolution of a corporation, at the instance of the state, or the forfeiture of its franchise, can only be accomplished by quo warranto proceedings. Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668; 87 Pac. 27. The proper remedy to question the validity of the action of a board of supervisors, in declaring territory described in its order to be duly incorporated under a specified name as a municipal corporation, is by a proceeding in quo warranto. Beaumont v. Samson, 5 Cal. App. 491; 90 Pac. 839. Drainage, irrigation, and reclamation districts are public corporations, and the proper remedy to question their acts is by a proceeding in quo warranto, whether corporations de jure or de factor. Keech v. Joplin, 157 Cal. 1; 106 Pac. 222; Reclamation District No. 765 v. McPhee, 13 Cal. App. 382; 109 Pac. 1106. Whether or not the petition for the annexation of territory to a city was signed by the requisite number of electors, cannot be inquired into by the court in an action of quo warranto, where the determination whether it was so signed was a question of fact, submitted by the statute to the decision of the city council. People v. Los Angeles, 133 Cal. 338; 65 Pac. 749. The result of an election may be tested by a proceeding upon an information in the nature of quo warranto. Stone v. Elkins, 24 Cal. 125. A proceeding for the confirmation of the organization of an irrigation district, under the act of March 16, 1889, is in rem, and the decree of confirmation is conclusive upon the state, as well as upon others, that all of the steps necessary for the proper organization of the district had been taken, and the contrary cannot be shown in an action of quo warranto. People v. Perris Irrigation Dist., 132 Cal. 289; 64 Pac. 399.

Public officers, who are. A pilot in the port of San Francisco was an officer, under the act of 1854, as amended in 1858. People v. Woodbury, 14 Cal. 43. The physician of a county hospital is an officer, where the law authorizing the appointment of such physician fixes his term of office, provides for his salary, and prescribes his duties. People v. Harrington, 63 Cal. 257; and see Wall v. Board of Directors, 145 Cal. 468; 78 Pac. 951. A graduate of medicine, appointed by a board of supervisors as a county physician, or hospital physician, under the County Government Act of 1897 (§ 25, subd. 5), to attend upon the indigent sick and dependent poor of the county, is not a public officer, but a mere employee of the board, and hence is not subject to proceedings in quo warranto upon relation of the attorney-general. People v. Wheeler, 136 Cal. 652; 69 Pac. 435. A member of the board of health of the city and county of San Francisco is an officer, within the meaning of the constitu-

tion. People v. Perry, 79 Cal. 105; 21 Pac. 423. A director in a private corporation cannot be said to hold a public office. Foster v. Superior Court, 115 Cal. 279; 47 Pac. 58.

Usurper, who is. When the question as to who is the legal successor of an officer is in litigation upon a point of law, the incumbent is bound to know who his successor is, and if his legal successor qualifies and demands the office, and the incumbent refuses to deliver it up upon the termination of the litigation, he becomes a usurper ab initio. People v. Smyth, 28 Cal. 21. An office becomes vacant, ipso facto, upon the incumbent ceasing to be an inhabitant of the district for which he was elected; and one appointed to fill such vacancy is not a usurper, merely because the office had not previously been declared vacant. People v. Brite, 55 Cal. 79.

Franchise, what is. A franchise is a particular privilege conferred by a grant from the government and vested in individuals. Ex parte Henshaw, 73 Cal. 486; 15 Pac. 110; People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85. Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally, of common right; the common right refers to the right of citizens generally at common law, the investiture of which is not to be looked for in any special law, whether established by the constitution or by an act of the legislature; and although a right, such as a right to lay down pipes in the streets of a city, and to collect rates for water furnished, may be granted by the constitution to every person, yet it does not follow that such right is not a franchise; they are vested by a grant of the sovereign power, and not by the common law, and the generality of the grant does not deprive them of the character of franchises. Spring Valley Water Works v. Schottler, 62 Cal. 69. The right to collect tolls on roads and bridges is a franchise, the character of which may be defined as a certain privilege of a public nature, conferred by grant from the government and vested in individuals; it makes no difference whether the grant is made directly by the legislature, or by a subordinate body to whom the power is delegated; it is still a grant emanating from the sovereign authority of the state; a grant of such a franchise by a board of supervisors has the same standing, in respect to its validity, the presumptions in its favor, and the mode in which it may be attacked, as a grant of any other right, privilege, or thing made by any department of the government, under the authority of law. Truckee etc. Turnpike Road Co. v. Campbell, 44 Cal. 89; Bartram v. Central Turnpike Co., 25 Cal. 284; Volcano Cañon Road Co. v. Board of Supervisors, 88 Cal. 634; 26 Pac. 513. The right to be a corporation is, in itself, a franchise. People v. Selfridge, 52 Cal. 331; People v. Montecito Water Co., 97 Cal. 276; 33 Am. St. Rep. 172; 32 Pac. 236. The very existence of a corporation, as such, is a franchise, and it exercises its franchise in every act which it performs as a corporation; but a corporation, whose existence is a franchise, may possess powers and privileges which, in themselves, are not franchises, such as the right to bank, or the right to buy and sell property, real and personal, but it usually owns, with such privileges, some that are franchises, but, whether the powers are entirely of the kind which are franchises or not, its existence and right to employ its corporate powers is a franchise. Spring Valley Water Works v. Schottler, 62 Cal. 69. The right of laying down and maintaining pipes in the streets of a city, by which water or gas is conveyed, and to collect rates for water or gas, is a franchise. San José Gas Co. v. January, 57 Cal. 614; Spring Valley Water Works v. Schottler, 62 Cal. 69. An office is of the nature of a franchise, in that it can be derived only from the sovereign. Ex parte Henshaw, 73 Cal. 486; 15 Pac. 110. The right and power claimed by a municipal corporation to govern and tax the inhabitants of a territory annexed to that described in its charter, is a franchise, in addition to and distinct from that of being a corporation. People v. Oakland, 92 Cal. 611; 28 Pac. 807.

Title to public office tried how. There are two separate and distinct methods provided in this code for testing the title to an office: the first is by proceedings under this chapter (§§ 802–810), in the nature of quo warranto, against any person who usurps or intrudes into a public office; and the second is by contesting the election under §§ 1111–1127, post. Powers v. Hitchcock, 129 Cal. 325; 61 Pac. 1076; and see Satterlee v. San Francisco, 23 Cal. 314. The act conferring upon any elector the right to contest the election of any person who has been declared duly elected to a public office, does not deprive the people, in their sovereign capacity, on complaint made, of their right to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise, or to remove him therefrom if it is shown that he is a usurper having no legal title thereto; the two remedies are distinct, the one belonging to the elector in his individual capacity, as a power granted, and the other to the people, in the right of their sovereignty. People v. Holden, 28 Cal. 123. An information in the nature of quo warranto is not collateral, but is a direct proceeding to try the title to an office, and to inquire into all the facts upon which the title rests; such in-

formation is the direct and appropriate remedy for a review. People v. Scannell, 7 Cal. 432. The actual incumbent of an office may maintain a summary proceeding, by petition, to recover the books and papers pertaining to the office; his right to the office can only be called in question by an information against him in the nature of quo warranto, and such right cannot be questioned on review by certiorari. Hull v. Superior Court, 63 Cal. 174; and see Lamb v. Schottler, 54 Cal. 319. The contest of the right of an actual incumbent in possession under color of right can be originated only by a proceeding by information in the nature of quo warranto against him as incumbent. People v. Olds, 3 Cal. 167; 58 Am. Dec. 398; Hull v. Superior Court, 63 Cal. 174. One in possession of an office to which he was not duly elected, but who holds a certificate of election, proper in form, from the board of election canvassers, has not the real title, but only the color of title given by the certificate, and he is an intruder or usurper, or one who unlawfully holds and exercises office, and an action may be maintained against him, under this section. People v. Jones, 20 Cal. 50. The forfeiture of the right to office, by failure of the appointee to qualify under the commission of appointment within the time provided by law, may be determined in an action under this chapter. People v. Perkins, 85 Cal. 509; 26 Pac. 245. Under this section, claims to the office of a member of a municipal board of health may be determined. People v. Perry, 79 Cal. 105; 21 Pac. 423. One holding over after the expiration of his term of office, and who is entitled to retain office until the appointment of his successor, cannot be ousted by a new appointee, who does not possess the qualifications prescribed by law: in such case there is not a ground for a judgment that he wrongfully usurps or holds the office. People v. King, 127 Cal. 570; 60 Pac. 35.

Public officers, removal of for malfeasance. The act of March 30, 1874 (Stats. 1873–74, p. 911), providing for the removal of certain officers for malfeasance in office, was repealed by the constitution of 1879, and its place supplied by §§ 55, 184, of the County Government Act of 1883. Fraser v. Alexander, 75 Cal. 147; 16 Pac. 757. A proceeding, by accusation, for misdemeanor in office, under § 772 of the Penal Code, is in no sense a proceeding in the nature of quo warranto, title to office not being in dispute. Wheeler v. Donnell, 110 Cal. 655; 43 Pac. 1.

De facto officers, validity of acts of. The acts of a de facto sheriff, who participated in the drawing of a jury, in a criminal case, are good. People v. Roberts, 6 Cal. 214. One who assumes office under color of election is an officer de facto, and holds a vested right to act as such until his right is questioned in a proper proceeding for that purpose. People v. Hammond, 109 Cal. 384; 42 Pac. 36. Although the action of a de facto officer to hold an existing office cannot be questioned collaterally, yet this principle does not apply when the office does not exist: there cannot be a de facto judge of a court that has no legal existence. People v. Toal, 85 Cal. 333; 24 Pac. 603.

Surrender of office, effect of. Where an officer surrenders his office upon the apparent election of his successor, he cannot thereafter resume his functions, upon the ground that the election of his successor was declared void and annulled on the ground of his ineligibility, after he had entered upon the duties of the office. People v. Rodgers, 118 Cal. 393; 46 Pac. 740; 50 Pac. 668.

Collateral attack on public officer. The validity of an election, or the right to take and hold office, cannot be inquired into in a collateral action or proceeding (Satterlee v. San Francisco, 23 Cal. 314; Shores v Scott River Water Co., 17 Cal. 626; People v. Sassovich, 29 Cal. 480; Susanville v. Long, 144 Cal. 362; 77 Pac. 987); nor can the right of a de facto justice of the peace to exercise the functions of his office be questioned in a collateral proceeding. People v. Sehorn, 116 Cal. 503; 48 Pac. 495; People v. Provines, 34 Cal. 520; and see People v. Mellon, 40 Cal. 648.

Perversion and usurpation of franchise, and action therefor. Cases of forfeiture are said to be divided into two great classes: 1. Cases of perversion, as where a corporation does an act inconsistent with the nature, and destructive of the ends and purposes, of the grant, in which cases, unless the perversion is such as to amount to an injury to the public, who are interested in the franchise, it will not work a forfeiture; 2. Cases of usurpation, as where a corporation exercises a power it has no right to exercise, in which case the question of forfeiture is not dependent, as in the former, upon any interest of or injury to the public. People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277; People v. Rosenstein-Cohn Cigar Co., 131 Cal. 153; 63 Pac. 163. Corporations are creatures of the law; and when they fail to perform the duties for which they were incorporated, and in which duties the public have an interest, or when they do acts they are not authorized or are forbidden to do, the state may forfeit their franchises, and dissolve them by an information in the nature of quo warranto. People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277. The principle of a forfeiture is, that the franchise is a trust, and the terms of the charter are conditions of the trust; and the violation of such conditions works a forfeiture of the charter. People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277; Havemeyer v. Superior Court,

84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121; People v. Rosenstein-Cohn Cigar Co., 131 Cal. 153; 63 Pac. 163. Information in the nature of quo warranto lies against a legally existing corporation for abuse of its franchises: scire facias, which seems to have been the more usual proceeding where a legally existing body had abused the powers and franchises intrusted to it, is abolished. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85. Where the articles of incorporation declared the purpose of the company to be to transport freight and passengers, and upon this representation the court condemned land, under the right of eminent domain, for the railway, and such railway, when constructed, was operated exclusively for the transportation of coal, the proceedings in condemnation amounted to an imposition on the court, and the misuse of the corporate authority will be inquired into by the state, in order to correct the abuse. People v. Pittsburgh R. R. Co., 53 Cal. 694. An information in the nature of quo warranto does not lie to enforce the dissolution of a corporation organized merely "to promote the cause of temperance," on the ground that it has disregarded its corporate trust and violated its charter by perversion and misapplication of its funds from the object for which it was formed, and from the use for which the funds were given and received, by dividing the same among its members, for the reason that the perversion of the funds is not an injury to the public. People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277. An individual or a corporation assuming, without grant, to exercise powers which are prerogatives of the government, and such as can be exercised by a private person only when granted by the government, should be adjudged to be unlawfully exercising such powers. Ex parte Henshaw, 73 Cal. 486; 15 Pac. 110. The articles of incorporation of a manufacturing company, formed to own and run a sawmill, and to manufacture lumber and articles made of wood, are not vitiated by including therein power to operate, construct, maintain, and deal in railroads, tramways, and rights of way, as part of the manufacturing plant; and an information in the nature of quo warranto, seeking to have it adjudged that such manufacturing corporation is exercising the corporate functions of a railroad company without right, not being constituted as the code requires of every railroad corporation, does not state a cause of action. People v. Mount Shasta Mfg. Co., 107 Cal. 256; 40 Pac. 391. Where the incorporators of a railroad company fail to subscribe the amount of capital stock required by law, and to pay the prescribed percentage thereof in cash, their acts of attempted incorporation and organization are invalid, and an action may be maintained, upon an information in the nature of quo warranto, to prevent the incorporators from usurping the functions of a railroad company without being duly incorporated as such. People v. Chambers, 42 Cal. 201. Where the officers of a corporation, organized under a particular name, in the exercise of its franchises use an abbreviation of that name, there is not a usurpation, and a proceeding by quo warranto, upon the part of the people, cannot be maintained to oust them from the enjoyment of those franchises. People v. Bogart, 45 Cal. 73; and see People v. Sierra Buttes etc. Mining Co., 39 Cal. 514. The continued exercise of a franchise, without right, is a continuously renewed usurpation, on which a new cause of action arises each day; and the sovereign power has at all times the right to inquire into the matter of the user of a franchise or the title by which it is held. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; People v. Reclamation District, 121 Cal. 522; 50 Pac. 1068; People v. Jefferds, 126 Cal. 296; 58 Pac. 704. The action may be for the forfeiture of a particular franchise or of the whole charter. People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277. The state acquires no lien on the property of a corporation by an action against it for the forfeiture of its charter, and cannot attack a sale thereof, made pendente lite; up to the time of dissolution, the corporation has the same power of disposing of its property, honestly and in good faith, that any corporation has: what is forfeited to the state, and all that is forfeited, is the charter,—the right to be a corporation,—and this is taken back by the state, solely upon the ground that the condition upon which it was granted has been violated. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. The actual use of the franchise by the defendant is not, in all cases, necessary, in order to authorize an action for the usurpation of such franchise; as, where the forfeiture of a franchise to maintain a street-railway on certain streets is sought because of the failure of the company to comply with the conditions upon which the franchise was granted. People v. Sutter Street Ry. Co., 117 Cal. 604; 49 Pac. 736. The willful acts and neglects of the officers or agents of a corporation are regarded as the acts and neglects of the corporation, and render it liable to a judgment or decree of dissolution; but where the officers or agents have departed from their duties as prescribed by the corporation, or violated their instructions in the performance of the acts complained of and relied upon as a basis for forfeiture, no such forfeiture will be declared. People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277. Acts sufficient to cause a forfeiture do not, per se, produce a forfeiture: the corporation continues to

exist until the sovereignty which created it shall, by proper proceedings in a proper court, procure an adjudication of forfeiture and enforce it. People v. Los Angeles Electric Ry. Co., 91 Cal. 338; 27 Pac. 673.

Who may attack franchise. A grant of a turnpike franchise is not liable to attack by a private person, nor in a collateral proceeding, for mere error in the exercise of the authority to make the grant (Truckee etc. Turnpike Road Co. v. Campbell, 44 Cal. 89); nor can the franchise of a turnpike-road company to maintain a toll-road, or its title and right to possess such road, be inquired into by a mere intruder or trespasser. Stockton etc. Gravel Road Co. v. Stockton etc. R. R. Co., 45 Cal. 680.

Prerequisites to exercise of corporate powers. The general rule is, that the existence of a corporation may be proved by producing its charter, and showing acts of user under it; but this rule has no application to a corporation formed under the provisions of a general statute requiring certain acts to be performed before the corporation can be considered in esse or its transactions possess any validity: the existence of a corporation thus formed must be proved by showing at least a substantial compliance with the requirements of the statute; but there is a broad and obvious distinction between such acts as are declared to be necessary in the process of incorporation, and those required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers; in respect to the former, any material omission is fatal to the existence of the corporation, and may be taken advantage of collaterally, in any form in which the fact of incorporation can properly be called in question; and in respect to the latter, the corporation is responsible only to the government, and in a direct proceeding to forfeit its charter; the right to be considered a corporation, and to exercise corporate powers, depends upon the fact of the performance of the particular acts named in the statute as essential to its corporate existence. Mokelumne Hill etc. Mining Co. v. Woodbury, 14 Cal. 424; 73 Am. Dec. 658; Harris v. McGregor, 29 Cal. 124. The right to be a corporation is, in itself, a franchise; and although, to acquire a franchise under a general law, the prescribed statutory conditions must be complied with, yet a substantial rather than a literal compliance will suffice; but it does not follow from this, that any positive statutory requirement can be omitted on the ground that it is unimportant; none of the conditions precedent to acquiring a statutory right can be dispensed with by the court. People v. Selfridge, 52 Cal. 331; People v. Montecito Water Co., 97 Cal. 276; 33 Am. St. Rep. 172; 32 Pac. 236.

Jurisdiction. Quo warranto proceedings are within the appellate jurisdiction of the supreme court. People v. Perry, 79 Cal. 105; 21 Pac. 423. The supreme court is strictly an appellate tribunal, and has no original jurisdiction, except in cases of habeas corpus; hence, it is not empowered to issue a writ of quo warranto to determine the right to an office, or the existence of the office. Ex parte Attorney-General, 1 Cal. 85; and see Caulfield v. Hudson, 3 Cal. 389; Miliken v. Huber, 21 Cal. 166; People v. Harvey, 62 Cal. 508. The former district court had jurisdiction of an action to determine the result of an election to office. People v. Holden, 28 Cal. 123. The superior court has power, under § 5 of article VI of the constitution, to issue writs of quo warranto, and, in an action in the nature of quo warranto, brought under this section and § 809, post, it has authority to oust a person from office, and recover a penalty of five thousand dollars for unlawfully holding such office. People v. Bingham, 82 Cal. 238; 22 Pac. 1039. The jurisdiction of the superior court to issue writs of quo warranto, given by the constitution of 1879, is not exclusive of their jurisdiction over a regular action to declare the forfeiture of a franchise. People v. Sutter Street Ry. Co., 117 Cal. 604; 49 Pac. 736. The jurisdiction of the superior court to try the question of usurpation of an office, and incidentally the existence of the office, is not derived from any act relating to a particular office, but from its constitutional grant of general jurisdiction in civil cases, the exercise of which, so far as respects actions of this character, is regulated by this chapter. Ex parte Henshaw, 73 Cal. 486; 15 Pac. 110. An action brought by the attorney-general to oust a person from the office of supervisor of the city and county of San Francisco, and to recover the statutory penalty for usurpation of office, is in the nature of quo warranto, and within the constitutional grant of jurisdiction to the superior court, and this jurisdiction, being conferred by the constitution, cannot be abridged or taken away by the legislature; hence, the provision of the consolidation act, that the board of supervisors shall be the judge of election returns and qualifications of its own members, was superseded by the present constitution, at least so far as it could be held to confer exclusive jurisdiction upon the supervisors. People v. Bingham, 82 Cal. 238; 22 Pac. 1039; and see People v. Perry, 79 Cal. 105; 21 Pac. 423. That a corporation has entered into an illegal trust for the purpose of creating a monopoly will not confer upon the court, in quo warranto proceedings, the right to appoint a receiver of the assets of the corporation. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. The superior court has no jurisdiction to appoint a receiver of the property of a corporation in a quo warranto proceeding, upon judgment of for-

feiture of its corporate charter, unless a new suit is commenced by a creditor or stockholder of the corporation for that purpose. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121; and see Neall v. Hill, 16 Cal. 146; 76 Am. Dec. 508; People v. Union Building etc. Ass'n, 127 Cal. 400; 59 Pac. 692; Murray v. Superior Court, 129 Cal. 628; 62 Pac. 191. The jurisdiction of the superior court to decree a dissolution of a corporation exists only by virtue of statutory authority; the court does not possess this authority by virtue of its inherent general jurisdiction in equity, either at the suit of an individual or at the suit of the state, and, as its jurisdiction is derived from the statute, it is limited by the provisions of the statute, both as to the conditions under which it may be invoked and the extent of the judgment which it may make in the exercise of this jurisdiction. State Investment etc. Co. v. Superior Court, 101 Cal. 135; 35 Pac. 549. The provisions of the constitution relative to the jurisdiction of courts do not disable the legislature, in creating municipal corporations, from providing that the city council shall be the final and exclusive judge of the election of all municipal officers; and prohibition will lie to the superior court to prevent the hearing of a contest for a municipal office, of which the city council is given exclusive jurisdiction under its charter. Carter v. Superior Court, 138 Cal. 150; 70 Pac. 1067. Where the charter of a city provides that the common council shall judge of the qualifications, elections, and returns of its own members, such council possesses exclusive authority to pass on the subject, and courts have no jurisdiction to inquire into the qualifications, elections, or returns of the members of the council. People v. Metzger, 47 Cal. 524.

Parties defendant. Quo warranto does not lie against a mere temporary employment, like that of the jury; it lies only against the holder of a public office having a fixed and permanent tenure. Bruner v. Superior Court, 92 Cal. 239; 28 Pac. 341. The stockholders of a corporation are, in a certain sense, parties to an action to forfeit its franchise, but they are not parties in any other sense than that they are bound by the consequences of such judgment as the court, in that action, has power to give; and if the court goes outside of the issues in the action, and renders a judgment or makes an order embracing matters entirely foreign to such issues, the stockholders are not bound by such judgment or order. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. In an action to have it determined that certain persons are unlawfully claiming to be, and are exercising the functions of, a private corporation, which never had an existence, the persons usurping the franchise are the only proper defendants; if the corporation is made a defendant as such, its corporate existence is admitted. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693. Where it is claimed that a corporation is usurping privileges and powers not belonging to it, the corporation is the proper, and the only proper, party. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; People v. Reclamation District, 117 Cal. 114; 48 Pac. 1016. Where the action is for the forfeiture of the franchise of the corporation for abuse and misuse of its powers, the corporation is a proper party defendant. People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277. In an action brought to determine and restrain the usurpation of a corporate franchise, the alleged usurping corporation is a necessary party defendant. People v. Flint, 64 Cal. 49; 28 Pac. 495; People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693. In a proceeding by the state, in the nature of a quo warranto, to deprive a corporation de facto of its corporate charter and procure its dissolution on the ground of a want of substantial compliance with the statutory requirements in its formation, the corporation de facto is a necessary party, and making it such, with the averment that it is a corporation de facto, but not de jure, does not estop the state from questioning its corporate character. People v. Monteeito Water Co., 97 Cal. 276; 33 Am. St. Rep. 172; 32 Pac. 236. Whenever a proceeding is such as that it must test and determine the validity of a municipal charter as such, the municipality, real or pretended, must be made a party. People v. Gunn, 85 Cal. 238; 24 Pac. 718.

Joinder of parties defendant. In an action of quo warranto to determine the validity of an election for school trustees, all the defendants claiming to be elected are properly joined as defendants, under § 808, post; and there is no improper joinder of several causes of action against them. People v. Prewett, 124 Cal. 7; 56 Pac. 619. The statutory action for the usurpation of a municipal franchise may be maintained against the defendant in its assumed corporate name without joining the trustees; their liability is for a usurpation of office, and not of a franchise. People v. Riverside, 66 Cal. 288; 5 Pac. 350.

Joinder of causes of action. An information in the nature of quo warranto, against the three trustees of a school district, to determine their right to office, all three claiming to be elected, is not open to the objection that three causes of action are improperly united. People v. Prewett, 124 Cal. 7; 56 Pac. 619. To allege that the defendant unlawfully exercises and wrongfully claims the right to exercise a franchise, and that it claims the right to lay tracks and make switches, is not to unite

two causes of action. People v. Sutter Street Ry. Co., 117 Cal. 604; 49 Pac. 736.

Complaint, allegations of. It was a peculiarity of both the quo warranto, and an information in the nature of a quo warranto, that the ordinary rule of pleading was reversed, and the state was bound to show nothing, and the defendant was required to show his right to the franchise or office in question; and if he failed to show authority, judgment went against him; the practice has, however, now become quite general for the information to set forth the facts relied upon to show the intrusion, misuser, or nonuser complained of. People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277. An averment that the defendants held, used, exercised, and enjoyed the office in question, without a license for that purpose, is sufficient: these are the facts constituting the cause of action, and the only facts necessary to be stated. People v. Abbott, 16 Cal. 359. Although the complaint need not state the facts constituting the usurpation or illegal exercise of the office by the defendant, and is sufficient where it merely alleges that he is unlawfully exercising the office, leaving his right to such exercise to be pleaded in his defense, yet such allegation, being material, and relevant to the issue, must be denied, or the fact thus alleged must be held to be admitted by the defendant. People v. Superior Court, 114 Cal. 466; 46 Pac. 383. A complaint in quo warranto, showing that the plaintiff is in the exercise of the office, but not alleging nor suggesting that the defendant has usurped or intruded into the office, does not state a cause of action. Powers v. Hitchcock, 129 Cal. 325; 61 Pac. 1076. A complaint in quo warranto, to determine the validity of an election, which merely alleges that copies of an old great register were used at the polls, instead of copies of a new one required by law, but which does not aver that the names of all the voters were not on the new register, does not state a cause of action. People v. Worswick, 142 Cal. 71; 75 Pac. 663. It is sufficient, in an action against individuals, charging that they are wrongfully claiming to act as a corporation, to allege, in general terms, that there never was such a corporation: such allegation covers the whole ground. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693. A complaint alleging that by reason of the acts and omissions of the defendant company, if the said company ever had, as a corporation, "any legal existence, right, privilege, or franchise, . . . the same became forfeited," but not alleging that the company once had a legal existence as a corporation, fails to state a cause of action: there can be no resumption or forfeiture, by the state, of a franchise never granted. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693. The complaint in an action to forfeit the franchise of a street-railway company to maintain tracks upon a certain street is not open to the objection that it does not state a cause of action, because it avers that the defendant has not, at any time, operated a railway upon the tracks constructed by it, where the complaint does state that the franchise was granted upon certain conditions as to the operation, which had not been complied with, and that the defendant merely pretended to operate the same by running over the track one car every day, not with an intention to accommodate the public, but merely for the purpose of maintaining the franchise. People v. Sutter St. Ry. Co., 117 Cal. 604; 49 Pac. 736. In an action of quo warranto, the state may either charge the corporation defendant with the usurpation of a franchise in general terms, and thus throw the burden upon the defendant, or it may allege the specific grounds or defects relied upon to show a usurpation, in which case the facts pleaded, if admitted, must be sufficient to sustain the charge of usurpation, and if denied, the burden of proof is upon the plaintiff. People v. Los Angeles, 133 Cal. 338; 65 Pac. 749. Where the claim is, that the corporation is acting as such, but the proceedings under which it is acting are defective, the facts showing that it is so claiming to act, and the defects claimed to exist, should be set out specifically. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693. A complaint showing that the defendant is exercising the franchise of a municipal corporation, without being incorporated according to law, states facts sufficient to constitute a cause of action. People v. Riverside, 66 Cal. 288; 5 Pac. 350; People v. Flint, 64 Cal. 49; 28 Pac. 495. Where no relief is asked in favor of the relator, allegations of the complaint, setting forth his right to the office, are superfluous and immaterial; and if the allegations are insufficient to authorize a determination of the rights of the relator, the proper course is to disregard them. People v. Abbott, 16 Cal. 359. Where the complaint alleges that the defendant has usurped the office, erroneous allegations as to the statutory origin of the office may be disregarded as surplusage: it will then be sufficient to give the court jurisdiction to decide the question of usurpation. Ex parte Henshaw, 73 Cal. 486; 15 Pac. 110. A complaint in quo warranto against a toll-road company, alleging "that for more than six months last past the defendant has had no franchise or right to demand or take toll, etc.," does not admit that the defendant ever had a toll-road franchise. People v. Volcano Cañon Toll-road Co., 100 Cal. 87; 34 Pac. 522.

Demurrer, general and special. A general demurrer to a complaint in quo war-

ranto does not raise any question as to the sufficiency of the allegations relating to the right of the relator to the office (People v. Abbott, 16 Cal. 359); nor raise the question as to whether the relator's bond was properly approved. People v. Shorb, 100 Cal. 537; 38 Am. St. Rep. 310; 35 Pac. 163. An allegation in a complaint in quo warranto, that the defendant is in possession of the office without lawful authority, is a sufficient allegation of intrusion and usurpation; if the complaint is defective in this particular, the defect must be reached by special demurrer. People v. Woodbury, 14 Cal. 43.

Answer. The defendant in an action in the nature of quo warranto is at liberty to set forth, in his answer, as many defenses as he may have (People v. Stratton, 28 Cal. 382); and in an action for the usurpation of a corporate franchise, the answer must show that the corporation was organized in the manner required by the general laws. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; People v. Superior Court, 114 Cal. 466; 46 Pac. 383. An answer denying that the individual defendants are unlawfully claiming to be and are exercising the functions of a private corporation, together with a similar general denial of other material allegations of the complaint, is sufficient, where they rest their defense on the denial that they are making such claim and exercising the rights and privileges alleged. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85. Where a verified complaint sets up facts showing the illegality of the charter of the corporation, a general answer, or one which merely denies the conclusions of law stated in the complaint, or sets up affirmatively conclusions of law, is insufficient. People v. Lowden, 2 Cal. Unrep. 537; 8 Pac. 66. Where the existence of a corporation is expressly averred or is admitted, it is not sufficient to allege that it has ceased to exist: the facts showing that its existence has terminated must be set forth. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693; and see People v. Volcano Cañon Toll-road Co., 100 Cal. 87; 34 Pac. 522. The proper course for the defendant is, either to disclaim or to justify: if he seeks to justify, he must set out his title specially and distinctly. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; People v. Superior Court, 114 Cal. 466; 46 Pac. 383.

Intervention and defense. The holders of the bonds of an irrigation district, which is charged with the usurpation and unlawful exercise of the powers and franchise of a legally organized irrigation district, may intervene and join in defending the action, and may avail themselves of all the procedure and remedies to which the defendant district would be entitled, for the purpose of defeating the action or resisting the claim of the plaintiff. People v. Perris Irrigation Dist., 132 Cal. 289; 64 Pac. 399.

Prima facie evidence. Testimony tending to show that a company is a corporation de facto dispenses with strict proof of the corporate character, and precludes the party offering it from afterwards inquiring into or disputing the company's right to act as a corporation; such inquiry can only be had at the suit of the state, on information by the attorney-general. Rondell v. Fay, 32 Cal. 354. A certificate of election is not necessary to enable a party, claiming to have been elected, to bring his action by quo warranto: such certificate is merely prima facie evidence of title to the office, and not conclusive; nor is it the only evidence by which the title may be established; it is the fact of election which gives title, and this fact may not only be established without the evidence of the certificate, but also against it. Magee v. Board of Supervisors, 10 Cal. 376.

Presumptions. Where it is shown that the claimant of the office in controversy is performing the duties of such office, that fact, taken in connection with proof of the loss of the certificate of election, raises the presumption that he had executed his bond and taken the oath of office. People v. Clingan, 5 Cal. 389; Hull v. Superior Court, 63 Cal. 174. The presumption of law is, that ballots are all returned to the county clerk, and that they have not been mutilated; if such is not the case, it should be shown by evidence. People v. Holden, 28 Cal. 123. The positive testimony of the county clerk, that the documents or records relating to the election are not in his office, raises the legal presumption that he had searched for them, unless it appears from his testimony that such was not the fact. People v. Clingan, 5 Cal. 389. As against the state, there is no presumption that citizens exercising a franchise are exercising it rightfully. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693.

Best evidence. In an action brought to try the right to an office, the list of ballots cast in any precinct, and returned with the poll-list and tally-paper to the county clerk, is better evidence of the number of votes cast at the precinct, and for whom cast, than the tally-list made from them by the officers of the election. People v. Holden, 28 Cal. 123.

Parol evidence. The loss or destruction of a certificate of election may be shown and the fact of election established by parol evidence. People v. Clingan, 5 Cal. 389.

Admissions. A principal is not concluded by the admissions of his deputies, made in an action prosecuted against them, under this chapter, to which he was not a party. People v. Shorb, 100 Cal. 537; 38 Am. St. Rep. 310; 35 Pac. 163.

Admissibility of evidence. Where the defendant is exercising the functions of the office as the same are defined in the act creating the office, and is called on by the state to show by what authority he is acting, he cannot defend his conduct by proving that no one else has the power to exercise such functions. Ex parte Henshaw, 73 Cal. 486; 15 Pac. 110.

Burden of proof. In an action by one claiming to have been elected to an office, against his predecessor, to recover possession of the books and papers of the office, the plaintiff must show prima facie that a vacancy existed in the office, and that he was elected to fill it. Doane v. Scannell, 7 Cal. 393; People v. Scannell, 7 Cal. 432. In an action for the usurpation of a franchise, where the defendants admit, or do not deny, that they are exercising the rights and privileges alleged, and they attempt to establish their right to do so, they must show affirmatively by what right they are exercising the franchise. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; People v. Volcano Cañon Toll-road Co., 100 Cal. 87; 34 Pac. 522; People v. Superior Court, 114 Cal. 466; 46 Pac. 383. The burden of proof is on the defendants to show that the corporation was legally formed, and that its existence has been legally extended, where it is alleged that the charter has expired. People v. Lowden, 2 Cal. Unrep. 537; 8 Pac. 66.

Findings. Allegations of the complaint, that, at a general election, the relator was, by the greatest number of votes cast, elected to the office, and the answer denying that the relator was elected, and the finding of the court that such election was held, and that the relator received the greatest number of votes cast, are sufficient to sustain judgment for the relator. People v. Jones, 20 Cal. 50.

Injunction against removal of street-railroad tracks. Although the right of a street-railroad company to lay tracks along certain streets can be inquired into only in a proceeding by the state, yet if the grant of a right to lay such tracks is void, and another company possesses a valid right to do so, the latter company may remove the tracks laid by the former company, as an obstruction or impediment to the prosecution of their work, and the former company cannot enjoin them from making such removal. Omnibus R. R. Co. v. Baldwin, 57 Cal. 160.

Pendency of quo warranto against corporation as defense to mandamus. Pendency of proceeding in quo warranto, against persons claiming to compose a corporation, is no defense to a proceeding by mandamus, by such corporation, to compel a county to subscribe to its capital stock and to issue its bonds therefor. Oroville etc. R. R. Co. v. Supervisors, 37 Cal. 354.

Collateral attack on franchise. The provision of the statute, that the due incorporation of a company claiming in good faith to be a corporation under the laws of this state, and doing business as such, shall not be inquired into collaterally, does not preclude a private person from denying the existence, de jure or de facto, of an alleged corporation: to say that the due incorporation cannot be inquired into collaterally does not mean that no inquiry can be made as to whether it is a corporation; many of the acts required to be performed, in order to make a complete organization of the corporation, may have been irregularly performed, or some of them may have been entirely omitted, and the rule of the statute is, that such irregular or defective performance shall not defeat the incorporation when drawn into question collaterally; and a substantial compliance with the requirements of the statute is sufficient to show a corporation de jure, in an action between the corporation and a private person. Oroville etc. R. R. Co. v. Supervisors, 37 Cal. 354; Spring Valley Water Works v. San Francisco, 22 Cal. 434; Dannebroge etc. Mining Co. v. Allment, 26 Cal. 286; People v. Frank, 28 Cal. 507; Dean v. Davis, 51 Cal. 406; Bakersfield Town Hall Ass'n v. Chester, 55 Cal. 98; Fresno Canal etc. Co. v. Warner, 72 Cal. 379; 14 Pac. 37; Lakeside Ditch Co. v. Crane, 80 Cal. 181; 22 Pac. 76; Golden Gate etc. Mining Co. v. Joshua Hendy Machine Works, 82 Cal. 184; 23 Pac. 45; First Baptist Church v. Branham, 90 Cal. 22; 27 Pac. 60. The rule that the right to a franchise is not subject to attack in a collateral proceeding does not, in an action brought by a turnpike-road company to enforce the payment of tolls, prevent the defendant from denying the right of the plaintiff to a franchise to collect such tolls, where it affirmatively appears, on the plaintiff's own showing, that no toll-gate had been legally established or located upon the road, and where, under the law, the board of supervisors was without jurisdiction to grant the franchise to collect such tolls until after it had established such toll-gates. Waterloo Turnpike Road Co. v. Cole, 51 Cal. 381. In an action by a corporation, the defendant cannot put the due incorporation of the plaintiff, or its right to exercise corporate powers, in issue, if the plaintiff claims in good faith to be a corporation under the laws of the state, and to be doing business as such. Pacific Bank v. De Ro, 37 Cal. 538. A proceeding, in pursuance of the act of March 16, 1889, to procure the confirmation of proceedings for the issue and sale of the bonds of an irrigation district, is not one in which the question of the due in-

corporation of the corporation arises collaterally: in such case, the corporation itself comes into court and challenges an examination of the regularity of its organization, and asks the court to examine each and all of the proceedings for the organization of the district; and in such proceeding it is necessary for the corporation to establish such regularity, and to give evidence of each step therein, as fully as if its acts were under investigation upon a writ of review, or as if the state were, by quo warranto, questioning its right to exercise the franchise of a corporation. In re Madera Irrigation Dist., 92 Cal. 296; 27 Am. St. Rep. 106; 14 L. R. A. 755; 28 Pac. 272; People v. Perris Irrigation Dist., 132 Cal. 289; 64 Pac. 399.

Prohibition. Prohibition lies to restrain the superior court from proceeding, in quo warranto, with the receivership of property of a dissolved corporation. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121; Yore v. Superior Court, 108 Cal. 431; 41 Pac. 477.

Abatement of action for usurpation of public office. Where a proceeding is instituted during the term in which the usurpation is alleged to exist, the action does not abate, merely by reason of a failure to bring it to a judgment before the expiration of such term; neither will it abate by reason of the fact that the office involved had ceased to exist by reason of an amendment to the charter of the city, under which the office existed. People v. Rodgers, 118 Cal. 393; 46 Pac. 740; 50 Pac. 668.

Waiver of forfeiture of franchise. Although, under § 7 of article IX of the constitution, the legislature cannot remit the forfeiture of any franchise, yet it may waive the forfeiture, even after proceedings in the nature of quo warranto have been commenced to have it determined that the defendant has forfeited such right. People v. Los Angeles Electric Ry. Co., 91 Cal. 338; 27 Pac. 673.

Validity of appointment of receiver of corporation. The appearance of creditors, for their own safety, in actions against a de facto receiver appointed in quo warranto proceedings, who has assets of the corporation in his possession, which are about to be disposed of in the actions, is not a concession of the validity of the appointment of the receiver, nor a ratification thereof, and they are not in a position to attack the validity of his appointment until brought into a hostile attitude to him by the levy of execution. Yore v. Superior Court, 108 Cal. 431; 41 Pac. 477.

Effect of judgment against corporation. In order to dissolve a corporation, there must be an averment of the usurpation of the franchise of being a corporation, and a judgment excluding the defendant from exercising the franchise, that is, from assuming to be a corporation; hence, where a complaint merely avers that the corporation has been illegally exercising certain enumerated franchises, a judgment merely declaring that the defendant is guilty of usurping rights and franchises, "as charged and alleged in the complaint," and adjudging that the defendant be excluded from "such rights, privileges, and franchises," does not have the effect of dissolving the corporation. Yore v. Superior Court, 108 Cal. 431; 41 Pac. 477.

Estoppel and bar. One who has unlawfully assumed and is exercising the public functions of an office, as the same were defined in a repealed statute, is estopped, in an action brought against him for the usurpation, to deny the existence of the office; and where he continues to exercise the functions of such office, after being adjudged a usurper thereof, he is guilty of contempt. Ex parte Henshaw, 73 Cal. 486; 15 Pac. 110. The state is not estopped by the judgment in a former action between an elector and the defendant, to contest the election of the defendant, nor would such judgment estop the state, even though such elector were the relator in an action prosecuted by the state. People v. Rodgers, 118 Cal. 393; 46 Pac. 740; 50 Pac. 668. The state is not estopped from maintaining an action to have it determined that a corporation never acquired the franchise to build and operate a street-railroad within the limits of a municipal corporation, from the mere fact that in a prior action, brought against the corporation as such, in which the existence of the corporation was not put in issue, it obtained a judgment requiring the corporation to abate a portion of its road on the ground that it was a public nuisance. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693. A proceeding under the confirmatory act of 1889, supplemental to the Wright irrigation act, taken in the superior court, in which was confirmed the validity of the organization of an irrigation district, and of the bonds issued thereby, under the provisions of the Wright act, is a proceeding in rem, the judgment in which is res adjudicata, and binds the whole world, including the state, and is a bar to a subsequent proceeding by the state, in quo warranto, assailing the validity of the organization of the irrigation district. People v. Linda Vista Irrigation Dist., 128 Cal. 477; 61 Pac. 86. An action commenced by the state to restrain the usurpation of a franchise is not barred by any prior act of the informant. People v. Lowden, 2 Cal. Unrep. 537; 8 Pac. 66. If the proceeding is simply one in which a forfeiture is sought by reason of misuser or nonuser of its powers by the cor-

poration, the statute of limitations may be pleaded in bar. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693.

Dismissal. An information in the nature of quo warranto may be dismissed for want of prosecution, in the same manner as any other action. People v. Jefferds, 126 Cal. 296; 58 Pac. 704.

New trial. A new trial of an action brought under the authority of this section is permissible. People v. Oakland, 123 Cal. 145; 55 Pac. 772; People v. Sutter Street Ry. Co., 117 Cal. 604; 49 Pac. 736; People v. Rodgers, 118 Cal. 393; 46 Pac. 740; People v. Perris Irrigation Dist., 132 Cal. 289; 64 Pac. 399.

Appeal. Where the words "township" and "precinct" are used synonymously in the complaint, answer, and finding, and in stating the facts concerning an election in said precinct, and no objection was taken by demurrer or otherwise on this ground, and the statute requires that there shall be an election precinct in each township, the defendant cannot, on appeal, for the first time, object that the complaint does not allege nor the judge find that said place was a precinct at which the election would have been held. People v. Jones, 20 Cal. 50.

Terms defined. A drainage district is not a municipal corporation. People v. Sacramento Drainage District, 155 Cal. 373; 103 Pac. 207. A municipal corporation is a "person," within the meaning of this section. People v. Oakland, 92 Cal. 611; 28 Pac. 807; and see People v. Nevada Township, 6 Cal. 143. In the abstract, the word "office" signifies a place of trust; in the legal sense, an office is an entity, and may exist in fact, though it is without an incumbent, and in the latter sense the word "office" is used, in a number of instances, both in the constitution and in the statutes; it is also defined as a right to exercise a public function or employment, and to take the fees and emoluments belonging to it. People v. Stratton, 28 Cal. 382; Miller v. Board of Supervisors, 25 Cal. 93; People v. Harrington, 63 Cal. 257.

Voluntary dissolution of corporations. See notes post, §§ 1227–1233.

Nature and kinds of franchises. See note 131 Am. St. Rep. 862.

What is office, and how distinguished from mere employment. See notes 72 Am. Dec. 179; 17 Ann. Cas. 451.

Equity jurisdiction to determine title to office. See note 42 Am. St. Rep. 236.

What is public office. See note 63 Am. St. Rep. 181.

Quo warranto to try title to office. See note 140 Am. St. Rep. 195.

Effect of termination of office upon quo warranto proceedings to try title to public office. See notes 11 Ann. Cas. 1170; Ann. Cas. 1913C, 1303.

Provision for testing election of city officer before city council or other municipal body as exclusive of quo warranto. See note 26 L. R. A. (N. S.) 208.

Quo warranto to oust foreign association from exercise of corporate function. See note 24 L. R. A. 295.

Quo warranto against corporations for making illegal charges in course of authorized business. See note 63 L. R. A. 761.

Quo warranto to test validity of liquor license. See notes 18 Ann. Cas. 526; 24 L. R. A. (N. S.) 555.

Quo warranto against municipal corporation. See note 8 Ann. Cas. 322.

Who may maintain quo warranto to test validity of organization of municipal corporation or political subdivision of state. See note 21 L. R. A. (N. S.) 685.

Quo warranto at instance of private person. See note 125 Am. St. Rep. 634.

Right of private individual to file information in nature of quo warranto to try title to public office. See notes 6 Ann. Cas. 463; 13 Ann. Cas. 1063.

Quo warranto as matter of right by attorney-general or district attorney. See note 1 L. R. A. (N. S.) 826.

Scope of discretion of public prosecutor with respect to institution of proceedings in nature of quo warranto. See note 15 L. R. A. (N. S.) 603.

Necessity for leave of court to prosecution of quo warranto proceedings. See note 6 Ann. Cas. 912.

Pleadings and proceedings in quo warranto. See note 30 Am. Dec. 44.

Burden of proof in proceedings by quo warranto. See note 100 Am. Dec. 268.

Right to jury trial in quo warranto proceedings. See note 5 Ann. Cas. 640.

Statutes of limitation applicable to quo warranto. See note 52 Am. St. Rep. 312.

CODE COMMISSIONERS' NOTE. 1. Object of the action is to prevent the usurpation of an office, franchise, or liberty. Ex parte Attorney-General, 1 Cal. 87; People v. Olds, 3 Cal. 175; 58 Am. Dec. 398.

2. When it can be maintained. To try title to an office. People v. Scannel, 7 Cal. 439. To test the right of an appointee of the board of pilot commissioners. People v. Woodbury, 14 Cal. 43. Against one in possession of an office to which he has not been duly elected, but who holds a certificate of election. People v. Jones, 20 Cal. 50.

3. Certificate of election. One holding a certificate, without the legal title to the office, is an intruder, within the meaning of this section; for the right to the office comes from the will of the voters as expressed at the election. If the office was, in fact, given by the voters to another, the possession by the defendant of the certificate affords him, at most, but a color of title, and does not invest him with the right which belongs to another. People v. Jones, 20 Cal. 50. A certificate is not necessary to enable a party, claiming to have been elected, to bring his action; it is only prima facie evidence of title to the office, not conclusive. Nor is it the only evidence by which the title may be established. It is the fact of election which gives title to the office, and this fact may be established, not only without, but against the evidence of the certificate. Magee v. Board of Supervisors, 10 Cal. 376. The issuance of a certificate to a person elected to office is a ministerial act. Conger v. Gilmer, 32 Cal. 75.

4. Generally. The use of an abbreviated corporate name, by the officers of a corporation, is not a usurpation, nor will it support a proceeding by quo warranto to oust them from the enjoyment of the franchise. People v. Bogart, 45 Cal. 73; People v. Sierra Buttes Quartz Mining Co., 39 Cal. 514. The pendency of proceedings in quo warranto, against the persons claiming to compose a corporation, is no defense to an action by the corporation. Oroville etc. R. R. Co. v. Supervisors, 37 Cal. 354.

§ 804. Name of person entitled to office may be set forth in the complaint. If fees have been received by the usurper, he may be arrested. Whenever such action is brought, the attorney-general, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a justice of the supreme court, or a judge of the superior court, for the arrest of such defendant and holding him to bail; and thereupon he may be arrested and held to bail in the same manner and with the same effect and subject to the same rights and liabilities as in other civil actions where the defendant is subject to arrest.

Action, where several claimants. Post, § 808.
Arrest and bail. Ante, §§ 478 et seq.

Legislation § 804. 1. Enacted March 11, 1872 (based on Practice Act, § 311), changing "judge" to "justice" before "of the supreme court."
2. Amended by Code Amdts. 1880, p. 11, changing "district judge" to "judge" of the superior court."

Proper parties defendant in quo warranto proceedings against corporation. See note Ann. Cas. 1913A, 570.

CODE COMMISSIONERS' NOTE. An allegation that the defendant is in possession of the office without authority, is a sufficient allegation of intrusion or usurpation. Any defects in the complaint in this respect must be reached by demurrer. People v. Woodbury, 14 Cal. 43. In an action for the usurpation of the office of pilot for the port of San Francisco, the complaint averred that defendants hold, use, exercise, usurp, and enjoy the office without a license, and also contained certain allegations as to the right of relator to the office. It was held: that the allegation as to relator's rights could not be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office. Flynn v. Abbott, 16 Cal. 258. In a proceeding to contest the election of district judge, the ineligibility of the candidate receiving the highest number of votes, the defendant being next on the list, is no defense. The fact that the candidate receiving the highest number of votes at an election by the people is ineligible, does not give the office to the next highest on the list. Saunders v. Haynes, 13 Cal. 145.

§ 805. Judgment may determine the rights of both incumbent and claimant. In every such action judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice may require.

Judgment. Post, § 809.

Legislation § 805. Enacted March 11, 1872 (based on Practice Act, § 312), changing (1) "case" to "action" and (2) "shall" to "may."

Forms of judgment. In information of quo warranto, there are two forms of judgment: when against an officer or individual, the judgment is ouster, and there being no franchise forfeited, there is nothing to seize; and when against a corporation by its corporate name, the judgment is ouster and seizure; there being a franchise, consequently the franchise is seized. People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277. The usurpation of an office is one thing, and the usurpation of a franchise is another and quite a different thing: in the former case, the judgment should be, that the defendant be excluded from the office, and in the latter, from the franchise. People v. Riverside, 66 Cal. 288; 5 Pac. 350. There may be a judgment of ouster of a particular franchise, and not of the whole charter. People v. Dashaway Association, 84 Cal. 114; 12 L. R. A. 117; 24 Pac. 277.

Judgment against incumbent. A judgment ousting the defendant does not rest upon the relator's right to the office. People v. Shorb, 100 Cal. 537; 38 Am. St. Rep. 310; 35 Pac. 163. The judgment in an election contest cannot properly adjudge that the defendant is unlawfully holding the office. Day v. Gunning, 125 Cal. 527; 58 Pac. 172.

Judgment determining right of claimant. Where the relator claims the office as against the incumbent, the court may not only determine the right of the defendant, but that of the relator also; and if it determines in favor of the relator, it may render judgment that the defendant forthwith deliver up to the relator the office. People v. Banvard, 27 Cal. 470; Kelly v. Edwards, 69 Cal. 460; 11 Pac. 1. If the defendant is rightfully in the exercise of the office, the relator can have no right thereto; and if the defendant has no right to the office, it is immaterial to him whether the office is vacant or is to be held by the relator; and although the court may determine the right of the relator to the office, it is not required to do so. People v. Superior Court, 114 Cal. 466; 46 Pac. 383.

Contempt of court. Where one continues to exercise the functions of a public office after being adjudged a usurper thereof, he is guilty of contempt of court. Ex parte Henshaw, 73 Cal. 486; 15 Pac. 110.

Proceedings after judgment against corporation. After a final judgment that a de facto corporation has no legal existence, proceedings should be had for winding up and settling its affairs by trustees. People v. Flint, 64 Cal. 49; 28 Pac. 495.

Jurisdiction. The supreme court has jurisdiction of an appeal taken in proceedings under this chapter. People v. Perry, 79 Cal. 105; 21 Pac. 423; People v. Superior Court, 114 Cal. 466; 46 Pac. 383. The jurisdiction of the superior court to decree a dissolution of any corporation exists only by virtue of statutory authority; and its jurisdiction is limited by the provisions of the statute, both as to the conditions under which it may be invoked and the extent of the judgment which it may make in the exercise of this jurisdiction. State Investment etc. Co. v. Superior Court, 101 Cal. 135; 35 Pac. 549.

Collateral attack on judgment. The court has jurisdiction to try the question of usurpation of an office, and incidentally the question of the existence of the office, and its finding upon that issue cannot be assailed collaterally, though it should be conceded that the finding was erroneous, or though, in determining the issue, the court may erroneously have believed and assumed that a statute was not repealed. Ex parte Henshaw, 73 Cal. 486; 15 Pac. 110.

Appeal. The judgment in an action under this chapter, adjudging the defendants guilty of usurping a franchise to collect tolls upon a public road, and involving the right of the defendants to possess the lands claimed to constitute the toll-road, is appealable. People v. Horsley, 65 Cal. 381; 4 Pac. 384. The intervener may prosecute an appeal from a judgment dissolving the corporation, notwithstanding the defendant, against whom the judgment was rendered, does not appeal. People v. Perris Irrigation Dist., 132 Cal. 289; 64 Pac. 399. Where the only demurrer interposed in an action to determine the right to an office, was as to the cause of action, and none was interposed to the right of the relator, who claimed title to the office upon the regular returns made to the board of canvassers, his title is not involved upon appeal from a judgment rendered upon the sustaining of the demurrer. People v. Stewart, 132 Cal. 283; 64 Pac. 285. Upon appeal by the intervener from the judgment upon the contest between him and the relator in an action to determine the title to office, where a recount of votes was necessary, the court is not limited to a consideration of the exceptions taken by the appellant, but is entitled to consider like exceptions taken by the relator, in order to determine whether errors urged by the appellant are not counterbalanced so as to be rendered harmless by similar rulings against the relator. People v. Campbell, 138 Cal. 11; 70 Pac. 918.

Suspension of proceedings on appeal. The giving of a sufficient undertaking upon appeal to stay the execution of a judgment declaring the forfeiture of a corporate charter, suspends all proceedings upon the judgment. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121; State Investment etc. Co. v. Superior Court, 101 Cal. 135; 35 Pac. 549. The provision of § 949, post, which provides that an appeal does not stay proceedings where the judgment adjudges the defendant guilty of usurping or intruding into, or unlawfully holding office, applies only to a judgment in an action of quo warranto or for the usurpation of office, and not to any judgment proper to be entered in an election contest. Day v. Gunning, 125 Cal. 527; 58 Pac. 172.

Reversal of judgment on appeal. In an action brought to try the right to an office, if the record shows in any manner that all the election returns were given in evidence, the judgment will not be reversed by the appellate court, even though there is no formal statement in the record that such returns were all in evidence. People v. Holden, 28 Cal. 123. In an action to have it determined that certain persons are unlawfully claiming to be and are exercising the functions of a private corporation, which never had an existence, a judgment decreeing that the plaintiff recover the powers and franchise exercised and claimed by the defendants, and enjoining them from exercising the same, will be reversed, where the question of the non-existence of the corporation is left wholly undetermined. People v. Stanford, 77 Cal. 360; 2 L. R. A. 92; 18 Pac. 85; 19 Pac. 693.

CODE COMMISSIONERS' NOTE. In an action to determine the right to an office where the relator claims the office as against the incumbent, the court may not only determine the right of the defendant, but of the relator also; and if it determine in favor of the relator, may render judgment that the defendant deliver to the relator the office. People v. Banvard, 27 Cal. 470.

§ 806. When rendered in favor of applicant. If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he will be entitled, after taking the oath of

office and executing such official bond as may be required by law, to take upon himself the execution of the office.

Legislation § 806. Enacted March 11, 1872 (based on Practice Act, § 313), changing "shall" to "will."

Judgment is sufficient evidence of title to office. The entry of judgment in favor of the person alleged to be entitled supersedes the necessity of any other certificate or commission: it is, of itself, evidence of title to the office. Bledsoe v. Colgan, 138 Cal. 34; 70 Pac. 924.

§ 807. Damages may be recovered by successful applicant. If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he may have sustained by reason of the usurpation of the office by the defendant.

Costs and fine. Post, § 809.

Legislation § 807. Enacted March 11, 1872 (based on Practice Act, § 314), changing "shall" to "will."

Judgment is not a "commission of office." A judgment in plaintiff's favor, in quo warranto proceedings, is not "a commission of office," as that phrase is used in § 936 of the Political Code. Bledsoe v. Colgan, 138 Cal. 34; 70 Cal. 924.

Salary, who entitled to. The solution of the question as to who is entitled to the salary of an office, pending an appeal from a judgment in quo warranto proceedings, is dependent upon the construction to be given to § 936 of the Political Code. Bledsoe v. Colgan, 138 Cal. 34; 70 Pac. 924. The successful contestant for a public office is not authorized to recover, as damages, from the incumbent, who held the certificate of election and discharged the duties of the office pending the contest, the amount of the salary or compensation received by him pending the contest: the incumbent is entitled to it. Chubbuck v. Wilson, 151 Cal. 162; 12 Ann. Cas. 888; 90 Pac. 524.

Whether fine or judgment for damages may be imposed in quo warranto proceedings. See note Ann. Cas. 1913D, 942.

§ 808. When several persons claim the same office, their rights may be determined by a single action. When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

Legislation § 808. Enacted March 11, 1872; re-enactment of Practice Act, § 315.

Joinder of parties defendant. All claimants and intruders may be made parties to an action to oust defendants from the office of justice of the peace. People v. Rea, 2 Cal. App. 109; 83 Pac. 165. In quo warranto, to oust persons as school trustees, all the defendants who claim to have been elected are properly joined as defendants. People v. Prewett, 124 Cal. 7; 56 Pac. 619.

§ 809. If defendant found guilty, what judgment to be rendered against him. When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise, or privilege, judgment must be rendered that such defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars, which fine, when collected, must be paid into the treasury of the state.

Legislation § 809. Enacted March 11, 1872 (based on Practice Act, § 316), changing "shall" to "must," in both instances.

Costs. Where judgment was rendered in favor of the relator, and against the intervener, the relator is entitled to recover costs against him, whether the proceeding between them be considered as an action or as a special proceeding to determine the right to the office. People v. Campbell, 138 Cal. 11; 70 Pac. 918.

Nature of judgment imposing a fine. Where a fine is imposed upon the defendant for the usurpation of a franchise, it is not for the purpose of compensating the state, but solely for the purpose of punishment; the judgment of fine is not based on any evidence of loss or damage, but rests, within the limit prescribed by the statute, solely within the discretion of the court; it is more properly a sentence or judgment imposed on the defendant, than a judgment recovered against him. People v. Sutter Street R. R. Co., 129 Cal. 545; 79 Am. St. Rep. 137; 62 Pac. 104.

Fine payable to state. The recovery of the fine is for the benefit of the state, and must be paid into the state treasury, no

matter who is the relator. People v. Bingham, 82 Cal. 238; 22 Pac. 1039.

No interest on judgment imposing a fine. A judgment adjudging the defendant guilty of usurping a franchise, and imposing a fine pursuant to this section, is penal in its nature; and the same rule as to interest on the fine imposed in such action should govern as applies to a judgment for a fine in any criminal case, and no interest can be allowed thereupon; such judgment does not come within the terms of §§ 1915, 1920, of the Civil Code. People v. Sutter Street R. R. Co., 129 Cal. 545; 79 Am. St. Rep. 137; 62 Pac. 104.

Receiver, how appointed after judgment. The rendition of the judgment authorized by this section ends the proceeding, so far as the superior court is concerned; and no receiver of corporate property can be appointed, unless a new and distinct proceeding is commenced by a creditor or stockholder of the corporation. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121.

§ 810. Actions on information. Undertaking. When the action is brought upon the information or application of a private party, the attorney-general may require such party to enter into an undertaking, with sureties to be approved by the attorney-general, conditioned that such party or the sureties will pay any judgment for costs or damages recovered against the plaintiff, and all the costs and expenses incurred in the prosecution of the action.

Legislation § 810. Added by Code Amdts. 1873–74, p. 327.

CHAPTER VI.

ACTIONS AGAINST STEAMERS, VESSELS, AND BOATS.

§ 813. When vessels, etc., are liable. Their liabilities constitute liens.
§ 814. Actions, how brought.
§ 815. Complaint must be verified.
§ 816. Summons may be served on owners, etc., of vessels.
§ 817. Plaintiff may have such vessel, etc., attached.
§ 818. The clerk must issue the writ of attachment.
§ 819. Such writ must be directed to the sheriff.
§ 820. Sheriff must execute such writ without delay.
§ 821. The owner, master, etc., may appear and defend such vessel.
§ 822. Discharge of attachment.
§ 823. After appearance, attachment may, on motion, be discharged.
§ 824. When not discharged, such vessel, etc., may be sold at public auction. Application of proceeds.
§ 825. Mariners and others may assert their claim for wages, notwithstanding prior attachment.
§ 826. Proof of the claims of mariners and others.
§ 827. Sheriff's notice of sale to contain measurement, tonnage, etc.

§ 813. When vessels, etc., are liable. Their liabilities constitute liens. All steamers, vessels, and boats are liable:

1. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees.

2. For supplies furnished in this state for their use, at the request of their respective owners, masters, agents, or consignees.

3. For work done or materials furnished in this state for their construction, repair, or equipment.

4. For their wharfage and anchorage within this state.

5. For non-performance, or malperformance, of any contract for the transportation of persons or property between places within this state, made by their respective owners, masters, agents, or consignees.

6. For injuries committed by them to persons or property, in this state.

Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued.

Seamen's wages, jurisdiction of actions. Ante, § 114.
Salvage. Civ. Code, § 2079.
Preference over all other demands, as to labor claims. Post, §§ 1204–1206.
Lien, defined. Post, § 1180.

Legislation § 813. **1.** Enacted March 11, **1872** (based on Practice Act, § 317, as amended by Stats. 1860, p. 304), (1) in introductory paragraph, changed "shall be" to "are"; (2) omitted subd. 5, which read the same as the present subd. 5, except that it did not contain the words "between places within this state"; (3) subd. 6 was renumbered subd. 5, the Practice Act subd. 6 reading, "Sixth. For injuries committed by them to persons or property. The said several causes of action shall constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated, and shall have preference over all other demands; provided, such lien shall only continue in force for the period of one year from the time the cause of action accrued," and when renumbered subd. 5 in 1872, a paragraph was made, beginning with the words "The several," in which (a) "said" was omitted before "several," (b) "shall" was omitted before "constitute" and before "have preference," (c) "provided" was changed to "but," and (d) "lien shall only" was changed to "liens only."

2. Amended by Code Amdts. **1873–74**, p. 327, (1) in subd. 2, adding the words "in this state"; (2) in subd. 3, adding (a) "work done or" and (b) "in this state"; (3) restoring Practice Act subd. 5, and adding therein the words "between places within this state"; (4) restoring the first sentence of Practice Act subd. 6 (original code subd. 5) as subd. 6, and adding at end the words "in this state"; (5) changing the final paragraph of original code section, beginning "The several," to the present final paragraph, beginning "Demands."

Construction of section. This section, and § 3060 of the Civil Code, providing for a lien on vessels, are, under § 4480 of the Political Code, to be construed together, as though they had been passed at the same time, and were parts of the same statute. Jensen v. Dorr, 159 Cal. 742; 116 Pac. 553.

Constitutionality of section. The statute, so far as it attempts to authorize proceedings in rem for causes of action cognizable in admiralty, is unconstitutional; but, so far as it may be made applicable to causes of action which are not cognizable in courts of admiralty jurisdiction, it is constitutional; and there is no objection to the law, merely because it authorizes a suit against a vessel itself, except so far as the suit is upon a maritime contract. Crawford v. Bark Caroline Reed, 42 Cal. 469. The provisions of this chapter are not invalid, although a suit may be brought under them, of which the courts of the state have no jurisdiction. Olsen v. Birch, 133 Cal. 479; 85 Am. St. Rep. 215; 65 Pac. 1032.

Jurisdiction of state courts. The state courts have concurrent jurisdiction of causes of action cognizable in admiralty, where only a common-law remedy is sought (Bohannan v. Hammond, 42 Cal. 227); and they have jurisdiction of an action for wages, brought by a seaman against the master of a British vessel, both subjects of the United Kingdom, for services rendered on such vessel, where the seaman was discharged by the master in a port of the United States, without any fault on the part of the seaman (Pugh v. Gillam, 1 Cal 485); and also of actions to recover from the owners the value of supplies sold and delivered, at the request of the master, for the use of a vessel engaged in navigating the high seas (Crawford v. Roberts, 50 Cal. 235); and also of actions to enforce liens for work done in construction and for services rendered by members of the crew on board a steamer which has never been in commission, nor used in navigation; the action against the owner personally to enforce the liens against his vessel by judgment, and the order of sale thereunder, is in personam, and is not the action in rem used in courts of admiralty. Olsen v. Birch, 133 Cal. 479; 85 Am. St. Rep. 215; 65 Pac. 1032. The state courts have jurisdiction also of an action for breach of contract for the transportation of a passenger from a port in this state to a port in another state. Ord v. Steamer Uncle Sam, 13 Cal. 370. The court does not acquire jurisdiction by reason of a bond being given for the release of the vessel, where jurisdiction does not otherwise attach, by reason of the vessel not being within the class designated by the act. McQueen v. Ship Russell, 1 Cal. 165.

Jurisdiction of admiralty courts. There is no jurisdiction in admiralty over a vessel not engaged in maritime trade and navigation, though on her voyages she may touch, at one terminus, upon tide-water, her employment being substantially on other waters. Souter v. The Sea Witch, 1 Cal. 162. Admiralty jurisdiction does not extend to ships, merely because they are ships, but to commerce and navigation; and to ships, only because they are, and while they are, used in commerce and navigation; a ship, while building, is not an instrument of commerce, nor is she such while out of commission, and being cared for to preserve her for possible future use; a ship, injured by use, and only temporarily laid up for repairs, or being refitted that she may resume her voyage, is considered as still engaged in commerce. Olsen v. Birch, 133 Cal. 479; 85 Am. St. Rep. 215; 65 Pac. 1032. Where materials for equipment and repair, and also supplies, are furnished a domestic vessel at her home port, under a contract with the master of the vessel, the United States courts have exclusive original jurisdiction of proceedings in rem to enforce a lien against the vessel for the same. Crawford v. Bark Caroline Reed, 42 Cal. 469. The act conferring admiralty and maritime jurisdiction on the United States district court expressly saves "to suitors in all cases the right of a common-law remedy, where the common law is competent to give it." Crescent City Wharf etc. Co. v. Simpson, 77 Cal. 286; 19 Pac. 426; Olsen v. Birch, 133 Cal. 479; 85 Am. St. Rep. 215; 65 Pac. 1032.

Maritime contracts, what are. An action against a steamer for damages for malperformance of a contract to carry the plaintiff from a port in this state to a port in another state, and for injuries suffered

through the wrongful acts of the agents of the defendant during the voyage, is an action on a maritime contract. Warner v. Steamship Uncle Sam, 9 Cal. 697. Maritime contracts have reference to navigation upon the sea, and to vessels actually used in commerce, or in navigation: a contract for work on a vessel which was never in commission, and never used in navigation, is not a maritime contract. Olsen v. Birch, 133 Cal. 479; 85 Am. St. Rep. 215; 65 Pac. 1032; Bennett v. Beadle, 142 Cal. 239; 75 Pac. 843.

Boats used in navigating the waters of this state, what are. A vessel whose home port is in another state, and intended for use between that port and a foreign one, and never otherwise used in navigating the waters of this state than by sailing into a harbor in this state, is not, within the meaning of the statute of April 10, 1850, a boat or vessel used in navigating the waters of this state. Souter v. The Sea Witch, 1 Cal. 162; McQueen v. Ship Russell, 1 Cal. 165; Tucker v. Bark Sacramento, 1 Cal. 403; Ray v. Bark Henry Harbeck, 1 Cal. 451.

Common-law and statutory remedies. The remedy given by the act of April 10, 1850, against boats and vessels, was strictly a statutory remedy, and of a character not recognized by the common law. Souter v. The Sea Witch, 1 Cal. 162. A proceeding in rem is not a common-law remedy. Crawford v. Bark Caroline Reed, 42 Cal. 469. The idea that the practice in this class of cases should be assimilated to that prevailing in courts of admiralty has no foundation in the statute; and in all cases where the statute is silent, the common law furnishes the rule of decision. Sheldon v. Steamship Uncle Sam, 18 Cal. 526; 79 Am. Dec. 193; and see Averill v. Steamer Hartford, 2 Cal. 308.

Work or materials for construction, etc., lien for. For the original construction of vessels, a lien is given, irrespective of the amount of the debt. Jensen v. Dorr, 159 Cal. 742; 116 Pac. 553. This section must be construed as in pari materia with the mechanic's lien law, in determining the liability of a vessel for a lien for materials furnished in this state for its construction, repair, or equipment; and the materials must be actually furnished to the vessel and used thereon, and the vessel must be in this state when the materials are so furnished and used, in order to create the lien; no lien can be enforced, in this state, upon a vessel wholly constructed in another state, for materials furnished by residents of this state to shipbuilders engaged in construction in such other state; the statute not providing for the creation of a lien by the act of the vessel coming into the state, no lien is enforceable for materials furnished out of the state when the vessel comes within its jurisdiction. Bennett v. Beadle, 142 Cal. 239; 75 Pac. 843.

Wharfage, etc., recovery of. The state board of harbor commissioners are entitled to avail themselves of the remedy provided by this section, for the recovery of tolls and wharfage, against a vessel. People v. Steamer America, 34 Cal. 676.

Breach of contract, and injuries, liability for. A steamer is liable to the full extent of injuries, either in an action ex contractu for the breach of a contract made with the defendant for transportation, or in an action in the nature of one in tort for injuries inflicted, where the defendant fraudulently induced the plaintiff to enter into the contract, and the plaintiff was subjected to hardships and abandoned without protection in an unhealthy climate. Sheldon v. Steamship Uncle Sam, 18 Cal. 526; 79 Am. Dec. 193. Before the amendment of this section in 1873–74, it was held that a contract for the transportation of passengers from a port in this state to a port in another state, was an entirety, whether the entire voyage was to be performed in one vessel or not, and a breach of such contract at any point, such as leaving a passenger at the Isthmus of Panama, rendered the vessel liable. Ord v. Steamer Uncle Sam, 13 Cal. 370. In an action under this section, by a husband and wife, against a steamship, for injuries inflicted upon the wife, disbursements or expenditures made by the husband cannot be recovered: for these he must sue alone. Sheldon v. Steamship Uncle Sam, 18 Cal. 526; 79 Am. Dec. 193.

When lien attaches. Under the Practice Act, as there was nothing in the statute expressly creating a lien, the lien attached only when service was had in the suit. Fisher v. White, 8 Cal. 419. In actions against vessels, the service of process in the manner prescribed by statute is equivalent to an actual seizure: it is not necessary that the vessel shall be attached, in order to acquire a lien as against subsequent purchasers. Meiggs v. Scannell, 7 Cal. 406; Averill v. Steamer Hartford, 2 Cal. 308.

Lien continues for one year. Where credit is given for supplies and materials furnished a vessel, the lien of the person furnishing the same continues on the vessel for one year from the time for which credit is given expires. Edgerly v. Schooner San Lorenzo, 29 Cal. 418; Fisher v. White, 8 Cal. 419.

Relation between attachment lien and lien under this section. An ordinary attachment, irregularly issued under §§ 537 and 538, ante, for services rendered and material furnished in the construction of a yacht, cannot be dissolved on the ground that the plaintiff's demand was secured by a lien upon the vessel antecedent to and

independent of any seizure, and that the affidavit falsely stated that the debt was not secured. Jensen v. Dorr, 157 Cal. 437; 108 Pac. 320.

Nature of proceedings. Attachment proceedings against vessels are entirely distinct from the ordinary attachment described in § 537, ante. Jensen v. Dorr, 157 Cal. 437; 108 Pac. 320. Proceedings to foreclose liens on vessels are not in rem, but in personam, with the right to attach the interest of the defendant in the vessel: they are said to be quasi in rem, which phrase has become quite common since Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, where it is said that they are not strictly in rem, because they are not against the thing as debtor. Olsen v. Birch, 133 Cal. 479; 85 Am. St. Rep. 215; 65 Pac. 1032.

When right of action accrues. A party furnishing supplies for a vessel cannot maintain an action therefor until the term of credit fixed by the contract has expired. Edgerly v. Schooner San Lorenzo, 29 Cal. 418.

Agents, liability for acts of. The acts of agents, masters, or captains are binding on steamers and their owners. Oakland Cotton Mfg. Co. v. Jennings, 46 Cal. 176; 13 Am. Rep. 209; Crawford v. Roberts, 50 Cal. 235; Trabing v. California Navigation etc. Co., 121 Cal. 137; 53 Pac. 644; Kerry v. Pacific Marine Co., 121 Cal. 564; 66 Am. St. Rep. 65; 54 Pac. 89. Where supplies for a vessel are purchased at the home port, by the captain, with the knowledge and consent of the ship's husband, the owner is prima facie liable for the same. Crawford v. Roberts, 50 Cal. 235. Where the acts constituting the alleged wrongs and injuries done to the plaintiff were done and performed on the defendant's steamboat, in its operation as a common carrier, by the captain in charge thereof, in the line of his employment, the defendant is liable in damages for all that the captain wrongfully did to the plaintiff in the execution, or attempted execution, of his authority, even though the captain acted from wanton or malicious motives, or resorted to unlawful means in executing it; and that the injuries were willfully or wantonly inflicted does not relieve the defendant from liability. Trabing v. California Navigation etc. Co., 121 Cal. 137; 53 Pac. 644. The agent has the right to bind the vessel for the entire contract for the transportation of passengers from a port in this state to a port in another state. Ord v. Steamer Uncle Sam, 13 Cal. 370. The master of a vessel is presumed, even at a home port, to have authority to contract for such articles for the use of the vessel as come under the general appellation of ship's stores, and the owner of the vessel is liable for the value of the same, unless he shows that the master had not such power. Crawford v. Roberts, 50 Cal. 235.

Liability of ship-owners. The act of Congress of June 26, 1884 (Supp. U. S. Rev. Stats. 1874–91, p. 443), which limits the liability of a ship-owner to his proportionate share of all the debts and liabilities, is confined to the liability imposed on the part-owners by law, in consequence of their ownership of the vessel, and does not prohibit part-owners from so contracting as to become liable for the entire damage for breach of the contract. Kerry v. Pacific Marine Co., 121 Cal. 564; 66 Am. St. Rep. 65; 54 Pac. 89. Where a vessel is chartered in the usual way, either for a particular voyage or for a period of time, the charterer having authority to appoint the master, and undertaking to victual, man, and navigate her at his own expense, he will be deemed the owner pro hac vice, and the general owner will not be personally liable on contracts of affreightment or for supplies. Oakland Cotton Mfg. Co. v. Jennings, 46 Cal. 175; 13 Am. Rep. 209; Kerry v. Pacific Marine Co., 121 Cal. 564; 66 Am. St. Rep. 65; 54 Pac. 89. Where the owner lets out to charter the hold of his vessel, but appoints her master and sails her at his own expense, he is liable on contracts of affreightment made by the master with shippers who have no notice of the charter-party. Oakland Cotton Mfg. Co. v. Jennings, 46 Cal. 175; 13 Am. Rep. 209; Kerry v. Pacific Marine Co., 121 Cal. 564; 66 Am. St. Rep. 65; 54 Pac. 89.

Admissibility of evidence of ownership. The ship's register is admissible in evidence, in favor of the person claiming to be the owner, in connection with other evidence tending to establish ownership. Brooks v. Minturn, 1 Cal. 481. Where the master of the vessel is in possession, and the record does not disclose any other owner, the admissions of the master are admissible in evidence, with the same effect as if the suit were against the master himself. Bailey v. Steamer New World, 2 Cal. 370. A copy of the decree in a libel of a vessel in admiralty is not admissible to prove part-ownership in a person not appearing and asserting ownership; and evidence that one of the partners in the plaintiff's firm paid, individually, for a share in the corporation, does not tend to show that the firm or other partner was in any manner interested in the vessel. Moynihan v. Drobaz, 124 Cal. 212; 71 Am. St. Rep. 46; 56 Pac. 1026.

Prima facie evidence of ownership. The question of the ownership of a vessel forms no exception to the rule of law, that the possession of property is prima facie evidence of ownership. Bailey v. Steamer New World, 2 Cal. 370. The entry, in the custom-house books, of the register or transfer of a vessel, is not even prima facie evidence of ownership, as against one not claiming to be an owner therein, unless

such entry is shown to have been made by his authority. Moynihan v. Drobaz, 124 Cal. 212; 71 Am. St. Rep. 46; 56 Pac. 1026.

Ownership as question for jury. In an action for materials furnished for the construction of a vessel, the question of ownership is one of fact for the jury; and where there is a shadow of conflict with respect to such fact, it is error for the court to withdraw such question from the jury. Dean v. Ross, 105 Cal. 227; 38 Pac. 912.

Adjudication of ownership. A libel of a vessel in admiralty, where the proceeding is in rem, is only a conclusive adjudication of ownership as against persons actually interested in the vessel; and no one can be adjudged to be a part-owner of the vessel, who has not appeared and asserted ownership or other interest therein. Moynihan v. Drobaz, 124 Cal. 212; 71 Am. St. Rep. 46; 56 Pac. 1026.

Admissions. The master of a vessel has no authority to make an admission of culpability for the owners of the ship, after an accident; but a remark, made before the accident, showing that the master knew of the defects causing such accident, stands upon a different basis. Silveira v. Iverson, 128 Cal. 187; 60 Pac. 687.

Liability of owners of hired vessels. See note 13 Am. Dec. 87.

Territorial limits of admiralty. See note 32 Am. Dec. 65.

Liability of vessels and their owners for injuries caused by collision. See note 45 Am. Dec. 51.

Rights and liabilities of part-owners of vessels. See notes 88 Am. Dec. 364; 90 Am. St. Rep. 355.

Actions in state courts against vessels. See note 62 Am. Dec. 234.

Whether contracts to build vessels are maritime contracts. See note 13 Am. Rep. 273.

Duties of ship-owners to seamen. See note 1 Am. St. Rep. 812.

Liability of ship-owners for injuries received by seamen from the officers. See note 31 Am. St. Rep. 805.

Over what waters jurisdiction of admiralty extends. See note 19 Am. St. Rep. 227.

Liability of owners for acts of master toward crew. See note 27 L. R. A. 183.

What contracts will support maritime lien. See note 70 L. R. A. 354.

Acceptance of commercial paper as discharge of maritime lien for material and supplies. See note 35 L. R. A. (N. S.) 94.

CODE COMMISSIONERS' NOTE. 1. Constitutionality. Section 317 of the Practice Act contained six subdivisions, the fifth of which read as follows:

"5th. For non-performance or malperformance of any contract for the transportation of persons or property made by their respective owners, masters, agents, or consignees."

This subdivision was omitted by the commissioners because, in the case of The Moses Taylor v. Hammons, 4 Wall. (U. S.) 411, 18 L. Ed. 397, it had been held unconstitutional, as being an attempt to confer upon state courts the power to administer a remedy for marine torts and contracts. See also The Hine v. Trevor, 4 Wall. (U. S.) 555; 18 L. Ed. 451. The remaining portions of the section and of the chapter were retained, never having been expressly held invalid. In People v. Steamer America, 34 Cal. 676, in which the constitutionality of the whole section was challenged, upon the authority, among others, of the cases of The Hine v. Trevor, and The Moses Taylor v. Hammons, supra, Mr. Justice Rhodes, in delivering the opinion of the court, says:

"The defendant's counsel presents the point that the statute under which the section is brought (§ 2 of Water Front Act of 1864, Stats. 1863–64, p. 139) is unconstitutional. The ground taken is, that this is a case of admiralty and maritime jurisdiction, and that 'as the Judiciary Act of 1789, passed in pursuance of § 2 of article III of the constitution of the United States, provides that the district courts . . . shall have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction,' etc., the legislature of this state was without power to confer upon its own courts jurisdiction of such cases. Before this point can be reached, it must be determined that this is a case of admiralty and maritime jurisdiction. It is said by Mr. Conkling (1 Conkling on Admiralty, p. 19) that 'the admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and service purely maritime, and touching rights and duties appertaining to commerce and navigation.' See De Lovio v. Boit, 2 Gall. 398; Fed. Cas. No. 3776; The Thomas Jefferson, 10 Wheat. (U. S.) 428; 6 L. Ed. 358, and other cases cited. A cause of action, to be cognizable in admiralty, whether arising out of a contract, claim, service, or obligation, or liability of any kind, must relate to the business of commerce and navigation.

"The defendant's counsel, in stating the facts of the case, says that 'the action is brought to recover wharfage while the steamer was engaged in navigating the high seas, and conveying passengers and freight to and from this port and ports in Central America.' But it does not appear from the complaint that the steamer was engaged in commerce and navigation. This fact, or one of similar import, must be stated in the pleadings, in order to make a case falling within the admiralty and maritime jurisdiction. The court cannot take judicial notice that a vessel found at a wharf is engaged in navigating the high seas, or the navigable inland waters of the state, or is employed in trade, commerce, or navigation, of any sort or in any manner. That is a fact of jurisdictional consequence, and must be expressly alleged or be necessarily inferable from the other facts alleged. The precedents of libels in admiralty, although 'there is no special custom extant' with respect to their form, state this fact, that it is very generally found in all the reported cases. This fact not appearing in the case, the question presented by the defendant's counsel does not arise.

"It is objected that the harbor commissioners have no authority to institute actions in rem in the name of the people. Section 2 of the act of 1863–64 provides that 'the said commissioners are hereby authorized and empowered, in the name of the people of the state of California, to institute actions at law and in equity for the possession of any wharf . . . or for the recovery of the tolls, dockage, rents, and wharfage thereof.' The words are comprehensive enough to include all the remedies that a private person could have under the same circumstances, and there are no words in the act, and nothing in the nature of the cause of action, indicative of a restriction to certain remedies to the exclusion of others provided by law. We see no ground for holding that the commissioners are not entitled to avail themselves of the remedy against the steamer provided by § 317 of the Practice Act. The proceeding is similar to that adopted in The Hine v. Trevor, 4 Wall. 555, 18 L. Ed. 451, which, it was said, was 'a remedy partaking of all the essential features of an admiralty proceeding in rem.' In that case one question was, whether the remedy adopted was one falling within the clause of the ninth section of the Judiciary Act of 1789, which 'saves to suitors in all cases the right of a common-law remedy.' It was not held that the form of the remedy adopted would make a case within the admiralty jurisdiction; but the court having determined, from

the facts of the case, that it was one of admiralty cognizance, considered that the remedy was not within the saving clause of that section. In cases not within the jurisdiction of the admiralty courts, there can be no question that the legislature may devise or adopt any form of remedy." See also subds. 14, 15, 16, 17, of note to § 33, ante.

2. Generally. Persons engaged in navigating our rivers with boats must take every reasonable precaution to protect the property of others. Carelessness in either particular, resulting in the injury of an innocent party, will make person liable. He is bound to temper their care according to circumstances of the danger. Gerke v. California Steam Nav. Co., 9 Cal. 251; 70 Am. Dec. 650. A British seaman on a British vessel, of which a British subject is master, may, when discharged by the master in a port of the United States, without any fault on the part of the seaman, sue for and recover his wages in a state court. Pugh v. Gillam, 1 Cal. 485. If credit is given for supplies and materials furnished a vessel, the lien for the price thereof continues on the vessel for the period of one year from the time the demand becomes due. Edgerly v. Schooner San Lorenzo, 29 Cal. 418. Part-owners have no lien for advances or disbursements. Sterling v. Hanson, 1 Cal. 480.

§ 814. Actions, how brought. Actions for any of the causes specified in the preceding section must be brought against the owners by name, if known, but if not known, that fact shall be stated in the complaint, and the defendants shall be designated as unknown owners. Other persons having a lien upon the vessel may be made defendants to the action, the nature and amount of such lien being stated in the complaint.

Unknown owners, fictitious designation of. Ante, § 474.

Parties, generally. Ante, §§ 367 et seq.

Legislation § 814. 1. Enacted March 11, 1872; based on Practice Act, § 318, which read: "Actions for demands arising upon any of the grounds specified in the preceding section, may be brought directly against such steamers, vessels, or boats." When § 814 was enacted in 1872, "demands" was changed to "damages."

2. Amended by Code Amdts. 1873–74, p. 328,

Actions in rem and in personam. Under the statute of April 10, 1850, the plaintiff could, at his option, instead of proceeding against the master, agent, owner, or consignee, institute suit against the boat or vessel by name. Souter v. The Sea Witch, 1 Cal. 162; Loring v. Illsley, 1 Cal. 24. Where, in an action to recover damages for grievances committed against the passengers of a vessel, the master of the vessel, who was a part-owner, answered in his own behalf, but there was no answer on the part of the vessel, nor on the part of the other owners, and there was no service of summons upon any of them but the master, nor publication of notice requiring them to appear, the action was held to be one in personam, and not in rem, and the judgment bound only the interest of the master. Loring v. Illsley, 1 Cal. 24.

Joint action on contract. Husband and wife cannot recover jointly in an action by them ex contractu for the breach of a contract for transportation; but if no demurrer is interposed, and if the facts stated show that the plaintiffs are entitled to relief for fraud practiced by the defendant, or for personal injury to the wife, the action is maintainable, and relief will not be denied on the ground that the same facts would support an action on the contract in which the husband alone can recover. Sheldon v. Steamship Uncle Sam, 18 Cal. 526; 79 Am. Dec. 193; and see Warner v. Steamship Uncle Sam, 9 Cal. 697; Matthew v. Central Pacific R. R. Co., 63 Cal. 450.

§ 815. Complaint must be verified. The complaint must designate the steamer, vessel, or boat by name, and must be verified by the oath of the plaintiff, or some one on his behalf.

Verification of pleadings. Ante, § 446.

Legislation § 815. Enacted March 11, 1872 (based on Practice Act, § 319), changing "shall" to "must," in both instances.

Allegations of complaint. The court cannot take judicial notice that a vessel found at a wharf is engaged in navigating the high seas, or the navigable inland waters of the state, or is engaged in commerce or navigation of any sort or in any manner: that is a fact of jurisdictional consequence, and must be expressly alleged, or be necessarily inferable from the other facts alleged; hence, if the complaint in an action for the collection of wharfage does not disclose the fact that the vessel was engaged in commerce and navigation, the case cannot, on demurrer, be considered one falling within admiralty or maritime jurisdiction. People v. Steamer America, 34 Cal. 676. A complaint alleging an assigned claim for services of members of the crew on board a steamship, does not necessarily imply that the vessel was engaged in commerce, but the allegation may be applied to a force put on board the vessel to care for it before it was put in commission; and where the findings show the latter case in fact, the defendant could not be injured, even if the court improperly refused to sustain a special demurrer for the ambiguity. Olsen v. Birch, 133 Cal. 479; 85 Am. St. Rep. 215; 65 Pac. 1032.

§ 816. Summons may be served on owners, etc., of vessels. The summons and copy of the complaint must be served on the owners if they can

be found; otherwise, they may be served on the master, mate, or person having charge of the steamer, vessel, or boat.

Service of summons, generally. Ante, §§ 410 et seq.

Legislation § 816. **1.** Enacted March 11, **1872** (based on Practice Act, § 320), omitting "any" before "person having"; the section then reading, "The summons, attached to a certified copy of the complaint, may be served on the master, mate, or person having charge of the steamer, vessel, or boat against which the action is brought."

2. Amended by Code Amdts **1873–74**, p. 328, (1) changing "may" to "must" before "be served"; (2) adding the words "owners, if they can be found; otherwise, it may be served on the," before "master"; (3) and omitting, at end, after "boat," the words "against which the action is brought."

3. Amended by Code Amdts. **1880**, p. 12.

CODE COMMISSIONERS' NOTE. The rule, requiring a seizure of the thing to give jurisdiction in actions in rem, is altered by our statute. Service on a person, standing in a particular relation to the thing, confers jurisdiction. Averill v. Steamer Hartford, 2 Cal. 308; Meiggs v. Scannell, 7 Cal. 405; Fisher v. White, 8 Cal. 422. The rule of law, that possession of personal property is primary evidence of ownership, is uniform in its application. The question of the ownership of a vessel forms no exception to the rule. Bailey v. The New World, 2 Cal. 370.

§ 817. Plaintiff may have such vessel, etc., attached. The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the steamer, vessel, or boat, with its tackle, apparel, and furniture, attached as security for the satisfaction of any judgment that may be recovered in the action.

Attachment, generally. Ante, §§ 537 et seq.

Legislation § 817. **1.** Enacted March 11, **1872**; re-enactment of Practice Act, § 321.

2. Amended by Code Amdts. **1873–74**, p. 328, (1) striking out "against which the action is brought," after "or boat," and (2) changing, at end, "therein" to "in the action."

Lien presupposed. An attachment under this section presupposes the existence of a lien. Jensen v. Dorr, 157 Cal. 437; 108 Pac. 320.

Necessity for attachment. It is not necessary to attach a vessel, in order to acquire a lien against subsequent purchasers. Meiggs v. Scannell, 7 Cal. 406.

CODE COMMISSIONERS' NOTE. In this action the lien attaches, only when service is had in the suit. Fisher v. White, 8 Cal. 418. As soon as a vessel is seized, a lien attaches in favor of the party at whose instance the seizure is made. If it was the intention of the legislature to provide that a lien should only be acquired by attachment, this would virtually be denying a right to creditors for small sums. It would be almost impossible for a merchant or mechanic of small capital or credit, who had a claim of a few hundred dollars against one of our large steamers, or some sea-going vessel, to give the necessary bonds to detain her until his suit could be determined, and in the mean time she might be run off and sold, free of all such debts or encumbrances. Meiggs v. Scannell, 7 Cal. 405.

§ 818. The clerk must issue the writ of attachment. The clerk of the court must issue a writ of attachment, on the application of the plaintiff, upon receiving a written undertaking on behalf of the plaintiff, executed by two or more sufficient sureties, to the effect that if the judgment be rendered in favor of the owner of the steamer, vessel, or boat, as the case may be, he will pay all costs and damages that may be awarded against him, and all damages that may be sustained by him from the attachment, not exceeding the sum specified in the undertaking, which shall in no case be less than five hundred dollars.

Attachment bond, generally. Compare ante, § 539.

Qualifications of sureties. Post, § 1057.

Legislation § 818. **1.** Enacted March 11, **1872**; based on Practice Act, § 322, which had (1) in first line, the word "shall" instead of "must"; (2) "which" instead of "that" after "all damages"; and, at end, after "five hundred dollars," the section reading, "when the attachment is issued against a steamer or vessel, or less than two hundred dollars when issued against a boat. The undertaking shall be accompanied by an affidavit of each of the sureties, that he is a resident and freeholder or householder of the county, and worth double the amount specified in the undertaking over and above all his just debts and liabilities. The clerk shall file the undertaking and affidavits." When § 818 was enacted in 1872, (1) the word "the" was added before "judgment be rendered," and (b) the last two sentences of the Practice Act section were omitted, beginning "The undertaking shall" and ending "affidavits."

2. Amended by Code Amdts. **1873–74**, p. 328, (1) adding the words "owner of the" after "in favor of the," (2) after "sustained by," substituting "him" for "such steamer, vessel, or boat," and (3) omitting, at end, the words of the Practice Act and original code section, after "five hundred dollars," beginning "when the attachment" and ending "against a boat."

§ 819. Such writ must be directed to the sheriff. The writ must be directed to the sheriff of the county within which the steamer, vessel, or boat lies, and direct him to attach such steamer, vessel, or boat, with its tackle,

apparel, and furniture, and keep the same in his custody until discharged in due course of law.

Legislation § 819. **1.** Enacted March 11, **1872**; based on Practice Act, § 323, which had (1) in first line, the word "shall" instead of "must," (2) the word "by" instead of "in," after "discharged," and (3) a limitation, after the words "due course of law" (the end of the present section), reading, "unless the owner, master, agent, or consignee thereof, give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy the demand in suit, which shall be specified in the writ, besides costs; in which case, to take such undertaking." When § 819 was enacted in 1872, (1) "shall" was changed to "must," (2) "by" was changed to "in," and (3) in the limitation, "besides costs" was substituted for "which shall be specified in the writ, besides costs."

2. Amended by Code Amdts. **1873–74**, p. 329.

Specific writ necessary. In an action to enforce a lien against a particular vessel, a specific writ of attachment must be issued: such special writ gives authority to seize specific property only. Jensen v. Dorr, 157 Cal. 437; 108 Pac. 320.

What constitutes appurtenances of ship. See note 5 Ann. Cas. 652.

CODE COMMISSIONERS' NOTE. McQueen v. The Russell, 1 Cal. 165.

§ 820. **Sheriff must execute such writ without delay.** The sheriff to whom the writ is directed and delivered must execute it without delay, and must attach and keep in his custody the steamer, vessel, or boat named therein, with its tackle, apparel, and furniture, until discharged in due course of law; but the sheriff is not authorized by any such writ to interfere with the discharge of any merchandise on board of such steamer, vessel, or boat, or with the removal of any trunks or other property of passengers, or of the captain, mate, seamen, steward, cook, or other persons employed on board.

Legislation § 820. **1.** Enacted March 11, **1872** (based on Practice Act, § 324), changing (1) "shall" to "must," in both instances; (2) "the same" to "it" after "execute"; (3) "be" to "is" after "last section"; (4) "by" to "in" before "due course"; (5) "shall not be" to "is" before "not authorized"; (6) "nor will" (sic) to "or with" after "or boat"; and (7) "seaman" to "seamen."

2. Amended by Code Amdts. **1873–74**, p. 329, omitting, before "attach and keep," the words "unless the undertaking mentioned in the last section is given."

§ 821. **The owner, master, etc., may appear and defend such vessel.** The owner, or the master, agent, or consignee of the steamer, vessel, or boat, may, on behalf of the owner, appear and answer, or plead to the action; and may except to the sufficiency of the sureties on the undertaking filed on behalf of the plaintiff, and may require sureties to justify, as upon bail on arrest.

Appearance. Post, § 1014.
Answer. Ante, § 437.
Justification of sureties. Ante, § 495.

Legislation § 821. **1.** Enacted March 11, **1872**; re-enactment of Practice Act, § 325.

2. Amended by Code Amdts. **1873–74**, p. 329, (1) inserting "or the" before "master"; (2) omitting "against which the action is brought" after "boat"; (3) inserting "on behalf of the owner" before "appear and answer"; (4) omitting "the" after "filed on"; (5) omitting "in actions against individuals" before "upon bail on arrest."

§ 822. **Discharge of attachment.** After the attachment is levied, the owner, or the master, agent, or consignee of the steamer, vessel, or boat, may, in behalf of the owner, have the attachment discharged, upon giving to the sheriff an undertaking of at least two sufficient sureties in an amount sufficient to satisfy the demand in suit, besides costs, or depositing that amount with the sheriff. Upon receiving such undertaking or amount, the sheriff must restore to the owner, or the master, agent, or consignee of the owner, the steamer, vessel, or boat attached.

Compare ante, § 540. See also ante, §§ 554–558.

Legislation § 822. **1.** Enacted March 11, **1872** (based on Practice Act, § 326), changing "shall" to "must," the section then reading, "All proceedings in actions under the provisions of this chapter must be conducted in the same manner as in actions against individuals, except as otherwise herein provided; and in all proceedings subsequent to the complaint, the steamer, vessel, or boat may be designated as defendant."

2. Amended by Code Amdts. **1873–74**, p. 330.

§ 823. **After appearance, attachment may, on motion, be discharged.** After the appearance in the action of the owner, the attachment may, on

motion, also be discharged in the same manner, and on like terms and conditions, as attachments in other cases, subject to the provisions of section eight hundred and twenty-five.

Discharge of attachment. Ante, §§ 554–558.

Legislation § 823. **1.** Enacted March 11, **1872**; based on Practice Act, § 327, which had (1) in first line, "to" instead of "in," and (2) at end, instead of the present section number, "section 329" (of the Practice Act). When § 823 was enacted in 1872, the changes supra were made, but it contained the words of the Practice Act, after "owner," "master, agent, or consignee."

2. Amended by Code Amdts. **1873–74**, p. 330, (1) omitting "master, agent, or consignee" after "owner," and (2) adding "also" before "be discharged."

Attachment discharged without reference to levy. Under this section, involving §§ 556 and 558, ante, a writ of attachment against a vessel may be discharged on motion, if wrongfully issued, without reference to any levy made thereunder. Jensen v. Dorr, 157 Cal. 437; 108 Pac. 320.

CODE COMMISSIONERS' NOTE. Averill v. Steamer Hartford, 2 Cal. 308.

§ 824. When not discharged, such vessel, etc., may be sold at public auction. Application of proceeds. If the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the sheriff must sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel, or boat, with its tackle, apparel, and furniture, or such interest therein as may be necessary, and must apply the proceeds of the sale as follows:

1. When the action is brought for demands other than the wages of mariners, boatmen, and others employed in the service of the steamer, vessel, or boat sold, to the payment of the amount of such wages, as specified in the execution.

2. To the payment of the judgment and costs, including his fees.

3. He must pay any balance remaining to the owner, or to the master, agent, or consignee who may have appeared on behalf of the owner, or if there be no appearance, then into court, subject to the claim of any party or parties legally entitled thereto.

Sale on execution, generally. Ante, §§ 694 et seq.

Payment into court. Ante, §§ 572–574.

Legislation § 824. **1.** Enacted March 11, **1872** (based on Practice Act, § 328), (1) in first paragraph, (a) changing "shall" to "must," in both instances, and (b) adding "the" after "proceeds of"; (2) in subd. 2, omitting "and" at end of paragraph; (3) in subd. 3, changing "shall" to "must."

2. Amended by Code Amdts. **1873–74**, p. 330, (1) in subd. 3, (a) adding "or to the" before "master," and (2) substituting "on behalf of the owner" for "in the action."

3. Amendment by Stats. **1901**, p. 166; unconstitutional. See note ante, § 5.

Nature of judgment. A judgment against the owners of a vessel, foreclosing liens against the vessel, and providing for the sale thereof, with her engines, tackle, etc., is not a judgment directing the payment of money, within the meaning of § 942, post, and a stay bond given under that section, in twice the amount found due, is without consideration, and void. Olsen v. Birch, 1 Cal. App. 99; 81 Pac. 656.

Judgment erroneous when. Where, in an action for the breach of a contract for the transportation of a passenger, the contract alleged in the complaint is not denied in the answer, a judgment of nonsuit, on the ground that the contract was not proven as set out in the complaint, is erroneous. Ord v. Steamer Uncle Sam, 13 Cal. 370.

Findings. Where it was stipulated, in an action to enforce a lien upon a vessel, that, at the commencement of the action, the vessel was seized under the provisions of this chapter, and that it was released upon a bond being given, on the part of the defendant, as therein required, a finding in regard to the insufficiency of the undertaking, which is outside of any issue presented in the case, cannot be considered; and a finding of a conclusion of law, that the plaintiff, at the commencement of the action, had no lien upon the vessel, is erroneous. Moynihan v. Drobaz, 124 Cal. 212; 71 Am. St. Rep. 46; 56 Pac. 1026.

Nature and effect of sale. Where the judgment is against the owner, the sale of the property, if one is had, is like an ordinary sale under execution. Olsen v. Birch, 133 Cal. 479; 85 Am. St. Rep. 215; 65 Pac. 1032. Where the master of a vessel was a part-owner, and all his right, title, and interest in the vessel had been sold under execution against him, the purchaser of his interest is not entitled to supersede him in the command of the vessel, nor deprive him of the possession thereof. Loring v. Illsley, 1 Cal. 24.

§ 825. Mariners and others may assert their claim for wages, notwithstanding prior attachment. Any mariner, boatman, or other person employed in the service of the steamer, vessel, or boat attached, who may wish to assert his claim for wages against the same, the attachments being issued for other demands than such wages, may file an affidavit of his claim, setting forth the amount and the particular service rendered, with the clerk of the court; and thereafter no attachment can be discharged upon filing an undertaking, unless the amount of such claim, or the amount determined as provided in the next section, be covered thereby, in addition to the other requirements; and any execution issued against such steamer, vessel, or boat, upon judgment recovered thereafter, must direct the application of the proceeds of any sale:

1. To the payment of the amount of such claims filed, or the amount determined, as provided in the next section, which amount the clerk must insert in the writ;

2. To the payment of the judgment and costs, and sheriff's fees, and must direct the payment of any balance to the owner, master, or consignee, who may have appeared in the action; but if no appearance by them be made therein, it must direct a deposit of the balance in court.

Preferred claims, for wages, etc. Post, §§ 1204–1207.

Deposit in court. Ante, §§ 572 et seq.

Legislation § 825. Enacted March 11, **1872** (based on Practice Act, § 329), (1) in first paragraph, changing (a) "shall" to "may" before "file," (b) "shall" to "can" after "attachment," and (c) "shall" to "must" before "direct"; (2) making a paragraph of subd. 1, and (a) adding "amount" before "the clerk," (b) changing "shall" to "must," and (c) omitting "and" at end of paragraph; (3) making a paragraph of subd. 2, and (a) changing "shall" to "must" in both instances, and (b) omitting the word "agent" after "master," the omission of the word "agent" being evidently an oversight of the code commissioners, as the omission is listed in the "Errata" of the Practice Act.

Construction of section. This section is intended to provide a summary mode of determining claims of a particular class, which have not been adjudicated by competent tribunal; but where such claims have neither been presented to nor filed with the court according to the requirements of the section, nor any suits instituted thereon to enforce them, but the claims were filed and suits instituted thereon in the court of another district or county, the court whose mesne or final process has made the first actual seizure of the thing must have exclusive power over its disposal, and the distribution of the fund arising therefrom; the judgments of other courts, when properly authenticated, and filed in the court having custody of the fund, must be regarded as a complete adjudication of the subject-matter of the litigation which they disclosed, and entitled to distribution according to their respective merits. Averill v. Steamer Hartford, 2 Cal. 308.

§ 826. Proof of the claims of mariners and others. If the claim of the mariner, boatman, or other person filed with the clerk of the court, as provided in the last section, be not contested within five days after notice of the filing thereof by the owner, master, agent, or consignee of the steamer, vessel, or boat against which the claim is filed, or by any creditor, it shall be deemed admitted; but if contested, the clerk must indorse upon the affidavit thereof a statement that it is contested, and the grounds of the contest, and must immediately thereafter order the matter to a single referee for his determination, or he may hear the proofs and determine the matter himself. The judgment of the clerk or referee may be reviewed by a court in which the action is pending or a judge thereof immediately after the same is given, and the judgment of the court or judge shall be final. On the review the court or judge may use the minutes of the proofs taken by the clerk or referee, or may take the proofs anew.

Legislation § 826. **1.** Enacted March 11, **1872** (based on Practice Act, § 330), changing (1) "shall be" to "is" before "deemed admitted," (2) "shall" to "must" before "indorse" and be-

fore "immediately thereafter," (3) "received" (sic) to "reviewed" after "referee may be," and (4) "shall be" to "is" before "final."

2. Amended by Code Amdts. **1873–74**, p. 331, (1) adding "or by any creditor" after "is filed"; (2) changing "is" to "shall be" before "deemed admitted"; (3) substituting for "county judge" the words "court in which the action is pending, or a judge thereof"; (4) substituting for "county judge is final" the words "court or judge shall be final"; and (5) changing "county judge" to "court or."

3. Amended by Code Amdts. **1880**, p. 12, in sentence beginning "The judgment," (1) changing "the" to "a" before "court in which," and (2) omitting, after "a judge thereof," the words "either in term or vacation."

CODE COMMISSIONERS' NOTE. The admissions of a master in possession of a vessel (the record not disclosing any other owner), held admissible in evidence, with the same effect as though the suit had been against the master. Bailey v. The New World, 2 Cal. 370.

§ 827. **Sheriff's notice of sale to contain measurement, tonnage, etc.** The notice of sale published by the sheriff must contain a statement of the measurement and tonnage of the steamer, vessel, or boat, and a general description of her condition.

Legislation § 827. **1.** Enacted March 11, **1872** (based on Practice Act, § 331), changing "shall" to "must."

2. Repeal by Stats. **1901**, p. 166; unconstitutional. See note ante, § 5.

TITLE XI.

PROCEEDINGS IN JUSTICES' COURTS.

Chapter I. Place of Trial of Actions in Justices' Courts. §§ 832–838.
II. Manner of Commencing Actions in Justices' Courts. §§ 839–850.
III. Pleadings in Justices' Courts. §§ 851–860.
IV. Provisional Remedies in Justices' Courts. §§ 861–870.
Article I. Arrest and Bail. §§ 861–865.
II. Attachment. §§ 866–869.
III. Claim and Delivery of Personal Property. § 870.
V. Judgment by Default in Justices' Courts. §§ 871, 872.
VI. Time of Trial and Postponements in Justices' Courts. §§ 873–877.
VII. Trials in Justices' Courts. §§ 878–887.
VIII. Judgments (Other than by Default) in Justices' Courts. §§ 889–900.
IX. Executions from Justices' Courts. §§ 901–905.
X. Contempts in Justices' Courts. §§ 906–910.
XI. Dockets of Justices. §§ 911–918.
XII. General Provisions Relating to Justices' Courts. §§ 919–926.

CHAPTER I.

PLACE OF TRIAL OF ACTIONS IN JUSTICES' COURTS.

§ 832. Actions, where must be commenced.
§ 833. Place of trial may be changed in certain cases.
§ 834. Limitation on the right to change.
§ 835. To what court transferred.
§ 836. Proceedings after order changing place of trial.
§ 837. Effect of an order changing place of trial. [Repealed.]
§ 838. Transfer of cases to the superior court.

§ 832. Actions, where must be commenced. Actions in justices' courts must be commenced, and, subject to the right to change the place of trial, as in this chapter provided, must be tried:

1. If there is no justices' court for the township or city in which the defendant resides—in any city or township of the county [in which] he resides;

2. When two or more persons are jointly, or jointly and severally, bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties—in the township or city in which any of the persons liable may reside;

3. In cases of injury to the person or property—in the township or city where the injury was committed, or where the defendant resides;

4. If for the recovery of personal property, or the value thereof, or damages for taking or detaining the same—in the township or city in which the property may be found, or in which the property was taken, or in which the defendant resides;

5. When the defendant is a non-resident of the county—in any township or city wherein he may be found;

6. When the defendant is a non-resident of the state—in any township or city in the state;

7. When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city—in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred is deemed to be the township or city in which it is to be performed, unless there is a special contract in writing to the contrary;

8. When the parties voluntarily appear and plead without summons—in any township or city in the state;

9. In all other cases—in the township or city in which the defendant resides.

Place of trial, generally. Ante, §§ 392 et seq.
Jurisdiction of justice's court. Ante, §§ 112–115; post, § 925.

Legislation § 832. 1. Enacted March 11, **1872**; based on Practice Act, § 535, as amended by Stats. 1867–68, p. 551, which read: "No person shall be held to answer to any summons issued against him from a justice's court, in a civil action, in any township or city other than the one in which he shall reside, except in the cases following: First. When there shall be no justice's court for the township or city in which the defendant may reside, or no justice competent to act on the case. Second. When two or more persons shall be jointly or jointly and severally bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties, the plaintiff may prosecute his action in a justice's court of the township or city in which any of the debtors or other persons liable may reside. Third. In cases of injury to the person, or to real or personal property, the plaintiff may prosecute his action in the township or city where the injury was committed. Fourth. Where personal property, unjustly taken or detained, is claimed, or damages therefor are claimed, the plaintiff may bring his action in any township or city in which the property may be found, or in which the property was taken. Fifth. When the defendant is a non-resident of the county, he may be sued in any township or city wherein he may be found. Sixth. When a person has contracted to perform any obligation at a particular place, and resides in another county or in a township or city of the same county, he may be sued in the township or city in which such obligation is to be performed or in which he resides; and for the purpose of justices' courts' jurisdiction under this clause, the township or city in which the obligation is incurred shall be deemed to be the township or city in which it is to be performed, unless there is a special contract to the contrary. Seventh. When the foreclosure of a mortgage or the enforcement of a lien upon personal property is sought by the action, the plaintiff may sue in the township or city where the property is situated. Eighth. Any person or persons residing in the city of San Francisco may be held to answer to any summons issued against him or them from the court of a justice for any township within the corporate limits of the city of San Francisco, in any action or proceeding whereof justices of the peace of the city or county of San Francisco have or may have jurisdiction by law; provided, nothing herein contained shall be construed to allow any justice of said city or county to hold a court in any other township than the one for which he shall have been elected." When § 832 was enacted in 1872, it read the same as at present, except for the amendments of 1873–74 and 1907.

2. Amended by Code Amdts. **1873–74**, p. 333, (1) in subd. 3, adding, at end, after "committed," the words "or where the defendant resides"; (2) in subd. 4, adding, at end, after "taken," the words "or in which the defendant resides"; (3) in subd. 7, adding the last clause, then reading, "and the township or city in which the obligation is incurred shall be deemed to be the township or city in which it is to be performed, unless there is a special contract to the contrary."

3. Amendment by Stats. **1901**, p. 166; unconstitutional. See note ante. § 5.

4. Amended by Stats. **1907**, p. 878, (1) in subd. 1, (a) changing "be" to "is" after "If there," and (b) omitting (sic) the words "in which" before "he resides"; (2) in subd. 7, in the clause added in 1873–74, (a) changing "shall be" to "is" before "deemed," and (b) adding the words "in writing"; the code commissioner saying, "Amendment simply changes the verb to the transitive mood, present tense, where it occurs otherwise in the original section."

Construction of section. There is no repugnancy between the provisions of the seventh subdivision of this section and § 106, ante, and § 848, post. Cole v. Fisher, 66 Cal. 441; 5 Pac. 915. The jurisdiction conferred by § 806 of the Municipal Corporation Act of 1883 on recorders' courts of cities of the sixth class is concurrent with that conferred by this chapter as to all matters ordinarily cognizable in justices' courts, within the corporate limits of such cities. Prince v. Fresno, 88 Cal. 407; 26 Pac. 606. This section is to be construed in connection with § 890, post, which provides for a mode of waiving objection to the jurisdiction, fully as effective as a voluntary appearance without summons. McGorray v. Superior Court, 141 Cal. 266; 74 Pac. 853.

Jurisdiction. It is essential to the validity of a judgment, that the court rendering it has jurisdiction: a justice of the peace can try a defendant only in a justice's court, and no validity can attach to his judgment rendered in another forum; and the designation of the court as a police court, and of the justice as a police judge, cannot be disregarded, nor can the proceedings be regarded as having taken place in a justice's court, before a justice of the peace. Ex parte Giambonini, 117 Cal. 573; 49 Pac. 732.

Action for breach of contract. An action, in a justice's court, to recover damages for the breach of a contract, may be brought either in the township or city where the contract is to be performed or where the defendant resides; if brought in the former place, prior to the amendment in 1907 of the second subdivision of § 848, post, whether the contract sued on was or was not in writing, the summons could be served in the county in which the defendant resided. Cole v. Fisher, 66 Cal. 441; 5 Pac. 915; and see Allen v. Napa County, 82 Cal. 187; 23 Pac. 43.

Summons served where. Where a complaint in a justice's court shows jurisdiction of the subject-matter, but fails to allege that the contract sued on was in writing, service of summons cannot be had outside of the county in which the action is brought. Olcese v. Justice's Court, 156 Cal. 82; 103 Pac. 317.

Defendant's residence proved how. The fact of the defendant's residence is jurisdictional; but the statute does not require that its existence shall be recorded in the docket of the justice, or be made to appear in any written evidence of the proceedings in the action, nor does it provide in what

manner such facts as are not required to be entered in the docket or other written proceeding shall be made to appear or be proved; and it is error for the court to reject parol evidence that the defendant, at the time the action was commenced, resided in the township where it was commenced. Jolley v. Foltz, 34 Cal. 321.

Record of proceedings must show what. The record of the proceedings in a justice's court, in which judgment is rendered, must affirmatively show that the suit was brought in the proper township, or the proceedings are coram non judice and void; and the failure of the defendant, after summons served, to appear and object that suit was brought in the wrong township, is no waiver of the objection. Lowe v. Alexander, 15 Cal. 296.

Defendant sued under fictitious name. A person sued and served under a fictitious name must come in and set up the misnomer and whatever defense he may have, or he is concluded by the judgment. Brum v. Ivins, 154 Cal. 17; 129 Am. St. Rep. 137; 96 Pac. 876.

Equity cases. The foreclosure of a mortgage, and the sale of the mortgaged property for the payment of the debt thereby secured, is a case of purely equitable cognizance. Willis v. Farley, 24 Cal. 490.

CODE COMMISSIONERS' NOTE. Subdivisions 6 and 8 of this section (§ 832) are new provisions. The statutes of 1867–68, p. 552, provided, however, that "nothing in this act should be construed to preclude the bringing of actions in justices' courts of this state against any parties residing out the state." Section 535 of the Practice Act contained the following subdivision:

"7th. When the foreclosure of a mortgage, or the enforcement of a lien, upon personal property, is aought by the action, the plaintiff may sue in the township or city where the property is situated."

But the foreclosure of mortgage and the sale of the property for the payment of the debt secured thereby are matters of purely equitable cognizance; and the constitution provides that the district court shall have jurisdiction in all cases of equity. See Willis v. Farley, 24 Cal. 499. The subdivision was therefore omitted from this section. No intendments can be indulged in favor of the jurisdiction of justices' courts; but their jurisdiction must affirmatively appear, or their judgments will be void. The record must show that the suit was brought in the proper township. It is not necessary, if the suit is not brought in the proper place, for the defendant to appear and object to the jurisdiction. A constable cannot serve summons out of his township. Lowe v. Alexander, 15 Cal. 301; Jolley v. Foltz, 34 Cal. 321; Rowley v. Howard, 23 Cal. 401; see also note to § 911, post; see also § 114, ante, and notes.

§ 833. Place of trial may be changed in certain cases. The court may, at any time before the trial, on motion, change the place of trial in the following cases:

1. When it appears to the satisfaction of the justice before whom the action is pending, by affidavit of either party, that such justice is a material witness for either party;

2. When either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice, or bias of the justice;

3. When a jury has been demanded, and either party makes and files an affidavit that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township or city against him;

4. When, from any cause, the justice is disqualified from acting;

5. When the justice is sick or unable to act.

Change of venue, generally. Ante, §§ 397 et seq.

Legislation § 833. Enacted March 11, **1872**; based on Practice Act, § 582, as amended by Stats. 1863, p. 502, which read: "If, at any time before the trial, it appear to the satisfaction of the justice before whom the action is brought, by affidavit of either party, that such justice is a material witness for either party, or if either party make affidavit that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice, or bias of the justice, the action may be transferred to some other justice of the same or neighboring township; and in case a jury be demanded, and affidavit of either party is made that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township against him, the action may be transferred to some other justice of the peace in the county; but only one transfer shall be allowed to either party. The justice to whom an action may be transferred by the provisions of this section, shall have and exercise the same jurisdiction over the action as if it had been originally commenced before him. The justice ordering the transfer of the action to another justice, shall immediately transmit to the latter, on payment by the party applying of all the costs that have accrued, all the papers in the action, together with a certified transcript from his docket of the proceedings therein. The justice to whom the case is transferred shall issue a notice, stating the time and place when and where the trial will take place, which notice shall be served upon the parties by any officer authorized to serve process in a justice's court, or by any person specially deputed by the justice for that purpose, at least one day before the trial."

Construction of section. An action commenced before a justice of the city of San Diego, under § 12 of the act reincorporating that city, to recover a fine for a violation of a city ordinance, may be transferred for trial to a justice having his office outside the city, but in the same county: there is nothing in the reincorporating act to show

that this section and § 836, post, are not applicable to the case, as to change of place of trial. Palmer v. Snyder, 67 Cal. 105; 7 Pac. 196. The statute does not provide a right to have a change of the place of trial of an action pending in a justice's court, upon the ground of residence. Powell v. Sutro, 80 Cal. 559; 22 Pac. 308. It seems to have been contemplated by the legislature, in framing the second subdivision of this section, that the justice shall be relieved from the very delicate and trying duty of deciding upon the question of his own disqualification, and that the mere fact that a suitor in his court makes affidavit of his belief that the justice is biased against him renders it imperative upon the justice to transfer the case to some disinterested officer. People v. Compton, 123 Cal. 403; 56 Pac. 44. This section is not to be given the same construction as § 1431 of the Penal Code, under which the court has a discretion to refuse a change. Miles v. Justices' Court, 13 Cal. App. 454; 110 Pac. 349; Ex parte Wright, 119 Cal. 401; 54 Pac. 639. Before the enactment of § 834, post, the fact that a case had been transferred once could make no difference, the object of law being to provide the parties with a disinterested, unprejudiced, and unbiased tribunal to adjudicate their cause. People v. Hubbard, 22 Cal. 34. A proceeding for the transfer of a cause from a state to a Federal court is not a proceeding for a change of venue. Ritzman v. Burnham, 114 Cal. 522; 46 Pac. 379.

Refusal to allow change of venue, effect of. The refusal of a justice of the peace to allow a change of venue, on the ground of the interest, prejudice, and bias of the justice, though erroneous, does not render subsequent proceedings before the justice without jurisdiction, nor invalidate the judgment rendered by him. Ritzman v. Burnham, 114 Cal. 522; 46 Pac. 379.

CODE COMMISSIONERS' NOTE. If the justice is interested in the result of the action, the place of trial should be changed. Larue v. Gaskins, 5 Cal. 507. If the place of trial has been changed from one justice's court to another, it may again be changed if it appear that good cause for such change exists. People v. Hubbard, 22 Cal. 34.

§ 834. Limitation on the right to change. The place of trial cannot be changed, on motion of the same party, more than once, upon any or all the grounds specified in the first, second, and third subdivisions of the preceding section.

Legislation § 834. Enacted March 11, **1872.**

§ 835. To what court transferred. When the court orders the place of trial to be changed, the action must be transferred for trial to a court the parties may agree upon; and if they do not so agree, then to another justice's court in the same county.

Legislation § 835. Enacted March 11, **1872.**

§ 836. Proceedings after order changing place of trial. After an order has been made, transferring the action for trial to another court, the following proceedings must be had:

1. The justice ordering the transfer must immediately transmit to the justice of the court to which it is transferred, on payment by the party applying of all the costs that have accrued, all the papers in the action, together with a certified transcript from his docket of the proceedings therein;

2. Upon the receipt by him of such papers, the justice to whom the case is transferred has thereafter the same jurisdiction over the action as though it had been commenced in his court.

Legislation § 836. **1.** Enacted March 11, **1872,** the introductory paragraph and subd. 1 reading as at present, subd. 2 then reading, "2. Upon the receipt by him of such papers, the justice of the court to which the case is transferred must issue a notice, stating when and where the trial will take place, which notice must be served upon the parties at least one day before the time fixed for trial."

2. Amendment by Stats. **1901,** p. 166; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907,** p. 879, changing subd. 2 to read as now printed; the code commissioner saying, in relation to §§ 836, 837, "The amendment incorporates into § 836 the matters in former § 837, and repeals § 837, thus avoiding the conflict previously existing between these two sections." See Legislation § 837.

Application of section. This section, as to change of place of trial, is applicable to an action to recover a fine for a violation of a city ordinance. Palmer v. Snyder, 67 Cal. 105; 7 Pac. 196.

Necessity of filing papers in superior court. The superior court to which the action is transferred has, upon the failure of

the moving party to pay the costs of filing the papers anew therein, the power to deal with the matter, although the papers have not actually been filed there. Chase v. Superior Court, 154 Cal. 789; 99 Pac. 355.

§ 837. [Effect of an order changing place of trial. Repealed.]

Legislation § 837. 1. Enacted March 11, 1872.
2. Repeal by Stats. 1901, p. 167; unconstitutional. See note ante, § 5.
3. Repealed by Stats. 1907, p. 879. See ante, Legislation, § 836.

Construction of sections. There is no substantial difference between this section and § 399, ante, respecting the transfer of cases, and both sections should be given such a construction as shall make them harmonize. Chase v. Superior Court, 154 Cal. 789; 99 Pac. 355.

Effect of transfer. The transfer of a case puts an end to the jurisdiction of the justice by whom the order was made. Hatch v. Galvin, 50 Cal. 441.

§ 838. Transfer of cases to the superior court. The parties to an action in a justice's court cannot give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine; nor can any issue presenting such question be tried by such court; and if it appear, from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, or the legality of any tax, impost, assessment, toll, or municipal fine, the justice must suspend all further proceedings in the action and certify the pleadings, and, if any of the pleadings are oral, a transcript of the same, from his docket to the clerk of the superior court of the county; and from the time of filing such pleadings or transcript with the clerk, the superior court shall have over the action the same jurisdiction as if it had been commenced therein; provided, that in cases of forcible entry and detainer, of which justices' courts have jurisdiction, any evidence, otherwise competent, may be given, and any question properly involved therein may be determined.

Certifying to superior court, from justices' courts, in cities and counties. Ante, § 92.
Title or possession of realty involved. Ante, § 112, subd. 2.
Legality of tax, etc., involved. Ante, § 112, subd. 4.
Forcible entry and detainer, jurisdiction of. Ante, § 113, subd. 1.

Legislation § 838. 1. Enacted March 11, 1872 (based on Practice Act, § 581, as amended by Stats. 1863–64, p. 117), (1) changing the first words of the section from "The parties shall not be at liberty to give evidence"; (2) changing "shall" to "can" before "any issue"; (3) changing "said justice" to "such court"; (4) omitting, after "and if it appear," the words "from the plaintiff's own showing on the trial, or"; (5) changing "shall" to "must" before "suspend," and changing "or if the pleadings be oral" to "and, if any of the pleadings are oral"; (6) adding "clerk of the" before "district court" ("superior court" of the present section); (7) omitting "county" after "with the," before "clerk"; (8) changing (a) "shall have" to "has" before "over," and (b) "were" to "had been" before "commenced therein"; these last words then ending the section.
2. Amended by Code Amdts. 1880, p. 18, (1) substituting "superior" for "district" before "court," in both instances; (2) restoring "shall have" of the Practice Act from "has," before "over the action"; and (3) adding the proviso.

Construction of section. The supreme court say, that it is conceivable that the author of this section was of the opinion that the title to or the right to the possession of the real estate was not involved unless an issue to be tried was raised; but they held, in view of their own decisions, that that view cannot be maintained, and it seemed to them that the defendant could not make such an issue, save by a verified pleading. Boyd v. Southern California Ry. Co., 126 Cal. 571; 58 Pac. 1046. The purpose of this section is to secure to the superior court the right to hear and determine the causes that are, by the constitution, placed within its jurisdiction. Dungan v. Clark, 159 Cal. 30; 112 Pac. 718.

Evidence not allowed in justice's court. The language of this section is clear and explicit, to the effect that the parties are not allowed to give evidence on any question which involves the title to or the possession of real property. O'Meara v. Hables, 163 Cal. 240; 124 Pac. 1003; King v. Kutner-Goldstein Co., 135 Cal. 65; 67 Pac. 10. The opinion of a witness as to the title to real property is not evidence of title. Schroeder v. Wittram, 66 Cal. 636; 6 Pac. 737.

Verified answer as prerequisite to admission of evidence or to transfer. Where any question is raised concerning the legality of any tax, impost, assessment, toll, or municipal fine, in a case originating in a justice's court, it must be by answer verified by the oath of the defendant, and unless so raised, no evidence as to such legality can be received, either in the justice's court, or on appeal in the superior

court. Williams v. Mecartney, 69 Cal. 556; 11 Pac. 186. A justice of the peace has no authority, under this section, to certify the pleadings to the superior court, nor does the superior court obtain jurisdiction by his certifying them to it, unless the defendant has presented in the justice's court a verified answer, that a question mentioned in this section is necessarily involved in the action. Raisch v. Sausalito Land etc. Co., 131 Cal. 215; 63 Pac. 346. The fact that the defendant filed an unverified answer is immaterial, where the complaint is unverified, as in such case an unverified answer raises every issue that a verified answer would raise. King v. Kutner-Goldstein Co., 135 Cal. 65; 67 Pac. 10. Where the complaint itself shows that the question of the title to or the right to the possession of real property is necessarily involved in an action brought before a justice of the peace, there is no propriety in requiring a verified answer before the case can be transferred to the superior court. Boyd v. Southern California Ry. Co., 126 Cal. 571; 58 Pac. 1046. It is an elementary principle, that the facts, and not the verified answer, constitute the final test of jurisdiction upon any cause of action inaugurated in a justice's court. King v. Kutner-Goldstein Co., 135 Cal. 65; 67 Pac. 10. The mere allegation, in an unverified answer, that title to real estate will be brought into issue, is insufficient to authorize the justice to certify the case to the superior court: facts should be stated from which such conclusion would follow. McAllister v. Tindal, 1 Cal. App. 236; 81 Pac. 1117.

Power and duty of justice to transfer cases. While a justice of the peace has jurisdiction to pass upon any question of fact or of law involved in the trial of an issue properly before him, so that his judgment will be binding upon the parties in the absence of any appeal or review, yet he cannot divest himself of jurisdiction which he possesses, nor transfer it to the superior court, which does not possess it. Arroyo Ditch etc. Co. v. Superior Court, 92 Cal. 47; 27 Am. St. Rep. 91; 28 Pac. 54. It is proper for a justice of the peace to transfer an action brought in his court, where the answer filed alleges that the determination of the action necessarily involves the question of title to or the possession of real property. Baker v. Southern California Ry. Co., 126 Cal. 516; 58 Pac. 1055. Where it appears from the verified answer of the defendant in a justice's court, that the determination of the action necessarily involves the legality of a license tax sued for, the justice should suspend the proceedings and certify the pleadings to the superior court. Monterey County v. Abbott, 77 Cal. 541; 18 Pac. 113.

Superior court acquires jurisdiction how. The superior court cannot exercise jurisdiction until it has acquired it in the mode prescribed by statute; and the mere certifying to the county clerk, by a justice of the peace, of the pleadings in a case pending before the justice, does not confer upon the superior court jurisdiction of a matter, the jurisdiction of which has not been conferred upon it by the constitution, nor does it acquire jurisdiction of the parties to the cause by thereafter determining that it has jurisdiction, and by proceeding in the trial of the cause and rendering judgment therein. Arroyo Ditch etc. Co. v. Superior Court, 92 Cal. 47; 27 Am. St. Rep. 91; 28 Pac. 54. Where the action of the justice in certifying the case is unauthorized, the case is not legally before the superior court, and, having no jurisdiction thereof, there is no error in denying a motion to change the place of trial. McAllister v. Tindal, 1 Cal. App. 236; 81 Pac. 1117.

Original and appellate jurisdiction of the superior court. The jurisdiction of the superior court in causes transferred to it under this section is original, and not appellate (Raisch v. Sausalito Land etc. Co., 131 Cal. 215; 63 Pac. 346); and if it would have had no jurisdiction if the action had been commenced therein, it can have none by the filing of pleadings certified by a justice of the peace; it cannot exercise original jurisdiction in those matters in which its jurisdiction is only appellate. Arroyo Ditch etc. Co. v. Superior Court, 92 Cal. 47; 27 Am. St. Rep. 91; 28 Pac. 54. The superior court has original jurisdiction in matters involving the legality of a tax, and over an action to recover a tax, the legality of which is put in issue; and where the parties proceed to trial upon the merits in such an action, appealed from the police court to the superior court, over which the superior court has no appellate jurisdiction, its original jurisdiction is not affected by the irregular way in which it acquires the jurisdiction over the parties, the consent of the parties to the trial upon the merits being a waiver of the irregularity of procedure. Santa Barbara v. Eldred, 95 Cal. 378; 30 Pac. 562.

Jurisdiction of superior court where title to or possession of real property is involved. The superior court has original jurisdiction of all questions pertaining to the title to or the possession of real property; and where an appeal is taken upon questions of law and fact, without a statement of the case, or anything in the record to show that the justice's court exceeds its jurisdiction, it is not the duty of the superior court to reverse the judgment of the justice's court, and remand the case, with instructions to certify a transcript thereof back to the superior court, but it is proper for it to try the cause de novo. Hart v. Carnall-Hopkins Co., 103 Cal. 132; 37 Pac. 196. Where a plaintiff alleges that the title to land, agreed to be purchased by him, is invalid, and he seeks a return of the purchase-deposit upon the ground of such

invalidity, the title to land is necessarily involved, and jurisdiction is in the superior court, not in the justice's court. Bates v. Ferrier, 19 Cal. App. 79; 124 Pac. 889. Where the issue of title or possession is so involved that it must be decided in order to determine the case, the superior court has original, and the supreme court appellate, jurisdiction, whether the involution may be said to be incidental or not. Hart v. Carnall-Hopkins Co., 103 Cal. 132; 37 Pac. 196; Dungan v. Clark, 159 Cal. 30; 112 Pac. 718. Where the case is certified to the superior court, under this section, and the amended complaint therein shows upon its face that the title to or the possession of real property is necessarily involved, the jurisdiction of the superior court is not affected. Baker v. Southern California Ry. Co., 114 Cal. 501; 46 Pac. 604. The jurisdiction of the superior court may be invoked by a plaintiff, when the title to or the right to the possession of real estate is involved, irrespective of the amount of his money demand, by alleging that fact in his complaint and setting forth the matters out of which the question arises; but when his demand is for less than three hundred dollars, and he brings an action therefor in a justice's court, without showing that such question is involved, the defendant, if he would invoke the jurisdiction of the superior court, must comply with the procedure authorized therefor. Raisch v. Sausalito Land etc. Co., 131 Cal. 215; 63 Pac. 346. Where the title to or the possession of real property is only incidentally brought into the action, or is only collaterally in question, it cannot be said that the case involves the title or the possession. Copertini v. Oppermann, 76 Cal. 181; 18 Pac. 256.

Justice's court has jurisdiction in what cases. In an action to recover a deposit made by a vendor under an executory contract for the sale of land, the jurisdiction of the justice's court is not ousted by the fact that the title to the land is incidentally called in question on the trial: to occasion a loss of jurisdiction, the title or right of possession must be directly involved. Schroeder v. Wittram, 66 Cal. 636; 6 Pac. 737. Possession of land may be shown in a justice's court, where the fact of possession is a mere incident, and not the basis of the action: to constitute a case which involves the possession of real property, the right of possession must be involved in the action. Fisch v. Nice, 12 Cal. App. 60; 106 Pac. 598; Pollock v. Cummings, 38 Cal. 683. A justice's court has jurisdiction of an action to recover a deposit made by a vendor under an executory contract for the sale of land, by which he agreed to purchase the land if the title was good, and in which it was stipulated that if the title was not good, the deposit was to be returned. Schroeder v. Wittram, 66 Cal. 636; 6 Pac. 737. Where the consideration of a note sued upon in a justice's court, by a private corporation, to which the note was executed, is assailed upon the ground that it was given for an illegal assessment upon the stock of the corporation plaintiff, the justice's court, having jurisdiction of the amount of the note, has full jurisdiction to determine all questions relating to the assessment, and has no authority to certify the pleadings to the superior court. Arroyo Ditch etc. Co. v. Superior Court, 92 Cal. 47; 27 Am. St. Rep. 91; 28 Pac. 54.

Civil jurisdiction of justices of the peace. See note ante, § 112.

Jurisdiction of police court. The police court cannot try an action to recover a license tax, where the answer denies the legality of the tax: it must transfer it to the superior court. Santa Barbara v. Stearns, 51 Cal. 499; Santa Barbara v. Eldred, 95 Cal. 378; 30 Pac. 562. Where an action is brought in the police court to recover city taxes assessed against property, and the answer discloses facts which require a transfer of the cause to the superior court, the police court, from the time of the filing of such answer, is ousted of its jurisdiction to proceed further upon the merits presented by the pleadings, and a judgment rendered therein is void, and the superior court has no appellate jurisdiction to try the case. Santa Barbara v. Eldred, 95 Cal. 378; 30 Pac. 562.

Jurisdiction of district court. The jurisdiction of the district court, under this section, was special, and that court could hear and determine a cause transferred to it, only after the pleadings before the justice were filed with its clerk; that court had jurisdiction of such action, only because the pleadings had before the justice, and filed with its clerk, presented the issue of the legality or validity of a tax or impost, and it could then take jurisdiction only for the purpose of trying such issue; and where the amount was less than three hundred dollars, the justice's court had jurisdiction to pass upon every other issue; and such action had to be tried and determined in the district court upon the pleadings in the justice's court. Santa Cruz v. Santa Cruz R. R. Co., 56 Cal. 143.

Jurisdiction must appear in record. The jurisdiction of a court over any subject-matter that is not included within its general jurisdiction must appear upon the record of its proceedings. Raisch v. Sausalito Land etc. Co., 131 Cal. 215; 63 Pac. 346. The jurisdiction of the superior court must appear on the face of the pleadings certified to it by the justice of the peace, and any amendment of the pleadings which show that the justice had jurisdiction to try the case justifies the court in remanding it. Baker v. Southern California Ry. Co., 114 Cal. 501; 46 Pac. 604.

Unlawful detainer cases. Where a justice's court has jurisdiction of an action of unlawful detainer, it is improper to certify

it to the superior court as involving a question of title, where the decisive question in the case is, Are the parties to the action landlord and tenant, respectively? Richmond v. Superior Court, 9 Cal. App. 62; 98 Pac. 57.

Change of venue. Where an action, commenced in a justice's court, is, on motion of the defendant, transferred for trial to the superior court of the county in which it was brought, because the answer shows that its determination necessarily involves a question as to the legality of a tax, the superior court has no power to change the place of trial to the county in which the defendant resides, there having been no demand for a change made in the justice's court at the time of answering. Powell v. Sutro, 80 Cal. 559; 22 Pac. 308.

Amendments to pleadings allowed when. The superior court, in an action transferred from a justice's court under this section, has jurisdiction to allow an amendment to the complaint, when the amended complaint, as well as the original, shows upon its face that the title or possession of real estate is involved in the action; and such amendment may be allowed in other respects, to the same extent as if the action had been commenced in the superior court. Baker v. Southern California Ry. Co., 114 Cal. 501; 46 Pac. 604.

Terms defined. The term "possession," as used in this section, means such a possession of real property as has relation to title, or is necessary to the enforcement or defeat of the cause of action asserted. O'Meara v. Hables, 163 Cal. 240; 124 Pac. 1003. A license charge or fee for the transaction of business is a "tax." Santa Barbara v. Stearns, 51 Cal. 499. The term "assessment," as used in § 5 of article VI of the constitution, refers to such assessments as are authorized in relation to revenue and taxation, and such as may be made under the authority of a municipal or other public corporation to meet the cost or expense of a public improvement, and does not include assessments made under § 331 of the Civil Code, by a private corporation upon its stockholders, pursuant to contract, express or implied; therefore a justice's court has jurisdiction to determine all questions relating to an assessment upon corporate stock that may be presented upon the trial of a cause, where the amount is within its jurisdiction. Arroyo Ditch etc. Co. v. Superior Court, 92 Cal. 47; 27 Am. St. Rep. 91; 28 Pac. 54.

Appeal. There is nothing before the superior court, upon appeal from a justice's court, until the undertaking is filed: until the sureties justify, the cause remains in the justice's court. Lane v. Superior Court, 5 Cal. App. 762; 91 Pac. 405. The refusal of a justice to certify the pleadings to the superior court, when in duty bound to do so, is, if followed by a judgment against the defendant, subject to review on appeal. Clark v. Minnis, 50 Cal. 509.

CODE COMMISSIONERS' NOTE. Parties to action in justice's court cannot give evidence upon any question which involves the title or possession of real property. Doherty v. Thayer, 31 Cal. 144; Holman v. Taylor, 31 Cal. 338; Pollock v. Cummings, 38 Cal. 684; Cullen v. Langridge, 17 Cal. 67; Cornett v. Bishop, 39 Cal. 319. See these cases, commented on and explained in note to § 115, ante; also notes 8 and 9 of § 114, ante; and see also, particularly, note 32 of § 57, ante. No question involving the legality of any tax, impost, assessment, toll, or municipal fine can be raised in a justice's court. People v. Mier, 24 Cal. 61; Bell v. Crippin, 28 Cal. 327. See these cases commented on in § 57, ante, note 33.

CHAPTER II.

MANNER OF COMMENCING ACTIONS IN JUSTICES' COURTS.

§ 839. Actions, how commenced.
§ 840. Summons may issue within a year.
§ 841. Defendant may waive summons.
§ 842. Parties may appear in person or by attorney.
§ 843. When guardian necessary, how appointed.
§ 844. Summons, how issued, directed, and what to contain.
§ 845. Time for appearance of defendant.
§ 846. Alias summons.
§ 847. Same.
§ 848. Service of summons outside of county.
§ 849. Summons, by whom and how served and returned.
§ 850. Notice of hearing. Form. Service. Service by mail. Docket entries.

§ 839. Actions, how commenced. An action in a justice's court is commenced by filing a complaint.

Actions, in cities and counties, title, etc. Ante, § 89.
Commencement of action. Ante, §§ 350, 405.
Action, when pending. Post, § 1049.
Complaint, generally. Ante, § 426.
Fees payable in advance. Ante, § 91.

Legislation § 839. **1.** Enacted March 11, **1872**; based on Practice Act, § 538, as amended by Stats. 1869–70, p. 637, q v., post, Legislation § 840. When § 839 was enacted in 1872, it had, at the end of the section, the words "and issuing a summons thereon, or by the voluntary appearance and pleading of the parties."

2. Amended by Code Amdts. **1875–76**, p. 98.

§ 840. Summons may issue within a year. The court must indorse on the complaint the date upon which it was filed, and at any time within one year thereafter the plaintiff may have summons issued.

Issuance of summons, generally. Ante, § 406.
Payment of fees, in cities and counties. Ante, § 91.

Legislation § 840. Enacted March 11, 1872; based on Practice Act, § 538, as amended by Stats. 1869–70, p. 637, which read: "Actions in justices' courts shall be commenced by filing a copy of the account, note, bill, bond or instrument upon which the action is brought, or a concise statement, in writing, of the cause of action, and the issuance of a summons thereon, within one year after the filing of the same, or by the voluntary appearance and pleadings of the parties without summons; in the latter case, the action shall be deemed commenced at the time of appearance."

§ 841. Defendant may waive summons. At any time after the complaint is filed the defendant may, in writing, or by appearing and pleading, waive the issuing of summons.

Waiver. Compare ante, § 406.

Legislation § 841. Enacted March 11, 1872.

Special appearance is not waiver. Where the service of summons is defective, the justice's court does not acquire jurisdiction to proceed against a defendant by reason of his special appearance for the purpose of moving to set aside the service. Southern Pacific R. R. Co. v. Superior Court, 59 Cal. 471. Where, in an action before a justice of the peace, the defendant appears for the purpose of taking advantage of irregular summons by a motion to dismiss, this does not amount to a waiver of his rights so as to cure the defect. Deidesheimer v. Brown, 8 Cal. 339.

Service of process. The legal service of summons in a justice's court includes, as a necessary part of such service, service of the complaint. Southern Pacific R. R. Co. v. Superior Court, 59 Cal. 471.

§ 842. Parties may appear in person or by attorney. Parties in justices' courts may appear and act in person or by attorney; and any person, except the constable by whom the summons or jury process was served, may act as attorney.

Justice's court practitioners. Ante, § 96.
Attorneys, generally. Ante, §§ 275 et seq.

Legislation § 842. Enacted March 11, 1872; based on Practice Act, § 534, which read: "Parties in justices' courts may prosecute or defend in person, or by attorney; and any person, on the request of a party, may act as his attorney, except that the constable by whom the summons or jury process was served, shall not appear or act on the trial in behalf of either party."

Notice of appeal, who may sign. A notice of appeal from a justice's court need not be signed by the attorney of record of appellant in that court: if signed by the appellant personally, or by any one he may select personally for that purpose, it is sufficient. Totton v. Superior Court, 72 Cal. 37; 13 Pac. 72

§ 843. When guardian necessary, how appointed. When an infant, insane, or incompetent person is a party, he must appear either by his general guardian, if he have one, or by a guardian ad litem appointed by the justice. When a guardian ad litem is appointed by the justice, he must be appointed as follows:

1. If the infant, insane, or incompetent person, be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years; if under that age, or if insane or incompetent, upon the application of a relative or friend.

2. If the infant, insane, or incompetent person, be defendant, the appointment must be made at the time the summons is returned, or before the answer, upon the application of the infant, if he be of the age of fourteen years and apply at or before the summons is returned; if he be under the age of fourteen, or be insane or incompetent, or neglect so to apply, then upon the application of a relative or friend, or any other party to the action, or by the justice on his own motion.

Guardians. Compare ante, §§ 372, 373.

Legislation § 843. 1. Enacted March 11, 1872; based on Practice Act, § 539, which read: "When a guardian is necessary, he shall be appointed by the justice as follows: 1st. If the infant be plaintiff, the appointment shall be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years or upwards; if under that age, upon the application of some relative or friend. The consent in writing of the guardian to be appointed, and to be responsible for costs, if he fail in the action, shall be first filed with the justice. 2d. If the infant be defendant, the guardian shall be appointed at the time the summons is returned, or before the pleadings. It shall be the right of the infant to nominate his own guardian, if the infant be over fourteen years of age, and the proposed guardian be present and consent in writ-

ing to be appointed. Otherwise, the justice may appoint any suitable person who gives such consent." When § 843 was enacted in 1872, (1) in introductory paragraph, "shall" was changed to "must"; (2) in subd. 1, (a) "be" was changed to "is," before "plaintiff" and before "of the age," (b) "shall" was changed to "must," in both instances, and (c) in last sentence the words "to act as such" were added; (3) in subd. 2, (a) "be" was changed to "is" before "defendant," before "over," and before "present," and (b) "shall be" was changed to "is" before "the right."

2. Amended by Code Amdts. **1873–74,** p. 333, to read: "When an infant is a party, he must appear either by his general guardian, if he have one, or by a guardian appointed by the justice as follows: One. If the infant be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years; if under that age, upon the application of a relative or friend. Two. If the infant be defendant, the guardian must be appointed at the time the summons is returned, or before the answer. It is the right of the infant to nominate his own guardian, if the infant be over fourteen years of age; otherwise the justice must make the appointment."

3. Amended by Code Amdts. **1880,** p. 18.

§ 844. Summons, how issued, directed, and what to contain. The summons must be directed to the defendant, signed by the justice, and must contain:

1. The title of the court, name of the county, city and county, or township in which the action is brought, and the names of the parties thereto;

2. A direction that the defendant appear and answer before the justice, at his office, as specified in section eight hundred and forty-five of this code;

3. A notice that unless the defendant so appear and answer, the plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or will apply to the court for the relief demanded in the complaint. If the plaintiff appears by attorney, the name of the attorney must be indorsed upon the summons.

Contents of summons. Compare ante, § 407.

Legislation § 844. 1. Enacted March 11, **1872;** based on Practice Act, § 540, which read: "The summons shall be addressed to the defendant by name, or if his name be unknown, by a fictitious name; and shall summon him to appear before the justice at his office, naming its township or city, and at a time specified therein, to answer the complaint of the plaintiff, for a cause of action therein described in general terms, sufficient to apprise the defendant of the nature of the claim against him; and in action for money or damages, shall state the amount for which the plaintiff will take judgment, if the defendant fail to appear and answer. It shall be subscribed by the justice before whom it is returnable." When enacted in 1872, § 844 read: "The summons must be directed to the defendant and signed by the justice, and must contain: 1. The title of the court, name of the county and city, or township, in which the action is commenced, and the names of the parties thereto; 2. A sufficient statement of the cause of action, in general terms, to apprise the defendant of the nature of the claim against him; 3. A direction that the defendant appear and answer before the justice, at his office, at a time specified in the summons; 4. In an action arising on a contract, for the recovery of money or damages only, a notice that unless the defendant so appears and answers the plaintiff will take judgment for the sum claimed by him (stating it); 5. In other actions, a notice that unless defendant so appears and answers the plaintiff will apply to the court for the relief demanded. If the plaintiff has appeared by attorney, the name of the attorney must be indorsed on the summons."

2. Amended by Code Amdts. **1875–76,** p. 98, (1) substituting "as specified in section eight hundred and forty-five" for "at a time specified in the summons," in the third subdivision, (2) in subds. 4 and 5, changing "appears" to "appear" and "answers" to "answer," and (3) changing "on" to "upon" in subd. 5.

3. Amended by Code Amdts. **1880,** p. 19, adding "of this code" at end of subd. 3.

4. Amended by Stats. **1899,** p. 100, and became a law, under constitutional provision, without governor's approval.

5. Amendment by Stats. **1901,** p. 167; unconstitutional. See note ante, § 5.

Issuance of summons. The justices' clerk of the city and county of San Francisco may issue a summons upon the order of the presiding justice. Helms v. Dunne, 107 Cal. 117; 40 Pac. 100.

Mistake in name. A mistake in a summons, as to the name of the particular person who was at the time presiding justice of the justices' court, does not present, in any way, a jurisdictional question. Helms v. Dunne, 107 Cal. 117; 40 Pac. 100.

Summons, who may sign. The rule declared in this section, regarding the proper party to sign a summons in the justice's court of the city and county of San Francisco, is modified by § 91, ante. Helms v. Dunne, 107 Cal. 117; 40 Pac. 100.

Name of plaintiff in summons. A summons, in an action under this section, which does not contain the name of the plaintiff, is fatally defective. Tucker v. Justice's Court, 120 Cal. 512; 52 Pac. 808.

Notice to defendant in summons. The summons in cases arising in superior courts is, in substance, the same as those issued from justices' courts: each is required to contain the same notice to the defendant; viz., in cases arising on contract for the recovery of money or damages only, that, if the defendant fail to answer, judgment will be taken against him for the sum claimed, stating it; in other actions, that, unless the defendant so appear and answer, the plaintiff will apply to the court for the relief demanded. Keybers v. McComber, 67 Cal. 397; 7 Pac. 838.

Surplusage in summons, effect of. Only those recitals in the summons which the law requires to be recited therein, are evi-

dence of their truth; recitals of matters of mere surplusage prove nothing; recitals of matters which are not subject to the statutory requirements are not conclusive as to the facts recited. Helms v. Dunne, 107 Cal. 117; 40 Pac. 100.

Service of summons. Jurisdiction of the person of the defendant is gained, both in superior courts and in justices' courts, by service of summons. Keybers v. McComber, 67 Cal. 395; 7 Pac. 838. Where summons was issued from a justice of the peace against defendants by a firm name, and the return showed service on a party not shown by the record to be in any way connected with the defendants, and no appearance was made for them on the return-day, a judgment rendered against them is void. Adams & Co. v. Town, 3 Cal. 247. Where, in an action in the justice's court, the complaint was filed against a company, but a part of the name of such company was omitted therefrom, and the service, as shown by the return, was on a member of the company, with the name therein conforming to that in the complaint, and the summons was addressed to and a default judgment was rendered against the company by its correct business name, the court did not acquire jurisdiction of the company, and its judgment was void. King v. Randlett, 33 Cal. 318.

§ 845. Time for appearance of defendant. The time specified in the summons for the appearance of the defendant must be as follows:

1. If an order of arrest is indorsed upon the summons, forthwith;

2. In all other cases, within five days, if the summons is served in the city and county, township, or city, in which the action is brought; within ten days, if served out of the township or city, but in the county in which the action is brought; and within twenty days, if served elsewhere.

Legislation § 845. 1. Enacted March 11, **1872**; based on Practice Act, § 541, as amended by Stats. 1867–68, p. 551, which read: "The time in which the summons shall require the defendant to appear and answer the complaint shall be as follows: First. If the plaintiff and defendant reside within the township when the action is brought, within ten days after the service thereof. Second. If the plaintiff and defendant reside out of the township but within the county where the action is brought, within five days after the service thereof. Third. If the plaintiff reside out of the township where the action is brought and the defendant resides in said township, within three days after the service thereof. Fourth. If the defendant reside out of the county or township in which the action is brought and the plaintiff resides in said township, within fifteen days after the service thereof. The defendant may appear in the action by demurrer or answer at any time after service of summons upon him, and shall notify the plaintiff, by written notice, of such appearance. If any of the defendants shall fail to answer or appear in the action within the time prescribed in the summons, such default shall be entered by the justice in his docket. If all of the defendants shall fail to appear or answer within the time prescribed in the summons, the justice shall thereupon enter judgment against them for the amount demanded in the summons, where the action is brought upon a contract for the direct payment of money; and in all other cases shall hear the proofs, and give judgment in accordance with the pleadings and proofs. Where all the defendants served with process shall have appeared, or some of them have appeared and the remaining defendants have made default, the justice may proceed to try the cause, or, upon good cause shown by either party, may fix the day for trial on any subsequent day not more than ten days thereafter." When enacted in 1872, § 845 read: "The time specified in the summons for the appearance of the defendant must be as follows: 1. If an order of arrest is indorsed upon the summons, forthwith; 2. In all other cases, not less than three nor more than twelve days from its date."

2. Amended by Code Amdts. **1873–74**, p. 407, (1) adding a new subd. 2, reading, "Second. If the defendant is not a resident of the county in which the action is brought, not less than twenty nor more than thirty days from its date"; and (2) subd. 2 renumbered subd. 3.

3. Amended by Code Amdts. **1875–76**, p. 99, (1) in subd. 1, changing "is" to "be" and "upon" to "on," and (2) adding a new subd. 2, which replaced subds. 2 and 3, and reading, "In all other cases the summons must contain a direction that the defendant must appear and answer the complaint within five days, if the summons be served in the township in which the action is brought; within ten days, if served out of the township, but in the county in which the action is brought; and within twenty days, if served elsewhere."

4. Amended by Code Amdts. **1880**, p. 19, (1) in subd. 1, changing "on" to "upon," and (2) in subd. 2, (a) adding "city and county" after "served in the," and (b) adding "or city" after "township," in both instances.

5. Amendment by Stats. **1901**, p. 168; unconstitutional. See note ante, § 5.

6. Amended by Stats. **1907**, p. 879; the code commissioner saying, "The amendment consists in striking out the words 'the summons must contain a direction that the defendant must appear and answer the complaint,' formerly in subd. 2."

Time for appearance. Where the summons is served where the action is brought, the defendant has five days in which to appear and answer. Hall v. Justice's Court, 5 Cal. App. 133; 89 Pac. 870.

Return-day of summons. Under the Practice Act, the summons could not be made returnable more than ten days from its date, unless publication was required. Hisler v. Carr, 34 Cal. 641. The justice cannot make the summons returnable in eleven days from its date; if he could, he could make it returnable in eleven months; the defendant, as well as the plaintiff, has an interest in a speedy trial. Deidesheimer v. Brown, 8 Cal. 339; Hisler v. Carr, 34 Cal. 641.

Appearance as waiver of rights. Where the defendant appears for the purpose of making a proper motion to dismiss the case because the summons was dated, issued, and served more than ten days before the return thereof, he does not thereby waive his rights. Deidesheimer v. Brown, 8 Cal. 339.

Time for appearance in justice's court. See note 40 Am. Dec. 177.

CODE COMMISSIONERS' NOTE. This substitutes a plain and simple rule as to the return-day of the summons. Under the old practice, the rules relating thereto were exceedingly difficult of application. The justice may, within the limits fixed by the rule, determine, from the peculiar circumstances attending each case, the proper return-day. For decisions rendered under the old practice, as to service of summons, see Deidesheimer v. Brown, 8 Cal. 339; Seaver v. Fitzgerald, 23 Cal. 85; Hisler v. Carr, 34 Cal. 641. See §§ 412, 413, ante, and notes. Sections 405 to 416, inclusive, and the notes thereto, are applicable to justices' courts, so far as relates to the service and return of the summons.

§ 846. Alias summons. If the summons is returned without being served upon any or all of the defendants, the justice, upon the demand of the plaintiff, may issue an alias summons, in the same form as the original, except that he may fix the time for the appearance of the defendant at a period not to exceed ninety days from its date.

Alias summons, generally. Ante, § 408.

Legislation § 846. Enacted March 11, **1872.**

Collateral attack on alias summons. An objection to the regularity of the issuance of an alias summons, in an action in a justice's court, is not jurisdictional, and cannot be taken advantage of in a collateral attack; and a judgment, in such court, rendered by default after a personal service of summons, is not void, although the summons fails to state definitely the nature of the cause of action, and does not notify the defendant to appear and answer at the office of the justice. Dore v. Dougherty, 72 Cal. 232; 1 Am. St. Rep. 48; 13 Pac. 621.

CODE COMMISSIONERS' NOTE. The main object of this section is to enable service to be made by publication, in the mode and manner provided for in title V, part II, of this code. See note to § 845.

§ 847. Same. The justice may, within a year from the date of the filing of the complaint, issue as many alias summons as may be demanded by the plaintiff.

Alias summons. Ante, § 408.

Legislation § 847. Enacted March 11, **1872.**

CODE COMMISSIONERS' NOTE. See note to § 845.

§ 848. Service of summons outside of county. The summons cannot be served out of the county wherein the action is brought, except in the following cases:

1. When the action is upon the joint contract or obligation of two or more persons, one of whom resides within the county;

2. When the action is brought against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county, in which case the summons may be served in the county where he resides;

3. When the action is for injury to person or property, and the defendant resides in a different county, in which case summons may be served in the county wherein he may be found;

4. In all cases where the defendant was a resident of the county when the action was brought, or when the obligation was incurred, and thereafter departed therefrom, in which event he may be served wherever he may be found;

5. In actions of forcible entry and detainer, or to enforce and foreclose liens on, or to recover possession of, personal property situate within the county.

Process of justices' courts, extent of. Ante, §§ 94, 106.

Legislation § 848. 1. Enacted March 11, **1872,** and then read: "The summons cannot be served within two days of the time fixed therein for the appearance of the defendant."

2. Amended by Code Amdts. **1873–74,** p. 333, to read: "The summons cannot be served out of the county of the justice before whom the action is brought, except where the action is brought upon a joint contract or obligation of two or more persons who reside in different counties, and the summons has been served upon the defendant resident of the county, in which case the summons may be served upon the other defendants out of the county, and except also when an action is brought against a party who has contracted to perform an obligation at a particular place, and resides in a different county, in which case summons may be served in the county where he resides. When the defendant resides in the

county, the summons cannot be served within two days of the time fixed for the appearance of the defendant: when he resides out of the county, and the summons is served out of the county, the summons cannot be served within twenty days of such time."

3. Amended by Code Amdts. **1875–76**, p. 99, (1) changing "where" to "when" before "the action is brought"; (2) changing "defendants" to "defendant" before "out of the county"; and (3) striking out the sentence beginning "When the defendant," and adding a third exception, reading, "and except, also, where an action is brought for injury to person or property, and the defendant resides in a different county, in which case summons may be served in the county where the defendant resides."

4. Amendment by Stats. **1901**, p. 168; unconstitutional. See note ante, § 5.

5. Amended by Stats. **1907**, p. 879; the code commissioner saying, "The amendment consists in recasting the form of the section, and changing the matter covered by subd. 2, so as to substitute for the words 'the county where he resides,' the words 'any county wherein he may be found.' The matter covered by subds. 4 and 5 in the new form of section is entirely new matter."

6. Amended by Stats. **1909**, p. 355, in subd. 4 adding the words "or when the obligation was incurred," this being the only change.

Construction of section. This section contains exceptions to the general rule, that a summons cannot be served out of the county of the justice before whom the action is brought; there is no repugnancy between the first exception in this section, and § 106, ante, and the seventh subdivision of § 832, ante; repeals by implication are not favored, and there is nothing to support the implication that this section and § 849, post, were repealed by the amendment of § 106, ante, in 1880. Cole v. Fisher, 66 Cal. 441; 5 Pac. 915.

Contract in writing, service of summons. The summons from a justice's court cannot be served outside of the county in which the action is brought, where the complaint shows jurisdiction of the subject-matter, but fails to allege that the contract sued on is in writing. Olcese v. Justice's Court, 156 Cal. 82; 103 Pac. 317. Service of summons outside of the county can be made only in an action based upon a written contract. Newman v. Barnet, 165 Cal. 423; 132 Pac. 588.

Burden of proving improper service of summons. A justice of the peace has jurisdiction to entertain a motion of a defendant to set aside the service of a summons attempted to be made upon him in a county other than that in which the action was pending, and the motion is properly made upon affidavits showing the grounds of the motion; and, upon such motion, the fact that an unverified complaint was filed in the action, alleging that the contract sued upon was to be performed by the defendant therein in the county in which the action was brought, does not foreclose all inquiry as to the fact, nor deprive the justice of jurisdiction to pass upon the truth of the allegation; the burden of proving improper service of summons in such action is on the defendant, and he is required to present a clear case. History Co. v. Light, 97 Cal. 56; 31 Pac. 627.

Waiver of objection to want of jurisdiction. Where the defendants, in an action in a justice's court, which is personal in its nature, move for a dismissal on the ground that the court has no jurisdiction to try the cause, their subsequent withdrawal of the motion and consent to trial on the merits is a waiver of the objection to the want of jurisdiction. Luco v. Superior Court, 71 Cal. 555; 12 Pac. 677.

Motion to quash service. Where improper issue of summons, or improper service thereof, appears, the remedy is by motion to quash the service. Burge v. Justice's Court, 11 Cal. App. 213; 104 Pac. 581.

CODE COMMISSIONERS' NOTE. See note to § 845.

§ 849. Summons, by whom and how served and returned. The summons may be served by a sheriff or constable of any of the counties of this state or by any other person of the age of eighteen years or over not a party to the action. When a summons issued by a justice of peace is to be served out of the county in which it is issued the summons must have attached to it a certificate under seal by the county clerk of such county to the effect that the person issuing the same was an acting justice of the peace at the date of the summons and must be served and returned as provided in title five, part two of the code, or it may be served by publication and sections four hundred and thirteen and four hundred and twelve so far as they relate to the publication of summons are made applicable to justices courts, the word justice being substituted for the word judge wherever the latter word occurs.

Act superseded. Act of Stats. 1875–76, p. 855, relating to the service of summons in justice's court in San Francisco, superseded by this section.

Publication, service by. Ante, §§ 412, 413.

Legislation § 849. 1. Enacted March 11, **1872** (based on Practice Act, § 542, § 613 as amended by Stats. 1865–66, p. 467, and § 614), and then read: "The summons may be served by a sheriff or constable of the county, or by any male resident of the county over twenty-one years of age, not a party to the suit, and must be served and returned as prescribed in Title V, Part II, of this code; or it may be served by publication; and

sections 413 and 412, so far as they relate to the publication of summons, are made applicable to justices' courts, the word 'justice' being substituted for the word 'judge,' wherever the latter word occurs."

2. Amended by Code Admts. **1873–74**, p. 407, to read: "The summons may be served by a sheriff or constable of any of the counties of this state; provided, that when a summons, issued by a justice of the peace, is to be served out of the county in which it was issued, the summons shall have attached to it a certificate under seal by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace at the date of the summons, or the summons may be served by any male resident, over the age of twenty-one years, not a party to the suit, within the county where the action is brought, and must be served and returned, as provided in Title Five, Part Two, of this code, or it may be served by publication; and sections four hundred and thirteen and four hundred and twelve, so far as they relate to the publication of summons, are made applicable to justices' courts, the word 'justice' being substituted for the word 'judge,' whenever the latter word occurs."

3. Amended by Stats. **1891**, p. 51, changing (1) "twenty-one" to "eighteen" after "age of," (2) "justices' " to "justice's," and (3) "whenever" to "wherever" in last line.

4. Amendment by Stats. **1901**, p. 168; unconstitutional. See note ante, § 5.

5. Amended by Stats. **1905**, p. 27.

Service of summons includes service of complaint. Jurisdiction of the person of a sole defendant in a justice's court is obtained by service of the summons and a copy of the complaint; the legal service of the summons includes, as a necessary part of such service, service of the complaint. Southern Pacific R. R. Co. v. Superior Court, 59 Cal. 471.

Proof of service of summons sufficient when. While justices' courts are inferior courts of limited jurisdiction, and their jurisdiction must affirmatively appear, or their judgments will be absolutely void, and while no intendments can be indulged in favor of the jurisdiction of such courts, yet, within these rules, the return of service of summons and complaint on the defendant is proved, and sustains the judgment, where the officer certifies that he "served the within summons by delivering a copy thereof, together with a true copy of the complaint, personally," giving the name of the township and county, and the date, with the signature of the officer, although failing to state upon whom the summons was served or to whom the copies were delivered, or that the copy of the complaint delivered was a copy of that in the action, or that the service was personal. Cardwell v. Sabichi, 59 Cal. 490.

County clerk's certificate necessary. Without the county clerk's certificate, no valid service of the summons can be made out of the county. Ferguson v. Basin Consolidated Mines, 152 Cal. 712; 93 Pac. 867.

Publication of summons. To entitle the plaintiff in a justice's court to have the summons served by publication, he must make and file with the justice the affidavit required by law, which must show that a cause of action exists in his favor, against the defendant. Hisler v. Carr, 34 Cal. 641. A summons in a justice's court, where it is required to be published, may be made returnable more than ten days from its date. Seaver v. Fitzgerald, 23 Cal. 85; Hisler v. Carr, 34 Cal. 641. An order of publication of summons, made by a justice, need not state that the paper designated is the one "most likely to give notice to the person to be served." Seaver v. Fitzgerald, 23 Cal. 85.

Proof of service by publication. The publication of summons issued by a notice may be proved by the affidavit of the principal clerk of the publishers of the newspaper, and the fact that a copy of the summons had been duly deposited in the post-office, properly directed, may be proved by the affidavit of a competent witness: a return of such facts, indorsed upon the summons by a constable or the sheriff, is not necessary. Seaver v. Fitzgerald, 23 Cal. 85.

CODE COMMISSIONERS' NOTE. Constables may appoint deputies. Taylor v. Brown, 4 Cal. 188; 60 Am. Dec. 604. See note to § 845, ante.

§ 850. Notice of hearing. Form. Service. Service by mail. Docket entries. When all the parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix the day for the trial of said cause, whether the issue is one of law or fact, and give notice thereof to the parties to the action who have appeared, but in case any of the parties are represented by an attorney, then to such attorney. Such notice shall be in writing, signed by the justice, and substantially in the following form (filling blanks according to the facts):

In the justice court, —— township (or city, or city and county), county, or city and county of —— state of California —— plaintiff, vs. —— defendant.

To ——, plaintiff, or —— attorney for plaintiff, and to —— defendant, or, —— attorney for defendant.

You and each of you will please take notice that the undersigned justice of the peace before whom the above-entitled cause is pending, has set for

hearing the demurrer of ——, filed in said cause (or has set the said cause for trial, as the case may be), before me at my office in said township (or city, or city and county), at —— o'clock — m., on the —— day of ——, 19—.

Dated this —— day of ——, 19—.

(Signed) —— Justice of the peace.

Said notice shall be served by mail or personally. When served by mail the justice of the peace shall deposit copies thereof in a sealed envelope in the post-office at least ten days before the trial or hearing addressed to each of the persons on whom it is to be served at their place of residence and the postage prepaid thereon; provided, that such notice shall be served by mail only when the person on whom service is to be made, resides out of the county in which said justice's court is situated, or is absent therefrom. When personally served said notice shall be served at least five days before the trial or hearing on the persons on whom it is to be served by any person competent and qualified to serve a summons in a justice's court, and when personally served it shall be served, returned and filed in like manner as a summons. When a party has appeared by attorney the notice may be served in the manner prescribed by subdivision one of section one thousand and eleven of this code. The justice shall enter on his docket the date of trial or hearing; and when such notice shall have been served by mail the justice shall enter on his docket the date of mailing such notice, of trial or hearing and such entry shall be prima facie evidence of the fact of such service. The parties are entitled to one hour in which to appear after the time fixed in said notice, but are not bound to remain longer than that time unless both parties have appeared and the justice being present is engaged in the trial of another cause.

Time of trial. Post, §§ 873 et seq.

Legislation § 850. 1. Enacted March 11, **1872,** and then read: "§ 850. The parties are entitled to one hour in which to appear after the time fixed in the summons, but are not bound to remain longer than that time, unless both parties have appeared, and the justice being present is engaged in the trial of another cause."

2. Amended by Code Amdts. **1875–76,** p. 99, (1) adding a new sentence at beginning of section, reading, "When all the parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix a day for the trial of said cause, and notify the plaintiff, and the defendants who have appeared, thereof"; and (2) substituting "said notice" for "summons."

3. Amended by Stats. **1901,** p. 598, (1) the first sentence then reading, "When all the parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix the day for the trial of said cause, whether the issue is one of law or fact, and give notice thereof to the plaintiff and the defendants who have appeared, but in case any of the parties are represented by an attorney, then to such attorney. Such notice shall be in writing, signed by the justice, and substantially in the following form (filling blanks according to the facts)"; (2) the blank form reading the same as the present amendment (1913); (3) the first sentence of the final paragraph then reading, "Said notice shall be served by any person competent and qualified to serve a summons in a justice's court, and shall be served, returned, and filed in like manner as a summons; and the justice shall enter on his docket the date of giving notice of trial or hearing, and date of trial or hearing, and the time of its return, and by whom and how served"; (4) the final paragraph then having only two sentences, the second being exactly the same as the final sentence of the present amendment (1913).

4. Amended by Stats. **1905,** p. 33, (1) in first sentence, (a) after the section number, adding a section title, "Notice of hearing," and (b) substituting "parties to the action" for "plaintiff and the defendants"; (2) changing the first part of the final paragraph to read: "Said notice shall be served by mail or personally. When served by mail the justice of the peace shall deposit copies thereof in a sealed envelope in the post-office at least ten days before the trial or hearing addressed to each of the persons on whom it is to be served at their place of residence and the postpage prepaid thereon; provided that such notice shall be served by mail only when the attorney [sic] on whom service is to be made, resides out of the county in which said justice's court is situated. When personally served said notice shall be served at least five days before the trial or hearing on the persons on whom it is to be served by any person competent and qualified to serve a summons in a justice's court and when personally served it shall be served, returned and filed in like manner as a summons"; (3) the final sentence of this paragraph not being changed.

5. Amended by Stats. **1909,** p. 968, (1) in first sentence, striking out the section title inserted in 1905; (2) in the proviso in the final paragraph, (a) substituting "person" for "attorney," and (b) at the end of the proviso, adding "or is absent therefrom."

6. Amended by Stats. **1913,** p. 234, adding a new sentence in the final paragraph, beginning "When a party has appeared."

Trial of issue of law or fact. The provisions of this section have reference only

to such trial as is authorized by the nature of the appearance; and if, by such appearance, only an issue of law is presented, there can be a trial of only such issue, and a trial of fact cannot be had, unless an issue of fact is presented after the trial and disposition of the issue of law. Stewart v. Justice's Court, 109 Cal. 616; 42 Pac. 158.

Fixing day for trial. Where the defendant files a demurrer to the complaint, and the justice fixes the following day for the hearing upon the demurrer, there is no occasion to fix any day for the trial, other than that already fixed, there being no issue of fact to be tried. Stewart v. Justice's Court, 109 Cal. 616; 42 Pac. 158.

Notice of trial necessary. When the party served with process has appeared, he is entitled to notice of the time fixed by the justice for the trial of the cause; such notice is imperative, and is as essential to the authority of the justice to proceed upon the trial of the case as is the summons and return of the service thereof to his entering judgment by default. Elder v. Justice's Court, 136 Cal. 364; 68 Pac. 1022; Green v. Rogers, 18 Cal. App. 572; 123 Pac. 974; Los Angeles v. Young, 118 Cal. 295; 62 Am. St. Rep. 234; 50 Pac. 534; Jones v. Justice's Court, 97 Cal. 523; 32 Pac. 575. The judgment of a justice, rendered upon an issue of fact raised, without giving notice of the trial, is void. Purcell v. Richardson, 164 Cal. 150; 128 Pac. 31.

Notice must be in writing. The notice of the day fixed for the trial of an action in a justice's court, required by this section to be given to the parties who have appeared, must be in writing and form a part of the record, and there must be an entry thereof, and of the mode in which it is given, in the justice's docket, in order to authorize him to proceed upon the trial of the case and render a judgment therein. Jones v. Justice's Court, 97 Cal. 523; 32 Pac. 575; Elder v. Justice's Court, 136 Cal. 364; 68 Pac. 1022. The notice of trial cannot be verbal, and cannot be waived by a conversation over the telephone, in which the attorney for the defendant consented to the setting of the case. Elder v. Justice's Court, 136 Cal. 364; 68 Pac. 1022.

Notice to attorney sufficient. Where a defendant has been served with summons and has appeared by his attorney, he is sufficiently notified by the justice, of the time and place of trial, under this section, where the attorney receives the notice as such, and he notifies the defendant. Grant v. Justice's Court, 1 Cal. App. 383; 82 Pac. 263.

Proof of notice. While it is not necessary that the justice shall personally serve the notice of the day fixed for trial, he ought not to accept the verbal statement of the plaintiff that notice has been served upon the defendant. Jones v. Justice's Court, 97 Cal. 523; 32 Pac. 575; Elder v. Justice's Court, 136 Cal. 364; 68 Pac. 1022. A mere entry in the justice's docket, that the plaintiff's attorney filed affidavits of service of notice of trial is not evidence that they contained proper proof that the notice had been given to the defendant. Jones v. Justice's Court, 97 Cal. 523; 32 Pac. 575.

Waiver of notice. Notice of trial may be waived by appearance, not by a conversation over the telephone. Elder v. Justice's Court, 136 Cal. 364; 68 Pac. 1022. Where a demurrer is filed after default, without first having the default vacated, it confers no right, and does not prevent the justice from setting the case for trial, and trying it without notice to the defendant, as he, being in default, is not entitled to notice. Green v. Rogers, 18 Cal. App. 572; 123 Pac. 974.

Review or certiorari. This section, providing that a justice of the peace must give notice of the day fixed for trial, is imperative, and a judgment, entered without such notice having been first given to the parties, will be set aside, upon a writ of review. Jones v. Justice's Court, 97 Cal. 523; 32 Pac. 575; Elder v. Justice's Court, 136 Cal. 364; 68 Pac. 1022. Certiorari goes only to the jurisdiction or power of the court to act, and cannot be substituted for an appeal to review an erroneous judgment of a justice's court. Armantage v. Superior Court, 1 Cal. App. 130; 81 Pac. 1033. If the requirement of this section, that the justice must fix a day for the trial of the case, and notify the parties who have appeared, is jurisdictional, and the time for appeal has expired before the defendant had notice that the case had been so set, and trial is had and judgment entered against him, it would be a harsh rule which would preclude him from showing, upon certiorari, that he had never had any notice of the trial; because the justice is not required to enter in his docket any minute of the service of notice of the time of trial, nor is he required to file any proof of such service. Weimmer v. Sutherland, 74 Cal. 341; 15 Pac. 849.

Default, what constitutes. A default occurs when the defendant fails to answer or demur as prescribed in this section and § 871, post. Weimmer v. Sutherland, 74 Cal. 314; 15 Pac. 849.

CHAPTER III.

PLEADINGS IN JUSTICES' COURTS.

§ 851. Form of pleadings.
§ 852. Pleadings in justices' courts.
§ 853. Complaint defined.
§ 854. When demurrer to complaint may be put in.
§ 855. Answer, what to contain.
§ 856. If the defendant omit to set up counter-claim.
§ 857. When plaintiff may demur to answer.
§ 858. Proceedings on demurrer.
§ 859. Amendment of pleadings.
§ 860. Answer or demurrer to amended pleadings.

§ 851. Form of pleadings. Pleadings in justices' courts—

1. Are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended;
2. May, except the complaint, be oral or in writing;
3. Must not be verified, unless otherwise provided in this title;
4. If in writing, must be filed with the justice;
5. If oral, an entry of their substance must be made in the docket.

Subd. 3. Verified answer. Ante, § 112, subd. 2, § 838.

Legislation § 851. Enacted March 11, 1872; based on Practice Act, §§ 571, 572, which read: "§ 571. The pleadings shall be in writing, and verified by the oath of the party, his agent or attorney, when the action is: 1st. For the foreclosure of any mortgage or the enforcement of any lien on personal property: 2d. For a forcible or unlawful entry upon, or a forcible or unlawful detention of lands, tenements, or other possessions: 3d. To recover possession of a 'mining claim.' In other cases the pleadings may be oral or in writing." "§ 572. When the pleadings are oral, the substance of them shall be entered by the justice in his docket; when in writing they shall be filed in his office, and a reference to them made in the docket. Pleadings shall not be required to be in any particular form, but shall be such as to enable a person of common understanding to know what is intended."

Form of pleadings sufficient when. A pleading in a justice's court is not required to be in any particular form: it is sufficient if it shows the value of the claim asserted by the plaintiff against the defendant, in such a way as that a person of common understanding may know what was intended. Aucker v. McCoy, 56 Cal. 524.

Construction of pleadings. In construing the pleadings in a justice's court upon a collateral attack upon the judgment, or upon the judgment upon appeal therefrom, the rule excluding conclusions of law as no part of the pleading does not apply; and the court, having jurisdiction of the action, has power to construe the pleadings and determine what facts are put in issue, and its findings and adjudications therein, even if erroneous, cannot be questioned collaterally. Koehler v. Holt Mfg. Co., 146 Cal. 335; 80 Pac. 73.

CODE COMMISSIONERS' NOTE. It is not the policy of the law to confine parties to any nice strictness in pleading before justices of the peace; thus, if a party does not demur to some matter of form, but, instead thereof, goes to trial, it must be considered as cured by the verdict. Cronise v. Carghill, 4 Cal. 120. Pleading in justices' courts must be construed with great liberality; and if the facts stated are sufficient to show the nature of the claim or defense relied upon, nothing further is required. Where it is unnecessary (as in this case) that pleadings should be in writing, it is difficult to lay down any rule for determining their sufficiency. To authorize the reversal of a judgment, the defects complained of should be such as were calculated to mislead the adverse party. Stuart v. Lander, 16 Cal. 374; 76 Am. Dec. 538; Liening v. Gould, 13 Cal. 599. Where an offense is created by statute and a penalty inflicted, it is necessary that the party seeking a recovery should, in general, refer to such statute; but this rule does not apply to pleadings in justices' courts, which are usually without regard to form. O'Callaghan v. Booth, 6 Cal. 66; affirmed in Hart v. Moon, 6 Cal. 162. If the complaint states a good cause of action, but, in addition thereto, contains averments and prays for relief as to matters not within the jurisdiction of the justice, the action should not be dismissed for that reason, but the court should order an amendment and disregard the objectionable matter. Howard v. Valentine, 20 Cal. 282. The pleadings, except the complaint, may be oral or in writing. See § 853, post.

§ 852. Pleadings in justices' courts. The pleadings are:

1. The complaint by the plaintiff;
2. The demurrer to the complaint;
3. The answer by the defendant;
4. The demurrer to the answer.

List of pleadings, generally. Ante, § 422.

Legislation § 852. Enacted March 11, 1872; based on Practice Act, § 570, which read: "The pleadings in justices' courts shall be: 1st. The complaint by the plaintiff, stating the cause of action: 2d. The answer by the defendant, stating the ground of the defense."

Sufficiency of pleadings. Pleadings in justices' courts are not held to much strictness (Liening v. Gould, 13 Cal. 598); and must be construed with great liberality: if the facts stated are sufficient to show the nature of the claim or defense relied upon, nothing further is required (Stuart v. Lander, 16 Cal. 372; 76 Am. Dec. 538); but, however liberal the rules of pleading may be in such courts, the complaint must

state the cause of action relied upon; and in that court, as in every other, the allegations and proof must correspond, and the judgment must be upon the demand and within the pleadings. Terry v. Superior Court, 110 Cal. 85; 42 Pac. 464.

Cross-complaint not authorized. In a justice's court, the only pleadings available to a defendant are a demurrer, or an answer to the complaint: a cross-complaint is not authorized. Purcell v. Richardson, 164 Cal. 150; 128 Pac. 31.

§ 853. **Complaint defined.** The complaint in justices' courts is a concise statement, in writing, of the facts constituting the plaintiff's cause of action; or a copy of the account, note, bill, bond, or instrument upon which the action is based.

Complaint, generally. Ante, § 426.

Legislation § 853. Enacted March 11, **1872**; based on Practice Act, § 573, which read: "The complaint shall state in a plain and direct manner the facts constituting the cause of action."

Copy of account as complaint. A complaint, filed with a justice, purporting to be a copy of an account for money borrowed, is sufficient, under this section, in the absence of a demurrer. Montgomery v. Superior Court, 68 Cal. 407; 9 Pac. 720.

Note, or copy thereof, as complaint. A note, with the proper indorsements thereon, filed with a justice, is sufficient as a complaint. Hamilton v. McDonald, 18 Cal. 128. In an action by a bank, in a justice's court, a copy of the note sued on is sufficient; and if the bank is a corporation, in the absence of objection to its want of capacity to sue, by demurrer or answer, all objection thereto is waived. McFall v. Buckeye Grangers' etc. Ass'n, 122 Cal. 468; 68 Am. St. Rep. 47; 55 Pac. 253.

Value of claim stated how. A complaint in a justice's court is sufficient if it shows the value of the claim asserted, in such a way as that a person of common understanding may know what is intended. Aucker v. McCoy, 56 Cal. 524.

Subscription to complaint unnecessary. The complaint, in an action in a justice's court, need not be subscribed by the plaintiff or his attorney. Montgomery v. Superior Court, 68 Cal. 407; 9 Pac. 720.

CODE COMMISSIONERS' NOTE. In action for payment of a note, the complaint may consist simply of the note, with the proper indorsement thereon, filed with the justice. Hamilton v. McDonald, 18 Cal. 128.

§ 854. **When demurrer to complaint may be put in.** The defendant may, at any time before answering, demur to the complaint.

Demurrer, generally. Ante, § 430.

Legislation § 854. Enacted March 11, **1872**.

§ 855. **Answer, what to contain.** The answer may contain a denial of any or all of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defense or counterclaim, upon which an action might be brought by the defendant against the plaintiff, or his assignor, in a justice's court.

Answer, generally. Ante, § 437.

Legislation § 855. **1.** Enacted March 11, **1872** (based on Practice Act, § 574), (1) adding "or all" after "of any," (2) omitting "a" before "counterclaim," and (3) changing "justices'" to "justice's."

2. Amendment by Stats. **1901**, p. 168; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 880; the code commissioner saying, "The words 'or his assignor' are inserted after the word 'plaintiff.'"

Counterclaim. A pleading that sets up new matter by way of counterclaim is simply an answer. Purcell v. Richardson, 164 Cal. 150; 128 Pac. 31. The defendant in an action in a justice's court cannot set up a counterclaim for a sum exceeding three hundred dollars. Maxfield v. Johnson, 30 Cal. 545; Malson v. Vaughn, 23 Cal. 61; Griswold v. Pieratt, 110 Cal. 259; 42 Pac. 820.

Sufficiency of answer. An answer denying generally the allegations of the complaint conforms substantially to the requirements of the statute (Sullivan v. Cary, 17 Cal. 80); and an answer denying the material allegations of the complaint either generally or specifically, is sufficient. Minturn v. Burr, 20 Cal. 48.

CODE COMMISSIONERS' NOTE. An answer is sufficient, which denies generally the allegations of the complaint. Sullivan v. Cary, 17 Cal. 80. Even the answer to a verified complaint, in an action in a justice's court, need not controvert specifically the material allegations of such complaint. It is sufficient if the answer deny the material allegations, either generally or specifically. Minturn v. Burr, 20 Cal. 49. The appearance of a defendant, for the purpose of making a motion to dismiss the case on account of a defective summons, does not waive his rights. Had he answered without any objection, then he could not have complained. Deidesheimer v. Brown, 8 Cal. 339. But his rights are not waived by the filing of an answer after he has moved to dismiss and the motion has been overruled. Gray v. Hawes, 8 Cal. 569. A counterclaim, which exceeds three hundred dollars, cannot be set up in answer. Maxfield v.

Johnson, 30 Cal. 545; Malson v. Vaughn, 23 Cal. 61. The objection to the jurisdiction of the justice, on the ground of the excess in value of the subject of the controversy, was held to be properly made by the answer, and that objection should be first determined before the justice proceeds to hear the merits of the case. Small v. Gwinn, 6 Cal. 449.

§ 856. If the defendant omit to set up counterclaim. If the defendant omit to set up a counterclaim in the cases mentioned in the last section, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.

Counterclaim waived, generally. Ante, § 439.
Legislation § 856. Enacted March 11, **1872.**

§ 857. When plaintiff may demur to answer. When the answer contains new matter in avoidance, or constituting a defense or a counterclaim, the plaintiff may, at any time before the trial, demur to the same for insufficiency, stating therein the grounds of such demurrer.

Demurrer to answer, generally. Ante, § 443.
Legislation § 857. Enacted March 11, **1872.**

§ 858. Proceedings on demurrer. The proceedings on demurrer are as follows:

1. If the demurrer to the complaint is sustained, the plaintiff may, within such time, not exceeding two days, as the court allows, amend his complaint;

2. If the demurrer to a complaint is overruled, the defendant may answer forthwith;

3. If the demurrer to an answer is sustained, the defendant may amend his answer within such time, not exceeding two days, as the court may allow;

4. If the demurrer to an answer is overruled, the action must proceed as if no demurrer had been interposed.

Proceedings on demurrer. Compare ante, §§ 472, 636.
Legislation § 858. Enacted March 11, **1872.**

Construction of section. This section is controlled by § 874, post, which is general in its terms, in relation to the subject-matter of its provisions. Hall v. Kerrigan, 135 Cal. 4; 66 Pac. 868.

Time allowed for answer. Although the pleadings in a justice's court may be oral, yet they are not required to be so; and there are many instances in which a defense can be better presented by a written pleading; and, as a defendant cannot know in advance whether his demurrer will be sustained or overruled, he ought not to be required to prepare his answer in advance of the hearing upon the demurrer, unless the statute so demands; whether, in any particular case, the court should allow time for the preparation of the answer, after the order upon the demurrer, as well as the time which it will allow, must depend upon the facts of that case, but, so long as it has power to make such an order, its action cannot be disregarded; and as § 874, post, forbids the postponement of the trial for more than two days for this purpose, there cannot, ordinarily, be any abuse of this power. Hall v. Kerrigan, 135 Cal. 4; 66 Pac. 868. Where a demurrer is filed to a complaint in a justice's court, and a day for the hearing thereof is fixed by the justice, and notice is served upon the defendant, as required by § 850, ante, the court has jurisdiction, under this section and § 872, post, upon the failure of the defendant to appear at the hearing, to overrule the demurrer and require the defendant to answer at once, and upon a failure so to answer, to render judgment by default in favor of the plaintiff. Stewart v. Justice's Court, 109 Cal. 616; 42 Pac. 158.

§ 859. Amendment of pleadings. Either party may, at any time before the conclusion of the trial, amend any pleading; but if the amendment is made after the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. The court may also, in its discretion, when an adjournment will by the amendment be rendered

necessary, require as a condition to the allowance of such amendment, made after issue joined, the payment of costs to the adverse party, to be fixed by the court, not exceeding twenty dollars. The court may also, on such terms as may be just, and on payment of costs, relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after notice of the entry of the judgment and upon an affidavit showing good cause therefor.

Amendment.
1. Generally. Ante, § 473.
2. Adjournment because of. Post, § 874, subd. 2.
Relief from judgments, generally. See ante, § 473.

Legislation § 859. 1. Enacted March 11, **1872**; based on Practice Act, § 580.
2. Amendment by Stats. **1901**, p. 169; unconstitutional. See note ante, § 5.
3. Amended by Stats. **1905**, p. 254, inserting "notice of" before "the entry."

Construction of sections. Proceedings in superior courts are dealt with in § 473, ante; but this section is a special provision, applicable to justices' courts, and prevails in dealing with the subject of vacating judgments in justices' courts. Hubbard v. Superior Court, 9 Cal. App. 166; 98 Pac. 394.

Amendment of pleadings. Amendments should be readily allowed, whenever they tend to the furtherance of justice; and the greatest liberality, in this respect, should be extended to pleadings in justices' courts. Butler v. King, 10 Cal. 342.

Application for relief against default judgments. Application for relief against a judgment by default must be by motion, and the mere making of a written application is not sufficient: the attention of the court must be called to it, and the court moved to grant it, or some present action requested, upon notice to the opposite party, before the expiration of the time limited. Spencer v. Branham, 109 Cal. 336; 41 Pac. 1095. The court does not lose jurisdiction to set aside a default by continuing the hearing for further argument. Townsend v. Parker, 21 Cal. App. 317; 131 Pac. 766. Where a default judgment is rendered against the defendant, his motion to set it aside, made more than ten days after notice of the entry of the judgment, is properly denied, although the summons in the action does not name the plaintiff in the action, but another name is inserted therein as plaintiff. Tucker v. Justice's Court, 120 Cal. 512; 52 Pac. 808. Where notice of entry of a default judgment expires on Sunday, the defendant has all of the next day within which to apply for a release from a judgment, on the ground of mistake, surprise, or excusable neglect. Townsend v. Parker, 21 Cal. App. 317; 131 Pac. 766.

Jurisdiction to set aside default judgment. The power given to justices' courts, by this section, to relieve from judgments by default, taken through mistake, inadvertence, surprise, or excusable neglect, is expressly confined to judgments by default (Weimmer v. Sutherland, 74 Cal. 341; 15 Pac. 849; Jones v. Justice's Court, 97 Cal. 523; 32 Pac. 575; American Type Founders Co. v. Justice's Court, 133 Cal. 319; 65 Pac. 742); and the time is limited to ten days after the entry of such judgments. Weimmer v. Sutherland, 74 Cal. 341; 15 Pac. 849; Simon v. Justice's Court, 127 Cal. 45; 59 Pac. 296; Fast v. Young, 19 Cal. App. 577; 126 Pac. 854. Justices' courts have no power, under this section, to set aside a judgment rendered after a regular trial. Heinlen v. Phillips, 88 Cal. 557; 26 Pac. 366. Where a motion is made, within the time limited, to set aside a default, the court may continue the hearing for argument or further evidence, without loss of jurisdiction. Spencer v. Branham, 109 Cal. 336; 41 Pac. 1095. A judgment entered after a demurrer to the complaint has been overruled and the defendant has failed to answer, may be set aside as a default judgment. Fast v. Young, 19 Cal. App. 577; 126 Pac. 854.

Default judgment voidable when. Where the summons, in an action in a justice's court, is defective, a judgment by default, rendered after personal service on the defendant, is voidable only, and cannot be collaterally attacked. Keybers v. McComber, 67 Cal. 395; 7 Pac. 838. A judgment entered against the defendant by default, before the time for answering has expired, is voidable. Harnish v. Bramer, 71 Cal. 155; 11 Pac. 888.

Collateral attack upon judgment. A judgment of a justice of the peace, against a person who was not served with summons, and did not appear in the action, is in fact void; but if the record shows that the defendant was served and appeared, and the judgment is regular on its face, it cannot be collaterally attacked. Harnish v. Bramer, 71 Cal. 155; 11 Pac. 888.

Equitable relief against judgment. Where legal and equitable relief is dispensed in different tribunals, a court of equity will not grant relief against a judgment, when the same relief can be obtained by the aid of the court that rendered the judgment; but, under the system of procedure in this state, where the various kinds of relief are administered by the same tribunal, and where

there is but one form of civil action for the enforcement or protection of civil rights, a party who presents a complaint showing his right to the relief asked is not to be denied that relief because he might have sought it under a different form of action. Merriman v. Walton, 105 Cal. 403; 45 Am. St. Rep. 50; 30 L. R. A. 786; 38 Pac. 1108. Where a motion, in a justice's court, to open a judgment procured by fraud was granted, but, on the following day, the justice, without notice to the plaintiff or his attorney, vacated the order, such subsequent action is equivalent to a denial of the motion, and from this order there was no appeal to the superior court, and equity will relieve against the judgment: the rule under which a court of equity declines to interfere until after an application for relief has been made to the court in which the judgment was rendered has no application when relief has been sought and denied in that court. Merriman v. Walton, 105 Cal. 403; 45 Am. St. Rep. 50; 30 L. R. A. 786; 38 Pac. 1108. Where a money judgment was recovered in a justice's court, but the causes of action set out in the case were barred by limitation before the commencement of an action for relief against such judgment, and there is nothing to show that the plaintiff in the justice's court case was guilty of any fraud in the procurement of the judgment, it would be inequitable to set aside the judgment without a showing that there was a good defense to the justice's court action. Burbridge v. Rauer, 146 Cal. 21; 79 Pac. 526. A complaint for an injunction to restrain the enforcement of a judgment in a justice's court, from which it appears that the grounds therefor were known to the plaintiff within a week after the verdict against him, and that he negligently failed to avail himself of the remedy therefor by appeal within the time limited by law, does not state a cause of action for the interference of a court of equity. Hollenbeck v. McCoy, 127 Cal. 21; 59 Pac. 201. An injunction does not lie to restrain the enforcement of an execution issued on a judgment by default, rendered in a justice's court, which is void on its face for the reason that the court never acquired jurisdiction of the person of the defendant: in such case, there is an adequate remedy at law, by motion in the justice's court to set aside the execution. Luco v. Brown, 73 Cal. 3; 2 Am. St. Rep. 772; 14 Pac. 366. The enforcement of a judgment by default, rendered in a justice's court, will not be restrained in equity on the ground that the same was taken through the inadvertence and excusable neglect of the judgment debtor, after a motion made by him in the justice's court, under this section, to be relieved from the judgment, on such ground, has been denied. Reagan v. Fitzgerald, 75 Cal. 230; 17 Pac. 198.

Certiorari. Where a motion is made, under this section, before the expiration of ten days, to set aside a judgment by default, and for leave to answer, and the motion is denied, the order denying the motion will not be reviewed on certiorari, although erroneous, where the justice had jurisdiction. Reagan v. Justice's Court, 75 Cal. 253; 17 Pac. 195. Under this section, a justice's court has no power to vacate its judgments, other than judgments by default, and an order attempting so to do, not being appealable, will be annulled on certiorari. Weimmer v. Sutherland, 74 Cal. 341; 15 Pac. 849. On certiorari to annul an order vacating a default judgment entered by a justice, the superior court, if satisfied that the justice had power to make the order, should affirm it, instead of dismissing the proceedings. Fast v. Young, 19 Cal. App. 577; 126 Pac. 854.

CODE COMMISSIONERS' NOTE. This section was amended so as to read as published in the text, by act of April 1, 1872. Amendments should be readily allowed, and the greatest liberality in this respect should be extended to pleadings in justices' courts. Butler v. King, 10 Cal. 343. And this, whether the defect be the statement of jurisdictional or any other fact. Amendments in all respects should be allowed, so that the case may be determined on its merits. Linhart v. Buiff, 11 Cal. 280.

§ 860. Answer or demurrer to amended pleadings. When a pleading is amended, the adverse party may answer or demur to it within such time, not exceeding two days, as the court may allow.

Time to plead. Compare ante, § 432.

Legislation § 860. Enacted March 11, 1872.

CHAPTER IV.

PROVISIONAL REMEDIES IN JUSTICES' COURTS.

Article I. Arrest and Bail. §§ 861–865.
II. Attachment. §§ 866–869.
III. Claim and Delivery of Personal Property. § 870.

ARTICLE I.

ARREST AND BAIL.

§ 861. Order of arrest, and arrest of defendant.
§ 862. Affidavit and undertaking for order of arrest.
§ 863. A defendant arrested must be taken before the justice immediately.
§ 864. The officer must give notice to the plaintiff of arrest.
§ 865. The officer must detain the defendant.

§ 861. Order of arrest, and arrest of defendant. An order to arrest the defendant may be indorsed on a summons issued by the justice, and the defendant may be arrested thereon by the sheriff or constable, at the time of serving the summons, and brought before the justice, and there detained until duly discharged, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state, with intent to defraud his creditors;

2. In an action for a fine or penalty, or for money or property embezzled or fraudulently misapplied, or converted to his own use by one who received it in a fiduciary capacity;

3. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought;

4. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female can be arrested in any action.

Arrest and bail. Ante, §§ 478 et seq.

Mesne and final process of justices' courts may be issued to any part of the county. Ante, §§ 94, 106.

Legislation § 861. Enacted March 11, 1872 (based on Practice Act, § 544), (1) omitting, in introductory paragraph, "arising after the passage of this act," after "following cases"; (2) omitting from end of subd. 1, "or where the action is for a willful injury to the person, or for taking, detaining, or injuring personal property"; (3) in subd. 2, substituting "one who received it" for "an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person"; (4) in subd. 4, substituting "can" for "shall" before "be arrested."

Proof necessary before order. Before an order of arrest can be made by a justice of the peace, in an action to recover a debt, it must be proved that a cause of action exists upon a contract, express or implied, and that a case of fraud exists, within the terms of the statute. In re Vinich, 86 Cal. 70; 26 Pac. 528. An order of arrest in a civil action may be issued by a justice of the peace, upon the facts necessary to authorize the order. Application of La Due, 161 Cal. 632; 120 Pac. 13. The proof required, before an order of arrest can be made by a justice of the peace, in an action to recover a debt, is jurisdictional. In re Vinich, 86 Cal. 70; 26 Pac. 528.

Female cannot be arrested. A woman cannot be arrested upon process issued in a civil action. Nelson v. Kellogg, 162 Cal. 621; Ann. Cas. 1913D, 759; 123 Pac. 1115.

§ 862. Affidavit and undertaking for order of arrest. Before an order for an arrest can be made, the party applying must prove to the satisfaction of the justice by the affidavit of himself, or some other person, the facts upon which the application is founded. The plaintiff must also execute and deliver to the justice a written undertaking in the sum of three hundred dollars, with sufficient sureties, to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking.

Affidavit and undertaking for arrest. Compare ante, §§ 481, 482.

Qualification of sureties. Post, § 1057.

Legislation § 862. 1. Enacted March 11, **1872**; based on Practice Act, § 545, which read: "Before an order for an arrest shall be made, the party applying shall prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts on which the application is founded. The plaintiff shall also execute and deliver to the justice a written undertaking, with two or more sureties, to the effect that if the defendant recover judgment, the plaintiff will pay to him all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least two hundred dollars." When § 862 was enacted in 1872, (1) "can" was substituted for "shall" after "arrest," and "must" for "shall" after "applying" and after "plaintiff"; (2) "in the sum of three hundred dollars" was inserted after "undertaking," and (3) "which shall be at least two hundred dollars" was omitted at end of section.

2. Amended by Code Amdts. **1873–74**, p. 334, (1) substituting "sufficient sureties" for "two or more sureties," (2) omitting "if the defendant recover judgment" before "the plaintiff," (3) substituting "adjudge" for "awarded," and (4) inserting, after "by reason of the arrest," "if the same be wrongful or without sufficient cause."

Affidavit must state what. The affidavit for an order of arrest must state the facts constituting the fraud charged, by way of direct averment, and not upon information and belief. In re Vinich, 86 Cal. 70; 26 Pac. 528.

Want of jurisdiction to make order of arrest. An affidavit showing that an action has been begun for the recovery of an "alleged" indebtedness, but containing no averment that such indebtedness or any cause of action exists, is fundamentally defective, and leaves the court without jurisdiction to make an order of arrest, for want of proof of the cause of action. In re Vinich, 86 Cal. 70; 26 Pac. 528.

§ 863. A defendant arrested must be taken before the justice immediately. The defendant immediately upon being arrested, must be taken to the office of the justice who made the order, and if he is absent or unable to try the action, or if it appears to him by the affidavit of the defendant that he is a material witness in the action, the officer must immediately take the defendant before another justice of the township or city, if there is another, and if not, then before the justice of an adjoining township, who must take jurisdiction of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him.

Legislation § 863. Enacted March 11, **1872** (based on Practice Act, § 546), substituting (1) "must" for "shall" after "arrested," (2) "is" for "be" after "absent," (3) "be made to appear" for "appears," (4) "must" for "shall" after "officer," (5) "another" for "the next" after "justice," (6) "township or city, if there is another and if not, then before the justice of an adjoining township, who must take jurisdiction of the action," for "city or township, who shall take cognizance of the action."

§ 864. The officer must give notice to the plaintiff of arrest. The officer making the arrest must immediately give notice thereof to the plaintiff, or his attorney or agent, and indorse on the summons, and subscribe a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff.

Legislation § 864. Enacted March 11, **1872** (based on Practice Act, § 547), changing "must" from "shall."

§ 865. The officer must detain the defendant. The officer making the arrest must keep the defendant in custody until he is discharged by order of the justice.

Legislation § 865. Enacted March 11, **1872** (based on Practice Act, § 548), changing (1) "the" from "an" before "arrest," (2) "must" from "shall," and (3) "he is" from "duly" before "discharged."

ARTICLE II.

ATTACHMENT.

§ 866. Issue of writ of attachment.
§ 867. Attachment, undertaking on. Exceptions to sureties.
§ 868. Writ of attachment, substance of. Officer may take an undertaking instead of levying.
§ 869. Certain provisions apply to all attachments in justices' courts.

§ 866. Issue of writ of attachment. A writ to attach the property of the defendant must be issued by the justice at the time of, or after issuing summons in actions in which the sum claimed exclusive of interest exceeds ten dollars, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in section five hundred and thirty-eight.

Attachment, generally. Ante, §§ 537 et seq.

Mesne and final process of justices' courts may be issued to any part of the county. Ante, §§ 94, 106.

Legislation § 866. 1. Enacted March 11, **1872**; based on Practice Act, § 552, as amended by Stats. 1858, p. 154, which read: "§ 552. A writ to attach the property of the defendant shall be issued by the justice, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in section one hundred and twenty-one of this act." When § 866 was enacted in 1872, (1) "must" was substituted for "shall," (2) "at the time of, or after issuing summons and before answer," was inserted after "justice," and (3) "538 of this code" was substituted for "one hundred and twenty-one of this act."

2. Amendment by Stats. **1901**, p. 169; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 880; the code commissioner saying, "The amendment omits 'and before answer' after the word 'summons,' to bring the section into harmony with § 537."

4. Amended by Stats. **1911**, p. 399, (1) striking out the commas after the words "after" and "summons," and (2) after the latter word, adding the phrase, "in actions in which the sum claimed exclusive of interest exceeds ten dollars."

Validity of attachment. Where the defendant absents himself so that summons cannot be served on him before return-day thereof, and it is returned not served, the attachment is not vitiated. Seaver v. Fitzgerald, 23 Cal. 85. Where the summons is unauthorized and void, an attachment issued in the cause is also void. Hisler v. Carr, 34 Cal. 641.

Application of section to trespassing animals. All the provisions of this code relating to attachment process apply to actions against the owner to recover damages for injuries caused by trespassing animals, subject only to the modification, that, instead of filing the affidavit required by this section and § 538, ante, the plaintiff is entitled to the issuance of a writ of attachment against the property of the defendant upon filing his complaint stating a cause of action, verified according to law. Wigmore v. Buell, 122 Cal. 144; 54 Pac. 600.

Lien as affecting attachment. Under the act of March 7, 1878, a plaintiff who seeks to recover for injuries caused by trespassing animals is not deprived of his remedy by attachment thereafter, upon the ground that he has a continuing lien upon the animals. Wigmore v. Buell, 122 Cal. 144; 54 Pac. 600.

§ 867. Attachment, undertaking on. Exceptions to sureties. Before issuing the writ, the justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, in a sum not less than fifty nor more than three hundred dollars, to the effect that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. At any time after the issuing of the attachment, but not later than five days after notice of its levy, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to they must justify in the manner and within the time provided in section five hundred and thirty-nine, otherwise the justice must order the writ of attachment vacated.

Undertaking on attachment, generally. Ante, § 539.

Legislation § 867. 1. Enacted March 11, **1872**; re-enactment of Practice Act, § 553, as amended by Stats. 1871–72, p. 75.

2. Amendment by Stats. **1901**, p. 169; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 880, (1) substituting "recovers" for "recover" before "judgment," and (2) adding the last three sentences; the code commissioner saying, "The last sentence is added, to provide for the exception to, and justification by, sureties or undertakings in attachments in justice's courts."

Undertaking is necessary. The attachment is unauthorized and void, unless issued in substantial conformity with the provisions of the statute, including the undertaking required to be given. Hisler v. Carr, 34 Cal. 641.

Validity of undertaking. The attachment bond is the antecedent of the attachment, and accompanies, in point of time, the affidavit, which must be made before the writ is issued; the bond depends for its legal effect upon the writ, and if no writ is issued, the bond is null and void; it can have no effect, except as connected with the attachment, and they must exist together; hence, an attachment bond, executed after the writ has been levied, and the attachment dismissed, is void. Benedict v. Bray, 2 Cal. 251; 56 Am. Dec. 332. Where a justice issues an attachment, and takes a bond in a suit for a sum exceeding his jurisdiction, the proceedings are void, and no action lies on the bond. Benedict v. Bray, 2 Cal. 251; 56 Am. Dec. 332.

Appeal bond. An undertaking on attachment, given months prior to the appeal, and securing damages and costs on appeal, is not the bond required by statute for costs on appeal. Stimpson Computing Scale Co. v. Superior Court, 12 Cal. App. 536; 107 Pac. 1013.

CODE COMMISSIONERS' NOTE. The provision that the justice must require two or more securities, in a sum not less than fifty nor more than three hundred dollars, is new. If a justice order the issuance of an attachment, and takes bond in an action for a sum in excess of his jurisdiction, the proceedings are void, and no suit can be maintained upon the bond. Benedict v. Bray, 2 Cal. 254; 56 Am. Dec. 332. Under § 553 of the old Practice Act, which did not fix the amount of the bond nor contain the words "not exceeding the sum specified in the undertaking," it was held that the undertaking was required to be to the effect that the plaintiff would pay costs and all damages, etc., without any limitation whatever as to amount; and if the undertaking had been conditioned to pay all damages not exceeding a certain sum, it would have been therefore unauthorized and void, as not conforming to the statute. Hisler v. Carr, 34 Cal. 646. The addition of the words, "not exceeding the sum specified in the undertaking," of course modify this decision. An attachment is unauthorized and void, unless issued in substantial conformity with the provisions of the statute. Hisler v. Carr, 34 Cal. 646; Homan v. Brinckerhoff, 1 Denio (N. Y.), 184; Davis v. Marshall, 14 Barb. (N. Y.) 96.

§ 868. Writ of attachment, substance of. Officer may take an undertaking instead of levying. The writ may be directed to the sheriff or any constable of the county in which such justice court is situate, and must require him to attach and safely keep all the property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security, by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs; in which case, to take such undertaking.

Several writs may be issued at the same time to the sheriffs or constables of different counties; provided, that where a writ of attachment issued by a justice of the peace is to be served out of the county in which it was issued, the writ of attachment shall have attached to it a certificate under seal, by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace of said county, at the date of the writ.

Contents of writ. Compare ante, § 540.

Legislation § 868. 1. Enacted March 11, **1872**; based on Practice Act, § 554. Compare infra.

2. Amended by Stats. **1905**, p. 208, (1) in first clause, substituting "in which such justice court is situate" for "or the sheriff of any other county"; (2) adding the second sentence.

3. Amended by Stats. **1915**, p. 112, (1) making a paragraph of second sentence, and (2) inserting therein "or constables," after "sheriffs."

§ 869. Certain provisions apply to all attachments in justices' courts. The sections of this code from section five hundred and forty-one to section five hundred and fifty-nine, both inclusive, are applicable to attachments issued in justices' courts, the word "constable" being substituted for the word "sheriff," whenever the writ is directed to a constable, and the word "justice" being substituted for the word "judge."

Attachment of property in superior court.
1. Property attachable. § 541.
2. How sheriff attaches. §§ 542, 543.
3. Garnishee's liability. § 544.
4. Examination of defendant and garnishee. § 545.
5. Inventory, return, etc. § 546.
6. Perishables. § 547.
7. Other property, immediate sale of. § 548.
8. Claim by third person. § 549.
9. Realization of attached property after judgment for plaintiff. § 550.

10. Collecting balance by sheriff. § 551.
11. Proceedings, execution unsatisfied. § 552.
12. Effect of judgment for defendant. § 553.
13. Discharge of attachment. §§ 554–558.
14. Sheriff's return. § 559.
15. Releasing attachment. §§ 559, 560.

Legislation § 869. Enacted March 11, 1872 (based on Practice Act, § 555), substituting (1) "code" for "act," (2) "541 to section 559" for "one hundred and twenty-four to section one hundred and forty-one," and (3) "are" for "shall be" before "applicable."

CODE COMMISSIONERS' NOTE. See notes to §§ 541–559, ante, inclusive.

ARTICLE III.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 870. How claim and delivery enforced.

§ 870. How claim and delivery enforced. In an action to recover possession of personal property, the plaintiff may, at the time of issuing summons or at any time thereafter before answer, claim the delivery of such property to him; and the sections of this code from section five hundred and ten to section five hundred and twenty-one, both inclusive, are applicable to such claim when made in justices' courts, the powers therein given and duties imposed on sheriffs being extended to constables, and the word "justice" substituted for "judge."

Claim and delivery of personalty in superior court.

1. Affidavit for claim and delivery. § 510.
2. Requisition to sheriff to take property claimed. § 511.
3. Undertaking by plaintiff. § 512.
4. Exception to sureties by defendant. § 513.
5. Defendant claiming redelivery. § 514.
6. Justification of defendant's sureties. § 515.
7. Qualification of sureties. § 516.
8. Breaking open building, etc. § 517.
9. Property, how kept. § 518.
10. Claim by third person. § 519.
11. Sheriff to file notice, affidavit, etc. § 520.
12. Actions on undertaking. § 521 (repealed by Code Amdts. 1873–74, p. 306).

Legislation § 870. Enacted March 11, 1872.

CODE COMMISSIONERS' NOTE. See notes to §§ 510–521, ante, inclusive.

CHAPTER V.

JUDGMENT BY DEFAULT IN JUSTICES' COURTS.

§ 871. Judgment when defendant fails to appear. § 872. Judgment against defendant on demurrer.

§ 871. Judgment when defendant fails to appear. If the defendant fail to appear, and to answer or demur within the time specified in the summons, then, upon proof of service of summons, the following proceedings must be had:

1. If the action is based upon a contract, and is for the recovery of money, or damages only, the court must render judgment in favor of plaintiff for the sum specified in the summons.

2. In all other actions the court must hear the evidence offered by the plaintiff, and must render judgment in his favor for such sum (not exceeding the amount stated in the summons), as appears by such evidence to be just.

Default judgment, generally. Ante, § 585.

Legislation § 871. 1. Enacted March 11, 1872, (1) the introductory paragraph then reading, "When the defendant fails to appear and answer or demur, at the time specified in the summons, or within one hour thereafter, then, upon proof of service of the summons, the following proceedings must be had," and (2) subds. 1 and 2 reading as at present, except that subd. 2 had the article "a" before the word "sum."

2. Amended by Code Amdts. 1875–76, p. 100, (1) changing the introductory paragraph to read, "If the defendant fails to appear and answer, or demurs at the time specified in the summons, then, upon proof of service of summons, the following proceedings must be had," and (2) in subd. 2, omitting "a" before "sum."

3. Amended by Code Amdts. 1880, p. 113.

Construction of section. This section is controlled by § 874, post, which is general in its terms. Hall v. Kerrigan, 135 Cal. 4; 66 Pac. 868.

Default is made when. A default is made when the defendant fails to answer or demur, as described in § 850, ante, and in this chapter. Weimmer v. Sutherland, 74 Cal. 341; 15 Pac. 849.

Right to judgment by default. Upon a sufficient statement of his cause of action, the plaintiff is entitled to judgment for the amount demanded, where the defendant fails to appear and answer the com-

plaint. Schroeder v. Wittram, 66 Cal. 636; 6 Pac. 737. Where the return affords some evidence that the copy of the complaint served was a copy of the complaint in the action, the court will not say that the proof in this regard was not sufficient to authorize the justice to render a judgment by default. Cardwell v. Sabichi, 59 Cal. 490.

Default judgment after eight years. This section does not require a judgment by default to be entered within any prescribed time: the justice may enter a default judgment after a delay of eight years from the return of service of summons. Hall v. Justice's Court, 5 Cal. App. 133; 87 Pac. 870.

Entry of non-appearance in docket. See notes post, §§ 911, 912.

Default judgment rendered by justice of the peace on process served less than required time as void or voidable. See note 8 Ann. Cas. 1142.

CODE COMMISSIONERS' NOTE. See note to § 890, post; O'Connor v. Blake, 29 Cal. 316.

§ 872. **Judgment against defendant on demurrer.** In the following cases the same proceedings must be had, and judgment must be rendered in like manner, as if the defendant had failed to appear and answer or demur:

1. If the complaint has been amended, and the defendant fails to answer it as amended, within the time allowed by the court;

2. If the demurrer to the complaint is overruled, and the defendant fails to answer at once;

3. If the demurrer to the answer is sustained, and the defendant fails to amend the answer within the time allowed by the court.

Compare ante, § 858.

Legislation § 872. Enacted March 11, 1872.

Defendant must answer at once. Under this section, and § 858, ante, the defendant may answer forthwith, upon the overruling of his demurrer; but if he fails to answer "at once," the justice is authorized, if no issue of fact is presented for trial, to render judgment by default in favor of the plaintiff. Stewart v. Justice's Court, 109 Cal. 616; 42 Pac. 158.

Defendant cannot claim time to answer. There is no provision in the code requiring a justice of the peace to allow the defendant any time within which to answer the complaint, where his demurrer is overruled, or to give to him any notice of that fact. Stewart v. Justice's Court, 109 Cal. 616; 42 Pac. 158.

Effect of default judgment as to one defendant. In an action in a justice's court against a number of stockholders of a corporation to enforce their individual liability for the indebtedness of the corporation to the plaintiff, there may possibly be as many diverse issues made, and as many trials had, resulting in several judgments, as there are several defendants; and proof made and judgment rendered against a defaulting defendant cannot operate as a dismissal of the action against answering defendants, nor affect the jurisdiction of the court to try the cause as to them. Grimwood v. Barry, 118 Cal. 274; 50 Pac. 430.

Default judgment, what constitutes. A judgment entered after a demurrer to the complaint has been overruled and the defendant has failed to answer, may be treated as a default judgment. Fast v. Young, 19 Cal. App. 577; 126 Pac. 854.

CODE COMMISSIONERS' NOTE. See §§ 851–860, inclusive, ante, and notes.

CHAPTER VI.

TIME OF TRIAL AND POSTPONEMENTS IN JUSTICES' COURTS.

§ 873. Time when trial must be commenced.
§ 874. When court may, of its own motion, postpone trial.
§ 875. Postponement by consent.
§ 876. Postponement upon application of a party.
§ 877. No continuance for more than ten days to be granted, unless upon filing of undertaking.

§ 873. **Time when trial must be commenced.** Unless postponed, as provided in this chapter, or unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the notice mentioned in section eight hundred and fifty, and the trial must be continued, without adjournment for more than twenty-four hours at any one time, until all the issues therein are disposed of.

Legislation § 873. 1. Enacted March 11, 1872. 2. Amended by Code Amdts. 1875–76, p. 100, substituting "notice mentioned in section eight hundred and fifty" for "summons for the appearance of defendant."

Notice of hearing. The provision in this section, that the trial must commence one hour from the time specified in the notice referred to, implies that such notice should be given in writing and form part of the record, and that there should be an entry thereof, and also of the mode in which it is given, in the justice's docket, so that there may be affirmative evidence of his authority to render a judgment. Jones v. Justice's Court, 97 Cal. 523; 32 Pac. 575.

Mandamus to compel justice to proceed with trial. If a justice of the peace should refuse to proceed with the trial of a case as required by this section, the remedy would be, to obtain a writ of mandate compelling him forthwith to proceed with such trial; but upon the service of such a writ he would still have a right to entertain a motion for a further continuance, and if sufficient cause were shown therefor in accordance with the provisions of the code, he would be justified in granting it. Whaley v. King, 92 Cal. 431; 28 Pac. 579.

CODE COMMISSIONERS' NOTE. See §§ 833, 859, 876, ante.

§ 874. When court may, of its own motion, postpone trial. The court may, of its own motion, postpone the trial—

1. For not exceeding one day, if, at the time fixed by law or by an order of the court for the trial, the court is engaged in the trial of another action;

2. For not exceeding two days, if, by an amendment of the pleadings, or the allowance of time to make such amendment or to plead, a postponement is rendered necessary;

3. For not exceeding three days, if the trial is upon issues of fact, and a jury has been demanded.

Amendment of pleadings, etc. Ante, §§ 858, 859.

Legislation § 874. Enacted March 11, 1872.

Construction of section. The provision in this section, by which the court may postpone the trial if postponement is necessary by reason of allowance of time "to plead," must have been intended to have some effect, and must refer to a pleading that has not yet been made or filed; and it implies that the court may allow a party time, not to exceed two days, within which to file an original pleading, when he has no such pleading on file; being general in its terms, this section controls the provisions of §§ 858, 871, 872, ante. Hall v. Kerrigan, 135 Cal. 4; 66 Pac. 868.

Divestiture of jurisdiction. The granting, by a justice's court, of a continuance for a few hours, at the defendant's request, the plaintiff being ready and desirous to proceed with the trial, if it be an error against the plaintiff, cannot operate as a discontinuance of the action to the plaintiff's prejudice; nor can any error in refusing a further continuance upon the affidavit of the defendant divest the court of jurisdiction. Disque v. Herrington, 139 Cal. 1; 72 Pac. 336.

CODE COMMISSIONERS' NOTE. See §§ 833, 859, 876, ante.

§ 875. Postponement by consent. The court may, by consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties.

Legislation § 875. Enacted March 11, 1872.

CODE COMMISSIONERS' NOTE. See §§ 833, 859, 876, ante.

§ 876. Postponement upon application of a party. The trial may be postponed upon the application of either party, for a period not exceeding four months:

1. The party making the application must prove, by his own oath or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so;

2. If the application is on the part of the plaintiff, and the defendant is under arrest, a postponement for more than three hours discharges the defendant from custody, but the action may proceed notwithstanding, and

the defendant is subject to arrest on execution, in the same manner as if he had not been discharged;

3. If the application is on the part of a defendant under arrest, before it can be granted he must execute an undertaking, with two or more sufficient sureties, to be approved by, and in a sum to be fixed by, the justice, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action, not exceeding the amount specified in the undertaking. On filing the undertaking specified in this subdivision, the justice must order the defendant to be discharged from custody;

4. The party making the application must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, may be then taken by deposition before the justice, and that the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witness was produced;

—But the court may require the party making the application to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.

Postponement.
1. Generally. Ante, § 595.
2. Costs of. Post, § 1029.
Arrest and bail. Ante, §§ 478 et seq.

Legislation § 876. Enacted March 11, 1872.

Practice before justice for obtaining of continuance for illness of party. See note 42 L. R. A. (N. S.) 669.

CODE COMMISSIONERS' NOTE. See §§ 833, 859, ante.

§ 877. No continuance for more than ten days to be granted, unless upon filing of undertaking. No adjournment must, unless by consent, be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking, in an amount fixed by the justice, with two sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying, not exceeding the sum specified in the undertaking.

Legislation § 877. Enacted March 11, 1872 (based on Practice Act, § 585), (1) substituting "must, unless by consent" for "shall," (2) inserting "in an amount fixed by the justice" after "undertaking," (3) inserting "two" before "sureties," and (4) adding at end of section "not exceeding the sum specified in the undertaking."

CHAPTER VII.

TRIALS IN JUSTICES' COURTS.

§ 878. Issue defined, and the different kinds.
§ 879. Issue of law, how raised.
§ 880. Issue of fact, how raised.
§ 881. Issue of law, how tried.
§ 882. Issue of fact, how tried.
§ 883. Jury, how waived.
§ 884. Either party failing to appear, trial may proceed at request of other party.
§ 885. Challenges to jurors.
§ 886. Manner of pleading a written instrument.
§ 887. Complaint, when accompanying instrument deemed genuine.

§ 878. Issue defined, and the different kinds. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

Compare §§ 878–880 with §§ 588–590, ante.
Legislation § 878. Enacted March 11, 1872.
Title to land is involved when. See note post, § 976.
Issue of fact arises when. When the answer is filed, an issue of fact arises as to all allegations in the complaint controverted by the answer, and "upon any new matter in the answer." Purcell v. Richardson, 164 Cal. 150; 128 Pac. 31.

§ 879. **Issue of law, how raised.** An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

Identical statute. Ante, § 589.
Legislation § 879. Enacted March 11, 1872.

§ 880. **Issue of fact, how raised.** An issue of fact arises—

1. Upon a material allegation in the complaint controverted by the answer; and,

2. Upon new matter in the answer, except an issue of law is joined thereon.

Identical statute. Ante, § 590.
Legislation § 880. Enacted March 11, 1872.

§ 881. **Issue of law, how tried.** An issue of law must be tried by the court.

Compare ante, § 591.
Legislation § 881. Enacted March 11, 1872.

§ 882. **Issue of fact, how tried.** An issue of fact must be tried by a jury, unless a jury is waived, in which case it must be tried by the court.

Compare ante, § 592.
Legislation § 882. Enacted March 11, 1872.
Number of jurors necessary to verdict in justice's court. See note 43 L. R. A. 51.

§ 883. **Jury, how waived.** A jury may be waived—

1. By consent of parties, entered in the docket;

2. By a failure of either party to demand a jury before the commencement of the trial of an issue of fact;

3. By the failure of either party to appear at the time fixed for the trial of an issue of fact.

Waiver of jury. Compare ante, § 631.
Legislation § 883. Enacted March 11, 1872.

§ 884. **Either party failing to appear, trial may proceed at request of other party.** If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party.

Compare ante, § 594.
Legislation § 884. Enacted March 11, 1872.
Evidence necessary. Where the defendant fails to appear at the trial, the justice may proceed at the request of the plaintiff, but he should not, without any evidence, render a judgment in favor of plaintiff if the answer denies the averments of the complaint: such judgment would be erroneous. Curtis v. Superior Court, 63 Cal. 435.

CODE COMMISSIONERS' NOTE. See note to § 871, ante.

§ 885. **Challenges to jurors.** The challenges are either peremptory or for cause. Each party is entitled to three peremptory challenges. Either party may challenge for cause on any grounds set forth in section six hundred and two. Challenges for cause must be tried by the justice.

Challenges. Compare ante, §§ 601, 602.
Legislation § 885. Enacted March 11, 1872; based on Practice Act, § 590, which read: "Either party may challenge the jurors. The challenges shall be either peremptory, or for cause. Each party shall be entitled to three peremptory challenges. Either party may challenge for cause, on any grounds set forth in section one hundred and sixty-two. Challenges for cause shall be tried by the justice in a summary manner, who may examine the juror challenged, and witnesses."

CODE COMMISSIONERS' NOTE. The manner of summoning and impaneling juries in justices' courts is provided for in §§ 230, 231, 232, 251, of this code.

§ 886. Manner of pleading a written instrument. When the cause of action or counterclaim arises upon an account or instrument for the payment of money only, the court, at any time before the trial, may, by an order under his hand, require the original to be exhibited to the inspection of, and a copy to be furnished to, the adverse party, at such time as may be fixed in the order; or, if such order is not obeyed, the account or instrument cannot be given in evidence.

Order for inspection. Post, § 1000.
Delivering copy of account. See ante, § 454.

Legislation § 886. Enacted March 11, **1872**; based on Practice Act, § 576, which read: "When the cause of action or counterclaim arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver a copy of the account or instrument to the court, and to state that there is due to him thereupon, from the adverse party, a specified sum, which he claims to recover or set off. The court may, at the time of the pleading, require that the original account or instrument be exhibited to the inspection of the adverse party, and a copy to be furnished; or if it be not so exhibited and a copy furnished, may prohibit its being afterwards given in evidence."

§ 887. Complaint, when accompanying instrument deemed genuine. If the complaint of the plaintiff, or the answer of the defendant, contains a copy, or consists of the original of the written obligation upon which the action is brought or the defense founded, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same is verified, or unless the plaintiff, within two days after the service on him of such answer, files with the justice an affidavit denying the same, and serves a copy thereof on the defendant.

Compare ante, §§ 447, 448, 853.
Written instrument, denial of, under oath. See ante, §§ 447, 448.

Legislation § 887. **1.** Enacted March 11, **1872**; based on Practice Act, § 577, as amended by Stats. 1854, p. 68 [96], which read: "If the plaintiff annex to his complaint or file with the justice at the time of issuing the summons, a copy of the promissory note, bill of exchange, or other written obligation for the payment of money upon which the action is brought, the defendant shall be deemed to admit the genuineness of the signatures of the makers, indorsers, or assignors thereof, unless he specifically deny the same in his answer, and verifying [sic] the answer by his oath." When § 887 was enacted in 1872, (1) "the original or" was inserted before "a copy," (2) "is" was substituted for "shall be" before "deemed," and (3) "verify" was substituted for "verifying."

2. Amendment by Stats. **1901**, p. 169; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 880; the code commissioner saying, "The amendment requires the same proceeding to deny the genuineness of a written instrument when made part of an answer as when part of a complaint in a justice's court."

CHAPTER VIII.

JUDGMENTS (OTHER THAN BY DEFAULT) IN JUSTICES' COURTS.

§ 889. Judgment by confession.
§ 890. Judgment of dismissal entered in certain cases without prejndice.
§ 891. Judgment upon verdict.
§ 892. Entry of judgment in thirty days.
§ 893. Judgment. Form. What must state, where defendant subject to arrest. Service and entry.
§ 894. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted.
§ 895. Offer to compromise before trial.
§ 896. Costs may be included in the judgment.
§ 897. Abstract of judgment.
§ 898. Abstract may be filed and docketed in superior court.
§ 899. Effect of docketing.
§ 900. Judgment no lien unless recorded.

§ 889. Judgment by confession. Judgments upon confession may be entered up in any justice's court specified in the confession.

Confession of judgment.
1. Generally. Post, §§ 1132–1135.
2. Jurisdiction. Ante, § 112, subd. 6.

Legislation § 889. Enacted March 11, **1872** (based on Practice Act, § 536), (1) substituting "judgments" for "judgment," and (2) omitting "in the state" before "specified."

CODE COMMISSIONERS' NOTE. It was held that a judgment upon confession cannot be entered up for three hundred dollars or more, as justices have no jurisdiction where the amount in controversy exceeds that amount, and consent of parties cannot confer jurisdiction. Feillett v. Engler, 8 Cal. 77. The jurisdiction of the justice's court is determined by the amount in controversy, and not by the amount of the judgment. In addition to the amount in controversy, costs and interest may be included in the judgment, and it seems that the judgment will not for that reason be void, and in such cases may exceed the sum of three hundred dollars. See Bradley v. Kent, 22 Cal. 171; and particularly Reed v. Bernal, 40 Cal. 628; and Will v. Sinkwitz, 39 Cal. 570. In Reed v. Bernal, 40 Cal. 633, where a judgment was rendered by a justice of the peace for the principal and interest due on a note, and also a further sum of fifty per cent on the amount of such principal and interest, in pursuance of a stipulation contained in a note authorizing the allowance of the fifty per cent additional, which latter sum, when

added to the principal and interest, exceeded in amount the sum of three hundred dollars, and such judgment was held void, as exceeding the jurisdiction of the justice, the fifty per cent additional was not in the nature of interest, and hence could not be added to the judgment. Reed v. Bernal, 40 Cal. 633. See, as to these matters of jurisdiction, § 44, ante, note 6; also § 86, ante, note 4, and § 114, note 7, where the phrase "amount in controversy" is defined, and the amounts for which judgments may be entered by justices' and county courts is discussed.

§ 890. Judgment of dismissal entered in certain cases without prejudice. Judgment that the action be dismissed, without prejudice to a new action, may be entered with costs, in the following cases:

1. When the plaintiff voluntarily dismisses the action before it is finally submitted; or fails to prosecute the action to judgment with reasonable diligence; provided a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of the defendant; if a provisional remedy has been allowed, the undertaking must thereupon be delivered by the justice of the peace to the defendant who may have his action thereon;

2. When he fails to appear at the time specified in the summons, or at the time to which the action has been postponed, or within one hour thereafter;

3. When, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court;

4. When the action is brought in the wrong county, or township, or city.

Dismissal. Compare ante, § 581.

Legislation § 890. 1. Enacted March 11, **1872**; based on Practice Act, § 591, (1) the introductory paragraph reading as at present; (2) subd. 1 ended with the words "finally submitted"; (3) subd. 2 read, "When he fails to appear at the time specified in the summons, or upon adjournment, or within one hour thereafter"; (4) subd. 3 (the present subd. 4) read, "When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, or city; but if the objection be taken and overruled, it shall be cause only of reversal on appeal, and shall not otherwise invalidate the judgment; if not taken at the trial, it shall be deemed waived, and shall not be cause of reversal," the Practice Act section ending with these words. When § 890 was enacted in 1872, (1) subd. 2 was changed to read as at present; (2) the present subd. 3 was added; (3) Practice Act subd. 3 was renumbered subd. 4, and (a) "be" changed to "is" before "taken," (b) "shall be" changed to "is" before "cause," (c) "shall be deemed" changed to "does" before "not otherwise," and (d) after "the trial," the words "it is waived" substituted as the final words.

2. Amended by Stats. **1905**, p. 44.

Construction of section. This section must be considered in connection with § 832, ante; and it provides for a mode of waiving objection to the jurisdiction, fully as effective as a voluntary appearance without summons. McGorray v. Superior Court, 141 Cal. 266; 74 Pac. 853. It limits the causes for which a judgment of dismissal may be entered; and the plaintiff's failure to establish his case by satisfactory evidence is not one of those causes. Peacock v. Superior Court, 163 Cal. 701; 126 Pac. 976. The provision of § 581, ante, for the dismissal of an action for failure to serve and return the summons within three years, does not apply to justices' courts. Hubbard v. Superior Court, 9 Cal. App. 166; 98 Pac. 394.

Decision sustaining demurrer to complaint. The action of a justice of the peace in sustaining a demurrer to the complaint does not constitute a judgment of the court; and where there is no trial upon the merits, such action is but an order in regard to the sufficiency of the complaint, and not a judgment: an order upon a demurrer is only a decision upon the correctness or sufficiency of practice in seeking to obtain a judgment, and is not itself a judgment; but if a judgment is afterwards entered upon such order, it must be that the action be dismissed without prejudice to a new action; hence, the decision sustaining the demurrer is not a bar to a subsequent action in the superior court. Sivers v. Sivers, 97 Cal. 518; 32 Pac. 571.

Jurisdiction, waiver of objection to. Under the terms of the fourth subdivision of this section, the objection that the action has not been commenced in the proper township is waived, if not taken at the trial. McGorray v. Superior Court, 141 Cal. 266; 74 Pac. 853. Under this section, it is not essential that the defendant appear specially and move to dismiss the action, but the objection may be taken by answer and urged upon the trial; but "if not taken at the trial, it is waived." Holbrook v. Superior Court, 106 Cal. 589; 39 Pac. 936. Where the action is in its nature personal, and the defendant withdraws his motion to dismiss, and goes to trial upon the merits, there is a waiver of the question of jurisdiction. Luco v. Superior Court, 71 Cal. 555; 12 Pac. 677.

Trial after dismissal refused. A motion to dismiss, under this section, is addressed to the discretion of the justice's court, which has jurisdiction to try the action after such a motion has been denied. Hub-

bard v. Superior Court, 9 Cal. App. 166; 98 Pac. 394.

Nonsuit. A justice's court cannot grant a nonsuit. Peacock v. Superior Court, 163 Cal. 701; 126 Pac. 976. Where the justice grants a nonsuit, there has been no trial on the merits, and the superior court, upon reversal, may properly refuse to grant a trial de novo therein, and may remand the case for a new trial in the justice's court. Smith v. Superior Court, 2 Cal. App. 529; 84 Pac. 54.

CODE COMMISSIONERS' NOTE. A justice of the peace cannot vacate a judgment and reinstate the cause after a judgment of dismissal. When once properly dismissed, the case is out of court and the proceedings ended, and the justice has no further control over it. Sprague v. Shed, 9 Johns. (N. Y.) 140; Hunt v. Wickwire, 10 Wend. (N. Y.) 104; 25 Am. Dec. 545. In case of the dismissal of a suit for the non-appearance of a plaintiff, the judgment for the defendant ipso facto operates as a dissolution of the attachment. O'Connor v. Blake, 29 Cal. 316. Suit brought in justice's court for one township and service on defendant was made in another township by constable of the latter township; defendant appeared, and, before filing answer, moved to dismiss the action on the grounds: 1. That the court has no jurisdiction of the person of defendant; 2. That the return of the officer is insufficient to give jurisdiction. The motion was properly denied; because defendant could not thus defeat the whole case in limine upon the insufficiencies of the record, though the action might have been thus dismissed if the facts were shown to be such that the record could not be amended. Hamilton v. McDonald, 18 Cal. 128; see also Lowe v. Alexander, 15 Cal. 296.

§ 891. Judgment upon verdict. When a trial by jury has been had, judgment must be entered by the justice at once, in conformity with the verdict.

Entry of judgment.
1. Generally. Ante, § 664.
2. As affecting appeals. Post, § 939.

Legislation § 891. Enacted March 11, **1872.**

Duty to enter judgment. It is the justice's duty to enter the judgment promptly, but until he does so, there is no "rendition" of the judgment, in the sense of that word as used in § 974, post. Thomson v. Superior Court, 161 Cal. 329; 119 Pac. 98.

How entered. The justice need not formulate a judgment with great particularity, but he must make some entry in his docket, showing that he has rendered judgment on the verdict. Thomson v. Superior Court, 161 Cal. 329; 119 Pac. 98; June v. Superior Court, 16 Cal. App. 126; 116 Pac. 293.

Entry of judgment, what constitutes. The entry of the verdict of a jury by the justice, in his docket, is not the entry of the judgment. Thomson v. Superior Court, 161 Cal. 329; 119 Pac. 98; June v. Superior Court, 16 Cal. App. 126; 116 Pac. 293.

Rendering judgment, what constitutes. A judgment is not "rendered" in a justice's court until it is "entered," or can legally be held to be "entered": there is no other way of "rendering" a judgment in such a court. Thomson v. Superior Court, 161 Cal. 329; 119 Pac. 98; June v. Superior Court, 16 Cal. App. 126; 116 Pac. 293.

Result of failure to enter judgment. The formal entry of a judgment by a justice of the peace, upon the verdict of a jury, is a mere clerical duty, which he may be compelled to perform; and if he fails to do so, a motion to set aside an execution should be sustained; but an execution issued by a justice of the peace, which recites a judgment, is not void by reason of his failure to enter the judgment. Lynch v. Kelly, 41 Cal. 232. A justice, who refuses to enter judgment, may be compelled to act. Thomson v. Superior Court, 161 Cal. 329; 119 Pac. 98.

CODE COMMISSIONERS' NOTE. See next section.

§ 892. Entry of judgment in thirty days. When the trial is by the court, judgment must be entered within thirty days after the submission, and no justice of the peace who is paid a salary, shall draw or receive any monthly salary unless he shall make and subscribe an affidavit before an officer entitled to administer oaths, that no cause in his court remains pending and undecided, that has been submitted for decision for a period of thirty days.

Legislation § 892. 1. Enacted March 11, **1872,** and then read: "§ 892. When a trial is by the court, judgment must be entered at the close of the trial."

2. Amendment by Stats. **1901,** p. 170; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907,** p. 881, and then read: "§ 892. When the trial is by the court, judgment must be entered within ten days after the submission"; the code commissioner saying, "The amendment permits the judgment in justices' courts to be entered 'at any time within ten days after submission,' instead of 'at the close of the trial.' "

4. Amended by Stats. **1913,** p. 77, adding all the matter after the word "submission."

Construction of section. The provision of this section, prior to its amendment in 1907, that judgment must be entered at the close of the trial, was merely directory, and a judgment was not void because not rendered until six weeks after the submission of the case. Heinlen v. Phillips, 88 Cal. 557; 26 Pac. 366; Jones v. Justice's Court, 97 Cal. 523; 32 Pac. 575; American

Type Founders Co. v. Justice's Court, 133 Cal. 319; 65 Pac. 742; and see Webster v. Hanna, 102 Cal. 177; 36 Pac. 421. No penalty is prescribed, or consequence attached, for a violation of this section; if the legislature intended that a delay of a day by the justice (for that would be a violation of the provision) should subject the parties to the expense of a retrial, it would have said so in express terms. Heinlen v. Phillips, 88 Cal. 557; 26 Pac. 366. A justice of the peace is not prohibited, by this section, from taking the case under advisement, and afterwards rendering judgment; and a judgment so rendered, several months after trial, is valid. American Type Founders Co. v. Justice's Court, 133 Cal. 319; 65 Pac. 742.

Action on judgment of sister state. In an action upon a judgment rendered in a justice's court of another state, the defendant cannot interpose a defense going to the merits of the action in which the justice's judgment was rendered. Banister v. Campbell, 138 Cal. 455; 71 Pac. 504.

Collateral attack upon judgment. The judgment of a justice of the peace, who has jurisdiction of the subject-matter of the action, and of the person of the defendant, cannot be collaterally attacked as void, merely because the complaint is insufficient to constitute a cause of action: the insufficiency of the complaint is not a conclusive test of the jurisdiction of the justice's court; it has jurisdiction to determine that question, whether his decision is right or wrong; and if error is committed, the only remedy is by appeal. Brush v. Smith, 141 Cal. 466; 75 Pac. 55.

"Entering" and "rendering" judgment. See note ante, § 891.

Time of rendition and entry of judgment by justice of the peace sitting without jury. See note 12 Ann. Cas. 1029.

§ 893. Judgment. Form. What must state, where defendant subject to arrest. Service and entry. The judgment of a justice of the peace must be entered substantially in the form required in section six hundred and sixty-seven, and where the defendant is subject to arrest and imprisonment thereon the fact must be stated in the judgment. No judgment shall have effect for any purpose until so entered. Notice of the rendition of judgment must be given to the parties to the action in writing signed by the justice. Where any of the parties are represented by an attorney, notice shall be given to the attorney. Said notice shall be served by mail or personally, and shall be substan[ti]ally in the form of the abstract of judgment required in section eight hundred and ninety-seven of this code. When served by mail the justice of the peace shall deposit copies thereof in a sealed envelope in the post-office not later than five days after the rendition of the judgment, addressed to each of the persons on whom notice is to be served at their place of residence, or place of business if on an attorney, and the postage prepaid thereon. When served personally said notice shall be served within five days after the rendition of the judgment. Entry of the date of mailing shall be made by the justice in his docket.

Final process, issued to any part of county. Ante, §§ 94, 106.

Legislation § 893. 1. Enacted March 11, **1872** (based on Practice Act, § 597), and then read: "893. When a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, the fact that the defendant is so subject, must be so stated in the judgment."

2. Amended by Code Amdts. **1873–74,** p. 334, adding a sentence at the beginning, reading, "The judgment in justices' courts must be entered substantially in the form required by section six hundred and sixty-seven of this code."

3. Amended by Stats. **1901,** p. 170; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907,** p. 881; the code commissioner saying, "The meaning of the section is not changed, but superfluous portions are omitted, and the last sentence is added."

5. Amended by Stats. **1915,** p. 1441, adding the final six sentences.

"Entering" and "rendering" judgment. See note ante, § 891.

What controls as between oral announcement of decision by justice of the peace and judgment actually entered of record. See note Ann. Cas. 1912A, 1283.

§ 894. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted. When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

Limit, three hundred dollars. Ante, § 112.

Legislation § 894. Enacted March 11, **1872;** re-enactment of Practice Act, § 595.

Test of jurisdiction. Sufficiency of complaint not conclusive test of jurisdiction. Brush v. Smith, 141 Cal. 466; 75 Pac. 55.

Jurisdiction determined how. A justice of the peace has jurisdiction to determine the question of his jurisdiction; and if error is committed, the remedy is by appeal. Brush v. Smith, 141 Cal. 466; 75 Pac. 55.

§ 895. Offer to compromise before trial. If the defendant, at any time before the trial, offers, in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he does not accept such offer before the trial, and fails to recover in the action a sum in excess of the offer, he cannot recover costs incurred after the offer, but costs must be adjudged against him, and, if he recovers, be deducted from his recovery. The offer and failure to accept it cannot be given in evidence nor affect the recovery, otherwise than as to costs.

Offer to compromise. Compare post, §§ 997, 2078.

Legislation § 895. **1.** Enacted March 11, **1872**; based on Practice Act, § 596.

2. Amended by Code Amdts. **1877–78**, p. 103, substituting "in excess of the offer" for "equal to the offer."

3. Amendment by Stats. **1901**, p. 170, unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 881, inserting "incurred after the offer," after "costs"; the code commissioner saying, "Amended so as to allow plaintiff to recover costs up to the time defendant allows judgment to be taken."

§ 896. Costs may be included in the judgment. The justice must tax and include in the judgment the costs allowed by law to the prevailing party.

Legislation § 896. Enacted March 11, **1872**.

§ 897. Abstract of judgment. The justice, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in substantially the following form (filling blanks according to the facts): State of California, —— county (or city and county), ——, plaintiff, vs. ——, defendant. In justice's court, before ——, justice of the peace, —— township (or city, or city and county), ——, 18— (inserting date of abstract). Judgment entered for plaintiff (or defendant) for $——, on the —— day of ——. I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court, ——, or (as the case may be) in the court of ——, justice of the peace, as appears by his docket, now in my possession, as his successor in office. ——, Justice of the Peace.

Legislation § 897. **1.** Enacted March 11, **1872**.

2. Amended by Code Amdts. **1880**, p. 19, (1) inserting "substantially" before "the following form"; (2) inserting "(or city and county)" after "county," and inserting also, after "18—," "(inserting date of abstract)."

Filing abstract with auditor. The filing with the county auditor, of an abstract of the judgment, under this section, is insufficient to entitle the plaintiff to the benefits of § 710, ante, which requires the filing of a transcript of the judgment. Erkson v. Parker, 3 Cal. App. 98; 84 Pac. 437. The abstract of a judgment, as contemplated by this section and § 900, post, is not the same as the transcript of a judgment provided by § 710, ante. First Nat. Bank v. Tyler, 21 Cal. App. 791; 132 Pac. 1053.

Execution issued by whom. Under the Practice Act, before the filing and docketing of the transcript the justice alone could issue executions, but, after filing and docketing, it was the duty of the clerk to issue execution to be executed in another county. Kerns v. Graves, 26 Cal.156.

Judgment a lien on real property when. Under the Practice Act, a judgment rendered by a justice of the peace did not become a lien on the real estate of the judgment debtor until a copy of the judgment, certified by the justice was recorded in the office of the county recorder. Bagley v. Ward, 27 Cal. 369. Since the adoption of the codes, and under this section, in order that a judgment rendered by a justice of the peace shall become a lien on the property of the judgment debtor, an abstract of the judgment, and not a certified copy, must be filed in the office of the county recorder. Frazier v. Crowell, 52 Cal. 399.

CODE COMMISSIONERS' NOTE. See § 900, post.

§ 898. Abstract may be filed and docketed in superior court. The abstract may be filed in the office of the county clerk of the county in which the judgment was rendered, and the judgment docketed in the judgment-docket of the superior court thereof. The time of the receipt of the abstract by the clerk must be noted by him thereon, and entered in the docket.

Docketing judgment, generally. Ante, § 671.
Recording transcript. Ante, § 674.

Legislation § 898. 1. Enacted March 11, 1872. 2. Amended by Code Amdts. 1880, p. 20, (1) omitting "and docketed" after "filed," (2) substituting "the judgment" for "must be," and (3) substituting "superior court thereof" for "county court."

Docketing of judgment by justice of the peace. See note 40 Am. Dec. 386.

Entry or record of judgment in justice's court. See note 28 L. R. A. 638.

CODE COMMISSIONERS' NOTE. See § 900, post.

§ 899. **Effect of docketing.** From the time of docketing in the county clerk's office, execution may be issued thereon by the county clerk to the sheriff of any county in the state, other than the county in which the judgment was rendered, in the same manner and with like effect as if issued on a judgment of the superior court.

Execution, generally. Ante, §§ 681 et seq.
Docketing judgment. Ante, § 671.
Recording transcript. Ante, § 674.

Legislation § 899. 1. Enacted March 11, 1872. 2. Amended by Code Amdts. 1880, p. 20, substituting (1) "superior" for "county" before "court," and (2) "a judgment" for "judgments."

Effect of docketing. The docketing of a judgment neither gives it new vitality nor prolongs its existence: it simply enables an execution to be issued to another county. Kerns v. Graves, 26 Cal. 156. Under the statute providing that execution may be issued by the county clerk upon a judgment obtained before a justice of the peace, where the transcript is filed in the office of the county clerk, as upon a judgment recovered in the higher courts, execution can issue only within five years after the judgment is rendered by the justice of the peace, and execution is still upon and by virtue of the judgment rendered by the justice. McMann v. Superior Court, 74 Cal. 106; 15 Pac. 448.

Recording of abstract. No recording of the abstract is necessary for the county in which the judgment was rendered. Campbell v. Wickware, 19 Cal. 145.

Justice may recall execution and stay proceedings. A justice of the peace has power to recall an execution issued by him on a void judgment, and stay further proceedings, even if the judgment has been docketed in the office of the county clerk and execution issued by the clerk. Gates v. Lane, 49 Cal. 266.

Effect of filing transcript of judgment in court of record on statute of limitations. See note 133 Am. St. Rep. 75.

CODE COMMISSIONERS' NOTE. See next section. No filing of such transcript with the recorder is necessary, except to procure execution against property situated in a different county. With reference to property in the same county, the provisions for the enforcement of an execution upon a judgment in a justice's court are the same as those relating to district courts. Execution may issue as to the real estate of the judgment debtor in the county where the judgment was rendered, whether the abstract of judgment is filed in the office of the recorder or not. Campbell v. Wickware, 19 Cal. 145.

§ 900. **Judgment no lien unless recorded.** A judgment rendered in a justice's court creates no lien upon any lands of the defendant, unless such an abstract is filed in the office of the recorder of the county in which the lands are situated. When so filed, and from the time of filing, the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien continues for two years, unless the judgment be previously satisfied.

At any time before the expiration of two years from the time of filing such abstract of judgment, and while the judgment is yet in force or unsatisfied, a successive abstract of such judgment may be likewise filed, and it shall have the effect of continuing such lien for a further period of two years from the time of filing the subsequent abstract of judgment; provided, however, that no such lien shall continue or be in force after five years from the time of the rendition of such judgment.

Lien, extent and duration of. Compare ante, § 674.

Legislation § 900. 1. Enacted March 11, 1872, and then consisted of only one paragraph, of two sentences, the first of which was in the exact words of the same sentence of the present amendment (1911); the other sentence reading, "When so filed and recorded, such a judgment is a lien upon the lands of the judgment debtor situated in that county."
2. Amended by Code Amdts. 1880, p. 114, recasting the section after the first sentence, the entire section then being the first paragraph of the present amendment.
3. Amended by Stats. 1911, p. 398, adding the second paragraph.

Lien upon lands. There is but one mode of constituting a justice's judgment a lien upon the lands of the judgment debtor, and that is, by filing an abstract thereof in the office of the recorder of the county in which the land is situated. Beaton v.

Reid, 111 Cal. 484; 44 Pac. 167; Frazier v. Crowell, 52 Cal. 399.

Effect of execution. The execution neither creates a judgment lien nor extends a judgment lien once created. Beaton v. Reid, 111 Cal. 484; 44 Pac. 167.

Copy of judgment filed with auditor. A compliance with § 897, and with this section, to secure a lien on real estate, is not enough to obtain the relief authorized by § 710, ante: a certified copy of the judgment must be filed with the auditor, in order to obtain relief under the last-named section. Erkson v. Parker, 3 Cal. App. 98; 84 Pac. 437. The abstract of a judgment, as contemplated by this section and § 897, ante, is not the same as the transcript of a judgment provided by § 710, ante. First Nat. Bank v. Tyler, 21 Cal. App. 791; 132 Pac. 1053.

Recording abstract under Practice Act. See note ante, § 897.

CODE COMMISSIONERS' NOTE. In order that the judgment of a justice's court may constitute a lien upon real estate, the abstract of the judgment as prescribed in §§ 897, 898, 899, and 890, must be filed in the county recorder's office. The filing and recording of copies of the justice's docket entries does not constitute the judgment a lien on the real estate. The judgment becomes a lien only after the filing of the abstract of judgment, as specified in the sections referred to. Bagley v. Ward, 27 Cal. 370; see also People v. Doe, 31 Cal. 220; see note to § 899, ante.

CHAPTER IX.

EXECUTIONS FROM JUSTICES' COURTS.

§ 901. Execution may issue at any time within five years.
§ 901a. Stay of execution of judgment.
§ 902. Execution, contents of.
§ 903. Renewal of execution.
§ 904. Duty of officer receiving execution.
§ 905. Proceedings supplementary to execution.

§ 901. Execution may issue at any time within five years. Execution for the enforcement of a judgment of a justice's court may be issued by the justice who entered the judgment, or his successor in office, on the application of the party entitled thereto, at any time within five years from the entry of judgment.

After five years, generally. Ante, § 685.
Execution, generally. Ante, §§ 681 et seq.
Final process, issued to any part of county. Ante, §§ 94, 106.

Legislation § 901. Enacted March 11, **1872**; based on Practice Act, § 600, which read: "Execution for the enforcement of a judgment in a justice's court, may be issued on the application of the party entitled thereto, at any time within five years from the entry of judgment."

Who may issue execution. A justice of the peace, but not the superior court, is authorized to issue an execution, under this section. John Heinlen Co. v. Cadwell, 3 Cal. App. 80; 84 Pac. 443.

Issuance of execution after five years. There is no provision allowing an execution to be issued by a justice of the peace after the lapse of five years: execution, not issued within that time, is void. White v. Clark, 8 Cal. 512. The provision that an execution may be issued upon a judgment rendered by a justice of the peace, within five years from the time of its entry, amounts to a limitation, and negatives, by implication, the right to issue an execution after that period; the limitation applies alike to all executions authorized to be issued on such judgments, and applies not only to the justice, but also to the clerk, the section being general. Kerns v. Graves, 26 Cal. 156. The loss of the docket does not prevent the running of the time limited by this section. White v. Clark, 8 Cal. 512.

Recalling execution. An execution issuing from a justice's court, though issued by the county clerk, may be recalled by the justice rendering the judgment. Gates v. Lane, 49 Cal. 266.

CODE COMMISSIONERS' NOTE. Execution for the enforcement of a judgment in justice's court cannot issue after five years from the entry of judgment. The loss of the docket of the justice will not prevent the running of the time. White v. Clark, 8 Cal. 512. The filing and docketing of an abstract of a judgment rendered by a justice, in the office of the clerk of the county, will not empower the clerk of the court in which it is filed and docketed to issue an execution upon it after five years from the date when judgment was rendered. Kerns v. Graves, 26 Cal. 156.

§ 901a. Stay of execution of judgment. The court, or any justice thereof, may stay the execution of any judgment, including any judgment in a case of forcible entry or unlawful detainer, for a period not exceeding ten days.

Legislation § 901a. Added by Stats. **1906**, p. 35.

§ 902. Execution, contents of. The execution must be directed to the sheriff or to a constable of the county, and must be subscribed by the jus-

tice and bear date the day of its delivery to the officer. It must intelligibly refer to the judgment, by stating the names of the parties, and the name of the justice before whom, and of the county and the township or city where, and the time when it was rendered; the amount of judgment, if it be for money; and, if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable, as are required by the provisions of title nine, part two, of this code, in an execution to the sheriff.

Compare ante, §§ 681 et seq.

Legislation § 902. Enacted March 11, **1872**; based on Practice Act, § 601, the first sentence of which read, "The execution, when issued by a justice, shall be directed to the sheriff or to a constable of the county, and subscribed by the justice by whom the judgment was rendered, or by his successor in office, and shall bear date the day of its delivery to the officer to be executed," and had, in the other sentences, (1) "shall" instead of "must" in both instances, and (2) "title VII of this act" instead of "title nine, part two, of this code."

Constable's power outside of township or county. A constable may execute criminal process outside of his county: the construction which the phrase, "a constable of the county," in § 601 of the Practice Act, the original of this section, seems to have received was, that it meant any constable of the county, and that, consequently, the writ might be directed to a constable of a township other than that of the justice, or other than that where the property to be levied upon was situated; and by inference, that a constable could act outside of his township. Allen v. Napa County, 82 Cal. 187; 23 Pac. 43.

Blanks in writ. It is not necessary to the valid execution of the writ, that the blank after the word "defendant" shall be filled, but if it is necessary, it may be done by amendment, which would be by the court, and not "filled by another," in the sense of the code: the code provision was intended to prevent persons, other than the court, from making changes in the writ. Brann v. Blum, 138 Cal. 644; 72 Pac. 168.

Amendable errors in execution. Where the writ correctly gives the name of the justice who rendered the judgment, and the names of the parties thereto, and the county in which it was rendered, and states the name of the township in the title of the writ and in the indorsement thereupon, errors in stating the month in which it was dated, and in omitting to state the township in describing the judgment, and in omitting to fill the blank after the word "defendant" in the writ, do not vitiate the writ or the sale thereunder, but are amendable, and must be deemed amended. Brann v. Blum, 138 Cal. 644; 72 Pac. 168; and see Hunt v. Loucks, 38 Cal. 372; 99 Am. Dec. 404; O'Donnell v. Merguire, 131 Cal. 527; 82 Am. St. Rep. 389; 63 Pac. 847.

CODE COMMISSIONERS' NOTE. A constable can serve an execution out of his township. In this respect there is a difference between service of summons and service of execution. Lafontaine v. Greene, 17 Cal. 296.

§ 903. Renewal of execution. An execution may, at the request of the judgment creditor, be renewed before the expiration of the time fixed for its return, by the word "renewed" written thereon, with the date thereof, and subscribed by the justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterwards issued.

Legislation § 903. Enacted March 11, **1872**.

Mandamus to compel issuance of another execution. Where a recorder's court erroneously directs an execution to be returned unsatisfied, and such order is complied with, the recorder may be compelled by mandamus to issue another execution, his duty to do so being purely ministerial. Hayward v. Pimental, 107 Cal. 386; 40 Pac. 545.

§ 904. Duty of officer receiving execution. The sheriff or constable to whom the execution is directed must execute the same in the same manner as the sheriff is required by the provisions of title nine, part two, of this code, to proceed upon executions directed to him; and the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff.

Writ.

1. **Execution of.** Compare ante, §§ 691 et seq.
2. **Generally.** See ante, §§ 688 et seq.

Legislation § 904. Enacted March 11, **1872**; based on Practice Act, § 602, as amended by Stats. 1854, Redding ed. p. 69, Kerr ed. p. 98, which read: "The sheriff or constable to whom

the execution is directed shall proceed to execute the same in the same manner as the sheriff is required by the provisions of title VII of this act to proceed upon executions directed to him; and the constable, when the execution is directed to him, shall be vested for that purpose with all the powers of the sheriff, and, after issuing an execution, and either before or after its return, (if the same be returned unsatisfied either in whole or in part,) the judgment creditor shall be entitled to an order from the justice requiring the judgment debtor to attend at a time to be designated in the order, and answer concerning his property before such justice, and the attendance of such debtor may be enforced by the justice on his attendance, such debtor may be examined under oath concerning his property, and any person alleged to have in his hands property, moneys, effects or credits of the judgment debtor may also be required to attend and be examined, and the justice may order any property in the hands of the judgment debtor or any other person not exempt from execution, belonging to such debtor, to be applied towards the satisfaction of the judgment; and the justice may enforce such order by imprisonment until complied with, but no judgment debtor or other person shall be required to attend before the justice out of the county in which he resides."

Service of execution outside of township. A constable may serve an execution outside of his township. Lafontaine v. Greene, 17 Cal. 294.

Constable's power outside of township or county. See note ante, § 902.

Recording transcript of judgment. Under § 602 of the Practice Act, the original of this section, where a judgment was rendered by a justice of the peace, a judgment debtor's real estate, situated in the county where judgment was rendered, could be sold on execution, whether a transcript of the judgment was filed in the office of the recorder of such county or not: no filing of such transcript with the recorder was necessary, except as to property situated in a different county. Campbell v. Wickware, 19 Cal. 145.

Claim by third person, liability of officer. Where property has been taken and detained under an attachment and execution, but is claimed by a third party, and a jury, called to try the right to the property under the claim, render a verdict against the claimant, such verdict is no protection to the officer in a subsequent suit brought against him by the claimant, nor is it admissible in evidence as a defense. Sheldon v. Loomis, 28 Cal. 122.

CODE COMMISSIONERS' NOTE. See §§ 681–721, ante, inclusive, and notes thereto.

§ 905. Proceedings supplementary to execution. The sections of this code, from seven hundred and fourteen to seven hundred and twenty-one, both inclusive, are applicable to justices' courts, the word "constable" being substituted, to that end, for the word "sheriff," whenever the writ is directed to a constable, and the word "justice" for "judge." If the judgment debtor does not reside in the county wherein the judgment was entered, an abstract of the judgment, in the form prescribed by section eight hundred and ninety-seven, may be filed in the office of the justice of any town, township, or city wherein the defendant resides, and such justice may issue execution on such judgment, and may take and exercise such jurisdiction in proceedings supplemental to execution, as if such judgment were originally entered in his court.

Proceedings supplementary to execution. Ante, §§ 714–721.

Legislation § 905. 1. Enacted March 11, **1872**, and read: "The sections of this code, from 714 to 721, both inclusive, are applicable to justices' courts, the word 'constable' being substituted, to that end, for the word 'sheriff,' and the word 'justice' for the word 'judge.'"

2. Amendment by Stats. **1901**, p. 170; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 881; the code commissioner saying, "The amendment inserts the words 'whenever the writ is directed to a constable,' and adds the last sentence, authorizing the filing of an abstract of the judgment in the office of the justice of any town, township, or city where the defendant resides, and the issuing of execution thereon."

Construction of section. This section provides that §§ 714–721, ante, shall be applicable to justices' courts: these sections relate to proceedings supplementary to execution, and define the steps to be pursued to compel the judgment debtor to disclose his property, and to secure its application toward the payment of execution. Ex parte Latimer, 47 Cal. 131; West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315; 85 Am. St. Rep. 171; 65 Pac. 622.

CODE COMMISSIONERS' NOTE. See notes to §§ 714–721, ante, inclusive.

CHAPTER X.

CONTEMPTS IN JUSTICES' COURTS.

§ 906. Contempts a justice may punish for.
§ 907. Proceedings for contempts.
§ 908. Same.
§ 909. Punishments for contempts.
§ 910. The conviction must be entered in the docket.

§ 906. Contempts a justice may punish for. A justice may punish as for contempt, persons guilty of the following acts, and no other:

1. Disorderly, contemptuous, or insolent behavior toward the justice while holding court, tending to interrupt the due course of a trial or other judicial proceedings;

2. A breach of the peace, boisterous conduct, or violent disturbance in the presence of the justice, or in the immediate vicinity of the court held by him, tending to interrupt the due course of a trial or other judicial proceeding;

3. Disobedience or resistance to the execution of a lawful order or process, made or issued by him;

4. Disobedience to a subpœna duly served, or refusing to be sworn or to answer as a witness;

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of the court held by him;

6. Any of the acts specified in subdivisions four, eight, or eleven, of section twelve hundred and nine.

Contempts, generally. Post, §§ 1209 et seq.
Courts and judicial officers, powers of. Ante, §§ 128, 177–179.

Legislation § 906. **1.** Enacted March 11, **1872** (based on Practice Act, § 616), in subd. 5, substituting "an" for "any" before "officer."
2. Amendment by Stats. **1901**, p. 170; unconstitutional. See note ante, § 5.
3. Amended by Stats. **1907**, p. 881, (1) in subd. 1, inserting "the" between "holding" and "court," and (2) adding subd. 6.

Power of justices of the peace to punish contempts. See notes 117 Am. St. Rep. 953, 955; 9 Ann. Cas. 316; 1 L. R. A. (N. S.) 1135.

§ 907. Proceedings for contempts. When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily; to that end an order must be made, reciting the facts as they occurred, and adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed.

Compare post, § 1211.

Legislation § 907. Enacted March 11, **1872**; based on Practice Act, § 617, which read: "When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily, for which an order shall be made reciting the facts, as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defense or excuse shall be given. The justice may thereupon discharge him, or may convict him of the offense. A justice may punish for contempts, by fine or imprisonment, or both; such fine not to exceed in any case one hundred dollars, and such imprisonment one day."

§ 908. Same. When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defense or excuse must be given. The justice may, thereupon, discharge him, or may convict him of the offense.

Compare post, §§ 1212 et seq.
Legislation § 908. Enacted March 11, **1872**; based on Practice Act, § 617. See ante, Legislation § 907.

§ 909. Punishments for contempts. A justice may punish for contempts, by fine or imprisonment, or both; such fine not to exceed, in any case, one hundred dollars, and such imprisonment one day.

Legislation § 909. Enacted March 11, **1872**; based on Practice Act, § 617. See ante, Legislation § 907.

Construction of section. This section merely limits the power of the justice to punish for a contempt as such: it does not prevent him from adjudging, that, if the contempt be the omission to perform any act, the guilty person may be imprisoned until performance. Ex parte Latimer, 47 Cal. 131.

§ 910. The conviction must be entered in the docket. The conviction, specifying particularly the offense and the judgment thereon, must be entered by the justice in his docket.

Legislation § 910. Enacted March 11, **1872** (based on Practice Act, § 618), substituting "must" for "shall."

CHAPTER XI.

DOCKETS OF JUSTICES.

§ 911. Docket, what to contain.
§ 912. Entries therein prima facie evidence of the fact.
§ 913. An index to the docket must be kept.
§ 914. Dockets must be delivered by justice to his successor, or to county clerk.
§ 915. Proceedings when office becomes vacant, and before a successor is appointed.
§ 916. A justice may issue execution or other process upon the docket of his predecessor.
§ 917. Successor of a justice, who shall be deemed.
§ 918. Two justices deemed successors, superior court shall designate one.

§ 911. Docket, what to contain. Every justice must keep a book, denominated a "docket," in which he must enter:

1. The title of every action or proceeding.

2. The object of the action or proceeding; and if a sum of money be claimed, the amount thereof.

3. The date of the summons, and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of the fact.

4. The time when the parties, or either of them, appear, or their non-appearance, if default be made; a minute of the pleadings and motions; if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleading.

5. Every adjournment, stating on whose application and to what time.

6. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the return of the jury and for the trial.

7. The names of the jurors who appear and are sworn, and the names of all witnesses sworn, and at whose request.

8. The verdict of the jury, and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge.

9. The judgment of the court, specifying the costs included and the time when rendered.

10. The issuing of the execution, when issued and to whom; the renewals thereof, if any, and when made, and a statement of any money paid to the justice, when and by whom.

11. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed.

Docket in justices' court in cities and counties. Ante, § 93.

Legislation § 911. 1. Enacted March 11, **1872** (based on Practice Act, § 604), (1) in introductory paragraph, (a) substituting "must" for "shall" in both instances, and (b) transposing the article "a" outside of the quotation-marks; (2) in subd. 2, changing (a) "be" to "is" and (b) "of the demand" to "thereof"; (3) in subd 3, changing (a) "be" to "is" in both instances, and (b) "these facts" to "the fact"; (4) in subd. 4, (a) changing "be" to "is" after "default," (b) adding "and motions" after "pleadings," (c) changing, after "parts of the," the

word "pleading" to "pleadings," and adding thereafter the words (which were stricken out in 1873–74), "and of all motions made during the trial by either party, and his decisions thereon"; (5) subd. 5 (no change being made from the Practice Act) having, after "application," the words "whether on oath, evidence, or consent"; (6) in subd. 6, changing "trial and return of the jury" (sic) to "return of the jury and for the trial"; (7) in subd. 7, (a) changing "jury" to "jurors" and (b) adding "and" before "the names"; (8) adding a subd. 10 (stricken out in 1873–74), reading "The motion for a new trial, when made, and how disposed of"; (9) subd. 10 renumbered subd. 11 (the present subd. 10), (a) adding "the" before "execution" and (b) omitting "and" after "justice"; (10) subd. 11 renumbered subd. 12 (the present subd. 11), adding, after "given," the words "and of the appeal bond, if any be filed."

2. Amended by Code Amdts. **1873–74,** p. 334.

Entry is ministerial duty. The entry of the non-appearance of the defendant is a ministerial duty: it is made by the clerk of the justices' court in the city and county of San Francisco. Hall v. Justice's Court, 5 Cal. App. 133; 89 Pac. 870.

Verdict and judgment must be entered. The justice is required, by this section, to enter in his docket, separately, "the verdict of the jury, and when received," and "the judgment of the court, specifying the costs," etc. Thompson v. Superior Court, 161 Cal. 329; 119 Pac. 98.

What need not be entered in docket. The fact of the residence of the defendant is a jurisdictional fact, and it must exist; but the statute does not require that its existence shall be recorded in the docket of the justice, or that it shall be made to appear in the written evidence of the proceedings. Jolley v. Foltz, 34 Cal. 321. The justice is not required to enter in his docket any minute of the service of notice of the time of trial, nor to file any proof of such service, under this section. Weimmer v. Sutherland, 74 Cal. 341; 15 Pac. 849. The provision of this section relating to summons is, merely, that its date, and the time of its return, shall be stated in the docket; but neither this section nor § 912, post, requires the fact of service of summons to be entered in the docket. Fisk v. Mitchell, 124 Cal. 359; 57 Pac. 149; Ferguson v. Basin Consolidated Mines, 152 Cal. 712; 93 Pac. 867. Affidavits for attachments in a justice's court are not required to be noted in the docket of the justice, under this section. Banning v. Marleau, 133 Cal. 485; 65 Pac. 964.

Result of failure to make entry. The fourth subdivision of this section, and § 912, post, respecting the making of entries, provide merely for ministerial duties; and the failure to execute such duties in proper time does not divest the court of jurisdiction. Hall v. Justice's Court, 5 Cal. App. 133; 89 Pac. 870.

Dockets of justices of the peace. See note 87 Am. St. Rep. 672.

CODE COMMISSIONERS' NOTE. Subdivision 10, providing for entry in the justice's docket of all motions for new trials, etc., should have been omitted, since the justice, under the code, has now no power to grant a new trial. This provision can, however, do no harm. Its presence is simply an oversight.

Judgment will not be set aside, on appeal, because the justice failed to enter in his docket that the summons was returned "served." Service can be shown by the return of the officer on the summons. Denmark v. Liening, 10 Cal. 93. And if the justice's docket showed that the summons was "returned duly served," it does not prove service, and amounts to nothing, if the officer's return fails to show proper service. Lowe v. Alexander, 15 Cal. 296; Rowley v. Howard, 23 Cal. 403. The record of an action in a justice's court must show affirmatively that the suit was brought in the proper township, or the judgment will be void. Objection is not waived because defendant failed to appear and object that the suit was commenced in the wrong township. Lowe v. Alexander, 15 Cal. 296. The residence of defendant is a jurisdictional fact, but it is not required that the existence of this fact should be entered in the justice's docket, or appear in the written evidence of the proceedings; and to support a judgment of a justice, it is competent to admit parol evidence of residence, and such jurisdictional facts as are not required to be entered in the docket. Such evidence does not contradict the docket, but, on the contrary, it is entirely consistent with it, and is in support of the judgment. Jolley v. Foltz, 34 Cal. 326; see also Blair v. Hamilton, 32 Cal. 50. The docket of the justice is primary evidence; its omissions may be supplied from other sources when it becomes necessary. Blair v. Hamilton, 32 Cal. 50.

§ 912. **Entries therein prima facie evidence of the fact.** The several particulars of the last section specified must be entered under the title of the action to which they relate, and (unless otherwise in this title provided) at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice, or his successor in office, are prima facie evidence of the facts so stated.

Prima facie evidence. Post, § 1833.

Legislation § 912. 1. Enacted March 11, **1872;** based on Practice Act, § 605, which read: "The several particulars of the last section specified shall be entered under the title of the action to which they relate, and at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice or his successor in office, shall be primary evidence to prove the facts so stated therein."

2. Amended by Code Amdts. **1880,** p. 20, substituting "prima facie" for "primary."

Entries prima facie evidence when. The entries required to be made in a justice's docket are prima facie evidence of the facts stated. Ferguson v. Basin Consolidated Mines, 152 Cal. 712; 93 Pac. 867. A justice's docket is prima facie evidence of the facts stated therein: it is error to exclude it, when offered in evidence (Kriste v. International Savings etc. Bank, 17 Cal. App. 301; 119 Pac. 666); but it is not evidence of matters not required to be inserted therein, such as service of

summons. Ferguson v. Basin Con. Mines, 152 Cal. 715; 93 Pac. 867. This section and § 911, ante, do not require the fact of service of summons to be entered in the justice's docket; hence, they do not impart to such entry, if made, the character of prima facie evidence. Fisk v. Mitchell, 124 Cal. 359; 57 Pac. 149. Where the docket-entries of a justice of the peace show a judgment for costs, apparently rendered on the day that the cause was tried, they are prima facie evidence that such was the truth, where they are not rebutted by anything else in the record. Rauer v. Justice's Court, 115 Cal. 84; 46 Pac. 870.

Sufficiency of entry as evidence. An entry in the docket of a justice of the peace, to the effect that the summons was returned served, does not show such a service as the law requires to give jurisdiction of the person. Kane v. Desmond, 63 Cal. 464. The justice's docket, containing a minute of the judgment, is sufficient evidence of the judgment. Beardsley v. Frame, 85 Cal. 134; 24 Pac. 721; Fisk v. Mitchell, 124 Cal. 359; 57 Pac. 149.

Admissibility of copy of entries in evidence. Where the papers in a criminal action, tried before a justice of the peace, were attached together, and include a copy of the docket-entries in the action, certified by the justice, and such copy being prima facie evidence of the facts stated therein, under this section, and the admission of the papers as evidence was objected to as a whole, and no particular paper was specified as being objected to, it is proper to admit in evidence all the papers so attached together. Shatto v. Crocker, 87 Cal. 629; 25 Pac. 921.

Contradiction of docket-entries by parol. Those jurisdictional facts in support of judgments in justices' courts which are not in writing, nor required to be in writing, nor in fact entered in the docket, may be proved by parol; but the rule is otherwise where the statute requires such facts to be entered in the docket, and they are so entered, or where they actually appear in the written files of the action, because parol evidence in such cases is not the best evidence, and such entries and writings may not be contradicted by parol evidence Jolley v. Foltz, 34 Cal. 321.

CODE COMMISSIONERS' NOTE. See note to last section. Jolley v. Foltz, 34 Cal. 326; Blair v. Hamilton, 32 Cal. 50.

§ 913. An index to the docket must be kept. A justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs must be entered in the index, in the alphabetical order of the first letter of the family name.

Legislation § 913. Enacted March 11, 1872 (based on Practice Act, § 606), substituting "must" for "shall."

§ 914. Dockets must be delivered by justice to his successor, or to county clerk. Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors, or any other which may be in his custody to be kept as public records.

Legislation § 914. Enacted March 11, 1872; based on Practice Act, § 607, as amended by Stats. 1869–70, p. 223, which read: "It shall be the duty of every justice of the peace, upon the expiration of his term of office, to deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors, or any other which may be in his custody, to be kept as public records. If the office of a justice become vacant, by his death or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice shall be deposited in the office of some other justice in the township, to be by him delivered to the successor of said justice; and while in his possession he may issue execution on a judgment, there entered and unsatisfied (may make all orders in proceedings supplemental to execution, and may file notices and undertakings on appeal, and may take the justification of the sureties, and on the filing of the undertaking on appeal, order stay of execution), in the same manner and with the same effect as the justice by whom the judgment was entered might have done. If there be no other justice in the township, then the docket and papers of such justice shall be deposited in the office of the county clerk of the county, to be by him delivered to the successor in office of the justice."

§ 915. Proceedings when office becomes vacant, and before a successor is appointed. If the office of a justice become vacant by his death or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the township, to be by him delivered to the successor of such justice. If there is no other justice in the township, then the docket and papers of such justice must be

deposited in the office of the county clerk of the county, to be by him delivered to the successor in office of the justice.

Legislation § 915. Enacted March 11, **1872**; based on Practice Act, § 607, as amended by Stats. 1869–70, p. 223. See ante, Legislation § 914.

§ 916. A justice may issue execution or other process upon the docket of his predecessor. Any justice with whom the docket of his predecessor, or of any other justice, is deposited, has and may exercise over all actions and proceedings entered in such docket, the same jurisdiction as if originally commenced before him. In case of the creation of a new county, or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory may come, is, for the purposes of this section, considered the successor of such former justice.

Legislation § 916. Enacted March 11, **1872** (based on Practice Act, § 608, as amended by Stats. 1863, p. 232), (1) inserting "or of any other justice" after "predecessor," (2) substituting (a) "has and may" for "shall have and," (b) "such docket" for "the docket of his predecessor," (c) "is" for "shall" before "for the purposes of this section," (3) omitting "be" before "considered," and (4) substituting "such" for "said" before "former."

§ 917. Successor of a justice, who shall be deemed. The justice elected to fill a vacancy is the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township or city, from that time is the successor.

Legislation § 917. Enacted March 11, **1872** (based on Practice Act, § 609), substituting "is" for "shall be deemed," in both instances.

§ 918. Two justices deemed successors, superior court shall designate one. When two or more justices are equally entitled, under the last section, to be deemed the successors in office of the justice, a judge of the superior court must, by a certificate subscribed by him and filed in the office of the county clerk, designate which justice is the successor of a justice going out of office, or whose office has become vacant.

Legislation § 918. **1.** Enacted March 11, **1872** (based on Practice Act, § 610), substituting (1) "must" for "shall," and (2) "is" for "shall be" before "the successor."

2. Amended by Code Amdts. **1880**, p. 20, substituting "a judge of the superior court" for "the county judge."

CHAPTER XII.

GENERAL PROVISIONS RELATING TO JUSTICES' COURTS.

§ 919. Justices may issue subpœnas and final process to any part of the county.
§ 920. Blanks must be filled in all papers issued by a justice, except subpœnas.
§ 921. Justices to receive all moneys collected and pay same to parties.
§ 922. In case of disability of justice, another justice may attend on his behalf.
§ 923. Justices may require security for costs.
§ 924. Who entitled to costs. Attorney's fee.
§ 925. What provisions of code applicable to justices' courts.
§ 926. Deposit in lieu of undertaking.

§ 919. Justices may issue subpœnas and final process to any part of the county. Justices of the peace may issue subpœnas in any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county.

Final process, issued to any part of county. Ante, §§ 94, 106.

Legislation § 919. Enacted March 11, **1872**; based on Practice Act, § 619, as amended by Stats. 1863, p. 496, which read: "Justices of the peace may issue subpœnas in any action or proceeding in the courts held by them, and final process, or [on] any judgment recovered therein, to any part of the county. A justice of the peace may issue summons to any person, a resident of the proper township, to appear before him, at his office, to act as interpreter in any action or proceeding in the courts held by him. Such summons shall be served and returned in like manner as a subpœna issued by a justice. Any person so summoned shall, for a failure to attend at the time and place named in the summons, be deemed guilty of a contempt, and may be punished accordingly."

§ 920. Blanks must be filled in all papers issued by a justice, except subpœnas. The summons, execution, and every other paper made or issued by a justice, except a subpœna, must be issued without a blank left to be filled by another, otherwise it is void.

Legislation § 920. Enacted March 11, **1872** (based on Practice Act, § 611), substituting (1) "must be issued" for "shall be filed," and (2) "is" for "shall be" before "void."

Filling of blanks in execution. This section was intended to prevent persons, other than the court, from making changes in a writ of execution; but it is not necessary to the valid execution of the writ, that the blank after the word "defendant" shall be filled, but if it is necessary, it may be done by amendment, which would be by the court, and not "filled by another," in the sense of this section. Brann v. Blum, 138 Cal. 644; 72 Pac. 168.

§ 921. Justices to receive all moneys collected and pay same to parties. Justices of the peace must receive from the sheriff or constables of their county, all moneys collected on any process or order issued from their courts respectively, and must pay the same, and all moneys paid to them in their official capacity, over to the parties entitled or authorized to receive them, without delay.

Legislation § 921. 1. Enacted March 11, **1872** (based on Practice Act, § 633), (1) substituting (a) "must" for "shall" in both instances, and (b) "from" for "by" before "their courts"; and (2) omitting, after "delay," at end of section, the sentence, "For a violation of this section they may be removed from their office, and shall be deemed guilty of a misdemeanor."

2. Amended by Code Amdts. **1880**, p. 20, (1) inserting "and must pay the same" after "respectively," and (2) omitting "and must pay the same," after "official capacity."

§ 922. In case of disability of justice, another justice may attend on his behalf. In case of the sickness or other disability or necessary absence of a justice, another justice of the same county may, at his request, attend in his behalf, and thereupon is vested with the power and may perform all the duties and issue all the papers or process of the absent justice. In case of a trial the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction.

Legislation § 922. 1. Enacted March 11, **1872**; based on Practice Act, § 612, which read, "In case of the sickness, other disability, or necessary absence of a justice on a return of a summons, or at the time appointed for a trial, another justice of the same township or city may, at his request, attend in his behalf, and shall thereupon become vested with the power, for the time being, of the justice before whom the summons was returnable. In that case the proper entry of the proceedings before the attending justice, subscribed by him, shall be made in the docket of the justice before whom the summons was returnable. If the case be adjourned, the justice before whom the summons was returnable, may resume jurisdiction." When § 922 was enacted in 1872, (1) "or" was added after "sickness"; (2) "thereupon is" was substituted for "shall thereupon become," (3) "must" for "shall" before "be made," and (4) "is" for "be" before "adjourned."

2. Amended by Stats. **1909**, p. 328.

§ 923. Justices may require security for costs. Justices may in all cases require a deposit of money or an undertaking, as security for costs of court, before issuing a summons.

Prepayment of fees. Ante, § 91.

Legislation § 923. Enacted March 11, **1872** (based on Practice Act, § 634), omitting "of the peace" after "justices."

CODE COMMISSIONERS' NOTE. This is optional with the justice. He may demand his fees in advance, or he may allow the party credit, at his election. Lick v. Madden, 25 Cal. 203. If the justice should fail to demand the deposit as security for his fees, he must nevertheless perform the duty just the same as if the deposit had been made. If he wished the deposit to be made in advance, he should have demanded it. Lick v. Madden, 25 Cal. 203.

§ 924. Who entitled to costs. Attorney's fee. The prevailing party in the justices' courts is entitled to costs of the action, and also of any proceedings taken by him in aid of an execution, issued upon any judgment recovered therein. In actions for the recovery of wages for labor performed, the court shall add, as part of the costs, in any judgment recovered by the plaintiff, an attorney's fee not exceeding twenty per cent of the amount recovered.

Costs, Ante, § 896.

Legislation § 924. **1.** Enacted March 11, **1872,** and then read: "The prevailing party in justices' courts is entitled to costs."

2. Amended by Code Amdts. **1873–74,** p. 335, adding, at end of section, "of the action and also of any proceedings taken by him in aid of an execution, issued upon any judgment recovered therein."

3. Amended by Stats. **1907,** p. 69.

Constitutionality of statutes allowing attorney's fees to successful party. See note 79 Am. St. Rep. 178.

§ 925. What provisions of code applicable to justices' courts. Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this code which are, in their nature, applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions in this title, are applicable to justices' courts and the proceedings therein.

Peculiar and limited jurisdiction. Ante, §§ 112–114.

Legislation § 925. Enacted March 11, **1872.**

Construction of section. The necessary inference from the language used in this section is, that those provisions of this code which are in their nature "applicable to the organization, powers, and course of proceedings in justices' courts," are applicable to them. Ex parte Latimer, 47 Cal. 131. The language of this section is difficult of construction, and cases may well arise wherein it would be extremely doubtful whether or not certain acts of a justice's court would be justified by its provisions; the grant is somewhat in the shape of a parenthesis in a clause of limitation; if, therefore, that part of the code which expressly deals with proceedings in justices' courts prescribes the powers of those courts in relation to a general subject about which the powers of courts of record are expressly prescribed in another part, then the powers of the justices' courts with respect to that subject are to be determined by the provisions of the code expressly applicable to them, and not by the provisions expressly applicable to courts of record. Weimmer v. Sutherland, 74 Cal. 341; 15 Pac. 849; and see Hubbard v. Superior Court, 9 Cal. App. 166; 98 Pac. 394.

Character of jurisdiction of justices' courts. This section expressly preserves the notion of the "peculiar and limited" jurisdiction of justices' courts, and its general character is negative, rather than positive. Weimmer v. Sutherland, 74 Cal. 341; 15 Pac. 849; Hubbard v. Superior Court, 9 Cal. App. 166; 98 Pac. 394.

Sections applicable to superior courts. Proceedings in superior courts are dealt with in §§ 473, 581, ante. Hubbard v. Superior Court, 9 Cal. App. 166; 98 Pac. 394.

Pleadings allowed. This section cannot be extended to authorize other pleadings to be filed in justices' courts, than those specifically enumerated in § 852, ante, as being permitted in such courts. Purcell v. Richardson, 164 Cal. 150; 128 Pac. 31.

Nonsuit. A justice's court has no power to pass upon and grant a motion for a nonsuit. Peacock v. Superior Court, 163 Cal. 701; 126 Pac. 976.

Action on judgment. An independent action on a judgment of a justice's court, after the expiration of the five-year limitation prescribed in § 336, ante, is not authorized by this section. John Heinlen Co. v. Cadwell, 3 Cal. App. 80; 84 Pac. 443.

§ 926. Deposit in lieu of undertaking. In all civil cases arising in justices' courts, wherein an undertaking is required as prescribed in this code, the plaintiff or defendant may deposit with said justice a sum of money in United States gold coin equal to the amount required by the said undertaking, which said sum of money shall be taken as security in place of said undertaking.

Legislation § 926. Added by Code Amdts. **1877–78,** p. 103.

Section not repealed. This section was not repealed by implication by the amendment of § 978, post, in 1880, which made no change as to the bond on appeal, although the act by which it was amended concluded with a clause repealing all acts and parts of acts in conflict therewith. Swem v. Monroe, 148 Cal. 741; 83 Pac. 1074.

Appeal to superior court, deposit in lieu of undertaking. The provisions of this section, authorizing a deposit in lieu of an undertaking for costs on appeal to the superior court, are applicable to the undertaking for costs on appeal, required by the first clause of § 978, post. Laws v. Troutt, 147 Cal. 172; 81 Pac. 401. An appeal may be perfected by making a deposit of a hundred dollars with the justice, instead of giving an undertaking. Swem v. Monroe, 148 Cal. 741; 83 Pac. 1074. A deposit of the requisite amount of money, in lieu of an undertaking on appeal, gives the superior court jurisdiction of the appeal. Pacific Window Glass Co. v. Smith, 8 Cal. App. 762; 97 Pac. 898.

Undertaking on appeal in justices' courts. See note post, § 978.

TITLE XII.

PROCEEDINGS IN CIVIL ACTIONS IN POLICE COURTS.

§ 929. How commenced.
§ 930. Summons must issue on filing complaint.
§ 931. Defendant may plead orally or in writing.
§ 932. Trial by jury, when defendant is entitled to.
§ 933. Proceedings to be conducted as in justices' courts.

§ 929. How commenced. Civil actions in police courts are commenced by filing a complaint, setting forth the violation of the ordinance complained of, with such particulars of time, place, and manner of violation as to enable the defendant to understand distinctly the character of the violation complained of, and to answer the complaint. The ordinance may be referred to by its title. The complaint must be verified by the oath of the party complaining, or of his attorney or agent.

Jurisdiction of police court. See Pol. Code, §§ 4426, 4427. See also post, §§ 1068, 1085, 1103.

Provisions relating to police judges. See Pol. Code, §§ 4424–4432.

Legislation § 929. Enacted March 11, **1872** (based on Practice Act, § 636), substituting (1) "police courts are" for "recorder's and mayor's courts shall be," and (2) "must" for "shall."

Jurisdiction and transfer of cause. An action to recover a fine, forfeiture, or penalty, imposed by an ordinance of a city, may perhaps be maintained in a police court as a civil action, where a certain and specific sum is imposed as a fine or penalty for the breach of an ordinance; but the jurisdiction of such actions is conferred on the police courts, and not on justices' courts; there is no provision of the law to authorize a transfer of an action from the police court to the district court (Santa Cruz v. Santa Cruz R. R. Co., 56 Cal. 143); but in Santa Barbara v. Eldred, 95 Cal. 378, 30 Pac. 562, it was held, that, in an action brought in a police court to recover taxes, where the answer raises an issue as to the legality of the tax sought to be recovered, it is the duty of the court to transfer the action to the superior court for trial, under the provisions of § 838, ante, which applies to police courts as well as to justices' courts.

§ 930. Summons must issue on filing complaint. Immediately after filing the complaint a summons must be issued, directed to the defendant, and returnable either immediately or at any time designated therein, not exceeding four days from the date of its issuing.

Legislation § 930. Enacted March 11, **1872** (based on Practice Act, § 637), substituting (1) "must" for "shall" after "summons," and (2) "issuing" for "issuance."

§ 931. Defendant may plead orally or in writing. On the return of the summons, the defendant may answer the complaint. The answer may be oral or in writing, and immediately thereafter the case must be tried, unless, for good cause shown, an adjournment is granted.

Legislation § 931. Enacted March 11, **1872**; based on Practice Act, § 638, which read: "On the return of the summons the defendant may plead to the complaint, or he may answer or deny the same. Such plea, answer, or denial, may be oral or in writing, and immediately thereafter the case shall be tried, unless for good cause shown an adjournment be granted."

§ 932. Trial by jury, when defendant is entitled to. In all actions for violation of an ordinance, where the fine, forfeiture, or penalty imposed by the ordinance is less than fifty dollars, the trial must be by the court. In actions where the fine, forfeiture, or penalty imposed by the ordinance is over fifty dollars, the defendant is entitled to a trial by jury.

Legislation § 932. Enacted March 11, **1872** (based on Practice Act, § 639), substituting (1) "must" for "shall" after "trial," and (2) "is entitled to a trial by jury" for "shall be entitled, if demanded by him, to a jury of six persons."

§ 933. Proceedings to be conducted as in justices' courts. All proceedings in civil actions in police courts must, except as in this title otherwise

provided, be conducted in the same manner as civil actions in justices' courts.

Civil proceedings in justices' courts. Ante, §§ 832–926.

Disqualification of police judge. Calling in of justice of the peace. See Pol. Code, § 4428.

Legislation § 933. Enacted March 11, **1872**; based on Practice Act, § 641, which read: "All proceedings in civil actions in recorders' and mayors' courts, except as herein otherwise provided, shall be conducted in the same manner as in civil actions in justices' courts."

Jurisdiction where ordinance is violated. The police court has jurisdiction of all proceedings for the violation of any ordinance of a city. Santa Barbara v. Stearns, 51 Cal. 499.

Transfer to superior court. Where, in an action in a police court to recover a license tax for the transaction of business, the answer denies the legality of the tax, the police court cannot try the cause, but must transfer it to the superior court. Santa Barbara v. Eldred, 95 Cal. 378; 30 Pac. 562; Santa Barbara v. Stearns, 51 Cal. 499.

TITLE XIII.

APPEALS IN CIVIL ACTIONS.

Chapter I. Appeals in General. §§ 936–959.
II. Appeals to Supreme Court. §§ 963–971.
III. Appeals to Superior Courts. §§ 974–980.
IV. Appeals from Probate Courts. [Repealed.]
V. Appeals to County Courts. [Repealed.]

CHAPTER I.

APPEALS IN GENERAL.

§ 936. Judgment and orders may be reviewed.
§ 937. Orders made out of court, without notice, may be reviewed by the judge.
§ 938. Party aggrieved may appeal. Names of parties.
§ 939. Within what time appeal may be taken.
§ 940. Appeal, how taken.
§ 941. Undertaking or deposit on appeal.
§ 941a. Appeals. Alternative method.
§ 941b. Notice of appeal, what to contain.
§ 941c. Effect of appeal.
§ 942. Undertaking on appeal from a money judgment.
§ 943. Appeal from a judgment for delivery of documents.
§ 944. Appeal from a judgment directing execution of a conveyance, etc.
§ 945. Undertaking on appeal concerning real property.
§ 946. Release of property under levy, on appeal. Attachment not continued.
§ 947. Undertaking may be in one instrument or several.
§ 948. Justification of sureties on undertakings on appeal.
§ 949. Undertakings in cases not specified.
§ 950. What papers to be used on appeal from the judgment.
§ 951. What papers used on appeals from orders, except orders granting new trials.
§ 952. What papers to be used on appeal from an order granting a new trial.
§ 953. Copies and undertakings, how certified.
§ 953a. Preparation of papers on appeal. Notice to county clerk.
§ 953b. Payment of cost of transcript.
§ 953c. Clerk to transmit the prepared record on appeal.
§ 954. When an appeal may be dismissed. When not.
§ 955. Effect of dismissal.
§ 956. What may be reviewed on appeal from judgment.
§ 957. Remedial powers of an appellate court.
§ 958. On judgment on appeal, remittitur must be certified to the clerk of the court below.
§ 959. Provisions of this chapter not applicable to appeals to superior courts.

§ 936. Judgment and orders may be reviewed. A judgment or order, in a civil action, except when expressly made final by this code, may be reviewed as prescribed in this title, and not otherwise.

Judgments and orders, appeal from. Post, § 939.

Legislation § 936. **1.** Enacted March 11, **1872** (based on Practice Act, § 333, as amended by Stats. 1854, Redding ed. p. 64, Kerr ed. p. 91), substituting (1) "code" for "act," and (2) "in" for "by" after "prescribed."

2. Amendment by Stats. **1901**, p. 171, changing the number to § 934; unconstitutional. See note ante, § 5.

Appeal lies when. When the conclusion of the court is unsupported by the facts found, the remedy is by appeal from the judgment. Cargnani v. Cargnani, 16 Cal. App. 96; 116 Pac. 306. An order based on conflicting affidavits will not be disturbed on appeal. Asiatic Club v. Biggy, 160 Cal. 713; 117 Pac. 912. Where the complainant's bill is wholly without equity, a judgment is properly rendered upon demurrer thereto, and an appeal therefrom will be treated as frivolous. Pacific Debenture Co. v. Caldwell, 147 Cal. 106; 81 Pac. 314.

Exclusiveness of right to appeal. A writ of error does not lie, where an appeal is authorized by the code (Haight v. Gay, 8 Cal. 297; 68 Am. Dec. 323); and where a party has a right to appeal, he is not entitled to a writ of certiorari. Newman v. Superior Court, 62 Cal. 545.

Loss of right to appeal. Where, in an action to enjoin the issuance of a tax deed, the plaintiff appeals from a judgment rendered against him, he thereby abandons his remedy by appeal by afterwards redeeming the property by paying the taxes and costs. Dehail v. Los Angeles, 5 Cal. Unrep. 866; 51 Pac. 27. The right to accept the fruits of a judgment, and the right of appeal therefrom, are not concurrent, but are totally inconsistent; hence, an election to accept either of such rights is a renunciation of the other. Estate of Shavers, 131 Cal. 219; 63 Pac. 340. Where a plaintiff accepts money ordered to be paid by the defendant, as for costs and expenses, as a condition of an order setting aside a judgment by default, he is deemed to have consented to the order, and to have waived the right to appeal. San Bernardino County v. Riverside County, 135 Cal. 618; 67 Pac. 1047. A party does not lose his right to appeal by payment of the judgment, unless the pay-

ment was by way of compromise, or with an agreement not to take or pursue the appeal. Warner Bros. Co. v. Freud, 131 Cal. 639; 82 Am. St. Rep. 400; 63 Pac. 1017. An enforcement of the judgment by the plaintiff does not deprive the defendant of his right to appeal. Ramsbottom v. Fitzgerald, 6 Cal. Unrep. 214; 55 Pac. 984. The plaintiff cannot deprive the defendant of his right to appeal, and to be restored to rights lost by reason of the judgment in case of reversal, by enforcing the judgment, and entering satisfaction of it, before the time to appeal has expired. Kenney v. Parks, 120 Cal. 22; 52 Pac. 40. The satisfaction of the judgment by setting off against it a judgment in favor of the appellant does not cut off his right to appeal. Haskins v. Jordan, 123 Cal. 157; 55 Pac. 786. The fact that a creditor, who appealed from an adjudication of insolvency, made claim and proof of his debt in the superior court, does not estop him to pursue his appeal. In re Chope, 112 Cal. 630; 44 Pac. 1066; and see Stateler v. Superior Court, 107 Cal. 536; 40 Pac. 949.

Judgment of dismissal not consent judgment when. Where items in a complaint have been stricken out, so that less than the jurisdictional amount is left, the fact that both parties thereafter admit that the court has no jurisdiction of such residue, does not render a judgment of dismissal a consent judgment. Placer County v. Freeman, 149 Cal. 738; 87 Pac. 628.

Findings, absence of evidence to support. The entire absence of evidence in support of a finding necessary to sustain a judgment presents a question of law. Troy Laundry Machinery Co. v. Drivers' Independent Laundry Co., 14 Cal. App. 152; 111 Pac. 121.

Conclusiveness of recitals in judgment. A recital by the court, in the judgment appealed from, that findings of fact and conclusions of law were waived by the failure of the defendant to appear and participate in the trial, must, in the absence of any showing to the contrary, be regarded as conclusive. Kritzer v. Tracy Engineering Co., 16 Cal. App. 287; 116 Pac. 700.

Presumption in favor of judgment. All presumptions are in favor of the action of the court below. Estate of Voght, 154 Cal. 508; 98 Pac. 265; Niles v. Gonzalez, 155 Cal. 359; 100 Pac. 1080; Union Lumber Co. v. Webster, 15 Cal. App. 165; 113 Pac. 891; Serpiglio v. Downing, 14 Cal. App. 683; 112 Pac. 905.

Jurisdiction of appellate court. The amount of money involved in an appeal from an order of the superior court, taxing costs, is not determinative of the jurisdiction of the appellate court. Meyer v. Perkins, 20 Cal. App. 661; 130 Pac. 206, 208.

Appeal taken how. A judgment or order in a civil proceeding, which is not expressly made final by the code, can be reviewed by the supreme court, only when it is brought up on an appeal pursuant to the code; hence, an appeal taken in any other than the prescribed mode is abortive, and leaves the case below undisturbed. Home for Inebriates v. Kaplan, 84 Cal. 486; 24 Pac. 119. An appeal in a probate or guardianship proceeding must be taken under § 1715, post. Estate of Dunphy, 158 Cal. 1; 109 Pac. 627. The rules of practice relating to appeals under the McEnerney Act are those applicable to other civil actions. Potrero Nuevo Land Co. v. All Persons, 155 Cal. 371; 101 Pac. 12.

Rules of appellate courts. The authority to make rules of practice in the courts of appeal is vested by the constitution in the supreme court. San Joaquin etc. Irrigation Co. v. Stevinson, 16 Cal. App. 235; 116 Pac. 378. The rules of the supreme court are a part of the system of appellate procedure. Reclamation District v. Sherman, 11 Cal. App. 399; 105 Pac. 277. The ruling against dismissal in this case, for serious nonconformity of the transcript to the seventh and eighth rules of the supreme court, is no guide as a precedent for any future case showing inexcusable breach of the rules of the court. Naylor v. Adams, 15 Cal. App. 548; 115 Pac. 335.

Briefs and argument on appeal. Counsel should file briefs to assist the court in the determination of cases. Harvey v. Meigs, 17 Cal. App. 360; 119 Pac. 941. The appellant should make the points on which he relies in his opening brief, and not reserve them for his reply; the court may properly consider them as waived unless so made. Hibernia Sav. & L. Soc. v. Farnham, 153 Cal. 578; 126 Am. St. Rep. 129; 96 Pac. 9. Aid should be given the appellate court, in its examination of the record, in order to discover error: counsel should point out wherein error is claimed to exist. Carley v. Vallecita Mining Co., 16 Cal. App. 781; 117 Pac. 1037. Unless rulings complained of as erroneous are pointed out, and the reasons why they are so, with reference to authorities, they will not be deemed of sufficient importance to merit notice in an opinion. National Bank v. Mulford, 17 Cal. App. 551; 120 Pac. 446.

Hearing in bank, absence of justice. A purported order of the supreme court, granting a hearing in bank, after decision in a district court of appeal, concurred in by a justice who was absent from the state, and by only three justices present in the state, is void, and must be vacated. People v. Ruef, 14 Cal. App. 576; 114 Pac. 48; Brown v. Northern California Power Co., 14 Cal. App. 661; 114 Pac. 74.

Appeal from orders concerning amendments, and giving or denying relief from judgments. See note ante, § 473.

Jurisdiction of appeal from order denying motion for a new trial of case tried on agreed statement of facts. See note ante, § 657.

When appeals may be prosecuted from satisfied judgments. See note 45 Am. St. Rep. 271.

Right of party to review judgment in his favor. See note 3 Ann. Cas. 510.

Right of plaintiff to appeal from voluntary judgment of nonsuit. See note 9 Ann. Cas. 631.

Right of party who recovers judgment for less than his demand to appeal after satisfaction of judgment. See note 16 Ann. Cas. 79.

Right to accept favorable part of a decree, judgment, or order and appeal from the rest. See 29 L. R. A. (N. S.) 1.

CODE COMMISSIONERS' NOTE. The remedy by appeal is exclusive. Haight v. Gay, 8 Cal. 297; 68 Am. Dec. 323; see also Milliken v. Huber, 21 Cal. 169; Nowland v. Vaughn, 9 Cal. 52; Sacramento etc. R. R. Co. v. Harlan, 24 Cal. 336; Middleton v. Gould, 5 Cal. 190. The right of appeal exists from a judgment by default. Hallock v. Jaudin, 34 Cal. 167; McGlynn v. Brodie, 31 Cal. 382. A judgment, from which an appeal is pending, is a final one, within the meaning of § 21 of the Federal Bankruptcy Act. Merritt v. Glidden, 39 Cal. 559; 2 Am. Rep. 479.

§ 937. Orders made out of court, without notice, may be reviewed by the judge.

An order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made.

Orders, generally. Post, §§ 1003 et seq.

Legislation § 937. 1. Enacted March 11, **1872,** in the exact language of Practice Act, § 334.

2. Amendment by Stats. **1901,** p. 171, changing the number to § 935; unconstitutional. See note ante, § 5.

Construction of section. This section manifestly applies only to such orders as a court or judge has power or jurisdiction to make without notice. Boca etc. R. R. Co. v. Superior Court, 150 Cal. 147; 88 Pac. 715.

Orders in probate. An allowance, by a judge, of a claim against the estate of a deceased person, made on an ex parte application, may subsequently be set aside by him without notice to the claimant. Estate of Sullenberger, 72 Cal. 549; 14 Pac. 513. A decree discharging an administrator, made inadvertently and ex parte, may be set aside by the court. Wiggin v. Superior Court, 68 Cal. 398; 9 Pac. 646.

Order granting leave to file cross-complaint. An order granting leave to file a cross-complaint, made upon an ex parte application, without notice to the plaintiff, by the judge, and not by the court, may be set aside without notice. Alpers v. Bliss, 145 Cal. 565; 79 Pac. 171; and see Coburn v. Pacific Lumber etc. Co., 46 Cal. 31.

Injunction vacated or modified how. It is competent for the judge to vacate or modify an injunction order without notice, but it is not the better practice, and should never be done, except when, from the urgency of the case, it is necessary to guard against serious loss, and except where the injunction has been improvidently granted upon a complaint disclosing no ground whatever for equitable relief. Borland v. Thornton, 12 Cal. 440. An injunction, granted ex parte, is properly modified, without notice to the plaintiff, on application of the defendant. Fremont v. Merced Mining Co., 9 Cal. 18. This section does not apply where an injunction was granted ex parte, and the application to dissolve the injunction was based upon affidavits; notice, in such case, is required to be given, under § 532, ante: it is only when the application to dissolve the injunction is based on the showing made when it was granted that this section applies. Heffon v. Bowers, 72 Cal. 270; 13 Pac. 690. This section is not affected by the provision of § 532, ante, that if an injunction is granted without notice, the defendant can apply to the judge who granted the injunction, to dissolve or modify it: the latter action is in addition to the provisions of this section. Borland v. Thornton, 12 Cal. 440.

Appeal. This section does not affect provisions allowing an appeal from an order granting an injunction: such right is a further remedy to that provided by this section. Sullivan v. Triunfo Gold etc. Mining Co., 33 Cal. 385.

CODE COMMISSIONERS' NOTE. See subdivision 2 of note to § 532 of this code.

§ 938. Party aggrieved may appeal. Names of parties.

Any party aggrieved may appeal in the cases prescribed in this title. The party appealing is known as the appellant, and the adverse party as the respondent.

Death of party, effect of. Ante, § 385.

Legislation § 938. 1. Enacted March 11, **1872** (based on Practice Act, § 335), substituting "is" for "shall be."

2. Amendment by Stats. **1901,** p. 171, changing the number to § 936; unconstitutional. See note ante, § 5.

Right of aggrieved party to appeal. A party aggrieved may appeal (Estate of Benner, 155 Cal. 153; 99 Pac. 715; Winsor Pottery Works v. Superior Court, 13 Cal. App. 360; 109 Pac. 843); but a party not aggrieved has no standing as an appellant. United Railroads v. Colgan, 153 Cal. 53; 94 Pac. 245; People v. Bank of San Luis Obispo, 152 Cal. 261; 92 Pac. 481; Estate of Piper, 147 Cal. 606; 82 Pac. 246; Delger v. Jacobs, 19 Cal. App. 197; 125 Pac. 258; Flannigan v. Towle, 8 Cal. App. 229; 96 Pac. 507. Where the plaintiffs appeal, but the defendants do not, the latter are in no

position to attack the findings and conclusions of law. Garibaldi v. Grillo, 17 Cal. App. 540; 120 Pac. 425. Where a corporation has appealed, and is afterwards merged into another corporation, but both appear as appellants, an objection that the latter has no standing in the matter is immaterial, where all of its rights are fully protected by the appeal of the corporation first named. Isom v. Rex Crude Oil Co., 147 Cal. 663; 82 Pac. 319.

Aggrieved party, who is. Any person having an interest, recognized by law, in the subject-matter of the judgment, which interest is injuriously affected by the judgment, is a party aggrieved, and entitled to be heard upon appeal. Estate of Colton, 164 Cal. 1; 127 Pac. 643. The right of appeal is remedial in its character, and in doubtful cases the right should always be granted; and an appeal will be sustained where there is a reservation in the judgment, by which the appellant is necessarily aggrieved, and which, in effect, renders the judgment in his favor a nullity. Quint v. McMullen, 103 Cal. 381; 37 Pac. 381. As to a judgment dismissing an action, which provides that such dismissal is not a bar to another action, the defendant therein is an aggrieved party. Nevills v. Shortridge, 129 Cal. 575; 62 Pac. 120. The sureties on the replevin bond are parties aggrieved by a judgment rendered against their principal, since they are concluded thereby. Coburn v. Smart, 53 Cal. 742. A party not having a right to bring the suit, and not interested in the controversy, is not a party aggrieved by the judgment. Williams v. Savings and Loan Society, 133 Cal. 360; 65 Pac. 822. A defendant, against whom no judgment is rendered, is not a party aggrieved by an order granting a new trial as to a co-defendant. Rankin v. Central Pacific R. R. Co., 73 Cal. 96; 15 Pac. 57. An appeal taken by a defendant whose name is omitted from the judgment as entered is a nullity: such defendant is not a party aggrieved by a judgment against a co-defendant. Spencer v. Troutt, 133 Cal. 605; 65 Pac. 1083. Where a pretermitted finding must necessarily be adverse to appellants, they are not aggrieved by the omission. Pinheiro v. Bettencourt, 17 Cal. App. 111; 118 Pac. 941. The question as to who are adversely affected is to be considered in connection with the merits of the case, and not on a motion to dismiss the appeal. Estate of Sutro, 152 Cal. 249; 92 Pac. 486; 1027.

Appellant must be a party of record. None but parties to the record can appeal. Elliott v. Superior Court, 144 Cal. 501; 103 Am. St. Rep. 102; 77 Pac. 1109. A person shown by the record to be a party aggrieved may appeal, although he has not previously appeared in the case. Estate of Meade, 5 Cal. Unrep. 678; 49 Pac. 5. One not a party to the record cannot, as a rule, appeal in his own name; one not a party to the action or proceeding may sometimes appeal, but his interest must be made to appear in the record in some way, and he must be made a party to the ruling appealed from. Estate of Crooks, 125 Cal. 459; 58 Pac. 89. To entitle a person to an appeal under this section, he must have been a party to the action or proceeding in the court below; he need not have been an original party when the action was first instituted, but he must have made himself a party afterwards by some appropriate action, and the record must show that he was such party. Estate of McDermott, 127 Cal. 450; 59 Pac. 783; and see Estate of Ryer, 110 Cal. 556; 42 Pac. 1082.

Stranger to record. An appeal lies from an order denying the motion of one not a party to the record, to vacate or modify an order for a writ of possession; and he may insist upon the duty of the court to fix the amount of the undertaking necessary to stay the operation of the writ of possession, and the discharge of such duty may be compelled by writ of mandate. Green v. Hebbard, 95 Cal. 39; 30 Pac. 202. An order for a writ of assistance, made upon an ex parte application against the defendant, is not operative against any other person than the defendant; and appellants, who were not parties to the order, are not parties aggrieved, so as to be entitled to appeal. Miller v. Bate, 56 Cal. 135. Strangers to an action do not become parties of record thereto by being parties to a contract, though it is embodied in an order of the court, nor do they become parties to the action by intervention in a special proceeding during the time a person was acting as receiver, so as to entitle them to appeal from the judgment in such action. Elliott v. Superior Court, 144 Cal. 501; 103 Am. St. Rep. 102; 77 Pac. 1109.

Interveners. The interveners in an action, where judgment has been rendered against the defendant, are entitled to appeal from such judgment, though the defendant did not appeal, since the court, by granting leave to intervene, determined that they had an interest in the matter in litigation. People v. Perris Irrigation Dist., 132 Cal. 289; 64 Pac. 399. One who is denied the right to intervene has an immediate right of appeal. Dollenmayer v. Pryor, 150 Cal. 1; 87 Pac. 616. A proceeding in the nature of an intervention is substantially an independent action, from the judgment in which any party aggrieved may appeal. De Forrest v. Coffey, 154 Cal. 444; 98 Pac. 27.

Sureties. A surety, merely as such, has no right of appeal from a judgment against his principal. Estate of McDermott, 127 Cal. 450; 59 Pac. 783. The sureties on a replevin bond, whose application to intervene in an action of replevin has been refused, and who have taken exception to

such refusal, are parties to the record in a technical sense, so as to entitle them to prosecute an appeal from the judgment against their principal. Coburn v. Smart, 53 Cal. 742; and see People v. Grant, 45 Cal. 97. A petition in intervention by a surety, merely for the purpose of appeal from the order, and an allowance thereof by the court, does not render such surety a party to the action, so as to entitle him to appeal from the judgment against his principal. Estate of McDermott, 127 Cal. 450; 59 Pac. 783.

Trustees. Trustees who claim funds in the hands of an executor, adversely to the estate, who have not presented any claim against the estate, are not parties aggrieved by a decree distributing the funds to the heir. Estate of Burdick, 112 Cal. 387; 44 Pac. 734. Trustees under a will who have sued to obtain for their direction a construction of certain clauses of the will, are not parties aggrieved by an order of the court allowing the attorney and guardian ad litem for the minor heirs a fee for their services, to be paid by the trustees out of any funds in their hands belonging to the estate. Goldtree v. Thompson, 83 Cal. 420; 23 Pac. 383; and see Adams v. Woods, 8 Cal. 306; Bates v. Ryberg, 40 Cal. 465; Estate of Wright, 49 Cal. 550; Rosenberg v. Frank, 58 Cal. 387.

Appeal does not lie from satisfied judgment. A board of supervisors, which levied taxes in pursuance of a judgment, cannot be said to be aggrieved, so as to be entitled thereafter to appeal from such judgment, which was satisfied and its force exhausted. San Diego School District v. Board of Supervisors, 97 Cal. 438; 32 Pac. 517.

Garnishment, judgment debtor. Where a fund claimed to be due to the judgment debtor has been garnished, but, before judgment, is assigned to another creditor, and the court improperly orders the garnishee to pay the fund into court, the assignee is the party adversely interested, and an appeal by the judgment debtor cannot be sustained, as he is not a party aggrieved. Schino v. Cinquini, 7 Cal. App. 244; 94 Pac. 83.

Foreclosure suit, lien claimant in. Where the defendant in an action to foreclose a mortgage, who claimed a judgment lien on the premises, fails to appear at the trial, and offers no proof, a finding that all the allegations of the answer are untrue shows that he has no interest in the action, and hence he is not an aggrieved party entitled to appeal. Foster v. Bowles, 138 Cal. 449; 71 Pac. 495.

Receivership, person interested in. Any person interested in a fund in the hands of a receiver may appeal from an order fixing the compensation of the receiver, and taxing it as costs in the action, and directing him to apply toward its payment the balance of the fund remaining in his hands. Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71; 47 Pac. 872. A person cannot become a party to the action, merely by consenting to an order settling the account of the receiver therein; nor where his assent to agreements in the action was not given for the purpose of placing himself and his interest in the property in controversy within the jurisdiction of the court, but merely to make the contract between the parties effective and binding only so far as it affected his interest in the property. Elliott v. Superior Court, 144 Cal. 501; 103 Am. St. Rep. 102; 77 Pac. 1109. One who is a defendant in a suit, and is in possession of real estate sought to be recovered through the medium of a receiver, has a right to appeal from the order appointing the receiver. Winsor Pottery Works v. Superior Court, 13 Cal. App. 360; 109 Pac. 843.

Insolvency, creditors in. Creditors aggrieved by a judgment in insolvency proceedings may appeal. Kohlman v. Wright, 6 Cal. 230. A creditor of an insolvent estate of a deceased person is a party aggrieved by an order of family allowance erroneously made, and may appeal therefrom. Estate of Fretwell, 152 Cal. 573; 93 Pac. 283.

Judicial sales, purchasers at. The purchaser of land sold by an administratrix, though not an actual party to the proceedings in the court below, is a party aggrieved, and is entitled to appeal from an order directing the resale of the property. Estate of Boland, 55 Cal. 310. The purchaser of property of an estate, at the executor's sale thereof, has a right to file objections to a confirmation of the sale by the probate court, and is a party aggrieved by an order of the court confirming the sale, and is entitled to appeal therefrom. Estate of Pearsons, 98 Cal. 603; 33 Pac. 451. The purchaser at a sale under an interlocutory decree of partition is a party to the confirmation of the sale, and has the right of appeal from that part of the decree as to which he is a party aggrieved. Hammond v. Cailleaud, 111 Cal. 206; 52 Am. St. Rep. 167; 43 Pac. 607; Dunn v. Dunn, 137 Cal. 51; 69 Pac. 847. The purchaser of property at a judicial sale is entitled to appeal from an order refusing confirmation of the sale and refusing to hear evidence thereon. Estate of Leonis, 138 Cal. 194; 71 Pac. 171.

Suits to quiet title, claimants in. Where appellants admitted, at the trial, in a suit to quiet title, that their title was involved in only one of several tax deeds offered in evidence, they are not aggrieved parties, in so far as the judgment relates to the other tracts. Flannigan v. Towle, 8 Cal. App. 229; 96 Pac 507.

Estates of decedents, claimants to. The claimants to an estate, who have not controverted the finding that they were not kin to the deceased, are not parties aggrieved in a ruling respecting the rights of a person to whom the estate has been granted, or those of any other claimants. Blythe v. Ayres, 102 Cal. 254; 36 Pac. 522. Parties whose right to distribution of the estate of a decedent depends upon the character of the property, as community or otherwise, not having attached the sufficiency of the evidence to sustain the finding that the property was the separate property of the deceased, are not parties aggrieved, so as to be entitled to appeal, making merely the point that the court was without jurisdiction to make the decree distributing the estate to the state. Estate of Piper, 147 Cal. 606; 82 Pac. 246. After the claim of a woman, as the widow of a deceased person, has been finally adjudicated adversely to her on appeal, in a proceeding to determine the heirship and right of succession in the estate of the deceased, she thereupon ceases to be a party interested in the estate, and cannot afterwards maintain an appeal from the decree distributing the estate. Estate of Blythe, 108 Cal. 124; 41 Pac. 33. The mortgagee of a deceased devisee, who is not a party to the decree of distribution, is not entitled to appeal therefrom. Estate of Crooks, 125 Cal. 459; 58 Pac. 89. The contestants of a will, who are not heirs at law of the testator, nor related to him, are not parties aggrieved, entitled to appeal from an order denying a new trial. Estate of Antoldi, 7 Cal. Unrep. 211; 81 Pac. 278.

Executors and administrators. The devisees under the will as well as the executors, are parties aggrieved by an order setting apart from the property of the deceased a homestead for the use of the surviving wife for and during the period of administration and until the final distribution of the estate. Estate of Levy, 141 Cal. 646; 99 Am. St. Rep. 92; 75 Pac. 301. The executrix of a deceased administrator, to whom the succeeding administrator had been directed to pay a certain sum as counsel fees for the services of an attorney rendered to him as administrator, is not a party aggrieved by an order directing the payment of such sum, without interest. Estate of Blythe, 103 Cal. 350; 37 Pac. 392. The executors of a deceased person are parties aggrieved by an order of the probate court, requiring them, in pursuance of the terms of the will, to redeem certain lands from a foreclosure sale, and, as such, are entitled to appeal from the order. Estate of Heydenfeldt, 117 Cal. 551; 49 Pac. 713. An executor is not an aggrieved party, and consequently cannot appeal from an order distributing the estate to the persons found entitled thereto, if jurisdiction of the proceedings for distribution has been properly acquired by the superior court before making the order. Estate of Williams, 122 Cal. 76; 54 Pac. 386. An executrix is a party aggrieved by an order for partial distribution to legatees under the will, where she presents for review an issue of law as to the sufficiency of the petition to show that there were sufficient assets to pay legacies without loss to the creditors. Estate of Murphy, 145 Cal. 464; 78 Pac. 960. Executors may appeal from any order that is embarrassing to the due administration of the estate. Estate of Colton, 164 Cal. 1; 127 Pac. 643. Where an estate is insolvent, and an order directing the payment of a preferred claim is made before the amount of the distributable estate is ascertained and the accounts of the administrator settled, the administrator is a party aggrieved by the premature order, and has a right of appeal therefrom. Estate of Smith, 117 Cal. 505; 49 Pac. 456. A special administrator is a party aggrieved by an order settling his account, and directing him to pay a balance in his hands to another special administrator. Estate of Heaton, 139 Cal. 237; 73 Pac. 186. Where an administrator files a petition to sell two parcels of land, the court's denial of the petition as to one parcel does not make him an aggrieved party, and he is not entitled to appeal therefrom. Estate of Steward, 1 Cal. App. 57; 81 Pac. 728. A public administrator, making or having no claim upon an estate beyond his commissions, and not filing the petition for distribution nor taking part at the hearing, is not an aggrieved party having the right to appeal. Estate of Jones, 118 Cal. 499; 62 Am. St. Rep. 251; 50 Pac. 766; and see Bates v. Ryberg, 40 Cal. 463; Estate of Wright, 49 Cal. 550; Estate of Marrey, 65 Cal. 287; 3 Pac. 896.

Person claiming right to administer. One who claims a prior right to administer upon the estate of a deceased person is, upon the denial of such right, a party aggrieved, and entitled to appeal from the order granting letters of administration to another. Estate of Damke, 133 Cal. 433; 65 Pac. 888.

Joint appeals. A plaintiff and a defendant, who are defendants in a cross-complaint filed by another defendant, may unite in an appeal from the judgment against them on the cross-complaint. Downing v. Rademacher, 136 Cal. 673; 69 Pac. 415. Joint appeals may be taken by parties who are aggrieved, and they may be supported by one undertaking. Estate of Sutro, 152 Cal. 249; 92 Pac. 486; 92 Pac. 1027.

Motion to dismiss appeal, inquiry as to merits. A motion to dismiss an appeal, on the ground that the appellant is not a party aggrieved by the order and decree appealed from, which involves an inquiry

as to the merits, will be denied. Estate of Williams, 4 Cal. Unrep. 511; 36 Pac. 6. Whether the judgment is prejudicial to the rights of the appellant, or whether it is competent for the court to determine the effect of its judgment in any subsequent proceeding between the parties, are questions involving the merits, and cannot be determined on a motion to dismiss the appeal on the ground that the defendant was not an aggrieved party, because judgment was in his favor. Nevills v. Shortridge, 129 Cal. 575; 62 Pac. 120.

"Any party," defined. The term, "any party," in this section, means any person who is a party to the action. Senter v. Bernal, 38 Cal. 637.

Who may appeal as an interested or injured party. See note 119 Am. St. Rep. 740.

CODE COMMISSIONERS' NOTE. 1. Who may appeal. One not a party to a record may appeal, if aggrieved by the judgment. Adams v. Woods, 8 Cal. 306. Any heir, devisee, or legatee of an estate, party to proceedings for distribution, may appeal from the final order of distribution; but the executor of the estate cannot, upon the ground that the estate was improperly distributed. Bates v. Ryberg, 40 Cal. 463. The party aggrieved, within the meaning of § 335 of the Practice Act, is the one against whom an appealable order or judgment has been entered; and when an order is made directing an injunction upon condition that an undertaking be executed and filed, the party against whom the order is made may appeal at once. Ely v. Frisbie, 17 Cal. 250. A party made defendant in an action, if a decree is taken against him, may appeal, and the appeal cannot be dismissed upon the ground that he is not a party in interest. Ricketson v. Torres, 23 Cal. 636. I. filed his complaint against T., alleging a partnership between them, and praying for an account of the partnership property. Subsequently I. filed a petition in the same court, setting forth the complaint, and also that L. T. B. and H. B. had obtained judgment against T., the defendant, and that execution had issued on the judgment, and was levied on the partnership property of the plaintiff and defendant, and that the sheriff was about to sell the property. The petition prayed that L. T. B. and H. B. might be made parties, and that an injunction might issue against L. T. B. and H. B. and the sheriff. It was held on appeal that it did not lie in the mouth of I. and T. to say that L. T. B. and H. B. were not parties to the suit, and had no right of appeal. Jones v. Thompson, 12 Cal. 191. That appellant has resided out of the state for several years, is not ground for denying his right to appeal. Ricketson v. Torres, 23 Cal. 636.

2. Who may not appeal. See subdivision 1 of this note. A party not affected by a judgment cannot take an appeal. Hibernia Sav. & L. Soc. v. Ordway, 38 Cal. 679. In an action against the husband alone, involving the homestead right, the judgment could not affect the question of homestead, and the husband has no right of appeal. Kraemer v. Revalk, 8 Cal. 74. A judgment in a suit against a corporation contained a direction for the sale of the interest of individuals not parties to the action; from it the corporation alone appealed. Held, that the corporation could not take advantage of the error in the judgment in embracing individuals. Dennis v. Table Mountain Water Co., 10 Cal. 369.

§ 939. Within what time appeal may be taken. An appeal may be taken from any judgment or order of a superior court from which an appeal lies under any provision of this code, or of any other code, or under any other statute, within sixty days from the entry of said judgment or order. No appeal, however, shall be dismissed on the ground that it was taken after the rendition of such judgment or order and before formal entry. If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion.

Appeal.
1. Effect of. See post, § 946.
2. From judgment on controversy submitted without action. Post, § 1140.
3. In probate, to be taken within sixty days. See post, § 1715.
4. Record on. See post, § 951.
5. Time for, in suit to determine heirship. See post, § 1664.
6. To supreme court. Post, §§ 963–966.
7. To superior court. Post, §§ 974–980.
Definition of judgment. Ante, § 577.
Exceptions, need of. Ante, § 646; post, § 956.

Legislation § 939. 1. Enacted March 11, **1872**; based on Practice Act, § 336, as amended by Stats. 1865–66, p. 706, which read: "An appeal may be taken: First. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one year after the rendition of the judgment. Second. From a judgment rendered on an appeal from an inferior court, within ninety days after the rendition of such judgment. Third. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from any special order made after final judgment, and from an interlocutory judgment in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court." When § 939 was enacted in 1872, it read: "§ 939. An appeal may be taken: 1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one year after the entry of judgment. But an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment; 2. From a judgment rendered on an appeal from an inferior court, within ninety days after the entry of such judgment; 3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or

dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment, and from an interlocutory judgment in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court or filed with the clerk."

2. Amended by Code Amdts. **1880,** p. 61, (1) in subd. 3, adding, (a) after "real property," the words in the present subdivision, beginning "and from an order," and ending "sixty-three of this code," and (b) "(60)" after "sixty."

3. Amended by Stats. **1897,** p. 55, (1) in subd. 1, changing "one year" to "six months"; (2) in subd. 3, (a) adding, after "dissolve an injunction," the words "from an order appointing a receiver," and (b) omitting "and" before "from an interlocutory," "in the provisions" after "mentioned," and "(60)" after "sixty."

4. Amended by Stats. **1899,** p. 7, (1) in subd. 3, (a) adding, after "final judgment," the words "from an interlocutory judgment, order, or decree hereafter made or entered in any action to redeem real or personal property from a mortgage thereof, or lien thereon, determining such right to redeem and ordering an accounting," and (b) changing before "interlocutory," at end of section, the word "or" to "of" (sic).

5. Amendment by Stats. **1901,** p. 172, being a substitution of § 963, post, for this section, with amendments, the old § 963 being repealed; unconstitutional. See note ante, § 5.

6. Amended by Stats. **1907,** p. 60, the section then reading, "939. An appeal may be taken: 1. From a final judgment in an action, or special proceeding, commenced in the court in which the same is rendered, within six months after the entry of judgment. But an exception to the decision, or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the entry of the judgment; 2. From a judgment rendered on appeal from an inferior court, within ninety days after the entry of such judgment; 3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order appointing a receiver; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment; from an interlocutory judgment, order, or decree hereafter made or entered in any action for divorce or to redeem real or personal property from a mortgage thereof, or lien thereon, determining such right to redeem and ordering an accounting; from an interlocutory judgment in actions for partition of real property; and from an order confirming, changing, modifying, or setting aside the report, in whole or in part, of the referees in actions for partition of real property in the cases mentioned in section seven hundred and sixty-three of this code, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk."

7. Amended by Stats. **1915, p.** 205, recasting the section.

Construction of code sections. The amendment to this section in 1897, reducing the time allowed for appeal from a judgment from one year to six months, is to be construed as not intended to operate retrospectively upon judgments entered before its passage, but as limited in its operation to judgments thereafter entered. Pignaz v. Burnett, 119 Cal. 157; 51 Pac. 48; Melde v. Reynolds, 120 Cal. 234; 52 Pac. 491. Since the amendment to this section in 1897, allowing an appeal from an order appointing a receiver, and the amendment, at the same time, of § 943, post, providing for the staying of an order by an undertaking on appeal, there is afforded a remedy for prodigal, unwise, and unwarranted appointments of receivers; therefore prohibition will not lie to arrest proceedings under an order appointing a receiver. Jacobs v. Superior Court, 133 Cal. 364; 85 Am. St. Rep. 204; 65 Pac. 826; and see French Bank Case, 53 Cal. 495; Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. The first subdivision of this section is applicable to judgments in election contests; yet errors in the admission and rejection of ballots, excepted to at the trial, are not within that subdivision, and may be reviewed upon an appeal from the judgment, taken after the lapse of sixty days. McCarthy v. Wilson, 146 Cal. 323; 82 Pac. 243; and see Packard v. Craig, 114 Cal. 95; 45 Pac. 1033. The shortening of the time for appeal made by the amendment of 1897, did not affect the limitation of one year in which to invoke the remedy given by § 473, ante, as that is wholly independent of the remedy by appeal. Fox v. Townsend, 2 Cal. App. 193; 83 Pac. 272.

Requisites of valid appeal. Where the appellant gives notice of appeal under this section, he must also comply with the provisions of § 940, post, requiring the serving as well as the filing of his notice of appeal and the giving of an undertaking. Theisen v. Matthai, 165 Cal. 249; 131 Pac. 747.

Concerning the new method of appeal. See notes post, §§ 941a–941c, 953a–953c.

Final judgment. A final judgment is one that finally determines the rights of all the parties in relation to the matter in controversy. Nolan v. Smith, 137 Cal. 360; 70 Pac. 166; and see Stockton etc. Agricultural Works v. Glens Falls Ins. Co., 98 Cal. 557; 33 Pac. 633; Anglo-Californian Bank v. Superior Court, 153 Cal. 753; 96 Pac. 803. Under the first subdivision of this section, prescribing the older method of taking appeals, an appeal from a final judgment must be taken, if at all, within six months after the entry of such judgment. Cook v. Suburban Realty Co., 20 Cal. App. 538; 129 Pac. 801. An order settling the account of a receiver, and directing the payment of his compensation by one of the parties, although made before there has been a final judgment in the action in which he was appointed, is a final determination of the rights of the parties in the matter then before the court, and an appeal therefrom, as from a final judgment, may be taken within six months after its entry. Los Angeles v. Los Angeles City Water Co., 134 Cal. 121; 66 Pac. 198.

Appeal from final judgment. See note post, § 963.

Review of sufficiency of evidence to support finding or verdict. The word "decision," or the alternative word "verdict," as used in this section, refers to the writ-

ten findings of facts and conclusions of law required by §§ 632, 633, ante, to the exclusion of the intermediate orders and decisions which may be reviewed upon appeal from a final judgment, and as to which no written findings are required. Clifford v. Allman, 84 Cal. 528; 24 Pac. 292. The ruling on a motion for a nonsuit is a decision, within the meaning of this section; hence, the sufficiency of the evidence to sustain the decision will not be considered, unless the appeal is taken within sixty days. Miller v. Wade, 87 Cal. 410; 25 Pac. 487. Before the amendment of this section in 1907, changing "rendition" to "entry," the sufficiency of the evidence to sustain the decision could be reviewed, where the appeal was taken within sixty days after the rendition of the judgment. Pease v. Fink, 3 Cal. App. 371; 85 Pac. 657. At the present time, the sufficiency of the evidence cannot be reviewed, where the appeal was taken more than sixty days after the "entry" of the judgment. In re College Hill Land Ass'n, 157 Cal. 596; 108 Pac. 681; First Nat. Bank v. Trognitz, 14 Cal. App. 176; 111 Pac. 402; Cordano v. Ferretti, 15 Cal. App. 670; 115 Pac. 657; Morcom v. Baiersky, 16 Cal. App. 480; 117 Pac. 560; Union Lumber Co. v. Sunset Road Oil Co., 17 Cal. App. 460; 120 Pac. 44; National Bank v. Mulford, 17 Cal. App. 551; 120 Pac. 446; and see also Clark v. Gridley, 49 Cal. 105. The provision of this section, that the evidence cannot be reviewed on appeal from the judgment unless the appeal is taken within sixty days after the rendition of judgment, does not change the time within which the appeal must be taken, but is only a limitation upon the matters that may be considered upon the appeal. McHugh v. Adkins, 117 Cal. 228; 49 Pac. 2. On an appeal from a judgment confirming the report of appraisers setting apart a homestead out of the estate of a decedent, the evidence could be reviewed, prior to 1907, if the appeal was taken within sixty days after the order was made. Estate of Crowey, 71 Cal. 300; 12 Pac. 230. An appeal from an order denying a motion to vacate a judgment, void on its face, must be taken within sixty days. Beaumont v. Midway Provident Oil Company, 21 Cal. App. 128; 131 Pac. 106. While the filing of the undertaking perfects the appeal, yet it is not a part of the taking of the appeal in the statutory sense; hence, the fact that it was not given within sixty days from the rendition of judgment did not prevent a consideration of the evidence. Perkins v. Cooper, 3 Cal. Unrep. 279; 24 Pac. 377. An order or decision striking out a complaint being an intermediate order or decision, the provisions of this section do not preclude a review of the sufficiency of the evidence to sustain such order or decision, on appeal taken more than sixty days after the rendition of the judgment. Clifford v. Allman, 84 Cal. 528; 24 Pac. 292. An order settling the account of an administrator is not a judgment; hence, the evidence upon which the order was based can be reviewed, although the appeal was taken more than sixty days after the order was signed and filed with the clerk, but less than sixty days after it was entered in the minute-book of the clerk: the provisions of this section do not apply to an appeal from such an order. Estate of Levinson, 108 Cal. 450; 41 Pac. 483; 42 Pac. 479; Estate of Rose, 80 Cal. 166; 22 Pac. 86, reversing Estate of Rose, 3 Cal. Unrep. 50; 20 Pac. 712. The refusal to admit and to take into consideration certain proper evidence, and the taking into consideration of other evidence which should have been excluded, can be considered on appeal from the judgment, taken more than sixty days after the rendition thereof. McCarthy v. Wilson, 146 Cal. 323; 82 Pac. 243; and see Packard v. Craig, 114 Cal. 95; 45 Pac. 1033. Upon appeal from a judgment, taken more than sixty days after the rendition thereof, the case must be reviewed upon the judgment roll alone, without reference to the question whether the evidence was sufficient to support the findings and judgment or not. Reed v. Johnson, 127 Cal. 538; 59 Pac. 986. Where the judgment was not entered in time to allow an appeal therefrom to be taken within sixty days from its rendition, the evidence could be reviewed only upon motion for a new trial. Painter v. Painter, 113 Cal. 371; 45 Pac. 689.

Review of evidence on bill of exceptions. Evidence contained in a bill of exceptions could not be considered on an appeal taken more than sixty days after the rendition of the judgment. Los Angeles Brewing Co. v. Klinge, 7 Cal. App. 550; 95 Pac. 44. The second sentence of the first subdivision of this section refers only to exceptions to a decision on an issue of fact: it does not apply to a bill of exceptions to the order of the trial court refusing to allow proposed amendments. Campbell-Kawannanakoa v. Campbell, 152 Cal. 201; 92 Pac. 184. An exception to the entry of judgment against executors, on the ground that no claim had been presented to them, and that the decision was against law, in giving judgment against them without proof of the presentation of the claim, is not, in effect, an objection to the decision on the ground that it was not sustained by the evidence, and may be reviewed on appeal, although not taken within sixty days after the rendition of the judgment. Falkner v. Hendy, 107 Cal. 49; 40 Pac. 21. A statement on motion for a new trial may be used for the purpose of determining the sufficiency of the evidence, where the appeal was taken within sixty days after the rendition of the judg-

ment. Blood v. La Serena Land etc. Co., 150 Cal. 764; 89 Pac. 1090. A bill of exceptions may be looked into to determine the sufficiency of the evidence to sustain the verdict, on an appeal from the judgment, taken within sixty days after its rendition, even though there is no motion for a new trial. Perkins v. Cooper, 3 Cal. Unrep. 279; 24 Pac. 377; and see Balch v. Jones, 61 Cal. 234; Estate of Crowey, 71 Cal. 300; 12 Pac. 230. A bill of exceptions, which contains no specifications of the insufficiency of the evidence to justify the findings, and shows no errors of law, cannot be considered upon appeal from an order denying a new trial, nor upon an appeal from the judgment, taken more than sixty days after its entry. Sather Banking Co. v. Briggs, 138 Cal. 724; 72 Pac. 352. The insufficiency of the evidence to sustain the findings may be reviewed, under a proper bill of exceptions, if the appeal was taken within sixty days after the entry of the judgment. Russell v. Banks, 11 Cal. App. 450; 105 Pac. 261. A judgment of dismissal, without findings, and without an opportunity to the appellant to prepare a record, is not an exception to the decision or verdict. Rickey Land etc. Co. v. Glader, 153 Cal. 179; 94 Pac. 768.

Appeal must be taken within sixty days. The sufficiency of the evidence to support the decision, judgment, or verdict could not be reviewed prior to the amendment to this section in 1907, substituting "entry" for "rendition," where the appeal was taken more than sixty days after the rendition of the judgment (Bettis v. Townsend, 61 Cal. 333; Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202; 10 Pac. 510; Mogk v. Peterson, 75 Cal. 496; 17 Pac. 446; McGrath v. Hyde, 81 Cal. 38; 22 Pac. 293; Turner v. Reynolds, 81 Cal. 214; 22 Pac. 546; Miller v. Wade, 87 Cal. 410; 25 Pac. 487; Curran v. Kennedy, 89 Cal. 98; 26 Pac. 641; Forni v. Yoell, 99 Cal. 173; 33 Pac. 887; Nelmes v. Wilson, 4 Cal. Unrep. 267; 34 Pac. 341; Steen v. Hendy, 4 Cal. Unrep. 916; 38 Pac. 718; Secord v. Quigley, 106 Cal. 149; 39 Pac. 623; Brooks v. San Francisco etc. Ry. Co., 110 Cal. 173; 42 Pac. 570; Painter v. Painter, 113 Cal. 371; 45 Pac. 689; California Improvement Co. v. Baroteau, 116 Cal. 136; 47 Pac. 1018; Rhoads v. Gray, 5 Cal. Unrep. 664; 48 Pac. 971; Wood v. Etiwanda Water Co., 122 Cal. 152; 54 Pac. 726; McRae v. Argonaut Land etc. Co., 6 Cal. Unrep. 145; 54 Pac. 743; Wise v. Ballou, 129 Cal. 45; 61 Pac. 574; Coonan v. Loewenthal, 129 Cal. 197; 61 Pac. 940; Ryland v. Heney, 130 Cal. 426; 62 Pac. 616; McDonald v. Hayes, 132 Cal. 490; 64 Pac. 850; People v. Jones, 7 Cal. Unrep. 64; 70 Pac. 1063; Gilbert v. Kelly, 138 Cal. 689; 72 Pac. 344; Dodge v. Carter, 140 Cal. 663; 74 Pac. 292; Baum v. Roper, 145 Cal. 116; 78 Pac. 466; Hawley v. Harrington, 152 Cal. 188; 92 Pac. 177; Crandall v. Parks, 152 Cal. 772; 93 Pac. 1018; Andrews v. Wheeler, 10 Cal. App. 614; 103 Pac. 144; Carver v. San Joaquin Cigar Co., 16 Cal. App. 761; 118 Pac. 92; Layne v. Johnson, 19 Cal. App. 95; 124 Pac. 860), although the evidence and the specifications were set forth in the statement (Wall v. Mines, 128 Cal. 136; 60 Pac. 682), nor although the appeal was taken within sixty days after service of the notice of rendition: notice of the rendition of the judgment was not required (Fatjo v. Swasey, 111 Cal. 628; 44 Pac. 225); nor could such sufficiency be considered on an appeal taken within sixty days after the "entry" of the judgment, but not within sixty days after its "rendition." Schurtz v. Romer, 81 Cal. 244; 22 Pac. 657.

Orders respecting new trial. There is an immediate right of appeal from an order denying a new trial, as soon as it is entered in the minutes of the court. O'Rourke v. Finch, 8 Cal. App. 263; 96 Pac. 784. An appeal from an order denying a new trial must be taken within sixty days from the time the order is made and entered. Walbridge v. Cousins, 2 Cal. App. 302; 83 Pac. 462; Prine v. Duncan, 7 Cal. Unrep. 330; 90 Pac. 713. To render an appeal from an order denying a new trial valid, the undertaking on appeal must be given and the notice of appeal must be filed within sixty days after the order is made. Holcomb v. Sawyer, 51 Cal. 417. An appeal from an order denying a motion for a new trial, not taken within sixty days after the order is entered in the minutes of the court, will be dismissed. Esrey v. Southern Pacific Co., 4 Cal. Unrep. 402; 35 Pac. 310; McDonald v. Lee, 132 Cal. 252; 64 Pac. 250; and see Peck v. Courtis, 31 Cal. 207; Brown v. Green, 65 Cal. 221; 3 Pac. 811. An order striking a statement on motion for a new trial from the files is a special order, made after judgment, and if the appeal therefrom is not taken within sixty days from its date, it must be dismissed. Symons v. Bunnell, 101 Cal. 223; 35 Pac. 770. An appeal from an order granting a new trial operates to suspend the functions of the order, and leaves the judgment subsisting for the purposes of an appeal therefrom pending the order; and the time between the making of the order and the reversal thereof upon appeal cannot be excluded from the computation of time within which an appeal must be taken from the judgment. Henry v. Merguire, 111 Cal. 1; 43 Pac. 387. An appeal from an order denying a motion for a new trial may be taken before the judgment is entered. Schroder v. Schmidt, 71 Cal. 399; 12 Pac. 302.

Motion for new trial after notice of entry of judgment. See note ante, § 659.

Order dissolving injunction. An appeal from an order dissolving an injunction must be taken within sixty days from the entry of the order. Barham v. Hostetter, 67 Cal. 272; 7 Pac. 689; and see McCourtney v. Fortune, 42 Cal. 387.

Order dissolving attachment. An appeal from an order dissolving an attachment may be taken, under this section, within sixty days from the date of the order, whether the appellant takes steps to preserve the lien of the attachment or not. Flagg v. Puterbaugh, 101 Cal. 583; 36 Pac. 95.

Order changing place of trial. An appeal must be taken within sixty days after the entry or filing of an order changing the place of trial. Chase v. Superior Court, 154 Cal. 789; 99 Pac. 355.

Order made after final judgment. An order discharging a judgment debtor from imprisonment is a special order made after final judgment, though made by the judge of another court, who was authorized to take jurisdiction of such proceedings, and an appeal must be taken within sixty days from the entry of the order. Wells Fargo & Co. v. Anthony, 35 Cal. 696. An order refusing to set aside and vacate a judgment must be appealed from within sixty days from the entry of the order. McCourtney v. Fortune, 42 Cal. 387. An appeal from an order refusing to vacate a judgment by default, being from an order made after final judgment, must be taken within sixty days from the date of such order. Doyle v. Republic Life Ins. Co., 125 Cal. 15; 57 Pac. 667; and see Harper v. Hildreth, 99 Cal. 265; 33 Pac. 1103. An order of sale of mortgaged premises, for the entire debt after its maturity, after judgment of foreclosure, is appealable only as an order made after judgment, and within sixty days from the entry thereof. Byrne v. Hoag, 126 Cal. 283; 58 Pac. 688. An order that money sold on execution, without delivery, be paid to the purchaser is appealable as a special order made after final judgment. Magee v. Superior Court, 10 Cal. App. 154; 101 Pac. 532.

Appeal from orders made after judgment. See note post, § 963.

Interlocutory judgment appealable when. No appeal can be taken from an interlocutory order, unless the order be designated by statute as one of those from which an appeal may be taken. Title Insurance etc. Co. v. California Development Co., 159 Cal. 484; 114 Pac. 838. No appeal, except as specified in this section, is authorized from an interlocutory judgment. Fay v. Fay, 165 Cal. 469; 132 Pac. 1040. An appeal from an interlocutory decree in partition must be taken within sixty days from the entry of the decree in the minutes of the court. Regan v. McMahon, 43 Cal. 625; Watson v. Sutro, 77 Cal. 609; 20 Pac. 88; Bartlett v. Mackey, 130 Cal. 181; 62 Pac. 482; Dore v. Klumpke, 140 Cal. 356; 73 Pac. 1064; Bloom v. Gordan, 150 Cal. 762; 90 Pac. 115. An interlocutory judgment which has become final, in an action for partition, and to enforce a trust in favor of other alleged heirs of a deceased person, against the distributee of his estate, adjudging that such alleged heirs had no interest in the land distributed, is conclusive upon all of the claimants, as to any trust of the distributee in their favor, when not appealed from within sixty days. Quirk v. Rooney, 130 Cal. 505; 62 Pac. 825; and see Lorenz v. Jacobs, 53 Cal. 24.

Order approving account of receiver. A notice of appeal from an order approving the account of a receiver, served more than sixty days after the entry of the order, is too late, even if such order is appealable. Illinois etc. Savings Bank v. Pacific Railway Co., 99 Cal. 407; 33 Pac. 1132; but see Los Angeles v. Los Angeles City Water Co., 134 Cal. 121, 67 Pac. 198, holding that an appeal from an order settling the account of a receiver, and directing the payment of his compensation by one of the parties, may be taken, as from a final judgment, within six months after its entry.

Probate orders and decrees. Appeals in probate proceedings are governed, so far as the time for taking an appeal is concerned, by § 1715, post. Estate of Brewer, 156 Cal. 89; 103 Pac. 486. An appeal from an order denying the revocation of the probate of a will, taken more than sixty days after its entry, must be dismissed. Estate of Nelson, 132 Cal. 182; 64 Pac. 294. An appeal from an order refusing the probate of a will is properly taken within sixty days from the entry of the order; the provisions of this section, in regard to the rendition of judgments, do not apply in such case. Estate of Fay, 145 Cal. 82; 104 Am. St. Rep. 17; 78 Pac. 340. An appeal from a decree of distribution, or from a decree of final discharge of an administrator, taken more than sixty days after its entry, must be dismissed. Estate of Campbell, 141 Cal. 72; 74 Pac. 550. An appeal from an amended judgment, in probate proceedings, may be taken within sixty days from the date of the amendment, though more than sixty days since the entry of the original judgment. Estate of Potter, 141 Cal. 350; 74 Pac. 986.

Time for appeal begins to run when. The time for appeal from a final judgment begins to run from the time of the actual entry of the judgment. Coon v. Grand Lodge, 76 Cal. 354; 18 Pac. 384; Moore v. Miller, 6 Cal. Unrep. 110; 54 Pac. 263; and see In re Fifteenth Avenue Extension, 54 Cal. 179. Where the minute-entry of the clerk is not sufficient to amount to a judgment of nonsuit, being a mere memorandum from which data for a judgment

might be drawn, the time to appeal does not begin to run until the entry of a proper judgment of nonsuit; hence, an appeal taken within six months after the entry of such proper judgment is in time. Ferris v. Baker, 127 Cal. 520; 59 Pac. 937. Where a judgment is amended, the date of the amendment must be taken as the true date of the entry for the purpose of appeal; hence, an appeal from a judgment, taken within six months from the entry of the amended judgment, is in time, though taken more than six months after the entry of the original judgment. Hayes v. Silver Creek etc. Water Co., 136 Cal. 238; 68 Pac. 704. The entry of the interlocutory decree, and not the mere ministerial act of the clerk in compiling the judgment roll after such entry, sets the statute of limitations running for the purpose of appeal. Dore v. Klumpke, 140 Cal. 356; 73 Pac. 1064. Where no notice of the entry of the order or judgment has been given, the appeal must be taken within six months from the entry of judgment. Foss v. Johnstone, 158 Cal. 119; 110 Pac. 294. The time for appeal by interveners commences to run from the time the complaint in intervention is stricken out for want of interest, and not from the time of judgment between the original parties; hence, an appeal from an order dismissing a complaint in intervention for want of interest, taken more than one year after the rendition of such order, is not in time. More v. Miller, 6 Cal. Unrep. 78; 53 Pac. 1077. An appeal from a judgment in a court of record may not be taken until after the "entry" of the judgment; but the time for an appeal from a judgment in a justice's court begins to run upon its "rendition." Thompson v. Superior Court, 161 Cal. 329; 119 Pac. 98. The presumption is, that the judgment was entered before the judgment roll was made up; and an appeal from the judgment, taken within less than six months from such presumed entry, is in time. Foss v. Johnstone, 158 Cal. 119; 110 Pac. 294.

Time for appeal begins to run when. See also note post, § 941b.

Extension of time for taking appeal. Statutes limiting the time for taking an appeal are jurisdictional, and cannot be enlarged by stipulation of the parties or order of court. Land v. Johnston, 156 Cal. 253; 104 Pac. 449. The supreme court cannot enlarge the time fixed by statute for taking an appeal (Dooling v. Moore, 20 Cal. 142); the period fixed by the statute being an express and peremptory limitation of time within which the appeal must be taken, and not a flexible rule to be varied by extrinsic circumstances. Henry v. Merguire, 111 Cal. 1; 43 Pac. 387. The statutes limiting the time for appeal are jurisdictional and mandatory, and courts have no power, not given by statute, to extend the time limited for an appeal, or to relieve an appellant from the effect of misfortune, accident, surprise, or mistake. Williams v. Long, 130 Cal. 58; 80 Am. St. Rep. 68; 62 Pac. 264.

Appeal after time has expired, dismissal of. An appeal from a judgment, taken after the time to appeal has expired, cannot be considered, and must be dismissed. Gray v. Palmer, 28 Cal. 416; Bates v. Gage, 49 Cal. 126; Voll v. Hollis, 60 Cal. 569; Gray v. Winder, 77 Cal. 525; 20 Pac. 47; Mattingly v. Pennie, 105 Cal. 514; 45 Am. St. Rep. 87; 39 Pac. 200; Henry v. Merguire, 111 Cal. 1; 43 Pac. 387; Sutter County v. Tisdale, 128 Cal. 180; 60 Pac. 757; Moore v. Douglas, 132 Cal. 399; 64 Pac. 705; Hunter v. Milam, 133 Cal. 602; 65 Pac. 1079; Bunting v. Salz, 3 Cal. Unrep. 193; 22 Pac. 1132; Contra Costa County v. Soto, 138 Cal. 57; 70 Pac. 1019; Robinson v. Eberhart, 148 Cal. 495; 83 Pac. 452; Michaelson v. Fish, 1 Cal. App. 116; 81 Pac. 661; Walbridge v. Cousins, 2 Cal. App. 302; 83 Pac. 462; Prine v. Duncan, 7 Cal. Unrep. 330; 90 Pac. 713; Sheehan v. Lapique, 15 Cal. App. 517; 115 Pac. 965. Formerly, an appeal not taken within one year after the "entry" of judgment had to be dismissed (United States v. Crooks, 116 Cal. 43; 47 Pac. 870; Cox v. Odell, 1 Cal. App. 682; 82 Pac. 1086); but now an appeal not taken within six months after the "entry" of judgment must be dismissed. Begbie v. Begbie, 128 Cal. 154; 49 L. R. A. 141; 60 Pac. 667; McGorray v. Stockton Sav. & L. Soc., 131 Cal. 321; 63 Pac. 479; McDonald v. Lee, 132 Cal. 252; 64 Pac. 250; Hellman v. Longley, 154 Cal. 78; 97 Pac. 17; Dundas v. Lankershim School District, 155 Cal. 692; 102 Pac. 925; Allen v. Allen, 159 Cal. 197; 113 Pac. 160; Calkins v. Howard, 2 Cal. App. 233; 83 Pac. 280; Houghton Co. v. Kennedy, 8 Cal. App. 777; 97 Pac. 905; Green v. Gavin, 10 Cal. App. 330; 101 Pac. 931; Bennett v. Potter, 16 Cal. App. 183; 116 Pac. 681; Breidenbach v. McCormick Co., 20 Cal. App. 184; 128 Pac. 423. Where an appeal from a judgment of a county court, rendered on appeal from a justice's court, was taken more than ninety days after the entry of judgment, the supreme court had no jurisdiction. Dooling v. Moore, 20 Cal. 142. That part of a final judgment which vacates a temporary injunction is not an "order," and an appeal therefrom will not be dismissed because not taken within sixty days. Bekins v. Dieterle, 5 Cal. App. 586; 91 Pac. 105. An appeal from an order denying a new trial, taken more than sixty days after entry of the order, will be dismissed. Hellman v. Longley, 154 Cal. 78; 97 Pac. 17; McDonald v. Lee, 132 Cal. 252; 64 Pac. 250. The fact that the respondent died only a short time before the expiration of the six months allowed for the appeal, and that not until after the expiration of such time was an administrator ap-

pointed, upon whom service of notice of appeal was made with due diligence, cannot operate to suspend the period of limitation, nor to preclude the dismissal of the appeal. Williams v. Long, 130 Cal. 58; 80 Am. St. Rep. 68; 62 Pac. 264. No appeal is instituted by the service of a notice of appeal after the time to appeal has expired; hence, an order will not be made dismissing such attempted appeal. Estate of Walkerly, 4 Cal. Unrep. 819; 37 Pac. 893.

Premature appeal, dismissal of. An appeal taken from a judgment, before the actual entry thereof, although after its rendition, is premature, and will be dismissed. Thomas v. Anderson, 55 Cal. 43; Schroder v. Schmidt, 71 Cal. 399; 12 Pac. 302; Tyrrell v. Baldwin, 72 Cal. 192; 13 Pac. 475; Home for Inebriates v. Kaplan, 84 Cal. 486; 24 Pac. 119; People v. Center, 66 Cal. 551; 5 Pac. 263; Kimple v. Conway, 69 Cal. 71; 10 Pac. 189; Brady v. Burke, 90 Cal. 1; 27 Pac. 52; McHugh v. Adkins, 117 Cal. 228; 49 Pac. 2; Bell v. Staacke, 137 Cal. 307; 70 Pac. 171; Estate of More, 143 Cal. 493; 77 Pac. 407; McLaughlin v. Doherty, 54 Cal. 519; Wood v. Etiwanda Water Co., 122 Cal. 152; 54 Pac. 726; Wood v. Missouri Pacific Ry. Co., 152 Cal. 344; 92 Pac. 868. An appeal from a judgment, and from an order refusing to set aside a default judgment, taken by a party against whom no judgment has been rendered, is prematurely taken, and must be dismissed. Scotland v. East Branch Mining Co., 56 Cal. 625. Where the notice of appeal from the judgment was filed on the day on which the judgment was entered, the appeal is not premature, although the notice was served on the preceding day. Tyrrell v. Baldwin, 72 Cal. 192; 13 Pac. 475. The rights of the parties in respect to an appeal are determined by the date of the actual entry of the judgment, and they cannot be affected by the entry of the judgment nunc pro tunc as of a prior date; hence, an appeal from a judgment, taken prior to the date of its actual entry, is premature, and will be dismissed. Coon v. Grand Lodge, 76 Cal. 354; 18 Pac. 384. A decree of distribution of the estate of a deceased person is not entered so as to authorize an appeal, until it is entered at length in the minute-book of the court; hence, an appeal taken before such entry is premature. Estate of Pearsons, 119 Cal. 27; 50 Pac. 929. An appeal from an order vacating a sale of the real estate of a deceased person, taken before the entry of the order in the minutes of the court, is premature. Estate of Devincenzi, 131 Cal. 452; 63 Pac. 723.

Certiorari after time for appeal has expired. A writ of certiorari will not be issued after the lapse of the period within which an appeal might have been taken, under this section, from the judgment or order sought to be reviewed, where no circumstances of any kind are made to appear to justify the delay in applying for the writ. Kimple v. Superior Court, 66 Cal. 136; 4 Pac. 1149.

Dismissal of appeal. See also note post, § 954.

"Rendition" and "entry" of judgment. A judgment is "rendered" when an order for a judgment is made by the court, and "entered" when it is actually entered in the judgment-book. Thomas v. Anderson, 55 Cal. 43; Shurtz v. Romer, 81 Cal. 244; 22 Pac. 657. The term "rendition of the judgment," in this section, means either the announcement from the bench entered in the minutes, or the filing of the findings, if there are findings, or both. Estate of Rose, 3 Cal. Unrep. 50; 20 Pac. 712; Wood v. Etiwanda Water Co., 122 Cal. 152; 54 Pac. 726. A judgment is rendered when the order therefor is made and entered, and the judgment is signed by the judge and filed in the cause, and nothing remains to be done but the mere ministerial duty of copying it into the record. Gray v. Palmer, 28 Cal. 416; Painter v. Painter, 113 Cal. 371; 45 Pac. 689; Peck v. Courtis, 31 Cal. 209; Genella v. Relyea, 32 Cal. 159; Waggenheim v. Hook, 35 Cal. 216; Wetherbee v. Dunn, 36 Cal. 249; Webster v. Cook, 38 Cal. 423; McLaughlin v. Doherty, 54 Cal. 519. An amendment of the judgment as entered, nunc pro tunc, so as to include therein the name of an omitted defendant as of the date of its original entry, cannot operate to deprive such defendant of his right of appeal from the judgment then entered against him for the first time. Spencer v. Troutt, 133 Cal. 605; 65 Pac. 1083. A recital in the notice of appeal, that the judgment was entered on the date of its rendition, and acknowledgment of service thereon, and the use of the word "entered" in the bill of exceptions, do not constitute a stipulation that the decree has been entered, so as to authorize an appeal. Estate of More, 143 Cal. 493; 77 Pac. 407. Under the Practice Act, the appeal ran from "the rendition of the judgment," by which was meant its announcement by the court, and its entry upon the minutes of the clerk, or the filing of the findings and order for judgment. Wood v. Etiwanda Water Co., 122 Cal. 152; 54 Pac. 726. The amendment to this section in 1907 substituted "entry" for "rendition," in that part of the first subdivision which refers to a review of an exception to the decision or verdict. Boin v. Spreckels Sugar Co., 155 Cal. 612; 102 Pac. 937.

What are final and interlocutory judgments. See note 60 Am. Dec. 427.

What judgments and orders may be appealed from. See note 20 Am. St. Rep. 173.

Computation of time for appeal as affected by motion for new trial or rehearing. See note 3 Ann. Cas. 630.

Validity and construction of statutes requiring appellate courts to weigh evidence. See note 3 Ann. Cas. 685.

Necessity for motion for new trial in order to obtain review on appeal of sufficiency of evidence in jury cases. See note 4 Ann. Cas. 304.

Appealability of judgments in contempt under appeal statutes. See notes 3 Ann. Cas. 759; 17 Ann. Cas. 321.

Finality of decree adjudicating equities but reserving settlement of accounts for report of master. See note 5 Ann. Cas. 176.

Right to appeal from ex parte order. See note 10 Ann. Cas. 38.

Appealability of order granting or refusing writ of assistance. See note 10 Ann. Cas. 1042.

Appealable judgments and orders in eminent domain proceedings. See note 16 Ann. Cas. 1004.

Order dismissing action as frivolous as final or interlocutory for purposes of appeal. See note 18 Ann. Cas. 394.

CODE COMMISSIONERS' NOTE. 1. Subd. 1. Appeal from a judgment must be taken within a year. Waggenheim v. Hook, 35 Cal. 216. If the appeal is not taken within a year, it will be dismissed. Bornheimer v. Baldwin, 38 Cal. 671. The time within which an appeal from a judgment may be taken is not computed from the date of the entry of the judgment by the clerk in the judgment-book, but from the time the judgment is announced by the court and entered in the minutes. Wetherbee v. Dunn, 36 Cal. 249; Genella v. Relyea, 32 Cal. 159; Gray v. Palmer, 28 Cal. 417; Peck v. Courtis, 31 Cal. 207. If a demurrer to an intervention is sustained, and judgment thereupon rendered against the intervener, he may appeal at once. Stich v. Goldner, 38 Cal. 608. The time for an appeal from a judgment on demurrer commences to run from its rendition, not from the time of the ruling on the demurrer. Webster v. Cook, 38 Cal. 423. If the appeal is dismissed for want of an undertaking, and no final judgment has been rendered, a second appeal may be taken within the period allowed by law. Martinez v. Gallardo, 5 Cal. 155. An appeal from an order denying a new trial, although taken more than a year after rendition of a judgment, brings up the whole record. And if there was error in refusing a new trial, the appellate court will order a new trial, which, in effect, vacates the judgment. Walden v. Murdock, 23 Cal. 540; 83 Am. Dec. 135.

2. Subd. 2. Dooling v. Moore, 20 Cal. 141.

3. Subd. 3. An appeal from an order denying a new trial must be taken within sixty days. Waggenheim v. Hook, 35 Cal. 216; Towdy v. Ellis, 22 Cal. 650; Brown v. Tolles, 7 Cal. 398; Peck v. Vandenberg, 30 Cal. 11; Peck v. Courtis, 31 Cal. 207. An appeal from an order refusing to vacate award of arbitrators must be taken within sixty days from date of order. Fairchild v. Daten, 38 Cal. 286. If an appeal from the judgment is dismissed, the dismissal is not a bar to an appeal from an order refusing a new trial. Fulton v. Cox, 40 Cal. 101; Fulton v. Hanna, 40 Cal. 278; Waugenheim v. Graham, 39 Cal. 169. After appealing from a judgment, a party may appeal from an order overruling a motion for a new trial, if the latter appeal is taken in time. Marziou v. Pioche, 8 Cal. 522. Where an appeal is taken, both from a final judgment and an order refusing a new trial, after sixty days from the entry of the order for a new trial, the appeal, so far as the order is concerned, will, on motion, be dismissed. Lower v. Knox, 10 Cal. 480. An order made by the court on a motion is a final adjudication upon the subject-matter, unless appealed within the time allowed by law, nor can the time for appeal be extended by subsequent renewal of the motion, even if it be varied in its terms, provided it is substantially the same motion. Kittredge v. Stevens, 23 Cal. 283. See, generally, Gray v. Palmer, 28 Cal. 416.

§ 940. Appeal, how taken. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose, unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing.

Service of papers. Post, §§ 1010–1017.
Notice, generally. Post, §§ 1010 et seq.
Undertaking on appeal.
1. Requirements of. Post, § 941.
2. Unnecessary when. Post, §§ 965, 1058.
3. Exception to sureties, time for. Post, § 948.
Exceptions, necessity for. Ante, §§ 646, 647; post, § 956.
Practice on appeals in criminal causes. See Pen. Code, §§ 1237 et seq.

Legislation § 940. **1.** Enacted March 11, **1872;** based on Practice Act, § 337, which read: "The appeal shall be made by filing with the clerk of the court, with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney." When enacted in 1872, § 940 read: "An appeal is taken by: 1. Filing with the clerk of the court in which the judgment or order appealed from is entered or filed a notice stating the appeal from the same, or some specific part thereof; 2. Filing, at the same time, an undertaking on appeal; and, 3. Serving a copy of the notice of appeal upon the adverse party or his attorney."

2. Amended by Code Amdts. **1873–74,** p. 336.

3. Amendment by Stats. **1901,** p. 173; unconstitutional. See note ante, § 5.

Method of appeal. Where a party takes an appeal under this section, instead of under §§ 941a, 941b, and 941c, post, he may support it either by a transcript prepared and filed under §§ 953a, 953b, and 953c, post, or by a transcript printed and filed as was customary previous to the enactment of those sections, and as directed by the rules of the supreme court. Lang v. Lilley & Thurston Co., 161 Cal. 295; 119 Pac. 100. An appeal may be taken under either this section or § 941b: if properly taken under either, the appellate court has jurisdiction, whether any transcript is filed to support it or not. Smith v. Jaccard, 20 Cal. App. 280; 128 Pac. 1026. An appeal, to be effective, must be perfected under either the new or the old method. Credit Clearance Bureau v. Weary & Alford Co., 18 Cal. App. 467; 123 Pac. 548.

Appeal deemed taken when. An appeal is taken, under this section, when the notice of appeal is served and filed, although

the undertaking, which perfects the appeal, is not filed until afterwards. Perkins v. Cooper, 3 Cal. Unrep. 279; 24 Pac. 377. Where the notice is given under § 939, ante, it must be served and filed and the undertaking given as required by this section. Theisen v. Matthai, 165 Cal. 249; 131 Pac. 747.

Alternative method of perfecting appeal. See note post, § 953a.

Appeal from part of judgment or order. A party may appeal from the whole or from any specific part of a judgment. Englund v. Lewis, 25 Cal. 337. An appeal may be taken from a portion of an order, as well as from a portion of an judgment. Donnelly v. Gray Brothers, 3 Cal. App. 59; 84 Pac. 451. Where only part of a judgment is appealed from, that part not appealed from is, ordinarily, not affected, and is final. Whalen v. Smith, 163 Cal. 360; Ann. Cas. 1913E, 1319; 125 Pac. 904.

Probate appeals. This section, in its application to probate appeals, is limited. Estate of Brewer, 156 Cal. 89; 103 Pac. 486.

Necessary parties to appeal. All the parties to a final judgment in a partition suit must be made parties to an appeal from the whole of the judgment, either as appellants or respondents, or the appeal will prove ineffectual. Senter v. Bernal, 38 Cal. 637. The fact that the judgment or order appealed from may be used as evidence in some collateral action or proceeding, or that its reversal may have a remote or consequential effect, to the prejudice of one not a party thereto, does not entitle such person to be made a party to the appeal. Estate of Ryer, 110 Cal. 556; 42 Pac. 1082. While the adverse party must necessarily be before the court on appeal, yet it is immaterial whether his presence is by a voluntary appearance or whether he has been brought there by a hostile notice from the appellant. Hibernia Sav. & L. Soc. v. Lewis, 111 Cal. 519; 44 Pac. 175. Although the name of a person and his interest in the estate in controversy are disclosed upon the record, yet such person is not necessarily a party to the cause. Estate of McDougald, 143 Cal. 476; 77 Pac. 443. The parties to the motion for a new trial are the only necessary parties to the appeal from the order denying it. Herriman v. Menzies, 115 Cal. 16; 56 Am. St. Rep. 82; 35 L. R. A. 318; 44 Pac. 660; and see Watson v. Sutro, 77 Cal. 609; 20 Pac. 88; Estate of Ryer, 110 Cal. 556; 42 Pac. 1082; Barnhart v. Edwards, 111 Cal. 428; 44 Pac. 160; Johnson v. Phenix Ins. Co., 146 Cal. 571; 80 Pac. 719.

Necessity of giving notice. To take an appeal, notice of appeal must be given, under either this section or § 941b, post: a notice to the clerk to prepare a transcript is not a notice of appeal. Boling v. Alton, 162 Cal. 297; 122 Pac. 461.

Sufficiency of notice. The object of the notice of appeal is to impart to the opposite party the requisite information of his opponent's intention to appeal, and what specific judgment or order is appealed from; and where the notice is sufficiently explicit in these particulars, it is sufficient. Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202; 10 Pac. 510. In order to sustain a notice of appeal as an appeal from a judgment, the paper relied upon for that purpose should state, at least, that the appeal is taken from a judgment, or use other language which can be so construed. Meley v. Boulon, 104 Cal. 262; 37 Pac. 931. The notice of appeal, in form, must sufficiently indicate the order or judgment from which the appeal is taken. Estate of Nelson, 128 Cal. 242; 60 Pac. 772. Where there is but one judgment in the action, a notice of appeal stating that the plaintiff appeals from the said judgment made and entered in said action, is not insufficient for uncertainty, in failing to give the date of the judgment or other identification. Jones v. Iverson, 131 Cal. 101; 63 Pac. 135. A notice of appeal reciting that it is taken from an order and decree made and entered on a certain day, directing letters of administration to issue to the public administrator, is sufficient, there having been only one order and decree made upon that day, or any other day, making such appointment. Estate of Damke, 133 Cal. 433; 65 Pac. 888. Where there is but one judgment in the case, a slight mistake, as of the date of entry, will not invalidate the notice of appeal. Swasey v. Adair, 83 Cal. 136; 23 Pac. 284. A notice of appeal, sufficient in other respects, will not be held insufficient, merely because it incorrectly states the date upon which the judgment and order appealed from were entered, if the record on appeal shows that there has been but one judgment or order of the kind appealed from entered in the cause. Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202; 10 Pac. 510. A mistake in the notice of appeal, as to the date of the order appealed from, does not invalidate the appeal, if the description of the order is sufficient to identify it. Foss v. Johnstone, 158 Cal. 119; 110 Pac. 294. It is not required that the notice of appeal shall be addressed to the persons who constitute the adverse party; and where the notice is addressed to the attorneys on whom it is properly to be served under the statute, this is sufficient: a mere mistake of the scrivener, which could not possibly mislead anybody, will be disregarded on appeal. Estate of Nelson, 128 Cal. 242; 60 Pac. 772. A notice of appeal, addressed to one party, is not notice to another. Estate of Pendergast, 143 Cal. 135; 76 Pac. 962. One notice is sufficient for taking an appeal from a judgment, and from an order subsequent to a judgment. People v. Center, 61 Cal. 191. The inclusion of an additional notice of appeal from the judgment, in the notice of appeal from an order denying a new

trial, has no effect, either as an original appeal or to impair the previous appeal pending. Woodside v. Hewel, 107 Cal. 141; 40 Pac. 103. A notice of appeal from an order directing the payment of alimony and counsel fees is not rendered ineffectual because a notice of appeal from the judgment is embraced in the same paper, nor because the appellant has inserted in the notice a statement that on the appeal from the judgment he would ask the court to review and set aside the order for alimony: such matter is mere surplusage, which does no injury. Sharon v. Sharon, 68 Cal. 326; 9 Pac. 187.

Construction of notice. Where a notice of appeal stated that the plaintiff appealed from an order overruling and denying his motion to set aside a judgment or order of nonsuit, and dissolving a preliminary injunction, and for granting a rehearing therein, the word "rehearing" is used in the sense of "new trial," and the appeal referred to in the notice is from the order denying a new trial. Kimple v. Conway, 69 Cal. 71; 10 Pac. 189. A notice of appeal from an order denying a motion for a new trial, and from an order denying a motion to set aside the decision and judgment, describing the judgment, and concluding with the words "and from the whole thereof," does not include a notice of appeal from the judgment: the concluding words refer to the orders previously mentioned, and indicate that the appeal is from the whole, and not from a part, of said orders. Meley v. Boulon, 104 Cal. 262; 37 Pac. 931.

Joint notice. A plaintiff and a defendant, who are joint defendants in a cross-complaint, may give joint notice of appeal. Downing v. Rademacher, 136 Cal. 673; 69 Pac. 415.

Necessity for filing notice. The filing of the notice of appeal, and the service of a copy thereof upon the opposite party or his attorney, are indispensable, in order to give the appellate court jurisdiction. Bonds v. Hickman, 29 Cal. 460.

County where notice should be filed. The notice of appeal from an order changing the place of trial to another county, and the undertaking on appeal, must each be filed in the office of the clerk of the county in which the order was made: if filed with the clerk of the county to which the transfer was made, the appeal is ineffectual, and will be dismissed. Mansfield v. O'Keefe, 133 Cal. 362; 65 Pac. 825.

Time of filing. As this section now stands, the rule previously in force respecting appeals has been changed, and the notice of appeal may now be filed with the clerk on a day subsequent to that upon which the service is made, and the undertaking may be filed before the notice of appeal is filed. Hewes v. Carville Mfg. Co., 62 Cal. 516; Robinson v. Templar Lodge, 114 Cal. 41; 45 Pac. 998; and see Boyd v. Burrel, 60 Cal. 280. The statute does not prescribe any particular time after service of the notice of appeal within which such notice must be filed: it may be filed at any time before the expiration of the time for appeal. San Francisco etc. Collection Co. v. State, 141 Cal. 354; 74 Pac. 1047; and see Galloway v. Rouse, 63 Cal. 280; Noonan v. Nunan, 76 Cal. 44; 18 Pac. 98; Robinson v. Templar Lodge, 114 Cal. 41; 45 Pac. 998. Where the notice of appeal and the undertaking were filed within three days after the service of the notice, the appeal is effectual. Galloway v. Rouse, 63 Cal. 280. Where the notice of appeal was not filed until eleven days after the service thereof, but was filed within six months after the entry of the judgment, it is not too late. San Francisco etc. Collection Co. v. State, 141 Cal. 354; 74 Pac. 1047.

Effect of filing. The filing of a notice of appeal, under either this section or 941b, post, confers jurisdiction of the appeal, which is not ousted by the method of preparing or filing the transcript: that may be gotten up and filed under either method, as the appellant may choose. Lang v. Lilley & Thurston Co., 161 Cal. 295; 119 Pac. 100.

Waiver of filing. A waiver of the filing of the notice of appeal, by the stipulation of the parties, is not the equivalent of the filing of the notice: consent, though it may waive error, cannot confer jurisdiction. Bonds v. Hickman, 29 Cal. 460. The failure to serve and file a notice of appeal cannot be waived after the time for appealing has expired, so as to confer jurisdiction on the appellate court. Niles v. Gonzalez, 152 Cal. 90; 92 Pac. 74.

Relief from stipulation admitting filing. Where an attorney stipulates, under a mistake of fact, that a notice of appeal has been filed, when no notice has in fact been filed, the court below, upon a proper application, may relieve him from it, but the appellate court cannot. Bonds v. Hickman, 29 Cal. 460.

Time of serving notice. The clause in this section, "The order of service is immaterial," is the equivalent of "Whether the service precede or follow the filing of the notice, is immaterial." Boyd v. Burrel, 60 Cal. 280. The serving of the notice of appeal may precede the filing. San Francisco etc. Collection Co. v. State, 141 Cal. 354; 74 Pac. 1047; Hewes v. Carville Mfg. Co., 62 Cal. 516; but see Aram v. Shallenberger, 42 Cal. 275. Service of a notice of appeal by mail is complete at the time of the deposit of a copy thereof in the post-office. Brown v. Green, 65 Cal. 221; 38 Pac. 811.

Service upon adverse party. The adverse party must be served with the notice of appeal. Brown v. Green, 65 Cal. 221; 3

Pac. 811; Lancaster v. Maxwell, 103 Cal. 67; 36 Pac. 951; Estate of Walkerley, 5 Cal. Unrep. 5; 40 Pac. 13; Johnson v. Phenix Ins. Co., 152 Cal. 196; 92 Pac. 182. A notice of appeal must be served, within the time prescribed, upon all adverse parties, that is, upon those who are interested in the judgment, and who would be affected by its reversal. Herriman v. Menzies, 115 Cal. 16; 56 Am. St. Rep. 82; 35 L. R. A. 318; 44 Pac. 660; Estate of Pendergast, 143 Cal. 135; 76 Pac. 962; Estate of Young, 149 Cal. 173; 85 Pac. 145; Mannix v. Tryon, 152 Cal. 31; 91 Pac. 983; Niles v. Gonzalez, 152 Cal. 90; 92 Pac. 74; Bell v. San Francisco Sav. Union, 153 Cal. 64; 94 Pac. 225; Ford v. Cannon, 5 Cal. App. 185; 89 Pac. 1071. The adverse party upon whom the notice of appeal is to be served is the party who appears by the record to be adverse; and the record to be considered for that purpose is the record of the proceedings in which the appeal is taken. McKenzie v. Hill, 9 Cal. App. 78; 98 Pac. 55; Ford v. Cannon, 5 Cal. App. 185; 89 Pac. 1071. In proceedings under the McEnerney Act, before the adoption of the alternative method of taking appeals, a notice of appeal was required to be served only on the parties who appeared from the record to be adverse. Potrero Nuevo Land Co. v. All Persons, 155 Cal. 371; 101 Pac. 12. The notice of appeal from an order denying a motion for a new trial need be served only on the parties who were adverse to the motion in the court below. Niles v. Gonzalez, 155 Cal. 359; 100 Pac. 1080; 152 Cal. 90; 92 Pac. 74. A notice of appeal from an order denying a motion for a new trial need be served only on the parties to the motion in the court below. Watson v. Sutro, 77 Cal. 609; 20 Pac. 88. Service upon an adverse party personally, when he has appeared by attorney, is insufficient. Jones v. McGarvey, 6 Cal. Unrep. 277; 56 Pac. 896.

Adverse parties, who are. By the term "adverse party" is meant every party whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal is taken, irrespective of the question whether he appears upon the record in the attitude of plaintiff or defendant, or intervener. Senter v. Bernal, 38 Cal. 637; Randall v. Hunter, 69 Cal. 80; 10 Pac. 130; Milliken v. Houghton, 75 Cal. 539; 17 Pac. 641; Harper v. Hildreth, 99 Cal. 265; 33 Pac. 1103; Lancaster v. Maxwell, 103 Cal. 67; 36 Pac. 951; Bullock v. Taylor, 112 Cal. 147; 44 Pac. 457; United States v. Vrooks, 116 Cal. 43; 47 Pac. 870; Kenney v. Parks, 120 Cal. 22; 52 Pac. 40; Vincent v. Collins, 122 Cal. 387; 55 Pac. 129; Mohr v. Byrne, 132 Cal. 250; 64 Pac. 257; Johnson v. Phenix Ins. Co., 146 Cal. 571; 80 Pac. 719; Quist v. Sandman, 154 Cal. 748; 99 Pac. 204; Bell v. San Francisco Sav. Union, 153 Cal. 64; 94 Pac. 225; Niles v. Gonzalez, 152 Cal. 90; 92 Pac. 74; Mannix v. Tryon, 152 Cal. 33; 91 Pac. 983; Jackson v. Superior Court, 20 Cal. App. 638; 129 Pac. 946; Ford v. Cannon, 5 Cal. App. 185; 89 Pac. 1071. An adverse party to an appeal is any party whose interest in relation to the subject of the appeal is in conflict with the reversal of the order or decree appealed from, or the modification sought by the appeal. Green v. Berge, 105 Cal. 52; 45 Am. St. Rep. 25; 38 Pac. 539. Persons sought to be substituted as parties defendant are adverse parties on an appeal from a judgment by default; the defendant claiming a reversal on the ground that the refusal to make the substitution was erroneous. Toy v. San Francisco etc. R. R. Co., 75 Cal. 542; 17 Pac. 700. A mortgagor and his co-defendant, who constructed a building on the mortgaged premises, are adverse parties to an appeal by the mortgagee from a judgment giving mechanic's lien claimants priority over the mortgage lien, where the decree of foreclosure provided for a deficiency judgment: in such case the liability for the deficiency judgment might be affected by a reversal of the judgment. Pacific Mutual Life Ins. Co. v. Fisher, 106 Cal. 224; 39 Pac. 758. Defaulting defendants are not adverse parties to other defendants, where there is no joint relation alleged between the defendants, and the judgment against each is several and independent. Kenney v. Parks, 120 Cal. 22; 52 Pac. 40. In an action on a promissory note, alleged to have been executed by two defendants as partners, one of whom made default and trial was had as to the other, and judgment was entered against the one by default and against the other on the verdict, the defendant who made default is not an adverse party to the appeal of the defendant as to whom trial was had. Randall v. Hunter, 69 Cal. 80; 10 Pac. 130. Defendants who, by their default, have admitted that their claim to mortgaged premises was inferior to that of the plaintiff, are not adverse parties in an appeal by the mortgagor from a judgment in favor of the plaintiff, foreclosing the mortgage. Boob v. Hall, 107 Cal. 160; 40 Pac. 117. Defaulting defendants, in an action to quiet title, are not adverse parties to answering defendants, where the reversal of the judgment in favor of the plaintiff, quieting his title, and giving him the right of possession to the lands described, as against the defaulting defendants, could not injuriously affect their interests, on the appeal of the answering defendants. Kenney v. Parks, 120 Cal. 22; 52 Pac. 40. In an action to recover from one defendant the amount due upon a note, and asking that another defendant be directed to pay the said judgment out of certain moneys owing to the first defendant, such first de-

fendant is not an adverse party to an appeal taken by an intervener from a judgment directing the second defendant to pay the amount of the judgment. Mohr v. Byrne, 132 Cal. 250; 64 Pac. 257. On appeal from an order against a garnishee in supplementary proceedings, the judgment debtor, if he was not a participant, is not an adverse party required to be served with notice of appeal. McKenzie v. Hill, 9 Cal. App. 78; 98 Pac. 55. A contractor, who cannot be injuriously affected by an appeal from a judgment of foreclosure, is not an adverse party who must be served with notice of appeal. Quist v. Sandman, 154 Cal. 748; 99 Pac. 204. The phrase, "adverse party," is also found in §§ 650, 659, ante.

Determination as to who are adverse parties. Whether a party to the action is adverse to the appellant, must be determined by their relative positions on the record and the averments in their pleadings, rather than from the manner in which they may manifest their wishes at the trial, or from any presumption to be drawn from their relation to each other, or to the subject-matter of the action, in matters outside of the action. Harper v. Hildreth, 99 Cal. 265; 33 Pac. 1103. The question as to who are adverse parties can be determined only from the record. O'Rourke v. Finch, 8 Cal. App. 263; 96 Pac. 784. An adverse party upon whom the notice of appeal is to be served is a party who appears by the record to be adverse; and the rule that the notice of appeal must be served upon all parties that would be affected by a reversal of the judgment appealed from, is to be construed with the other rule, that only the record can be examined for the purpose of determining who are adverse parties. Estate of Ryer, 110 Cal. 556; 42 Pac. 1082. The record to be considered for the purpose of determining who are adverse parties to be served with the notice of appeal, is the record of the proceedings in which the appeal is taken. Estate of Bullard, 114 Cal. 462; 46 Pac. 297. The record upon the appeal is the only record that can be examined for the purpose of ascertaining who are adverse parties to be served with the notice of appeal. Estate of Bullard, 114 Cal. 462; 46 Pac. 297; Kenney v. Parks, 120 Cal. 22; 52 Pac. 40; Mohr v. Byrne, 132 Cal. 250; 64 Pac. 257; and see Bullock v. Taylor, 112 Cal. 147; 44 Pac. 457.

Service on defendants. Where an execution, issued against all the parties to a judgment, is quashed upon the motion of a part of them, and an appeal from the order is taken by the judgment creditor, all the persons against whom the judgment was rendered are adverse parties, and should be served with notice of the appeal. Millikin v. Houghton, 75 Cal. 539; 17 Pac. 641. In an action to dissolve a partnership, and to determine the rights of the parties to certain land claimed by the defendant partner, where other defendants were made parties because of their claim of an interest in the land, the defendant partner is an adverse party to an appeal by the plaintiff from an order dismissing the action as against such other parties and as against the land, and he must be served with the notice of appeal. Harper v. Hildreth, 99 Cal. 265; 33 Pac. 1103. Where a defendant did not appear in the action, but was properly made a party thereto, the notice of appeal must be served on him, as an adverse party interested therein. Johnson v. Phenix Ins. Co., 146 Cal. 571; 80 Pac. 719. Fictitious defendants, who were not served with process, and who did not appear, need not be served with the notice of appeal. Benson v. Bunting, 127 Cal. 532; 78 Am. St. Rep. 81; 59 Pac. 991.

Service by defendant on co-defendants. A notice of appeal by one of several co-defendants should be served not only on the plaintiff, but also on non-appealing co-defendants: they have an interest in the judgment to be affected by a reversal. Millikin v. Houghton, 75 Cal. 539; 17 Pac. 641. Where an action is brought by a county for the condemnation of a strip of land for a highway, across lands owned by the respective defendants, and judgment is rendered for the plaintiff as prayed for, and one of the defendants appeals, the other defendants are adverse parties, and should be served with notice of the appeal. Butte County v. Boydstun, 68 Cal. 189; 8 Pac. 835. In an action against two persons, as partners, to have a deed executed by one of them declared a mortgage to secure a partnership indebtedness, in which the other partner was not served with summons and did not appear, and judgment was had between the parties, the absent partner is not an adverse party upon whom the notice of appeal from the judgment must be served. Merced Bank v. Rosenthal, 99 Cal. 39; 31 Pac. 849. A mortgagee, who, refusing to be a co-plaintiff, was made a co-defendant with an insurance company in an action upon the policy by the owner of a burned building, is an adverse party to the appeal by the insurance company from a judgment in favor of the owner for the full amount of the insurance, out of which judgment the amount due to the mortgagee was ordered to be paid, and such mortgagee must be served with the notice of appeal. Johnson v. Phenix Ins. Co., 146 Cal. 571; 80 Pac. 719. In an action for breach of contract alleged to have been executed by the defendants as partners, on an appeal by the defendant against whom alone a recovery was had, his co-defendants, as to whom a nonsuit was granted, and to which he excepted, are adverse parties, and must be served with

the notice of appeal from the order granting the nonsuit. Bullock v. Taylor, 112 Cal. 147; 44 Pac. 457. Defaulting defendants, whose interests would be injuriously affected by the appeal of other defaulting defendants, must be served with the notice of appeal. Bowering v. Adams, 126 Cal. 653; 59 Pac. 134. A co-defendant who makes default is not an adverse party, and notice of the appeal need not be served on him. Randall v. Hunter, 69 Cal. 80; 10 Pac. 130; McKeany v. Black, 46 Pac. 381; French v. McCarthy, 110 Cal. 12; 42 Pac. 302. Defaulting defendants are not adverse parties to other defendants, where there is no joint relation alleged between them, and a judgment against each is several and independent; a judgment under the McEnerney Act must be several and independent. Potrero Nuevo Land Co. v. All Persons, 155 Cal. 371; 101 Pac. 12. A co-defendant, in whose favor judgment has been rendered against the plaintiff for costs, is not an adverse party who must be served with the notice of appeal by the other defendant, on judgment against him in favor of the plaintiff. Green v. Berge, 105 Cal. 52; 45 Am. St. Rep. 25; 38 Pac. 539. Where, in an action against several defendants, the plaintiff filed a dismissal before the service of summons upon or appearance by any of the defendants, and afterwards two of the defendants filed an answer and cross-complaint, asking affirmative relief, and thereafter, upon motion of the plaintiff, the action was dismissed by the court, from which the cross-complainants appealed, the other defendants, not appealing, are not adverse parties, and notice of appeal need not be served upon them. Hinkel v. Donohue, 88 Cal. 597; 26 Pac. 374. Co-defendants, not served with summons, and not appearing in the action, need not be served with the notice of appeal. Merced Bank v. Rosenthal, 99 Cal. 39; 31 Pac. 849; Clarke v. Mohr, 125 Cal. 540; 58 Pac. 176; Peck v. Agnew, 126 Cal. 607; 59 Pac. 125. Where an action was brought against two defendants, upon a contract of guaranty executed by them to the plaintiff, and was tried solely upon issues presented by the separate answer of one of them, and the record does not show that the co-defendant answered the complaint, it is not necessary, upon appeal from the judgment, to serve the notice of appeal upon such co-defendant. French v. McCarthy, 110 Cal. 12; 42 Pac. 302. The notice of appeal need not be served on a co-defendant who was not a party to the motion for a new trial. Barnhart v. Edwards, 111 Cal. 428; 44 Pac. 160; Johnson v. Phenix Ins. Co., 146 Cal. 571; 80 Pac. 719.

Service on intervener. When, after the foreclosure of a mortgage, and a sale under the decree, the decree is vacated, on motion of the plaintiff, to allow a grantee of the mortgagor to be made a party defendant, and the purchaser at the foreclosure sale also intervenes by leave of the court, the defendant, upon appealing from the order vacating the decree, must serve the notice of appeal upon the intervener. Miller v. Richards, 83 Cal. 563; 23 Pac. 936.

Service on substituted party. The service of notice of appeal upon parties substituted as respondents, after the lapse of time for appeal, can have no effect; and an attempted second appeal, after the expiration of such time, can be of no avail. Estate of Turner, 139 Cal. 85; 72 Pac. 718.

Service on attorney. The notice of appeal is not a process requiring personal service for the purpose of bringing the respondent before the court, but is the declaration of an intention to take further proceedings in a pending cause, and the statute requires it to be in writing, and to be served upon the attorney of the party, instead of on the party himself. Estate of Nelson, 128 Cal. 242; 60 Pac. 772. The service of the notice of appeal must be made upon the attorney of the adverse party, where such party has an attorney. Abrahms v. Stokes, 39 Cal. 150; Whittle v. Renner, 55 Cal. 395; Jones v. McGarvey, 6 Cal. Unrep. 277; 56 Pac. 896; Estate of Nelson, 128 Cal. 242; 60 Pac. 772. The attorney referred to in this section is the attorney of record: a notice of appeal served upon any other is void. Whittle v. Renner, 55 Cal. 395; Prescott v. Salthouse, 53 Cal. 221; Ellis v. Bennett, 2 Cal. Unrep. 302; 3 Pac. 801; Harrington v. Bolte, 8 Pac. 184. Where the notice of appeal was addressed only to heirs who were petitioners for a decree of distribution, and their attorney admits service as such, the fact that he is also attorney for all the other heirs cannot enlarge the notice so as to make them also parties to the appeal. Estate of Pendergast, 143 Cal. 135; 76 Pac. 962. The notice of appeal from an order refusing to set aside a default is properly served upon the defendant's attorney, in perfecting the appeal, if his appearance in the action was general, and not merely special. Thompson v. Alford, 128 Cal. 227; 60 Pac. 686. An affidavit stating that service of the notice of appeal was made by mail, and that the respondent's attorney had admitted receipt of the notice, is sufficient proof of service, as against a mere inference, in an affidavit of the respondent's attorney, that he had not received such notice. Brandenstein v. Johnson, 134 Cal. 102; 66 Pac. 86. Upon the death of a party to an action, the authority of his attorney to represent him ceases, and no notice of appeal can thereafter be effectively served upon his attorney (Pedler v. Stroud, 116 Cal. 461; 48 Pac. 371; Estate of Turner, 139 Cal. 85; 72 Pac. 718); and his acknowledgment of service of a notice of appeal cannot bind the representatives

of the deceased, subsequently appointed; and if such representatives are substituted in the supreme court, the appeal will be dismissed as to them, if nothing further appears to estop them from moving to dismiss. Moyle v. Landers, 78 Cal. 99; 12 Am. St. Rep. 22; 20 Pac. 241. In partition proceedings, the notice of appeal may be served upon the attorney of record of another party, notwithstanding the death of such party prior to the appeal; and such notice may be served upon the original attorney of record, where there has been no substitution, notwithstanding another attorney may have appeared and signed an amended pleading for such party. Lacoste v. Eastland, 117 Cal. 673; 49 Pac. 1040.

Service on representative of deceased party. Upon appeal from an order denying a new trial, the representative of an adverse party who was served with notice of intention but died pending the motion, must be served with the notice of appeal. Bell v. San Francisco Sav. Union, 153 Cal. 64; 94 Pac. 225.

Foreclosure of mortgage, service on whom. The administrator of a deceased mortgagor, who is required by the judgment foreclosing the mortgage to pay any deficiency over the amount derived from the sale of the mortgaged premises, and to whom the claim had been presented, is an adverse party, and must, on appeal from the judgment of foreclosure by the purchaser of the mortgaged premises, be served with notice of appeal. Barnhart v. Edwards, 111 Cal. 428; 44 Pac. 160. Upon an appeal by an insolvent mortgagor, from an order directing the sale of the mortgaged premises in one parcel, and from an order refusing to set aside the sale and to order the land resold in two parcels, the assignee in insolvency is an adverse party who must be served with notice of appeal. Vincent v. Collins, 122 Cal. 387; 55 Pac. 129.

Foreclosure of mechanic's lien, service on whom. In an action to foreclose mechanics' liens, where judgment was rendered for the sale of the property, and a judgment for any deficiency was directed to be docketed against the contractor, on appeal from the judgment the contractor is an adverse party who must be served with the notice of appeal. Lancaster v. Maxwell, 103 Cal. 67; 36 Pac. 951. A mechanic's lien claimant, in mortgage foreclosure proceedings, whose lien is directed to be paid out of the proceeds of the sale after the satisfaction of the plaintiff's mortgage, is an adverse party who must be served with the notice of appeal. Hibernia Sav. & L. Soc. v. Lewis, 111 Cal. 519; 44 Pac. 175.

Consolidated actions, service on successful party. A stipulation in an action which had been consolidated with another, that the pleadings in such consolidated action shall be omitted in the transcript on appeal, and that the action shall be determined by the decision on the appeal, is an appearance to the appeal, rendering service of the notice of appeal on the successful party in the consolidated action unnecessary. Valley Lumber Co. v. Struck, 146 Cal. 266; 80 Cal. 405.

Proceedings supplementary to execution, service on debtor. In proceedings supplementary to execution, it is not necessary to serve the judgment debtor with notice of appeal: he is not an adverse party. McKenzie v. Hill, 9 Cal. App. 78; 98 Pac. 55.

Insolvency proceedings, service on whom. Upon an appeal by petitioning creditors from an order dismissing a proceeding in insolvency against a foreign corporation for want of jurisdiction, though the corporation made default, and the controversy is between the petitioning creditors and the attaching creditors of the corporation, who intervened to prevent an adjudication of insolvency against the corporation, the notice of appeal must be served upon the corporation as well as upon the attaching creditors, since the judgment was in favor of the corporation, and a reversal would affect its rights. In re Castle Dome Mining etc. Co., 79 Cal. 246; 21 Pac. 746. Upon an appeal by a creditor from an adjudication of insolvency upon the voluntary petition of the debtor, the notice of appeal need only be served upon the insolvent debtor, and is not required to be served upon the receiver, nor upon the other creditors, who had not filed proof of their claims when the appeal was taken. In re Chope, 112 Cal. 630; 44 Pac. 1066; and see Chinette v. Conklin, 105 Cal. 465; 38 Pac. 1107.

Probate proceedings, service on whom. Where the daughter of an alleged incompetent person petitions to be appointed guardian, but, upon the hearing, the court, by her consent, appoints other persons, upon an appeal by the alleged incompetent such other persons are the only persons to be served with the notice of appeal, the petitioner, by her consent to their appointment, ceasing to be a party. Estate of Sullivan, 143 Cal. 462; 77 Pac. 153. Where all the parties appearing at the contest of the probate of a will are served with the notice of appeal from the order admitting the will to probate, this is sufficient to give the court jurisdiction of the appeal. Estate of Scott, 124 Cal. 671; 57 Pac. 654. A claimant against an estate, whose claim is contested by the appellant, and who was not a party to the proceedings in the trial court, need not be served with notice of appeal from the settlement of the account allowing such claim. Estate of Bullard, 114 Cal. 462; 46 Pac. 297. Legatees and devisees under a will are adverse parties who must be served with the notice of appeal from an order admitting the will

to probate. Estate of Scott, 121 Cal. 671; 57 Pac. 654. Upon appeal from an order confirming an executor's sale, the purchaser of property at such sale is an adverse party to be served with the notice of appeal. Estate of Bell, 125 Cal. 539; 58 Pac. 153. Persons in whose favor an order for the payment of a dividend is made do not thereby become parties to the proceeding for the settlement of the account of an administrator, where they do not make any contest or objection to the account, and need not be served with the notice of appeal from such order. Estate of McDougald, 143 Cal. 476; 77 Pac. 443.

Waiver of service. A mere waiver of service of the notice of appeal by an adverse party cannot give the appellate court jurisdiction of the appeal, where the notice was not addressed to such party, and there was no appearance entered by him either in person or by attorney. Hibernia Sav. & L. Soc. v. Lewis, 111 Cal. 519; 44 Pac. 175. Notice of appeal may be waived by appearance, or by stipulation. Burnett v. Piercy, 149 Cal. 178; 86 Pac. 603.

Admission of service. An admission of service of a notice of appeal, limited to one or more persons, does not bind those whose names are omitted from such admission; and a stipulation that "the appeal was duly perfected" is the admission of the due service of a properly addressed notice of appeal upon all the parties signing the stipulation. Burnett v. Piercy, 149 Cal. 182; 86 Pac. 603.

Duplicate notices and undertakings. Duplicate notices of appeal from the same judgment or order, given in time, and duplicate undertakings not designating either of the notices, also given in time, constitute, in substance, but one appeal. Estate of Sutro, 152 Cal. 249; 92 Pac. 486; 92 Pac. 1027.

Effect of failure to serve notice. A failure either to file or to serve a notice of appeal within the prescribed time is fatal to the taking of the appeal. Davey v. Mulroy, 7 Cal. App. 1; 93 Pac. 297. Where an adverse party was not served with the notice of appeal, the appellate court has no jurisdiction to hear the appeal as between the other parties. Estate of Scott, 124 Cal. 671; 57 Pac. 654. Where a decree may be modified without in any manner affecting a co-defendant of the appellant, failure to serve such co-defendant with the notice of appeal does not render the appeal defective. Latham v. Los Angeles, 83 Cal. 564; 23 Pac. 1116.

Dismissal for failure to serve. The merits of the case will not be gone into, on a motion to dismiss the appeal, for the purpose of determining whether a decision of the appeal would necessarily affect the interests of a co-defendant of the appellant, who was not served with the notice of appeal. Latham v. Los Angeles, 83 Cal. 564; 23 Pac. 1116. The failure to serve the notice of appeal upon one alleged to be an adverse party does not justify the dismissal of the appeal, where the determination of the motion to dismiss involves an examination of the entire record, and incidentally of the merits of the appeal, and the motion was not made until after the appellant had filed his points and authorities upon the appeal. Hibernia Sav. & L. Soc. v. Behnke, 118 Cal. 498; 50 Pac. 666. A motion for the dismissal of an appeal, on the ground that the notice of appeal had not been served on all the adverse parties, is not precluded by the fact that the case had been previously submitted to the court for decision. Pacific Mutual Life Ins. Co. v. Fisher, 106 Cal. 224; 39 Pac. 758. Where, in an action to enforce a street assessment, judgment was rendered against several defendants, if the effect of an appeal from the judgment is to establish that there was, in fact, no lien upon which the judgment could be rendered, a reversal of the judgment will not injuriously affect the other defendants, and therefore an appeal will not be dismissed for a failure to serve them with the notice of appeal. Warren v. Ferguson, 108 Cal. 535; 41 Pac. 417. An appeal from an order settling the account of an administrator, and from the decree of distribution, will not be dismissed for failure to serve the notice of appeal on one of the distributees, where the appeal from the order settling the account was served on the executor, as the reversal of such order would necessarily affect the decree of distribution. Estate of Delaney, 110 Cal. 563; 42 Pac. 981. Where, upon the question of the service of the notice of appeal, before or after the filing of the undertaking, the affidavits of the parties squarely contradict one another, a motion to dismiss the appeal will not be granted. Coonan v. Loewenthal, 122 Cal. 72; 54 Pac. 388. A motion to dismiss an appeal may be made by persons not parties to the record, upon whom the notice of appeal should have been served. Bullock v. Taylor, 112 Cal. 147; 44 Pac. 457.

Necessity for undertaking or deposit. An appeal is not perfected, unless an undertaking is filed or a deposit made within the prescribed time. Elliott v. Chapman, 15 Cal. 383; Shaw v. Randall, 15 Cal. 384; McAulay v. Tahoe Ice Co., 3 Cal. App. 642; 86 Pac. 912. The filing of the undertaking within the time fixed is essential to jurisdiction. Continental Building etc. Ass'n v. Beaver, 6 Cal. App. 116; 91 Pac. 666; Aram v. Shallenberger, 42 Cal. 275.

Necessity and essentials of undertaking. See note post, § 941.

Undertaking not necessary under new method of appeal. See note post, § 941b.

Undertaking on appeal from justice's court. See note post, § 978.

Kind of undertaking required. The undertaking on appeal which must be filed within five days after service of the notice of appeal, as required by this section, is the three-hundred-dollar undertaking mentioned in § 941, post. Hill v. Finnigan, 54 Cal. 493; and see Schacht v. Odell, 52 Cal. 447. The undertaking referred to in this section, and that in § 941, post, are obviously the same. McAulay v. Tahoe Ice Co., 3 Cal. App. 642; 86 Pac. 912. An undertaking in the form of and purporting to be an undertaking to stay execution, as provided in § 942, post, is not the undertaking on appeal required by this section and § 941, post. Duffy v. Greenebaum, 72 Cal. 157; 12 Pac. 74; 13 Pac. 323. One undertaking, in the sum of three hundred dollars, gives to the supreme court jurisdiction of an appeal, both from a judgment and from an order denying a motion for a new trial. Buchner v. Malloy, 152 Cal. 484; 92 Pac. 1029.

Contents of undertaking. Where two notices of appeal are given, and one undertaking is filed, which does not designate the particular appeal referred to, neither appeal is good if the notices are not identical. Estate of Sutro, 152 Cal. 249; 92 Pac. 486.

Time of executing. Where the undertaking was executed before the notice of appeal was given, the undertaking is not thereby rendered fatally defective. Stackpole v. Hermann, 126 Cal. 465; 58 Pac. 935. This section does not require that the undertaking shall not be signed by the sureties until after the appeal is taken, nor limit any time between the two acts, but merely requires that it shall be filed within five days after service of the notice of appeal; and it is not effective until it is filed. Clarke v. Mohr, 125 Cal. 540; 58 Pac. 176.

Time of filing. Where an undertaking on appeal is not filed within five days after the notice of appeal is served, the appeal is ineffectual for any purpose. Buhman v. Nickels, 1 Cal. App. 266; 82 Pac. 85; Aram v. Shallenberger, 42 Cal. 275; Reay v. Butler, 25 Pac. 685; San Francisco etc. Collection Co. v. State, 141 Cal. 354; 74 Pac. 1047; Clarke v. Mohr, 125 Cal. 540; 58 Pac. 176. Where the undertaking on appeal was filed before the notice of appeal, but within five days after the service of notice of appeal, the appeal is well taken. Hewes v. Carville, 62 Cal. 516. An undertaking on appeal, filed before service of the notice of appeal, is ineffectual for any purpose. Aram v. Shallenberger, 42 Cal. 275; Little v. Jacks, 68 Cal. 343; 8 Pac. 856. Service of the notice of appeal by mail is complete at the time of the deposit of a copy thereof in the post-office; and where the undertaking on appeal is not filed within five days from such deposit, the appeal is ineffectual. Brown v. Green, 65 Cal. 221; 38 Pac. 811. Where the fifth day after service of the notice of appeal falls upon a Sunday, the appellant has the whole of the following day in which to file the undertaking on appeal. Robinson v. Templar Lodge, 114 Cal. 41; 45 Pac. 998. The delivery of the undertaking upon appeal to a deputy clerk, at a place other than the clerk's office, after office hours, on the last day for filing, which he then marked as filed as of that day, but which did not reach the clerk's office and was not entered as filed until the following day, is not sufficiently filed to sustain the appeal. Hoyt v. Stark, 134 Cal. 178; 86 Am. St. Rep. 246; 66 Pac. 223.

Extension of time for filing. The time for filing an undertaking on appeal, as limited by this section, may be extended by the court or judge, under § 1054, post, not exceeding thirty days. Wadsworth v. Wadsworth, 74 Cal. 104; 15 Pac. 447; Schloesser v. Owen, 134 Cal. 546; 66 Pac. 726; but see Elliott v. Chapman, 15 Cal. 383, a decision rendered before the amendment to § 530 of the Practice Act (the original of § 1054, post). An order extending the time within which to file an undertaking on appeal is ineffectual, unless the same is filed in the office of the clerk within the time limited by this section for filing the undertaking. Rauer's Law etc. Co. v. Standley, 3 Cal. App. 44; 84 Pac. 214. Where the notice of appeal was served upon the attorneys of record of a respondent, more than five days before the filing of the undertaking on appeal, a second service, made personally upon such respondent, who had only appeared by his attorneys, is a mere nullity, and cannot avail to postpone the time required by law for the filing of the undertaking. Rose v. Mesmer, 134 Cal. 459; 66 Pac. 594.

Exemption from filing. A city is not required to file an undertaking on appeal (Meyer v. San Diego, 130 Cal. 60; 62 Pac. 211); nor is the state required to file an undertaking on appeal (San Francisco etc. Collection Co. v. State, 141 Cal. 354; 74 Pac. 1047); nor, where a county is the real party in interest, under § 1058, post, is a county officer required to give an undertaking on appeal, though no order is obtained dispensing with the undertaking under § 946, post. Lamberson v. Jefferds, 116 Cal. 492; 48 Pac. 485. The board of education of the city and county of San Francisco does not represent the city and county, and is not included in the exemption from filing an undertaking on appeal provided for in § 1058, post. Mitchell v. Board of Education, 137 Cal. 372; 70 Pac. 180.

Exemption from giving bonds or undertakings. See note post, § 1058.

Waiver of filing. The filing of an undertaking cannot be waived by a stipulation made after the right of appeal is lost (Niles v. Gonzalez, 152 Cal. 90; 92 Pac.

74); and a stipulation to the correctness of a transcript, that an undertaking on appeal was duly executed and filed, if proved and conceded to be untrue, and made without knowledge of the facts, is not binding, and does not constitute a valid waiver of the undertaking, there being no appeal pending when the stipulation was made. Perkins v. Cooper, 87 Cal. 241; 21 Pac. 411.

Failure of sureties to justify. The failure of the sureties to justify upon the undertaking on appeal from the judgment does not render the appeal ineffectual, nor take from the appellate court jurisdiction of the cause; and while an appeal is pending upon one notice and undertaking, a second appeal is unauthorized. Tompkins v. Montgomery, 116 Cal. 120; 47 Pac. 1006.

Effect of failure to file. Failure to file the undertaking on appeal within five days after the service of the notice of appeal renders the appeal ineffectual. Boyd v. Burrel, 60 Cal. 280; Biagi v. Howes, 63 Cal. 384; Estate of Skerrett, 80 Cal. 62; 22 Pac. 85; Reay v. Butler, 25 Pac. 685; Hoyt v. Stark, 134 Cal. 178; 86 Am. St. Rep. 246; 66 Pac. 223; Rose v. Mesmer, 134 Cal. 459; 66 Pac. 594; Buhman v. Nickels, 1 Cal. App. 266; 82 Pac. 85; Hoyt v. Stark, 134 Cal. 178; 86 Am. St. Rep. 246; 66 Pac. 223. Construing together §§ 337 and 348 of the Practice Act (this section, and § 941, post), failure to file the undertaking or make the deposit within five days after filing the notice of appeal is fatal to the appeal, and it must be dismissed. Elliott v. Chapman, 15 Cal. 383

Dismissal for want of undertaking. While, in a few cases, it has been held that an appeal will not be dismissed for a failure to file an undertaking on appeal within five days after the service of the notice of appeal, on the ground that the appeal is ineffectual for any purpose (Reed v. Kimball, 52 Cal. 325; Biagi v. Howes, 63 Cal. 384; Reay v. Butler, 25 Pac. 685; Bellegarde v. San Francisco Bridge Co., 80 Cal. 61; 22 Pac. 57), yet the rule seems to be, that an appeal will be dismissed, in such cases, by the appellate court. Winder v. Hendrick, 54 Cal. 275; Ellis v. Bennet, 2 Cal. Unrep. 302; 3 Pac. 801; Perkins v. Cooper, 87 Cal. 241; 25 Pac. 411; Robinson v. Templar, 114 Cal. 41; 45 Pac. 998; Meyer v. San Diego, 130 Cal. 60; 62 Pac. 211; Pacific Mutual Life Ins. Co. v. Edgar, 132 Cal. 197; 64 Pac. 260; Zane v. De Onativia, 135 Cal. 440; 67 Pac. 685. Where the only undertaking filed is limited by its terms to an appeal from the judgment, an appeal from an order made after judgment, with reference to which no undertaking was filed, must be dismissed. Pignaz v. Burnett, 121 Cal. 292; 35 Pac. 633. Where a city and a water company jointly gave notice of their appeals, a motion to dismiss both appeals for want of an undertaking on appeal will be denied as to the city, which is not required to give an undertaking, and will be granted as to the water company. Meyer v. San Diego, 130 Cal. 60; 62 Pac. 211. Where the appeal is from a judgment, and from any order other than an order denying a new trial, or where the notice of appeal is from more than one order, a separate undertaking must be given upon each of such appeals; otherwise a motion to dismiss the appeal will be granted. Estate of Kasson, 135 Cal. 1; 66 Pac. 871. An undertaking on appeal, executed after the filing of a first notice of appeal, and prior to the filing of a second notice, reciting that the appellant has appealed, and that the sureties undertake in consideration of such appeal, refers only to the first appeal, and limits the liability of the sureties thereto; the fact that the undertaking was filed by the appellant's attorney subsequently to the second appeal does not constitute it an undertaking thereupon; and the second appeal must be dismissed for want of an undertaking. Hibernia Sav. & L. Soc. v. Freese, 127 Cal. 70; 59 Pac. 769. A failure to file any undertaking on appeal may be taken advantage of under a motion to dismiss the appeal on the ground of the insufficiency of the undertaking, where the undertaking filed is so defective as not to constitute an undertaking. Wadleigh v. Phelps, 147 Cal. 135; 81 Pac. 418. When a motion to dismiss the appeal is made on the ground of want of the undertaking upon appeal, the character or nature of the order appealed from is not involved, and the action of the court is limited to determining whether the steps taken for the appeal are in compliance with the statute prescribing the mode of taking the appeal. Estate of Kasson, 135 Cal. 1; 66 Pac. 871. The judgment roll on appeal from an order subsequent to judgment is entirely different from the judgment roll on appeal from the judgment; and if the undertaking and the transcript belonging to each are not filed in due time, the respondent is entitled to a dismissal of the appeal. People v. Center, 61 Cal. 191. The court or judge has power to extend the time allowed by statute in which to file the undertaking on appeal; and where the undertaking is filed within the time properly allowed by the order of the judge of the court, a motion to dismiss the appeal will be denied. Schloesser v. Owen, 134 Cal. 546; 66 Pac. 726.

Dismissal of appeal at request of appellant. An attorney signing a notice of appeal is presumed to have had authority from the appellant; and, unless the appellant himself objects to the prosecution of the appeal, it will not be dismissed, upon motion of the respondent, upon the ground that it is prosecuted against the will of the appellant; nor will the court pass upon the weight or sufficiency of conflicting affidavits for the purpose of determining

whether the appellant desires the appeal to be dismissed. Woodbury v. Nevada etc. Ry. Co., 120 Cal. 367; 52 Pac. 650.

Dismissal as to some respondents, effect on appellant. In an appeal by the state from a decree of distribution, the dismissal of the appeal as to heirs not made parties to the notice cannot affect the right of appeal by the state as to the parties served: the right of each distributee is several, and independent of the rights of others as to the state. Estate of Pendergast, 143 Cal. 135; 76 Pac. 962.

Time for filing notice of appeal. See note 9 Ann. Cas. 731.

Parties entitled to notice of appeal. See note 13 Ann. Cas. 181.

CODE COMMISSIONERS' NOTE. Section 337 of the Practice Act of 1851 read as follows: "The appeal shall be made by filing with the clerk of the court, with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney." And § 348 as follows: "To render an appeal effectual for any purpose, in any case, a written undertaking shall be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars; or that sum shall be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking shall be filed, or such deposit made, with the clerk within five days after the notice of appeal is filed." For these two sections, §§ 940 and 941 of this code have been substituted.

1. **Substance of the notice.** A notice of appeal from a judgment and all orders made in the case is only a notice of appeal from the judgment. Gates v. Walker, 35 Cal. 289. An appeal "from all orders and rulings occurring on the trial" is not an appeal from an order granting or denying a new trial. Day v. Callow, 39 Cal. 593. A notice stating that the appeal is from all orders made by the probate court on a certain day is sufficient to cover any appealable order made on the day specified. Estate of Pacheco, 29 Cal. 229. If there is sufficient in the notice to show that the notice and order contained in the transcript are the same intended to be appealed from, the appeal will not be dismissed, although the notice may contain mistakes as to the date of the order or judgment. Flateau v. Lubeck, 24 Cal. 364. If the notice is signed by an attorney of the court, the presumption is that he had authority to take such action. Ricketson v. Torres, 23 Cal. 636.

2. **Filing notice of appeal.** It was held, under § 337 of the Practice Act of 1851, that the filing must precede or be contemporaneous with service of notice. Buffendeau v. Edmondson, 24 Cal. 94; Boston v. Haynes, 31 Cal. 107; James v. Williams, 31 Cal. 211; Lynch v. Dunn, 34 Cal. 518; Foy v. Domec, 33 Cal. 317. And must precede the filing of the undertaking. Buckholder v. Byers, 10 Cal. 481; Dooling v. Moore, 19 Cal. 81; Carpentier v. Williamson, 24 Cal. 609; Buffendeau v. Edmondson, 24 Cal. 94. Filing and service of notice is indispensable. Bonds v. Hickman, 29 Cal. 460; Whipley v. Mills, 9 Cal. 641. In Hastings v. Halleck, 10 Cal. 31, it was held, that to constitute an appeal three things were necessary: 1. Filing of notice; 2. Service of the same; and 3. Filing the undertaking. All of these steps must be taken within the times limited by the statute; and if not so taken, there is no appeal perfected, and the supreme court has no jurisdiction of the case. It will be seen, by reference to § 940 of this code, that the order in which the necessary steps are to be taken has been changed. When the record shows that a notice of appeal was served the same day that it was filed by the clerk, and the indorsement of the filing precedes the indorsement of admission of service, the inference is that the filing preceded the service. Wright v. Ross, 26 Cal. 262. Or if the notice of appeal is served on respondent's attorney, and immediately afterwards filed by the clerk, the service and filing will be regarded as one act. Id. Affidavits will not be received in the appellate court to show that a notice of appeal was filed on a different day from that stated in the record. Boston v. Haynes, 31 Cal. 107; see also Lorenzana v. Camarillo, 45 Cal. 125. If one of several respondents dies before notice of appeal is filed, a motion to dismiss the appeal as to him must be granted. Shartzer v. Love, 40 Cal. 93. Where an appeal was taken and perfected after the death of the appellant, it was held that there was no authority for prosecuting the cause in the name of the deceased, but that all proceedings should have been stayed until the executor or administrator could, by suggestion, have been made a party. Sanchez v. Roach, 5 Cal. 248.

3. **Service of notice.** A party appealing must notify all other parties to the action who have appeared and are interested in opposing the relief sought by appeal. Senter v. Bernal, 38 Cal. 637. The words "adverse party," used in relation to appeals, includes every party whose interest in the subject-matter is adverse to a reversal or modification of the judgment, without regard to the position as plaintiff or defendant of the party. Senter v. Bernal, 38 Cal. 637. Service on attorney is sufficient. Coulter v. Stark, 7 Cal. 244. It must affirmatively appear that the notice was served. Hildreth v. Gwindon, 10 Cal. 490. Proof of service, and supplying proof of service of notice. See Moore v. Besse, 35 Cal. 184; Towdy v. Ellis, 22 Cal. 650; Doll v. Smith, 32 Cal. 475.

4. **Waiver of defects in notice.** James v. Williams, 31 Cal. 211.

5. **Waiver of notice.** McLeran v. Shartzer, 5 Cal. 70; 63 Am. Dec. 84; Moulton v. Ellmaker, 30 Cal. 527; Mokelumne Hill etc. Mining Co. v. Woodbury, 10 Cal. 185.

6. **Filing undertaking.** Elliott v. Chapman, 15 Cal. 383; Bradley v. Hall, 1 Cal. 199; Cummins v. Scott, 23 Cal. 526; Shaw v. Randall, 15 Cal. 384; Hastings v. Halleck, 10 Cal. 31; Carpentier v. Williamson, 24 Cal. 609. If no undertaking on appeal has been filed, one may be filed after the objection has been taken. Bornheimer v. Baldwin, 38 Cal. 671; see also § 954 of this code.

§ 941. Undertaking or deposit on appeal. The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal.

Undertaking on appeal.
1. **Filing, time for.** Ante, § 940, and see post, § 1054.
2. **Sufficiency of.** Post, § 954.
3. **Sureties paying judgment.** Post, § 1059.

Deposit with clerk. Post, § 948.

Filing new undertaking in appellate court. See post, § 954.

Qualification of sureties. Post, § 1057.

Legislation § 941. Enacted March 11, 1872; based on Practice Act, § 348 (New York Code, § 334), which read: "To render an appeal effectual for any purpose, in any case, a written undertaking shall be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars; or that sum shall be deposited with the clerk, with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking shall be filed, or such deposit made with the clerk within five days after the notice of appeal is filed."

Constitutionality of statute. The act of March 12, 1885 (Stats. 1885, p. 114), in so far as it attempts to authorize the acceptance of a corporation, organized for that purpose, as sole and sufficient surety on an undertaking on appeal, is unconstitutional and void. Cramer v. Tittle, 2 Cal. Unrep. 715; 11 Pac. 852.

Construction of code sections. The undertaking referred to in this section and that in § 940, ante, are obviously the same. McAulay v. Tahoe Ice Co., 3 Cal. App. 642; 86 Pac. 912. The provisions of this section, as well as those of §§ 938, 963, ante, must be read as if the words "appeal," "appellant," and "party aggrieved," were plural. Estate of Sutro, 152 Cal. 249; 92 Pac. 486, 1027. This section, in its application to probate appeals, is limited. Estate of Brewer, 156 Cal. 89; 103 Pac. 486.

Undertaking or deposit, time of filing or making. Construing together §§ 337, 348, of the Practice Act (§ 940, ante, and this section), an appeal is not effectual for any purpose, unless an undertaking is filed or a deposit made with the clerk within five days after the filing of the notice: failure so to file the undertaking or to make the deposit is fatal to the appeal. Elliott v. Chapman, 15 Cal. 383. The filing of an undertaking perfects an appeal, but it is not a part of the taking, in the statutory sense; hence, the filing of an undertaking on appeal, more than sixty days after the rendition of the judgment, does not prevent the consideration of the sufficiency of the evidence, where the notice of appeal was served and filed within such time. Perkins v. Cooper, 3 Cal. Unrep. 279; 24 Pac. 377. A deposit of money in lieu of an undertaking on appeal must be made within five days after the notice of appeal is served and filed: if made after that time, the appeal will be dismissed. Stratton v. Graham, 68 Cal. 169; 8 Pac. 710.

Time of filing undertaking. See note ante, § 940.

Contests and sufficiency of undertaking. An undertaking on appeal, which is properly entitled in the case, and states correctly the date of the rendition and the entry of the judgment, is sufficient to bind the sureties: the specification of one item or incident of the judgment cannot invalidate what is otherwise sufficient. Wadleigh v. Phelps, 147 Cal. 135; 81 Pac. 418. An undertaking on appeal, which does not contain a stipulation for the payment of damages and costs in the event of a dismissal of the appeal, as required by this section, is ineffectual. Duncan v. Times-Mirror Co., 109 Cal. 602; 42 Pac. 147; Anderson v. Anderson, 123 Cal. 445; 56 Pac. 61; Estate of Fay, 126 Cal. 457; 58 Pac. 936; Jarman v. Rea, 129 Cal. 157; 61 Pac. 790. Where the undertaking on appeal does not contain the stipulation for the payment of damages and costs, the defect is not cured by the insertion of such stipulation in an undertaking to stay execution of the judgment, although the latter undertaking is included in the same document with the former and the sureties on each are the same. Duncan v. Times-Mirror Co., 109 Cal. 602; 42 Pac. 147. An undertaking on appeal, by one defendant, that the sureties undertake that the appellants will pay all costs and damages, is insufficient: standing on the strict letter of their contract, the sureties could not be liable thereon for anything as costs and damages that could be awarded against only one appealing defendant. Zane v. De Onativia, 135 Cal. 440; 67 Pac. 685. The proper construction of an undertaking on appeal, that the sureties will pay all costs and damages that may be awarded against the appellant, is, that the sureties are liable thereon to the respondent; and the omission of the name of the obligee, in such undertaking, is immaterial. Downing v. Rademacher, 136 Cal. 673; 69 Pac. 415. An undertaking on appeal from a judgment, which properly refers to the judgment, so as fully to identify it, is sufficient. Pacific Paving Co. v. Verso, 11 Cal. App. 383; 105 Pac. 136. An undertaking on appeal, otherwise sufficiently referring to the order from which the appeal is taken, is not rendered insufficient because of a recital therein, that the plaintiff "is about to appeal," instead of that he "has appealed," from such order. Kaltschmidt v. Weber, 139 Cal. 76; 72 Pac. 632. The undertaking on appeal must conform to the notice of appeal; hence, where the notice of appeal is from the whole judgment, and the undertaking recites an appeal from the judgment for costs, the appeal will be dismissed. Stockton School District v. Goodell, 6 Cal. Unrep. 277; 56 Pac. 885.

Execution of undertaking. An undertaking on appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant shall join: the statute provides that it shall be executed on the part of the appellant, not by him, but by the sureties. Curtis v. Richards, 9 Cal. 34.

Sufficiency of single undertaking for two appeals. A single undertaking on an appeal from the judgment, and from an order denying a new trial, is sufficient (Chester

v. Bakersfield Town Hall Ass'n, 64 Cal. 42; 27 Pac. 1104; Sharon v. Sharon, 68 Cal. 326; 9 Pac. 187; Corcoran v. Desmond, 71 Cal. 100; 11 Pac. 815; Centerville etc. Ditch Co. v. Bachtold, 109 Cal. 111; 41 Pac. 813; Estate of Ryer, 110 Cal. 556; 42 Pac. 1082; Granger v. Robinson, 114 Cal. 631; 46 Pac. 604; Martin v. Ornelas, 139 Cal. 41; 72 Pac. 440; White v. Stevenson, 139 Cal. 531; 73 Pac. 421; Buchner v. Malloy, 152 Cal. 484; 92 Pac. 1029); but such undertaking must refer to each of the appeals, and show, upon its face, that it is given in consideration of both: if it recites merely one, the other appeal will be dismissed. Buchner v. Malloy, 152 Cal. 484; 92 Pac. 1029. Where the undertaking on appeal from the judgment makes no reference to the appeal from the order denying a new trial, such last-named appeal will be dismissed. Corcoran v. Desmond, 71 Cal. 100; 11 Pac. 815; Berniaud v. Beecher, 16 Pac. 510; Wood v. Pendola, 77 Cal. 82; 19 Pac. 183; Schurtz v. Romer, 81 Cal. 244; 22 Pac. 657; Crew v. Diller, 86 Cal. 555; 25 Pac. 66; Pacific Paving Co. v. Bolton, 89 Cal. 155; 26 Pac. 650; Forni v. Yoell, 95 Cal. 442; 30 Pac. 578; Duncan v. Times-Mirror Co., 109 Cal. 602; 42 Pac. 147; Granger v. Robinson, 114 Cal. 631; 46 Pac. 604; Rhoads v. Gray, 5 Cal. Unrep. 664; 48 Pac. 971; Dodge v. Kimple, 121 Cal. 580; 54 Pac. 94; McRae v. Argonaut Land etc. Co., 6 Cal. Unrep. 145; 54 Pac. 743. The undertaking on the appeal from the judgment is distinct from the undertaking on appeal from the order denying a new trial; and although both may be included in the same instrument, yet the validity of each is to be determined by a reference to the appeal for which it is given. Clarke v. Mohr, 125 Cal. 540; 58 Pac. 176. On appeal from a judgment, and from an order denying a new trial, the undertaking must refer to each of the appeals as distinctly as if they were from separate orders requiring an undertaking for each. Granger v. Robinson, 114 Cal. 631; 46 Pac. 604; Corcoran v. Desmond, 71 Cal. 100; 11 Pac. 815. An undertaking on appeal, which, after reciting an appeal from the judgment, and an appeal from the order denying a new trial, declares that the appellants will pay damages awarded against them on the appeal or on a dismissal thereof, not exceeding three hundred dollars, is sufficient to sustain both appeals. Bell v. Staacke, 159 Cal. 193; 115 Pac. 221. Where one undertaking on appeal is sufficient to cover joint appeals from the judgment, and from an order denying a new trial, the fact that the words "or either of them" are omitted after the word "appeals," in the undertaking, does not render it invalid. Martin v. Ornelas, 139 Cal. 41; 72 Pac. 440. Where only one undertaking on appeal was filed, which recited the judgment, and the order appealed from, and provided that, in consideration of such appeal, the appellants would pay all damages and costs, and also contained a further provision and promise for a stay of execution under the judgment, the undertaking is insufficient to support either the appeal from the judgment or the appeal from the order. Corcoran v. Desmond, 71 Cal. 100; 11 Pac. 815. Where two appeals are taken, one from the judgment and the other from an order denying a motion to set aside the judgment, a single undertaking, given "in consideration of the premises and of such appeal," and conditioned that the appellants will pay all damages awarded against them on "the appeal," is insufficient, by reason of its ambiguity, to support either appeal. Carter v. Butte Creek Gold Mining etc. Co., 131 Cal. 350; 63 Pac. 667. Where an appellant, by one notice of appeal, gave notice that he appealed from the judgment, from an order denying a motion to dismiss the action, and from an order denying a motion to set aside a judgment by default, and gave one undertaking upon appeal, not referring separately to either of the appeals, the undertaking is void, and there is no remedy, under this section, to file a new undertaking, so as to preclude a dismissal of the appeal. McCormick v. Belvin, 96 Cal. 182; 31 Pac. 16. An undertaking on appeal is void, and the appeal wholly ineffectual, where there is more than one appeal, and the recitals of the undertaking do not identify the particular appeal which it was intended to perfect. Estate of Sutro, 152 Cal. 249; 92 Pac. 486, 1027; Pacific Paving Co. v. Verso, 11 Cal. App. 383; 105 Pac. 136. An undertaking on appeal from an order denying a motion to dismiss an action, and from an order denying a new trial, which does not state that the appeal has been taken from both orders, is insufficient. Field v. Andrada, 37 Pac. 180. Where an appeal is taken from two distinct orders, and only one undertaking is filed, which fails to designate to which of the appeals it is intended to apply, it is so ambiguous that it must be disregarded as if none had been filed. Home etc. Associates v. Wilkins, 71 Cal. 626; 12 Pac. 799; Crew v. Diller, 86 Cal. 555; 25 Pac. 66; Estate of Heydenfeldt, 119 Cal. 346; 51 Pac. 543; and see People v. Center, 61 Cal. 191. Where there are several appeals in the same action, the record on each appeal may be embodied in one transcript, but each appeal must be accompanied by an undertaking, and the particular appeal to which it applies designated, although the undertakings may be contained in one instrument, if the objects for which they are executed can be clearly distinguished. Sharon v. Sharon, 68 Cal. 326; 9 Pac. 187. An undertaking for costs, filed on an appeal from an order dismissing a motion for a new trial, which does not refer to an appeal from the judgment, which is taken

subsequently, cannot be treated as an undertaking for costs on such subsequent appeal. Biagi v. Howes, 63 Cal. 384. Where the appeal is from a judgment and any order other than an order denying a new trial, or where the notice of appeal is from more than one order, a separate undertaking must be given on each of such appeals; and this rule is not varied by the fact that one or more of the orders included in the appeal is not appealable. Estate of Kasson, 135 Cal. 1; 66 Pac. 871. Where a notice of appeal from a judgment also specially enumerates numerous unappealable orders as orders appealed from, which are reviewable on appeal from the judgment, it is a notice of appeal from the judgment alone, and a single undertaking is sufficient. Wadleigh v. Phelps, 147 Cal. 135; 81 Pac. 418. Where an appeal was taken from a judgment dismissing the action, and also from an order made after judgment, a single undertaking is insufficient. Gardiner v. California Guarantee Investment Co., 129 Cal. 528; 62 Pac. 110. The word "appeal," as used in the undertaking portion of an appeal bond, means the whole appeal described in the instrument, both that from the judgment and the appeal from the order denying a new trial. Buehner v. Malloy, 152 Cal. 484; 92 Pac. 1029.

Undertaking on joint appeals. The statute does not require separate undertakings for separate interests. Estate of Sutro, 152 Cal. 249; 92 Pac. 486, 1027. A plaintiff and a defendant, who were defendants in a cross-complaint filed by another defendant, may unite in an undertaking on appeal from the order against them on such cross-complaint. Downing v. Rademacher, 136 Cal. 673; 69 Pac. 415. The insufficiency of the three-hundred dollar undertaking on a joint appeal will not defeat the appeal. Estate of Sutro, 152 Cal. 249; 92 Pac. 486, 1027. Where an appeal is taken by more than one party, and an undertaking thereon is given by only one of the appellants, such undertaking is sufficient to perfect the appeal of the appellant by whom it is given; but where an appeal is taken by only one party, and the undertaking thereon purports to be given on an appeal taken by several appellants, such undertaking is insufficient to support the appeal, and it will be dismissed. Zane v. De Onativia, 135 Cal. 440; 67 Pac. 685.

Clerical errors in undertaking. Where the year as well as the date of the judgment is incorrectly stated in the undertaking on appeal, but the mistake in the year is an obvious slip of the pen, and corrects itself, while the mistake as to the day is immaterial, the undertaking is not vitiated, where the judgment is otherwise correctly described, so that sureties on the undertaking are bound by it. Swasey v. Adair, 83 Cal. 136; 23 Pac. 284.

Consideration for undertaking. An undertaking on appeal from an order denying a new trial, before it is entered, is without consideration, and void. Clarke v. Mohr, 125 Cal. 540; 58 Pac. 176; Stackpole v. Hermann, 126 Cal. 465; 58 Pac. 935. The validity of an appeal bond given as required by law to make an appeal effectual, the sureties upon which agree to be liable if the appeal is dismissed, is not destroyed by the fact that the appeal is premature and is not effectually secured; the expense to the respondent in securing a dismissal of the void appeal is a consideration for such undertaking. Estate of Kennedy, 129 Cal. 384; 62 Pac. 64.

Death of obligee, effect on undertaking. The fact that a co-plaintiff died prior to the judgment in the action does not vitiate an undertaking given upon appeal in his favor as one of the co-plaintiffs; his name as obligee represented his executors or distributees as the real parties in interest; the undertaking necessarily follows the judgment, and is valid, both as against the obligors and in favor of the executors or distributees of the deceased obligee named therein. Todhunter v. Klemmer, 134 Cal. 60; 66 Pac. 75.

Liability of sureties. The presumption is, that the surety on an undertaking on appeal intended to undertake for the appeal then in force, and not for a prior ineffectual appeal. Estate of Sutro, 152 Cal. 249; 92 Pac. 486, 1027. An undertaking on appeal from an order denying a new trial, before it is entered, is without consideration; and the subsequent interlineation of the date of the order in such undertaking is an alteration discharging the sureties, and such appeal must be dismissed. Clarke v. Mohr, 125 Cal. 540; 58 Pac. 176.

Attorney as surety. The fact that one of the attorneys of the appellant became a surety for such appellant upon the undertaking on appeal, in violation of a rule of the court, is not a ground of dismissal. De Jarnatt v. Marguez, 127 Cal. 558; 78 Am. St. Rep. 90; 60 Pac. 45.

Estoppel to object to undertaking. Where a respondent stipulates that the appellant has in due time given and filed a good and sufficient undertaking upon appeal in the cause, he is estopped from contradicting, after the time for appeal has expired, his former admissions. Forni v. Yoell, 95 Cal. 442; 30 Pac. 578. Where, on appeal from an order settling the final account of an executor and distributing the estate, there is a stipulation in the transcript, that "an undertaking in due form was properly made and filed," the objection that there are in fact two appeals, and that the undertaking is invalid because it refers to only one, without indicating which one, cannot be raised after the expiration of the time within which another undertaking might have been filed. Estate

of Marshall, 118 Cal. 379; 50 Pac. 540; Springer v. Springer, 126 Cal. 452; 58 Pac. 1060. Notwithstanding one undertaking upon two distinct appeals is so defective as to justify the dismissal of both, yet the right to move to dismiss the appeal from the judgment will be deemed waived, where the parties have mutually stipulated for extensions of time for the filing of points and authorities, and no objection was raised to the regularity or sufficiency of the appeal until after such points and authorities were filed, and until it was too late to take another appeal; but such waiver does not apply to a distinct appeal from an order made after judgment, the time of appeal from which had elapsed before any stipulations were made. Gardiner v. California Guarantee Investment Co., 129 Cal. 528; 62 Pac. 110.

Undertaking stays proceedings. Upon appeal from an order appointing an administrator, the required undertaking on appeal stays all proceedings upon the order appealed from. Estate of Woods, 94 Cal. 566; 29 Pac. 1108. The undertaking provided for by this section stays proceedings, except in those cases specified in §§ 942–945, post, and a few special matters mentioned in § 949, post. Estate of Woods, 94 Cal. 566; 29 Pac. 1108.

Stay of proceedings. See also note post, § 949.

Effect of perfecting appeal to stay proceedings. See note post, § 949.

Withdrawal of deposit. A party who has deposited in the trial court the amount of money required in lieu of an undertaking upon appeal, will not be allowed, upon a motion therefor in the supreme court, to withdraw the money so deposited, and file an undertaking upon appeal in lieu thereof. Wiebold v. Rauer, 95 Cal. 418; 30 Pac. 558.

Appeal dismissed when. In the absence of a bond, deposit, or waiver, the appeal is ineffectual, and will be dismissed. Willow Land Co. v. Goldschmidt, 11 Cal. App. 297; 104 Pac. 841.

Undertaking on appeal from justice's court. See note post, § 978.

Methods of taking an appeal. See note ante, § 940, and note post, § 941b.

Liability of sureties on appeal bonds. See note 38 Am. St. Rep. 702.

CODE COMMISSIONERS' NOTE. 1. Generally. Elliott v. Chapman, 15 Cal. 383; Gordon v. Wansey, 19 Cal. 82.

2. Form of undertaking. Canfield v. Bates, 13 Cal. 606; Dore v. Covey, 13 Cal. 502; Dobbins v. Dollarhide, 15 Cal. 375; Billings v. Roadhouse, 5 Cal. 71; Swain v. Graves, 8 Cal. 549; Tissot v. Darling, 9 Cal. 278; Zoller v. McDonald, 23 Cal. 136.

3. State and county need not file undertaking. Warden v. Mendocino County, 32 Cal. 655; People v. Clingan, 5 Cal. 389; Thornton v. Mahoney, 24 Cal. 569. See § 1058 of this code.

§ 941a. Appeals. Alternative method.

Appeals from all judgments, orders or decrees of any of the superior courts of this state, which may pursuant to law be reviewed by the supreme court, or any of the district courts of appeal of this state, may, in addition to the other modes prescribed by law, be taken pursuant to the provisions of the next section.

Legislation § 941a. Added by Stats. **1907**, p. 753 (based on §§ 949–554, Bellinger and Cotton's Oregon Ann. Codes and Stats.); the code commissioner saying of this section and of §§ 941b and 941c. "These are entirely new provisions prescribing an alternative method of taking appeals to the supreme court or district courts of appeal."

Constitutionality. The alternative method of appeal is constitutional. Mitchell v. California etc. S. S. Co., 154 Cal. 731; 99 Pac. 202.

Construction. The act of 1907 did not repeal the old method of appeal; an appeal perfected under either method is sufficient: all statutes in aid of appeals are to be liberally construed and applied. Mitchell v. California etc. S. S. Co., 154 Cal. 731; 99 Pac. 202. Rules of decision are not changed by the alternative method. United Investment Co. v. Los Angeles etc. Ry. Co., 10 Cal. App. 175; 101 Pac. 543.

Probate appeals. The alternative method of appeal is applicable to appeals from probate orders. Estate of McPhee, 154 Cal. 385; 97 Pac. 878. This section is limited in its application by the existence of special provisions relative to probate appeals. Estate of Brewer, 156 Cal. 89; 103 Pac. 486.

Bill of exceptions must be served. The alternative method of appeal, prescribed in §§ 941a, 941b, 941c, does not dispense with service of the bill of exceptions to be used on motion for a new trial. Ford v. Braslan Seed Growers Co., 10 Cal. App. 762; 103 Pac. 946.

Consideration of evidence. Under this section and §§ 941b, 941c, post, the appellate court cannot consider the evidence, unless it is embodied in a statement, bill of exceptions, or a transcript, approved as provided in § 953, post. Lane v. Tanner, 156 Cal. 135; 103 Pac. 846. A sufficient record is made, so far as the notice of appeal and the judgment roll are concerned, by the clerk's certificate to their correctness. Totten v. Barlow, 165 Cal. 378; 132 Pac. 749. An appellant, in order to avail himself of the alternative method of appeal, must present a transcript consisting of copies of the moving papers, the evidence taken upon the hearing of the mo-

tion, and the rulings of the court thereon, certified by the trial judge; the clerk cannot certify this record. Thompson v. American Fruit Co., 21 Cal. App. 338; 131 Pac. 878; Pouchan v. Godeau, 21 Cal. App. 365; 131 Pac. 879.

Undertaking not required. No undertaking is required on an appeal under this section. Theisen v. Matthai, 165 Cal. 249; 131 Pac. 747.

Undertaking not necessary under new method of appeal. See note post, § 941b.

§ 941b. Notice of appeal, what to contain. Any person to whom the right of appeal from any judgment, order or decree of the superior courts of the state is granted, may appeal therefrom by filing with the clerk of the court in which the judgment, order or decree is rendered, a notice entitled in the cause in which said judgment, order or decree was made, which said notice shall state that the person giving the same does thereby appeal to the supreme court or district court of appeal, as the case may be, from the judgment, order or decree, or some specific part thereof; and the said notice must identify the said judgment, order or decree or the part thereof appealed from, with reasonable certainty. This notice may be filed at any time after the rendition of the judgment, order or decree, but the same must be filed within sixty days after entry of said judgment, order or decree. If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion. This notice need not be served upon any of the parties to the action or the proceeding, or their representatives or attorneys, but when filed within the time herein specified it shall, without further action on the part of the appellant, transfer the cause for decision and determination to the higher court. In the event of the death of any person having at his death a right of appeal the attorney of record representing the decedent in the court in which the judgment was rendered may appeal therefrom at any time before the appointment of an executor or an administrator of the estate of the decedent.

Legislation § 941b. 1. Added by Stats. **1907**, p. 753; based on §§ 549–554, Bellinger and Cotton's Oregon Ann. Codes and Stats. See ante, Legislation § 941a.

2. Amended by Stats. **1915**, p. 204, (1) in second sentence, (a) striking out "notice of," before "entry of said judgment," and (b) also striking out, at end of sentence, "has been served upon the attorneys of record appearing in said cause or proceeding, provided, however, that if no notice of entry of judgment be given the notice must, nevertheless, be filed, under any circumstances, not later than six months after the entry of the judgment, order or decree"; (2) inserting the third sentence.

Application of section. This section applies to all appeals; but as to probate appeals it is limited in its application by the existence of special provisions relative to such appeals. Estate of Brewer, 156 Cal. 89; 103 Pac. 486. An appeal in a probate or guardianship proceeding is not to be taken under this section, but under §§ 1714, 1715, post. Estate of Dunphy, 158 Cal. 1; 109 Pac. 627. The last paragraph of this section is inapplicable, where an administratrix was appointed and letters were issued to her before the filing of either of the notices of appeal. Deiter v. Kiser, 158 Cal. 259; 110 Pac. 921.

Notice of entry of judgment. The notice of entry of judgment is a notice in writing, which may be served in the ordinary manner. Estate of Keating, 158 Cal. 109; 110 Pac. 109. Where the record on appeal does not show that any notice of entry of judgment was served on the appellants, it must be assumed that no such notice was served. Fraser v. Sheldon, 164 Cal. 165; 128 Pac. 33. Actual service of a written notice of the entry of a judgment is essential to start in motion the sixty days within which to appeal. Huntington Park Improvement Co. v. Park Land Co., 165 Cal. 429; 132 Pac. 760. This section does not require that any notice of the entry of the order or judgment shall be filed or put upon the record. Foss v. Johnstone, 158 Cal. 119; 110 Pac. 294.

Time of appeal. Under this section, which prescribes a new method of appealing from final judgments, the appeal must be taken within sixty days after the notice of entry of judgment, or if no notice thereof is given, not later than six months after the entry of such judgment. Cook

v. Suburban Realty Co., 20 Cal. App. 538; 129 Pac. 801. This section allows an appeal to be taken from an order at any time after the rendition thereof, provided it is within sixty days after notice of the entry thereof has been served on the attorney of record of the adverse party, or if no such notice is given, then not later than six months after such entry. Foss v. Johnstone, 158 Cal. 119; 110 Pac. 294. Where no notice of an order denying a new trial was ever served, an appeal from the order, taken more than sixty days but within six months from the date of its entry, is in time, under this section and § 941a, ante. Brode v. Goslin, 158 Cal. 699; 112 Pac. 280. Though an appeal taken more than sixty days after the entry of the order denying a new trial would be too late under § 939, ante, yet, when measured under the provisions of this section, such appeal is valid and in time, where the record shows no notice to the appellant of the entry of such order. Union Lumber Co. v. Sunset Road Oil Co., 17 Cal. App. 460; 120 Pac. 44. The provisions of this section are also applicable to an appeal assumed to be taken under the older method; the time within which an appeal must be taken, subject to the limitations of the statute, does not commence to run until notice of the entry of the judgment or order has been given. Carr v. Stern, 17 Cal. App. 397; 120 Pac. 35.

Notice of appeal. An appeal may be taken by simply filing a notice of appeal. Mitchell v. California etc. S. S. Co., 154 Cal. 731; 99 Pac. 202; Russell v. Banks, 11 Cal. App. 450; 105 Pac. 261. Notice of appeal is essential to the taking of an appeal, either under this section or under § 940, ante: a notice to the clerk to prepare a transcript is not a notice of appeal. Boling v. Alton, 162 Cal. 297; 122 Pac. 461. Prior to the adoption of this section, it was necessary not only to file the notice of appeal but to serve it. Davey v. Mulroy, 7 Cal. App. 1; 93 Pac. 297. This section does not require service of notice of appeal. Potrero Nuevo Land Co. v. All Persons, 155 Cal. 371; 101 Pac. 12; Davey v. Mulroy, 7 Cal. App. 1; 93 Pac. 297; Carr v. Stern, 17 Cal. App. 397; 120 Pac. 35. Notice of appeal must be filed, but need not be served. John Brickell Co. v. Sutro, 11 Cal. App. 460; 105 Pac. 948; Mitchell v. California etc. S. S. Co., 154 Cal. 731; 99 Pac. 202. Notice of intention to move for a new trial must be served, though it is not necessary that the filed notice of appeal be served. Ford v. Braslan Seed Growers Co., 10 Cal. App. 762; 103 Pac. 946.

Request for transcript. The appellant, in order to avail himself of the method of appeal in § 953a, post, must file with the clerk a request for a transcript as provided therein. Thompson v. American Fruit Co., 21 Cal. App. 338; 131 Pac. 878.

Transcript. Where a party takes an appeal under this section, he may follow it up by a printed transcript and copies thereof, as required by the rules of the supreme court, or, at his option, by filing the typewritten transcript authorized by §§ 953a, 953b, and 953c. Lang v. Lilley & Thurston Co., 161 Cal. 295; 119 Pac. 100. Where a transcript does not conform to the rules of the supreme court, it cannot be filed, or the appeal be considered, except as to such questions as may be reviewed on the judgment roll alone, when the judgment roll is in a proper, separate, and distinct form from the transcript. Reclamation District v. Sherman, 11 Cal. App. 399; 105 Pac. 277.

Undertaking not required. Under this section, no undertaking is essential to the jurisdiction of the appellate court, although the record may be prepared, according to the former method, in the form of a bill of exceptions, instead of by the reporter's transcript authorized by § 953a, post. Union Collection Co. v. Oliver, 162 Cal. 755; 124 Pac. 435; Bohn v. Bohn, 159 Cal. 366; 116 Pac. 567; Mitchell v. California etc. S. S. Co., 154 Cal. 731; 99 Pac. 202; Estate of McPhee, 154 Cal. 385; 97 Pac. 878; Carr v. Stern, 17 Cal. App. 397; 120 Pac. 35; Russell v. Banks, 11 Cal. App. 450; 105 Pac. 261. No undertaking is required on an appeal under this section. Theisen v. Matthai, 165 Cal. 249; 131 Pac. 747.

Requirements in addition to the giving of notice under this section. See note post, § 953a.

When evidence may be reviewed. Where an appeal is taken under the alternative method, this section and § 941c, post, authorize the sufficiency of the evidence to be reviewed in the same manner as if the appeal had been taken within sixty days of the entry of judgment, under § 939, ante. Fraser v. Sheldon, 164 Cal. 165; 128 Pac. 33; Dennis v. Gordon, 163 Cal. 427; 125 Pac. 1063; Brown v. Coffee, 17 Cal. App. 381; 121 Pac. 309. Where an appeal is taken under this section, within six months from the entry of judgment, the evidence may be reviewed, where no notice of the entry of judgment was given. Fraser v. Sheldon, 164 Cal. 165; 128 Pac. 33; Larson v. Larson, 15 Cal. App. 531; 115 Pac. 340; Brown v. Coffee, 17 Cal. App. 381; 121 Pac. 309. Where no notice of the entry of the judgment was served upon the attorney for the appellant, within sixty days before the taking of the appeal, then, under this section and § 941c, post, the sufficiency of the evidence may be reviewed upon appeal from the judgment. Foss v. Johnstone, 158 Cal. 119; 110 Pac. 294. A party who wishes to take advantage of the fact that notice of the

entry of judgment was served, for the purpose of preventing a consideration of the evidence on appeal from the judgment taken more than sixty days after its entry, must show that such notice was served more than sixty days before the taking of such appeal; otherwise the appeal will be considered as having been taken under §§ 941a, 941b, and 941c. Dennis v. Gordon, 163 Cal. 427; 125 Pac. 1063; Brown v. Coffee, 17 Cal. App. 383; 121 Pac. 309.

Certification of record. An appellant, in order to avail himself of the alternative method of appeal, must present a transcript consisting of copies of the moving papers, the evidence taken upon the hearing of the motion, and the rulings of the court thereon, certified by the trial judge; the clerk cannot certify this record. Thompson v. American Fruit Co., 21 Cal. App. 338; 131 Pac. 878; Pouchan v. Godeau, 21 Cal. App. 365; 131 Pac. 879. A sufficient record is made, so far as the notice of appeal and the judgment roll are concerned, by the clerk's certificate to their correctness. Totten v. Barlow, 165 Cal. 378; 132 Pac. 749.

Effect on time to appeal of death of judgment plaintiff. See note 7 Ann. Cas. 393.

Effect of death of party pending appeal. See note 49 L. R. A. 168.

§ 941c. **Effect of appeal.** Appeals perfected pursuant to the provisions of the foregoing section, shall have the same force and effect as appeals taken pursuant to the provisions of sections nine hundred and thirty-nine, nine hundred and forty and nine hundred and forty-one of this code; provided, however, that any question may be reviewed therein, which question could be reviewed upon an appeal taken pursuant to the provisions of section nine hundred and thirty-nine of this code, and within sixty days of the rendition of judgment.

Legislation § 941c. Added by Stats. **1907**, p. 754. See ante, Legislation § 941a.

Application of section. This section applies to all appeals; but as to probate appeals it is limited in its application by the existence of special provisions relative to such appeals. Estate of Brewer, 156 Cal. 89; 103 Pac. 486.

Reviewing sufficiency of the evidence. See note ante, § 941b.

Record and undertaking. A sufficient record is made, so far as the notice of appeal and the judgment roll are concerned, by the clerk's certificate to their correctness. Totten v. Barlow, 165 Cal. 378; 132 Pac. 749. No undertaking is required on an appeal under this section. Theisen v. Matthai, 165 Cal. 249; 131 Pac. 747.

§ 942. **Undertaking on appeal from a money judgment.** If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from or any part thereof be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than two thousand dollars, and the sureties do not state in their affidavits of justification accompanying the undertaking that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as in their affidavits they may state that they are severally worth, and judgment may be entered

against the sureties by the court from which the appeal is taken, pursuant to the stipulations herein designated. When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency.

Deposit in lieu of undertaking. Ante, § 941; post, § 948.
Qualification of sureties. Post, § 1057.
Specified kind of money. Ante, § 667.
Stay, where no provision made. Post, § 949.

Legislation § 942. 1. Enacted March 11, **1872**; based on Practice Act, § 349 (New York Code, § 335), as amended by Stats. 1863, p. 690, which read: "If the appeal be from a judgment or order directing the payment of money, it shall not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, stating their places of residence and occupation, to the effect that they are bound in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed, the appellant shall pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal. When the judgment or order appealed from is made payable in a specified kind of money or currency, the undertaking required by this section shall be drawn and made payable in the same kind of money or currency specified in such judgment." When § 942 was enacted in 1872, (1) "does" was substituted for "shall" before "not stay"; (2) "stating their places of residence and occupation," after "sureties," was omitted; (3) "or the appeal be dismissed," after "affirmed," was added; (4) "will" was substituted for "shall" before "pay"; (5) "is" was substituted for "shall be" before "affirmed"; (6) "may" was substituted for "shall" before "be awarded"; and (7) "must" was substituted for "shall" before "be drawn."

2. Amended by Code Amdts. **1873–74**, p. 336.

Construction of section. The judgment referred to in this section is the decree passing upon the matter directly involved in the litigation: in all other cases the proceedings are held in abeyance by virtue of the statute itself. McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 442; 33 Pac. 329. The words, "or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part," found in this section, are not in § 945, post. Heinlen v. Beans, 71 Cal. 295; 12 Pac. 167.

Application of section. This section is applicable only to appeals from a judgment or order directing the payment of money. Weldon v. Rogers, 154 Cal. 632; 98 Pac. 1070. Where the fund over which the litigation arose has never been in the possession of the appellants, but was in the custody of the court, no undertaking on appeal to stay execution, under this section, is required. McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 442; 33 Pac. 329. This section does not authorize the giving of an undertaking on an appeal from an order, not one directing the payment of money, to stay the proceedings, either on the original judgment or on the execution. Weldon v. Rogers, 154 Cal. 632; 98 Pac. 1070.

Money judgment, what constitutes. This section is applicable to judgments which direct the payment, by the defendant, of a specific amount of money, and which can be directly enforced by a writ of execution (Kreling v. Kreling, 116 Cal. 458; 48 Pac. 383), and to judgments which require the same process for their enforcement (Foster v. Superior Court, 115 Cal. 279; 47 Pac. 58); it refers solely to judgments in personam for a certain sum of money, and provides that upon affirmance on appeal the sureties must pay the whole amount, or have personal judgment entered against them therefor (Boob v. Hall, 105 Cal. 413; 38 Pac. 977); but it has no application to a judgment which may be satisfied in either of two or more modes, or which cannot be enforced against the defendant until after the plaintiff has exhausted another remedy, and where he is personally liable for only a deficiency in the proceeds of certain property which is primarily chargeable therefor; and if the judgment directs the sale of real property, and the defendant is liable only in case of deficiency, the provisions of § 945, post, control. Kreling v. Kreling, 116 Cal. 458; 48 Pac. 383. An appeal from a judgment directing that the plaintiff recover a certain sum of money, and declaring such sum to be a lien on the land, which is ordered sold, and the proceeds applied to the judgment, the clerk being directed to docket a judgment for any deficiency, is not within this section; hence, an undertaking to stay proceedings, as provided herein, is not required. Owens v. Pomona Land etc. Co., 124 Cal. 331; 57 Pac. 71. A judgment in an action for an accounting between partners, which adjudges that the plaintiffs shall receive from the defendant personally a certain sum of money, and that the defendant's interest in the property shall be sold to realize the amount, and if not sufficient, a personal judgment shall be entered against him for the deficiency, has the effect of postponing the right of the plaintiffs to a personal judgment and to execution thereon until a judgment for the deficiency is entered, and the defendant, after an appeal from such judgment, with an ordinary appeal bond, is entitled to a writ staying the execution of the judgment until the determination of such appeal. Painter v. Painter, 98 Cal. 625; 33 Pac. 483. A judgment against the owners of a vessel, foreclosing liens against the vessel, and providing for a sale thereof, with the engines, apparel, and furniture, and out

of the proceeds arising from such sale to pay to the plaintiff the amount found due him, is not a judgment directing the payment of money, within this section. Olsen v. Birch, 1 Cal. App. 99; 81 Pac. 656; and see Central Lumber etc. Co. v. Center, 107 Cal. 193; 40 Pac. 334; Kreling v. Kreling, 116 Cal. 458; 48 Pac. 383. In order to stay the judgment, where there is a personal judgment in addition to a decree directing a sale of the property, in an action by a vendor against his vendee, an undertaking on appeal must be executed, under this section. Englund v. Lewis, 25 Cal. 337. A judgment for costs is not a judgment directing the payment of money contemplated by this section, and a stay bond is not required, in order to restrain the issuance of an execution to recover such costs: the appeal bond effects that object. McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 442; 33 Pac. 329. An order denying a motion to strike out a cost-bill is not an order directing the payment of money, within this section; and an undertaking executed in double the amount of the cost-bill, upon appeal from such order, by the defendant, has no statutory authority, and cannot operate to stay execution; and the plaintiff is not entitled to judgment against the sureties thereon, upon motion, that being a summary remedy created by statute, and applicable only to undertakings allowed by it. Reay v. Butler, 118 Cal. 113; 50 Pac. 375. An order that an original judgment be carried into execution is not one directing the payment of money, and this section does not authorize the giving of an undertaking, on appeal, to stay proceedings. Weldon v. Rogers, 154 Cal. 632; 98 Pac. 1070.

Stay of proceedings allowed when. The stay of execution on a judgment for the payment of money, under this section, is only allowed on an appeal from the judgment, and on giving the undertaking in double amount, as required by this section; hence, this section does not apply to an appeal from an order made after a final judgment denying a motion to set aside an execution. Carit v. Williams, 67 Cal. 580; 8 Pac. 93; Weldon v. Rogers, 154 Cal. 632; 98 Pac. 1070. A stay bond, given on an appeal from an order denying a new trial, has the effect of staying execution on the judgment (Fulton v. Hanna, 40 Cal. 278; Baldwin v. Superior Court, 125 Cal. 584; 58 Pac. 185; Holland v. McDade, 125 Cal. 353; 58 Pac. 9; Starr v. Kreuzberger, 131 Cal. 41; 63 Pac. 134), though there is no appeal from the judgment. Baldwin v. Superior Court, 125 Cal. 584; 58 Pac. 185. The execution of a judgment in unlawful detainer, where the payment of a specified sum of money is directed, cannot be stayed, unless an undertaking on appeal is given, as provided by this section; hence, an appeal from an order, made after judgment, vacating an order for the satisfaction of a judgment, does not authorize the issuance of a writ of supersedeas. Bateman v. Superior Court, 139 Cal. 141; 72 Pac. 922. A judgment against the sureties on an undertaking on appeal to stay execution, executed under this section, does not have the effect of staying execution of the judgment, where the undertaking required should have been executed under § 945, post. Central Lumber etc. Co. v. Center, 107 Cal. 193; 40 Pac. 334. After an appeal is perfected from a judgment of the superior court, that court has no general power to stay execution, though, if execution has been stayed according to the statute, it has power to compel the sheriff to respect and observe such stay. Mannix v. Superior Court, 157 Cal. 730; 109 Pac. 264. The supreme court cannot grant a stay of execution upon a final judgment not appealed from, though there is an appeal from an order made after such judgment. Carit v. Williams, 67 Cal. 580; 8 Pac. 93.

Stay of proceedings. See also note post, § 949.

Effect of dismissal of appeal on stay. The dismissal of an appeal from the judgment cannot change the effect of the stay of execution effected by the undertaking given on the appeal from the order denying a new trial. Fulton v. Hanna, 40 Cal 278; Tompkins v. Montgomery, 116 Cal. 120; 47 Pac. 1006; Starr v. Kreuzberger, 131 Cal. 41; 63 Pac. 134.

Nature of undertaking. An undertaking in the form of and purporting to be an undertaking to stay execution, as provided in this section, must not be considered as the undertaking on appeal required by §§ 940, 941, ante. Duffy v. Greenebaum, 72 Cal. 157; 12 Pac. 74.

Undertaking on appeal from justice's court. See note post, § 978.

Execution of undertaking. It is essential to the validity of an undertaking to stay execution of a money judgment, that it be signed by the judgment debtor. Weldon v. Rogers, 154 Cal. 632; 98 Pac. 1070.

Amount of undertaking. On appeal from an order denying a motion for a new trial, after a money judgment, an undertaking in double the amount of the judgment may be given, under this section, and execution on the judgment will be stayed thereby, pending such appeal. Weldon v. Rogers, 154 Cal. 632; 98 Pac. 1070. An order directing the payment of alimony and counsel fees is properly stayed by an undertaking, under this section, in double the amount of the lump sums and double the amount of the monthly payments for a period of three years. Sharon v. Sharon, 67 Cal. 185; 7 Pac. 456. Where the ordinary bond on appeal is sufficient to stay execution, a stay bond, given under this section in double the amount found due, is void. Olsen v. Birch, 1 Cal. App. 99; 81 Pac. 656.

Time of filing. An undertaking on appeal to stay execution may be filed at any time after the appeal is taken, and before the execution is satisfied. Hill v. Finnigan, 54 Cal. 493.

Undertakings not required on appeal in certain actions. An undertaking for the stay of execution of an order of sale upon appeal from a decree foreclosing a mortgage cannot be given, under this section (Boob v. Hall, 105 Cal. 413; 38 Pac. 977); nor an undertaking upon appeal from a decree foreclosing a mechanic's lien (Central Lumber etc. Co. v. Center, 107 Cal. 193; 40 Pac. 334); nor an undertaking upon appeal in an action of claim and delivery. Churchill v. More, 7 Cal. App. 767; 96 Pac. 108. A decree in partition proceedings may be stayed without an undertaking on appeal, under this section. Born v. Horstmann, 80 Cal. 452; 5 L. R. A. 577; 22 Pac. 169; Estate of Kennedy, 129 Cal. 384; 62 Pac. 64. An appeal from a judgment upon the contest of an election for directors of a railroad company, is not within this section: all proceedings upon the judgment are stayed by the ordinary appeal bond. Foster v. Superior Court, 115 Cal. 279; 47 Pac. 58.

Probate appeals, undertaking on. Upon an appeal from an order appointing an administrator, an undertaking on appeal, under § 941, ante, stays all proceedings upon the order appealed from. Estate of Woods, 94 Cal. 566; 29 Pac. 1108. An order requiring an administrator to pay money for a family allowance may be stayed without an undertaking under this section. Pennie v. Superior Court, 89 Cal. 31; 26 Pac. 617. A decree of distribution, appealed from by the legatee, is not within this section. Estate of Schedel, 69 Cal. 241; 10 Pac. 334. Provisions authorizing or requiring stay bonds do not apply to a decree of distribution. Estate of Kennedy, 129 Cal. 384; 62 Pac. 64.

New undertaking. Where the surety on an undertaking on appeal to stay execution disposes of his property pending the appeal, the filing of a new undertaking cannot be required. Macomber v. Conradt, 4 Cal. Unrep. 723; 37 Pac. 382.

Rights and liabilities of sureties. The sureties, by signing the undertaking on appeal to stay execution under this section, submit themselves to the jurisdiction of the court, and waive any constitutional or statutory right to object to such jurisdiction or to the enforcement of such security. Meredith v. Santa Clara Mining Ass'n, 60 Cal. 617. Although, by entering into an undertaking on appeal, the sureties are brought under the jurisdiction of the court, yet they are not thereby made actors in the litigation, nor entitled to any part in its conduct; and the party to whom they have given the undertaking is not required to give them notice of any steps in procedure to be taken against the defendant, but they are bound, equally with him, by any order which may be made between the real parties in the action. Hitchcock v. Caruthers, 100 Cal. 100; 34 Pac. 627. The sureties, on a joint appeal by two defendants, are liable on their undertaking to stay execution, on affirmance of the judgment as to one of the defendants, though the judgment is reversed as to the other, and hence judgment is properly rendered against them on the undertaking. Wood v. Orford, 56 Cal. 157. The obligation upon the sureties, upon an undertaking to stay execution pending an appeal, to pay the judgment in case of the default of the defendant, is absolute, and continues until the judgment is actually paid; and when the judgment has been revived against the defendant, under § 708, ante, after having been satisfied by the purchase of property under execution, which belonged to a third party, and was recovered by such third party, the sureties are liable to pay the amount of such revived judgment, and a new judgment may be entered against them for such amount, upon notice to them, unless they can show that the judgment was properly satisfied and that the satisfaction was not properly set aside. Hitchcock v. Caruthers, 100 Cal. 100; 34 Pac. 627. Where the judgment from which an appeal is taken is not such as calls for the giving of an undertaking to stay execution, the sureties on such an undertaking are not liable thereunder, it being without consideration. McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 442; 33 Pac. 329; and see Powers v. Crane, 67 Cal. 65; 7 Pac. 135. A special stay bond, given upon appeal from a decree of distribution, is without consideration, arising from the fact that the undertaking does not stay the decree, and no recovery can be had against the sureties. Estate of Kennedy, 129 Cal. 384; 62 Pac. 64.

Judgment against sureties upon motion. The statute permitting judgment to be entered, on motion, against the sureties on undertakings on appeal, after affirmance of the judgment, is constitutional. Ladd v. Parnell, 57 Cal. 232; Meredith v. Santa Clara Mining Ass'n, 60 Cal. 617. This section is the only statute authorizing the rendition of judgment upon motion; and a recovery upon any bond, other than one covered by this section, as in claim and delivery, must be by action. Churchill v. More, 7 Cal. App. 767; 96 Pac. 108; United States Fidelity Co. v. More, 155 Cal. 415; 101 Pac. 302. Where an undertaking on appeal to stay execution has no validity as a statutory undertaking, a motion for a judgment thereon, against the sureties, should be denied, even if shown to be supported by a consideration, and to be good as a common-law bond. Central Lumber etc. Co. v. Center, 107 Cal. 193; 40 Pac.

334; and see Powers v. Chabot, 93 Cal. 266; 28 Pac. 1070; McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 422; 33 Pac. 329. Service of the original notice and affidavit, on application for judgment against the sureties on an undertaking on appeal to stay execution, on return of remittitur, is immaterial error, the defendants not having been misled. Wood v. Orford, 56 Cal. 157. Notice of the motion for judgment against the sureties, where the appellant does not pay the amount of the judgment or order within thirty days after the filing of the remittitur, is not required: the sureties stipulate in the undertaking that judgment may be so entered. Meredith v. Santa Clara Mining Ass'n, 60 Cal. 617; Mowry v. Heney, 3 Cal. Unrep. 277; 24 Pac. 301. A judgment against only one of the sureties on an undertaking on appeal, under this section, no reason appearing why the other was not joined, except that he could not be found and served with notice, is erroneous: the provision for a judgment "against the sureties" must be strictly pursued. Hansen v. Martin, 63 Cal. 282. The entry of judgment against the sureties upon an undertaking on appeal to stay execution, is not a special proceeding, but is a part of the procedure in the original action authorized by this section, and is in sequence of the judgment rendered against the appellant; and the reversal of a judgment against the sureties, because prematurely entered, does not affect or impair their obligation on the undertaking; and the plaintiff is still entitled to enforce that obligation by a proper motion for judgment against them. Hawley v. Gray Bros., 127 Cal. 560; 60 Pac. 437.

Effect of stipulation by sureties allowing judgment against themselves. A stipulation by sureties, inserted in an undertaking on appeal, that judgment may be entered against them in case the order recited in such undertaking shall be affirmed, cannot render them liable, since the undertaking rests for its efficiency on the statute alone, and as the undertaking was ineffectual as a stay, because made in a case not provided for by statute, the consent of the sureties to summary judgment against themselves is likewise ineffectual. Reay v. Butler, 118 Cal. 113; 50 Pac. 375. A stipulation by sureties, that, upon the affirmance of the judgment appealed from, if appellant does not pay the amount of such judgment within sixty days after the filing of the remittitur, judgment may be entered against them for the same, makes them parties to the original action, and the proceedings against them are all taken in that action. Hawley v. Gray Bros., 127 Cal. 560; 60 Pac. 437.

Who may recover against sureties. The assignee of a judgment cannot recover on the undertaking given to stay the proceedings, where he is not also the assignee of the undertaking. Chilstrom v. Eppinger, 127 Cal. 326; 78 Am. St. Rep. 46; 59 Pac. 696.

Effect of reversal. Reversal on appeal from an order denying a new trial, and remanding the cause for retrial, as effectually vacates the judgments as does a reversal of the judgment upon a direct appeal therefrom. Fulton v. Hanna, 40 Cal. 278.

Construction of condition in appeal bond requiring sureties to pay judgment of appellate court. See note 5 Ann. Cas. 90.

CODE COMMISSIONERS' NOTE. If, on appeal from an order denying a new trial, a full undertaking on appeal, as provided in § 349 of the Practice Act (§ 942 of this code), is given, it stays execution on the judgment. Fulton v. Hanna, 40 Cal. 278. An appeal will not be dismissed for insufficiency in the justification of the sureties on the undertaking, where the undertaking was both to render the appeal effectual and to stay execution, and the justification was sufficient for the former purpose. Dobbins v. Dollarhide, 15 Cal. 374. The undertaking on appeal providing for the liability of the sureties upon the condition of the affirmance of the judgment, operates as a stay. If by mere neglect to prosecute the appeal, and for that reason it should be dismissed, it would work manifest injustice to the respondent if he should be deprived of his rights under the judgment. This result would, however, necessarily follow, if the sureties could be released upon the pretense that the judgment was not affirmed. In many instances this would encourage a fraud upon the respondents. Karth v. Light, 15 Cal. 327; Chamberlin v. Reed, 16 Cal. 207; Chase v. Beraud, 29 Cal. 138. This section of the code conforms in language to the rule of the cases cited supra. In foreclosure cases, if a judgment in personam is rendered against the defendants, and also one enforcing the lien, and an appeal is taken from the whole judgment, in order to stay proceedings upon the judgment, the appellant must file an undertaking for costs, one in double the amount of the personal judgment, and one for the payment of waste and such deficiency as may remain due after the sale of the property, and all these undertakings may be in one instrument, or several, at the option of the appellant. Englund v. Lewis, 25 Cal. 356.

§ 943. **Appeal from a judgment for delivery of documents.** If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appel-

late court upon the appeal. If the judgment or order appealed from appoint a receiver, the execution of the judgment or order cannot be stayed by appeal, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that if such judgment or order be affirmed or the appeal dismissed, the appellant will pay all damages which the respondent may sustain by reason of such stay, not exceeding an amount to be fixed by the judge of the court by which the judgment was rendered or order made, which amount must be specified in the undertaking. If the judgment or order appealed from direct the sale of personal property upon the foreclosure of a mortgage thereon, the execution of the judgment or order cannot be stayed on appeal, unless an undertaking be entered into on the part of the appellant, with at least two sureties, in such amount as the court, or the judge thereof, may direct, to the effect that the appellant will, on demand, deliver the mortgaged property to the proper officer if the judgment be affirmed, or in default of such delivery that the appellant and sureties will, on demand, pay to the proper officer the full value of such property at the date of the appeal.

Receiver. Ante, § 564.
Undertaking. Ante, § 941.

Legislation § 943. **1.** Enacted March 11, **1872**; based on Practice Act, § 350 (New York Code, § 336), which read: "If the judgment or order appealed from, direct the assignment or delivery of documents, or personal property, the execution of the judgment or order shall not be stayed by appeal, unless the things required to be assigned or delivered, be placed in the custody of such officer or receiver as the court may appoint; or unless an undertaking be entered into, on the part of the appellant, with at least two sureties, and in such amount as the court or the judge thereof, or county judge, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal." When § 943 was enacted in 1872, "cannot" was substituted for "shall not" before "be stayed."

2. Amended by Code Amdts. **1880**, p. 6, (1) substituting "a" for "the" before "judge thereof," and (2) omitting "or county judge" before "may direct."

3. Amended by Stats. **1897**, p. 56.

Construction of section. This section relates only to a case where an appeal has been taken, and has to do only with the matter of staying execution after appeal; hence, a petition for a writ of mandate directing a judge of the superior court to fix the amount of a stay bond on appeal from an order appointing a receiver, which does not show that an appeal has been taken as provided in this section, but merely states that the petitioner is desirous of appealing from such order, is insufficient. Leonis v. York, 140 Cal. 333; 73 Pac. 1058. The judgment referred to in this section is the decree passing upon the matter directly involved in the litigation: in all other cases the proceedings are held in abeyance by virtue of the statute itself. McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 442; 33 Pac. 329.

Assignment or delivery of personal property. This section applies to cases where the appellant has money or other property in his possession which has been adjudged by the lower court to belong to the respondent, or where the appellant has been directed to do some act for the benefit of the respondent, and where it would be unjust to allow the appellant to retain the possession of the property without securing the respondent by a bond. Rohrbacher v. Superior Court, 144 Cal. 631; 78 Pac. 22. A judgment in replevin requires an undertaking on appeal, although a redelivery bond was given in the action; hence, supersedeas will not be issued, where the undertaking required by this section was not given. Swasey v. Adair, 88 Cal. 203; 26 Pac. 83. The only bond required to stay execution upon appeal is the one prescribed by this section; and an indemnity bond to stay execution upon appeal, in claim and delivery, not conditioned as prescribed in this section, but conditioned under § 942, ante, is without consideration. United States Fidelity etc. Co. v. More, 155 Cal. 415; 101 Pac. 302. Money, under this section, is not included in the term "personal property": this section does not apply to an appeal taken by a legatee from a decree of distribution, where such decree distributes certain moneys (Estate of Schedel, 69 Cal. 241; 10 Pac. 334; Estate of Kennedy, 129 Cal. 384; 62 Pac. 64); but where the money is a special fund, and capable of identification, it will answer to the term "personal property," as used herein. McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 442; 33 Pac. 329. An order directing an insolvent to turn over to a receiver goods, wares, and merchandise, or its avails, is a case provided for by this section, and must be stayed by the undertaking provided herein: an ordinary undertaking for damages and costs on appeal does not stay such order. Ex parte Clancy, 90 Cal. 553; 27 Pac. 411. A judgment determining the ownership of money paid into court does not require an undertaking on appeal, as provided by this sec-

tion. McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 442; 33 Pac. 329. Where the judgment appealed from directs the delivery of both real and personal property, it is the duty of the trial court to fix the amount of the bond to be given to obtain a stay; Doudell v. Shoo, 158 Cal. 50; 109 Pac. 615; 159 Cal. 448; 114 Pac. 579; Clute v. Superior Court, 155 Cal. 15; 132 Am. St. Rep. 54; 99 Pac. 362; Winsor Pottery Works v. Superior Court, 13 Cal. App. 360; 109 Pac. 843; Gordan v. Graham, 153 Cal. 297; 95 Pac. 145.

Order appointing receiver. An order appointing a receiver can be stayed only by the filing of a special bond. Coburn v. Hynes, 161 Cal. 685; 120 Pac. 26.

Foreclosure sale of personal property. A decree directing the sale of pledged property, on foreclosure of the pledge, is not within this section: the pledged property is in the possession of the plaintiff, and no delivery is required. Rohrbacher v. Superior Court, 144 Cal. 631; 78 Pac. 22. A judgment foreclosing liens on personal property, described therein as "plaintiff's mortgage and lien" and "intervener's mortgage and lien," and declaring that "such mortgages and liens are the ones described in the complaint," is within this section, and cannot be stayed without an undertaking on appeal: the ordinary three-hundred-dollar undertaking does not warrant a supersedeas. Tolle v. Heydenfeldt, 138 Cal. 56; 70 Pac. 1013. A judgment foreclosing liens against a vessel, and directing the sale thereof, and her engines, apparel, etc., and out of the proceeds of the sale to pay the plaintiff the amount found due him, is not a judgment directing the assignment or delivery of personal property upon the foreclosure of a mortgage thereon, within this section. Olsen v. Birch, 1 Cal. App. 99; 81 Pac. 656.

Decree in partition. A decree in partition is not stayed by an undertaking under this section. Born v. Horstmann, 80 Cal. 452; 5 L. R. A. 577; 22 Pac. 169.

Probate orders. An order appointing an administrator is not stayed by an undertaking under this section: § 941, ante, applies in such case (Estate of Woods, 94 Cal. 566; 29 Pac. 1108); nor is an order directing the payment of a family allowance stayed by an undertaking taken under this section, § 941, ante, applying also in this case. Pennie v. Superior Court, 89 Cal. 31; 26 Pac. 617.

Who may give undertaking. One who has the right to appeal from a judgment has also the right to give an undertaking to stay its execution. Winsor Pottery Works v. Superior Court, 13 Cal. App. 360; 109 Pac. 843.

Condition of undertaking. The condition of the undertaking under this section is not that judgment may be taken on motion: an action is a necessary basis for judgment. United States Fidelity etc. Co. v. More, 155 Cal. 415; 101 Pac. 302.

Mandamus to compel fixing amount. The trial judge may be compelled, by mandamus, to fix the amount of the undertaking. Winsor Pottery Works v. Superior Court, 13 Cal. App. 360; 109 Pac. 843.

Stay of proceedings. See note post, § 949.

§ 944. Appeal from a judgment directing execution of a conveyance, etc. If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court.

Legislation § 944. Enacted March 11, 1872 (based on Practice Act, § 351), substituting "cannot" for "shall not."

Construction of section. The judgment referred to in this section is the decree passing upon the matter directly involved in the litigation: in all other cases the proceedings are held in abeyance by virtue of the statute itself. McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 442; 33 Pac. 329.

Decree of distribution. Provisions authorizing or requiring stay bonds do not apply to an appeal from a decree of distribution. Estate of Kennedy, 129 Cal. 384; 62 Pac. 64; Estate of Schedel, 69 Cal. 241; 10 Pac. 334.

Stay of proceedings. See note post, § 949.

§ 945. Undertaking on appeal concerning real property. If the judgment or order appealed from, direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the

appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.

Mortgaged realty, sale or delivery of possession of. Ante, §§ 726, 744.
Deposit with clerk. Ante, § 941; post, § 948.
Undertaking, how executed. Ante, § 941.
Qualifications of sureties. Post, § 1057.
Waste. Ante, §§ 745, 746.

Legislation § 945. Enacted March 11, **1872;** based on Practice Act, § 352 (New York Code, § 338), (1) substituting "cannot" for "shall not," (2) inserting "or the appeal dismissed" after "affirmed," and (3) substituting "must" for "shall" before "be specified" and before "also provide."

Construction of section. This section includes orders as well as judgments; and the provision herein, in regard to use and occupation, refers to cases in which the creditor is entitled to the use, and more particularly to judgments and orders directing a delivery of the possession. Whitney v. Allen, 21 Cal. 233. This section provides for two distinct undertakings, upon two kinds of judgments: one directing a sale of real property, and the other directing a delivery of the possession of real property. Englund v. Lewis, 25 Cal. 337. An undertaking for costs and damages, upon an appeal from a judgment for the foreclosure of a mechanic's lien and the sale of the property subject thereto, taken by a lien-holder not in possession of the land, whose lien was adjudged subordinate to the lien foreclosed, is properly given under § 941, ante, and not under this section. Root v. Bryant, 54 Cal. 182. Where the judgment declares the lien of a mortgage subordinate to mechanics' liens, no undertaking on appeal is required, except that for costs. Pacific Mutual Life Ins. Co. v. Fisher, 35 Pac. 77.

Affidavit for stay of execution. Upon a motion in the supreme court for a stay of execution, the affidavits must state facts, and not mere general conclusions; it is not sufficient for the moving party to state generally that a person was not in possession of the property: he must state that some one else is in adverse possession. McMillan v. Hayward, 84 Cal. 85; 24 Pac. 151.

No stay after judgment executed. Where the judgment has been executed prior to the application for a writ of supersedeas to stay proceedings, the application must be denied. Hoppe v. Hoppe, 99 Cal. 536; 34 Pac. 222.

Undertaking and stay where sale is ordered. This section provides for the undertaking on appeal for the stay of execution of an order of sale in foreclosure proceedings. Boob v. Hall, 105 Cal. 413; 38 Pac. 977. An undertaking on appeal for costs only, without the provision against the commission of waste, is insufficient to stay proceedings under a judgment directing a receiver to sell the mortgaged premises. Hoppe v. Hoppe, 99 Cal. 536; 34 Pac. 222. A defendant in foreclosure, who is residing on the mortgaged premises, but who holds in subordination to another, cannot have a stay of execution without giving the undertaking prescribed by this section; nor can the person in subordination to whom the property is held have a stay without giving such undertaking. McMillan v. Hayward, 84 Cal. 85; 24 Pac. 151. The provision of this section, requiring an undertaking on appeal for a deficiency upon a sale of mortgaged premises, in order to stay execution, does not apply to a judgment of foreclosure and sale, and for deficiency, in an action by an administratrix to enforce an equitable lien upon property conveyed by her to a surviving partner of the decedent, upon a settlement between them, in consideration of his agreement to assume and pay the whole amount of a certain firm note, and to relieve the estate from liability thereon; but a bond, under this section, in an amount fixed by the judge rendering the judgment, to prevent waste pending the appeal, is sufficient to stay execution under the judgment. Kreling v. Kreling, 116 Cal. 460; 48 Pac. 383. In foreclosure proceedings, where judgment for deficiency is waived, and a receiver of the rents and profits has been appointed, leaving the tenant of the mortgagor in possession, although no undertaking for deficiency or for the value of the use and occupation is required upon appeal by the mortgagor from the decree, yet, in order to stay execution thereof, an undertaking must be given against waste, notwithstanding the tenancy may expire pending the appeal. Bank of Woodland v. Stephens, 137 Cal. 458; 70 Pac. 293. An undertaking on appeal from a judgment directing a sale of real property merely, need provide security only against waste, unless such sale is of mortgaged premises and the judgment provides for the payment of any deficiency, in which case it must provide for the payment of such deficiency, but no provision need be inserted therein for the payment of the value of the use and occupation of the premises pending the appeal, for the obvious reason that the judgment creditor does not become entitled to the value of the use and occupation until after the sale. Englund v. Lewis, 25 Cal. 337. An undertaking to stay execution, upon appeal from a decree foreclosing

a mechanic's lien, must be given under this section: a mere bond in double the amount of the judgment against the owner of the premises, not conditioned as required by this section, does not have the effect of staying execution of the judgment. Central Lumber etc. Co. v. Center, 107 Cal. 193; 40 Pac. 334; and see Corcoran v. Desmond, 71 Cal. 100; 11 Pac. 815. This section governs in the case of a judgment directing the sale of real property to pay a money judgment in an action by a vendee against his vendor; but it does not apply where the vendee of the land is in possession, and he rescinds, and recovers judgment for payments made on the purchase price, and for the value of his improvements, for which amounts the land is directed to be sold: the ordinary undertaking on appeal, in the sum of three hundred dollars, is sufficient to stay proceedings upon such judgment. Owen v. Pomona Land etc. Co., 124 Cal. 331; 57 Pac. 71.

Where delivery of possession is ordered. An undertaking on appeal from a judgment directing a delivery of the possession of real property must provide against waste, and for the payment of the value of the use and occupation, and for these two items only: there can be, in such a case, no question as to deficiency. Englund v. Lewis, 25 Cal. 337; Whitney v. Allen, 21 Cal. 233. An order requiring the plaintiff in condemnation proceedings to pay compensation for the lands, where he had entered into possession, or else restore possession thereof, may be stayed under this section. Neale v. Superior Court, 77 Cal. 28; 18 Pac. 790. A judgment in unlawful detainer, which directs the delivery of possession of real property, cannot be stayed, unless an undertaking is given as provided by this section; hence, an appeal from an order made after final judgment, vacating an order for the satisfaction of a judgment, does not warrant the issuance of a supersedeas. Bateman v. Superior Court, 139 Cal. 141; 72 Pac. 922.

Undertaking for deficiency required when. An undertaking to stay execution, pending an appeal from a judgment of foreclosure of a mortgage, must provide for the payment of any deficiency. Gutzeit v. Pennie, 97 Cal. 484; 32 Pac. 584. The appellant in an action to foreclose a mortgage must furnish an undertaking to pay any deficiency judgment, whether he is the mortgagor, or a party who claims the mortgaged premises and desires to prevent a sale and enjoy the property during the pendency of the appeal. Johnson v. King, 91 Cal. 307; 27 Pac. 644. An appellant must execute an undertaking for any deficiency, in an action for the foreclosure of a mortgage, although he may not be the mortgagor, and regardless of whether he is in possession or not. Spence v. Scott, 95 Cal. 152; 30 Pac. 202. An undertaking for the payment of any deficiency, on an appeal from a judgment, where the sale of real property is directed for the purpose of satisfying any lien other than the mortgage lien, is not required. Englund v. Lewis, 25 Cal. 337; Pacific Mutual Life Ins. Co. v. Fisher, 35 Pac. 77; Painter v. Painter, 98 Cal. 625; 33 Pac. 483; Kreling v. Kreling, 116 Cal. 458; 48 Pac. 383. To this extent the statute discriminates in favor of mortgage liens, and against other liens; and any further provision in such an undertaking, not being required by law, is utterly void. Englund v. Lewis, 25 Cal. 337. Where the judgment in an action for a partnership accounting directs the sale of real property of the partnership for the satisfaction of the lien of one partner against the others, an undertaking to pay any deficiency to stay its execution is not required, since such lien was not created by mortgage, and it is only in such latter case that an undertaking to pay a deficiency is required. Painter v. Painter, 98 Cal. 625; 33 Pac. 483; and see Englund v. Lewis, 25 Cal. 337. Where an undertaking on appeal against the commission of waste contains a further clause, that the undertaking is given in compliance with the provisions of this section, such clause does not extend the effect of the undertaking beyond the condition for which it was executed; hence, the undertaking against the commission of waste does not obviate the necessity of the provision for the payment of any deficiency arising after the sale of the mortgaged premises. Gutzeit v. Pennie, 97 Cal. 484; 32 Pac. 584. Where the judgment directs the defendant to pay the amount of certain notes, and in default thereof, that certain property shall be sold, and if the proceeds are insufficient, a deficiency judgment shall be docketed against the defendant, an undertaking on appeal for the payment of the deficiency is not required. Kreling v. Kreling, 116 Cal. 458; 48 Pac. 383.

Purpose of undertaking. The statutory undertaking in each case has reference to a particular judgment and its execution; it is made primarily for the benefit of the plaintiff. Walsh v. Soule, 66 Cal. 413; 6 Pac. 82.

Validity of undertaking. An undertaking on appeal, under this section, sufficient in form and amount, is not vitiated by the fact that some of the sureties are on it twice, for different sums. Wheeler v. Karnes, 130 Cal. 618; 63 Pac. 62.

Amount of undertaking. To stay the execution of the judgment, the appellant must give an undertaking against waste, and also an undertaking to pay any deficiency: against waste, in an amount to be fixed by the judge; against any deficiency, for the entire deficiency, whatever the amount may prove to be. Gutzeit v. Pennie, 97 Cal. 484; 32 Pac. 584. Where the judgment appealed from directs the delivery of

both real and personal property, it is the duty of the trial court to fix the amount of the bond to be given to obtain a stay: the supreme court has no jurisdiction to fix such amount. Doudell v. Shoo, 158 Cal. 50; 109 Pac. 615; 159 Cal. 448; 114 Pac. 579; Clute v. Superior Court, 155 Cal. 15; 132 Am. St. Rep. 54; 99 Pac. 362; Winsor Pottery Works v. Superior Court, 13 Cal. App. 360; 109 Pac. 843; Gordan v. Graham, 153 Cal. 297; 95 Pac. 145. Under this section, the judge of the court has power to fix the amount of the undertaking on appeal from a decree of foreclosure, in all the three matters mentioned in the section, namely, waste, use and occupation, and deficiency. Boob v. Hall, 105 Cal. 413; 38 Pac. 977. The provision of this section requiring the judge to fix the amount of the undertaking against waste is distinct from the provision requiring that the undertaking shall also provide for the payment of a deficiency; hence, the authority of the judge to fix the penalty of the undertaking is limited to the object named in the provision under which it is granted. Gutzeit v. Pennie, 97 Cal. 484; 32 Pac. 584. Under this section, the judge of the court is authorized, upon an ex parte application, to fix the amount of the undertaking on appeal in foreclosure suits; but the safer and better practice is to give the respondent an opportunity to be heard. Hubbard v. University Bank, 120 Cal. 632; 52 Pac. 1070. The order fixing the amount of undertaking on appeal, under this section, need not specify separately the amounts for waste, use and occupation, and deficiency, but may merely specify the whole amount deemed necessary to meet the requirements, although the undertaking itself must contain covenants for each of the matters covered by this section. Wheeler v. Karnes, 130 Cal. 618; 63 Pac. 62. The question whether a judgment has been executed by the sheriff by a delivery of the possession of the property should not be considered by the judge as a ground of refusal to fix the amount of the undertaking to stay proceedings; but the judge should determine the sufficiency of those matters, when presented upon a direct issue, in which the right to an actual stay of proceedings is involved. Gutierrez v. Hebbard, 104 Cal. 103; 37 Pac. 749.

Mandamus to compel judge to fix amount. The trial judge may be compelled, by mandamus, to fix the amount of the undertaking. Gordan v. Graham, 153 Cal. 297; 95 Pac. 145. One having a right of appeal from an order denying a motion to vacate or modify an order for a writ of possession, may insist upon the duty of the court to fix the amount of the undertaking necessary to stay the operation of such writ, under this section, and the discharge of such duty may be compelled by writ of mandate. Green v. Hebbard, 95 Cal. 39; 30 Pac. 202. Upon application for a writ of mandate to compel the court to fix the amount of the undertaking necessary to stay the operation of a writ of possession, under this section, the merits of the ruling appealed from will not be considered. Green v. Hebbard, 95 Cal. 39; 30 Pac. 202.

Result of giving undertaking. Upon the giving of a bond under this section, one may be rightfully left in the possession of lands, pending the determination of his appeal, he being answerable for the use and occupation of the premises. Agoure v. Lewis, 15 Cal. App. 71; 113 Pac. 882. An undertaking on appeal by a defendant in ejectment, against whom judgment was recovered, that he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof, deprives the plaintiff in ejectment of all right of possession pending the appeal, and operates, by virtue of the statute, to give the defendant a lease of the land during the period specified. Shepperd v. Tyler, 92 Cal. 552; 28 Pac. 601.

Result of failure to give undertaking. A writ of assistance may issue to recover the possession of land sold at foreclosure sale, where no undertaking staying the execution has been given, as provided by this section; hence, the judgment roll is admissible in evidence on the application for such writ, notwithstanding the pendency of an appeal from the judgment. California Mortgage etc. Bank v. Graves, 129 Cal. 649; 62 Pac. 259; and see Montgomery v. Tutt, 11 Cal. 190.

Failure to object to insufficiency of undertaking. The failure of the respondent to object to the insufficiency of the undertaking on appeal to stay execution of the judgment foreclosing the mortgage, at the time it was given, because of its failure to provide for the payment of any deficiency, is not a waiver of his right to the enforcement of the judgment. Gutzeit v. Pennie, 97 Cal. 484; 32 Pac. 584.

Liability of sureties. Where an undertaking strictly complies with the provisions of this section, and the sureties have bound themselves in a penal sum, fixed by the judge of the court, to make good not only any damage which may arise from waste, but also any deficiency judgment which may remain after sale of the mortgaged premises, if the penal sum fixed is consumed by a judgment against the sureties for waste, no recovery can be had against them for deficiency; but if no damage for waste is recovered, the full amount of the penal sum is available to make good any deficiency not exceeding that sum. Ogden v. Davis, 116 Cal. 32; 47 Pac. 772. Where an undertaking on appeal from a judgment foreclosing a mortgage provided, among other things, that if the judgment should be affirmed the mortgagor would pay to the plaintiff the value of the use and occupa-

tion of the premises pending the appeal, and the judgment was affirmed, and no sale of the property having been made, an action was brought against the sureties to recover the value of the use and occupation, the undertaking in reference to such use and occupation not being required by the statute, the sureties are not liable. Whitney v. Allen, 21 Cal. 233. The sureties on an undertaking against the commission of waste, in foreclosure proceedings, are not liable therefor, where the property is erroneously described in such undertaking, which followed the mortgage, complaint, and judgment. Ogden v. Davis, 116 Cal. 32; 47 Pac. 772. Sureties are not liable on an undertaking under this section, where the judgment is affirmed only in part: this section does not provide for the liability of sureties in such case, as does § 942, ante. Heinlen v. Beans, 71 Cal. 295; 12 Pac. 167. Where an undertaking on appeal for a stay of execution specifies a penal sum, and recites that such sum is the amount fixed by the judge, such recital binds the sureties, equally with the principal, and it may be taken as true against them, and need not be averred in the complaint nor proved at the trial. Ogden v. Davis, 116 Cal. 32; 47 Pac. 772.

Probate proceedings, undertaking on. Provisions authorizing or requiring stay bonds do not apply to an appeal from a decree of distribution. Estate of Kennedy, 129 Cal. 384; 62 Pac. 64; Estate of Schedel, 69 Cal. 241; 10 Pac. 334.

Writ of assistance. All that is requisite to obtain the writ of assistance, as against the parties, and those claiming with notice under them, after the commencement of the action, is, to furnish to the court proper evidence of a presentation of a deed to them, and a demand of possession, and their refusal to surrender it (Montgomery v. Middlemiss, 21 Cal. 103; 81 Am. Dec. 146; California Mortgage etc. Bank v. Graves, 129 Cal. 649; 62 Pac. 259); and such evidence can properly be furnished to the court by affidavit. California Mortgage etc. Bank v. Graves, 129 Cal. 649; 62 Pac. 259. It is the duty of the trial judge, upon proper application, to fix the amount of the undertaking to be given to stay proceedings on a writ of assistance, pending an appeal. Gordan v. Graham, 153 Cal. 297; 95 Pac. 145.

Stay of proceedings. See notes post, §§ 949, 1176.

CODE COMMISSIONERS' NOTE. Whitney v. Allen, 21 Cal. 233; Englund v. Lewis, 25 Cal. 356; Thornton v. Mahoney, 24 Cal. 584; Zoller v. McDonald, 23 Cal. 136; Pierson v. McCahill, 23 Cal. 249.

§ 946. Release of property under levy, on appeal. Attachment not continued. Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; provided, however, said property shall not be released from the levy, if the respondent excepts to the sufficiency of the sureties within five days after the giving of the undertaking staying execution until such sureties, or others, justify in the manner prescribed by law; but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from. And the court below may in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right. An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless, within five days after the entry of the order appealed from, such appeal be perfected.

Legislation § 946. 1. Enacted March 11, **1872**; based on Practice Act, § 353 (New York Code, § 339), as amended by Stats. 1865–66, p. 707, which read: "Whenever an appeal is perfected as provided in the preceding sections in this chapter, it shall stay all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein; and on appeal, and filing an appeal bond on appeal from an order discharging an attachment, said attachment shall not be dissolved, but shall remain in full force until the cause be disposed of on appeal, but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from. And the court below may, in its discretion, dispense with or limit the security required by said sections, when the appellant is an executor, administrator,

trustee, or other person acting in another's right; provided, that an appeal shall not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless, also, notice of the appeal be given within five days after service of the notice of the entry of the order appealed from, and such appeal be perfected, and the undertaking in this section mentioned be filed within five days thereafter." The changes from the original code § 946 are noted infra.

2. Amended by Code Amdts. **1873–74**, p. 337, (1) in first sentence, inserting "and releases from levy property which has been levied upon under execution issued upon such judgment"; (2) in final sentence, omitting (a) "from an order dissolving an attachment," after "an appeal," and (b) "and," before "such appeal" be perfected.

3. Repeal by Stats. **1901**, p. 173; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1913**, p. 316, in first sentence, adding the proviso, "provided . . . by law."

Construction of section. The effect of an appeal from a judgment is purely a matter of statutory regulation, to be determined by a construction of the statute under which the appeal is taken. Ex parte Queirolo, 119 Cal. 635; 51 Pac. 956.

Appeal perfected when. Whenever the undertaking on appeal has been properly executed, and the sureties, if excepted to, have justified, or the court has dispensed with security, "an appeal is perfected," in the sense in which these words are used in this section (Hill v. Finnigan, 54 Cal. 493); and when the order of the court, fixing the amount of the undertaking on appeal to stay execution in a foreclosure suit, has been complied with, the appeal is perfected. Hubbard v. University Bank, 120 Cal. 632; 52 Pac. 1070.

Judgment in force until appeal perfected. So far as the execution of the judgment is concerned, the judgment of the trial court remains in full force until the appeal is perfected by the proper undertaking for stay of proceedings, and the justification of the sureties, if excepted to. Hill v. Finnigan, 54 Cal. 493.

What undertaking stays proceedings. The giving of the ordinary undertaking on appeal, mentioned in § 941, ante, stays proceedings in the court below upon the judgment or order appealed from. Rohrbacher v. Superior Court, 144 Cal. 631; 78 Pac. 22; Olsen v. Birch, 1 Cal. App. 99; 81 Pac. 656; Los Angeles v. Pomeroy, 132 Cal. 340; 64 Pac. 477. The giving of the undertaking mentioned in § 941, ante, on appeal from an order which is not one of those specified in §§ 942, 943, 944, 945, ante, and 949, post, stays all proceedings; hence, a motion for a stay of proceedings will be granted. Los Angeles v. Pomeroy, 132 Cal. 340; 64 Pac. 477; and see Estate of Woods, 94 Cal. 567; 29 Pac. 1108; Root v. Bryant, 54 Cal. 183. The fact that an undertaking on appeal is insufficient because the sureties are not good, and that a new undertaking is given upon exception to the sureties upon the first undertaking, does not affect the stay of proceedings, which takes place upon the filing of the required undertaking, without regard to the sufficiency or insufficiency of the sureties. Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222; 15 Am. St. Rep. 50; 22 Pac. 594.

Amount of undertaking must be fixed. No stay of execution upon appeal is effectuated, unless the amount of the undertaking is fixed by the court, or by a judge thereof. United States Fidelity etc. Co. v. More, 155 Cal. 415; 101 Pac. 302.

Undertaking unnecessary when. No undertaking on appeal from a judgment is necessary or authorized to stay proceedings as to moneys deposited in court, by stipulation of the parties to the action, pending litigation. Broder v. Conklin, 121 Cal. 289; 53 Pac. 797.

Appeal stays proceedings. The effect of an appeal is to stay the proceedings (Karry v. Superior Court, 162 Cal. 281; 128 Pac. 760), and to remove the subject-matter of the order from the jurisdiction of the lower court, and that court is without power to proceed further as to any matter embraced therein until the appeal is determined. Stateler v. Superior Court, 107 Cal. 536; 40 Pac. 949; Ex parte Queirolo, 119 Cal. 635; 51 Pac. 956; and see Ruggles v. Superior Court, 103 Cal. 125; 37 Pac. 211. An appeal from an order denying a motion to set aside a judgment for want of findings of fact to support it, which was dismissed because it was not an appealable order, cannot operate to stay proceedings in the trial court, nor deprive the court of power to hear and deny a motion for a new trial. Gregory v. Gregory, 102 Cal. 50; 36 Pac. 364. A stay of proceedings can be had only of orders or judgments which command or permit some act to be done. Bliss v. Superior Court, 62 Cal. 543.

Proceedings upon the judgment. Proceedings to enforce a judgment are stayed by the filing of a sufficient undertaking on appeal from an order denying a new trial. Owen v. Pomona Land etc. Co., 124 Cal. 331; 57 Pac. 71; and see Fulton v. Hanna, 40 Cal. 278; Holland v. McDade, 125 Cal. 353; 58 Pac. 9; Baldwin v. Superior Court, 125 Cal. 584; 58 Pac. 185; Starr v. Krenzberger, 131 Cal. 41; 63 Pac. 135. An attempt to collect alimony by a writ of execution is a proceeding upon the judgment, and may be stayed on appeal. Anderson v. Anderson, 123 Cal. 445; 56 Pac. 61. The right of the appellant to have the execution stayed, pending an appeal from an order denying a new trial, is not impaired by the fact that the appeal from the judgment was dismissed. Tompkins v. Montgomery, 116 Cal. 120; 47 Pac. 1006; and see Fulton v. Hanna, 40 Cal. 278. Where the supreme court, upon notice to the respondent's attorney, permits the appellant to

file an undertaking staying execution on a judgment, pending an appeal from the judgment, and from an order denying a new trial, the issuance of execution is stayed until both appeals are decided; hence, the issuance of execution after the dismissal of the appeal from the order denying a new trial is improper, and the amount collected on the judgment will be ordered to be restored. Romine v. Cralle, 83 Cal. 432; 23 Pac. 525. A judgment declaring the forfeiture of a corporate charter is stayed by the giving of a sufficient undertaking, under this section. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. An appeal from an order setting aside a judgment has not the effect of reviving the judgment; such judgment no longer exists, so far as the assertion of any rights under it is concerned, until it is brought into force again by a reversal of the order setting it aside. Estate of Crozier, 65 Cal. 332; 4 Pac. 109; and see Peyeko v. Keefe, 114 Cal. 212; 46 Pac. 78. The provision that the appeal stays all proceedings upon the judgment in the court below does not restrict its effect elsewhere. Foster v. Superior Court, 115 Cal. 279; 47 Pac. 58.

Proceedings upon the order. Pending an appeal from an order modifying a decree of divorce awarding the custody of the children, the power of the court to compel the enforcement of such modified order is suspended. Ex parte Queirolo, 119 Cal. 635; 51 Pac. 956. An appeal from an order granting a new trial operates to suspend the functions of the order, and leaves the judgment subsisting, for the purposes of an appeal therefrom, pending the appeal from the order. Henry v. Mergnire, 111 Cal. 1; 43 Pac. 387. An appeal by an executor from an order directing him to pay a certain sum as an unpaid family allowance, stays all proceedings; hence, he cannot be punished for contempt, where he refuses to obey such order. Ruggles v. Superior Court, 103 Cal. 125; 37 Pac. 211. Proceedings on an order for a writ of assistance are stayed by the filing of an undertaking for that purpose; but such stay is not permanent and final, pending the appeal, since, on the failure of the surety to justify, it becomes nugatory and of no avail. Boyer v. Superior Court, 110 Cal. 401; 42 Pac. 892. Whether an order appealed from is or is not appealable, will not be determined in advance of the hearing of the appeal upon its merits; and while a motion to dismiss the appeal is pending and undetermined, it is the duty of the trial court to refrain from enforcing the order. Hale etc. Silver Mining Co. v. Fox, 122 Cal. 56; 54 Pac. 270.

Pending appeal, court cannot change direction as to undertaking. When the necessary direction and bond have been given for a stay of proceedings upon appeal from a judgment, the court below has no further control over the matter, and cannot withdraw its direction, nor discharge the order after it has been complied with and the appeal and undertaking have been perfected. Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222; 15 Am. St. Rep. 50; 22 Pac. 594. When the order of the court, fixing the amount of the undertaking on appeal to stay execution in a foreclosure suit, has been complied with, the appeal is perfected, and all further proceedings in the court are thereby stayed, and the court has no power to impose further conditions upon the appellant; hence, the court has no power thereafter to require an undertaking to be given in a larger amount. Hubbard v. University Bank, 120 Cal. 632; 52 Pac. 1070.

Cannot change record. While an appeal is pending, the trial court has no jurisdiction to allow an amendment to any pleading. Kirby v. Superior Court, 68 Cal. 604; 10 Pac. 119.

Effect of appeal from judgment. After an appeal from a judgment, the trial court has no power to change the judgment appealed from so as to prevent, in effect, a review of alleged errors brought up by bill of exceptions. Reynolds v. Reynolds, 67 Cal. 176; 7 Pac. 480. The superior court cannot deprive the appellate court of jurisdiction of an appeal from a judgment, by amending it while the appeal is pending. San Francisco Sav. Union v. Myers, 72 Cal. 161; 13 Pac. 403. Pending an appeal from a judgment of divorce, which includes a judgment awarding the custody of minor children, the trial court has no jurisdiction to modify the judgment as to the custody of the children. Vosburg v. Vosburg, 137 Cal. 493; 70 Pac. 473. A bill of exceptions, prepared and settled as the basis of a motion for a new trial, and upon which such motion was heard and denied, and which constitutes the record upon appeal from the order, cannot be corrected by the superior court pending an appeal. Baker v. Borello, 131 Cal. 615; 63 Pac. 914. Pending an appeal from an order, the superior court has no more power to modify it, than it has to proceed and enforce it in its entirety. Stateler v. Superior Court, 107 Cal. 536; 40 Pac. 949.

Cannot entertain motions. A motion to vacate an injunction, contained in a judgment, is a proceeding upon the judgment, and upon the matters embraced therein, within the meaning of this section, and cannot be entertained by the court, pending an appeal, although the judgment contained a condition, upon the performance of which the defendant might move to have the judgment vacated or set aside. Rogers v. Superior Court, 126 Cal. 183; 58 Pac. 452.

Cannot try case. Where an appeal is taken from an order setting aside a void judgment, the trial court cannot try the case until the appeal is heard and deter-

mined. Livermore v. Campbell, 52 Cal. 75.

Cannot set aside judgment or order. Pending an appeal from a judgment, and from an order refusing to set the same aside, the trial court loses jurisdiction of the cause, and has no authority of its own motion, to set the judgment aside. Peycke v. Keefe, 114 Cal. 212; 46 Pac. 78. Pending an appeal from an order denying a motion for a new trial, the trial court has no authority to vacate it or to set it aside. Stewart v. Taylor, 68 Cal. 5; 8 Pac. 605; and see Kirby v. Superior Court, 68 Cal. 604; 10 Pac. 119.

Cannot forbid certification of transcript. After the appeal to the appellate court is complete, the action is removed from the court below, except as to matters not affected by the appeal; therefore an order of the trial court, forbidding the clerk to certify to a proposed transcript on appeal, is void. People v. Center, 54 Cal. 236.

Power of court in insolvency proceedings. Pending an appeal from an order granting an adjudication in insolvency, the court has no jurisdiction to compel the insolvent to prepare and file his inventory and schedules, or to proceed to the selection of an assignee, or to call a meeting of creditors, or to do any further thing in the proceeding, except only such things as may be done through a receiver for taking and preserving the property of the insolvent. Dennery v. Superior Court, 84 Cal. 7; 24 Pac. 147. An appeal from a judgment declaring a corporation insolvent suspends the judgment until the determination of the appeal, and while the appeal is pending the court cannot carry into execution that part of its judgment authorizing the appointment of a receiver. State Investment etc. Co. v. Superior Court, 101 Cal. 135; 35 Pac. 549. The transfer of insolvency proceedings, after the order of adjudication had been made, from the department in which they had been pending to the department in which the action for dissolution of the corporation was pending, cannot confer upon the court any greater power for the appointment of a receiver, pending an appeal, than the court had previously. State Investment etc. Co. v. Superior Court, 101 Cal. 135; 35 Pac. 549.

Injunction stayed when. Pending an appeal, a mandatory injunction is stayed and suspended. Schwarz v. Superior Court, 111 Cal. 106; 43 Pac. 580; Clute v. Superior Court, 155 Cal. 15; 132 Am. St. Rep. 54; 99 Pac. 362. An injunction, though restrictive in form, is mandatory, if it has the effect to compel the performance of a substantive act, and is stayed pending appeal. Mark v. Superior Court, 129 Cal. 1; 61 Pac. 436. Although, pending an appeal, the effect of a prohibitory injunction is not stayed or suspended, yet the court cannot, by attempting to enforce a prohibitory injunction, indirectly enforce a mandatory injunction, the effect of which is suspended on appeal; and where appellants were ordered to remove certain trade-signs from their premises, and prohibited from using the trade name thereon, and made no use of such name pending the appeal, except upon signs the property of their lessors, they cannot be punished for contempt for violation of the prohibitory injunction for merely allowing the signs to remain in the same condition pending the appeal. Schwarz v. Superior Court, 111 Cal. 106; 43 Pac. 580. Pending an appeal from a judgment declaring a person entitled to office in a private corporation, all proceedings in the trial court are stayed: the court cannot, after appeal, enjoin the other directors of the corporation from interfering with the right of such plaintiff to the office. Foster v. Superior Court, 115 Cal. 279; 47 Pac. 58. An injunction is not dissolved or superseded by an appeal from the judgment awarding the injunction. Merced Mining Co. v. Fremont, 7 Cal. 130. Pending an appeal from a judgment granting a perpetual injunction, the trial court is not deprived of its power to punish a disobedience of the injunction as a contempt. Heinlen v. Cross, 63 Cal. 44. Pending an appeal from a judgment declaring that the plaintiff was elected and the defendant was not elected a director of a corporation, and granting no other relief, the plaintiff will not be restrained from performing his duties as such director: his assuming to be such director, while it may be in consequence of the judgment, is not a proceeding upon the judgment. Dulin v. Pacific etc. Coal Co., 98 Cal. 304; 33 Pac. 123. An appeal from a judgment granting a perpetual injunction does not suspend such injunction during the pendency of the appeal, where it is merely prohibitory. Heinlen v. Cross, 63 Cal. 44; Schwarz v. Superior Court, 111 Cal. 106; 43 Pac. 580; Rogers v. Superior Court, 126 Cal. 183; 58 Pac. 452.

Effect of appeal on undertaking to prevent attachment. An undertaking given to a sheriff to prevent the levy of an attachment is neither destroyed nor affected by the giving of an undertaking to stay the enforcement of the judgment upon an appeal therefrom. Ayres v. Burr, 132 Cal. 125; 64 Pac. 120.

On possession of real property. An undertaking on appeal in unlawful detainer, given before the removal of the personal property of the defendant, stays the proceedings, and the defendant is entitled to remain in possession pending the appeal. Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222; 15 Am. St. Rep. 50; 22 Pac. 594. An appeal by a defendant, accompanied by his abandonment of all defenses, except a claim for greater compensation, does not so affect the judgment as to destroy the plaintiff's right to possession.

Los Angeles etc. Ry. Co. v. Rumpp, 104 Cal. 20; 37 Pac. 859.

On powers of receivers. The filing of the undertaking operates as a supersedeas, suspends all authority of the receiver under the order, withdraws from him the right to the control and possession of the property involved, and restores the same to the appealing party, from whom it has been taken. Jacobs v. Superior Court, 133 Cal. 364; 85 Am. St. Rep. 204; 65 Pac. 826. The functions of a receiver, appointed after judgment for the purpose of carrying the judgment into effect, are suspended by an appeal upon which a sufficient undertaking is given to stay proceedings upon the judgment; nor can a receiver be appointed to carry a judgment into effect after a stay bond has been given. Havemeyer v. Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192; 10 L. R. A. 627; 24 Pac. 121. The functions of a receiver, appointed in involuntary proceedings against an insolvent, are not suspended during an appeal from the adjudication in such proceedings. In re Real Estate Associates, 58 Cal. 356.

On motion for new trial. The pendency of an appeal from a judgment does not affect the jurisdiction of the trial court to hear and determine a motion for a new trial. Rayner v. Jones, 90 Cal. 78; 27 Pac. 24. The filing of an undertaking on appeal from a judgment does not stay action upon a motion for a new trial, and the court has power, pending such appeal, to grant a new trial: proceedings on motion for a new trial are not in the direct line of the judgment, but are independent and collateral thereto. Knowles v. Thompson, 133 Cal. 245; 65 Pac. 468. Pending appeal, the trial court has jurisdiction to issue a commission to take the deposition of a witness, with a view to its use on a new trial, should one be awarded. San Francisco Gas etc. Co. v. Superior Court, 155 Cal. 30; 17 Ann. Cas. 933; 99 Pac. 359.

Appeal suspends judgment as evidence. The effect of an appeal from a judgment is to suspend the effect of the judgment as evidence until its final determination, even though the execution thereof is not stayed; hence, where an appeal is taken from a judgment foreclosing a mortgage, without a stay of execution, and the mortgagee made a sale, pending the appeal, at which he became the purchaser, and afterwards conveyed the title, pending the appeal, to the respondent, the effect of the reversal of the judgment is to nullify the title in the hands of the respondent, who was bound to take notice of all the proceedings in the cause and of the defeasible title of his grantor. Di Nola v. Allison, 143 Cal. 106; 101 Am. St. Rep. 84; 65 L. R. A. 419; 76 Pac. 976.

Effect of premature appeal. Where an appeal from a judgment is premature and ineffectual, the trial court is not divested of jurisdiction to enter a subsequent judgment at any time: the appellate court does not acquire any jurisdiction of such appeal, whether its attention is called to the want of jurisdiction or not. Brady v. Burke, 90 Cal. 1; 27 Pac. 52. Where a mandamus proceeding against an officer has been prematurely appealed, an ex parte order substituting the successor in office of the appellant, made by the appellate court inadvertently, is invalid, and must fall with the futile appeal, for want of a case to support it. Home for Inebriates v. Kaplan, 84 Cal. 486; 24 Pac. 119. The dismissal of an appeal as prematurely taken does not operate as an affirmance of the judgment; and such an appeal being absolutely void, it does not deprive the court below of its jurisdiction, and no stay of proceedings is effected thereunder. Estate of Kennedy, 129 Cal. 384; 62 Pac. 64.

Motion for new trial does not stay proceedings. The superior court has jurisdiction to preserve the status quo by issuing a restraining order, after judgment for the defendants, denying an injunction, and pending the determination of a motion for a new trial. Pierce v. Los Angeles, 159 Cal. 516; 114 Pac. 818; and see Pasadena v. Superior Court, 157 Cal. 786, 109 Pac. 620, where the authorities are cited and reviewed.

No stay where proceedings ended. When the existence of the judgment appealed from affords all the relief awarded, and there is no proceeding to be had under it, the stay provided for in this section does not apply. Rogers v. Superior Court, 126 Cal. 183; 58 Pac. 452; and see Foster v. Superior Court, 115 Cal. 279; 47 Pac. 58.

Effect of stay. The stay of proceedings, pending appeal, has the legitimate effect of keeping them in the condition in which they were when the stay was granted: it operates so as to prevent any future change in the condition of the parties. Schwarz v. Superior Court, 111 Cal. 106; 43 Pac. 580; Vosburg v. Vosburg, 137 Cal. 493; 70 Pac. 473; Application of De Lemos, 143 Cal. 313; 76 Pac. 1115; and see State Investment etc. Co. v. Superior Court, 101 Cal. 135; 35 Pac. 549. The superior court, after an appeal is perfected from a judgment, has not general power to stay execution; but where execution has been stayed, it has power to compel the sheriff to respect and observe such stay. Mannix v. Superior Court, 157 Cal. 730; 109 Pac. 264. A stay of proceedings upon appeal from an order for the payment of alimony operates as a supersedeas. McAneny v. Superior Court, 150 Cal. 6; 87 Pac. 1020. The sureties upon an undertaking to stay execution on appeal cannot be liable to any motion for entry of judgment against them, so long as the principal is protected against the issuance of execution against

him. Starr v. Kreuzberger, 131 Cal. 41; 63 Pac. 134. The act of the parties in proceeding in accordance with the judgment is not affected by the provision that the appeal stays the enforcement of the judgment, which is limited to proceedings in the court below on the judgment. Rose v. Mesmer, 131 Cal. 631; 63 Pac. 1010.

Remedies against orders made pending appeal. Where an action of interpleader has been dismissed, and, under order of the court, the plaintiff has withdrawn the money deposited, and has subsequently appealed from an order setting aside the former judgment of dismissal, the court has no jurisdiction, pending such appeal, to grant an order for the repayment of the money into court, and prohibition lies to prevent the entering of such order. Kaufman v. Superior Court, 108 Cal. 446; 41 Pac. 476. An order adjudging a person insolvent, and ordering a stay of proceedings, constitutes one order; and where the appeal is from the whole of the adjudication, the court has no power to modify the order staying the proceedings, pending the appeal, and such order will be annulled on certiorari. Stateler v. Superior Court, 107 Cal. 536; 40 Pac. 949. An order amending a judgment appealed from is erroneous, and an appeal lies from such order. Bryan v. Berry, 8 Cal. 130.

Supersedeas. The object of a writ of supersedeas is, to stay proceedings in the trial court upon the judgment appealed from, and to suspend its enforcement until a determination of the appeal. Hoppe v. Hoppe, 99 Cal. 536; 34 Pac. 222. A supersedeas deprives the superior court of all power to enforce the order appealed from, either by execution or by proceedings for contempt, or through the appointment of a receiver. McAneny v. Superior Court, 150 Cal. 6; 87 Pac. 1020. Upon appeal from a judgment in an action to determine water rights, which confers upon the plaintiff the right to lay a pipe through the land of the defendant, the statutory undertaking on appeal in the sum of three hundred dollars stays proceedings in the court below upon the judgment; and a supersedeas will issue to restrain any further proceedings. Daly v. Ruddell, 129 Cal. 300; 61 Pac. 1080. Upon appeal from a judgment in favor of a pledgee of a life-insurance policy, foreclosing the lien of the pledge, the ordinary bond upon appeal, in the sum of three hundred dollars, is sufficient to stay execution; and a supersedeas will issue to prevent a sale of the policy under the decree, pending the appeal. Commercial etc. Bank v. Hornberger, 134 Cal. 90; 66 Pac. 74. Where the appellant, in a state court, has filed a supersedeas bond staying execution of the judgment, he has the right to insist that the status quo shall be preserved until the final adjudication of the controversy upon the appeal; hence, pending such appeal, it is error for the state court to order the receiver of the appellant's property, in controversy, to turn it over to a United States marshal. Isom v. Rex Crude Oil Co., 147 Cal. 663; 82 Pac. 319. The writ of supersedeas is directed to the court whose action is sought to be restrained, or to some one of its officers; it is limited to restraining any proceeding upon the judgment appealed from, and cannot be employed, for any purpose, upon persons not parties to the judgment. Dulin v. Pacific Wood etc. Co., 98 Cal. 304; 33 Pac. 123; and see Rose v. Mesmer, 131 Cal. 631; 63 Pac. 1010. The power of a guardian is stayed, pending an appeal from the order appointing him, by the filing of a proper undertaking on appeal; but if he, notwithstanding such appeal, threatens to act as guardian, a writ of supersedeas will be issued against him. Coburn v. Hynes, 161 Cal. 685; 120 Pac. 26. An appeal from an order setting aside the satisfaction of a judgment has not the effect of restoring the entry of satisfaction, nor of precluding the execution of the judgment pending the appeal; and execution will not be stayed by a writ of supersedeas, mandamus, or prohibition, in the absence of a direction from the trial judge. Bateman v. Superior Court, 139 Cal. 141; 72 Pac. 922. The power to issue a writ of supersedeas is one of the inherent powers of a court of appeals, to be exercised in any proper case, when it appears necessary to protect the rights of a litigant until final determination of his appeal. Reed Orchard Co. v. Superior Court, 19 Cal. App. 648; 128 Pac. 9, 18. A writ of supersedeas may properly be issued by the appellate court to arrest further action by the court below, after the issuance of a mandatory injunction. Clute v. Superior Court, 155 Cal. 15; 132 Am. St. Rep. 54; 99 Pac. 362. The appellate court will grant a writ of supersedeas to stay the execution of a judgment, where an order was made, granting execution, while there was a proper bond on file to stay execution. Brown v. Rouse, 115 Cal. 619; 47 Pac. 601. Pending an appeal from an order made after final judgment for the payment of money, the undertaking on appeal from the order having been waived, but no appeal having been taken from the judgment, the appellate court has no authority to grant a stay of execution upon the judgment. Carit v. Williams, 67 Cal. 580; 8 Pac. 93. Upon appeal from a judgment ordering an accounting in a partnership business, and enjoining the defendants from interfering with the plaintiff in his conduct of the business as a managing partner, the appellate court will deny a writ of supersedeas, where the amount of a stay bond upon such appeal was not fixed. Doudell v. Shoo, 159 Cal. 448; 114 Pac. 579. A writ of supersedeas will not issue,

in any case, where the statute does not provide for a stay of proceedings. Reed Orchard Co. v. Superior Court, 19 Cal. App. 648; 128 Pac. 9, 18. A writ of supersedeas, or order for the stay of proceedings pending on an appeal, cannot be used to perform the functions of an injunction against the parties to the action, restraining them from any act in the assertion of their rights, other than to prevent them from using the process of the court to enforce judgment. Dulin v. Pacific Wood etc. Co., 98 Cal. 304; 33 Pac. 123; Rose v. Mesmer, 131 Cal. 631; 63 Pac. 1010. Grounds for staying execution of a judgment, other than upon the taking of an appeal, cannot be urged upon a motion for a writ of supersedeas in the appellate court, but should be first presented in the trial court. Swasey v. Adair, 88 Cal. 203; 26 Pac. 83.

Writ of prohibition. Whether the appellant is a party aggrieved, and entitled to appeal from an order, cannot be determined upon petition for a writ of prohibition to prevent the trial court from acting in the case, until the appeal is heard and determined. Kaufman v. Superior Court, 108 Cal. 446; 41 Pac. 476.

Release from levy on execution. Under the provisions of this section prior to its amendment in 1873–74, the perfecting of an appeal from a money judgment, and the filing of an undertaking to stay proceedings, operated merely to stay proceedings on the judgment, but did not release from levy property already seized by the sheriff under an execution issued on the judgment before the appeal was effected. Ewing v. Jacobs, 49 Cal. 72. Upon notice of the filing of the notice of appeal, and the giving of the undertaking on appeal, under this section, to stay execution, it is the duty of the sheriff to release from levy all property taken under execution, regardless of the sufficiency or insufficiency of the sureties, and he cannot retain possession until the sureties have justified, or until their justification has been waived. Sam Yuen v. McMann, 99 Cal. 497; 34 Pac. 80. A sheriff is not warranted in retaining money collected under execution, pending an appeal from the judgment on which execution has not been stayed, the undertaking on appeal being insufficient: he should pay it over to the judgment creditor, for whom it was collected. Maze v. Langford, 16 Cal. App. 743; 117 Pac. 929.

Effect of appeal on attachment. Under this section and § 553, ante, an attachment may be continued in force, pending an appeal by the plaintiff from a judgment in favor of the defendant, upon the plaintiff's perfecting his appeal and filing the required undertaking; and this does not deprive the defendant of his property without due process of law. Primm v. Superior Court, 3 Cal. App. 208; 84 Pac. 786. This section and § 553, post, construed together, permit of an attachment being continued in force, pending an appeal by the plaintiff from a judgment in favor of the defendant, upon the plaintiff's perfecting his appeal and filing an undertaking as required by the final clause of this section. Primm v. Superior Court, 3 Cal. App. 208; 84 Pac. 786. Where, pending an appeal by the plaintiff, the lien of an attachment on real property was continued by an order of the court, under this section, without authority, and the effect of the order is to impose a continuing restraint on the defendant's right to the untrammeled enjoyment of his property, he is entitled to a writ of prohibition restraining the court from continuing the attachment; and, under such circumstances, the order will not be deemed a completed judicial act. Primm v. Superior Court, 3 Cal. App. 208; 84 Pac. 786.

Proceedings in matters not affected by order appealed from. A court has power to proceed upon any matter in an action not affected by the order appealed from. Bliss v. Superior Court, 62 Cal. 543; Estate of Thayer, 1 Cal. App. 104; 81 Pac. 658. An appeal from an order refusing to dissolve a temporary injunction has not the legal effect of suspending the jurisdiction of the court over so much of the action as is not affected by the order. Bliss v. Superior Court, 62 Cal. 543; and see Rogers v. Superior Court, 126 Cal. 183; 58 Pac. 452. The settlement and filing of the bill of exceptions, after judgment and appeal taken, is a matter embraced in the action and not affected by the judgment appealed from, and is within the power of the court after appeal taken; hence, such bill of exceptions will be considered on appeal. Colbert v. Rankin, 72 Cal. 197; 13 Pac. 491. Pending an appeal from an order decreeing a partial distribution of an estate, the court is not deprived of power to settle the final account of the executor, where such account does not contain any item relating to the distribution. Estate of Thayer, 1 Cal. App. 104; 81 Pac. 658. An appeal from an order granting general letters of administration has only the effect of suspending the order appealed from, and does not in any manner affect or suspend the jurisdiction of the court over the distinct proceedings of special administration of the estate, the object of which is to preserve the estate until general letters testamentary or of administration are granted; hence, the court has jurisdiction, pending such appeal, to order the administrator to turn over all the property in his possession, forthwith, to a special administrator appointed by the court. Estate of Heaton, 142 Cal. 116; 75 Pac. 662. An appeal from an order revoking the probate of a will has not the effect of reviving the powers and functions of the former executor; and the court has power to appoint a special ad

ministrator to take charge of the estate. Estate of Crozier, 65 Cal. 332; 4 Pac. 109. After an appeal has been taken from an order pendente lite, directing the husband to pay counsel fees in an action by the wife for permanent support and maintenance, the trial court has power to direct the payment of further counsel fees to enable the wife to prosecute her action on appeal. Ex parte Winter, 10 Cal. 291; 11 Pac. 630. Pending an appeal from a decree of divorce, the trial court still has jurisdiction to grant temporary alimony, as the matter is not affected by the judgment appealed from; such alimony cannot be granted by the appellate court. Reilly v. Reilly, 60 Cal. 624. Where a receiver is appointed at the request of the plaintiff, for a purpose ancillary to the main object of the action, and judgment is afterwards rendered in favor of the defendant, an appeal by the plaintiff from the judgment does not deprive the lower court of jurisdiction to hear and determine a motion made by the defendant for the discharge of the receiver. Baughman v. Superior Court, 72 Cal. 572; 14 Pac. 207. Pending an appeal, the approval of an undertaking may be set aside by the trial court; and the filing of the transcript on appeal has not the effect of taking away such power. Palmer v. Galvin, 2 Cal. Unrep. 446; 6 Pac. 99. An appeal from an order dismissing a motion to vacate a prior order can have no effect to stay proceedings on such prior order. Credits Commutation Co. v. Superior Court, 140 Cal. 82; 73 Pac. 1009. An adjudication in bankruptcy, though filed in the appellate court, by a defendant, subsequently to an appeal, does not stay the appeal in the state court. Reynolds v. Pennsylvania Oil Co., 150 Cal. 630; 89 Pac. 610.

Court may dispense with or limit security. This section applies to cases in which the executor, administrator, or guardian is a party plaintiff or defendant in an action, and he appeals from a judgment or order in such action; but it does not apply to an appeal by an administrator from an order directing him to pay a claim against the estate. Ex parte Orford, 102 Cal. 656; 36 Pac. 928. An appeal from an order of distribution by an executor does not entitle him to claim the benefit of § 965, post, as to undertakings on appeal, such appeal not being from an order made in the settlement of the estate of which he is executor; and to entitle such executor to the benefit of § 946, an order must be made dispensing with the undertaking, within the time allowed for filing the same. Estate of Skerrett, 80 Cal. 62; 22 Pac. 85. An administrator, in appealing from an order revoking his appointment, is not acting in another's right, within the meaning of this section, providing for an order dispensing with the undertaking on appeal. Estate of Danielson, 88 Cal. 480; 26 Pac. 505. It is not indispensably necessary that a judgment should have been rendered against an executor in his representative capacity, in order to warrant the county in dispensing with the undertaking; but it is sufficient if a showing is made that the matter in litigation really involves the rights of the estate, and that if the judgment shall be affirmed the property rights of such estate will be affected and its assets diminished. Kirsch v. Derby, 93 Cal. 573; 29 Pac. 218. A municipal officer, proceeded against in his official capacity, and not as an individual, is within this section, and on appeal by him the undertaking on appeal may be dispensed with. Scheerer v. Edgar, 67 Cal. 377; 7 Pac. 760; Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109. The board of education of the city and county of San Francisco must, upon appeal, give an undertaking, or procure an order of the court dispensing with it: such board does not represent the city and county. Mitchell v. Board of Education, 137 Cal. 372; 70 Pac. 180. To entitle an executor to the benefit of this section, the order dispensing with the undertaking must be made within the time for filing the same: after the appeal has lapsed, it cannot be restored by an order subsequently made; and a direction that such order shall be entered nunc pro tunc is unavailing. Estate of Skerrett, 80 Cal. 62; 22 Pac. 85. To entitle certain parties to appeal, without filing an undertaking, the order dispensing with the undertaking must be made within the time fixed by law for filing the same. Crowley Launch etc. Co. v. Superior Court, 10 Cal. App. 342; 101 Pac. 935; Estate of Skerrett, 80 Cal. 63; 22 Pac. 85. An order dispensing with an undertaking on appeal, made by the judge who tried the case, while the court was in session, and filed with the clerk, but not entered in the minutes, is an order of the court, within this section. Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109.

Necessity that executor or administrator give bond on appeal from revocation of probate or grant of letters. See note 20 Ann. Cas. 416.

Effect of appeal from injunction upon jurisdiction of trial court to punish contempt for its violation. See note 14 L. R. A. (N. S.) 1150.

Jurisdiction to award temporary alimony, suit money, or counsel fees pending appeal in divorce suit. See note 27 L. R. A. (N. S.) 712.

Power of trial court to correct its record after appeal. See note 31 L. R. A. (N. S.) 207.

CODE COMMISSIONERS' NOTE. Merced Mining Co. v. Fremont, 7 Cal. 132; Hicks v. Michael, 15 Cal. 109; Mokelumne Hill etc. Min. Co. v. Woodbury, 10 Cal. 185; Ross v. Austill, 2 Cal. 183; Woodbury v. Bowman, 13 Cal. 634; Smith v. Pollock, 2 Cal. 92; Dobbins v. Dollarhide, 15 Cal. 374.

§ 947. Undertaking may be in one instrument or several. The undertakings prescribed by sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-five, may be in one instrument or several, at the option of the appellant.

Legislation § 947. Enacted March 11, **1872**; based on Practice Act, § 354 (New York Code, § 340), which read: "The undertaking prescribed by sections 348, 349, 350, and 352, may be in one instrument, or several, at the option of the appellant."

Undertaking may be in several instruments. If, in foreclosure cases, a judgment in personam is rendered against the defendants, and also one enforcing the lien, and an appeal is taken from the whole judgment, in order to stay proceedings upon the whole judgment the appellant must give an undertaking for costs, one in double the amount of the personal judgment, and one for the payment of waste and such deficiency as may remain due after the sale of the property, and all these undertakings may be in one instrument or several, at the option of the appellant. Englund v. Lewis, 25 Cal. 337. The undertakings on appeal and to stay execution may be contained in one instrument, where the undertakings, and the objects for which they are executed, can be clearly distinguished. Sharon v. Sharon, 68 Cal. 326; 9 Pac. 187.

CODE COMMISSIONERS' NOTE. Englund v. Lewis, 25 Cal. 356.

§ 948. Justification of sureties on undertakings on appeal. The adverse party may except to the sufficiency of the sureties to any of the undertakings mentioned in sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-five, at any time within thirty days after notice of the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent.

Justification of sureties. 'Ante, § 495.

Legislation § 948. **1.** Enacted March 11, **1872**; based on Practice Act, § 355 (New York Code, § 341), as amended by Stats. 1865–66, p. 708, which read: "An undertaking on appeal shall be of no effect unless it be accompanied by the affidavit of the sureties that they are each worth the amount specified therein over and above all their just debts and liabilities exclusive of property exempt from execution, except where the judgment exceeds three thousand dollars and the undertaking is executed by more than two sureties; they may state in their affidavit that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties. The adverse party, however, may except to the sufficiency of the sureties to the undertaking or undertakings mentioned in section three hundred and forty-nine, three hundred and fifty, three hundred and fifty-one, and three hundred and fifty-two, at any time within thirty days after the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant or appellants shall have been served with notice of such exception, justify before a judge of the court below, a county judge, or county clerk, upon five days' notice to the appellant, execution of the judgment or decree appealed from shall be no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this act a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking, and in all cases the undertaking or deposit may be waived by the written consent of the respondent." When enacted in 1872, § 948 read as now, except for the amendments of 1873–74, 1880, and 1905.

2. Amended by Code Amdts. **1873–74**, p. 338, (1) omitting "undertaking or" before "undertakings"; (2) substituting "respondent of the time and place of justification" for "appellant"; (3) inserting "order" after "judgment."

3. Amended by Code Amdts. **1880**, p. 6, (1) inserting "any of" before "the undertakings mentioned," (2) omitting "a county judge" after "court below," and (3) substituting "shall be" for "is" before "equivalent."

4. Amendment by Stats. **1901**, p. 173; unconstitutional. See note ante, § 5.

5. Amended by Stats. **1905**, p. 155, (1) inserting "notice of" before "the filing" and (2) omitting "or county clerk" after "court below."

Exception to sureties. An objection to the form of the affidavit attached to an undertaking on appeal is not an objection to the sufficiency of the sureties, nor an objection which requires them to justify before the court below. Schacht v. Odell, 52 Cal. 447. The time to except to the sureties begins to run from the filing of the undertaking, and not from the service of the notice of appeal. Brown v. Green, 65 Cal. 221; 3 Pac. 811.

Justification of sureties. The justification of the sureties on a bond is a thing

apart from its validity; but the qualification of the sureties is a material part of the bond. Maze v. Langford, 16 Cal. App. 743; 117 Pac. 929. A corporation organized for the purpose of becoming a surety upon bonds or undertakings, notwithstanding the provisions of §§ 1056, 1057, post, may be required, upon exception to its sufficiency as surety, under this section, to show surplus assets equal to the amount of its undertaking. Fox v. Hale etc. Mining Co., 97 Cal. 353; 32 Pac. 446. In a proper case, where the sureties on a stay bond have been excepted to, the appellant may give a new notice of justification, and, at the time noticed, if sufficient time within the prescribed limits is left, may tender a new bond, the sureties upon which may then justify. Brown v. Rouse, 115 Cal. 619; 47 Pac. 601. Where, on account of the insufficiency of the undertaking on appeal, the appellant files a new undertaking in the appellate court, approved by one of the justices, the respondent cannot require the sureties in the substituted undertaking to justify. Stevenson v. Steinberg, 32 Cal. 373.

Justification before whom. Before the amendment to this section in 1905, the county clerk and a judge of the superior court were vested by the statute with equal authority as to the justification of sureties. Boyer v. Superior Court, 110 Cal. 401; 42 Pac. 892. The decision of the clerk of the court, upon the justification of the sureties before him, could not be reviewed by the appellate court; the statute designated that officer as a tribunal for hearing and determining that question, and provided no mode by which his conclusion might be reviewed. Kreling v. Kreling, 116 Cal. 458; 48 Pac. 383; Boyer v. Superior Court, 110 Cal. 401; 42 Pac. 892. Where the respondent excepts to the sureties on the undertaking on appeal, the sureties must justify before a county judge of the county where the suit is pending, where that officer is selected; and where such justification was before the county judge of another county, where the sureties resided, the appeal will be dismissed. Roush v. Van Hagen, 18 Cal. 668 (decided before the amendment to this section in 1880).

Effect of failure to justify. The failure of the sureties to justify, where excepted to, does not establish a failure to perfect the appeal, and is not a ground for a dismissal of the appeal (Schacht v. Odell, 52 Cal. 447; De Jarnatt v. Marquez, 127 Cal. 558; 78 Am. St. Rep. 90; 60 Pac. 45; Klingler v. Henderson, 137 Cal. 561; 70 Pac. 617): it merely affects the stay of execution. Swasey v. Adair, 83 Cal. 136; 23 Pac. 284; and see Wittram v. Crommelin, 72 Cal. 89; 13 Pac. 160. There is no effectual provision for the justification of the sureties on the undertaking for the appeal; although they may be required to justify under this section, yet, if they fail to justify, the only consequence is, that the execution is no longer stayed: the appeal would therefore be effectual although the sureties are worthless. Duncan v. Times-Mirror Co., 109 Cal. 602; 42 Pac. 147. The statutes contemplate but one proceeding to stay the execution, and the failure of the sureties to justify leaves the plaintiff in a position to enforce the execution of his judgment; and although a new undertaking cannot afterwards be filed in the court below, yet the appellate court has an inherent power to secure to the appellant the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right, and may make an order to operate as a supersedeas, upon proper terms. Hill v. Finnigan, 54 Cal. 493. Where the appellant filed the statutory undertaking to stay proceedings pending the appeal, but, through a mistaken method of procedure, failed to have the sureties justify when required, and two stay bonds were disapproved by the clerk, the proceedings were not thereby stayed; yet, good faith being shown, a new stay bond will be permitted to be filed in the appellate court, when approved by the superior judge upon notice, and a writ of supersedeas will be granted. Nonpareil Mfg. Co. v. McCartney, 143 Cal. 1; 76 Pac. 653. A stay bond upon appeal from a judgment foreclosing a mortgage is operative, notwithstanding the pecuniary insufficiency of the sureties, until the failure of the sureties to justify after exception taken; and a sale made after the giving of such stay bond, and prior to exception taken to the sureties, is void, and should be set aside upon motion. Wheeler v. Karnes, 130 Cal. 618; 63 Pac. 62.

Waiver of undertaking. Under a stipulation that the appellant has in due time given and filed a good and sufficient undertaking on appeal, it must be supposed either that a good and sufficient undertaking was filed, or that the filing of the undertaking was waived. Forni v. Yoell, 99 Cal. 173; 33 Pac. 887. Waiver of the undertaking on appeal must be made before the time for filing the undertaking has expired; but it need not be filed within that time, if it is required to be filed at all. Newman v. Maldonado, 3 Cal. Unrep. 540; 30 Pac. 833. A stipulation to have the case placed on the calendar out of its order for hearing does not constitute a waiver of the filing of the undertaking on appeal. Little v. Jacks, 68 Cal. 343; 8 Pac. 856; 9 Pac. 264; 11 Pac. 128. Where the sureties on a stay bond, after exception to their sufficiency, offered to justify, but the matter was continued, from time to time, at the respondent's suggestion, and he apparently abandoned the proceeding to justify, his contention that the sureties failed

to justify cannot be sustained. Hubbard v. University Bank, 120 Cal. 632; 52 Pac. 1070.

Requisites of undertakings. See post, § 1057.

CODE COMMISSIONERS' NOTE. A party gave notice of justification before the clerk of the court on the 7th of November, between the hours of 10 A. M. and 5 P. M. of that day, and the sureties appeared upon such notice soon after ten of that day. It was held that the clerk acted properly in refusing to take their justification, the opposite party being absent, until the last hour stated in the notice. Lower v. Knox, 10 Cal. 480. A respondent gave notice April 20th, excepting to the sufficiency of the sureties on an undertaking on appeal, and appellant then gave notice that the sureties would justify on the 25th of the same month, and orders were afterwards made extending the time of justification to May 1st. Held, that the statute upon this point is peremptory, and that the court had no power to extend the time. Roush v. Van Hagen, 17 Cal. 121. Where respondent excepts to the sureties, they must justify before a county judge of the county where the suit is pending, where that officer is selected, and where such justification was before the county judge of another county, where the sureties resided, the appeal will be dismissed. Roush v. Van Hagen, 18 Cal. 668. Justification made before a county judge of a county other than that where the judgment was rendered, is not effectual for any purpose. Tevis v. O'Connell, 21 Cal. 512. A failure to justify when exceptions are taken, leaves the appeal as though no undertaking had been filed, and ineffectual for any purpose. Lower v. Knox, 10 Cal. 480. After notice of exception to the sufficiency of the sureties, they cannot justify without notice to the adverse party. Stark v. Barrett, 15 Cal. 361. When, on account of the insufficiency of the undertaking on appeal, the appellant files a new undertaking in the appellate court, approved by one of the justices, the respondent cannot require the sureties to justify. Stevenson v. Steinberg, 32 Cal. 373. If the sureties are excepted to, and appear before the justice to testify, and the party excepting then states before the justice that he knows the sureties to be good, and only excepted because his attorney told him to do so, this is a waiver of justification. Blair v. Hamilton, 32 Cal. 49.

§ 949. Undertakings in cases not specified. In cases not provided for in sections nine hundred and forty-two, nine hundred and forty-three, nine hundred and forty-four, and nine hundred and forty-five, the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section nine hundred and forty-one, stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court; and except, also, where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this state, and except, also, where the order grants, or refuses to grant, a change of the place of trial of an action; and except also where it orders a corporation or its officers or agents, or any of them, to give to a person adjudged to be a director, stockholder or member of such corporation a reasonable opportunity to inspect or take copies of such books, papers or documents of the corporation as the court finds that such director, stockholder or member is entitled by law to inspect or copy.

Appeal in condemnation proceedings is not a stay when. See post, § 1257.

Legislation § 949. 1. Enacted March 11, **1872**; based on Practice Act, § 356 (New York Code, § 342), which read: "In cases not provided for in sections 349, 350, 351, and 352, the perfecting of an appeal, by giving the undertaking, and the justification of the sureties thereon, if required, or making the deposit mentioned in section 348, shall stay proceedings in the court below upon the judgment or order appealed from; except that where it directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof to be deposited, to abide the judgment of the appellate court." When enacted in 1872, § 949 read as at present, except that it did not contain the last two exceptions.

2. Amended by Code Amdts. **1873–74**, p. 408, adding the second exception.

3. Amended by Stats. **1905**, p. 22, adding the last exception.

Scope of section. This section refers only to a stay of execution upon the order or judgment appealed from, in cases not provided for in §§ 942–945, ante. Rohrbacher v. Superior Court, 144 Cal. 631; 78 Pac. 22; Olsen v. Birch, 1 Cal. App. 99; 81 Pac. 656; Los Angeles v. Pomeroy, 132 Cal. 340; 64 Pac. 477; Carit v. Williams, 67 Cal. 580; 8 Pac. 93.

Construction of section. The provision of this section, declaring that the perfecting of an appeal stays proceedings in the court below upon the judgment or order appealed from, creates a statutory supersedeas, or a suspension of the power of the court below to issue an execution on the judgment or decree appealed from, or if a writ of execution is issued, a prohibition against the execution of the writ. Dulin v. Pacific Wood etc. Co., 98 Cal. 304; 33 Pac. 123. The amendment to this section in 1905 did not, by implication, repeal § 1254, post. Reed Orchard Co. v. Superior Court, 19 Cal. App. 648; 128 Pac. 9.

Application of section. This section does not apply where there is not an appeal from the judgment, but only from an order made after judgment, denying a motion to set aside an execution. Carit v. Williams, 67 Cal. 580; 8 Pac. 93.

Sufficiency of undertaking. On appeal from a judgment foreclosing liens against a vessel, and providing for a sale of the vessel, with her engines, apparel, etc., the undertaking prescribed by § 941, ante, is sufficient to stay execution, and an undertaking under § 942, ante, is without consideration and void. Olsen v. Birch, 1 Cal. App. 99; 81 Pac. 656. On appeal from an order granting a new trial, an undertaking for damages and costs is a sufficient undertaking to obtain a stay of proceedings pending the appeal. Ford v. Thompson, 19 Cal. 118.

Undertaking not required is void. A stay bond, where none is required, is without consideration and void. Olsen v. Birch, 1 Cal. App. 99; 81 Pac. 656.

Proceedings stayed. An undertaking on appeal, under § 941, ante, stays the proceedings pending the appeal, except in the cases provided for in §§ 942–945, ante, where it does not appear that the property to be sold under the execution on the judgment appealed from is perishable property (Root v. Bryant, 54 Cal. 182); hence, a motion to stay the execution will be granted. Cummings v. Cummings, 2 Cal. Unrep. 744; 13 Pac. 322; Los Angeles v. Pomeroy, 132 Cal. 340; 64 Pac. 477. A judgment determining the right to money deposited in court is stayed by the ordinary appeal bond for costs, although a judgment for costs is also made. McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 442; 33 Pac. 329. Upon appeal from a judgment giving the plaintiff the right to lay a pipe through the land of the defendant, the undertaking prescribed by § 941, ante, stays proceedings in the court below. Daly v. Ruddell, 129 Cal. 300; 61 Pac. 1080. On appeal from a judgment for the foreclosure of a mortgage upon personal property, execution is stayed by the undertaking on appeal as provided by § 941, ante. Snow v. Holmes, 64 Cal. 232; 30 Pac. 806. A judgment foreclosing a pledge, and directing a sale of the pledged property, is stayed by an undertaking in accordance with § 941, ante, and a writ of supersedeas will issue to prevent the execution of the decree, pending the appeal. Rohrbacher v. Superior Court, 144 Cal. 631; 78 Pac. 22. An undertaking on appeal, as prescribed by § 941, ante, stays proceedings on the judgment in an action by a vendee against his vendor, by which, after directing that the plaintiff recover a certain sum of money from the defendant, the sale of the land is directed, and deficiency judgment provided for, where, at the time, the plaintiff is in possession of the premises. Owen v. Pomona Land etc. Co., 124 Cal. 331; 57 Pac. 71. A judgment in a partnership accounting, adjudging that the plaintiff is entitled to a certain sum, and directing the sale of partnership real estate, and if there be any deficiency, a judgment for such deficiency against the defendant, is stayed by the undertaking prescribed by § 941, ante. Painter v. Painter, 98 Cal. 625; 33 Pac. 483. An appeal from an order appointing a receiver to collect alimony does not operate to enlarge the rights of the plaintiff to issue an execution on a judgment awarding alimony, so as to prevent its being stayed by the undertaking required by § 941, ante. Anderson v. Anderson, 123 Cal. 445; 56 Pac. 61. Where, in divorce proceedings, an order modifying a judgment awards the custody of a child of the parties to the father, and the mother delivers the child to the father in pursuance thereof, the giving of an undertaking on appeal, under § 941, ante, does not entitle the mother to the custody of the child, pending the appeal. Application of De Lemos, 143 Cal. 313; 76 Pac. 1115. A decree in partition, settling rights of property, is stayed by an undertaking executed in accordance with § 941, ante. Born v. Horstmann, 80 Cal. 452; 22 Pac. 169. Upon appeal from an order denying a motion to set aside an order directing execution to issue, the giving of a three-hundred-dollar undertaking operates to stay proceedings on the order appealed from, but proceedings on a former judgment and execution are not stayed. Weldon v. Rogers, 154 Cal. 632; 98 Pac. 1070. On appeal from an order refusing to vacate a prior order settling the account of a receiver, and directing him to pay a large sum of money upon certain claims, the ordinary bond on appeal merely stays the order appealed from, but can have no effect to stay proceedings on the prior order. Credits Commutation Co. v. Superior Court, 140 Cal. 82; 73 Pac. 1009. Upon an appeal from an order appointing an administrator, an undertaking under § 941, ante, stays all proceedings upon the order. Estate of Woods, 94 Cal. 566; 29 Pac. 1108. An order directing an administrator to pay money, as a family allowance, to the heir of the estate, is stayed by an undertaking given as required by § 941, ante. Pennie v. Superior Court, 89 Cal. 31; 26 Pac. 617. A proceeding on a decree of distribution is stayed by an undertaking in accordance with § 941, ante, on appeal by a legatee from such decree. Estate of Schedel, 69 Cal. 241; 10 Pac. 334. An order granting an adjudication of insolvency, not being a case in which a separate stay bond is required on appeal, is stayed by the ordinary appeal bond for costs. Dennery v. Superior Court, 84 Cal. 7; 24 Pac. 147. An appeal from a judgment rendered in favor of the contestant in an election contest has the effect to

suspend the judgment; hence, where the contestee had entered office before the rendition of the judgment, he is entitled to retain it pending appeal. Day v. Gunning, 125 Cal. 527; 58 Pac. 172. An appeal from a judgment removing a board of supervisors, ipso facto, operates as a supersedeas, and suspends the effect of the judgment, so as to restore the board to its right to continue in office until the final determination of the appeal. Morton v. Broderick, 118 Cal. 474; 50 Pac. 644. A judgment granting or denying an application for a writ of mandamus is stayed by the undertaking prescribed by § 941, ante. Palache v. Hunt, 64 Cal. 473; 2 Pac. 245.

Sale of perishable property not stayed. Upon appeal from a judgment foreclosing liens on personal property, described as "mortgages and liens," the court having also found that the property ordered to be sold was "perishable property," the ordinary three-hundred-dollar bond will not stay the judgment nor warrant a writ of supersedeas. Tolle v. Heydenfeldt, 138 Cal. 56; 70 Pac. 1013. The supreme court has power to order a stay of proceedings, pending an appeal from an order directing a sale of certain property as perishable property. Rogers v. Superior Court, 158 Cal. 467; 111 Pac. 357. An order made after final judgment, for the sale of perishable property, is appealable, notwithstanding a stay of proceedings by virtue of an appeal. Rogers v. Superior Court, 158 Cal. 467; 111 Pac. 357.

Usurpation, etc., of public office. An appeal from a judgment declaring that the defendant had usurped and intruded into and was unlawfully exercising office, and that the relator was entitled to the office, has not the effect of staying execution of the judgment. Ex parte Henshaw, 73 Cal. 486; 15 Pac. 110. An appeal by an intervener in an action, where it is determined that the defendant unlawfully held office and that the relator was entitled thereto, does not operate to stay the judgment. People v. Campbell, 138 Cal. 11; 70 Pac. 918. The provision in this section, that the appeal does not stay proceedings upon the judgment, where it adjudges the defendant guilty of usurping or intruding into or unlawfully holding public office, civil or military, within the state, authorizes the construction, that proceedings upon the judgment are stayed when it affirms the right of the plaintiff to any office which is not public. Foster v. Superior Court, 115 Cal. 279; 47 Pac. 58.

Order refusing to change place of trial. An appeal from an order refusing to change the place of trial does not operate to stay proceedings in the lower court. Howell v. Thompson, 70 Cal. 635; 11 Pac. 789; and see People v. Whitney, 47 Cal. 584. Although an appeal from an order denying a motion to change the place of trial entitles the appellant to a continuance of the case in the court below while such appeal is pending, yet it does not deprive the court of jurisdiction to proceed and try the action, in such sense that prohibition would lie. People v. Whitney, 47 Cal. 584. Where an order refusing to change the place of trial is reversed on appeal, a judgment rendered against the appellant before the reversal of the order will be reversed on an appeal therefrom, without inquiring as to the commission of errors on the trial, although the appellant may have appeared at the trial and contested the right of the respondent to recover. Howell v. Thompson, 70 Cal. 635; 11 Pac. 789; and see People v. Whitney, 47 Cal. 584.

Injunction. An appeal from a judgment granting a perpetual injunction does not suspend the injunction during the pendency of the appeal, nor does it deprive the court in which the judgment was rendered of the power to punish a disobedience of the injunction as a contempt. Heinlen v. Cross, 63 Cal. 44.

Writ of assistance. A writ of assistance to recover the possession of land, sold under mortgage foreclosure sale, will not be stayed, where the only undertaking on appeal is that given under § 941, ante. California etc. Savings Bank v. Graves, 129 Cal. 649; 62 Pac. 259.

Judgment not evidence, pending appeal. This section includes a judgment which is self-executing; and an appeal therefrom does not impair this effect, except that while the appeal is pending it is not available as evidence of the facts adjudged. Foster v. Superior Court, 115 Cal. 279; 47 Pac. 58.

Implied power of courts to issue supersedeas. See note 67 Am. St. Rep. 714.

CODE COMMISSIONERS' NOTE. Ford v. Thompson, 19 Cal. 118.

§ 950. What papers to be used on appeal from the judgment. On appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions upon which the appellant relies.

Judgment roll. Ante, § 670.
Judgment. What orders reviewable. Post, § 956.
Transcript.
1. **Authentication of.** Post, § 953.
2. **Contents.** Post, §§ 951, 952.

Legislation § 950. 1. Enacted March 11, 1872; based on Practice Act, § 346, as amended by Stats. 1863–64, p. 247, which read: "On an appeal from a final judgment, the appellant shall furnish the court with a transcript of the notice of appeal, the pleadings, or amended pleadings,

as the case may be, which form the issues tried in the case, the judgment, and such other parts of the judgment roll, and no more, as are necessary to present or explain the points relied on, and the statement, if there be one, certified by the attorneys of the parties to the appeal, or by the clerk, to be correct. On appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used on the hearing in the court below, such copies to be certified in like manner to be correct. If any written opinion be placed on file in rendering the judgment or making the order in the court below, a copy shall be furnished. If the appellant fail to furnish the requisite papers, the appeal may be dismissed." When enacted in 1872, § 950 read: "On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, the pleadings, or amended pleadings, which form the issues tried in the case, the judgment, bills of exception, and such other parts of the judgment roll, and no more, as are necessary to present or explain the points relied on."

2. Amended by Code Amdts. **1873–74**, p. 338, to read: "On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case upon which the appellant relies. Any statement used on motion for a new trial or settled after decisions of such motion when the motion is made upon the minutes of the court, as provided in section six hundred and sixty-one, or any bill of exceptions settled, as provided in sections six hundred and forty-nine or six hundred and fifty, or used on motion for a new trial, may be used on appeal from a judgment equally as upon appeal from the order granting or refusing the new trial."

3. Amendment by Stats. **1901**, p. 173; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1915**, p. 205, (1) in first sentence, striking out (a) "an" in the phrase "On an appeal," and (b) "or statement in the case," after "bill of exceptions"; (2) striking out the second sentence.

Construction of section. A litigant's right to appeal from a judgment, and his right to appeal from an order refusing a new trial, are distinct and separate rights. Vinson v. Los Angeles Pacific R. R. Co., 141 Cal. 151; 74 Pac. 757 (7 Cal. Unrep. 142, 72 Pac. 840, department decision). The provisions of the first sentence of this section are not affected or impaired by the provisions of the second sentence. Wall v. Mines, 128 Cal. 136; 60 Pac. 682. This section is not to be construed as authorizing the statement to be considered upon matters which cannot be determined upon an appeal from the judgment: it will be limited to such matters as are authorized to be heard upon such appeal. Wall v. Mines, 128 Cal. 136; 60 Pac. 682. The trial court is not authorized to say what papers shall be used on appeal: that is a matter regulated by the code. People v. Center, 54 Cal. 236.

Contents of record. A bill of exceptions, based upon errors of law occurring at the trial, settled within thirty days after judgment is rendered, becomes a part of the record on appeal from the judgment. Caldwell v. Parks, 47 Cal. 640. A statement becomes a matter of record without the certificate of the judge. Reynolds v. Harris, 8 Cal. 617. If the appellant desires to show error in the instructions to the jury, he must present the evidence in his record on appeal. People v. McCauley, 1 Cal. 379; People v. Baker, 1 Cal. 403; White v. Abernathy, 3 Cal. 426; People v. Roberts, 6 Cal. 214; People v. Honshell, 10 Cal. 83; People v. Byrnes, 30 Cal. 206; People v. Best, 39 Cal. 690. Where the record contains no copy of the pleadings, the appeal will be dismissed. Hart v. Plum, 14 Cal. 149. The opinion of the trial judge is no part of the record on appeal (Wilson v. Wilson, 64 Cal. 92; 27 Pac. 861; Wilson v. Devine, 67 Cal. 341; 7 Pac. 776); nor are the statements of counsel in their brief (Hood v. Hamilton, 33 Cal. 698; Porter v. Peckham, 44 Cal. 204); nor is a supplemental affidavit, filed long after the perfecting of the appeal (R. H. Herron Co. v. Westside Electric Co., 18 Cal. App. 778; 124 Pac. 455); nor is a mere loose sheet of unidentified paper (Youmans v. H. S. Clarke Co., 19 Cal. App. 784; 127 Pac. 799); nor is a statement, not prepared and filed within the time prescribed by the statute. Ryan v. Dougherty, 30 Cal. 218. Where there is no bill of exceptions or statement of the case, or other like record, the appeal being upon the judgment roll alone, the orders of the court, allowing or refusing amendments to the answer, do not constitute any part of the record which an appellate court may review. Segerstrom v. Scott, 16 Cal. App. 256; 116 Pac. 690. Where the record discloses no reason or sufficient showing why a motion for a change of venue should not be granted, an order refusing to grant such a motion cannot be justified upon the ground that the refusing or granting of such orders is in the discretion of the court. Carr v. Stern, 17 Cal. App. 397; 120 Pac. 35.

Opinion of court is no part of record. See note post, § 952.

Amendment and completion of record. Where the record is incomplete, the appellant should move the court below, at the earliest possible moment, to supply the lost papers, or by other means within its control, to complete the record. Buckman v. Whitney, 24 Cal. 267; Bonds v. Hickman, 29 Cal. 461. A stipulation as to the correctness of the transcript does not estop the respondent from pleading a diminution of the record and having it completed. California Wine Ass'n v. Commercial Union Fire Ins. Co., 159 Cal. 49; 112 Pac. 858. The lower court may amend the record and make it speak the truth. Morrison v. Dapman, 3 Cal. 255; Anderson v. Parker, 6 Cal. 197; Branger v. Chevalier, 9 Cal. 172; Browner v. Davis, 15 Cal. 9; Swain v. Naglee, 19 Cal. 127; Hagler v. Henckell, 27 Cal. 491; Estate of Schroeder, 46 Cal. 304. For the purpose of amendment, the record remains in the court below, although the appeal has been taken; and the lower court will grant amendments or supply lost rec-

ords in all cases where such relief would have been granted in case no appeal had been taken. Buckman v. Whitney, 24 Cal. 267. A motion to strike from the transcript and to disregard a certain order and finding, on the ground that it is not a part of the record, will not be considered until the final hearing of the case. Estate of Williams, 4 Cal. Unrep. 511; 36 Pac. 6. The appellate court may order a document to be inserted in or stricken from the transcript, in order to perfect it; but it cannot vary or amend a document found in the record. Bonds v. Hickman, 29 Cal. 461; Satterlee v. Bliss, 36 Cal. 489; Thompson v. Patterson, 54 Cal. 542; Boyd v. Burrel, 60 Cal. 280; California Wine Ass'n v. Commercial Union Fire Ins. Co., 159 Cal. 49; 112 Pac. 858. The appellate court has no control over the record of the inferior court from which the appeal lies, and cannot make an order supplying lost records. Buckman v. Whitney, 24 Cal. 267; Satterlee v. Bliss, 36 Cal. 489; Thompson v. Patterson, 54 Cal. 542; Boyd v. Burrel, 60 Cal. 280. A bill of exceptions cannot be amended by the appellate court, which must review the order upon the same record upon which it was made. Baker v. Borello, 131 Cal. 615; 63 Pac. 914. The settled statement on motion for a new trial cannot be amended by the appellate court: the action of the trial court must be reviewed upon a transcript of the records of that court. Clare v. Sacramento Electric etc. Co., 122 Cal. 504; 55 Pac. 326.

Effect of insufficiency of record. Where the transcript does not contain a copy of the judgment roll, or of a bill of exceptions, or of a statement in the case, the appeal from the judgment cannot be considered. Welch v. Allen, 54 Cal. 211. Where the record fails to show that the complaint, answer, findings, and judgment, were ever filed in the court below, or that the judgment was ever entered, and fails to contain a certificate to the papers which would constitute the judgment roll, and further fails to show that the statement on motion for new trial was filed, or that the order denying a new trial was ever entered, the record is insufficient, and the judgment must be affirmed. Wells v. Kreyenhagen, 117 Cal. 329; 49 Pac. 128.

New record. Parties are powerless, without the consent of the court, to make up a new record based upon former rulings. Grunsky v. Field, 1 Cal. App. 623; 82 Pac. 979.

Notice of appeal. The notice of appeal should be included in the transcript on appeal. Woodside v. Hewel, 107 Cal. 141; 40 Pac. 103. An appeal cannot be taken from parts of two judgments, and from a special order made after judgment, by one notice of appeal, and on one undertaking on appeal. People v. Center, 61 Cal. 191.

Judgment roll. On appeal from a judgment, without a statement or bill of exceptions, nothing is part of the record, except the judgment roll, and no question arising outside of the roll can be considered. Wetherbee v. Carroll, 33 Cal. 549. An appeal by an administrator with the will annexed, from portions of a decree of partial distribution, is, in effect, an appeal from a judgment, and may be taken on the judgment roll alone, consisting of the petitions of the parties, the oppositions thereto, the findings thereon, and the decree based upon those findings; in such a case, no bill of exceptions is necessary: the clerk's certificate to the correctness of the transcript is the only certification required. Estate of Broome, 162 Cal. 258; 122 Pac. 470. The judgment roll, on appeal from an order denying a motion for a new trial of the contest of a will after probate, should include at least the petition for revocation of the probate, the answer thereto, the verdict of the jury, and the judgment. Estate of Kilborn, 162 Cal. 4; 120 Pac. 762. The bill of exceptions, when settled, becomes a part of the judgment roll. Lunnun v. Morris, 7 Cal. App. 710; 95 Pac. 907. A stipulation is not an exception, nor a statement on appeal, nor a part of the judgment roll. People v. Hawes, 41 Cal. 632. An order granting leave to a party to amend his answer is no part of the judgment roll, and is not required to be entered thereon. Segerstrom v. Scott, 16 Cal. App. 256; 116 Pac. 690. Where papers, not included in the judgment roll, are required upon appeal, no duty is imposed upon the clerk to certify them. Rose v. Lelande, 17 Cal. App. 308; 119 Pac. 532. An appeal from a judgment, where no bill of exceptions is filed, has the effect to bring up only the judgment roll, or such parts of it as are necessary to explain the points relied on; hence, as a petition for certiorari is not a part of the judgment roll, it is not brought up on such appeal. Reynolds v. County Court, 47 Cal. 604.

Necessity for bill of exceptions. There is no provision of law, which dispenses with a bill of exceptions, where the sufficiency of the evidence to sustain the decision is sought to be questioned on appeal. California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692; 118 Pac. 103. This section does not forbid the hearing of an appeal from a judgment, unless there is a bill of exceptions, but only provides that the court shall be furnished with a copy of any bill of exceptions upon which the appellant relies. Thompson v. Hancock, 51 Cal. 110. The absence of a bill of exceptions is not a ground for the dismissal of the appeal, but rather for an affirmance of the judgment, if there is nothing in the record upon which the action of the superior court can be properly reviewed. Howell v. Howell, 101 Cal. 115; 35 Pac. 443. The question whether the trial court erred in striking out portions of the answer, cannot be presented upon an appeal

without a bill of exceptions. Spence v. Scott, 97 Cal. 181; 31 Pac. 52. Where the order appealed from is, in effect, a judgment, and can be reviewed on the judgment roll, a motion to dismiss the appeal for want of a bill of exceptions will be denied. Howell v. Howell, 101 Cal. 115; 35 Pac. 443.

Sufficiency and contents of bill of exceptions. On appeal from a judgment, any bill of exceptions settled may be used; and the fact that a bill of exceptions was entitled "A bill of exceptions on motion for a new trial," is immaterial. Bedan v. Turney, 99 Cal. 649; 34 Pac. 442. A bill of exceptions, to constitute a part of the transcript on appeal, must be settled as provided in § 649 or § 650, ante. Witter v. Andrews, 122 Cal. 1; 54 Pac. 276. It is not intimated that § 650, ante, is other than directory, or that the failure to serve the engrossed bill therein provided for, when certified, will preclude its use on appeal. Regents of University v. Turner, 159 Cal. 541; Ann. Cas. 1912C, 1162; 114 Pac. 842. On appeal from a judgment, the appellant is required to bring up only the judgment roll, and any bill of exceptions or statement in the case upon which he relies; hence, errors committed against the respondent need not be shown by such bill of exceptions. Klauber v. San Diego Street Car Co., 98 Cal. 105; 32 Pac. 876. An erroneous ruling of the trial court, in rendering judgment on the pleadings without a trial of the action, may be reviewed on an appeal from the judgment, without being incorporated in a bill of exceptions, when the judgment recites that it was rendered on the pleadings. Weeks v. Garibaldi, 73 Cal. 599; 15 Pac. 302. When the appellant presents his record in the form of a bill of exceptions, which presents the objection and rulings in such manner that no more particular presentation is needed to call the court's attention to the errors relied upon, the particular errors need not be specified in the bill. First National Bank v. Trognitz, 14 Cal. App. 176; 111 Pac. 402. Where the bill of exceptions shows that there was no error in refusing a continuance to the defendant, resort cannot be had, upon appeal, to the defendant's affidavit to show the contrary. Frost v. Witter, 132 Cal. 421; 85 Am. St. Rep. 53; 64 Pac. 705. Affidavits, used on motion after judgment, cannot be considered on appeal from final judgment, where they are not embodied in the bill of exceptions, or the statement is not settled in due form. Welch v. Allen, 54 Cal. 211.

May be used on all appeals. A bill of exceptions is equally applicable to any and all kinds of appeals provided for by the code. Brandt v. Clark, 81 Cal. 634; 22 Pac. 863.

Similarity between bill of exceptions and statement. The legal effect of a document is to be determined by the matter which it contains; when settled, there is no substantial difference between a bill of exceptions and a statement of the case, except that the latter, in addition to setting forth the exceptions taken at the trial, must also designate the particular errors attacked; the particulars in which the evidence is claimed to be insufficient must be specified in either document. Pease v. Fink, 3 Cal. App. 371; 85 Pac. 657. Where the appellant called a document a "statement," rather than a "bill of exceptions," he will not be deprived of his appeal, where he was not entitled to a statement of the case, but to a bill of exceptions. Witter v. Andrews, 122 Cal. 1; 54 Pac. 276. Where an appellant set forth in the transcript a document entitled an "Engrossed statement of the case," in which was set forth all the matters essential to a bill of exceptions, it is sufficient as such. Pease v. Fink, 3 Cal. App. 371; 85 Pac. 657.

Right to have statement settled. A party appealing from a judgment has an independent right to have settled a statement of the case to be used upon such appeal. Vinson v. Los Angeles Pacific R. R. Co., 141 Cal. 151; 74 Pac. 757 (7 Cal. Unrep. 142, 72 Pac. 840, department decision).

Waiver of statement. A statement, if not filed in time, is deemed to have been waived. Macomber v. Chamberlain, 8 Cal. 322; but see Bryan v. Maume, 28 Cal. 238; Kavanagh v. Maus, 28 Cal. 262.

Kinds of statements. The only statement that can be used on appeal is the one used on the hearing of a motion for a new trial, or the subsequent statement designated in § 661, ante. Wall v. Mines, 128 Cal. 136; 60 Pac. 682. Compare §§ 659, 661, ante, and §§ 951, 952, post.

Statement on motion for new trial. The principles applicable to statements on appeal apply to statements for new trials. Dickinson v. Van Horn, 9 Cal. 207. A statement of the case, used on the hearing of the motion for a new trial, is a part of the record, on which an appeal from the judgment may be heard. Sharon v. Sharon, 68 Cal. 326; 9 Pac. 187; Scott v. Wood, 81 Cal. 398; 22 Pac. 871; Brind v. Gregory, 122 Cal. 480; 55 Pac. 250; and see People v. Crane, 60 Cal. 279; Somers v. Somers, 83 Cal. 621; 24 Pac. 162. The requirement of this section, that the appellant must furnish a copy of any statement in the case, upon which he relies, must be held to include the statement prepared for use on the motion for a new trial, whether or not such statement had been actually used: the latter part of this section does not affect this right. Wall v. Mines, 128 Cal. 136; 60 Pac. 682; and see Brandt v. Clark, 81 Cal. 634; 22 Pac. 863; Jue Fook Sam v. Lord, 83 Cal. 159; 23 Pac. 225; Forni v. Yoell, 99 Cal. 173; 38 Pac. 887; Brind v. Gregory, 120 Cal. 640; 53 Pac. 25; Witter v. Andrews,

122 Cal. 1; 54 Pac. 276; Kelly v. Ning Yung Ben Ass'n, 138 Cal. 602; 72 Pac. 148. On appeal from a judgment, taken more than sixty days after its entry, the use of a statement settled to be used upon a motion for a new trial is not involved in a motion to dismiss the appeal. Wall v. Mines, 128 Cal. 136; 60 Pac. 682. An order settling the account of an executor is not a final judgment upon which a statement on motion for a new trial can be used. Estate of Franklin, 133 Cal. 581; 65 Pac. 1081. A statement on motion for a new trial, settled and filed subsequently to the date of the order denying a new trial, may be considered on appeal from the judgment, even though it cannot be resorted to for the purpose of reviewing such order. Blood v. La Serena Land etc. Co., 150 Cal. 764; 89 Pac. 1090.

Statement on appeal. The general purpose of statements on appeal, both from judgments and orders, is to provide for errors in other portions of the field of litigation than those covered by statements on motions for new trial. Quivey v. Gambert, 32 Cal. 304. A statement on appeal must specify the grounds or errors on which the appellant relies (Burnett v. Pacheco, 27 Cal. 408); and there is no distinction, as to the manner in which a statement is to be prepared, between an action at law and a suit in equity. Barrett v. Tewksbury, 15 Cal. 354; Hutton v. Reed, 25 Cal. 478; People v. Banvard, 27 Cal. 470; Haggin v. Clark, 28 Cal. 162; Cross v. Zane, 45 Cal. 89; Ferrer v. Home Mutual Ins. Co., 47 Cal. 416. Questions of law and fact raised must be distinctly set forth in a statement on appeal, accompanied with only so much of the evidence as may be necessary to show their pertinency and materiality. Barrett v. Tewksbury, 15 Cal. 354; Hutton v. Reed, 25 Cal. 478. A statement on appeal must be authenticated and served. Kavanagh v. Maus, 28 Cal. 261. The time for making and filing a statement on appeal may be extended. Bryan v. Maume, 28 Cal. 238.

Contents of statements on appeal from probate court. See note post, § 963.

Nature of case on appeal. The case made by the record on appeal is regarded as a new and distinct action. Davidson v. Dallas, 15 Cal. 75.

Examination on appeal confined to what. On appeal from a judgment, the examination is confined to the judgment roll, and to any bill of exceptions, statement on motion for new trial, and statement of the case, on which appellant relies; the question to be considered must arise on these papers, and if they do not thus arise, no duty devolves on the appellate court to decide them. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. The only papers which can be considered on appeal from a final judgment are the notice of appeal and the judgment roll, where there is no bill of exceptions: a stipulation for judgment cannot be considered. Spinetti v. Brignardello, 53 Cal. 281. The appellate court will not examine the evidence for the purpose of finding a fact. Ellis v. Jeans, 26 Cal. 272. A bill of exceptions, or statement of the case, may be considered on an appeal from the judgment. Mendocino County v. Peters, 2 Cal. App. 21; 82 Pac. 1122; Wall v. Mines, 128 Cal. 136; 60 Pac. 682. The appeal must be disposed of on the record as it comes up to the court: the appellate court cannot interpolate other matters. Davidson v. Dallas, 15 Cal. 75; Rogers v. Tennant, 45 Cal. 184; Parrott v. Floyd, 54 Cal. 534. The appellate court will not be controlled by the views or the reasoning of counsel, but will decide the case upon the record. Hubbard v. Sullivan, 18 Cal. 508; San Francisco v. Beideman, 17 Cal. 443. The appellant is required to confine himself to the objections taken at the trial and set out in the record (Clarke v. Huber, 25 Cal. 593; Davey v. Southern Pacific Co., 116 Cal. 325; 48 Pac. 117; Frank v. Pennie, 117 Cal. 254; 49 Pac. 208; Dikeman v. Norrie, 36 Cal. 94; McKay v. Riley, 65 Cal. 623; 4 Pac. 667; Howland v. Oakland Consol. Street Ry. Co., 110 Cal. 513; 42 Pac. 983); he cannot be allowed, in the appellate court, to enlarge the grounds of his objections, and urge new ones not presented in the first instance (Frank v. Pennie, 117 Cal. 254; 49 Pac. 208); but the respondent, on appeal, may justify the rulings of the court upon any ground, whether advanced in the discussion below or not. Clarke v. Huber, 25 Cal. 593; Davey v. Southern Pacific Co., 116 Cal. 325; 48 Pac. 117.

Contents of transcript. Copies of such papers as are designated in this section must be set out in and be made a part of the transcript. San Francisco etc. R. R. Co. v. Anderson, 77 Cal. 297; 19 Pac. 517. It cannot be said that the verdict shows prejudice as being excessive, where the transcript contains no testimony as to the plaintiff's injuries. Kirk v. Santa Barbara Ice Co., 157 Cal. 591; 108 Pac. 509. All matter that does not tend, in some degree, to illustrate the points made upon appeal should be omitted from the transcript. Estate of Boyd, 25 Cal. 511. The undertaking on appeal should not be embodied in the transcript. San Francisco etc. R. R. Co. v. Anderson, 77 Cal. 297; 19 Pac. 517. Where the appeal is taken on the judgment roll alone, the transcript need not contain a statement of the grounds of the appeal. Solomon v. Reese, 34 Cal. 28. Affidavits printed in the transcript, which form no part of the record, cannot be considered. Warren v. Russell, 129 Cal. 381; 62 Pac. 75. Where the transcript purports to contain a record of all the proceedings of the superior court, sought to be reviewed on

appeal, it is sufficient to avoid a dismissal, under the rules of the supreme court. Tompkins v. Montgomery, 116 Cal. 120; 47 Pac. 1006.

Waiver of objections to transcript. A stipulation that the transcript contains all that is necessary for the purposes of the appeal, is a waiver of the objection that the transcript does not contain all the judgment roll. Solomon v. Reese, 34 Cal. 28. The appellant cannot predicate error on a record to which he has consented. Grunsky v. Field, 1 Cal. App. 623; 82 Pac. 979.

One transcript for several appeals. On appeal from a judgment, and from an order subsequent to the judgment, the record on each appeal may be included in one transcript. Sharon v. Sharon, 68 Cal. 326; 9 Pac. 187. Where, on four appeals, but one transcript is made up, so that the appellate court cannot determine on what the lower court acted, the appeals will be dismissed. People v. Center, 61 Cal. 191.

Time for filing transcript. As an appeal is not perfected until the undertaking thereon is filed, the period of forty days for filing the transcript does not commence until such undertaking is filed. Wadsworth v. Wadsworth, 74 Cal. 104; 15 Pac. 447. The time within which a transcript on appeal must be filed does not, in all cases, commence to run from the date of perfecting the appeal; if there is an unsettled bill of exceptions or statement which may be used in support of the appeal, the forty days does not begin to run until such bill or statement is settled. Somers v. Somers, 83 Cal. 621; 24 Pac. 162. The forty days' time within which the transcript may be served and filed, under the rule of the supreme court, cannot commence to run pending a proceeding in the trial court for the settlement of a bill of exceptions for use in the appeal from the judgment. Dernham v. Bagley, 151 Cal. 216; 90 Pac. 543. The time within which to file the transcript upon appeal from a judgment is required to be filed, is not extended by reason of a pending and unsettled bill of exceptions upon appeal from an order made after judgment, which is not applicable to the appeal from the judgment. Butler v. Soule, 117 Cal. 226; 49 Pac. 5. A bill of exceptions, used on the motion for a new trial, which can be used on appeal from the judgment, cannot be held to excuse the delay to file a transcript upon appeal from the judgment, where such bill of exceptions had been settled more than forty days before notice of the motion to dismiss the appeal from the judgment. Bell v. Southern Pacific R. R. Co., 137 Cal. 77; 69 Pac. 692. A bill of exceptions, taken upon the order of the court refusing to vacate its order for the issuance of a writ of assistance, has not the effect of extending the time within which the transcript on appeal from the judgment in the case must be filed. Pignaz v. Burnett, 121 Cal. 292; 53 Pac. 633. Where a motion for a new trial is pending, the time for filing the transcript on an appeal from a judgment is, under the rules of the supreme court, extended for forty days after the disposition of the motion. People v. Bank of San Luis Obispo, 152 Cal. 261; 92 Pac. 481. The transcript on appeal from an order refusing to set apart a probate homestead, or to exempt personal property, or to grant a family allowance, must be filed within forty days after the appeal has been perfected, notwithstanding the pendency of proceedings for a new trial. Estate of Heywood, 154 Cal. 312; 97 Pac. 825. The pendency of a motion to vacate a judgment is no excuse for a failure to file the transcript on appeal within time. Modoc Co-operative Ass'n v. Porter, 11 Cal. App. 270; 104 Pac. 710. The filing of the printed transcript on the day of the filing of the motion to dismiss the appeal for failure to file such transcript, will not defeat such motion: the filing of the transcript can defeat the motion, only when it is filed before the notice of motion to dismiss is served. Ward v. Healy, 110 Cal. 587; 42 Pac. 1071. The pendency of a motion to dismiss an appeal does not, of itself, extend the time within which the appellant is required to file his transcript. White v. White, 112 Cal. 577; 44 Pac. 1026. The filing of a printed transcript is not required under the new method of appeal provided by §§ 953a, 953b, and 953c, post; hence, the rule of the supreme court, requiring a printed transcript to be filed within forty days after the appeal is perfected, is inapplicable to such an appeal. Estate of Keating, 158 Cal. 109; 110 Pac. 109.

What constitutes filing. The fact that the printed transcript was in the office of the express company, in transit to the clerk for filing, when the motion to dismiss the appeal was served, is not the equivalent of filing such transcript. Ward v. Healy, 110 Cal. 587; 42 Pac. 1071.

Dismissal of appeal for defects in transcript. The objection that some parts of the judgment roll have been omitted from the transcript is not ground for the dismissal of an appeal, in the first instance; and the respondent must notify the appellant of his objections, and the appellant will then have an opportunity to supply the papers; and where he fails to do so, he must take the risk of having his appeal dismissed. Hellings v. Duval, 119 Cal. 199; 51 Pac. 335. An appeal cannot be dismissed, where the entire record in the transcript must be examined for the purpose of ascertaining the sufficiency of the grounds urged in support of the motion; hence, the ground for a dismissal, set forth in the notice of motion, that the transcript

does not contain any specifications of errors of law, or the particulars in which the evidence is insufficient to support the verdict, cannot be considered. Jarman v. Rea, 129 Cal. 157; 61 Pac. 790. Where the transcript fails to show the papers used on the hearing in the court below, upon which the court acted in making and rendering the order appealed from, the appeal will not be dismissed, as the question involves an examination of the transcript, which will not be done on a motion to dismiss. Wolf v. Board of Supervisors, 143 Cal. 333; 76 Pac. 1108. Alleged defects in the statement of the case, embodied in the transcript on appeal, will not be considered on motion to dismiss the appeal, but when the case comes up on its merits. Richardson v. Eureka, 92 Cal. 64; 28 Pac. 102. Where the settled bill of exceptions, properly certified, contains the order appealed from, a motion to dismiss the appeal, because the order does not elsewhere appear in the transcript, is not tenable. Wolf v. Board of Supervisors, 143 Cal. 333; 76 Pac. 1108. Proof of service of the notice of appeal need not be included in the transcript, and its absence therefrom is not a ground for the dismissal of the appeal. Warren v. Hopkins, 110 Cal. 506; 42 Pac. 986; and see Modesto Bank v. Owens, 121 Cal. 223; 53 Pac. 552; People v. Alameda Turnpike Road Co., 30 Cal. 182; Ellis v. Bennet, 2 Cal. Unrep. 302; 3 Pac. 801. A motion to dismiss an appeal, for failure of the transcript to show service of notice of appeal, will be denied, where, at the hearing of the motion, proof of such service was made. Estate of Stratton, 112 Cal. 513; 44 Pac. 1028. Where the evidence of the service of a notice of appeal, as contained in the transcript, is defective, the appellant will be allowed to show, by proper proof, that a sufficient service had been made, and an appeal will not be dismissed for such failure in the transcript. Knowlton v. MacKenzie, 110 Cal. 183; 42 Pac. 580. Interlineations in a printed transcript are not, per se, ground for dismissing the appeal or for reprinting the transcript. Swasey v. Adair, 83 Cal. 136; 23 Pac. 284.

Dismissal for failure to file transcript. An appeal will be dismissed for failure to file the printed transcript within forty days after the refusal of the judge to settle or certify any bill of exceptions, which must be regarded with the same effect as its settlement. White v. White, 112 Cal. 577; 44 Pac. 1026. The appeal will be dismissed, where there is a failure to file the transcript within the prescribed time. Hart v. Kimberly, 5 Cal. Unrep. 532; 46 Pac. 618; Johnson v. Goodyear Mining Co., 6 Cal. Unrep. 274; 57 Pac. 383; Warren v. McGowan, 7 Cal. Unrep. 190; 77 Pac. 909. Where, after taking an appeal, a guardian ad litem failed to file a bill of exceptions or statement on appeal, and did not request the clerk of the lower court to certify any transcript of the record on appeal, and none was filed, the appeal will be dismissed. In re Moss, 7 Cal. Unrep. 172; 74 Pac. 546. Where, as to certain respondents, an appeal is to be considered upon the judgment roll alone, without a bill of exceptions, and no transcript is filed or served, the appeal, as to such respondents, will be dismissed, although they are included in a notice of appeal with others, on whom a bill of exceptions has been served, which has not yet been settled. Emeric v. Alvarado, 106 Cal. 646; 40 Pac. 11. Where no transcript on appeal was filed within the time prescribed by the rules of the court, and no extension of time was obtained for that purpose, the motion to dismiss the appeal will prevail. Galloway v. Rouse, 63 Cal. 280. An extension of the time within which to file the transcript may be granted by the supreme court; hence, an appeal will not be dismissed, where the transcript was filed within the time as extended. Meeker v. Hoffer, 57 Cal. 140. Where the transcript on appeal is not filed within the time granted by the supreme court, but the appellant acted in good faith, upon a mistaken construction of the order extending the time, and the transcript was served soon after such time, and the respondent is not injured, the appeal will not be dismissed. Brunnings v. Townsend, 6 Cal. Unrep. 647; 64 Pac. 106. Where the clerk of the supreme court permitted an appellant, on filing a written transcript, to have it printed himself, at his home town, instead of depositing the money to cover the costs thereof, as required by the rules of the court, and the appellant, some forty-eight days later, filed the printed transcript, but, prior to such filing, and on the same day, a motion to dismiss for failure to file was served on him, such permission of the clerk was a waiver, in effect, of the rule of the court, which, although unauthorized, so far excused the appellant, that, under the circumstances of the case, the appeal should not be dismissed. Ward v. Healy, 110 Cal. 587; 42 Pac. 1071. Failure to file the transcript within the time limited by the rule of the court and the stipulation of the parties, will not justify a dismissal of the appeal, where the facts and circumstances presented in the affidavit in behalf of the appellant are such as to excuse such failure. Esrey v. Southern Pacific Co., 4 Cal. Unrep. 402; 35 Pac. 310; and see Carter v. Paige, 77 Cal. 64; 19 Pac. 2. A motion to dismiss an appeal for failure of the appellant to file the transcript within forty days after the appeal was perfected, will be denied, where there is an uncertified bill of exceptions, which the judge declined to sign and certify, on the ground that the engrossed bill had been

filed in the clerk's office, and that he had no authority to certify it. Jackson v. Puget Sound Lumber Co., 115 Cal. 632; 47 Pac. 603. A motion to dismiss an appeal from the judgment, because the transcript was not filed in time, will be denied, where the bill of exceptions, or statement on motion for a new trial, had not been settled. Estate of Walkerly, 4 Cal. Unrep. 819; 37 Pac. 893; Pignaz v. Burnett, 119 Cal. 157; 51 Pac. 48; Bernard v. Sloan, 138 Cal. 746; 72 Pac. 360; San Francisco Law etc. Co. v. State, 141 Cal. 354; 74 Pac. 1047; Castro v. Breidenbach, 143 Cal. 335; 76 Pac. 1114. Where the superior judge, after motion to dismiss the appeal for failure to file the transcript, settled the statement, which was objected to because of irregularities, it must be presumed that the act of the judge in settling the statement was within his jurisdiction, and the appeal will not be dismissed for failure to file the transcript. Estate of Scott, 124 Cal. 671; 57 Pac. 654. A motion to dismiss an appeal from the judgment, for failure to file the transcript, will be denied, though more than forty days have elapsed after the perfecting of the appeal, where the transcript was filed within forty days after the settlement of a statement on motion for a new trial made upon the minutes of the court, notwithstanding more than sixty days had elapsed after the entry of the order denying the new trial, before the statement was settled, and no appeal was taken from the order. Vinson v. Los Angeles Pacific R. R. Co., 141 Cal. 151; 74 Pac. 757. A motion to dismiss an appeal for failure to file the transcript in time will be denied unless the certificate of the clerk justifies it; the affidavit of the respondent as to the character of the records kept by the clerk is inadmissible to contradict the latter's certificate, upon which alone the motion must be heard. Chevassus v. Burr, 134 Cal. 434; 66 Pac. 568.

No dismissal for failure to serve transcript. Failure of the appellant's attorney to serve a copy of the transcript on the respondent's attorney, before or at the time of filing, is not a ground for dismissing the appeal. Estate of Boyd, 25 Cal. 511.

CODE COMMISSIONERS' NOTE. 1. Notice of appeal. Transcript must show that notice of appeal was filed in due time. Franklin v. Reiner, 8 Cal. 340; Hildreth v. Gwindon, 10 Cal. 490; Coleman v. Wilkins, July term, 1872. It is not necessary that there should be a statement in the transcript that notice of appeal was filed and served. It is sufficient, within the rule of the cases cited supra, if a copy of the notice of appeal and of the proof of service appear in the record. Western Pacific R. R. Co. v. Reed, 35 Cal. 621. If the parties stipulate that notice of appeal was filed in the court below, and served, the appellate court will not receive evidence to contradict the stipulation, nor will it dismiss the appeal because no notice was filed. Bonds v. Hickman, 29 Cal. 460.

2. **Undertaking.** A statement that an undertaking in due form was filed within the time prescribed, is sufficient. Wakeman v. Coleman, 28 Cal. 58; Franklin v. Goodman, 31 Cal. 458; see also Franklin v. Reiner, 8 Cal. 340; Cook v. Klink, 8 Cal. 352.

3. **Pleadings.** Not necessary always to bring up pleadings in full. A summary, if agreed to by the attorneys, will in most cases be sufficient. Todd v. Winants, 36 Cal. 129.

4. **Bills of exceptions, and other parts of the judgment roll.** Where parties in the same action take independent appeals, each appeal must be heard on its own record. Gates v. Walker, 35 Cal. 289; Fair v. Stevenot, 29 Cal. 486. If an appeal is taken from the judgment, and also from an order denying a new trial, the appeal from the judgment must be determined on the judgment roll alone. Rush v. Casey, 39 Cal. 339. When an appeal is taken, and the parties rely upon the judgment roll, no statement of grounds is necessary. Jones v. Petaluma, 36 Cal. 230. But under this code a bill of exceptions, based upon the fact that the decision or verdict is not supported by the evidence, must contain a specification of the particulars in which the evidence is alleged to be insufficient. § 648, ante.

5. **What should be omitted.** The clerk's minutes. Mendocino County v. Morris, 32 Cal. 145. Matters that do not illustrate the point, Estate of Boyd, 25 Cal. 512. The original pleadings, where they have been superseded by amended ones. Marriner v. Smith, 27 Cal. 649.

§ 951. What papers used on appeals from orders, except orders granting new trials.

On appeal from a judgment rendered on an appeal, or from an order, except an order granting a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below.

Legislation § 951. 1. Enacted March 11, **1872**; based on Practice Act, § 346, as amended by Stats. 1863–64, p. 247. See ante, Legislation § 950.

2. Amended by Code Amdts. **1873–74**, p. 339, (1) inserting "of" before "the judgment," and (2) substituting "papers used on the hearing in the court below" for "the bill of exceptions relating thereto."

3. Amended by Stats. **1915**, p. 205, striking out "or refusing," in the phrase "granting or refusing a new trial."

Construction of section. This section does not require that findings in supplementary proceedings shall be brought up by a bill of exceptions. Lyons v. Marcher, 119 Cal. 382; 51 Pac. 559.

Application of section. This section applies to records on appeal, prepared under §§ 953a, 953c, post: a notice of appeal must be included in every record. Merritt v. Los Angeles, 162 Cal. 47; 120 Pac. 1064.

Appeal perfected how. To perfect an appeal from an order heard and determined, at least in part, upon affidavits, it is necessary for the appellant to follow either the method prescribed by §§ 953a, 953b, and 953c, post, or that prescribed by the rules of the supreme court. Hibernia Sav. & L. Soc. v. Doran, 161 Cal. 118; 118 Pac. 526. Upon appeal from an order denying a motion to vacate a judgment,

of dismissal, the burden is upon the plaintiffs appealing from the order to have settled a bill of exceptions, showing the evidence taken upon the hearing of such motion. Estate of Dean, 149 Cal. 487; 87 Pac. 13.

Copy of order appealed from. The appellant must furnish copies of the orders appealed from; and if the record has been destroyed by fire, he must have the record restored. Estate of Heywood, 154 Cal. 312; 97 Pac. 825. The requirement of this section, that the appellant must furnish the supreme court with a copy of the order appealed from, indicates that a copy of the order must be furnished the appellant by the clerk of the court in which it was made, and not by the clerk of the court to which the action was transferred. Mansfield v. O'Keefe, 133 Cal. 362; 65 Pac. 825. It is not necessary that orders appealed from shall be contained in any bill of exceptions or statement: copies of the orders, certified by the clerk, with a copy of the notice of appeal, are sufficient to sustain the appeal. Brode v. Goslin, 158 Cal. 699; 112 Pac. 280. On an appeal from an order dissolving a preliminary injunction, the order must be embodied in the transcript on appeal. Kimple v. Conway, 69 Cal. 71; 10 Pac. 189.

Papers used on the hearing. An appeal from an order dissolving an injunction must be heard upon the papers and evidence used on the hearing in the court below, which must be incorporated in a bill of exceptions, or authenticated by the judge as having been used at the hearing of the motion, and as being all of the papers and evidence so used; and upon failure to furnish such bill of exceptions or authentication, the appeal must be dismissed. Spreckels v. Spreckels, 114 Cal. 60; 45 Pac. 1022. The phrase in this section, "papers used on the hearing," means all of the papers. Muzzy v. D. H. McEwen Lumber Co., 154 Cal. 685; 98 Pac. 1062. This section applies only to orders which are themselves appealable, and does not relate to papers used on the hearing which resulted in the judgment; hence, papers used on the hearing of an application to file a supplemental complaint need not be authenticated by a bill of exceptions on appeal from the judgment. Giddings v. 76 Land etc. Co., 109 Cal. 116; 41 Pac. 788. Where the transcript contains no bill of exceptions, and no showing as to what papers were used on the hearing of the order appealed from, such order will not be reviewed. Ellis v. Bennet, 2 Cal. Unrep. 302; 3 Pac. 801. An appeal from an order revoking a temporary restraining order and refusing an injunction is heard upon the papers used on the hearing in the court below; and the testimony of witnesses contained in the record, identified by the judge as having been given on the hearing, will be treated on the appeal as written affidavits. Hunt v. Steese, 75 Cal. 620; 17 Pac. 920. Upon appeal from an order of confirmation, it is the duty of the appellant to make the return of sale, used on the hearing of the motion, a part of the record, or the order confirming the sale will not be reviewed. Estate of Robinson, 142 Cal. 152; 75 Pac. 777.

Necessity of authenticating papers used on hearing. Where the papers found in the transcript are not identified as having been used on the hearing in the court below, the order appealed from must be affirmed. White v. Longmire, 63 Cal. 232; and see Baker v. Snyder, 58 Cal. 617. When the record on appeal from an order changing the place of trial fails to contain any papers identified as having been used in the lower court on the hearing of the motion to change, such motion will be presumed to have been properly made. McAulay v. Truckee Ice Co., 79 Cal. 50; 51 Pac. 434; and see Pardy v. Montgomery, 77 Cal. 326; 19 Pac. 530.

Method and sufficiency of authentication. This section enumerates a list of papers, copies of which must be furnished the appellate court, but does not make any provision as to authentication; that matter is provided for by rule of court, requiring that the papers and evidence be authenticated by incorporating the same in a bill of exceptions. Harrison v. Cousins, 16 Cal. App. 515; 117 Pac. 564. The proper method of authenticating papers on appeal is by a bill of exceptions certified to by the judge. Muzzy v. D. H. McEwen Lumber Co., 154 Cal. 685; 98 Pac. 1062. On appeal from an order denying a motion to vacate a judgment of dismissal, all of the affidavits and evidence used upon the hearing must be authenticated by a bill of exceptions, purporting to contain them "all." Estate of Dean, 149 Cal. 487; 87 Pac. 13. A bill of exceptions, certified as settled by the judge, which merely refers to numerous papers and documents as used at the hearing, which are not incorporated in the bill of exceptions, is insufficient, and cannot be considered upon appeal; and documents omitted from the bill of exceptions cannot be properly authenticated by stipulation of counsel as to the correctness of file-marks and indorsements upon documents referred to, which are printed separately in the transcript. San Diego Sav. Bank v. Goodsell, 137 Cal. 420; 70 Pac. 299. Without a statutory provision authorizing the authentication of copies of papers in some other way, the only proper way that they can be brought into the record upon appeal and identified is by bill of exceptions or statement; and in case of appeal from any decision made after judgment, a bill of exceptions is the only proper mode of authentication: the certificate of the judge is not sufficient.

Herrlich v. McDonald, 80 Cal. 472; 22 Pac. 299; Somers v. Somers, 81 Cal. 608; 22 Pac. 967. The rule of the supreme court, providing that upon an appeal from an order the papers or evidence used on the hearing in the trial court must be authenticated by a bill of exceptions, when no other mode of authentication is provided by law, was intended to apply only to those appeals in which the order was sought to be reversed because of matters alleged to be shown by affidavits, or evidence used or taken on the hearing in the trial court, and does not apply when the order appealed from is attacked for matters appearing upon its face; hence, the findings of the court, in settling the account of an executor, need not be authenticated by a bill of exceptions, being a part of the judgment roll. Miller v. Lux, 100 Cal. 609; 35 Pac. 345. As the statute prescribes no mode in which the papers used on the hearing in the court below shall be authenticated, the appellate court has power to prescribe by rule how such papers shall be brought before it on appeal; and having such power, it has the power to ratify the mode adopted by the trial court; hence, where the transcript contains papers used on the hearing in the trial court, accompanied by the certificate of the judge, stating what papers were used, such papers are properly before the appellate court. Pieper v. Centinela Land Co., 56 Cal. 173. The certificate of the judge, reciting that the affidavits of certain persons were used and considered on the hearing of the motion, but failing to show that the affidavits set out in the transcript on appeal from an order after judgment are the same as those used and considered, or true copies of them, is insufficient, and the appeal should be dismissed. Somers v. Somers, 81 Cal. 608; 22 Pac. 967. On an appeal from an order for counsel fees and alimony, made pendente lite in an action for divorce, the certificate of the trial judge is a sufficient identification of the papers used on the hearing of the motion. Schammel v. Schammel, 70 Cal. 72; 11 Pac. 497; and see Pieper v. Centinela Land Co., 56 Cal. 173. Assuming that the clerk has power to authenticate papers used on the hearing of a motion, such authentication is insufficient, if it fails to state that the papers contained in the transcript were "all" the papers used on the hearing. Muzzy v. D. H. McEwen Lumber Co., 154 Cal. 685; 98 Pac. 1062. Unless the affidavits, etc., when used on a motion, are then indorsed or marked by the clerk, his certificate to the identity of such papers cannot be held to be determinative of the fact, as against his subsequent statement, that he signed the certificate by mistake, and that he did not know, and had no means of knowing, whether the affidavits were or were not used at the hearing of the motion. Baker v. Snyder, 58 Cal. 617. The certificates of the presiding judge and of the clerk, made after the service and the filing of the notice of motion to dismiss the appeal, do not supply defects in the transcript, in failing to contain proof of service of notice of appeal, undertaking, bill of exceptions, or papers used on motion from order in which the appeal was taken. Ellis v. Bennet, 2 Cal. Unrep. 302; 3 Pac. 801.

Contents of bill of exceptions. On an appeal from an order denying an application to fix the compensation of attorneys, which application was submitted "on the files, papers, and records in the case," a will and codicil, forming a part of such papers, are properly included in the bill of exceptions. Estate of Hite, 155 Cal. 448; 101 Pac. 448.

When no bill of exceptions necessary. See note ante, § 950.

Contents of transcript. On an appeal from an order setting aside a default, the transcript must contain a bill of exceptions, settled and signed as prescribed by the code. Grazidal v. Bastanchure, 47 Cal. 167. Where the transcript on appeal from an order granting a writ of assistance does not contain a copy of any motion or notice of motion for a writ of assistance, or order to show cause why such writ should not issue, it will be presumed that the order appealed from was made upon an ex parte application against the defendant in the action; hence, the appellants, not being parties to the original suit, and not having been made parties to the writ, are not parties aggrieved, and have no standing on appeal. Miller v. Bate, 56 Cal. 135. The undertaking on appeal should not be embodied in the transcript. San Francisco etc. R. R. Co. v. Anderson, 77 Cal. 297; 19 Pac. 517.

Transcript on appeal. See also note ante, § 950.

CODE COMMISSIONERS' NOTE. See note to § 950, ante; Harper v. Minor, 27 Cal. 109; Glidden v. Packard, 28 Cal. 649; Paine v. Linhill, 10 Cal. 370; Freeborn v. Glazer, 10 Cal. 337.

§ 952. What papers to be used on appeal from an order granting a new trial. On appeal from an order granting a new trial the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, the judgment roll and any bill of exceptions prepared and settled as provided in section six hundred fifty of this code subsequently to the order granting the motion.

Legislation § 952. **1.** Enacted March 11, **1872**, reading, "§ 952. On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of motion for new trial, and of appeal, and of the statement provided for in section six hundred and sixty-one, and of all the pleadings, papers, bills of exception, and affidavits referred to and made part of such statement."

2. Amended by Code Amdts. **1873–74**, p. 339, substituting, at end, for former provision, "a copy of the notice of appeal, of the order appealed from, and of the papers designated in section six hundred and sixty-one of this code."

3. Amended by Stats. **1901**, p. 174; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1915**, p. 205, recasting the section.

Application of section. This section applies to records on appeal prepared under §§ 953a, 953c, post. Merritt v. Los Angeles, 162 Cal. 47; 120 Pac. 1064.

Notice of appeal. A notice of appeal must be included in every record. Merritt v. Los Angeles, 162 Cal. 47; 120 Pac. 1064.

Original papers to remain on file. The originals of the classes of papers referred to in this section should remain on file in the office of the clerk of the superior court, and not be sent up to the reviewing court. Knoch v. Haizlip, 163 Cal. 20; 124 Pac. 997.

Judgment roll. The judgment roll must be embodied in the transcript, on appeal from an order denying a new trial. Kimple v. Conway, 69 Cal. 71; 10 Pac. 189.

Affidavits used at hearing. Under this section, it is the duty of the appellant to bring up not only the judgment roll and the bill of exceptions, but also such affidavits as may have been used on the hearing, properly authenticated in the bill of exceptions; and in the absence of such showing, it will be conclusively presumed, that the motion was, in part, based on some ground upon which affidavits could be used; that affidavits were in fact used on the hearing; and that such affidavits were sufficient to justify the court in making the order appealed from. Skinner v. Horn, 144 Cal. 278; 77 Pac. 904. Affidavits used on the hearing of the motion for a new trial must be incorporated in the bill of exceptions, under the rules of the supreme court: a certificate of the judge, authenticating certain affidavits as having been used upon the hearing of the motion, without showing that these were all the papers used at the hearing, is insufficient. Melde v. Reynolds, 120 Cal. 234; 52 Pac. 491.

Statement or bill of exceptions. Upon an appeal from an order granting or refusing a new trial, the statement or bill of exceptions, as used on the hearing of the motion in the court below, must be brought up to the appellate court by the transcript on appeal: where the transcript is in such imperfect condition that it has to be disregarded, there remains no record upon which the appellant is entitled to be heard. Thompson v. Patterson, 54 Cal. 542. A stipulation as to the correctness of the transcript does not estop the respondent from objecting to the sufficiency of the statement to support the motion for a new trial. Carver v. San Joaquin Cigar Co., 16 Cal. App. 761; 118 Pac. 92.

Notice of motion for new trial. The notice of intention to move for a new trial constitutes no part of the record on appeal from an order granting or refusing a new trial. Hook v. Hall, 68 Cal. 22; 8 Pac. 596; Richardson v. Eureka, 92 Cal. 64; 28 Pac. 102. A copy of the notice of intention to move for a new trial, though printed in the transcript, cannot be considered as a part of the record on appeal, where it is not authenticated by a bill of exceptions. Dennis v. Gordon, 163 Cal. 427; 125 Pac. 1063. An order denying a motion for a new trial is a part of the record; and where it recites that the motion was made on the grounds set forth in the defendant's notice of motion, it sufficiently shows that the notice was given: it is not necessary that the notice shall be formally set out. Randall v. Duff, 79 Cal. 115; 3 L. R. A. 754; 19 Pac. 532; 21 Pac. 610.

Papers on appeal, where motion made on minutes. On appeal from an order granting or refusing a new trial, on the minutes of the court, or from an order granting a new trial by the court on its own motion, a statement prepared subsequently to such ruling of the court, with the judgment roll and a copy of the order, constitute the papers on which the same is to be heard. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418.

Opinion of judge. The written opinion of the trial judge is not a part of the record on appeal (Classen v. Thomas, 164 Cal. 196; 128 Pac. 329; Goldner v. Spencer, 163 Cal. 317; 125 Pac. 347; People v. Quong Sing, 20 Cal. App. 26; 127 Pac. 1052), although printed in the transcript. Bouchard v. Abrahamsen, 4 Cal. App. 430; 88 Pac. 383.

Order granting new trial. The order entered in the minutes is the only record of the court's action in granting a new trial, and is to be measured by its terms. Classen v. Thomas, 164 Cal. 196; 128 Pac. 329.

Record on appeal. Except in the case of a bill of exceptions settled after judgment, or on an appeal from an order granting or refusing a new trial made on the minutes of the court, the record on appeal consists of copies of the notice of appeal, the judgment roll, and the bill of exceptions, statement, and affidavits used on the hearing of the motion. Frost v. Los Angeles Ry. Co., 165 Cal. 365; 132 Pac. 442. The undertaking on appeal should not be embodied in the transcript. San Francisco etc. R. R. Co. v. Anderson, 77 Cal. 297; 19 Pac. 517. On appeal from an order denying a new trial, a notice of

motion for relief, under § 473, ante, and a minute-order granting it, are no part of the record on appeal, though printed in the transcript, if they are not embodied in a statement or bill of exceptions. King v. Dugan, 150 Cal. 258; 88 Pac. 925. On appeal from an order refusing a new trial, a copy of the notice of intention to move for a new trial, although printed in the transcript, cannot be considered as a part of the record, unless it is authenticated by a bill of exceptions. Dennis v. Gordon, 163 Cal. 427; 125 Pac. 1063. Affidavits used upon a motion for a new trial are no part of the record upon appeal, unless they are incorporated in a bill of exceptions; if not so incorporated, they cannot be considered. Skinner v. Horn, 144 Cal. 278; 77 Pac. 904.

Authentication. On an appeal from an order denying a motion for a new trial of the contest of a will after probate, it is not essential that the papers constituting the judgment roll, or the order denying the motion, shall be authenticated by being embodied in a bill of exceptions: the clerk's certificate is a sufficient authentication. Estate of Kilborn, 162 Cal. 4; 120 Pac. 762. It is not within the functions of the clerk of the court to certify or determine what papers were used on the hearing of the motion for a new trial, and his certificate is of no effect. Melde v. Reynolds, 120 Cal. 234; 52 Pac. 491. A certificate that the record contains complete copies of the records and documents on file, and, among others, of the last bill of exceptions, including the order refusing a new trial, is sufficient to make such order a part of the record, where a second bill of exceptions recites the hearing of the motion, and states that the court, having heard the argument of counsel, and being fully advised, orders that such motion be denied. Hagman v. Williams, 88 Cal. 146; 25 Pac. 1111. The record on appeal from an order denying a motion for a new trial sufficiently shows that the order was made, when a copy of the minute order to that effect is contained in the transcript, properly certified in the clerk's certificate attached thereto. Worley v. Spreckels Bros. Commercial Co., 163 Cal. 60; 124 Pac. 697.

Time for filing transcript. Where a motion for a new trial has been made, the time for filing the transcript on appeal from the judgment begins to run from the date of the entry of the order disposing of the motion for a new trial, so as to give an immediate right of appeal therefrom. Bell v. Staacke, 148 Cal. 404; 83 Pac. 245.

Use of papers on appeals from orders, except orders granting or refusing new trials. See note ante, § 951.

CODE COMMISSIONERS' NOTE. See note to § 650, ante.

§ 953. Copies and undertakings, how certified. The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal, in due form, has been properly filed, or a stipulation of the parties waiving an undertaking.

Legislation § 953. 1. Enacted March 11, **1872**; based on Practice Act, § 346, as amended by Stats. 1863–64, p. 247. See ante, Legislation § 950.

2. Amended by Code Amdts. **1873–74**, p. 339, (1) inserting "or attorneys" after "certificate of the clerk," and (2) inserting, at end of section, "or a stipulation of the parties waiving an undertaking."

Powers and duties of clerk. Whether certain documents, when certified, will constitute a sufficient transcript on appeal, is a question which the clerk of the court cannot determine: it is his duty to certify to the correctness of the documents in the transcript, if they are correct copies of the originals in his custody, and transmit them to the appellate court; and if, on payment of his lawful fees, he refuses so to do, an order compelling him will be granted on motion. People v. Center, 54 Cal. 236. The authority of the clerk, under this section, is limited to certifying to the correctness of the copies of the papers designated in the preceding sections as forming the record on appeal: he is not authorized to certify what papers were used on the hearing of the motion for a new trial. Melde v. Reynolds, 120 Cal. 234; 52 Pac. 491. The certification by the clerk to the correctness of the transcript must be accompanied by his certificate that an undertaking on appeal, in due form, has been properly filed. San Francisco etc. R. R. Co. v. Anderson, 77 Cal. 297; 19 Pac. 517.

Sufficiency of certificate to transcript. On appeal from an order denying a new trial, such order is sufficiently authenticated by a certificate attached to the transcript, reciting that a true and correct copy of the order is therein contained. Mendocino County v. Peters, 2 Cal. App. 24; 82 Pac. 1122.

Effect of absence of certificate. A transcript, not certified by the clerk of the court, nor by the attorneys in the case, as provided in this section, cannot be considered on appeal. Ellis v. Bennet, 2 Cal. Unrep. 302; 3 Pac. 801. Appellant's affidavit as to the correctness of the transcript of the record cannot be substituted for a certificate to the transcript: if such

certificate is absent, the appeal must be dismissed. Snipsic Co. v. Riverside Music Co., 6 Cal. App. 115; 91 Pac. 747. Where the clerk's certificate to the transcript says nothing as to any bill of exceptions, a purported bill of exceptions, inserted in the transcript, cannot be considered. Pereira v. City Savings Bank, 128 Cal. 45; 60 Pac. 524.

Effect of stipulation as to correctness of transcript. A stipulation as to the correctness of the transcript merely obviates the necessity of the certificate by the clerk, and does not estop the respondent from denying the sufficiency of the statement. Leonard v. Shaw, 114 Cal. 69; 45 Pac. 1012.

Sufficiency of certificate as to undertaking. It must appear from the clerk's certificate that an undertaking on appeal, in due form, has been filed in time. Pacific Mutual Life Ins. Co. v. Edgar, 132 Cal. 197; 64 Pac. 260. A certificate of the clerk, "that a sufficient undertaking on appeal, in due form of law, was properly filed therein," is a sufficient compliance with this section. Meeker v. Hoffer, 57 Cal. 140. A certificate of the clerk, that "a good and sufficient undertaking on appeal was properly filed herein," conforms with the requirements of this section, and is prima facie sufficient. Downing v. Rademacher, 136 Cal. 673; 69 Pac. 415. In the absence of any certificate by the clerk that the undertaking on appeal is in due form, or of any copy of the undertaking certified by him, it will be assumed, on appeal, that the instrument on file is not in due form. Winder v. Hendrick, 54 Cal. 275. A certificate that the transcript is correct cannot be construed as certifying that the undertaking on appeal is in due form and has been properly filed, though the undertaking is set out in the transcript, and appears to be in proper form. San Francisco etc. R. R. Co. v. Anderson, 77 Cal. 297; 19 Pac. 517; Jones v. Iverson, 3 Cal. Unrep. 707; 31 Pac. 625; Shay v. Chicago Clock Co., 111 Cal. 549; 44 Pac. 237. A certificate of the clerk, "that an undertaking on appeal was properly filed in my office," giving the date, is insufficient, in failing to recite that the undertaking was in due form; the expression "properly filed" is not the equivalent of nor was it intended to include the words "in due form." Winder v. Hendrick, 54 Cal. 275. The insertion, in the transcript, of a copy of the undertaking on appeal, with its indorsements, certified by the county clerk to be correct, does not satisfy the express requirement of this section, that the clerk or the attorneys must certify that an undertaking in due form has been properly filed. Swasey v. Adair, 83 Cal. 136; 23 Pac. 284. Where the transcript does not contain a copy of the undertaking on appeal, and the certificate of the clerk, so far as it relates to such undertaking, does not conform to this section, the appeal will be dismissed. Watson v. Cornell, 52 Cal. 644. A certificate of the clerk, "that an undertaking in due form of law is on file in my office," is insufficient to show that an undertaking on appeal was filed, or that it was properly filed, or that it was filed in time. Pacific Mutual Life Ins. Co. v. Edgar, 132 Cal. 197; 64 Pac. 260. A certificate of the clerk, "that a good and sufficient undertaking on appeal, in due form of law, has been executed, and is now on file, in said action, in my office," is not sufficient, under this section, so far as it relates to the undertaking on appeal. Watson v. Cornell, 52 Cal. 644.

Conclusiveness of certificate. The certificate of the clerk, that an undertaking on appeal, in due form, has been properly filed, is not conclusive; and the appellate court may determine whether the undertaking is sufficient to confer jurisdiction. Duncan v. Times-Mirror Co., 109 Cal. 602; 42 Pac. 147.

Amended certificate. An amended certificate, that an undertaking on appeal, in due form, has been properly filed, may be allowed to be filed, under the rules of the supreme court. Swasey v. Adair, 83 Cal. 136; 23 Pac. 284.

Motion to dismiss, papers not furnished until hearing. Where, upon a motion to dismiss the appeal, the respondent filed a certificate of the clerk, showing that an undertaking on appeal, in due form, had been filed, which was not objected to for insufficiency, the appeal will not be dismissed, though, at the time the motion was made, no such certificate was on file. Shay v. Chicago Clock Co., 111 Cal. 549; 44 Pac. 237; and see Warren v. Hopkins, 110 Cal. 506; 42 Pac. 986. An appeal will not be dismissed on account of an informal certificate to the transcript, where, at the hearing of the motion, the appellant furnishes a proper certificate, and he will be allowed to add such certificate to the record. Hellings v. Duval, 119 Cal. 199; 51 Pac. 335. A motion to dismiss an appeal, because the transcript filed and served was not authenticated, will be denied, where, at the hearing of the motion, the appellant presented another copy, properly authenticated, and asks leave to file the same. Swortfiguer v. White, 137 Cal. 391; 70 Pac. 214.

Certification of appeal papers. See also notes ante, §§ 950, 951, 952.

CODE COMMISSIONERS' NOTE. A stipulation by the attorneys, that the transcript is correct, but takes the place of the clerk's certificate that the papers are correct. Todd v. Winants, 36 Cal. 129. See also Godchaux v. Mulford, 26 Cal. 319; 85 Am. Dec. 178; St. John v. Kidd, 26 Cal. 265.

§ 953a. **Preparation of papers on appeal. Notice to county clerk.** Any person desiring to appeal from any judgment, order or decree of the superior court to the supreme court or any of the district courts of appeal, may, in lieu of preparing and settling a bill of exceptions pursuant to the provisions of section six hundred fifty of this code, or for the purpose of presenting a record on appeal from any appealable judgment or order, or for the purpose of having reviewed, any matter or order reviewable on appeal from final judgment, file with the clerk of the court from whose judgment, order or decree said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared. Said notice must be filed within ten days after notice of entry of the judgment, order or decree, or if a proceeding on motion for new trial be pending, within ten days after notice of decision denying said motion, or of other termination thereof.

Upon receiving said notice, it shall be the duty of the court to require the stenographic reporter thereof to transcribe fully and completely the phonographic report of the trial. The stenographic reporter shall, within twenty days after said notice has been filed with the clerk, prepare a transcript of the phonographic report of the trial including therein copies of all writings offered or received in evidence and all other matters and things required by the notice above referred to to be therein contained, and shall file the same with the clerk of said court upon [court. Upon] the same being filed;[,] it shall be the duty of the clerk forthwith to give the attorneys appearing in said cause notice that said transcript has been filed, and that within five days after the receipt of said notice the same will be presented to the judge for approval. At the time specified in the notice of the clerk to the attorneys said transcript shall be presented to the judge for his approval, and the judge shall examine the same and see that the same is a full, true and fair transcript of the proceedings had at the trial, the testimony offered or taken, evidence offered or received, instructions, acts or statements of the court, also all objections and exceptions of counsel and matters to which the same relate. The judge shall thereupon certify to the truth and correctness of said transcript and the same shall, when so settled and allowed, be and become a portion of the judgment roll and may be considered on appeal in lieu of the bill of exceptions now provided for by law.

If the judgment, order or decree appealed from be not included in a judgment roll, the party desiring to appeal shall on the filing of said notice specify therein such of the pleadings, papers, records and files in said cause as he desires to have incorporated in said transcript in addition to the matters hereinbefore required and the same shall be included.

The respondents on said appeal may at the time said transcript is presented for settlement and allowance, require the insertion therein of such other papers, files, documents, records and proceedings of said cause as they then desire to have incorporated therein, and the said papers, files, documents, records and proceedings shall when so incorporated be deemed fully authentic for use on said appeal. The parties may by stipulation omit any matters from said record which they desire to so omit.

Legislation § 953a. **1.** Added by Stats. **1907,** p. 750 (based on §§ 549–554, Bellinger and Cotton's Oregon Ann. Codes and Stats.); the code commissioner saying of this section and of §§ 953b and 953c, "These three sections provide for a new and alternative method for the preparation of records to be used on appeals from judgments, orders or decrees of the superior court to the supreme court or district courts of appeal."

2. Amended by Stats. **1915,** p. 206, (1) in first sentence, adding "or for the purpose of presenting a record on appeal from any appealable judgment or order, or for the purpose of having reviewed any matter or order reviewable on appeal from final judgment"; (2) in second sentence, adding the clause beginning "or if a proceeding"; (3) in second paragraph, connecting the beginning of the third sentence with the end of the second (an evident misconception of the meaning of the text on the part of the printer); the former punctuation is bracketed in the text (which see).

Construction of sections. This section merely provides a substitute for a bill of exceptions: a notice, though strictly in compliance therewith, cannot serve as a valid notice of appeal. Boling v. Alton, 162 Cal. 297; 12 Pac. 461. The purpose of §§ 953a, 953b, 953c, is to provide a method for preparing the record or transcript to be filed on appeal; none of the proceedings prescribed are jurisdictional. Smith v. Jaccard, 20 Cal. App. 280; 128 Pac. 1026. The rules of decision are not changed under the alternative method of appeal. United Investment Co. v. Los Angeles etc. Ry. Co., 10 Cal. App. 175; 101 Pac. 543. The alternative for loss of right to appeal is to file a printed transcript within forty days, unless the time is extended or the appellate court excuses the failure so to file. Estate of Keating, 158 Cal. 109; 110 Pac. 109. The acts of 1907 enacting §§ 941a, 941b, 941c, and §§ 953a, 953b, 953c, are entirely independent of each other. Lang v. Tilley & Thurston Co., 161 Cal. 295; 119 Pac. 100.

Constitutionality of sections. The alternative method of appeal is constitutional. Estate of McPhee, 154 Cal. 385; 97 Pac. 878.

Method of appeal. To perfect an appeal from an order, either the old or the new method must be followed; otherwise there is no record upon which the court can review the order. Hibernia Sav. & L. Soc. v. Doran, 161 Cal. 118; 118 Pac. 526; and see Credit Clearance Bureau v. Weary, 18 Cal. App. 467; 123 Pac. 548.

Notice of entry of judgment. The appellant has ten days after notice of entry of judgment within which to demand a transcript of the evidence. Shaw v. Blasevich, 21 Cal. App. 498; 132 Pac. 278. Actual notice of entry waives written notice thereof. Estate of Keating, 158 Cal. 109; 110 Pac. 109. Whether notice of entry was given, is a question of fact. Hecker v. Baker, 19 Cal. App. 667; 127 Pac. 654.

Notice of appeal. An appellant who desires to dispense with a bill of exceptions must file with the clerk a notice stating his desire or intention to appeal, or that he has appealed, and request an authenticated transcript. Dyer Law etc. Co. v. Salisbury, 17 Cal. App. 395; 119 Pac. 947. To appeal under this section, it is necessary to file with the clerk a request for a transcript. Thompson v. American Fruit Co., 21 Cal. App. 338; 131 Pac. 878. The evidence must be certified by the judge; neither the certificate of the clerk nor the stipulation of counsel can take the place of the judge's certificate. Pouchan v. Godeau, 21 Cal. App. 365; 131 Pac. 879. An appellant, in order to avail himself of the alternative method of appeal, must present a transcript consisting of copies of the moving papers, the evidence taken upon the hearing of the motion, and the rulings of the court thereon, certified by the trial judge: the clerk cannot certify this record. Thompson v. American Fruit Co., 21 Cal. App. 338; 131 Pac. 178. It is not necessary to serve a notice of appeal, but it must be filed within the time required. Watson v. Dingley, 14 Cal. App. 88; 111 Pac. 106.

Duty of clerk. The clerk should not send up original files of papers, in lieu of a transcript, to be certified by the judge and filed upon the appeal (Waterbury v. Temescal Water Co., 11 Cal. App. 632; 105 Pac. 940); otherwise the clerk is not required to prepare, authenticate, and send up the judgment roll, without which there is no record. Dyer Law etc. Co. v. Salisbury, 17 Cal. App. 373; 119 Pac. 947.

Duty of reporter. It is the duty of the stenographic reporter to make a transcript of the report of the trial within twenty days after the notice of appeal has been given, and to file such transcript with the clerk: he cannot refuse so to file it until his fees are paid. Gjurich v. Fieg, 160 Cal. 331; 116 Pac. 745.

Contents of judgment roll. Since the amendment to § 670, ante, in 1907, bills of exceptions are no longer made a part of the judgment roll; and where an appeal is taken under § 941b, ante, without service of the notice of appeal, the proper record upon appeal, under this section, is a transcript to be certified by the judge in lieu of a bill of exceptions, which becomes a part of the judgment roll. Waterbury v. Temescal Water Co., 11 Cal. App. 632; 105 Pac. 940.

Requirements as to transcript. Except where the transcript has been settled and allowed by the trial court, the appellant cannot be relieved from printing his transcript on appeal. Waterbury v. Temescal Water Co., 11 Cal. App. 632; 105 Pac. 940. Under this section, no printed transcript of the record is required. Williams v. Hawkins, 20 Cal. App. 161; 128 Pac. 754. An appeal taken under this section, and §§ 953b, 953c, post, cannot be dismissed for a failure to file a printed transcript

within forty days, in the absence of any rule of court relative to the time in which a transcript must be filed under the new method of appeal. Estate of Keating, 158 Cal. 109; 110 Pac. 109. It is the duty of appellant, as the moving party, to exercise diligence to secure the filing of his transcript. Smith v. Jaccard, 20 Cal. App. 280; 128 Pac. 1026. An appeal must be dismissed, where the transcript has not been filed in time, without valid excuse for such neglect. Modoc Co-operative Ass'n v. Porter, 11 Cal. App. 270; 104 Pac. 710. The record of an appeal taken under the alternative method may be reviewed, though it does not show a service of the notice of appeal, nor that an undertaking to pay the cost of the transcript was given, nor that there was any notice and request for a transcript, where the transcript was written out in longhand by the appellant, and was properly certified and authenticated by the judge, and is before the appellate court. Carr v. Stern, 17 Cal. App. 397; 120 Pac. 35. Neither in the statute nor in the rules of the court is any penalty prescribed for the failure of the reporter to file a transcript of the proceedings within twenty days: this provision is merely directory, and failure to file such transcript within the time allowed is not jurisdictional. Smith v. Jaccard, 20 Cal. App. 280; 128 Pac. 1026. Where the appellant would have the testimony considered, as well as the judgment roll, he must have a statement or a bill of exceptions settled and certified, or have a transcript approved as provided in this section. Lane v. Tanner, 156 Cal. 135; 103 Pac. 846.

Necessity for authentication of record. To perfect an appeal, the appellant must follow either the old or the new method; in either case, the record must be examined and authenticated by the trial judge, who knows what papers were used on the hearing: it is not for the clerk to determine what papers or evidence the court acted upon. Credit Clearance Bureau v. Weary & Alford Co., 18 Cal. App. 467; 123 Pac. 548. The appellate court will not review an order upon a record not properly authenticated. Knox v. Schrag, 18 Cal. App. 220; 122 Pac. 969.

Judge should certify what papers. The new method of preparing records on appeal does not require nor authorize the judge to certify to the correctness of any papers, except such as form part of a transcript designed to take the place of a bill of exceptions. Knoch v. Haizlip, 163 Cal. 20; 124 Pac. 997. In lieu of a bill of exceptions, the court must certify the stenographic notes of the trial, containing the proceedings and evidence, which would form no part of the record unless authenticated as the statute provides: he is not required to certify the pleadings and orders constituting the judgment roll. Christenson Lumber Co. v. Seawell, 157 Cal. 405; 108 Pac. 276. On appeal, the phonographic report of the proceedings of the trial must be settled and allowed by the judge as being correct: a certificate by the reporter is not a proper authentication. Williams v. Lane, 158 Cal. 39; 109 Pac. 873.

Review of certification. If the respondent wishes to have the certification by the judge reviewed, he should present the matter to the appellate court upon a bill of exceptions. Hecker v. Baker, 19 Cal. App. 667; 127 Pac. 654.

Appellant must call attention to evidence. The appellant must, in his brief, direct attention to the evidence in support of his point. Wills v. Woolner, 21 Cal. App. 528; 132 Pac. 283.

Perfecting appeal under the old method. See note ante, § 940.

§ 953b. Payment of cost of transcript. At the time the said notice provided for in the last section is filed with the clerk of the court, the appellant, or person intending to appeal, shall file an undertaking in an amount to be fixed by the clerk, with two good and sufficient sureties, by which the party giving said notice shall undertake and agree to pay the clerk the cost of preparing said transcript, or may arrange personally with the stenographic reporter for his compensation.

Legislation § 953b. **1.** Added by Stats. **1907**, p. 751. See ante, Legislation § 953a.

2. Amended by Stats. **1915**, p. 207, adding, at end, the clause beginning "or may arrange."

Construction of section. See note ante, § 953a.

Review without undertaking. The failure to file an undertaking to pay the cost of the transcript does not preclude a review of the appeal; no cost bond is required. See note § 940, ante; Carr v. Stern, 17 Cal. App. 397; 120 Pac. 35; Estate of McPhee, 154 Cal. 385; 97 Pac. 878; Mitchell v. California etc. S. S. Co., 154 Cal. 731; 99 Pac. 202.

Liability on undertaking. The appellant is liable on his undertaking for the reporter's fees, upon the final approval of the transcript by the judge; if the appellant does not pay them, his sureties are liable. Gjurich v. Fieg, 160 Cal. 331; 116 Pac. 745.

Duty to make and file transcript of report of trial. See note ante, § 953a.

Certification of papers by judge. See note ante, § 953a.

§ 953c. Clerk to transmit the prepared record on appeal. Where, on appeals taken from judgments, orders or decrees of the superior court to the supreme court or district courts of appeal the appellant elects to avail himself of the provisions of the three preceding sections, it shall be the duty of the clerk of the court from which the appeal is taken, within ten days after the preparation of the record, to transmit to the clerk of the court to which the appeal is taken, the record prepared in accordance with the provisions of the two preceding sections. Said record shall be filed with the clerk of the court to which the appeal is taken and no transcript thereof need be printed. In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court.

Legislation § 953c. Added by Stats. **1907**, p. 751; based on §§ 549–554, Bellinger and Cotton's Ann. Codes and Stats. See ante, Legislation § 953a.

Construction of section. See note ante, § 953a.

Transcripts, typewritten or printed. The papers which, under the old method of appeal, would not properly be a part of the bill of exceptions, are to be certified by the clerk or the attorneys, as provided by § 953, ante; with respect to these papers, the main effect of the new method of appeal seems to be to permit the use of typewritten instead of printed copies. Knoch v. Haizlip, 163 Cal. 20; 124 Pac. 997. Typewritten transcripts are authorized. Lang v. Lilley & Thurston Co., 161 Cal. 295; 119 Pac. 100. It is not only allowable under this section, but desirable, that a printed and duly authenticated copy of the transcript shall be filed in the appellate court, in lieu of the original. Seymour v. Oelrichs, 162 Cal. 318; 122 Pac. 847.

Requirements as to briefs. Where typewritten transcripts are filed under the new method of preparing records on appeal, prescribed by this section and the next two preceding sections, the law requires the respective parties to print in their briefs, or in a supplement thereto, such parts of the record as they wish to call to the attention of the court (Estate of McPhee, 156 Cal. 335; 104 Pac. 455; Roussin v. Kirkpatrick, 8 Cal. App. 7; 95 Pac. 1123); and when so printed, the brief becomes part of the record upon appeal. San Joaquin etc. Irrigation Co. v. Stevinson, 16 Cal. App. 235; 116 Pac. 378; Williams v. Hawkins, 20 Cal. App. 161; 128 Pac. 754. Where the attorney for the appellant wholly fails to do this, the sufficiency of the evidence to support a finding will not be reviewed upon appeal. Williams v. Hawkins, 20 Cal. App. 161; 128 Pac. 754. It is not enough for the parties simply to refer in their briefs to the pages of the written transcript. Roussin v. Kirkpatrick, 8 Cal. App. 7; 95 Pac. 1123. Where a defendant physician's want of care and skill, in a negligence case, is relied on, it will be assumed that there was no evidence of such want of care or skill, when counsel for the appellant omits to print in his brief any part of the testimony on that subject, or to refer to any part of the record where it is contained. Marcucci v. Vowinckel, 164 Cal. 693; 130 Pac. 430. The court will not incontinently refuse to consider an appeal, though the appellant's brief does not comply strictly with the mandates of this section, where it would not be just to the appellant to dismiss his appeal. San Joaquin etc. Irrigation Co. v. Stevinson, 16 Cal. App. 235; 116 Pac. 378. The rule requiring points and authorities to be filed, confers rights that may be enforced by litigants. Barnhart v. Conley, 17 Cal. App. 230; 119 Pac. 200. The appellant must, in his brief, direct attention to the evidence in support of his point. Wills v. Woolner, 21 Cal. App. 528; 132 Pac. 283.

Certification of papers by judge. See note ante, § 953a.

Disposition of appeal where, without fault of appellant, record is lost or incomplete. See note 25 L. R. A. (N. S.) 860.

§ 954. When an appeal may be dismissed. When not. If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking, if a good and sufficient undertaking, approved by a justice of the supreme court be filed in the supreme court, or (where the appeal is pending before a district court of appeal either by direct appeal thereto or by transfer thereto by the supreme court, if a good and sufficient undertaking, approved by a

justice of said district court of appeal, be filed in said district court, before the hearing upon motion to dismiss the appeal. When it is made to appear to the satisfaction of the court or a judge thereof, from which the appeal was taken, that a surety or sureties upon an appeal bond from any cause has or have become insufficient, and the bond or undertaking inadequate as security for the payment of the judgment appealed from, or that the bond has been lost or destroyed, the last-named court, or a judge thereof, may order the giving of a new bond with sufficient sureties, as a condition to the maintenance of the appeal. The said bond or undertaking shall be approved by the last-named court, or a judge thereof; and in case said sureties fail to justify before said last-named court, or a judge thereof, or fail to comply with the order to appear and justify, execution may issue upon the judgment as if no undertaking to stay execution had been given.

Legislation § 954. **1.** Enacted March 11, **1872**; based on Practice Act, § 346, as amended by Stats. 1863–64, p. 247. See ante, Legislation § 950. When enacted in 1872, § 954 read: "If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal."

2. Amended by Stats. **1895**, p. 59, to read as at present, except for the amendments of 1906 and 1907.

3. Amended by Stats. **1906**, p. 52, inserting "or that the bond has been lost or destroyed."

4. Amended by Stats. **1907**, p. 579, (1) omitting "thereon" after "insufficiency of the undertaking," and (2) inserting, after "filed in the supreme court," the words "or (where the appeal is pending before a district court of appeal either by direct appeal thereto or by transfer thereto by the supreme court) if a good and sufficient undertaking, approved by a justice of said district court of appeal, be filed in said district court"; the code commissioner saying of the amendments, "Amend the section so as to extend the power with respect to the acceptance of bonds to district courts of appeal."

Construction of section. This section is remedial, and should receive a liberal interpretation. Pacific Paving Co. v. Verso, 11 Cal. App. 383; 105 Pac. 136. This section necessarily implies that there may be an undertaking which is insufficient, and that this insufficiency may be remedied by a new undertaking: when the original undertaking is itself sufficient, there is no room for the application of the section. Bay City Building etc. Ass'n v. Broad, 128 Cal. 670; 61 Pac. 368. An appeal taken under §§ 941a, 941b, ante, will not be dismissed, where it is taken within six months from the entry of judgment. Larson v. Larson, 15 Cal. App. 531; 115 Pac. 340.

Contents of notice of motion to dismiss. Good practice requires that the grounds for a dismissal of an appeal shall be embodied in the notice of motion. Newman v. Maldonado, 3 Cal. Unrep. 540; 30 Pac. 833. A clerical error in the notice of motion to dismiss an appeal does not invalidate it, nor prevent a dismissal, if otherwise proper. Pacific Paving Co. v. Bolton, 89 Cal. 154; 26 Pac. 650. A motion to dismiss an appeal cannot be considered, where the transcript upon record contains a notice of two appeals, and the sufficiency of each does not depend upon the same considerations, and it is uncertain to which appeal the notice of the motion is directed. De la Cuesta v. Calkins, 5 Cal. Unrep. 163; 41 Pac. 1098.

Service of notice. The service of a motion to dismiss an appeal on the executrix of an executor is not sufficient to bring parties before the court, where it is not shown that such executrix has been substituted for the executor. Chevassus v. Burr, 134 Cal. 434; 66 Pac. 568. The burden is upon a respondent, who moves to dismiss an appeal for want of service of notice of appeal upon an adverse party, to show from the record that the party not served was adverse in interest. Niles v. Gonzalez, 152 Cal. 90; 92 Pac. 74; Potrero Nuevo Land Co. v. All Persons, 155 Cal. 371; 101 Pac. 12.

Waiver of right to move to dismiss. The right to move for a dismissal of the appeal is not waived by stipulating to the correctness of the bill of exceptions, or of the transcript on appeal. San Bernardino County v. Riverside County, 135 Cal. 618; 67 Pac. 1047.

Answer to motion. Good cause for failure to comply with a rule requiring the printed transcript to be filed within the time provided, is always a sufficient answer to a motion to dismiss the appeal, based on the ground of such failure. Robinson v. Robinson, 158 Cal. 117; 110 Pac. 112.

Matters not considered on motion to dismiss. Where the motion to dismiss an appeal involves an examination of the entire record, and incidentally a consideration of the merits of the appeal, it will be continued until the hearing upon the merits. Leonis v. Leffingwell, 6 Cal. Unrep. 219; 55 Pac. 897. An appeal from a judgment will not be dismissed, on motion, in advance of a hearing on the merits, where the determination of a question involved necessitates an examination of the record. Quist v. Michael, 153 Cal.

365; 95 Pac. 658. In exceptional cases, a motion to dismiss, which involves an examination of the record, will be entertained in advance of the hearing upon the merits. Hibernia Sav. & L. Soc. v. Doran, 161 Cal. 118; 118 Pac. 526. Where a motion to dismiss an appeal, on the ground of the absence of a bill of exceptions, has been denied for the reason that such absence is not ground for dismissing an appeal, but rather for a judgment of affirmance, if there is no error in the record, a motion to affirm the judgment, made before the regular hearing of the appeal in its order upon the calendar, upon the grounds that the appeal is without merit, and merely for delay, and that the appeal is from a judgment directed upon a former appeal, and is a contempt of court, will be denied, it appearing that counsel on each side have filed briefs upon the question whether the judgment was properly entered, and that its decision involves the examination of the record upon both appeals. Randall v. Duff, 105 Cal. 271; 38 Pac. 739. An appeal from an order denying a new trial will not be dismissed for any defect in the proceedings in the superior court leading up to the order: this would involve an examination of the action of the court below, which can be properly had only on the hearing of the appeal. Estate of Scott, 124 Cal. 671; 57 Pac. 654. An appeal from an order denying a motion for a new trial will not be dismissed, on motion, and the court will not look into the record to determine the merits, in advance of a hearing thereon. Quist v. Michael, 153 Cal. 365; 95 Pac. 658. Upon a motion to dismiss an appeal, the supreme court will not consider any question which involves an examination of the record, and the determination of the correctness of the action of the lower court upon the facts presented to it (Estate of Kasson, 135 Cal. 1; 66 Pac. 871; Hibernia Sav. & L. Soc. v. Cochran, 6 Cal. Unrep. 821; 66 Pac. 732), or the failure to give an undertaking upon an appeal from an order, which failure was not made one of the grounds of the motion to dismiss the appeal (Pignaz v. Burnett, 119 Cal. 157; 51 Pac. 48), or any error in settling the statement on motion for a new trial (Estate of Scott, 124 Cal. 671; 57 Pac. 654), or the question whether other parties should have been made parties to a motion for a new trial (Watson v. Sutro, 77 Cal. 609; 20 Pac. 88; Johnson v. Phenix Ins. Co., 146 Cal. 571; 80 Pac. 719), or matters occurring prior to the order appealed from. Bell v. Staacke, 137 Cal. 307; 70 Pac. 171. The appellate court should not be called upon, originally, to determine, upon a motion to dismiss an appeal, whether the appellant was guilty of laches in presenting his proposed statement and amendments to the clerk for the judge. Curtin v. Ingle, 155 Cal. 53; 99 Pac. 480. A bill of exceptions cannot be looked into, upon a motion to dismiss the appeal, for the purpose of determining the merits of the ruling of the court: but it must be assumed that the exception was taken in good faith. Melde v. Reynolds, 120 Cal. 234; 52 Pac. 491. The merits of an appeal cannot be considered on a motion to dismiss. Swasey v. Adair, 83 Cal. 136; 23 Pac. 284; Steen v. Santa Clara Valley etc. Lumber Co., 145 Cal. 564; 79 Pac. 171. Where a decree of foreclosure directs that the assignee in insolvency of the mortgagor shall be paid any balance remaining after the payment of the amount found due and expenses upon the sale of the mortgaged premises, the question as to whether or not such decree was valid and binding, in so far as it directed the payment of such balance, cannot be considered upon a motion to dismiss an appeal from the order. Vincent v. Collins, 122 Cal. 387; 55 Pac. 129.

Dismissal of premature appeal. Where an order is made appointing a guardian for an incompetent, an appeal, taken subsequently to the filing of the order, but prior to its entry at large in the minutes of the court, is premature, and must be dismissed. Estate of Dunphy, 158 Cal. 1; 109 Pac. 627.

Of frivolous appeal. An appeal will not be dismissed on the ground that it is frivolous, or is taken merely for delay (Nevills v. Shortridge, 129 Cal. 575; 62 Pac. 120), or because of its want of merit. People v. Perris Irrigation Dist., 6 Cal. Unrep. 349; 58 Pac. 907.

Of futile appeal. Where the appeal is ineffective and futile, it will be dismissed. Suisun Lumber Co. v. Fairfield School District, 19 Cal. App. 587; 127 Pac. 349. An appeal from a judgment on an election contest will be dismissed, when neither the appellant nor the public can have any interest in the result of the appeal. Broadbent v. Keith, 17 Cal. App. 389; 119 Pac. 939. After the affirmance of a judgment in favor of the plaintiff for the condemnation of land, an appeal by the defendant from an order, made after the judgment was entered, authorizing the plaintiff to take possession of the land, pendente lite, will be dismissed: the affirmance of the judgment renders the order functus officio, and the questions presented become entirely moot. Mendocino County v. Peters, 2 Cal. App. 34; 82 Pac. 1124. Where the judgment appealed from has been satisfied, and the questions presented have become merely a moot case, the appeal will be dismissed. Moore v. Morrison, 130 Cal. 80; 62 Pac. 268. An appeal from an order directing the abatement of a nuisance, and allowing costs to the plaintiff, will not be dismissed, where the defendant has abated the nuisance, but has not paid the costs.

White v. Gaffney, 1 Cal. App. 715; 82 Pac. 1088. Where the appeal from an order granting a new trial was affirmed, the appeal from the judgment will be dismissed: the affirmance of the order has the effect to set aside the judgment. Blackburn v. Abila, 4 Cal. Unrep. 982; 39 Pac. 797. An appeal which raises only an abstract question will be dismissed. Foster v. Smith, 115 Cal. 611; 47 Pac. 591. An appeal by a defendant from a judgment against her in divorce proceedings must be dismissed, where, prior to such appeal, the lower court, on her application, made an order setting aside such judgment. Storke v. Storke, 111 Cal. 514; 44 Pac. 173. A motion to dismiss an appeal on the ground that a reversal of an order dissolving a temporary injunction would have no legal effect, will not be granted, where such effect does not clearly appear. Fox v. Grayson, 6 Cal. Unrep. 72; 53 Pac. 932.

Dismissal where reversal would prove fruitless. See note post, § 957.

Of unauthorized appeal. Where the appellant has taken a valid appeal in the first instance, a second appeal is unauthorized, and will be dismissed. People v. Bank of San Luis Obispo, 152 Cal. 261; 92 Pac. 481. An appeal from a non-appealable order must be dismissed (Forrester v. Lawler, 14 Cal. App. 170; 111 Pac. 284; Hadsall v. Case, 15 Cal. App. 541; 115 Pac. 330); but not where there is also an appeal from the judgment, upon which the orders appealed from may be reviewed. Wadleigh v. Phelps, 147 Cal. 135; 81 Pac. 418.

Dismissal for want of or for defect in notice of appeal. An appeal will be dismissed, where notice of appeal was not given (Lent v. California Fruit Growers' Ass'n, 161 Cal. 719; 121 Pac. 1002), or was not filed within the prescribed time (Bennett v. Potter, 16 Cal. App. 185; 116 Pac. 681), or was not properly served. Estate of Pendergast, 143 Cal. 135; 76 Pac. 962. An appeal from an order denying a motion for a new trial will not be dismissed because of a failure to serve the notice of appeal on a party who had not been made a party to the motion. Johnson v. Phenix Ins. Co., 152 Cal. 196; 92 Pac. 182. Where an appeal can be decided by giving to the parties thereto such relief as the record warrants, it will not be dismissed, though the notice of appeal was not served on an alleged necessary party, if his interests are not injuriously affected by such decision. Burnett v. Piercy, 149 Cal. 178; 86 Pac. 603. An appeal by the defendant will not be dismissed, where the notice of appeal gives his true name, though the name given in the complaint and judgment is a misnomer. Webster v. Board of Regents, 163 Cal. 705; 126 Pac. 974. A stipulation, that "the appeal was duly perfected," constitutes an appearance, by all of the respondents who signed the stipulation, and precludes a dismissal thereof for want of service of notice upon any of them. Burnett v. Piercy, 149 Cal. 178; 86 Pac. 603. The want of service of the notice of intention to move for a new trial is not a ground for dismissing an appeal from the order denying a new trial. Sutter County v. Tisdale, 128 Cal. 180; 60 Pac. 757. An appeal from an order denying a motion for a new trial will not be dismissed for want of service of notice of appeal upon an adverse party, where the record does not show affirmatively that the party not served was an adverse party to the motion in the court below. Niles v. Gonzalez, 152 Cal. 90; 92 Pac. 74; Potrero Nuevo Land Co. v. All Persons, 155 Cal. 371; 101 Pac. 12. The dismissal of an appeal from an order denying a motion for a new trial, on the ground that the notice of motion to move for a new trial was not served and filed within the time allowed by law, is not justified where the time was properly extended. Estate of Richards, 154 Cal. 478; 98 Pac. 528.

Dismissal of appeal for defects in notice of appeal. See also note ante, § 940.

For want of prosecution. An appeal will be dismissed for unwarrantable laches and delay of the appellant, justifying the conclusion that the appeal has been abandoned. Estate v. Johnston, 14 Cal. App. 376; 112 Pac. 191. Where an appeal from a judgment refusing to annul the marriage of the plaintiff with the defendant was taken too late, it must be dismissed; and an objection to the allowance of alimony to the defendant cannot be considered. Hunter v. Hunter, 111 Cal. 261; 52 Am. St. Rep. 180; 31 L. R. A. 411; 43 Pac. 756. Where a party has lost his right of appeal under §§ 953a, 953b, and 953c, ante, and sustains no right to file a printed transcript under the old method of appeal, the appeal must be dismissed. Estate of Keating, 158 Cal. 109; 110 Pac. 109. Where the transcript on appeal from the judgment is not filed within forty days from the date of the entry of the order disposing of the motion for a new trial, the appeal from the judgment must be dismissed. Bell v. Staacke, 148 Cal. 404; 83 Pac. 245; Gervais v. Joyce, 15 Cal. App. 189; 114 Pac. 409; Erving v. Napa Valley Brewing Co., 16 Cal. App. 41; 116 Pac. 331; Smith v. Jaccard, 20 Cal. App. 280; 128 Pac. 1026. The court may dismiss an appeal for delay in filing the transcript, but such dismissal will be for want of diligence in prosecuting the appeal, and not for lack of jurisdiction of the appeal. Smith v. Jaccard, 20 Cal. App. 280; 128 Pac. 1026. When there is an unexcused failure to file the transcript on appeal within the time prescribed by the rule of the court, and the time has passed for preparing and serving a bill of exceptions or statement, and none has been served or

offered for settlement, the appeal will be dismissed. Smith v. Solomon, 84 Cal. 537; 24 Pac. 286. An appeal taken under §§ 953a, 953b, and 953c, ante, cannot be dismissed for a failure to file a transcript within forty days, in the absence of any rule prescribing the time when a transcript prepared under those sections shall be filed. Estate of Keating, 158 Cal. 109; 110 Pac. 109. A failure to file the transcript within the time limited by law, owing to the reporter's failure to file a transcript of the report of the trial with the clerk, does not warrant the dismissal of an appeal taken under §§ 953a and 953b, ante. Gjurich v. Fieg, 160 Cal. 331; 116 Pac. 745. After default by the appellant, the subsequent filing of points and authorities by him does not affect the respondent's right to a dismissal. Barnhart v. Conley, 17 Cal. App. 230; 119 Pac. 200. While the appellate court has power to dismiss an appeal for the appellant's failure to proceed with proper diligence to procure the settlement of a statement, yet the proper practice is to require the respondent to avail himself of such objection in the lower court when the proceeding for the settlement of the statement is pending. Curtin v. Ingle, 155 Cal. 53; 99 Pac. 480.

For want of averments or evidence in lower court. An appeal from the refusal of the court to render judgment on matters which are neither supported by the averments nor by evidence, will be dismissed. Bank of Visalia v. Curtis, 131 Cal. 178; 63 Pac. 344.

For want of jurisdiction. An appeal will be dismissed, where the appellate court has no jurisdiction. Pedlar v. Stroud, 116 Cal. 461; 48 Pac. 371; Continental Building etc. Ass'n v. Beaver, 6 Cal. App. 116; 91 Pac. 666; Hanke v. McLaughlin, 20 Cal. App. 204; 128 Pac. 772. An appeal from an order denying a new trial in an action for divorce, in which no money question is involved, abates upon the death of the appellant, and the appellate court is deprived of all authority to review the action of the superior court, and the appeal must be dismissed. Begbie v. Begbie, 128 Cal. 154; 49 L. R. A. 141; 60 Pac. 667. A failure to serve an adverse party with the notice of intention to move for a new trial is not a reason for the dismissal of the appeal on the ground that the court has not acquired jurisdiction. Johnson v. Phenix Ins. Co., 146 Cal. 571; 80 Pac. 719. Failure to serve the adverse party with notice of the intention to move for a new trial, or with the draft of a statement of the case, does not deprive the appellate court of jurisdiction to hear the appeal, nor constitute a reason for its dismissal upon the ground that the court has no jurisdiction to hear it. Estate of Ryer, 110 Cal. 556; 42 Pac. 1082.

For want of requisite papers. The provision of this section, that if the appellant fails to furnish the requisite papers, the appeal may be dismissed, is to be construed in connection with the rules of the supreme court as to the correction of defects which may be cured upon suggestion of diminution of the record, and not as giving to the respondent the absolute right to a dismissal of the appeal upon the mere showing that the transcript filed is defective, but as authorizing a dismissal of the appeal if the defendant fails to furnish the requisite papers after the diminution of the record has been suggested. Woodside v. Hewel, 107 Cal. 141; 40 Pac. 103. An appeal may be dismissed, where the appellant fails to furnish the requisite papers (Bodley v. Ferguson, 25 Cal. 584), or for a serious nonconformity of the transcript to the rules of court. Naylor v. Adams, 15 Cal. App. 548; 115 Pac. 335. A motion to dismiss an appeal for a failure to file a transcript of the judgment roll will be denied, where, before the hearing of the motion, a certified transcript of the record is filed. Poole v. Grand Circle, 17 Cal. App. 229; 119 Pac. 201. An appeal from a judgment will not be dismissed, merely because some part of the judgment roll is omitted from the transcript, where it does not appear that the omitted parts are important: an omission, if deemed important, may be remedied by suggestion of a diminution of the record. Paige v. Roeding, 89 Cal. 69; 26 Pac. 787. Where the appellant has, in evident good faith, attempted to comply with the statute, his appeal from the judgment will not be dismissed, where there is doubt and uncertainty as to the proper procedure, but the court will allow the transcript to be withdrawn for a proper authentication, within a limited time, of the record. Knoch v. Haizlip, 163 Cal. 20; 124 Pac. 997. An appeal will be dismissed, where there is no properly authenticated record on appeal (Harrison v. Cousins, 16 Cal. App. 516; 117 Pac. 564; Willow Land Co. v. Goldschmidt, 11 Cal. App. 297; 104 Pac. 841; Muzzy v. D. H. McEwen Lumber Co., 154 Cal. 685; 98 Pac. 1062), or where the record is insufficient (Dyer Law etc. Co. v. Salisbury, 17 Cal. App. 393; 119 Pac. 947), or where no judgment was entered (Granger v. Richards, 126 Cal. 635; 59 Pac. 118), or for a failure to file points and authorities within the time prescribed by a rule of court. Barnhart v. Conley, 17 Cal. App. 230; 119 Pac. 200. An appeal from an order of the superior court dismissing an appeal from a justice's court will be dismissed, where there is no authenticated record, by bill of exceptions or otherwise, or where the amount involved is less than three hundred dollars. Willow Land Co. v. Goldschmidt, 11 Cal. App. 297; 104 Pac. 841. Where the judgment roll embodied in the transcript fails to show that any judgment has been given and entered in the action, an appeal, pur-

porting to be from a judgment of nonsuit, will be dismissed. Granger v. Richards, 126 Cal. 635; 59 Pac. 118.

For want of undertaking. An appeal will be dismissed, for want of jurisdiction, where the undertaking was not filed within the time prescribed by § 940, ante. Continental Building etc. Ass'n v. Beaver, 6 Cal. App. 116; 91 Pac. 666.

For insufficiency of undertaking. Where the appellate court has jurisdiction of the case, an appeal will not be dismissed because the undertaking was insufficient, if a new undertaking is filed in the appellate court. Moyle v. Landers, 78 Cal. 99; 12 Am. St. Rep. 22; 20 Pac. 241. An objection to the sufficiency of sureties in an undertaking on appeal does not entitle the respondent to a dismissal of the appeal if the sureties fail to justify, provided the appellant files an undertaking in the supreme court, approved by one of the justices. Schacht v. Odell, 52 Cal. 447. An undertaking on appeal which provides that the appellant will pay all damages and costs that may be awarded against him on the appeal, but which omits the phrase, "or on a dismissal thereof," is not a totally defective undertaking, which absolutely requires the dismissal of the appeal, but is objectionable only for insufficiency, which may be remedied by the filing of a new undertaking in the appellate court. Jarman v. Rea, 129 Cal. 157; 61 Pac. 790. Where the new undertaking, as well as the original, contains no agreement to pay damages and costs on a dismissal of the appeal, it is insufficient, and the appeal will be dismissed. Estate of Fay, 126 Cal. 457; 58 Pac. 936. An appeal cannot be dismissed for want of a sufficient undertaking, where it is not made a ground of the motion of a respondent, as he may have waived the giving of the undertaking. Clarke v. Mohr, 125 Cal. 540; 58 Pac. 176. A single undertaking on appeal from the judgment and the order denying a new trial, must refer to each of the appeals, and show on its face that it is given in consideration of both: if it recites but one, the other appeal will be dismissed. Buchner v. Malloy, 152 Cal. 484; 92 Pac. 1029. Upon a motion to dismiss an appeal, where there is a single undertaking for three separate and distinct appeals, the fact that only one of the orders appealed from was appealable will not be considered so as to render such undertaking the undertaking on the appealable order only. Estate of Heydenfeldt, 119 Cal. 346; 51 Pac. 543. Where an undertaking is invalid for all purposes, the objections cannot be obviated by the filing of a new undertaking under this section. Theisen v. Matthai, 165 Cal. 249; 131 Pac. 747.

Dismissal of appeal for defects in undertaking. See also note ante, § 941.

When new undertaking may be filed. It is the purpose of this section to allow a sufficient bond to be given to supply the defects of an insufficient bond. Pacific Paving Co. v. Verso, 11 Cal. App. 383; 105 Pac. 136. It is contemplated by this section, that although an undertaking has been filed, yet it may be of such a character, or in such a form, as not fully to indemnify the respondent against the costs and damages which he may sustain by reason of the appeal; the use of the phrase, "insufficiency of the undertaking," indicates a distinction between an undertaking which does not fully comply with all the terms of § 941, ante, and the entire absence of an undertaking; and an undertaking may be filed which is so defective as not to constitute any obligation on the sureties therein, and which is, in reality, no undertaking at all; in such a case, there is more than mere insufficiency,—there is an entire want of indemnity to the respondent,—and this section does not apply. Jarman v. Rea, 129 Cal. 157; 61 Pac. 790. This section does not apply where the undertaking given is void; in which case it is as though no undertaking had been filed and no appeal perfected within the time allowed by law; hence, no new undertaking can be permitted to be filed in the appellate court. Estate of Heydenfeldt, 119 Cal. 346; 51 Pac. 543; and see Duffy v. Greenbaum, 72 Cal. 157; 12 Pac. 74; Schurtz v. Romer, 81 Cal. 244; 22 Pac. 657; McCormick v. Belvin, 96 Cal. 182; 31 Pac. 16. Where the undertaking given is void, no new undertaking can be filed in the appellate court, even though there was an undertaking for stay of execution. Duffy v. Greenebaum, 72 Cal. 157; 12 Pac. 74; and see Biagi v. Howes, 63 Cal. 384. An undertaking to stay execution may be filed in the supreme court, after an appeal has been taken, where the sureties on the former undertaking have failed to justify (Tompkins v. Montgomery, 116 Cal. 120; 47 Pac. 1006; McClatchy v. Sperry, 6 Cal. Unrep. 345; 58 Pac. 529; Nonpareil Mfg. Co. v. McCartney, 143 Cal. 1; 76 Pac. 653); but such permission will not be granted without a showing excusing such failure. Williams v. Borgwardt, 115 Cal. 617; 47 Pac. 594. The filing of a new undertaking in the supreme court is limited to cases where it is sought to remedy a defective undertaking: no amendment of an undertaking can be allowed where there is no undertaking to amend. Schurtz v. Romer, 81 Cal. 244; 22 Pac. 657; Pacific Paving Co. v. Bolton, 89 Cal. 154; 26 Pac. 650; Wadleigh v. Phelps, 147 Cal. 135; 81 Pac. 418. Where the undertaking on appeal names the court and the department thereof, gives the number of the case, and accurately describes the judgment and the order denying a new trial, a mistake in the christian name of the plaintiff, in the title of the case, is within this section, and a new undertaking, approved by a justice of the supreme court, is authorized.

Butler v. Ashworth, 100 Cal. 334; 34 Pac. 780. Where the recitals in an undertaking fail to identify the appeal, the error is incurable, and a new undertaking, under this section, cannot be filed. Little v. Thatcher, 151 Cal. 558; 91 Pac. 321. The neglect of one of the sureties to sign the undertaking in the proper place, evidently through a mere oversight, renders the undertaking merely insufficient; and a new undertaking on appeal may be filed. Bay City Building etc. Ass'n v. Broad, 128 Cal. 670; 61 Pac. 368. An undertaking, signed by the sureties before the making of the order denying a new trial, is without consideration, and therefore there is more than insufficiency in such undertaking, and a new undertaking cannot be filed on appeal. Stackpole v. Hermann, 126 Cal. 465; 58 Pac. 935. Where, upon two appeals, one from an order dissolving an injunction and the other from the judgment, but one undertaking is given, reciting both appeals, and specifying a joint and several obligation in the sum of six hundred dollars for the two appeals, or either of them, such undertaking, if not sufficient in form, affords a sufficient basis to permit a new undertaking to be filed in the supreme court for each appeal. Spreckels v. Spreckels, 114 Cal. 60; 45 Pac. 1022. Appeals taken from two distinct orders are each ineffectual, and will be dismissed, when only one undertaking on appeal is filed, which fails to designate to which of the appeals it was intended to apply; in such case, the appellant is not authorized, under this section, to file new undertakings. Home and Loan Associates v. Wilkins, 71 Cal. 626; 12 Pac. 799. A single undertaking upon three orders, separately and independently appealable, and none of which could be reviewed upon an appeal from the others, is, in legal effect, no undertaking, and the defect cannot be cured by a new undertaking. Wadleigh v. Phelps, 147 Cal. 135; 81 Pac. 418. An undertaking on appeal from an order denying a new trial, filed in the appellate court, is ineffectual, where no undertaking on such appeal was filed in the lower court, although the undertaking on the appeal from the judgment was filed, but contained no reference to the appeal from the order denying the new trial. Schurtz v. Romer, 81 Cal. 244; 22 Pac. 657. Unless a request is made for leave to file a substituted undertaking, appellant's right to have a proper undertaking approved, as provided by law, does not arise. McAulay v. Tahoe Ice Co., 3 Cal. App. 642; 86 Pac. 912.

New undertaking on appeal to the superior court. See note post, § 978.

Result of failure to file. The failure to file a good and sufficient undertaking within the time allowed by this section, and to have indorsed thereon the approval of a justice of the supreme court, in place of an insufficient and irregular undertaking, renders the appeal ineffectual (Wood v. Pendola, 77 Cal. 82; 19 Pac. 183; Duncan v. Times-Mirror Co., 109 Cal. 602; 42 Pac. 147; Jarman v. Rea, 129 Cal. 157; 61 Pac. 790; Zane v. De Onativia, 135 Cal. 440; 67 Pac. 685; and see Estate of Wells, 148 Cal. 659; 84 Pac. 37); and the supreme court has no discretion to permit a new undertaking to be filed after the hearing on such motion. Duncan v. Times-Mirror Co., 109 Cal. 602; 42 Pac. 147; Zane v. De Onativia, 135 Cal. 440; 67 Pac. 685.

Effect of approval of new undertaking. An imperfection in the recitals of an undertaking on appeal from an order denying a motion for a new trial may be remedied by filing, in the supreme court, a good and sufficient undertaking containing the proper recital, approved by a justice of that court. Buehner v. Malloy, 152 Cal. 484; 92 Pac. 1029. The approval of an undertaking substituted for one held insufficient, by a justice of the supreme court, amounts not only to a determination that the undertaking is such in form and substance as the statute requires, but also of its sufficiency as to the sureties. Stevenson v. Steinberg, 32 Cal. 373.

Justification of new sureties. The appellant may file a new undertaking in the appellate court, but the respondent cannot require the sureties thereon to justify: the justice who approves the bond will ascertain, by examination of the sureties, whether they possess the necessary qualifications. Stevenson v. Steinberg, 32 Cal. 373. The provision for a new bond when the old becomes insufficient, as a condition for the maintenance of the appeal, means, merely, that, upon the failure of the new sureties to justify, execution may issue upon the judgment, and not that the appeal may be dismissed, where the appellant had perfected his appeal by giving the ordinary appeal bond. Mersfelder v. Spring, 136 Cal. 619; 69 Pac. 251.

For disobedience of order of court. The disobedience of an appellant to an order of the lower court, in an action of divorce, requiring him to bring a child into this state, whose custody was awarded to the respondent here, but to the appellant by the judgment of a court of a sister state, is not a legal ground for dismissing his appeal from the judgment and from an order denying a new trial. Vosburg v. Vosburg, 131 Cal. 628; 63 Pac. 1009.

Dismissal, where appellant has no attorney. An appeal cannot be dismissed because the attorney for the appellant is not an attorney of record in the case, but is a member of a firm of attorneys who appeared in the court below as attorneys of record. Woodmen of the World v. Rutledge, 133 Cal. 640; 65 Pac. 1105.

Where matter settled by consent. An appeal from a consent judgment will be

dismissed (Hibernia Sav. & L. Soc. v. Waymire, 152 Cal. 286; 92 Pac. 645; Erlanger v. Southern Pacific R. R. Co., 109 Cal. 395; 42 Pac. 31), as will also an appeal, where, during the pendency thereof, all matters in dispute in the action are settled by agreement between the parties. Nelson v. Nelson, 153 Cal. 204; 94 Pac. 880; Bank of Martinez v. Jahn, 104 Cal. 238; 38 Pac. 41. The resignation of the guardian of a minor operates as an acquiescence by him in a previous order of the court, annulling his letters, and precludes him from assigning any error in such order, and renders proper an order dismissing an appeal, upon the ground that all matters involved in the appeal were disposed of. Guardianship of Treadwell, 111 Cal. 189; 43 Pac. 584. Where the judgment and order must be affirmed upon the record, it is not necessary to pass upon a motion to dismiss the appeal on the ground that the controversy has been settled out of court. Brode v. Gosslin, 16 Cal. App. 632; 117 Pac. 778.

Where new trial granted. An appeal from a judgment will not be dismissed because a new trial had been granted, where the order granting such new trial has been appealed from. Pierce v. Birkholm, 110 Cal. 669; 43 Pac. 205.

Refusal to dismiss for equitable reasons. An appeal will not be dismissed, where its dismissal would be an injustice. San Joaquin etc. Irrigation Co. v. Stevinson, 16 Cal. App. 235; 116 Pac. 378.

Affirmance of order denying improper motion. An appeal from an order denying an improper motion for a new trial will not be dismissed: the proper course is to affirm the order. Quist v. Sandman, 154 Cal. 748; 99 Pac. 204.

Dismissal of appeals. See note ante, § 939.

When proper practice not to dismiss appeal, but to affirm judgment. See note post, § 957.

Dismissal of appeal for informalities. See note ante, § 953.

Dismissal of appeal from new-trial order. See note post, § 963.

Effect of dismissal. See note post, § 955.

Rehearing. If an appeal has been dismissed, a rehearing will be denied, where the record shows that the dismissal was proper; and a petition for the rehearing of an order of dismissal of an appeal will be denied, where the record shows that, although the order involved was an appealable order, no appeal was taken therefrom. Sheehan v. Lapique, 15 Cal. App. 517; 115 Pac. 965.

Justification of sureties. The authority given by the amendment of 1895 to this section is confined to the ordering of a new bond upon appeals from money judgments: that amendment does not provide for a further or second justification of the sureties upon the original bond. Boyer v. Superior Court, 110 Cal. 401; 42 Pac. 892.

Right of appellant to dismiss appeal. See notes 2 Ann. Cas. 794; 11 Ann. Cas. 966.

Requirement or permission of new or additional appeal or supersedeas bond in appellate court. See notes 10 Ann. Cas. 804; 17 Ann. Cas. 378; 9 L. R. A. (N. S.) 1054.

CODE COMMISSIONERS' NOTE. 1. Effect of dismissal. Rowland v. Kreyenhagen, 24 Cal. 57; Chamberlin v. Reed, 16 Cal. 207; Karth v. Light, 15 Cal. 324.

2. Without prejudice. Gordon v. Wansey, 19 Cal. 82; Dooling v. Moore, 19 Cal. 81; but see § 955 of this code.

3. Fraud in procuring dismissal. Rowland v. Kreyenhagen, 24 Cal. 52.

4. Generally. People v. Goldbury, 10 Cal. 312; Noriega v. Knight, 20 Cal. 172; Lynch v. Dunn, 34 Cal. 518; Dobbins v. Dollarhide, 15 Cal. 374; People v. Comedo, 11 Cal. 70; Ricketson v. Torres, 23 Cal. 636.

§ 955. Effect of dismissal.

The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

Legislation § 955. Enacted March 11, **1872.**

Dismissal of appeal affirms judgment. The dismissal of an appeal from a judgment operates as an affirmance of the judgment (Barnhart v. Edwards, 128 Cal. 572; 61 Pac. 176); as does also the dismissal of an appeal from a judgment by consent (Spaeth v. Ocean Park Realty etc. Co., 16 Cal. App. 329; 116 Pac. 329); but the dismissal of an appeal from a judgment, as prematurely taken, does not operate as an affirmance of the judgment. Estate of Kennedy, 129 Cal. 384; 62 Pac. 64. The dismissal of an appeal on the merits is a bar to second appeal: it is, in effect, an affirmance of the judgment. Karth v. Light, 15 Cal. 324.

Void judgment not affirmed. The dismissal of an appeal from a judgment is an affirmance of the judgment, only in a limited sense: if the judgment is void on its face, the dismissal of the appeal in no wise cures such vital defect; at most, it prevents a second appeal, and relieves the order or judgment from attack for error or irregularity which could be taken advantage of upon appeal. Sullivan v. Gage, 145 Cal. 759; 79 Pac. 537.

Dismissal as bar to second appeal. The dismissal of an appeal for want of prosecution, unless it is made expressly "without prejudice," or where it is on the merits, is a bar to another appeal. Estate of Rose, 80 Cal. 166; 22 Pac. 86; and see Karth v. Light, 15 Cal. 324. The dismissal of an appeal because there is nothing to appeal from does not preclude another appeal in the same case, when a record shall have been made up, upon which an appeal can be taken. Estate of Rose, 80 Cal. 166; 22 Pac. 86.

Effect of dismissal for defects in papers. The dismissal of an appeal for a technical defect in the notice of appeal or in the undertaking, or the like, is not a bar to a second appeal, and does not amount to an affirmance of the judgment. Karth v. Light, 15 Cal. 324.

Of dismissal without prejudice. The dismissal of an appeal from a judgment, because of the failure of the appellant to file the transcript within the time prescribed, is, in effect, an affirmance of the judgment, if the order of dismissal does not expressly provide that it is made without prejudice to the right of the appellant to take another appeal; and a second appeal from the same judgment will be dismissed. Garibaldi v. Garr, 97 Cal. 253; 32 Pac. 170. The dismissal of an appeal for failure to file the requisite papers, unless expressly made without prejudice, is a bar to another appeal. Spinetti v. Brignardello, 54 Cal. 521.

Of dismissal as to heirs not served. In a case involving the right of succession by non-resident heirs, where, as to the state, the right of each distributee of a decedent's estate is several and independent of the rights of others, the dismissal of an appeal as to heirs not made parties cannot affect the right of appeal by the state as to the parties served. Estate of Pendergast, 143 Cal. 135; 76 Pac. 962.

CODE COMMISSIONERS' NOTE. See subdivision 2 of note to § 954, ante; see also Fulton v. Cox, 40 Cal. 101; Fulton v. Hanna, 40 Cal. 278.

§ 956. What may be reviewed on appeal from judgment. Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party. The court may also on such appeal review any order on motion for a new trial. The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken.

Legislation § 956. 1. Enacted March 11, **1872**, and then read: "Upon an appeal from a judgment, the court may review the verdict or decision, if excepted to, or any intermediate order, if excepted to, which involves the merits or necessarily affects the judgment."

2. Amended by Code Amdts. **1875–76**, p. 92, to read: "§ 956. Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate order or decision excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken."

3. Amendment by Stats. **1901**, p. 174; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1915**, p. 328; recasting the section.

Construction of section. "Verdict or decision" means something different from "any intermediate order or decision": the latter phrase does not mean the written findings of fact and law required by §§ 632, 633, to be filed with the clerk as a result of a trial on the merits; hence, an intermediate non-appealable order or decision excepted to, involving the merits or affecting the judgment, may be reviewed on appeal from final judgment, taken within one year from its entry, and without any specification, in the bill of exceptions, of the particulars in which the evidence is insufficient to justify such order or decision: the exception to such intermediate order or decision is not an exception to the verdict or decision. Clifford v. Allman, 84 Cal. 528; 24 Pac. 292.

Appeal must be in time. An appeal from a judgment, not taken in time, cannot be considered (Chase v. Holmes, 19 Cal. App. 670; 127 Pac. 652); nor points urged on an appeal taken more than six months after entry of judgment. Sessions v. Southern Pacific Co., 159 Cal. 599; 114 Pac. 982; Allen v. Allen, 159 Cal. 197; 113 Pac. 160; Dundas v. Lankershim School Dist., 155 Cal. 692; 102 Pac. 925; Sequeira v. Collins, 153 Cal. 426; 95 Pac. 876; Roney v. Reynolds, 152 Cal. 323; 92 Pac. 847; Brownlee v. Reiner, 147 Cal. 641; 82 Pac. 324; Breidenbach v. M. McCormick Co., 20 Cal. App. 184; 128 Pac. 423; West v. Mears, 17 Cal. App. 718; 121 Pac. 700. Sufficiency of evidence not reviewable, where appeal not taken within sixty days. McGrath v. Hyde, 81 Cal. 38; 22 Pac. 293.

Judgment reviewed how. A judgment can be reviewed only by a direct appeal, taken after its entry. Brison v. Brison, 90 Cal. 323; 27 Pac. 186.

Matters not affecting party complaining. An intervener cannot complain that judgment for plaintiff is ineffectual or imperfect in its relation to other parties. Gray v. Bonnell, 19 Cal. App. 243; 125 Pac. 355.

Questions of law and fact. In a criminal case, the question whether a witness was an accomplice is one for the jury, where the facts are in dispute; otherwise it is a question of law for the court. People v. Coffey, 161 Cal. 433; 39 L. R. A. (N. S.) 701; 119 Pac. 901. Where the only question that can arise upon appeal is a legal one, the appellate court is limited to the papers mentioned in the first subdivision of § 670. Crackel v. Crackel, 17 Cal. App. 600; 121 Pac. 295.

Matters within discretion of court. The discretionary power of the court will not be disturbed, except for a clear abuse of discretion. Lang v. Lilley & Thurston Co., 164 Cal. 294; 128 Pac. 1026; Estate of Everts, 163 Cal. 449; 125 Pac. 1058; Smith v. Riverside Groves Water Co., 19 Cal. App.

165; 124 Pac. 870; Lamb v. Wilke, 19 Cal. App. 286; 125 Pac. 757; Jones v. Lewis, 19 Cal. App. 575; 126 Pac. 853; McConnell v. Imperial Water Co., 20 Cal. App. 8; 127 Pac. 1036, 1037; Smith v. Jaccard, 20 Cal. App. 280; 128 Pac. 1023, 1024; Conwell v. Varain, 20 Cal. App. 521; 130 Pac. 23; Dieckmann v. Merkh, 20 Cal. App. 655; 130 Pac. 27. The granting or refusing of a temporary injunction is a matter resting largely in the discretion of the trial court. Miller & Lux v. Madera Canal etc. Co., 155 Cal. 59; 22 L. R. A. (N. S.) 391; 99 Pac. 502. The principle of res adjudicata is not applicable to motions: the granting or denying of permission to renew a motion is a matter of discretion. Lawson v. Lawson, 15 Cal. App. 496; 115 Pac. 461. An order granting or denying relief under § 473, ante, is within the discretion of the court, and will not be disturbed on appeal, where no abuse of discretion is shown (Blumer v. Mayhew, 17 Cal. App. 223; 119 Pac. 202; Dernham v. Bagley, 151 Cal. 216; 90 Pac. 543); nor will an order quashing the service of summons by publication be disturbed on appeal, where no abuse of discretion is shown (Wilson v. Leo, 19 Cal. App. 793; 127 Pac. 1043); nor the disallowance of an amendment to an answer (Cook v. Suburban Realty Co., 20 Cal. App. 538; 129 Pac. 801); nor the action of the court below in dismissing an action for undue delay in serving the summons (Witter v. Phelps, 163 Cal. 655; 126 Pac. 593); nor an order made upon application for a temporary injunction (Miller & Lux v. Madera Canal etc. Co., 155 Cal. 59; 22 L. R. A. (N. S.) 391; 99 Pac. 502); nor the action of the court in dismissing an action for want of prosecution. Bell v. Solomons, 162 Cal. 105; 121 Pac. 377. In the absence of a bill of exceptions, an order denying defendant's motion to set aside a judgment, and for leave to file an amended answer, cannot be said, upon appeal, to involve an abuse of discretion. Zany v. Rawhide Gold Mining Co., 15 Cal. App. 373; 114 Pac. 1026. Whether, in any case, the discretion of the court has been abused by the denial of a motion to permit a "view of the premises," depends upon the circumstances, and the burden on appeal is upon the moving party to show affirmatively that such discretion has been abused. People v. Sampo, 17 Cal. App. 135; 118 Pac. 957. Injury arising from an unreasonable delay in prosecuting an action is immaterial upon the question whether there has been an abuse of discretion in dismissing the action upon that ground. Gray v. Times-Mirror Co., 11 Cal. App. 155; 104 Pac. 481.

Orders striking out pleadings. Neither an order striking out a portion of the complaint (Swain v. Burnette, 76 Cal. 299; 18 Pac. 394; Wood v. Missouri Pacific Ry. Co., 152 Cal. 344; 92 Pac. 868), nor an order or decision striking out the complaint, is appealable, but may be reviewed upon appeal from the final judgment. Clifford v. Allman, 84 Cal. 528; 24 Pac. 292; Alpers v. Bliss, 145 Cal. 565; 79 Pac. 171.

Orders made upon demurrers. The action of the court, either in sustaining or overruling a demurrer, can be reviewed only upon an appeal from the final judgment. Wood v. Missouri Pacific Ry. Co., 152 Cal. 344; 92 Pac. 868; Hadsall v. Case, 15 Cal. App. 541; 115 Pac. 330; Hanke v. McLaughlin, 20 Cal. App. 204; 128 Pac. 772. An order overruling a demurrer to a complaint will not be reviewed on an appeal by the plaintiff from a judgment in favor of the defendant. Bank of National City v. Johnston, 6 Cal. Unrep. 418; 60 Pac. 776.

Questions not raised in trial court. Objections that should have been, but were not, made in the court below, such as those not going to the question of jurisdiction, cannot be raised for the first time on appeal. Estate of Dombrowski, 163 Cal. 290; 125 Pac. 233; Hardy v. Schirmer, 163 Cal. 272; 124 Pac. 993; Milwaukee Mechanics' Ins. Co. v. Warren, 150 Cal. 346; 89 Pac. 93; Parke & Lacy Co. v. Inter Nos Oil etc. Co., 147 Cal. 490; 82 Pac. 51; Doudell v. Shoo, 20 Cal. App. 424; 129 Pac. 478; Tubbs v. Delillo, 19 Cal. App. 612; 127 Pac. 514; Keefe v. Keefe, 19 Cal. App. 310; 125 Pac. 929; Kern Valley Bank v. Koehn, 19 Cal. App. 247; 125 Pac. 358; Bartnett v. Hull, 19 Cal. App. 91; 124 Pac. 885; Brandt v. Salomonson, 17 Cal. App. 397; 119 Pac. 946; Kriste v. International Savings etc. Bank, 17 Cal. App. 301; 119 Pac. 666; Pehl v. Fanton, 17 Cal. App. 250; 119 Pac. 400. Except in the cases specified in § 647, ante, an exception must be taken at the time the decision is made; if not, the objection to the ruling cannot be urged on appeal. Randall v. Freed, 154 Cal. 299; 97 Pac. 669; Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469. Before the amendment of 1909 to § 647, ante, objections to testimony were disregarded on appeal, where the grounds thereof were not stated in the court below. Bakersfield etc. R. R. Co. v. Fairbanks, 20 Cal. App. 412; 129 Pac. 610. Error cannot be urged for the first time on appeal, where no objection was made in the court below. Hardy v. Schirmer, 163 Cal. 272; 124 Pac. 993. Where the court has jurisdiction of the subject-matter and of the parties, and where no objection is properly made in the court below to the manner of procedure by which the cause was brought into such court, such objection cannot be made for the first time on appeal (Groom v. Bangs, 153 Cal. 456; 96 Pac. 503); nor can an objection that a finding was not within the

issue be raised for the first time on appeal (Rutz v. Obear, 15 Cal. App. 435; 115 Pac. 67); nor an objection that there was a variance (Cargnani v. Cargnani, 16 Cal. App. 96; 116 Pac. 306); nor an objection that there was a variance in proof (Nielson v. Gross, 17 Cal. App. 74; 118 Pac. 725); nor an objection that certain evidence was erroneously admitted (People v. Schafer, 161 Cal. 573; 119 Pac. 920; Crackel v. Crackel, 17 Cal. App. 600; 121 Pac. 295; Burnett v. Lyford, 93 Cal. 114; 28 Pac. 855); nor an objection that certain evidence was inadmissible, where the case was tried upon the theory that it was admissible (Cargnani v. Cargnani, 16 Cal. App. 96; 116 Pac. 306); nor an objection that there was error in allowing the rereading to the jury, of a portion of the testimony of the plaintiff (Hardy v. Schirmer, 163 Cal. 272; 124 Pac. 993); nor an objection that the questions in a special verdict were improperly phrased (Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469); nor an objection that causes of action were improperly joined. Worth v. Worth, 155 Cal. 599; 102 Pac. 663. Where the appellant went to trial in the court below without insisting upon a disposition of his demurrer, he cannot be permitted to object upon that ground in the appellate court. De Leon v. Higuera, 15 Cal. 483. If parties, in an action for the sale of trust property, and to have the proceeds applied to the payment of certain debts, stipulate that the property may be sold and the proceeds distributed among the persons and parties thereto, the defendant cannot, because of such stipulation, urge for the first time on appeal that the plaintiff has no right to maintain the action, or that the complaint is insufficient because it does not state a cause of action. Bank of Visalia v. Dillonwood Lumber Co., 148 Cal. 18; 82 Pac. 374. Where permission to amend the complaint, after a demurrer thereto is sustained, is denied, it is too late to make the point for the first time on appeal, when nothing appears in the record to show an abuse of discretion. Varni v. Devoto, 10 Cal. App. 304; 101 Pac. 934. Where no objection was made in the court below to the manner in which a judgment of a justice of the peace was pleaded, and it seems to have been treated by all parties as a sufficient statement of the facts therein set out, it cannot be urged for the first time on appeal that the plea of such judgment was insufficiently alleged. Kriste v. International Savings etc. Bank, 17 Cal. App. 301; 119 Pac. 666. Where parties have proceeded to trial upon a pleading, without objection to its sufficiency to raise a particular issue, and evidence has been received as to the facts, and the issue found upon, the party whose duty it was to object will not be heard, in the appellate court, to say that the finding is not within the issue. Rutz v. Obear, 15 Cal. App. 435; 115 Pac. 67; California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692; 118 Pac. 103. Where the defendant's answer treats the issue of delivery as having been properly made, and evidence is heard on the subject, and the court makes a finding in determination of such issue, it is too late to object on appeal, for the first time, that the complaint fails to state a cause of action in the particular referred to. Hoover v. Lester, 16 Cal. App. 151; 116 Pac. 382. Where both parties treat a certain question of fact as being in issue, and offer evidence regarding it, the point that no issue is presented by the pleadings is waived, and cannot be raised on appeal. Milwaukee Mechanics' Ins. Co. v. Warren, 150 Cal. 346; 89 Pac. 93. A special objection to the admission of evidence is waived by the making of a general one, and cannot be urged for the first time on appeal. French v. Atlas Milling Co., 17 Cal. App. 226; 119 Pac. 203. Where no objection was made to the admission of evidence of a fact, and the trial was had upon the theory that the fact was in issue, the objection that the finding of fact was outside of the issues will not be considered on appeal. Peck v. Noce, 154 Cal. 351; 97 Pac. 865. A party will not be heard to object to a verdict, for the first time on appeal from the judgment, if it is susceptible of a construction that may have a lawful and relevant effect. Reed Orchard Co. v. Superior Court, 19 Cal. App. 648; 128 Pac. 9. A failure to interpose any objection to the settling of a bill of exceptions is a waiver of such objection. Sheppard v. Sheppard, 15 Cal. App. 614; 115 Pac. 751.

Sufficiency of complaint. The sufficiency of the complaint will be reviewed upon appeal from a judgment dismissing the action. Kinard v. Jordan, 10 Cal. App. 219; 101 Pac. 696. An objection that the complaint does not state facts sufficient to constitute a cause of action, is not waived by a failure to demur, nor cured by verdict or judgment, and may be urged on appeal. Bell v. Thompson, 147 Cal. 689; 82 Pac. 327. Objections to the complaint, urged upon a demurrer thereto, cannot be considered after the dismissal of an appeal from the judgment: the insufficiency of the complaint can be reviewed only upon such an appeal. Cook v. Suburban Realty Co., 20 Cal. App. 538; 129 Pac. 801. After a case has been tried on an amended complaint, the appellate court has no power to consider the original complaint for any purpose. Bray v. Lowery, 163 Cal. 256; 124 Pac. 1004.

Questions presented by demurrer. The defendant is entitled to the decision of the appellate court on all questions pre-

sented by his demurrer, and necessary to the decision made. Burke v. Maguire, 154 Cal. 456; 98 Pac. 21.

Exceeding amount claimed. The extent of relief is governed by the allegations of the complaint, although the evidence shows that the plaintiff is entitled to a judgment in excess of the amount claimed in his complaint. Tubbs v. Delillo, 19 Cal. App. 612; 127 Pac. 514.

Evidence. Upon an appeal from a judgment entered upon granting a motion for a nonsuit, all reasonable inferences must be resolved in favor of the plaintiff, in reviewing the evidence, and the construction of the evidence most favorable to the plaintiff must be given. Union Const. Co. v. Western Union Tel. Co., 163 Cal. 298; 125 Pac. 242. The weight of evidence is not determined by the number of witnesses: some circumstances almost always crop out which enable the court to determine the truth of the matter. Henley v. Pacific Fruit Cooling etc. Co., 19 Cal. App. 728; 127 Pac. 800. The question whether or not the evidence on a given subject is clear and convincing is for the trial court. Oldershaw v. Matteson & Williamson Mfg. Co., 19 Cal. App. 179; 125 Pac. 263. Where the judgment must be reversed, and the cause sent back for a new trial, it is neither necessary nor proper to review the evidence, so far as it relates to damages awarded to the plaintiff. Knight v. Black, 19 Cal. App. 518; 126 Pac. 512. Written opinions of the trial judge, although embodied in the bill of exceptions used on appeal, cannot be considered in determining whether or not the findings are sufficiently supported by the evidence. Goldner v. Spencer, 163 Cal. 317; 125 Pac. 347. On an appeal taken on the judgment roll alone, the evidence is not reviewable, and its sufficiency to support the findings is, of course, not to be questioned. Archer v. Harvey, 164 Cal. 274; 128 Pac. 410. Where the verdict is attacked for insufficiency of evidence, the power of the appellate court begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which, in itself, would support the conclusion reached by the jury. Gjurich v. Fieg, 164 Cal. 429; 129 Pac. 464.

Review, where evidence conflicting. Where there is conflicting evidence on a question of fact, with some substantial evidence to support it, the findings and conclusion of the trial court will not be disturbed on appeal. Suhr v. Lauterbach, 164 Cal. 591; 130 Pac. 2; Olaine v. McGraw, 164 Cal. 424; 129 Pac. 460; Cooke v. Mesmer, 164 Cal. 332; 128 Pac. 917; Home Real Estate Co. v. Los Angeles Pacific Co., 163 Cal. 710; 126 Pac. 972; Burr v. United Railroads, 163 Cal. 663; 126 Pac. 873; Walker v. Price, 163 Cal. 617; 126 Pac. 482; Wolf v. Ætna Indemnity Co., 163 Cal. 597; 126 Pac. 470; Callahan v. Marshall, 163 Cal. 552; 126 Pac. 358; Gallatin v. Corning Irrigation Co., 163 Cal. 405; Ann. Cas. 1914A, 74; 126 Pac. 864; Rimpau v. Baldwin, 163 Cal. 225; 124 Pac. 1002; Meloy v. Imperial Land Co., 163 Cal. 99; 124 Pac. 712; Channel Commercial Co. v. Hourihan, 20 Cal. App. 647; 129 Pac. 947; McCann v. McCann, 20 Cal. App. 567; 129 Pac. 965; Oppenheimer v. Radke & Co., 20 Cal. App. 518; 129 Pac. 798; Marston v. Watson, 20 Cal. App. 465; 129 Pac. 611; Doudell v. Shoo, 20 Cal. App. 424; 129 Pac. 478; Lundeen v. Nowlin, 20 Cal. App. 415; 129 Pac. 474; McDougall v. Eaton, 20 Cal. App. 164; 128 Pac. 415; Root v. Greadwohl, 20 Cal. App. 139; 128 Pac. 418; Wilson v. Leo, 19 Cal. App. 793; 127 Pac. 1043; Henley v. Pacific Fruit Cooling etc. Co., 19 Cal. App. 728; 127 Pac. 800; Blanck v. Commonwealth Amusement Corporation, 19 Cal. App. 720; 127 Pac. 805; Parker v. Herndon, 19 Cal. App. 451; 126 Pac. 183; Boyer v. Gelhaus, 19 Cal. App. 320; 125 Pac. 916; Lamb v. Wilke, 19 Cal. App. 286; 125 Pac. 757; Oldershaw v. Matteson & Williamson Mfg. Co., 19 Cal. App. 179; 125 Pac. 263; In re Property of Carlin, 19 Cal. App. 168; 124 Pac. 868; Scharpf v. Union Oil Co., 19 Cal. App. 100; 124 Pac. 864. On appeal, the court will not review conflicting evidence. Reeve v. Colusa Gas etc. Co., 152 Cal. 99; 92 Pac. 89. The appellate court cannot weigh conflicting evidence and determine according to the preponderance: that function devolves upon the trial court alone. Rimpau v. Baldwin, 163 Cal. 225; 124 Pac. 1002. On appeal from an order made upon conflicting affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered as established. Bernou v. Bernou, 15 Cal. App. 341; 114 Pac. 1000; Budd v. Superior Court, 14 Cal. App. 256; 111 Pac. 628. The order denying an application for a change of the place of trial will not be disturbed, where it was made upon conflicting affidavits. Carpenter v. Ashley, 15 Cal. App. 461; 115 Pac. 268.

Rule as to findings and verdict on conflicting evidence. The jury must decide facts in dispute, and their finding will not be disturbed on appeal. People v. Coffey, 161 Cal. 433; 39 L. R. A. (N. S.) 704; 119 Pac. 901. A finding based upon conflicting evidence is conclusive upon the appellate court, if there is some substantial evidence in support of it. Patterson v. San Francisco etc. Ry. Co., 147 Cal. 178; 81 Pac. 531; Emerson v. Yosemite Gold Mining etc. Co., 149 Cal. 50; 85 Pac. 122; Piercy v. Piercy, 149 Cal. 163; 86 Pac. 507; Crisman v. Lanterman, 149 Cal. 647; 117 Am. St. Rep. 167; 87 Pac. 89; Moore v. Gould, 151 Cal. 723; 91 Pac. 616; Estate of Johnson, 152 Cal. 780; 93 Pac. 1015; Estate of Doolittle, 153 Cal. 29; 94 Pac. 240; Fogg

v. Perris Irrigation Dist., 154 Cal. 209; 97 Pac. 316; Madison v. Octave Oil Co., 154 Cal. 768; 99 Pac. 176; De Gottardi v. Donati, 155 Cal. 109; 99 Pac. 492; Dunphy v. Dunphy, 161 Cal. 380; Ann. Cas. 1913B, 1230; 38 L. R. A. (N. S.) 818; 119 Pac. 512; Consolidated Lumber Co. v. Fidelity etc. Co., 161 Cal. 397; 119 Pac. 506; Smith v. Sinbad Development Co., 15 Cal. App. 166; 113 Pac. 701; Martin v. Stone, 15 Cal. App. 174; 113 Pac. 706; Estate of Weber, 15 Cal. App. 224; 114 Pac. 597; Patton v. Klemmer, 15 Cal. App. 459; 115 Pac. 62; Tench v. McMeekan, 17 Cal. App. 14; 118 Pac. 476; People v. Delucchi, 17 Cal. App. 96; 118 Pac. 935; Robinson v. American Fish etc. Co., 17 Cal. App. 212; 119 Pac. 388; West v. Mears, 17 Cal. App. 718; 121 Pac. 700. Conflicts of testimony are deemed to have been finally resolved in the court below. Dunphy v. Dunphy, 161 Cal. 380; Ann. Cas. 1913B, 1230; 38 L. R. A. (N. S.) 818; 119 Pac. 512. Where the finding of the trial court is in support of the evidence, either directly or by fair inference therefrom, it must stand. Tench v. McMeekan, 17 Cal. App. 14; 118 Pac. 476; Mentone Irrigation Co. v. Redlands Electric Light etc. Co., 155 Cal. 323; 17 Ann. Cas. 1222; 22 L. R. A. (N. S.) 382; 100 Pac. 1082. A finding against the great weight and preponderance of the evidence can be maintained on the doctrine of "conflict," only where the alleged conflict rests upon evidence, either direct or circumstantial, which so materially contradicts the testimony on the other side, or is so radically inconsistent with it, as to leave room, in a fair and reasonable mind, to find the fact either way. Houghton v. Loma Prieta Lumber Co., 152 Cal. 574; 93 Pac. 377. The rule that the trial judge is the final arbiter as to all questions of fact, where the evidence is conflicting, applies in all cases, whether the evidence is given orally or by deposition or affidavit. Sheehan v. Osborn, 138 Cal. 512; 71 Pac. 622; Crisman v. Lanterman, 149 Cal. 647; 117 Am. St. Rep. 167; 87 Pac. 89; Meyerink v. Barton, 6 Cal. Unrep. 551; 62 Pac. 505; Rounthwaite v. Rounthwaite, 6 Cal. Unrep. 878; 68 Pac. 304. The rule that the determination of a jury or of a trial court, upon matters of fact, in cases of a conflict of evidence, is deemed conclusive upon appeal, if there is any substantial evidence to support such determination, applies to negligence cases (Reeve v. Colusa Gas etc. Co., 152 Cal. 99; 92 Pac. 89; Scott v. San Bernardino Valley Traction Co., 152 Cal. 604; 93 Pac. 677; Imperial Valley Mercantile Co. v. Southern Pacific Co., 15 Cal. App. 385; 114 Pac. 1003); and to cases involving the credibility of witnesses and the weight of evidence (Roney v. Reynolds, 152 Cal. 323; 92 Pac. 847; Ernest v. McCauley, 155 Cal. 739; 102 Pac. 924; Carter v. Grosshaus, 17 Cal. App. 703; 121 Pac. 700); and to criminal cases (People v. Delucchi, 17 Cal. App. 96; 118 Pac. 935; People v. Barlow, 17 Cal. App. 375; 119 Pac. 940; People v. Moore, 155 Cal. 237; 100 Pac. 688; People v. Crosby, 17 Cal. App. 518; 120 Pac. 441; People v. Bennett, 161 Cal. 214; 118 Pac. 710); and to a finding as to the delivery of a deed (Zihn v. Zihn, 153 Cal. 405; 95 Pac. 868); and to a finding as to the true location of a disputed boundary line (Spencer v. Clarke, 15 Cal. App. 512; 115 Pac. 248); and to a finding as to whether a deed is a mortgage (Anglo-Californian Bank v. Cerf, 147 Cal. 384; 81 Pac. 1077; Wadleigh v. Phelps, 149 Cal. 627; 87 Pac. 93; Couts v. Winston, 153 Cal. 686; 96 Pac. 357; Beckman v. Waters, 161 Cal. 581; 119 Pac. 922); and to a finding relative to mental capacity, validity of a will, authority to issue letters of administration, etc. Dunphy v. Dunphy, 161 Cal. 380; Ann. Cas. 1913B, 1230; 38 L. R. A. (N. S.) 818; 119 Pac. 512; Estate of Doolittle, 153 Cal. 29; 94 Pac. 240; Estate of Weber, 15 Cal. App. 224; 114 Pac. 597; Estate of Hayden, 149 Cal. 680; 87 Pac. 275; Collins v. Maude, 144 Cal. 289; 77 Pac. 945); and to a motion, under § 581a, ante, to dismiss for want of service of summons. McColgan v. Piercy, 17 Cal. App. 160; 118 Pac. 957. A clear, specific finding of the ultimate fact must prevail over findings of probative facts, where there is no necessary conflict between the probative facts found and the finding of the ultimate fact: it is only where the probative facts found are necessarily in conflict with the ultimate fact found, that the findings of probative facts can prevail over a clear and express finding of ultimate fact. People v. McCue, 150 Cal. 195; 88 Pac. 899.

Specifications necessary for review of evidence. Whether the evidence is sufficient to sustain the findings cannot be considered on appeal, in the absence of specifications of particulars. Worth v. Worth, 155 Cal. 599; 102 Pac. 663; Anglo-Californian Bank v. Cerf, 147 Cal. 384; 81 Pac. 1077; Estudillo v. Security Loan etc. Co., 158 Cal. 71; 109 Pac. 884. Specifications of insufficiency of the evidence are essential to a review thereof to ascertain whether or not the judgment is supported thereby. California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692; 118 Pac. 103. The sufficiency of the evidence to support a finding, order, decision, or judgment cannot be reviewed on appeal, when the bill of exceptions contains no specifications of the particulars in which the evidence is alleged to be insufficient. Estate of Piper, 147 Cal. 606; 82 Pac. 246; Hawley v. Harrington, 152 Cal. 188; 92 Pac. 177; Guardianship of Baker, 153 Cal. 537; 96 Pac. 12; San Luis Water Co. v. Estrada, 117 Cal. 168; 48 Pac. 1075; Coghlan v. Quartararo, 15 Cal. App. 662; 115

Pac. 664; California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692; 118 Pac. 103; Layne v. Johnson, 19 Cal. App. 95; 124 Pac. 860; Rousseau v. Cohn, 20 Cal. App. 469; 129 Pac. 618. The appellate court is precluded from reviewing the sufficiency of the evidence, either upon an appeal from the judgment or from an order denying a new trial, and must accept the findings of fact made by the trial court as correct, where the evidence is embodied in a bill of exceptions containing no specifications of the particulars in which the evidence is insufficient to support the findings. Coghlan v. Quartararo, 15 Cal. App. 662; 115 Pac. 664. An affidavit used only on the motion for a new trial cannot be considered on appeal in determining the sufficiency of the evidence to support the findings. Gallatin v. Corning Irrigation Co., 163 Cal. 405; Ann. Cas. 1914A, 74; 126 Pac. 864. An appellant cannot complain of the admission of evidence offered by himself. Gjurich v. Fieg, 164 Cal. 429; 129 Pac. 464.

Reviewing sufficiency of evidence. See also note ante, § 939.

Where evidence is wanting. Where there is an entire absence of evidence to sustain a finding, the burden is on the party sustaining the finding to call attention to enough evidence to justify it. San Luis Water Co. v. Estrada, 117 Cal. 168; 48 Pac. 1075. When the appellate court must determine whether a finding of the trial court is without substantial affirmative evidence to support it, it must, like the trial court, be necessarily guided by the means furnished by the law for measuring the effect of the production or withholding of certain evidence. Bone v. Hayes, 154 Cal. 766; 99 Pac. 172. In a criminal case, a court of appeal will pass only upon questions of law: it is only where there is an entire absence of evidence to support a verdict that a question of fact is presented. People v. Barlow, 17 Cal. App. 375; 119 Pac. 940.

Review of instructions. A failure of the trial court to instruct on given points cannot be urged on appeal, where no request was made for such instructions. Hardy v. Schirmer, 163 Cal. 272; 124 Pac. 993. A refusal to give instructions will not be considered on appeal, where the record fails to give all the instructions submitted to the jury, or does not show that the instructions refused were not substantially embodied in those given. Patton v. Klemmer, 15 Cal. App. 459; 115 Pac. 62. The appellant cannot complain of instructions requested by himself. Gray v. Ellis, 164 Cal. 481; 129 Pac. 791. The refusal of the court, upon request, to direct the jury to find a special verdict upon a material issue is erroneous. Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469.

Review of verdict. A verdict cannot be based upon a mere general statement, consisting partly of imagination and partly of opinion. Scurich v. Ryan, 14 Cal. App. 750; 113 Pac. 123. It is the duty of an appellate court to sustain the verdict, where there is a substantial conflict of the evidence, no matter how much it may preponderate upon the other side. Fowden v. Pacific Coast S. S. Co., 149 Cal. 151; 86 Pac. 178. A verdict for damages for personal injuries will not be disturbed on appeal as excessive, unless it was clearly the result of passion or prejudice on the part of the jury. Bonneau v. North Shore R. R. Co., 152 Cal. 406; 125 Am. St. Rep. 68; 93 Pac. 106. The power of the appellate court over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest, at first blush, passion, prejudice, or corruption on the part of the jury. Bond v. United Railroads, 159 Cal. 270; Ann. Cas. 1912C, 50; 113 Pac. 366.

Necessity of findings. Before a judgment can be entered on new issues, and before the matters involved can be reviewed upon appeal, the trial court must have made specific findings. Estate of Yoell, 164 Cal. 540; 129 Pac. 999. Where a husband sues for divorce on the ground of desertion, and the wife subsequently begins an action for maintenance, a finding in her action cannot dispense with a finding in the husband's action upon the issue of desertion. Kusel v. Kusel, 147 Cal. 52; 81 Pac. 297. Where the admitted facts show that a finding on the statute of limitations could not have been otherwise than against the appellant, a finding thereon is unnecessary. Bell v. Adams, 150 Cal. 772; 90 Pac. 118. Where the defendant waives his claim to a heavier judgment, allegations and findings, other than those necessary to sustain the judgment as rendered, will be treated as surplusage. Great Western Gold Co. v. Chambers, 155 Cal. 364; 101 Pac. 6. Where certain findings necessarily dispose of the case, it matters not, on an appeal from an order denying a new trial, that there are no findings upon other issues, or that findings upon other issues are conflicting, or whether other findings are sufficiently supported by the evidence. Black v. Harrison Home Co., 155 Cal. 121; 99 Pac. 494.

Failure to make findings. The failure of the trial court to make a finding of fact upon a material issue renders the decision one against law, and a motion for a new trial will lie on that ground. Black v. Harrison Home Co., 155 Cal. 121; 99 Pac. 494. Where the findings sustain the judgment, the court's failure to find on other issues becomes immaterial on appeal, if a finding thereon in favor of the appellant could not have changed the judgment. Fogg v. Perris Irrigation Dist., 154 Cal.

209; 97 Pac. 316. The absence of a finding upon an issue not proved, or the failure of the court to act in the absence of evidence sustaining its action, constitutes no error. Murray Show Case etc. Co. v. Sullivan, 15 Cal. App. 475; 115 Pac. 259. Where the findings sustain the judgment, a failure to find on other issues is immaterial. Fogg v. Perris Irrigation Dist., 154 Cal. 209; 97 Pac. 316.

Construction of findings. The findings are to be read as a whole (Flora v. Bimini Water Co., 161 Cal. 495; 119 Pac. 661); and should be so construed, if possible, as to uphold the judgment. People v. Quong Sing, 20 Cal. App. 26, 806; 127 Pac. 1052, 1056; Rossi v. Beaulieu Vineyard, 20 Cal. App. 770; 130 Pac. 201; Parker v. Herndon, 19 Cal. App. 451; 126 Pac. 183; Wagner v. El Centro Seed etc. Co., 17 Cal. App. 387; 119 Pac. 952; Flora v. Bimini Water Co., 161 Cal. 495; 119 Pac. 661; People v. McCue, 150 Cal. 195; 88 Pac. 899; Lomita Land etc. Co. v. Robinson, 154 Cal. 36; 18 L. R. A. (N. S.) 1106; 97 Pac. 10. Where the appeal is upon the judgment roll alone, the language of the findings is to be given the broadest possible meaning, when that is necessary to support the judgment. Bell v. Adams, 150 Cal. 772; 90 Pac. 118. Findings in favor of the judgment are not to be taken as absolutely true, as against the party for whom the judgment went. Schroeder v. Schweizer Lloyd etc. Gesellschaft, 60 Cal. 467; 44 Am. Rep. 61.

Review of findings. Immaterial findings need not be considered on appeal. Zihn v. Zihn, 153 Cal. 405; 95 Pac. 868. An erroneous finding is without prejudice, where the judgment gives to the appellant all the relief to which he would be entitled if the finding were in his favor. Pugh v. Moxley, 164 Cal. 374; 128 Pac. 1037. Where a finding upon a material issue is without evidence to support it, there must be a new trial. Kaiser v. Barron, 153 Cal. 474; 95 Pac. 879. In the absence of a bill of exceptions or statement of the case, the findings of fact made by the lower court are conclusive upon appeal. Bradley Bros. v. Bradley, 20 Cal. App. 1; 127 Pac. 1044.

Sufficiency of findings. See note ante, § 648.

Presumptions on review as to filing of pleading. Where objection is made that new parties plaintiff and defendant were joined in an amended complaint without leave of court, it must be presumed upon appeal that the amended complaint was filed by leave of court. Harvey v. Meigs, 17 Cal. App. 353; 119 Pac. 941.

As to extension of time. Where objection is made for the first time on appeal, to the consideration of a bill of exceptions, for the reason that it was not settled and allowed in time, it must be presumed that the time was extended by stipulation or order of the court. Sheppard v. Sheppard, 15 Cal. App. 614; 115 Pac. 751.

As to error. The presumption is in favor of the regularity of the proceedings of the court below. Sheppard v. Sheppard, 15 Cal. App. 614; 115 Pac. 751; Estate of Young, 149 Cal. 177; 85 Pac. 145; Witter v. Redwine, 14 Cal. App. 393; 112 Pac. 311; Wagner v. United Railroads, 19 Cal. App. 396; 126 Pac. 186; Fox v. Mick, 20 Cal. App. 599; 129 Pac. 972; Pollitz v. Wickersham, 150 Cal. 244; 88 Pac. 911; Lomita Land etc. Co. v. Robinson, 154 Cal. 52; 18 L. R. A. (N. S.) 1106; 97 Pac. 10; Fox v. Townsend, 149 Cal. 659; 87 Pac. 82. Error is not presumed. Title Insurance etc. Co. v. California Development Co., 164 Cal. 58; 127 Pac. 502. The trial court has discretion to permit leading questions; and where the record indicates no abuse thereof, no prejudicial error will be presumed. Kinney v. Maryland Casualty Co., 15 Cal. App. 571; 115 Pac. 456. Upon appeal from an order vacating an allowance of attorneys' fees in a divorce suit, all presumptions are in favor of the order. Glass v. Glass, 4 Cal. App. 604; 88 Pac. 734.

As to evidence and findings. The presumption on appeal is, that findings speak the truth (O'Connell v. Behan, 19 Cal. App. 111; 124 Pac. 1038); that there was evidence to support the findings, and that it was sufficient (Semi-Tropic Spiritualists Ass'n v. Johnson, 163 Cal. 639; 126 Pac. 488; Newmire v. Ford, 20 Cal. App. 337; 128 Pac. 952; Estate of Olson, 19 Cal. App. 379; 126 Pac. 171; O'Connell v. Behan, 19 Cal. App. 111; 124 Pac. 1038; California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692; 118 Pac. 103); that no objection was made to the introduction of evidence upon which findings were made (California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 692; 118 Pac. 103); that a conflict of evidence was resolved, by the jury, in favor of the prevailing party (Gjurich v. Fieg, 164 Cal. 429; 129 Pac. 464); that findings were waived, where none appear, upon an appeal from the judgment, upon the judgment roll alone. Kritzer v. Tracy Engineering Co., 16 Cal. App. 287; 116 Pac. 700. Where findings are waived, the appellate court must assume that the trial court found every fact necessary to support the judgment. Jones v. Grieve, 15 Cal. App. 561; 115 Pac. 333. The want of a finding on an issue will be presumed, in the absence of a showing to the contrary, to be the result of a failure to offer any evidence in support of such issue. Schoonover v. Birnbaum, 150 Cal. 734; 89 Pac. 1108. It will be presumed that, on a motion to dismiss an action, where the affidavits were conflicting, the court below found the facts to be as asserted by the moving and prevailing party. Witter v. Phelps, 163 Cal. 655; 126 Pac. 593.

As to instructions. It will be presumed on appeal, that instructions refused were substantially embodied in those given (Patton v. Klemmer, 15 Cal. App. 459; 115 Pac. 62); that instructions given were applicable to the proofs (Cook v. Suburban Realty Co., 20 Cal. App. 538; 129 Pac. 801); that instructions refused were properly disallowed. Cook v. Suburban Realty Co., 20 Cal. App. 538; 129 Pac. 801.

As to verdict. All presumptions are in favor of the general verdict. Petersen v. California Cotton Mills Co., 20 Cal. App. 751; 130 Pac. 169. A verdict based on conflicting evidence will not be disturbed on appeal, if there is any substantial evidence to support it: it must be assumed that the jury resolved the conflict in favor of the prevailing party. Gjurich v. Fieg, 164 Cal. 429; 129 Pac. 464; Leavens v. Pinkham, 164 Cal. 242; 128 Pac. 399; Perkins v. Blauth, 163 Cal. 782; 127 Pac. 50; Hall v. Clark, 163 Cal. 392; 125 Pac. 1047; Black v. Riley, 20 Cal. App. 199; 128 Pac. 764.

As to judgment. Upon an appeal upon the judgment roll alone, all intendments are in support of the judgment; and all proceedings necessary to its validity are presumed to have been regularly taken; and any matters that might have been presented to the court below, that would have authorized the judgment, will be presumed to have been thus presented. Segerstrom v. Scott, 16 Cal. App. 260; 116 Pac. 690. On appeal, error cannot be presumed from the absence of findings: on the contrary, every intendment goes to support the judgment. Kritzer v. Tracy Engineering Co., 16 Cal. App. 287; 116 Pac. 700. In a controversy involving a homestead, it will be presumed, in support of the judgment, that the homestead was owned in joint or common tenancy by a husband and wife. Sewell v. Price, 164 Cal. 265; 128 Pac. 407. It will be presumed, on an appeal from a second judgment, that the former judgment was for good cause set aside. Von Schmidt v. Von Schmidt, 104 Cal. 547; 38 Pac. 361.

As to service of notice of judgment. Where the record fails to show that any notice of entry of judgment was served on appellants, it must be assumed that no such notice was served. Fraser v. Sheldon, 164 Cal. 165; 128 Pac. 33.

As to motion for new trial. It cannot be presumed on appeal that a motion for a new trial was made upon the ground that the decision was one "against law." Great Western Gold Co. v. Chambers, 153 Cal. 307; 95 Pac. 151.

As to new-trial orders. It will be assumed upon appeal, that no other valid ground for a new trial exists than that specified in the order granting it (Piercy v. Piercy, 149 Cal. 163; 86 Pac. 507); that an order denying a motion for a new trial was made upon the merits (Boin v. Spreckels Sugar Co., 155 Cal. 612; 102 Pac. 937); that a settled statement, upon which the court acted in rendering its decision, and in granting a new trial, constitutes a correct statement of the evidence. McCann v. McCann, 20 Cal. App. 564; 129 Pac. 966.

As to ordinance. The presumption is, that an ordinance proved is in force, until the contrary is shown. Wagner v. United Railroads, 19 Cal. App. 396; 126 Pac. 186.

Legality of documents presumed. As a city, in making street improvements, is authorized to act only in conformity with the statute, it must be assumed that a contract for street-work, and the bond given in connection therewith, were made in compliance with the statute, particularly where the bond, in its terms, was phrased according to the statutory requirement. Republic Iron etc. Co. v. Patillo, 19 Cal. App. 316; 125 Pac. 923.

Injury presumed from delay. Injury is presumed from an unreasonable delay in prosecuting an action. Gray v. Times-Mirror Co., 11 Cal. App. 155; 104 Pac. 481.

Objection that judgment is not supported by complaint or findings. The defect that neither the complaint nor the findings support the judgment may be reviewed on appeal from the judgment. Van Buskirk v. Kuhns, 164 Cal. 472; 129 Pac. 587. Upon an appeal upon the judgment roll and a bill of exceptions, where the record does not contain the evidence, the appellate court is limited to a consideration of the question whether the findings of fact support the conclusions of law and the judgment subsequently rendered and entered thereon. O'Connell v. Behan, 19 Cal. App. 111; 124 Pac. 1038. The claim that the findings do not support the judgment is not available on motion for a new trial. Black v. Harrison Home Co., 155 Cal. 121; 99 Pac. 494.

Time of appeal as affecting review. Upon an appeal perfected under § 941b, ante, any question may be reviewed, including the claim that the evidence does not sustain the findings, which could be reviewed upon an appeal under § 939, ante, within sixty days after the rendition of the judgment. Fraser v. Sheldon, 164 Cal. 165; 128 Pac. 33. An appeal taken and perfected under §§ 941a and 941b, ante, within six months from the entry of judgment, is in season to permit a consideration and review of the evidence, or for any other purpose. Larson v. Larson, 15 Cal. App. 531; 115 Pac. 340. On appeal from the judgment, within sixty days after its entry, the insufficiency of the evidence to sustain the findings may be reviewed under a proper bill of exceptions. Russell v. Banks, 11 Cal. App. 450; 105 Pac. 261. On an appeal from the judgment, taken within sixty days after its rendition, the statement on motion for a new trial, set-

tled and filed after the date of the order denying a new trial, may be used for the purpose of determining the sufficiency of the evidence. Blood v. La Serena Land etc. Co., 150 Cal. 764; 89 Pac. 1090. The sufficiency of the evidence to sustain the decision cannot be considered under § 939, ante, on an appeal taken more than sixty days after the entry of judgment. Morcom v. Baiersky, 16 Cal. App. 480; 117 Pac. 560; Union Lumber Co. v. Sunset Road Oil Co., 17 Cal. App. 460; 120 Pac. 44; Andrews v. Wheeler, 10 Cal. App. 614; 103 Pac. 144; Kelly v. Ning Yung Benevolent Ass'n, 138 Cal. 602; 72 Pac. 148. Errors of law may be reviewed on an appeal from a judgment taken within six months, and more than sixty days from the time of its entry. Union Lumber Co. v. Sunset Road Oil Co., 17 Cal. App. 460; 120 Pac. 44. Where the appeal is not taken within sixty days after the entry of judgment, the case is before the appellate court, not on the sufficiency of the evidence, but on its competency and admissibility alone. Andrews v. Wheeler, 10 Cal. App. 614; 103 Pac. 144. A statement, containing rulings excepted to at the trial, may be reviewed, as to such rulings, upon an appeal from the judgment taken after the lapse of sixty days. Kelly v. Ning Yung Benevolent Ass'n, 138 Cal. 602; 72 Pac. 148.

Time for appeal to review sufficiency of evidence. See also note ante, § 939.

Matters not in record. Matters not shown by the record are not involved on an appeal, and cannot be considered. Fresno Planing Mill Co. v. Manning, 20 Cal. App. 766; 130 Pac. 196. Testimony not made a part of the record cannot be considered on appeal. People v. Ernsting, 14 Cal. App. 708; 112 Pac. 913. Where a defendant is not entitled to have the testimony incorporated in the transcript, the mere fact that it is inserted in the record does not warrant the court in reviewing or considering it for any purpose. Crackel v. Crackel, 17 Cal. App. 600; 121 Pac. 295. An objection to the admission of evidence must specify the grounds on which it is based: in the absence of such specification in the record, a ruling admitting the evidence will not be deemed injurious. Hardy v. Schirmer, 163 Cal. 272; 124 Pac. 993. The appellate court will not review an objection to a judgment, if there is no showing whatever in the record on appeal that the objection is tenable. Segerstrom v. Scott, 16 Cal. App. 260; 116 Pac. 690. Error not shown by the record cannot be reviewed. National Bank v. Mulford, 17 Cal. App. 551; 120 Pac. 446; West v. Mears, 17 Cal. App. 718; 121 Pac. 700. Alleged error in the admission of a certain judgment roll in evidence will not be considered if the roll is not incorporated in the record. Robinson v. Muir, 151 Cal. 118; 90 Pac. 521. A map, not in the record, cannot be considered on appeal, for any purpose. Gallatin v. Corning Irrigation Co., 163 Cal. 405; Ann. Cas. 1914A, 74; 126 Pac. 864. The appellate court will not, in advance of a hearing of an appeal on its merits, consider a motion to strike from the transcript matters contained therein, on the ground that they were not properly authenticated; if, upon a consideration of the appeal, such matters have no place in the record, they will be disregarded. Brode v. Goslin, 158 Cal. 699; 112 Pac. 280.

Not in bill of exceptions or statement. Error in excluding evidence cannot be shown until the materiality of the proposed evidence appears in a bill of exceptions. Estate of Angle, 148 Cal. 102; 82 Pac. 668. On appeal taken upon a duly authenticated bill of exceptions, affidavits not referred to nor included in such bill cannot be considered. Schroeder v. Mauzy, 16 Cal. App. 451; 118 Pac. 459. On appeal, taken only upon the judgment roll, without any statement of evidence or bill of exceptions, an affidavit cannot be used to supply any matter which should have been presented in either of the last-mentioned forms. Bean v. National Union Fire Ins. Co., 19 Cal. App. 778; 127 Pac. 829.

Matters not argued. Rulings and alleged errors, merely referred to but not argued in appellant's brief, will receive scant notice. Perry v. Ayers, 159 Cal. 414; 114 Pac. 46; Dore v. Southern Pacific Co., 163 Cal. 182; 124 Pac. 817. Errors assigned, but not urged or argued on appeal, will not be noticed. National Bank v. Mulford, 17 Cal. App. 551; 120 Pac. 446. A point presented by merely stating that the court erred, citing the page of the transcript, but not arguing the matter, will not be considered. Madeira v. Sonoma Magnesite Co., 20 Cal. App. 719; 130 Pac. 175.

Not in judgment roll. A minute-entry by the clerk, which forms no part of the judgment roll, cannot be considered for any purpose, upon an appeal taken upon the judgment roll alone, although a copy of such entry is brought up in the transcript. Kritzer v. Tracy Engineering Co., 16 Cal. App. 287; 116 Pac. 700.

Review of unauthenticated record. A record, not authenticated either as required by a rule of court or any provision of law, cannot be considered on appeal. Harrison v. Cousins, 16 Cal. App. 516; 117 Pac. 564.

Order dismissing action. On appeal from an order dismissing an action for want of prosecution, the facts upon which the court exercised its discretion in making such order may be reviewed, but the fact that a cause of action may be shown to exist in favor of the plaintiff will not

be considered. Bell v. Solomons, 162 Cal. 105; 121 Pac. 377.

Refusing to transfer cause. An order refusing the transfer of a cause to the Federal courts can be reviewed upon an appeal from the final judgment, as an intermediate order. Tripp v. Santa Rosa Street R. R., 69 Cal. 631; 11 Pac. 219.

Rulings regarding testimony. Rulings made during the progress of the trial, refusing to strike out testimony, may be reviewed on an appeal from the judgment, if properly presented by the record. Leavens v. Pinkham & McKevitt, 164 Cal. 242; 128 Pac. 399.

Exception to verdict. Exceptions to the phraseology of questions in a special verdict, not reserved, cannot be considered on appeal. Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469.

Rehearing. The application of a respondent for a rehearing in the supreme court, that he may be relieved from the consequences of his omission to supply certain evidence in the district court of appeal having original jurisdiction of the appeal, will be denied: he should have sought that relief in the district court of appeal. Brown v. Coffee, 17 Cal. App. 386; 121 Pac. 309.

Decision, what constitutes. See note ante, § 633.

Review under alternative plan of appeal. See note ante, § 953c.

Raising question of variance on appeal. See note ante, § 469.

Judgment raising moot question. An appeal from a judgment, which raises merely a moot question, will not be considered. Bradley v. Voorsanger, 143 Cal. 214; 76 Pac. 1031.

Judgment or order by consent. A judgment or order by consent will not be reviewed on appeal (Erlanger v. Southern Pacific R. R. Co., 109 Cal. 395; 42 Pac. 31) by a party who expressly consented to the making thereof. Hibernia Sav. & L. Soc. v. Waymire, 152 Cal. 286; 92 Pac. 645.

Order refusing to vacate order. An order refusing to vacate an order substituting a person as plaintiff is reviewable only upon appeal from the final judgment. Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71; 47 Pac. 872.

Regarding nonsuit. An order granting a motion for a nonsuit can be reviewed either upon an appeal from the judgment based on the order of nonsuit, or upon an appeal from the order denying a new trial. Converse v. Scott, 137 Cal. 239; 70 Pac. 13. The granting of a nonsuit may be reviewed on appeal, as error of law, where it was excepted to and specified as such. Martin v. Southern Pacific Co., 150 Cal. 124; 88 Pac. 701. An order denying a motion for a nonsuit may be reviewed on an appeal from the judgment, if properly presented by the record. Leavens v. Pinkham & McKevitt, 164 Cal. 242; 128 Pac. 399; Fraser v. Sheldon, 164 Cal. 165; 128 Pac. 33. In reviewing an order denying the defendant's motion for a nonsuit, only the grounds stated therefor in the trial court can be considered or reviewed on appeal. Schroeder v. Mauzy, 16 Cal. App. 443; 118 Pac. 459; Blood v. La Serena Land etc. Co., 150 Cal. 764; 89 Pac. 1090. The reviewing court is not at liberty to consider any ground of nonsuit, not stated in the motion therefor. Breidenbach v. M. McCormick Co., 20 Cal. App. 184; 128 Pac. 423. The denial of a motion for a nonsuit will not be disturbed on appeal, although the evidence, at the close of the plaintiff's case, was so weak that it might properly have been granted, if, upon the trial, the defect is overcome by evidence subsequently introduced. Peters v. Southern Pacific Co., 160 Cal. 48; 116 Pac. 400.

Regarding cost-bill. An order striking out a cost-bill and retaxing the costs may be reviewed on an appeal from the judgment, although the amount involved was less than three hundred dollars. Quitzow v. Perrin, 120 Cal. 255; 52 Pac. 632; and see Empire Gold Mining Co. v. Bonanza Gold Mining Co., 67 Cal. 406; 7 Pac. 810.

Regarding injunctions. An order refusing to dissolve a preliminary injunction is reviewable on an appeal from a final judgment granting a permanent injunction. Tehama County v. Sisson, 152 Cal. 167; 92 Pac. 64.

Regarding receivers. An order, pending suit, authorizing a receiver to take charge of and conduct a business, should be reviewed upon an appeal from the judgment. Free Gold Mining Co. v. Spiers, 135 Cal. 130; 67 Pac. 61. An order, made before judgment, approving the account of a receiver in foreclosure proceedings, and allowing claims against the receiver, is reviewable only upon an appeal from the final judgment in the action. Illinois Trust etc. Bank v. Pacific Ry. Co., 99 Cal. 408; 33 Pac. 1132.

Order appointing receiver. An order, made before judgment, appointing a receiver, is not reviewable upon an appeal from a final judgment. La Société Française v. District Court, 53 Cal. 495.

In probate. Upon an appeal from an order settling an administrator's account, all the proceedings leading up to it, including the evidence upon which it is based, are open to review. Estate of Rose, 80 Cal. 166; 22 Pac. 86. On appeal from an order of sale of community property under a power in the husband's will, error in including the wife's interest in the order may be reviewed, though the order is valid as to the husband's interest. Estate of Wickersham, 7 Cal. Unrep. 70; 70 Pac. 1079.

Orders in probate. An order dismissing a contest to the probate of a will is reviewable upon appeal from the final order or judgment admitting the will to probate. Estate of Edelman, 148 Cal. 233; 113 Am. St. Rep. 231; 82 Pac. 962. An order setting aside a decree settling the final account of an executor, although not directly appealable, may be reviewed on an appeal by the executor from a subsequent decree settling his final account, it being an intermediate order affecting the judgment. Estate of Cahalan, 70 Cal. 604; 12 Pac. 427.

Order regarding attachments. Upon an appeal from a final judgment, the court cannot review an order refusing to dissolve an attachment. Allender v. Fritts, 24 Cal. 447. An order dissolving an attachment after an erroneous order of nonsuit, is not reviewable upon appeal from the judgment of nonsuit. Kennedy v. Merickel, 8 Cal. App. 378; 97 Pac. 81. Irregularities in an attachment, as to its inception or form, must be considered on a direct appeal from an order refusing to dissolve the attachment, and not on an appeal from the judgment. Mudge v. Steinhart, 78 Cal. 34; 12 Am. St. Rep. 17; 20 Pac. 147.

Orders in partition. Upon appeal from an order confirming a sale in an action of partition, any error occurring in or prior to the decree of partition, which is appealable, cannot be reviewed; and the question whether the complaint does or does not state facts sufficient to support that decree, or whether the court failed to find upon a material issue tendered in an answer of the appellant, cannot be considered upon such appeal. Holt v. Holt, 131 Cal. 610; 63 Pac. 912.

Interlocutory decree. An interlocutory decree cannot be reviewed upon an appeal from the final judgment. Lorenz v. Jacobs, 53 Cal. 24; and see Barry v. Barry, 56 Cal. 10. An interlocutory judgment in divorce is not reviewable on appeal from a final judgment: an appeal from that determination is given by the act providing for such judgment. Deyoe v. Superior Court, 140 Cal. 476; 98 Am. St. Rep. 73; 74 Pac. 28. Where a defendant in a divorce suit defaults, and appeals from the interlocutory decree, he is not entitled to have any bill of exceptions settled, or certification of evidence; the only question that can be considered on such appeal is a legal one, and the appellate court is limited in its examination to any questions arising upon the judgment roll, consisting of the papers mentioned in § 670, ante. Crackel v. Crackel, 17 Cal. App. 600; 121 Pac. 295. An interlocutory decree in an action of partition cannot be reviewed upon an appeal from the final judgment. Barry v. Barry, 56 Cal. 10; Holt v. Holt, 131 Cal. 610; 63 Pac. 912.

Bill of exceptions. An unauthenticated bill of exceptions cannot be considered on appeal, for any purpose (Brode v. Gosslin, 16 Cal. App. 632; 117 Pac. 778); nor a bill of exceptions, not served within the time required by law. Estate of Young, 149 Cal. 173; 85 Pac. 145. A bill of exceptions, settled within the time required for its use upon an appeal from the judgment, may be considered on appeal, though originally intended for use upon a motion for a new trial, the proceedings upon which were abandoned. Dresser v. Allen, 17 Cal. App. 508; 120 Pac. 65. The effect of allowing an amendment to a bill of exceptions, settled after the decision is rendered, is simply to enable the appellate court to review the decision of the lower court, in view of all the facts which that court had before it when it made its decision. Merced Bank v. Price, 152 Cal. 697; 93 Pac. 866.

Consideration of exceptions and bills of exceptions. See also note ante, § 939.

Review of bill of exceptions or statement. See also note ante, § 950.

Error. Error must be affirmatively shown, before a judgment can be disturbed. Title Insurance etc. Co. v. California Development Co., 164 Cal. 58; 127 Pac. 502. Although the court may be precluded, for good reasons, from considering an appeal from an order denying a new trial, yet it may consider an appeal from the judgment, as to alleged errors of law occurring at the trial, upon the statement of the case used upon the motion for a new trial and found in the record on appeal. Carver v. San Joaquin Cigar Co., 16 Cal. App. 761; 118 Pac. 92. In the absence of specifications of particulars, errors of law will not be reviewed on appeal. Estudillo v. Security Loan etc. Co., 158 Cal. 71; 109 Pac. 884.

Harmless error. Constitutional guaranties for the protection of person or property can be invoked only by parties whose rights are injuriously affected by the alleged disregard of such guaranties. Scheerer & Co. v. Deming, 154 Cal. 138; 97 Pac. 155. Harmless error should be disregarded on appeal. Estate of Packer, 164 Cal. 525; 129 Pac. 778; Naylor v. Ashton, 20 Cal. App. 544; 130 Pac. 181; Loudell v. Shoo, 20 Cal. App. 424; 129 Pac. 478. The appellate court will not undertake to decide abstract questions of law, at the request of a party who shows no substantial right that can be affected by a decision either way. Streator v. Linscott, 153 Cal. 285; 95 Pac. 42. The appellate court will not consider or discuss a ruling upon a question not answered by a witness. People v. Brown, 15 Cal. App. 393; 114 Pac. 1004. Where a question asked on cross-examination is not in fact answered, but the answer given is non-responsive and without injury, the error is harmless. People v. Kerr, 15 Cal. App. 273; 114 Pac. 584. Where the court has ruled in favor of the plaintiff upon an issue, he cannot complain

of the admission of evidence thereupon. Woolwine v. Storrs, 148 Cal. 7; 113 Am. St. Rep. 183; 82 Pac. 434. A ruling admitting evidence is not deemed injurious, unless the grounds of objection thereto are specified. Hardy v. Schirmer, 163 Cal. 272; 124 Pac. 993. Rulings of the trial court, in passing upon challenges to jurors for cause, will not be reviewed upon appeal, unless it clearly appears that prejudice resulted therefrom to the complaining party. McKernan v. Los Angeles Gas etc. Co., 16 Cal. App. 280; 116 Pac. 677. The action of the trial court in not allowing a challenge of a juror for bias will not be reviewed on appeal, unless prejudice or injury is shown. Melone v. Sierra Railway Co., 151 Cal. 113; 91 Pac. 522. An appellant is not harmed by the action of the court in submitting erroneous instructions, where there is no evidence that would have sustained a finding in his favor under the view of the law most advantageous to him. Spear v. United Railroads, 16 Cal. App. 637; 117 Pac. 956. An instruction, given at the request of defendant, though erroneous, will not be considered or reviewed on his appeal. People v. Arnold, 17 Cal. App 74; 118 Pac. 729. Where findings, actually made, are sufficient to support the judgment, a failure to find upon additional issues, not affecting the result, is immaterial. Robinson v. Muir, 151 Cal. 118; 90 Pac. 521.

Order made after final judgment. An order on a motion to tax a cost-bill, made after the rendition and entry of final judgment, can be reviewed only on a direct appeal from the order itself. Empire Gold Mining Co. v. Bonanza Gold Mining Co., 67 Cal. 406; 7 Pac. 810; and see Quitzow v. Perrin, 120 Cal. 255; 52 Pac. 632.

Appealable orders reviewed how. The correctness of an appealable order cannot be reviewed on appeal from the judgment. Bohn v. Bohn, 164 Cal. 532; 129 Pac. 791; Kennedy v. Merickel, 8 Cal. App. 378; 97 Pac. 81. Upon an appeal from a final judgment, an order, which is itself made by statute the subject of a distinct appeal, cannot be reviewed. Regan v. McMahon, 43 Cal. 625. In the absence of any appeal from appealable orders, the action of the court in making them cannot be reviewed. De Mitchell v. Croake, 20 Cal. App. 643; 129 Pac. 946.

Review on appeal from judgment. See note post, § 963.

Order not involving merits nor affecting judgment. An order refusing to dismiss an action is not, in itself, appealable; and where it does not involve the merits of the action, nor necessarily affect the judgment rendered therein, nor affect any substantial rights of the defendant, it will not be reviewed upon appeal from the judgment. Garthwaite v. Bank of Tulare, 134 Cal. 237; 66 Pac. 326. Where a decree of divorce reserves the question as to the division of community property for further consideration and adjudication, an order allowing the answer to be amended so as more particularly and specifically to deny that there was any community property, in no way involves the merits or necessarily affects the judgment of divorce, and is not therefore subject to review on appeal of the plaintiff from the judgment as entered. Sharon v. Sharon, 77 Cal. 102; 19 Pac. 230.

Power of appellate court to consider evidence not produced in court below. See note 9 Ann. Cas. 951.

Review on appeal from final judgment of interlocutory appealable order, decision, etc., not theretofore appealed from. See note 11 Ann. Cas. 552.

Right to review order granting or denying motion for inspection of books or papers apart from appeal from final judgment. See note 28 L. R. A. (N. S.) 516.

CODE COMMISSIONERS' NOTE. See notes to §§ 957 and 963 of this code.

§ 957. Remedial powers of an appellate court. When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale. When it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just.

Judgment reversed. Post, § 966.
Costs on appeal.
1. Generally. Post, § 1034.
2. Costs below, etc. Post, §§ 1022, 1039.
3. Where modification of judgment. Post, § 1027, subd. 2.
Review on appeal. See ante, § 53.

Legislation § 957. 1. Enacted March 11, **1872**, and then read: "When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order; and when it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just."

2. Amended by Code Amdts. **1873–74**, p. 340.

Construction of section. This section is not restrictive of the right of the appel-

lant, upon the reversal of the judgment, to the restitution of the property: it is a remedial statute, and is to be liberally construed. Di Nola v. Allison, 143 Cal. 106; 101 Am. St. Rep. 84; 65 L. R. A. 419; 76 Pac. 976. It applies only to those cases where the judgment operates upon specific property in such a manner that its title is not changed, as by directing the possession of real estate, or the delivery of documents or of particular personal property in the hands of the defendant, and the like. Hewitt v. Dean, 91 Cal. 617; 25 Am. St. Rep. 227; 28 Pac. 93; and see Farmer v. Rogers, 10 Cal. 335. The rights of a defendant whose property has been taken upon a judgment which is subsequently reversed do not depend upon the provisions of this section. Reynolds v. Harris, 14 Cal. 667; 76 Am. Dec. 459; Di Nola v. Allison, 143 Cal. 106; 101 Am. St. Rep. 84; 65 L. R. A. 419; 76 Pac. 976.

Power of appellate court. On appeal from an order made upon affidavits, involving the decision of a question of fact, the appellate court is bound by the same rule that controls it where oral testimony is presented for review. Doak v. Bruson, 152 Cal. 17; 91 Pac. 1001. In determining the propriety of a nonsuit, the appellate court is limited to the consideration of the particular grounds upon which the motion for a nonsuit was made. Stanton v. Carnahan, 15 Cal. App. 527; 115 Pac. 339. The appellate court, on appeal from a part of a judgment, has power to do that which justice requires, and if a reversal is ordered, it may extend it as far as may be necessary to accomplish that end. Whalen v. Smith, 163 Cal. 360; Ann. Cas. 1913E, 1319; 125 Pac. 904. The appellate court may sustain a demurrer to the complaint upon other grounds and for other reasons than those stated in the court below. Burke v. Maguire, 154 Cal. 456; 98 Pac. 21; Billesbach v. Larkey, 161 Cal. 649; 120 Pac. 31. In reversing the judgment, the appellate court has power to order a new trial of the issues. Pollitz v. Wickersham, 150 Cal. 238; 88 Pac. 911. Upon an appeal from the judgment, an appellate court may order a new trial as to a part of the issues, leaving the decision in force as to the remainder. Robinson v. Muir, 151 Cal. 118; 90 Pac. 521. On appeal from part of a judgment, where the parts not appealed from are not so intimately connected with the part appealed from that a reversal of that part would require a reconsideration of the whole case in the court below, the court must confine itself to the part appealed from. Whalen v. Smith, 163 Cal. 360; Ann. Cas. 1913E, 1319; 125 Pac. 904. The appellate court has power to issue a writ of supersedeas, in any proper case, to preserve the rights of a litigant until the final determination of his appeal. Reed Orchard Co. v. Superior Court, 19 Cal. App. 648; 128 Pac. 9. The appellate court has no power to make findings from the evidence; but where, under the evidence, findings not made are necessary to the proper determination of the rights of the parties, it will order a new trial of the case. Blood v. La Serena Land etc. Co., 113 Cal. 221; 41 Pac. 1017. The appellate court has no power to make findings of fact; and where a judgment is reversed for insufficiency of the evidence to support the judgment, a new trial must be awarded. Kellogg v. King, 114 Cal. 378; 55 Am. St. Rep. 74; 46 Pac. 166.

Power of court, upon remanding cause. See also note ante, § 473.

Reversal of judgment for error. The appellant must affirmatively show error, before the judgment or order appealed from will be reversed. People v. Rhodes, 17 Cal. App. 789; 121 Pac. 935. To warrant a reversal for error in overruling a demurrer for uncertainty in the complaint, prejudicial error must be shown. Krieger v. Feeny, 14 Cal. App. 545; 112 Pac. 901. The judgment will be reversed for error of the court in striking out an answer to the complaint, which seeks to have a forfeiture declared. Knight v. Black, 19 Cal. App. 518; 126 Pac. 512. A judgment dismissing an action for the plaintiff's failure to appear at the trial must be reversed for prejudicial error, where it affirmatively appears from the record that such dismissal was had without any showing made to the court, of notice to the plaintiff of the time of trial. Estate of Dean, 149 Cal. 487; 87 Pac. 13. A judgment and order denying the appellant a new trial must be reversed for prejudicial error apparent upon the record. Musick Consol. Oil Co. v. Chandler, 158 Cal. 12; 109 Pac. 613. Where the court improperly refused, upon the appellant's request, to submit a material question for a special verdict, and the appellant failed to move in time for judgment on the special findings, it is improper practice, on appeal, to direct judgment to be entered for him, but the judgment and order denying a new trial will be reversed for error appearing in the record. Napa Valley Packing Co. v. San Francisco Relief etc. Funds, 16 Cal. App. 461; 118 Pac. 469. Where the instructions given were substantially conflicting, there must be a reversal of the judgment. Guthrie v. Carney, 19 Cal. App. 144; 124 Pac. 1045. The judgment cannot be reversed because of an apparent conflict between isolated parts of instructions, if all of them, taken as a whole, correctly state the law (Rialto Construction Co. v. Reed, 17 Cal. App. 29; 118 Pac. 473); nor because of an erroneous instruction, unless it is shown that harm resulted therefrom. Kirk v. Santa Barbara Ice Co., 157 Cal. 591; 108 Pac. 509. An error in omitting to find upon a material fact requires not only a reversal of the judgment, but also of the order

denying a motion for a new trial. Lyden v. Spohn-Patrick Co., 155 Cal. 177; 100 Pac. 236. The judgment will not be reversed because of erroneous findings upon immaterial issues (Forestier v. Johnson, 164 Cal. 24; 127 Pac. 156; De Gottardi v. Donati, 155 Cal. 109; 99 Pac. 492); nor because of any omission in conclusions of law, merely as to matter of form (Anderson v. Blean, 19 Cal. App. 581; 126 Pac. 859); nor for a slight discrepancy in items of costs (Callan v. Empire State Surety Co., 20 Cal. App. 483; 129 Pac. 978); nor because of erroneous reasoning of the trial court: the appellate court will uphold the judgment, where satisfied of the correctness of the final conclusion of the trial court (McKee v. Title Insurance etc. Co., 159 Cal. 206; 113 Pac. 140); nor because of the exclusion of evidence, where it cannot be determined that such exclusion was erroneous. Snowball v. Snowball, 164 Cal. 476; 129 Pac. 784.

For want of jurisdiction. The judgment of a superior court, on appeal from a justice's court, rendered without jurisdiction, will be reversed, with directions to dismiss the action for want of jurisdiction. Bates v. Ferrier, 19 Cal. App. 79; 124 Pac. 889.

For abuse of discretion. The discretion of the trial court, under the former sixth subdivision of § 581, ante, in refusing to dismiss an action because judgment was not entered within six months after its rendition, was generally upheld, but a judgment of dismissal in such a case could be reversed for an abuse of discretion. Rickey Land etc. Co. v. Glader, 153 Cal. 179; 94 Pac. 768. An abuse of discretion must be shown, to justify a reversal of judgment because of a ruling either granting or refusing a continuance. Marcucci v. Vowinckel, 164 Cal. 693; 130 Pac. 430; Sheldon v. Landwehr, 159 Cal. 778; 116 Pac. 44. An order granting a new trial for want of evidence to support the verdict will not be reversed unless an abuse of discretion appears. Estate of Everts, 163 Cal. 449; 125 Pac. 1058.

When not justified by complaint. A default judgment, in excess of that justified by the complaint, the amount of which excess is not ascertainable from the record, must be reversed, and remanded for further action. First State Bank v. Blackinton, 16 Cal. App. 141; 116 Pac. 311.

When not justified by record. The appellate court will not look beyond the record on appeal, and the judgment, if not justified by the record, will be reversed. Reiss v. Brady, 2 Cal. 132.

For insufficiency of evidence. Where insufficiency of the evidence is relied upon for a reversal, a general specification, "that the evidence is wholly insufficient to justify a judgment in favor of the plaintiffs," is improper, as not giving the particulars. Rousseau v. Cohn, 20 Cal. App. 469; 129 Pac. 618.

When unsupported by findings. The failure to find upon a material issue is ground for a reversal of the judgment. Black v. Board of Police Commissioners, 17 Cal. App. 310; 119 Pac. 674; Rossi v. Beaulieu Vineyard, 20 Cal. App. 770; 130 Pac. 201; Kusel v. Kusel, 147 Cal. 52; 81 Pac. 297; Lyden v. Spohn-Patrick Co., 155 Cal. 177; 100 Pac. 236. A judgment upon the merits, unsupported by findings, must be reversed. Saul v. Moscone, 16 Cal. App. 506; 118 Pac. 452; Johnson v. All Night and Day Bank, 17 Cal. App. 571; 120 Pac. 432. Where the findings do not support the judgment, there must be a reversal, and the case remanded for a new trial (Fidelity etc. Co. v. Fresno Flume etc. Co., 161 Cal. 466; 37 L. R. A. (N. S.) 322; 119 Pac. 646); and also where findings are not waived, and no findings sufficient to support the judgment are, by the court, signed or filed in the cause. Pierson v. Pierson, 15 Cal. App. 567; 115 Pac. 461. The failure of the court to find upon a material issue, when properly assigned upon motion for a new trial, requires a reversal both of the judgment and of the order denying a new trial. Lyden v. Spohn-Patrick Co., 155 Cal. 177; 100 Pac. 236. The judgment will be reversed where it affirmatively appears that the findings could not have been properly made in any possible view of the case. Bradley Bros. v. Bradley, 20 Cal. App. 1; 127 Pac. 1044. The failure to find upon some issue made by the answer, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, is not ground for reversal, unless it is shown by a statement or bill of exceptions that evidence was submitted in relation to such issue. People v. McCue, 150 Cal. 195; 88 Pac. 899.

On matter of fact when. The judgment cannot be reversed because of any matter of fact not offered in the court below. Wallace v. Eldredge, 27 Cal. 498.

No reversal without grounds. Judgment will not be reversed unless sufficient grounds appear therefor. Hynes v. All Persons, 19 Cal. App. 185; 125 Pac. 253.

At appellant's instance when. A judgment too favorable to the appellant will not be reversed at his instance, where the other parties raise no objections. Stockton Lumber Co. v. Schuler, 155 Cal. 411; 101 Pac. 307.

Reversal of judgment by consent. A judgment by consent will not be reversed on appeal. Estate of Lorenz, 124 Cal. 495; 57 Pac. 381.

Where reversal fruitless. Where a reversal would prove fruitless, the appellate court will not reverse the judgment or order appealed from, but will dismiss the appeal. Wright v. Board of Public Works, 163 Cal. 328; 125 Pac. 353. An order made on rival applications for letters of administration will not be reversed to allow the appellant to offer evidence that would not

be admissible to impair the effect of the case made by the other applicant. Estate of McNeil, 155 Cal. 333; 100 Pac. 1086. Where, upon an appeal from an order refusing an injunction pendente lite, the act sought to be enjoined has been performed after the order and before the disposition of the appeal, the order will not be reversed, but the appeal will be dismissed. Wright v. Board of Public Works, 163 Cal. 328; 125 Pac. 353.

Judgment reversed in part. A judgment may be affirmed in part and reversed in part. Nolan v. Hyatt, 163 Cal. 1; 124 Pac. 439; Delger v. Jacobs, 19 Cal. App. 197; 125 Pac. 258.

Effect of reversal of judgment. The effect of an unqualified reversal is, not to entitle the appellant to a judgment upon the findings, but to remand the cause for a new trial (Heidt v. Minor, 113 Cal. 385; 45 Pac. 700); therefore, upon an unqualified reversal of the judgment, an express direction that the cause be remanded for a new trial is unnecessary. Falkner v. Hendy, 107 Cal. 49; 40 Pac. 21. Where the judgment is reversed and the cause remanded for a new trial, it is unnecessary to review and pass upon an objection to the complaint which may be obviated by amendment. Lissak v. Crocker Estate Co., 119 Cal. 442; 51 Pac. 688. The reversal of an order vacating a previous order, denying a petition for the partial distribution of the estate, deprives the order appealed from of all vitality and force, and leaves the order denying the petition in full force and effect until it is expressly set aside or reversed upon appeal. Estate of Mitchell, 126 Cal. 248; 58 Pac. 549. Upon the reversal of a judgment for an erroneous overruling of a demurrer to the complaint, the parties are restored to their original rights, and upon the sustaining of the demurrer with leave to amend, the plaintiff, instead of amending, may apply to the court for leave to dismiss the action without prejudice, and the court may order such dismissal. Richards v. Bradley, 129 Cal. 670; 62 Pac. 316. The levy of a tax, made in pursuance of a judgment, by a board of supervisors, is not set aside by the reversal of the judgment on appeal; nor did the board, by its compliance with the judgment, lose any property or rights, of which restitution could be made in case of a reversal. San Diego School District v. Board of Supervisors, 97 Cal. 438; 32 Pac. 517. The reversal of a judgment, on the ground that it is not supported by the findings, does not necessarily imply that any judgment should have been rendered on such findings. Heidt v. Minor, 113 Cal. 385; 45 Pac. 700. A reversal of judgment as to one joint tort-feasor does not necessitate a reversal as to all of them. Clark v. Torchiana, 19 Cal. App. 786; 127 Pac. 831. The subsequent reversal of an unstayed judgment does not authorize the successful judgment debtor to maintain an action against the sheriff and his surety to recover moneys collected by the sheriff, and paid over by him to the creditor, pending an appeal from the judgment on which execution has not been stayed: a judgment, in such an action, against the sheriff and his surety will be reversed. Maze v. Langford, 16 Cal. App. 743; 117 Pac. 929. An appeal from a distinct and independent part of a judgment does not ordinarily bring up the other parts for review, and a reversal of the part appealed from does not affect the portions not dependent thereon: they will stand as final adjudications. Whalen v. Smith, 163 Cal. 360; Ann. Cas. 1913E, 1319; 125 Pac. 904. The reversal of a judgment foreclosing a mortgage, with directions to the court below to enter a judgment in conformity with the opinion of the supreme court, has the effect to vacate the decree reversed, and to leave it as if it never had been rendered, and the form of the mandate does not change the reversal to a modification, nor authorize the trial court to modify the judgment reversed; and this is so, although the reversal directed a change only in the sum declared due, and the court might have ordered an affirmance with a modified judgment; therefore the successor of the creditor is entitled to recover possession of the premises sold on the mortgage foreclosure. Cowdery v. London etc. Bank, 139 Cal. 298; 96 Am. St. Rep. 115; 73 Pac. 196. The reversal of a judgment upon appeal has the effect to set aside the sale of the property under the judgment, where the sale was made to the plaintiff, and the appellant is restored to his original estate in the land. Reynolds v. Harris, 14 Cal. 667; 76 Am. Dec. 459; Di Nola v. Allison, 143 Cal. 106; 101 Am. St. Rep. 84; 65 L. R. A. 419; 76 Pac. 976. Upon the reversal of the judgment, the sale to the plaintiff of the defendant's property, for the satisfaction of the judgment, in whole or in part, will be set aside. Barnhart v. Edwards, 128 Cal. 572; 61 Pac. 176. Where a judgment foreclosing liens for labor was reversed so far as it awarded counsel fees, but was affirmed in other respects, and no order for the restitution of the property sold was ever made by the appellate or the superior court, the title of the purchaser at the execution sale is not affected by such reversal. Purser v. Cady, 5 Cal. Unrep. 707; 49 Pac. 180. The proceeds of a sale of property, under execution on a judgment reversed upon appeal, belong to the defendant: they cannot constitute payment of the note sued on. Carpy v. Dowdell, 131 Cal. 499; 63 Pac. 180. Where the facts in the case are stipulated by the parties, and the judgment is reversed upon appeal, a new trial will not be ordered, but judgment will be ordered upon the

stipulated facts, in favor of the opposite party. Eureka v. McKay, 123 Cal. 666; 56 Pac. 439.

Effect of reversal of new-trial orders. The reversal of an order granting a new trial leaves the verdict and the judgment standing. Pierce v. Birkholm, 110 Cal. 669; 43 Pac. 205. The reversal of an order denying a new trial has the effect to set aside the judgment. Estate of Kaufman, 117 Cal. 288; 59 Am. St. Rep. 179; 49 Pac. 192. The reversal of the judgment and the order refusing a new trial has the legal effect to vacate the judgment, and leave the case standing for trial in the superior court. Westall v. Altschul, 126 Cal. 164; 58 Pac. 458. Where the judgment and the order denying a new trial are reversed, it is necessary to try the case again. Glassell v. Hansen, 149 Cal. 511; 87 Pac. 200; Davis v. Le Mesnager, 155 Cal. 520; 101 Pac. 910; Stein v. Leeman, 161 Cal. 502; 119 Pac. 663. The reversal of an order denying a new trial, upon the contest of the probate of a will, has the effect to set aside the judgment denying the probate of the will. Estate of Kaufman, 117 Cal. 288; 59 Am. St. Rep. 179; 49 Pac. 192.

Reversal of judgment. See also note ante, § 473.

Modification of judgment. An excessive judgment may be modified, upon the excess being remitted. Curran v. Hubbard, 14 Cal. App. 733; 114 Pac. 81. A judgment may be modified, where there is a slight discrepancy in items of costs. Callan v. Empire State Surety Co., 20 Cal. App. 483; 129 Pac. 978. A judgment may be modified, conditioned upon consent. Clapp v. Vatcher, 9 Cal. App. 462; 99 Pac. 549. An injunction should not be vacated or modified without notice, except in urgent cases, to guard against serious loss. Hefflon v. Bowers, 72 Cal. 270; 13 Pac. 690. A judgment for damages, based upon a finding for an amount greater than the averments of the complaint, will not be reversed, but modified by reducing the amount to that stated in the complaint. Kerry v. Pacific Marine Co., 121 Cal. 564; 66 Am. St. Rep. 65; 54 Pac. 89.

Modification of judgment. See also note ante, § 473.

Affirmance of judgment or order for defects in appeal. The judgment will be affirmed, where no briefs have been filed, and no oral argument has been made (Delger v. Jacobs, 18 Cal. App. 698; 124 Pac. 95); and also where the appellants have practically abandoned their appeal except upon a single point that has no merit. Carley v. Vallecita Mining Co., 16 Cal. App. 781; 117 Pac. 1037. An appeal from an order cannot be considered, where no properly authenticated record is presented: in such a case the order will be affirmed. Credit Clearance Bureau v. Weary & Alford Co., 18 Cal. App. 467; 123 Pac. 548. Where the supreme court has become vested with jurisdiction over an appeal from an order, by virtue of a notice of appeal given under § 941a, ante, the proper practice is, not to dismiss the appeal, but to affirm the order for lack of a record showing error. Hibernia Sav. & L. Soc. v. Doran, 161 Cal. 118; 118 Pac. 526. An order denying a motion for a change of venue, upon conflicting affidavits as to the possibility of a fair trial, will be affirmed, where the voir dire examination of the jurors is not in the record, and it does not appear that a single citizen liable for jury duty is disqualified from giving a fair and impartial trial. Carpenter v. Sibley, 15 Cal. App. 589; 119 Pac. 391.

On merits. A judgment dismissing an action, on the ground that the plaintiff has not prosecuted it with reasonable diligence, will be affirmed, where no abuse of discretion is shown. Gray v. Times-Mirror Co., 11 Cal. App. 155; 104 Pac. 481. Where an order sustaining a demurrer is general in its terms, it must be affirmed, if the demurrer was well taken upon any of the grounds assigned therefor. MacMullan v. Kelly, 19 Cal. App. 700; 127 Pac. 819. Where the defendant offers no evidence, and judgment goes for the plaintiff, the judgment will be affirmed, where the complaint states a cause of action. Bakersfield etc. R. R. Co. v. Fairbanks, 20 Cal. App. 412; 129 Pac. 610. Where the evidence is substantially conflicting, and there is sufficient evidence for the plaintiff to support the findings in his favor, the decision of the trial court in plaintiff's favor must be affirmed upon appeal. Doudell v. Shoo, 20 Cal. App. 424; 129 Pac. 478. Where the findings of fact, under the pleadings, support the judgment as entered by the trial court, the plaintiff's motion for a different judgment is properly denied, and upon his appeal the order denying the same must be affirmed. Newmire v. Ford, 20 Cal. App. 337; 128 Pac. 952. A party must prove his case as alleged: he cannot have an affirmance of a judgment in his favor, upon proof of other facts not alleged, which might entitle him to the relief asked. Rheingans v. Smith, 161 Cal. 362; Ann. Cas. 1913B, 1140; 119 Pac. 494. The judgment will be affirmed, where it is supported by the findings. Brode v. Gosslin, 16 Cal. App. 632; 117 Pac. 778. The judgment will not be reversed on appeal, where the appellant has suffered no prejudice: it will be affirmed. Madary v. Fresno, 20 Cal. App. 91; 128 Pac. 340; Snowball v. Snowball, 164 Cal. 476; 129 Pac. 784; Gjurich v. Fieg, 164 Cal. 429; 129 Pac. 464; Sewell v. Price, 164 Cal. 265; 128 Pac. 407; Wolf v. Ætna Indemnity Co., 163 Cal. 597; 126 Pac. 470; Callahan v. Marshall, 163 Cal. 552; 126 Pac. 358; Sherman v. Ayers, 20 Cal. App. 733; 130 Pac. 163; Hunt v. Sharkey, 20

Cal. App. 690; 130 Pac. 21; Mentry v. Broadway Bank etc. Co., 20 Cal. App. 388; 129 Pac. 470; McDougall v. Eaton, 20 Cal. App. 164; 128 Pac. 415; Dieckmann v. Merkh, 20 Cal. 655; 130 Pac. 27; Tubbs v. Delillo, 19 Cal. App. 612; 127 Pac. 514; Wagner v. United Railroads, 19 Cal. App. 396; 126 Pac. 186. The court will affirm the judgment, with damages awarded against the appellants, where the appeal was frivolous, and taken merely for delay. Bell v. Camm, 10 Cal. App. 388; 102 Pac. 225. Where a justice of the supreme court is disqualified, and the other justices are equally divided in opinion, and there is no probability of an immediate change in the personnel of the court, the judgment of the lower court will be affirmed. Santa Rosa City R. R. v. Central Street Ry. Co., 112 Cal. 436; 44 Pac. 733; Smith v. Ferris etc. Ry. Co., 5 Cal. Unrep. 889; 51 Pac. 710. Where the supreme court believes that an order under review was properly made, its duty is to affirm the order, although it has, in another case, reversed an order similar in all respects. Bohn v. Bohn, 164 Cal. 532; 129 Pac. 981.

Effect of affirmance. The affirmance of a void judgment on appeal, upon grounds not touching but overlooking its invalidity, does not make it valid. Pioneer Land Co. v. Maddux, 109 Cal. 633; 50 Am. St. Rep. 67; 42 Pac. 295. An order granting a new trial has the effect to vacate the judgment, and the affirmance of the order on appeal leaves nothing in the court below upon which an appeal from the judgment can operate. Etchas v. Oreña, 121 Cal. 270; 53 Pac. 789. Where the order granting a new trial has been affirmed upon appeal, the judgment falls, and the appeal should be dismissed, at the costs of the respondent. San José Safe Deposit Bank v. Bank of Madera, 121 Cal. 543; 54 Pac. 85.

Effect of satisfaction on affirmance. The affirmance of a judgment is not affected by the fact that it has been partly satisfied. Ryland v. Heney, 130 Cal. 426; 62 Pac. 616.

Restitution discretionary with court. The provision of this section, that the appellate court may make complete restitution of all property and rights lost by an erroneous judgment or order which is reversed or modified, is not mandatory upon the court, and does not give the appellant an absolute right to a restitution of possession, but the power conferred thereby is to be exercised in the discretion of the court. Spring Valley Water Works v. Drinkhouse, 95 Cal. 220; 30 Pac. 218; Yndart v. Den, 125 Cal. 85; 57 Pac. 761; Taylor v. Ellenberger, 6 Cal. Unrep. 725; 65 Pac. 832.

Restitution may be compelled when and how. Restitution may be ordered when justice requires it, and may be directed and provided for in the original action itself, or may be sought in a separate action. Ward v. Sherman, 155 Cal. 287; 100 Pac. 864.

Restitution upon modification of judgment. A judgment debtor whose judgment has been modified on appeal, merely to the extent of relieving him from only a part of the judgment, has not lost any property or rights by the erroneous judgment so as to entitle him to the restitution of the property, unless more of his property has been taken than the amount for which the judgment has been affirmed. Hewitt v. Dean, 91 Cal. 617; 25 Am. St. Rep. 227; 28 Pac. 93. Where a judgment of foreclosure is modified on appeal, merely as to an excess of interest allowed, the sale under foreclosure will not be set aside, and the defendant is entitled only to the restitution of the excess of interest; and where he received in rents and profits a greater sum than such interest, a restitution of the amount of the interest will not be required. Yndart v. Den, 125 Cal. 85; 57 Pac. 761. Where a judgment directing a sale of property to satisfy a lien is modified by merely reducing the amount of the lien, it cannot be said from that fact alone that the appellant has lost any property, of which restitution is authorized to be made by setting aside the order of sale. Barnhart v. Edwards, 128 Cal. 572; 61 Pac. 176; and see Johnson v. Lamping, 34 Cal. 293. A reduction of the amount of a recovery does not cause property to be "lost," so as to authorize the appellate court, on modifying the judgment, to make restitution of property lost by an erroneous judgment. Barnhart v. Edwards, 57 Pac. 1004.

Upon reversal. Upon reversal, there should be restitution of things lost by reason of the judgment in the lower court, where justice requires it, and the prevailing party be placed as nearly as may be in the condition in which he previously stood. Ward v. Sherman, 155 Cal. 287; 100 Pac. 864. The enforcement of a judgment by execution before the expiration of the time to appeal cannot deprive the defendant of the right to appeal from the judgment, and in case of the reversal of the judgment on appeal, to the restitution of all property and rights lost by reason of the judgment. Kenney v. Parks, 120 Cal. 22; 52 Pac. 40. Where a mortgagee purchases the land at a foreclosure sale thereof, and sells it pending an appeal, the reversal of the judgment restores the mortgagor to his original estate, and he does not need an order of restitution to enable him to assert his right thereto. Di Nola v. Allison, 143 Cal. 106; 101 Am. St. Rep. 84; 65 L. R. A. 419; 76 Pac. 796. Where a judgment, under which personal property has been sold upon execution to the judgment creditor, who applied the

price upon the judgment, has been reversed upon appeal, the original owner is entitled to restitution of the property, or its value. Black v. Vermont Marble Co., 137 Cal. 683; 70 Pac. 776. Upon the reversal of a decree of distribution, the plaintiff is entitled to the redelivery of stock which had been turned over to the defendant in pursuance of the decree. Ashton v. Heydenfeldt, 124 Cal. 14; 56 Pac. 624. Upon the reversal of a judgment, with legal interest, under this section, costs paid by the respondent may be ordered to be returned to him, to the end that the status quo may be restored. Stockman v. Riverside Land etc. Co., 64 Cal. 57; 28 Pac. 116. Upon a reversal of an order for a writ of restitution, the appellant is entitled to be restored to all that he has lost by virtue of the order, and to be placed in the same position as he was prior to the execution of the writ, by the removal of all persons who have been placed in possession of the lands by virtue of the writ, as well as of all others who have come in under him after that date. Hyde v. Boyle, 105 Cal. 102; 38 Pac. 643. A restitution of premises taken in condemnation proceedings will not be made without a reversal of the judgment on appeal, where the case was remanded to the lower court for the sole purpose of determining the amount of compensation to which the appellant is entitled, and where the money deposited with the trial court was amply sufficient to satisfy any judgment for damages which might be recovered. Spring Valley Water Works v. Drinkhouse, 95 Cal. 220; 30 Pac. 218. Upon the reversal of a decree of foreclosure, where execution was not stayed, and the mortgaged property was sold to a third party, the measure of damages in an action for restitution is limited to the proceeds of the sale of the property, after deducting the expenses of the sale. Dowdell v. Carpy, 137 Cal. 333; 70 Pac. 167. Restitution by the losing party, of money which was not paid after nor in consequence of the judgment, but was paid in consequence of an unappealed order made prior to the judgment, will not be compelled upon appeal, where the judgment appealed from is reversed. Reynolds v. Reynolds, 2 Cal. Unrep. 547; 8 Pac. 184.

Action to enforce judgment for proceeds of sale. Where a mortgagor, in an action under this section to recover the proceeds of a foreclosure sale, the judgment having been set aside upon appeal, alleged in his complaint that foreclosure proceedings were commenced against the plaintiff, in which the defendant, a second mortgagee, was joined as a party, and filed a cross-complaint asking a foreclosure of his mortgage, and that an order of sale on the judgment foreclosing both mortgages was duly issued by the clerk, and was thereupon delivered to the sheriff, who sold the land to the defendant, and, after paying the first mortgage, there remained a balance, a right of action is not shown against the second mortgagee, it not being shown that the sheriff had applied any part of the proceeds of such sale to the satisfaction of the defendant's debt. Patton v. Thomson, 3 Cal. Unrep. 871; 33 Pac. 97. Attorneys' fees cannot be recovered in an action to recover the value of property sold under execution, pending an appeal from the judgment. Dowdell v. Carpy, 137 Cal. 333; 70 Pac. 167.

Damages, where appeal taken for delay. The remedy for a frivolous appeal, or for one taken merely for delay, must be sought under this section, and not by a motion to dismiss. Nevills v. Shortridge, 129 Cal. 575; 62 Pac. 120. Where an appeal is frivolous and vexatious, and taken merely for the purpose of delay, that is a matter which can only be determined by an examination of the record on appeal, which cannot be done on a motion to dismiss. Randall v. Duff, 104 Cal. 126; 43 Am. St. Rep. 79; 37 Pac. 803. Upon a motion to dismiss an appeal, and for damages, where an uncontradicted affidavit shows that the appeal was taken for delay, damages will be allowed upon the dismissal of the appeal, though, ordinarily, the court will not look into the record to see if the appeal is frivolous. McFadden v. Dietz, 115 Cal. 697; 47 Pac. 777. An appeal taken merely for delay, no transcript being filed, will be dismissed, with damages. Koelling v. Rutz, 108 Cal. 664; 41 Pac. 781. Damages may be awarded for a frivolous appeal. Bell v. Camm, 10 Cal. App. 388; 102 Pac. 225. Where an appeal is manifestly frivolous, damages will be added upon the affirmance of the judgment, as a penalty for the delay. Clark v. Nordholt, 121 Cal. 26; 53 Pac. 400; Henehan v. Hart, 127 Cal. 656; 60 Pac. 426; Hearst v. Hart, 128 Cal. 327; 60 Pac. 846. Twenty per cent of the amount of the judgment may be added to the costs, as damages, where the appeal is taken for delay. Shain v. Belvin, 79 Cal. 262; 21 Pac. 747; Williams v. Hall, 79 Cal. 606; 21 Pac. 965. Where an appeal is without merit, and it appears to the appellate court to have been taken for delay, the mere fact that the attorney for the appellant acted in good faith in its prosecution will not relieve the appellant from liability for damages, under this section. Lemon v. Rucker, 80 Cal. 609; 22 Pac. 471. An appeal from a judgment, where the only error upon the record is manifestly a trivial clerical error in the computation of interest, which would have been corrected by the court below upon having its attention called to the matter, is a frivolous appeal, and the superior court will be directed to make a proper correction in the computation of interest,

and the appellate court will require the costs to be paid by the appellant, and allow the respondent damages for delay as part of the costs of appeal. Rountree v. I. X. L. Lime Co., 106 Cal. 62; 39 Pac. 16. The issuance of an order of sale before the taxation of costs is not premature, and an appeal taken after the taxation of costs, from an order refusing to vacate the order of sale, because the costs were inserted in the decree before taxation, is without merit, and the order will be affirmed, with damages. Janes v. Bullard, 107 Cal. 130; 40 Pac. 108.

Authoritative effect of opinion. An order of the supreme court, refusing to transfer a cause after judgment in the district court of appeal, does not adopt the opinion of the court of appeal so as to give it, in the supreme court, the authoritative effect that one of its own decisions would have. Bohn v. Bohn, 164 Cal. 532; 129 Pac. 981.

Authority of trial court limited how. After the supreme court has determined that the complaint states facts sufficient to constitute a cause of action, the trial court is without power further to consider the objection that the complaint does not state a cause of action. Neale v. Morrow, 163 Cal. 445; 125 Pac. 1053.

Supreme court not influenced by subordinate court. The supreme court, in the determination of a cause, will act according to its own legal conviction, although in a case between the same parties, presenting identical questions, a contrary conclusion was reached by the district court of appeal. Bohn v. Bohn, 164 Cal. 532; 129 Pac. 981.

Disposition of case after death of party. Where the appellant dies after the argument and submission of the appeal, and before the decision, the judgment will be entered as of the day preceding his death. Ede v. Cuneo, 55 Pac. 772. Where the respondent dies after the submission of the appeal, an affirmance of the judgment will be entered nunc pro tunc as of a time prior to his death. Lucas v. Provines, 130 Cal. 270; 62 Pac. 509; McPike v. Heaton, 131 Cal. 109; 82 Am. St. Rep. 335; 63 Pac. 179.

Stare decisis. The decision of a former supreme court of this state, unreversed and unmodified, must be followed by a district court of appeal. Canadian Bank of Commerce v. Leale, 14 Cal. App. 307; 111 Pac. 759.

Law of the case. Where nothing materially new appears in a case, the views of the supreme court, upon a former appeal, become the "law of the case." Smith v. Goethe, 159 Cal. 628; Ann. Cas. 1912C, 1205; 115 Pac. 223; Barrett-Hicks Co. v. Glas, 14 Cal. App. 297; 111 Pac. 760; Conde v. Sweeney, 16 Cal. App. 157; 116 Pac. 319; Muller v. Swanton, 17 Cal. App. 232; 119 Pac. 200; Lantz v. Fishburn, 17 Cal. App. 583; 120 Pac. 1068. The construction given by the appellate court to the judgment of the trial court, in determining an appeal therefrom, becomes the law of the case, and is binding on the lower court in all subsequent proceedings, and whenever its interpretation is material. Gallatin v. Corning Irrigation Co., 163 Cal. 405; Ann. Cas. 1914A, 74; 126 Pac. 864; Gibbs v. Peterson, 163 Cal. 758; 127 Pac. 62. The rule of the law of the case is applicable, only where the same matters which were determined in the previous appeal are involved in the second appeal. Flood v. Templeton, 152 Cal. 148; 13 L. R. A. (N. S.) 579; 92 Pac. 78; Jacks v. Deering, 150 Cal. 272; 88 Pac. 909; Estate of Hall, 154 Cal. 527; 98 Pac. 269. The doctrine of the law of the case is, in a very limited class of cases, applied to matters of evidence, as distinguished from rulings of law, but its extension is not looked upon with favor. Allen v. Bryant, 155 Cal. 256; 100 Pac. 704; Smith v. Sinbad Development Co., 15 Cal. App. 166; 113 Pac. 701. The decision, upon a former appeal, as to the interest of a son in his deceased father's estate, is not the law of the case as to his right of inheritance from his mother. Estate of Wickersham, 153 Cal. 603; 96 Pac. 311. A decision upon a former appeal is not the law of the case upon a subsequent appeal that has an important distinction from the former appeal. Hibernia Sav. & L. Soc. v. Farnham, 153 Cal. 578; 126 Am. St. Rep. 129; 96 Pac. 9.

Rule of property. The rule of construction, that a tax deed misreciting, or omitting to recite, any one of the facts required by the statute to be recited has no effect at all as a conveyance, has become a rule of property that courts should not depart from. Henderson v. De Turk, 164 Cal. 296; 128 Pac. 747.

Rehearing. A petition for a rehearing, and not a motion for a new trial, is the proper remedy for one desiring a rehearing of an original petition in the supreme court for a writ of prohibition, after a decision has been rendered thereupon. Granger's Bank v. Superior Court, 101 Cal. 198; 35 Pac. 642. A rehearing will not be granted because of an erroneous statement of fact, upon which the court relied, which was contained in the respondent's pleading, where the allegations of the pleading were specifically noticed in the appellant's brief, and the respondent paid no attention to it, and made no suggestion that it was a clerical or other error, and relied wholly on another matter. Buhman v. Nickels, 1 Cal. App. 266; 82 Pac. 85.

Dictum. Where a decision is based upon two independent lines of reasoning, neither can be said to be dictum: one is as neces-

sary to the decision as the other. Pugh v. Moxley, 164 Cal. 374; 128 Pac. 1037.

Dismissal of appeal. See note ante, § 954.

Power of appellate court upon granting new trial to limit issues to be tried by jury. See note 7 Ann. Cas. 116.

Power of appellate court to enter final judgment upon reversing civil cause for insufficiency of evidence. See note 8 Ann. Cas. 873.

CODE COMMISSIONERS' NOTE. Restitution of property, etc. Reynolds v. Harris, 14 Cal. 667; 76 Am. Dec. 459; Farmer v. Rogers, 10 Cal. 335; Raun v. Reynolds, 18 Cal. 289; Gray v. Dougherty, 25 Cal. 273; Johnson v. Lamping, 34 Cal. 296.

2. Costs and damages. Cole v. Swanston, 1 Cal. 51; 52 Am. Dec. 288; Pacheco v. Bemel, 2 Cal. 150; Bates v. Visher, 2 Cal. 355; Buckley v. Stebbins, 2 Cal. 149; Russell v. Williams, 2 Cal. 158; Pinkham v. Wemple, 12 Cal. 449; De Witt v. Porter, 13 Cal. 171; Ricketson v. Torres, 23 Cal. 649; Harper v. Minor, 27 Cal. 109; Nickerson v. California Stage Co., 10 Cal. 520; Jungerman v. Bovee, 19 Cal. 355; Wilber v. Sanderson, 43 Cal. 496; Swimley v. Clark, 1872.

§ 958. On judgment on appeal, remittitur must be certified to the clerk of the court below. When judgment is rendered upon the appeal, it must be certified by the clerk of the supreme court to the clerk with whom the judgment roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment roll, and enter a minute of the judgment of the supreme court on the docket, against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified, by the supreme court on appeal.

Judgment rendered on appeal. Ante, §§ 43, 45.

Remittitur. Ante, § 56.

Judgment becomes final thirty days after it is filed. See Const., art. VI, § 2.

Legislation § 958. 1. Enacted March 11, **1872** (based on Practice Act, § 358), (1) substituting "must" for "shall" in all instances, and (2) omitting "as the case may be" after "modified."

2. Amendment by Stats. **1901**, p. 174; unconstitutional. See note ante, § 5.

Jurisdiction of appellate court after remittitur. As a general rule, the supreme court cannot exercise any jurisdiction over a case in which a remittitur has been issued by its order and filed in the court below; but this general rule rests upon the supposition that all of the proceedings have been regular, and that no fraud or imposition has been practiced upon the court or the opposite party: where such is the case, the appellate court will assert jurisdiction and recall the case. Trumpler v. Trumpler, 123 Cal. 248; 55 Pac. 1008; Richardson v. Chicago Packing etc. Co., 135 Cal. 311; 67 Pac. 769. A decision rendered by the appellate court, reversing the judgment of the trial court, after the death of the respondent, where no suggestion of his death or motion to substitute his representatives has been made, is not void, but merely erroneous; and where no fraud or imposition has been practiced upon the appellate court upon the issuance of the remittitur, the judgment of reversal becomes a finality, beyond the power of the appellate court to modify or amend. Martin v. Wagner, 124 Cal. 204; 56 Pac. 1023.

Recalling remittitur. Where the remittitur has been duly and regularly issued, without inadvertence, the supreme court loses jurisdiction of the cause, and has no power to recall it. Estate of Levinson, 108 Cal. 450; 41 Pac. 483. Where the remittitur conforms to the judgment as rendered, it will not be recalled, if it is too late to amend the judgment. San Francisco Sav. Union v. Long, 6 Cal. Unrep. 278; 56 Pac. 882. Where the judgment rendered by the appellate court is void, the remittitur will be recalled, and the appeal restored to the calendar. Martin v. Wagner, 124 Cal. 204; 56 Pac. 1023. An objection to an application to recall a remittitur, on the ground that the notice of the motion did not specifically state that it would be made on the ground that the remittitur failed to conform to the judgment, will not be sustained, where the terms of the notice otherwise disclose that this was the ground of the motion, and the opposite side was not prejudiced by the omission. Baker v. Southern California Ry. Co., 130 Cal. 113; 62 Pac. 302.

Jurisdiction of lower court after remittitur. A stay of execution of a decree of foreclosure, pending an appeal therefrom, ceases to operate when the remittitur from the appellate court is filed in the clerk's office of the superior court: the failure of the clerk to follow the directions given in this section cannot deprive the superior court of its jurisdiction, nor keep alive the stay of execution. Granger v. Sheriff, 140 Cal. 190; 73 Pac. 816. After the time of the going down of the remittitur, the superior court has no power to modify the judgment of the supreme court. Estate of Pichoir, 146 Cal. 404; 80 Pac. 512. Where, upon a judgment of reversal in the supreme court, a judgment for costs of appeal is docketed in conformity with the

rule of such court, and with this section, the trial court has no power to vacate it; but, in so far as it has been docketed against respondents as to whom the judgment was affirmed by the supreme court, the trial court had power to set it aside, so as to make it conform to the decision upon appeal. Chapman v. Hughes, 3 Cal. App. 622; 86 Pac. 908; and see Long v. Superior Court, 127 Cal. 686; 60 Pac. 464; Baker v. Southern California Ry. Co., 130 Cal. 113; 62 Pac. 302.

After modification of judgment. Where a judgment is ordered modified by the appellate court, without prescribing the mode of modification, the mode is within the discretion of the court below; and where the former judgment was vacated, and a new judgment made to cover the whole ground, such method is not improper. Downing v. Rademacher, 138 Cal. 324; 71 Pac. 343. A judgment of the supreme court, modifying the judgment appealed from, is a final adjudication of the rights of the parties in the action, and the superior court is without jurisdiction to make any further judgment or order. Vance v. Smith, 132 Cal. 510; 64 Pac. 1078.

Acts done by authority of appellate court. The clerk of the superior court, in making the entries required by this section, acts by authority of the appellate court; no action is required on the part of the superior court to authorize the entry or the issuance of execution thereon; and the judgment of the appellate court becomes the judgment of the superior court as soon as the remittitur is filed and the entry is made. McMann v. Superior Court, 74 Cal. 106; 15 Pac. 448. Where, upon appeal, it was held erroneous to refuse permission to the plaintiff to file an amended complaint, and the cause was remanded for a new trial, with leave to the parties to amend the pleadings, the plaintiff may, after the remittitur goes down, file, without leave of the trial court, an amended complaint, other than that offered on the first trial. Pottkamp v. Buss, 5 Cal. Unrep. 462; 46 Pac. 169.

Execution for costs may issue when. The five years within which an execution may be issued on a judgment for costs, incurred in the supreme court on appeal from a judgment, commences to run from the time that a minute of the judgment of the supreme court is entered on the docket of the lower court. McMann v. Superior Court, 74 Cal. 106; 15 Pac. 448.

CODE COMMISSIONERS' NOTE. McMillan v. Richards, 12 Cal. 467; Blanc v. Bowman, 22 Cal. 23; Marysville v. Buchanan, 3 Cal. 212; Argenti v. San Francisco, 30 Cal. 458; Meyer v. Kohn, 33 Cal. 484.

§ 959. Provisions of this chapter not applicable to appeals to superior courts. The provisions of this chapter do not apply to appeals to superior courts.

Appeals to superior courts. Post, §§ 974–980.

Legislation § 959. **1.** Enacted March 11, **1872.** **2.** Amended by Code Amdts. **1880,** p. 7, substituting "superior" for "county." **3.** Repeal by Stats. **1901,** p. 174; unconstitutional. See note ante, § 5.

CHAPTER II.

APPEALS TO SUPREME COURT.

§ 963. Cases in which an appeal may be taken from superior court.
§ 964. Appeals; in what cases appealed from justices' courts.
§ 965. Appeals by executors and administrators.
§ 966. Acts of executors and administrators, where appointment vacated.
§ 967, § 968. [None so numbered.]
§ 969. Appeal from probate court, when may be taken. [Repealed.]
§ 970. Executors and administrators not required to give undertaking on appeal. [Repealed.]
§ 971. Acts of acting administrator, etc., not invalidated by reversal of order appointing him. [Repealed.]

Legislation Chapter II. **1.** Enacted March 11, **1872,** and then contained only one section (§ 963), relating to appeals to the supreme court. **2.** Amended by Code Amdts. **1880,** p. 14, by "An Act to amend Chapters Two and Three, of Title Thirteen, of Part Two, of the Code of Civil Procedure, and each and every section of said Chapters Two and Three, and to substitute new Chapters Two and Three to take the place thereof in said Code, relating to appeals in civil actions."

§ 963. Cases in which an appeal may be taken from superior court. An appeal may be taken from a superior court in the following cases:

1. From a final judgment entered in an action, or special proceeding, commenced in a superior court, or brought into a superior court from another court;

2. From an order granting a new trial in an action or proceeding tried by a jury where such trial by jury is a matter of right, or granting or dissolving an injunction, or refusing to grant or dissolve an injunction, or appointing a receiver, or dissolving or refusing to dissolve an attachment, or changing or refusing to change the place of trial, from any special order

made after final judgment, from any interlocutory judgment, order, or decree, hereafter made or entered in actions to redeem real or personal property from a mortgage thereof, or lien thereon, determining such right to redeem and directing an accounting; and from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties and directs partition to be made, and interlocutory decrees of divorce.

3. From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale or conveyance of real property, or settling an account of an executor, administrator or guardian; or refusing, allowing or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, or legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser or appraisers setting apart a homestead.

Appeal from—
Award. See post, § 1289.
Criminal cases. See ante, § 52; Pen. Code, §§ 1237, 1238.
Final judgment. Compare ante, § 939, subd. 1.
Orders. Compare ante, § 939, subd. 3.
Probate decisions, generally. Post, §§ 1714, 1715.

Appeal lies from—
Decree dissolving corporation. See post, § 1233.
Decree of final distribution. See post, § 1664.
Decree settling account of trustee under will. See post, § 1701.
Judgment in agreed case. See post, § 1140.
Judgment in election contest. See post, § 1126.
Order allowing attorney's fee. See post, § 1616.

Contempt, judgments and orders in, final and conclusive. See post, § 1222.

Orders reviewable on appeal from judgment. See ante, § 956.

Special administration, granting. No appeal. Post, § 1413.

Legislation § 963. 1. Enacted March 11, **1872** (based on Practice Act, § 347, as amended by Stats. 1865–66, p. 707), and then read: "§ 963. An appeal may be taken to the supreme court, from the district courts, in the following cases: 1. From a final judgment entered in an action or special proceeding commenced in those courts, or brought into those courts from other courts; 2. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving, or refusing to dissolve, an attachment; from an order changing, or refusing to change, the place of trial; from any special order made after final judgment, and from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties, and directs partition to be made."

2. Amended by Code Amdts. **1880**, p. 14, (1) in introductory paragraph, substituting "a superior court" for "the district courts"; (2) in subd. 1, substituting (a) "a superior court" for "those courts," in both instances, and (b) "another court" for "other courts"; (3) in subd. 2, substituting "or" for "from an order," at the beginning of each clause, except the first; (4) adding subd. 3.

3. Amended by Stats. **1889**, p. 324, in subd. 3, (1) changing "granting, refusing, or revoking letters" to "granting or refusing to grant, revoking or refusing to revoke, letters," (2) changing "sales" to "sale," (3) inserting "or" before "legacy," and (4) changing "the" to "a" before "homestead."

4. Amended by Stats. **1897**, p. 209, (1) in subd. 2, adding "or appointing a receiver," after "injunction"; (2) in subd. 3, inserting "or appraisers," after "appraiser."

5. Amended by Stats. **1899**, p. 8, in subd. 2, (1) changing the comma to a semicolon, after "trial" and after "final judgment," and (2) inserting the clause beginning "from any interlocutory" and ending "an accounting."

6. Amended by Stats. **1901**, p. 85, (1) restoring punctuation changed in 1899, and (2) in subd. 3, inserting "or refusing to revoke," before "the probate thereof."

7. Repeal by Stats. **1901**, p. 174; unconstitutional. See note ante, § 5.

8. Amended by Stats. **1915**, p. 209, (1) in introductory paragraph, striking out "to the supreme court," after "taken"; (2) in subd. 2, (a) striking out "or refusing," before "a new trial," and inserting after these words, "in an action or proceeding tried by a jury where such trial by jury is a matter of right," and (b) inserting at end of subdivision, "and interlocutory decrees of divorce."

Construction of code sections. Under the third subdivision of this section, there is no limitation upon the character of the proceeding in which the order directing the conveyance is made, and the appellate court will not limit it. Estate of Pearsons, 98 Cal. 603; 33 Pac. 451. The remedy by motion in the superior court to set aside and vacate a judgment unsupported by the findings, and to enter another judgment in accordance therewith, provided for in §§ 663, 663½, ante, is merely cumulative, and was not designed to supersede the remedy by appeal provided in this section; upon such appeal, the judgment may be reversed, and the court directed to enter the judgment required by the findings. Patch v. Miller, 125 Cal. 240; 57 Pac. 986.

Appellate jurisdiction. Where the demand in suit is merely for money, the supreme court has no appellate jurisdiction, unless such demand, exclusive of interest, amounts to three hundred dollars. Heni-

gan v. Ervin, 110 Cal. 37; 42 Pac. 457. The amount of money involved in an appeal from an order of the superior court taxing costs is not determinative of the jurisdiction of the appellate court. Meyer v. Perkins, 20 Cal. App. 661; 130 Pac. 206. The supreme court acquires jurisdiction immediately upon the filing of the notice of appeal; the failure to file a transcript on appeal, or the loss or destruction of it after it is filed, does not affect such jurisdiction. Estate of Davis, 151 Cal. 318; 121 Am. St. Rep. 105; 86 Pac. 183.

Writ of error. A writ of error will not be granted in any case where an appeal lies: the remedy by appeal is exclusive in such cases. Sacramento etc. R. R. Co. v. Harlan, 24 Cal. 334.

Appeal must be authorized. The appeal must be authorized by a statute or a rule of court. Appeal of Houghton, 42 Cal. 35. The right of appeal comes from the statute, not from any unauthorized action of the court. Estate of Overton, 13 Cal. App. 117; 108 Pac. 1021.

Appealability determined how. The appealability of an order is determined, not from its form, but from its legal effect (Estate of West, 162 Cal. 352; 122 Pac. 953); but this case seems to hold to the contrary of former rulings upon this point. Estate of Bullock, 75 Cal. 419; 17 Pac. 540; Harper v. Hildreth, 99 Cal. 265; 33 Pac. 1103. Appeals can be taken only from such judgments on orders as are mentioned in this section. Estate of Moore, 86 Cal. 58; 24 Pac. 816; Estate of Walkerly, 94 Cal. 352; 29 Pac. 719; Estate of Hickey, 121 Cal. 378; 53 Pac. 818; Estate of Cahill, 142 Cal. 628; 76 Pac. 383. A judgment of the superior court granting a divorce is appealable. Sharon v. Sharon, 67 Cal. 185; 7 Pac. 456. All judgments rendered in special civil proceedings of a summary character are appealable; hence, a judgment in an action to remove a board of supervisors can be reviewed upon appeal. Morton v. Broderick, 118 Cal. 474; 50 Pac. 644. An order on proceedings supplementary to execution, that a garnishee pay to the plaintiff the amount of his indebtedness, is, in effect, a judgment, and appealable. Bronzan v. Drobaz, 93 Cal. 647; 29 Pac. 254. The decision of a judge at chambers, in quo warranto proceedings, is appealable. Brewster v. Hartley, 37 Cal. 15; 99 Am. Dec. 237. The discharge of a debtor in bankruptcy proceedings is appealable. Fisk v. His Creditors, 12 Cal. 281. An appeal lies from a judgment rendered by the trial court in conformity with the directions of the appellate court. Tuffree v. Stearns Ranchos Co., 124 Cal. 306; 57 Pac. 69; Lambert v. Bates, 148 Cal. 146; 82 Pac. 767; Randall v. Duff, 107 Cal. 33; 40 Pac. 20. The confirmation of the report of a referee, and an order that judgment be entered for the plaintiff, without pronouncing judgment upon the facts found, and a determination of the particular relief to which the plaintiff is entitled, is not the rendition of a judgment from which an appeal may be taken. Harris v. San Francisco Sugar Refining Co., 41 Cal. 393. A judgment under stipulation, being a judgment by consent, is not appealable. Pacific Paving Co. v. Vizelich, 1 Cal. App. 281; 82 Pac. 82. The presentation of the claim of a court reporter for his fees and expenses in criminal cases, to the judge or court, for allowance, is not an action or special proceeding in which an appeal lies, under this section. Pipher v. Superior Court, 3 Cal. App. 626; 86 Pac. 904. An order or judgment of nonsuit is not appealable. Kimple v. Conway, 69 Cal. 71; 10 Pac. 189; Leavens v. Pinkham, 164 Cal. 242; 128 Pac. 399; Fraser v. Sheldon, 164 Cal. 165; 128 Pac. 33.

Final judgment, what is. The term "final judgment," as used in the first subdivision of this section, applies only to those judgments known at common law as final judgments, and does not apply to the statutory determinations termed "orders or judgments," defined in the third subdivision; hence, the right of appeal is expressly given from certain of such orders or judgments. Estate of Smith, 98 Cal. 636; 33 Pac. 744. Where the judgment is the only judgment provided for in the act, it is a final judgment, in the strictest sense of the term. People v. Bank of Mendocino County, 133 Cal. 107; 65 Pac. 124; and see Stockton etc. Agricultural Works v. Glen Falls Ins. Co., 98 Cal. 557; 33 Pac. 633. The term "final judgment," as used in the second subdivision of this section, has the same meaning as that term has as used in the first subdivision. Estate of Calahan, 60 Cal. 232; Estate of Smith, 98 Cal. 636; 33 Pac. 744. An injunction against a bank, in proceedings by bank commissioners, made as a part of the judgment adjudging the bank insolvent, is final, and appealable. People v. Bank of Mendocino County, 133 Cal. 107; 65 Pac. 124. A judgment under the Bank Commissioners' Act, to the effect that the corporation is insolvent; that it is unsafe for it to continue business; that the property of the corporation, previously sequestered and in the hands of the commissioners, be delivered to it for the purpose of liquidation, to be administered under the direction of the bank commissioners; that the injunction applied for be issued,—is a final judgment, and appealable. The order refusing to modify such injunction was proper. People v. Bank of Mendocino County, 133 Cal. 107; 65 Pac. 124. An order fixing the compensation of a receiver, and taxing it as costs against all the parties, and directing the receiver to apply towards its payment the balance of the fund remaining in his hands, is, in legal effect, a final judgment upon a collateral matter arising out of the action, and is

appealable. Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71; 47 Pac. 872. An order settling the account of a receiver, and directing the payment of his compensation by one of the parties, although made before final judgment in the action, is a final determination of the rights of the parties to the matter then before the court, and is appealable. Los Angeles v. Los Angeles City Water Co., 134 Cal. 121; 66 Pac. 198. An order setting aside an order settling an account of the assignee of an insolvent debtor, reported by a referee in an action by creditors to set aside and vacate a fraudulent assignment of the insolvent, is not a final judgment, and is not appealable. Etchebarne v. Roeding, 89 Cal. 517; 26 Pac. 1079. The fact that an injunction, by its terms, was until further order of the court, cannot affect its character as part of the final judgment, nor does it render such judgment any the less final. People v. Bank of Mendocino County, 133 Cal. 107; 65 Pac. 124. An order substituting a party as plaintiff is not a final judgment, and is not appealable. Welch v. Allen, 54 Cal. 211. An order made during the trial is not an order which, under this section, is appealable. Eddy v. American Amusement Co., 21 Cal. App. 487; 132 Pac. 83; Steinberg v. Jacobs, 21 Cal. App. 765; 132 Pac. 1060. An order, made before judgment, in an action to foreclose a mortgage, directing the application of the proceeds of the mortgaged property, is not, in its nature, a final judgment, and is not appealable. Illinois etc. Sav. Bank v. Pacific Ry. Co., 99 Cal. 407; 33 Pac. 1132. An order discharging the petitioner in proceedings on habeas corpus is not a final judgment, and is not appealable. Ex parte White, 2 Cal. App. 726; 84 Pac. 242.

Final judgment. See also note ante, § 939.

Order dismissing action is final judgment. An order dismissing an action is such a final judgment as that an appeal may be taken therefrom. Dempsey v. Underhill, 156 Cal. 718; 106 Pac. 73; Marks v. Keenan, 140 Cal. 33; 73 Pac. 751; Bell v. Solomons, 162 Cal. 105; 121 Pac. 377. An order adjudging that the plaintiff is barred from all equity of redemption or other right to the property, and dismissing the action, is a final judgment as respects the rights of the plaintiff, and is appealable. Byrne v. Hudson, 127 Cal. 254; 59 Pac. 597. An order dismissing an action for failure to return the summons within the statutory period of three years, entered in the minutes of the court, is a final judgment, for the purpose of an appeal therefrom. Pacific Paving Co. v. Vizelich, 141 Cal. 4; 74 Pac. 352. A judgment upon demurrer in an action against a justice of the peace and the sureties upon his official bond, dismissing the action as to the sureties and leaving it still pending against the justice, is not a final judgment disposing of the merits of the whole case, and an attempted separate appeal from the judgment of dismissal in favor of the sureties is premature, and must be dismissed upon motion. Nolan v. Smith, 137 Cal. 360; 70 Pac. 166. An order dismissing a cause as to certain of the defendants is not appealable (Gates v. Walker, 35 Cal. 289); nor is an order refusing to dismiss an action. Forrester v. Lawler, 14 Cal. App. 170; 111 Pac. 284; Garthwaite v. Bank of Tulare, 134 Cal. 237; 66 Pac. 326.

What considered on appeal from order dismissing action. The dismissal of an action for lack of prosecution is without regard to the merits or demerits of the cause of action; and upon a review on appeal from such an order, the fact that the records show a cause of action in favor of the plaintiff will not be considered. Bell v. Solomons, 162 Cal. 105; 121 Pac. 377. Where the court denies a plaintiff's motion to dismiss an action in intervention, for a delay of five years in prosecution after the plaintiff has filed his answer, and of its own motion orders the entire action to be dismissed, the plaintiff cannot, on an appeal from the order of dismissal, urge as error the denial of the motion to dismiss the action in intervention. Dempsey v. Underhill, 156 Cal. 718; 106 Pac. 73. Matters reviewable upon direct appeal from a judgment of dismissal will not be reviewed on an appeal from an order refusing to vacate the order of dismissal. Bell v. Solomons, 162 Cal. 105; 121 Pac. 377.

Appeal does not lie from order dismissing proceedings when. No appeal lies from an order improperly dismissing proceedings for want of jurisdiction: such order is not a judgment; but mandate lies, in a proper case, to compel a hearing. Scott v. Shields, 8 Cal. App. 12; 96 Pac. 385.

Regarding default. An order denying a motion to set aside a judgment by default is appealable (McCormick v. Belvin, 96 Cal. 182; 31 Pac. 16); as is also an order, made after judgment, refusing, upon motion of the plaintiff, to set aside the default of a defendant, and to fix a time within which the defendant should plead (Thompson v. Alford, 128 Cal. 227; 60 Pac. 686); and an order refusing to relieve the appellant from default in failing to serve a notice of intention to move for a new trial within the statutory time (Steen v. Santa Clara etc. Lumber Co., 145 Cal. 564; 79 Pac. 171); and an appeal may be taken from a judgment by default, entered by the clerk; and the existence of a remedy by motion in the superior court to set it aside, if irregular or void, cannot affect the right of appeal nor justify a motion to dismiss the appeal. Jameson v. Simonds Saw Co., 144 Cal. 3; 77 Pac. 662. An order setting aside a defendant's default, entered by the clerk, but upon which no judgment has been en-

tered, is not appealable (Rauer's Law etc. Co. v. Standley, 3 Cal. App. 44; 84 Pac. 214; Rose v. Lelande, 17 Cal. App. 308; 119 Pac. 532; Savage v. Smith, 154 Cal. 325; 97 Pac. 821); nor is an order denying a motion for judgment by default, and for the removal of a guardian, as prayed for in the defendant's cross-complaint. Broadribb v. Tibbets, 60 Cal. 412.

Cases commenced in justice's court. No appeal lies to the supreme court from any judgment or order made in the superior court upon appeal from the judgment of a justice's court, and no writ of error therefrom is tenable. Pool v. Superior Court, 2 Cal. App. 533; 84 Pac. 53. The supreme court has no jurisdiction of an appeal from a judgment of the superior court, rendered, in an action to recover the rent of land, on appeal from a justice's court, although the complaint contains an allegation of the possession, by the defendant, of the demised premises. O'Meara v. Hables, 163 Cal. 240; 124 Pac. 1003. An action bought in a justice's court to enforce disputed claims of employees of an execution debtor for wages, and taken by appeal to the superior court, is not appealable to the supreme court, under the first subdivision of this section. Edsall v. Short, 122 Cal. 533; 55 Pac. 327. A special order, refusing to strike out a cost-bill, in the superior court, in a case appealed from a justice's court, is not appealable to the supreme court, although the cost-bill amounts to over three hundred dollars. Henigan v. Ervin, 110 Cal. 37; 42 Pac. 457. Where the case is one in which the supreme court has appellate jurisdiction under the constitution, notwithstanding the fact that it was commenced in the justice's court, the practice of taking an appeal first to the superior court and next to the supreme court is probably correct, in view of the first subdivision of this section. Edsall v. Short, 122 Cal. 533; 55 Pac. 327. The supreme court has jurisdiction of an appeal from an order of the superior court, on certiorari, annulling an order of a justice's court. Heinlen v. Phillips, 88 Cal. 557; 26 Pac. 366; but see contra, Bienenfeld v. Fresno Milling Co., 82 Cal. 425; 22 Pac. 1113.

Separate appeals. Every judgment, and every order subsequent to judgment, entered against a party, is the subject of a distinct and separate appeal, and must be appealed from as an entirety; no separate appeal lies from parts of two judgments: each should be appealed from by a notice and an undertaking of its own. People v. Center, 61 Cal. 191; Sharon v. Sharon, 68 Cal. 326; 9 Pac. 187.

Void orders and judgment. Void orders are appealable. Estate of Bullock, 75 Cal. 419; 17 Pac. 540. Thus, a void judgment of a superior court, rendered upon an appeal from a void judgment of a justice of the peace, is appealable (De Jarnatt v. Marquez, 127 Cal. 558; 78 Am. St. Rep. 90; 60 Pac. 45); as is also a void judgment rendered by a court without jurisdiction, or coram non judice, where it is entered in form as a judgment in the records of the court, upon which final process might be issued. Merced Bank v. Rosenthal, 99 Cal. 39; 31 Pac. 849.

Denying continuance. An order denying a continuance is not appealable. Haraszthy v. Horton, 46 Cal. 545.

What may be reviewed on appeal from the judgment. See note ante, § 956.

New-trial order appealable when. An order granting or refusing a new trial is appealable where a new trial is authorized. People v. Oakland, 123 Cal. 145; 55 Pac. 772; Estate of Sutro, 152 Cal. 249; 92 Pac. 486, 1027; Harper v. Hildreth, 99 Cal. 265; 33 Pac. 1103. An order granting or denying a motion for a new trial may be reviewed upon an appeal taken in time, notwithstanding the judgment may be final. Houser etc. Mfg. Co. v. Hargrove, 129 Cal. 90; 61 Pac. 660. An order granting or denying a new trial in a contest over the probate of a will is appealable, in cases where a new trial is authorized. Estate of Doyle, 68 Cal. 132; 8 Pac. 691; Estate of Bauquier, 88 Cal. 302; 26 Pac. 178; Estate of Spencer, 96 Cal. 448; 31 Pac. 453; Estate of Smith, 98 Cal. 636; 33 Pac. 744; Hartmann v. Smith, 140 Cal. 461; 74 Pac. 7. An order granting a motion to dismiss proceedings on motion for a new trial is appealable (Kokole v. Superior Court, 17 Cal. App. 454; 120 Pac. 67); as is also an order dismissing a motion for a new trial for want of prosecution, as that amounts to a denial of it. Voll v. Hollis, 60 Cal. 569. An order refusing to dismiss a motion for a new trial is not appealable: such order does not finally dispose of the motion itself (Griess v. State Investment etc. Co., 93 Cal. 411; 28 Pac. 1041); nor is an order denying a motion for a new trial in an action for divorce appealable, where there was no trial upon issues of fact, and judgment was entered for want of an answer: in such case there is no office to be subserved by a new trial. Foley v. Foley, 120 Cal. 33; 65 Am. St. Rep. 147; 52 Pac. 122. An appeal by the plaintiff may be presented with an appeal by the defendants from an order denying their motion for a new trial. Blood v. Munn, 155 Cal. 228; 100 Pac. 694. An appeal from an order denying a new trial, taken within proper time, may be considered, though the appeal from the judgment was not taken in time. Chase v. Holmes, 19 Cal. App. 670; 127 Pac. 652. Where the appeal from the judgment was taken more than six months after its entry, that appeal may be dismissed, and the review must be limited to the appeal from the order denying a new trial. Breidenbach v. McCormick Co., 20 Cal. App. 184; 128 Pac. 423.

Review, where no abuse of discretion shown. A general order granting a new trial to the plaintiff will not be disturbed upon appeal, if there is any ground upon which the court could reasonably, in the exercise of a proper discretion, have granted a new trial. Pollitz v. Wickersham, 150 Cal. 238; 88 Pac. 911; Witter v. Redwine, 14 Cal. App. 393; 112 Pac. 311; Hughes v. Rawhide Gold Mining Co., 16 Cal. App. 293; 116 Pac. 969; Shea-Bocqueraz Co. v. Hartman, 20 Cal. App. 534; 129 Pac. 807. Where there is a substantial conflict of evidence, the granting of a new trial upon the ground of the insufficiency of the evidence is conclusive upon the appellate court, in the absence of a showing that the action of the trial court was an abuse of discretion. McCarthy v. Morris, 17 Cal. App. 723; 121 Pac. 696. The action of the trial court in granting or denying a new trial will not be disturbed upon appeal, where no abuse of discretion is shown. Serpiglio v. Downing, 14 Cal. App. 683; 112 Pac. 905. The trial court has a discretion in granting or denying a new trial on the ground of newly discovered evidence, and such discretion, unless a clear abuse thereof is shown, will not be disturbed upon appeal. Rockwell v. Italian-Swiss Colony, 10 Cal. App. 633; 103 Pac. 162; Smith v. Hyer, 11 Cal. App. 597; 105 Pac. 787; Foley v. Northern California Power Co., 14 Cal. App. 401; 112 Pac. 467; Serpiglio v. Downing, 14 Cal. App. 683; 112 Pac. 905; Union Lumber Co. v. Webster, 15 Cal. App. 165; 113 Pac. 891; Spencer v. Clarke, 15 Cal. App. 512; 115 Pac. 248; Estate of Doolittle, 153 Cal. 29; 94 Pac. 240; Estate of Dolbeer, 153 Cal. 652; 15 Ann. Cas. 207; 96 Pac. 266; People v. Bennett, 161 Cal. 214; 118 Pac. 710; People v. Selby Smelting etc. Co., 163 Cal. 84; Ann. Cas. 1913E, 1267; 124 Pac. 692. The action of the trial court in granting or denying a new trial for insufficiency of the evidence to support the verdict or to justify the decision, will not be disturbed upon appeal, where no abuse of discretion appears. Estate of Everts, 163 Cal. 449; 125 Pac. 1058; Shea-Bocqueraz Co. v. Hartman, 20 Cal. App. 534; 129 Pac. 807; Walker v. Beaumont Land etc. Co., 15 Cal. App. 726; 115 Pac. 766; Webster v. Suiter, 15 Cal. App. 390; 114 Pac. 1007; Colon v. Tosetti, 14 Cal. App. 693; 113 Pac. 366; Brown v. Northern California Power Co., 14 Cal. App. 661; 114 Pac. 54; Witter v. Redwine, 14 Cal. App. 393; 112 Pac. 311. Although there may be some conflict in the testimony, yet it is the duty of the trial court to grant a new trial on the ground of insufficiency of the evidence, whenever the judge is convinced that the verdict is clearly against the weight of the evidence; and his action in that regard will not be disturbed, unless an abuse of discretion is shown. Weisser v. Southern Pacific Ry. Co., 148 Cal. 426; 7 Ann. Cas. 636; 83 Pac. 439.

Order granting new trial. Contents. Any limitation of an order granting a new trial, to be effectual, must be specified in the order itself. Classen v. Thomas, 164 Cal. 196; 128 Pac. 329; Weisser v. Southern Pacific Ry. Co., 148 Cal. 426; 7 Ann. Cas. 636; 83 Pac. 439.

Necessity of application for. On appeal from an order granting a new trial, the appellant's objection, that the order was made without an application therefor by respondent, is untenable, where the record shows that a hearing was had, with counsel for both parties present, and that the court ordered a new trial. Hovey v. Thorp, 17 Cal. App. 677; 121 Pac. 303.

Should be sustained when. On appeal from an order granting a new trial, it is the duty of the appellate court to sustain the order, if it can be upheld upon any ground embodied in the notice of intention. Shea-Bocqueraz Co. v. Hartman, 20 Cal. App. 534; 129 Pac. 807.

Effect of order. Where the plaintiff, in an action for personal injuries, obtains judgment for damages, prior to his death, proceedings to obtain a new trial operate merely to suspend the judgment until the final disposition of the motion; if the motion is finally denied, the judgment for damages will stand. Fowden v. Pacific Coast S. S. Co., 149 Cal. 151; 86 Pac. 178.

Notice of order. One appealing from an order denying a new trial is not entitled to notice of the entry of the order: he must take notice and inform himself thereof. Bell v. Staacke, 148 Cal. 404; 83 Pac. 245.

When service of notice necessary. The time for the doing of an act, or the taking of a step in a proceeding in court, begins to run from the service of a notice, only in cases where, by some law or rule of court, it is so provided. Bell v. Staacke, 148 Cal. 404; 83 Pac. 245.

Service of notice of motion for new trial. A failure to serve the notice of motion for a new trial on an adverse party necessitates a denial of the motion, and, on appeal, an affirmance of the order denying such motion. Johnson v. Phenix Insurance Co., 152 Cal. 196; 92 Pac. 182; National Bank v. Mulford, 17 Cal. App. 551; 120 Pac. 446.

Review of order, when no bill presented. An order denying a new trial must be affirmed on appeal, where no statement was settled upon the motion for a new trial. De Mitchell v. Croake, 20 Cal. App. 643; 129 Pac. 946. Where there is no settled statement or bill of exceptions to be used upon a motion for a new trial, the order denying a new trial must be affirmed upon appeal therefrom. Machado v. Kinney, 135 Cal. 354; 67 Pac. 331. Error in refusing to settle a proposed statement to be used on motion for a new trial cannot be taken advantage of by an appeal from the order denying the motion: the proper remedy is a proceeding to compel the settlement.

Estudillo v. Security Loan etc. Co., 158 Cal. 66; 109 Pac. 881. The incorporation, in a bill of exceptions, of an unsettled proposed statement, does not entitle it to consideration, on appeal, as a statement in support of the motion for a new trial. De Mitchell v. Croake, 20 Cal. App. 643; 129 Pac. 946. A preliminary objection to the hearing of an appeal from an order denying a new trial, that the bill of exceptions was not presented in time, is without merit. Bollinger v. Bollinger, 153 Cal. 190; 94 Pac. 770. Where the record on appeal from an order denying a new trial contains no bill of exceptions or statement of the case settled and signed by the judge who tried the case, the error cannot be reviewed on appeal. Pereira v. City Savings Bank, 128 Cal. 45; 60 Pac. 524. Upon appeal from an order refusing a new trial, alleged errors of law committed at the trial cannot be reviewed, where the bill of exceptions fails to indicate any ruling of the court, or any exception made in behalf of the appellant (Smith v. Smith, 163 Cal. 630; 126 Pac. 475); nor can an alleged error in excluding depositions be considered, where such depositions are not incorporated in the bill of exceptions, and the record shows no error in the ruling (Oldershaw v. Matteson & Williamson Mfg. Co., 19 Cal. App. 180; 125 Pac. 263); nor can unauthenticated affidavits, charging misconduct of the respondent, be considered, where they are not incorporated in a bill of exceptions (Cook v. Suburban Realty Co., 20 Cal. App. 538; 129 Pac. 801); nor can the ground of newly discovered evidence be reviewed, when the affidavits showing the same are not referred to nor included in the authenticated bill of exceptions. Schroeder v. Mauzy, 16 Cal. App. 443; 118 Pac. 459; West v. Mears, 17 Cal. App. 718; 121 Pac. 700. Unauthenticated affidavits cannot be considered on appeal from an order refusing to vacate a judgment and to grant a new trial. Estate of Dean, 149 Cal. 487; 87 Pac. 13. An order granting a new trial, based upon a bill of exceptions, should be affirmed, if the bill can properly be considered, and justifies the order; otherwise the order should be reversed. Pollitz v. Wickersham, 150 Cal. 238; 88 Pac. 911. A statement on appeal cannot be annexed to an order granting or refusing a new trial. Quivey v. Gambert, 32 Cal. 304.

Effect of appeal. An appeal from an order denying a new trial deprives the superior court of jurisdiction to set aside such order. Merced Bank v. Price, 152 Cal. 697; 93 Pac. 866.

Review limited to grounds and record of trial court. An order denying a new trial cannot be reviewed, if the settled statement used upon the hearing of the motion fails to show the motion itself, or the grounds upon which the defendant relied for a new trial. Carver v. San Joaquin Cigar Co., 16 Cal. App. 761; 118 Pac. 92. Upon appeal from an order denying a new trial, the appellate court is limited, in its review, to the grounds upon which the lower court was authorized to grant or deny a new trial, and cannot review the sufficiency of the pleadings or findings to support the judgment, nor consider any errors in the conclusions of law or in the judgment. Swift v. Occidental Mining etc. Co., 141 Cal. 161; 74 Pac. 700; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Stockton Iron Works v. Walters, 18 Cal. App. 373; 123 Pac. 240; Sebring v. Harris, 20 Cal. App. 56; 128 Pac. 7. Even though the order granting a new trial declares that the motion is granted for one or more reasons only, the appellate court is not precluded from considering any other assigned ground upon which the motion should have been granted, subject only to the limitation that the trial court may restrict the order granting the motion, so as to exclude, as a ground of its action, the insufficiency of the evidence; but such exclusion, to be effectual, must be declared in the order itself. Briggs v. Hall, 20 Cal. App. 372; 129 Pac. 288. The appellate court, in reviewing an order granting a new trial, is not limited to the grounds expressly stated in the order, but will affirm the order, if it was correctly made, upon any ground upon which the motion was based, except upon the single question as to the sufficiency of the evidence, where it is conflicting. Thompson v. California Construction Co., 148 Cal. 35; 82 Pac. 367; Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411; 95 Pac. 1029; Brett v. Frank, 153 Cal. 267; 94 Pac. 1051. The action of the trial court in limiting the ground for granting a new trial, does not restrict the appellate court in examining the record to ascertain any other ground for granting a new trial, except the sufficiency of the evidence, where it is conflicting. Weisser v. Southern Pacific Ry. Co., 148 Cal. 426; 7 Ann. Cas. 636; 83 Pac. 439. The appellate court is precluded from considering the defendant's appeal from an order denying his motion for a new trial, where the statement of the case, as settled by the trial judge, does not show the motion or the grounds therefor, but, on his appeal from the judgment, the court may review alleged errors of law occurring at the trial, upon the statement of the case used upon the motion for a new trial and found in the record. Carver v. San Joaquin Cigar Co., 16 Cal. App. 761; 118 Pac. 92. An order granting or refusing a new trial can be reviewed only on the record made and settled before the order was made. Quivey v. Gambert, 32 Cal. 304; Merced Bank v. Price, 152 Cal. 697; 93 Pac. 866. Upon an appeal from an order denying a new trial, the scope of the inquiry is limited to the order appealed from, and the judgment roll and the affidavits or bill of exceptions or statement used on the hear-

ing (Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418); and where the record does not contain the notice of intention, nor show the grounds of the motion or order, neither the evidence nor the order itself can be reviewed thereon (Morcom v. Baiersky, 16 Cal. App. 480; 117 Pac. 560); nor can an affidavit, not shown to have been used on the motion for a new trial, be considered, though it states good grounds for a new trial. Broads v. Mead, 159 Cal. 765; Ann. Cas. 1912C, 1125; 116 Pac. 46.

Record on new trial. See also note ante, § 952.

Sufficiency of evidence to sustain findings. Whether the findings are supported by the evidence may be reviewed on an appeal from an order denying a motion for a new trial. Suisun Lumber Co. v. Fairfield School District, 19 Cal. App. 587; 127 Pac. 349. On appeal from an order denying a new trial, the sufficiency of the evidence to sustain the findings is reviewable, but the findings cannot be examined to determine whether they support the judgment: that question may be considered only on appeal from the judgment. Bennett v. Potter, 16 Cal. App. 183; 116 Pac. 681; and see Foster v. Butler, 164 Cal. 623; 130 Pac. 6. The right of the appellants to have the sufficiency of the evidence to sustain the findings reviewed, upon appeal from an order denying a new trial, is not affected by the fact that the appeal was not taken within sixty days, nor by their failure to move, under §§ 663, 663a, ante, to set the judgment aside. J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581; 16 Ann. Cas. 1165; 21 L. R. A. (N. S.) 550; 98 Pac. 1027.

Review of evidence. The sufficiency of the evidence to support a finding cannot be reviewed upon appeal from an order denying a new trial, in the absence of specifications of insufficiency, as prescribed in § 648, ante. Layne v. Johnson, 19 Cal. App. 95; 124 Pac. 860. Although the record on appeal fails to contain a copy of the notice of intention to move for a new trial, yet the evidence may be reviewed on appeal from an order refusing a new trial, where the record does contain a bill of exceptions in which the insufficiency of the evidence to sustain the findings is specified. Dennis v. Gordon, 163 Cal. 427; 125 Pac. 1063. Where the bill of exceptions does not specify, either generally or specially, the particulars wherein the evidence is insufficient, its insufficiency cannot be reviewed upon appeal from the order denying a new trial. First National Bank v. Trognitz, 14 Cal. App. 176; 111 Pac. 402.

Conflicting evidence. The supreme court will not disturb the ruling of the trial court, on a motion for a new trial, upon the ground of insufficiency of the evidence, where the evidence is conflicting. Fowden v. Pacific Coast S. S. Co., 149 Cal. 151; 86 Pac. 178. It is the duty of a trial judge to grant a new trial if he is not satisfied with the verdict, in a case tried by a jury, or with the findings, if tried by the court: he is not bound by the rule as to conflicting evidence, as is the supreme court. Pollitz v. Wickersham, 150 Cal. 238; 88 Pac. 911. Where there is any appreciable conflict in the evidence, an order granting a new trial for insufficiency of the evidence to sustain the verdict is not reviewable. Harloe v. Berwick, 7 Cal. Unrep. 58; 70 Pac. 1060. The action of the trial court in granting a new trial upon the ground that the evidence is insufficient to justify the decision, is not open for review on appeal, if there is any appreciable conflict in the evidence. Hughes Bros. v. Rawhide Gold Mining Co., 16 Cal. App. 296; 116 Pac. 969; Briggs v. Hall, 20 Cal. App. 372; 129 Pac. 288. An order granting a new trial will not be disturbed upon appeal, where insufficiency of the evidence to justify the decision is one of the grounds specified in the notice of intention, and where the record upon appeal does not disclose whether or not the evidence was conflicting: it is only where the evidence shows an uncontradicted state of facts in favor of a party to an action that a question of law arises, which an appellate court may consider. McCann v. McCann, 20 Cal. App. 567; 129 Pac. 965.

Objection to evidence. An objection to evidence, on the ground that the complaint does not state a cause of action, cannot be reviewed upon appeal from an order denying a new trial. Spaeth v. Ocean Park Realty etc. Co., 16 Cal. App. 329; 116 Pac. 980.

Review of errors, verdict, and decision. Only upon an appeal from the judgment can the court consider errors apparent upon the judgment roll, or review the verdict or decision, if excepted to, or errors assigned on a statement on appeal: such matters cannot be considered upon an appeal from an order denying a new trial. Thompson v. Patterson, 54 Cal. 542. Error in overruling a motion for a new trial, made on the ground that the decision was one "against law," may be reviewed on appeal from the order. Great Western Gold Co. v. Chambers, 153 Cal. 307; 95 Pac. 151. The failure of the trial court to make a finding of fact upon a material issue renders the decision one "against law," and error in overruling a motion for a new trial, made on that ground, may be reviewed on appeal from the order. Great Western Gold Co. v. Chambers, 153 Cal. 310; 95 Pac. 151; Lyden v. Spohn-Patrick Co., 155 Cal. 177; 100 Pac. 236; Cargnani v. Cargnani, 16 Cal. App. 96; 116 Pac. 306. A verdict or other decision of fact may be reviewed upon an appeal from an order denying a motion for a new trial. Schroeder v. Mauzy, 16 Cal. App. 443; 118 Pac. 459.

Regarding pleadings. An order directing that a complaint be made more definite

and certain is not appealable. McFarland v. Holcomb, 123 Cal. 84; 55 Pac. 761. No appeal lies from an order sustaining or overruling a demurrer. Wood v. Missouri Pacific Ry. Co., 152 Cal. 344; 92 Pac. 868; Foster v. Bowles, 138 Cal. 449; 71 Pac. 495; Hanke v. McLaughlin, 20 Cal. App. 204; 128 Pac. 772; Hadsall v. Case, 15 Cal. App. 541; 115 Pac. 330; Kinard v. Jordan, 10 Cal. App. 219; 101 Pac. 696; Litch v. Kerns, 8 Cal. App. 747; 97 Pac. 897.

Regarding amendments. An order amending an order dismissing a complaint in interpleader, limiting such dismissal to the defendants who demurred to such complaint, is appealable. Kaufman v. Superior Court, 108 Cal. 446; 41 Pac. 476; and see Livermore v. Campbell, 52 Cal. 75. An order denying a motion to amend the minutes of the trial court, after judgment, is not subject to review by the ordinary process of appeal. Griess v. State Investment etc. Co., 93 Cal. 411; 28 Pac. 1041.

Of pleadings, findings, and conclusions of law. On appeal from an order denying a motion for a new trial, no question as to the sufficiency of the pleadings or findings can be reviewed: such questions are reviewable only on an appeal from the judgment. Estate of Keating, 162 Cal. 406; 122 Pac. 1079; Shaw v. Shaw, 160 Cal. 733; 117 Pac. 1048; Arroyo Ditch etc. Co. v. Baldwin, 155 Cal. 280; 100 Pac. 14; Quist v. Sandman, 154 Cal. 748; 99 Pac. 204; Crescent Feather Co. v. United Upholsterers Union, 153 Cal. 434; 95 Pac. 871; Great Western Gold Co. v. Chambers, 153 Cal. 307; 95 Pac. 151; Kaiser v. Dalto, 140 Cal. 167; 73 Pac. 828; Sebring v. Harris, 20 Cal. App. 56; 128 Pac. 7; Clark v. Torchiana, 19 Cal. App. 786; 127 Pac. 831; Stockton Iron Works v. Walters, 18 Cal. App. 373; 123 Pac. 240; Schroeder v. Mauzy, 16 Cal. App. 443; 118 Pac. 459; Spaeth v. Ocean Park Realty etc. Co., 16 Cal. App. 329; 116 Pac. 980; Bennett v. Potter, 16 Cal. App. 183; 116 Pac. 681. It cannot be urged, upon reviewing an order denying a new trial, that any of the findings made upon sufficient evidence are outside of the issues pleaded. Schroeder v. Mauzy, 16 Cal. App. 443; 118 Pac. 459. That the court has erroneously applied the law to the facts, or has drawn the wrong conclusion of law from the facts found, may be reviewed only upon an appeal from the judgment: such matters cannot be considered on appeal from an order denying a new trial. Estate of Doyle, 73 Cal. 564; 15 Pac. 125; Swift v. Occidental Mining etc. Co., 141 Cal. 161; 74 Pac. 700; Quist v. Sandman, 154 Cal. 748; 99 Pac. 204. Conclusions of law are superseded by the judgment, and cannot be reviewed on appeal from an order denying a new trial: they are reviewable only on appeal from the judgment or from an order made under §§ 663, 663a, ante. Mentone Irrigation Co. v. Redlands Electric Light etc. Co., 155 Cal. 323; 22 L. R. A. (N. S.) 382; 17 Ann. Cas. 1222; 100 Pac. 1082; Elizalde v. Murphy, 11 Cal. App. 32; 103 Pac. 904.

Of order striking out. An order striking out amended affidavits, filed upon a motion for a new trial, may be reviewed upon an appeal from an order denying the motion. Melde v. Reynolds, 120 Cal. 234; 52 Pac. 491. Orders striking out pleadings can be reviewed only on appeal from the judgment: they are not reviewable on appeal from an order denying a motion for a new trial. Stockton Iron Works v. Walters, 18 Cal. App. 373; 123 Pac. 240. On appeal taken only from an order denying a new trial, an order striking out an amendment to the answer cannot be reviewed: it can be reviewed only upon an appeal from the judgment. Reclamation District v. Hershey, 160 Cal. 692; 117 Pac. 904.

Refusing to vacate appealable order. An order refusing to vacate an unappealable order is not appealable. Harper v. Hildreth, 99 Cal. 265; 33 Pac. 1103; and see Estate of Keane, 56 Cal. 407. Thus, an order refusing to set aside an order refusing to transfer a cause to a Federal court is not appealable. Tripp v. Santa Rosa Street R. R., 69 Cal. 631; 11 Pac. 219. An order dismissing an action as to certain defendants, an order denying leave to file an amended and supplemental complaint, and an order denying a motion to introduce certain evidence, are not appealable; therefore orders denying motions to vacate these orders are not appealable. Harper v. Hildreth, 99 Cal. 265; 33 Pac. 1103. An order denying a motion to vacate an order that is itself appealable is not appealable (Harper v. Hildreth, 99 Cal. 265; 33 Pac. 1103; and see Holmes v. McCleary, 63 Cal. 497; Tripp v. Santa Rosa Street R. R., 69 Cal. 631; 11 Pac. 219; Eureka etc. R. R. Co. v. McGrath, 74 Cal. 49; 15 Pac. 360; Larkin v. Larkin, 76 Cal. 323; 18 Pac. 396; Goyhineeh v. Goyhineeh, 80 Cal. 409; 22 Pac. 175; Deering v. Richardson-Kimball Co., 109 Cal. 73; 41 Pac. 801), unless the record presents matters for consideration that could not be presented upon the appeal from the original order or judgment. Bell v. Solomons, 162 Cal. 105; 121 Pac. 377. Thus, an order denying a motion to vacate an order denying the petition of an executor for the allowance of compensation for extraordinary services, and to restore the cause to the calendar, is not appealable (Estate of Walkerly, 94 Cal. 352; 29 Pac. 719); nor is an order refusing to set aside an order granting a writ of assistance appealable (Davis v. Donner, 82 Cal. 35; 22 Pac. 879); nor an order refusing to revoke an order appointing a guardian of a minor (Guardianship of Get Young, 90 Cal. 77; 27 Pac. 158); nor an order denying a motion to set aside an ap-

pealable order that does not present any features not before the court when it exercised its judgment upon the original matter (Deering v. Richardson-Kimball Co., 109 Cal. 73; 41 Pac. 801); nor an order refusing to vacate a prior order or judgment, where the order does not present any facts other than those presented on appeal from the judgment itself (Kent v. Williams, 146 Cal. 3; 79 Pac. 527); nor an order denying an application to vacate an order substituting a person as plaintiff (Grant v. Los Angeles etc. Ry. Co., 116 Cal. 71; 47 Pac. 872); nor an order refusing to vacate a prior order refusing to vacate a judgment, or denying a motion for a new trial. Doyle v. Republic Life Ins. Co., 125 Cal. 15; 57 Pac. 667. An order refusing to set aside an order dismissing an action as to certain defendants is not appealable: such order of dismissal is a final judgment when entered, and is itself appealable. Tripp v. Santa Rosa Street R. R., 69 Cal. 631; 11 Pac. 219; Gates v. Walker, 35 Cal. 289. An appeal lies from an order striking out a statement on motion for a new trial (Calderwood v. Peyser, 42 Cal. 110; Clark v. Crane, 57 Cal. 629); hence, that being an appealable order, no appeal lies from an order refusing to vacate an order striking such a statement from the files. Symons v. Bunnell, 101 Cal. 223; 35 Pac. 770.

Overruling exceptions. An order overruling exceptions to a referee's report is not appealable. Peck v. Courtis, 31 Cal. 207.

Of refusal to settle statement. The refusal of the court to settle the statement on motion for a new trial cannot be reviewed upon an appeal from the judgment, and from an order denying a new trial: the remedy therefor is by mandamus. Machado v. Kinney, 135 Cal. 354; 67 Pac. 331; Hartmann v. Smith, 140 Cal. 461; 74 Pac. 7.

Of misconduct of district attorney. The misconduct of a district attorney cannot be regarded on a motion for a new trial: it can be reviewed only on an appeal from the judgment. People v. Pang Sui Lin, 15 Cal. App. 260; 114 Pac. 582.

Affirmance of order. An appeal from an order denying an improper motion for a new trial will not be dismissed: the proper course is to affirm the order. Quist v. Sandman, 154 Cal. 748; 99 Pac. 204. Though an order granting a new trial does not specify the particular ground upon which it was based, yet it must be affirmed upon appeal, if there is any ground upon which it can be sustained. Witter v. Redwine, 14 Cal. App. 393; 112 Pac. 311; Petaluma v. White, 152 Cal. 192; 92 Pac. 177; Webster v. Suiter, 15 Cal. App. 390; 114 Pac. 1007; Pollitz v. Wickersham, 150 Cal. 238; 88 Pac. 911.

Reversal of order. The appellate court will not disturb the action of the trial court in denying a motion for a new trial, if, upon any hypothesis, it can be sustained. Union Lumber Co. v. Webster, 15 Cal. App. 165; 113 Pac. 891. Where a new trial was properly denied as to some issues, and erroneously as to others, the order should be reversed only so far as may be necessary to correct error in the order, where the issues are entirely separate. Robinson v. Muir, 151 Cal. 118; 90 Pac. 521. Upon a proper appeal from an order denying a new trial, where the grounds of the motion are insufficiency of the evidence to justify the decision, and that the decision is against law, the order will be reversed, where the decision is against the effect of the evidence. McGorray v. Stockton Sav. & L. Soc., 131 Cal. 321; 63 Pac. 479. A failure to find upon the defendant's plea of estoppel, where there is substantial evidence to support it, is reversible error, justifying a new trial. Banning v. Kreiter, 153 Cal. 33; 94 Pac. 246.

Order regarding injunction. An order granting an injunction is appealable (Sullivan v. Triunfo Gold etc. Mining Co., 33 Cal. 385; Golden Gate etc. Mining Co. v. Superior Court, 65 Cal. 187; 3 Pac. 628); and such order, made without due notice of the application therefor, cannot be annulled in a proceeding for a writ of review (Golden Gate etc. Mining Co. v. Superior Court, 65 Cal. 187; 3 Pac. 628); and an order refusing to dissolve an injunction is also appealable (Neumann v. Moretti, 146 Cal. 31; 79 Pac. 512; Tehama County v. Sisson, 152 Cal. 179; 92 Pac. 64); but the rule was otherwise under the Practice Act. Allender v. Fritts, 24 Cal. 447. An order striking out the mandatory portion of a preliminary injunction is appealable (Wolf v. Board of Supervisors, 143 Cal. 333; 76 Pac. 1108); but an order refusing to restrain a sheriff from executing a writ of assistance is not appealable (Pignaz v. Burnett, 119 Cal. 157; 51 Pac. 48); nor is a mere declaratory order, signed by a judge, not purporting to vacate or dissolve an injunction, but merely declaring that the injunction is no longer in force, which order was not filed with the clerk, nor intended to be entered in the minutes of the court (Devlin v. Rydberg, 132 Cal. 324; 64 Pac. 396); nor is the refusal of an application for an order to show cause why an injunction should not issue: it is not an order refusing to grant an injunction. Grant v. Johnston, 45 Cal. 243.

Regarding receivers. An appeal lies from an order appointing a receiver (First Nat. Bank v. Superior Court, 12 Cal. App. 335; 107 Pac. 322); though it was otherwise under the former statute. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. While a direct appeal may be taken from an order appointing a receiver, yet the statute does not allow an appeal from an order refusing to vacate the appointment of a receiver. Title Insurance etc. Co. v. Cali-

fornia Development Co., 159 Cal. 484; 114 Pac. 838. An order made pending suit, authorizing a receiver, appointed to take charge of and work the property involved in such suit, is not appealable (Free Gold Mining Co. v. Spiers, 135 Cal. 130; 67 Pac. 61), nor is an order, made before final judgment, approving the account of a receiver. Rochat v. Gee, 91 Cal. 355; 27 Pac. 670.

Mandamus, where order appealable. An order dismissing a petition to restore to legal capacity one adjudged insane by the superior court of another county, is appealable; and mandamus does not lie to compel the court to consider such application. Aldrich v. Superior Court, 135 Cal. 12; 66 Pac. 846.

Regarding attachment. Under the Practice Act, an appeal did not lie from an order refusing to dissolve an attachment. (Allender v. Fritts, 24 Cal. 447); but an appeal now lies from an order dissolving an attachment (Kennedy v. Merickel, 8 Cal. App. 378; 97 Pac. 81), and from an order refusing to dissolve an attachment; hence, irregularities in an attachment, merely as to its inception or form, must be considered on direct appeal from the order refusing to dissolve the attachment, and not on appeal from the judgment. Mudge v. Steinhart, 78 Cal. 34; 12 Am. St. Rep. 17; 20 Pac. 147. The term "an attachment," as used in this section, is broad enough to include seizure and custody under the writ, as well as the writ itself; therefore an order discharging a writ of attachment in respect to particular property claimed not to be liable to seizure under the writ is, in effect, an order dissolving the attachment as to such property, and is appealable. Risdon Iron etc. Works v. Citizens' Traction Co., 122 Cal. 94; 68 Am. St. Rep. 25; 54 Pac. 529.

Regarding place of trial. An order changing the place of trial is appealable (Chase v. Superior Court, 154 Cal. 789; 99 Pac. 355); as is also an order denying a motion for a change of the place of trial. Bohn v. Bohn, 164 Cal. 532; 129 Pac. 981.

Refusing transfer of cause. An order refusing to transfer a cause to a Federal court is not appealable. Hopper v. Kalkman, 17 Cal. 517.

On motion to strike out. An order striking a statement from the files is appealable as a special order made after judgment (Symons v. Bunnell, 101 Cal. 223; 35 Pac. 770); as is also an order striking from the files an undertaking to stay execution, and directing the sheriff to pay the moneys collected under the garnishment in satisfaction of the judgment (Southern California Ry. Co. v. Superior Court, 127 Cal. 417; 59 Pac. 789); and a special order reducing the amount of the judgment by striking out the costs therefrom (Elledge v. Superior Court, 131 Cal. 279; 63 Pac. 360); and an order striking out competent affidavits used upon a motion for a new trial (Gay v. Torrance, 145 Cal. 144; 78 Pac. 540); but an order striking from the files amended affidavits filed in support of a motion for a new trial, after it had been made, and while it was pending, is not appealable (Melde v. Reynolds, 120 Cal. 234; 52 Pac. 491); nor is an order made on a motion to strike out portions of a pleading (Wood v. Missouri Pacific Ry. Co., 152 Cal. 344; 92 Pac. 868); nor an order directing the striking out of the complaint, or a part thereof (Clifford v. Allman, 84 Cal. 528; 24 Pac. 292; Swain v. Burnette, 76 Cal. 299; 18 Pac. 394); nor are rulings, made during the trial, refusing to strike out testimony. Leavens v. Pinkham, 164 Cal. 242; 128 Pac. 399.

Order modifying judgment. An order of the trial court, modifying a judgment in accordance with the directions of the supreme court, made on a prior appeal, and also the judgment as modified, is appealable (Randall v. Duff, 104 Cal. 126; 43 Am. St. Rep. 79; 37 Pac. 803); as is also an order denying a motion to correct a judgment, or the file-mark thereon, where an appeal upon the judgment roll would not present all the facts upon which the motion is based. Tuffree v. Stearns Ranchos Co., 6 Cal. Unrep. 134; 54 Pac. 826. An order denying a motion for a different judgment upon the findings is a special order made after final judgment, and appealable (Rahmel v. Lehndorff, 142 Cal. 681; 100 Am. St. Rep. 154; 65 L. R. A. 88; 76 Pac. 659); but otherwise as to an order adding to the judgment a provision requiring the plaintiff to pay the guardian ad litem of a minor defendant the sum of two hundred dollars for his services as such: such portion of the judgment, being merely for costs or expenses taxable against the defendant, and not amounting to three hundred dollars, is insufficient to confer jurisdiction on the supreme court. Aronson v. Levison, 148 Cal. 364; 83 Pac. 154.

Regarding bill of exceptions or statement. An order refusing to settle a bill of exceptions, and refusing to relieve the party presenting it from an objection that it was not served in due season, on the ground of mistake, inadvertence, surprise, and excusable neglect, is appealable. Stonesifer v. Kilburn, 94 Cal. 33; 29 Pac. 332. An order denying a motion to settle a statement on motion for a new trial is a special order made after judgment, and appealable (Clark v. Crane, 57 Cal. 629); but an order relieving a party moving for a new trial from his failure to present his bill of exceptions for settlement within the time required by law, upon the ground that such failure was excusable, and owing to inadvertence, is not appealable, as it is not a special order made after final judg-

ment, within the meaning of the second subdivision of this section, although it was made subsequently to the entry of judgment (Kaltschmidt v. Weber, 136 Cal. 675; 69 Pac. 497); nor is the certificate of a judge, settling an engrossed statement on motion for a new trial, an appealable order (Henry v. Merguire, 106 Cal. 142; 39 Pac. 599; but see Stonesifer v. Kilburn, 94 Cal. 33; 29 Pac. 332); nor is an order permitting the amendment of a statement on motion for a new trial in a contest over the probate of a will, appealable. Estate of Smith, 98 Cal. 636; 33 Pac. 744. An order striking a statement on motion for a new trial from the files is a special order made after final judgment, and appealable. Calderwood v. Peyser, 42 Cal. 110; Kimball v. Semple, 31 Cal. 657; Morris v. De Celis, 41 Cal. 331; Dooly v. Norton, 41 Cal. 439; but see Quivey v. Gambert, 32 Cal. 304; Leffingwell v. Griffing, 29 Cal. 192; Ketchum v. Crippen, 31 Cal. 365. An order refusing to strike out a statement on motion for a new trial is not a special order made after judgment, but an interlocutory order in the proceedings to obtain a new trial, and is in a different line of proceeding, in which the order granting or refusing a new trial is the final and appealable order; therefore it is not appealable. Ketchum v. Crippen, 31 Cal. 365.

Interlocutory judgments, orders, and decrees. An interlocutory decree, not intended to be an ultimate adjudication of the merits, is not a final decree. Doudell v. Shoo. 159 Cal. 448; 114 Pac. 579. No appeal lies from an interlocutory order, unless it is designated by statute as one of those from which an appeal may be taken. Title Insurance etc. Co. v. California Development Co., 159 Cal. 484; 114 Pac. 838. An interlocutory decree, in cases other than those prescribed by statute, is not appealable, but will be reviewed on appeal from the final decree. Watson v. Sutro, 77 Cal. 609; 20 Pac. 88. In a proceeding in partition, an interlocutory decree is indispensable definitely to ascertain and determine the rights of the parties. Lorenz v. Jacobs, 53 Cal. 24. In an action to have a trust declared in real property, alleged to have been fraudulently conveyed, an interlocutory judgment is not appealable (Duff v. Duff, 71 Cal. 513; 12 Pac. 570); nor in an action to compel the conveyance of real property (Kofoed v. Gordon, 122 Cal. 314; 54 Pac. 1115); nor does an appeal lie from an interlocutory decree for an accounting, in an action to enforce a constructive trust (Grey v. Brennan, 147 Cal. 355; 81 Pac. 1014); nor, in such an action, to subject a trust fund to the payment of a claim. Grey v. Brennan, 147 Cal. 355; 81 Pac. 1014.

In actions for divorce. A special order, made after final judgment, in favor of the plaintiff in an action for divorce, requiring the defendant to pay counsel fees and costs, to enable the plaintiff to contest the defendant's motion for a new trial, is appealable, the supreme court having appellate jurisdiction over all questions arising in an action for divorce, on the ground that it is a case in equity, regardless of the amount involved (Harron v. Harron, 123 Cal. 508; 56 Pac. 334); and an order directing a receiver of the property of the husband to sell it for the purpose of satisfying a judgment for alimony, is appealable; regardless of whether there is an excess of the jurisdiction of the court in making it, the remedy by appeal is conclusive of the right to review it upon certiorari (White v. Superior Court, 110 Cal. 54; 42 Pac. 471); and an order, pendente lite, directing the payment of alimony, is appealable. Sharon v. Sharon, 67 Cal. 185; 7 Pac. 456.

In partition. This section makes provision for an appeal from an interlocutory judgment in partition proceedings. Dore v. Klumpke, 140 Cal. 356; 73 Pac. 1064. An appeal from an interlocutory judgment in partition proceedings, under the second subdivision of this section, is only "from such interlocutory judgment as determines the rights and interests of the respective parties, and directs partition to be made," and not from an interlocutory decree directing the property to be sold and the proceeds distributed, which does not become final until the sale is confirmed, when an appeal may be had. Hammond v. Cailleaud, 111 Cal. 206; 52 Am. St. Rep. 167; 43 Pac. 607. An interlocutory decree in partition proceedings, finally determining the rights of the several parties, and directing a sale of the property, is appealable (Holt v. Holt, 131 Cal. 610; 63 Pac. 912; Barry v. Barry, 56 Cal. 10); and to be appealable, it must definitely ascertain the rights and interests of the parties in the subject-matter; therefore conclusions of law, which form the basis for such a decree, cannot be appealed from. Lorenz v. Jacobs, 53 Cal. 24; Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. An order confirming a sale in partition is conclusive upon the purchaser, if he fails to appeal. Hammond v. Cailleaud, 111 Cal. 206; 52 Am. St. Rep. 167; 43 Pac. 607. The interlocutory decree in partition, directing a sale, is to be regarded as a final judgment with respect to subsequent orders in aid of its execution; and a tenant in common in possession has the right to oppose the confirmation of the sale, and to review, on appeal, an order confirming such sale. Gordon v. Graham, 153 Cal. 297; 95 Pac. 145. An order vacating an order of reference and the proceedings subsequent thereto, in partition proceedings, was not appealable, under the former statute. Hastings v. Cunningham, 35 Cal. 549.

In condemnation proceedings. A final order of condemnation, made after the judgment awarding damages has been affirmed, adjudging that the damages and costs awarded to the defendants have been paid, or have been deposited in court, is a special order made after final judgment, and appealable. Los Angeles v. Pomeroy, 132 Cal. 340; 64 Pac. 477; Alameda v. Cohen, 133 Cal. 5; 65 Pac. 127; Sacramento etc. R. R. Co. v. Harlan, 24 Cal. 334.

In actions to redeem. It is not imperative upon the court, in all actions to redeem, to make an interlocutory order, so as to give the opportunity to appeal: the court, in its discretion, may make such an order, but it is not bound to do so. Smith v. Goethe, 147 Cal. 725; 82 Pac. 384.

Special orders made after final judgment. A special order, made after final judgment, is appealable (Bond v. United Railroads, 159 Cal. 270; Ann. Cas. 1912C, 50; 113 Pac. 366; Rogers v. Superior Court, 158 Cal. 467; 111 Pac. 357; Aronson v. Levison, 148 Cal. 364; 83 Pac. 154; Los Angeles v. Pomeroy, 132 Cal. 340; 64 Pac. 477; Holt v. James, 10 Cal. App. 360; 101 Pac. 1065; Magee v. Superior Court, 10 Cal. App. 154; 101 Pac. 532), without reference to any amount in value that may be involved in the order. Southern California Ry. Co. v. Superior Court, 127 Cal. 417; 59 Pac. 789. An appeal from an order that an original judgment be carried into execution is not an appeal from a judgment, but from an order made after final judgment. Weldon v. Rogers, 154 Cal. 632; 98 Pac. 1070. The provisions of the second subdivision of this section, relative to appeals from orders made after final judgment, are not applicable to probate proceedings. Estate of Wittmeier, 118 Cal. 255; 50 Pac. 393.

Regarding sales. An order, made after final judgment, authorizing the sale of perishable property, notwithstanding a stay of proceedings by virtue of an appeal, is appealable. Rogers v. Superior Court, 158 Cal. 467; 111 Pac. 357. An order, made after judgment, restraining the sale of property, pending an appeal, is appealable either as an order made after final judgment, or as an order granting an injunction. Stoddard v. Superior Court, 108 Cal. 303; 41 Pac. 278. An order refusing to confirm part of a sale in partition proceedings, in so far as it relates to a particular purchaser, is appealable as an order made after final judgment; and such purchaser is a party aggrieved, who is entitled to appeal from such order. Dunn v. Dunn, 137 Cal. 51; 69 Pac. 847; and see Hammond v. Cailleaud, 111 Cal. 206; 52 Am. St. Rep. 167; 43 Pac. 607.

Regarding deposits in court. An order directing that money, paid into court in satisfaction of a judgment, and claimed by a third party, be retained by the clerk until the determination of proceedings instituted to ascertain the right of the claimant to the money, is an order made after final judgment, and therefore appealable: it is not the subject of review by certiorari. Slavonic etc. Ass'n v. Superior Court, 65 Cal. 500; 4 Pac. 500.

Appeal from order made after final judgment. See also note ante, § 939.

Order made on motion to vacate judgment. No direct appeal lies from an order refusing a motion to dismiss an action, but, for error affecting the jurisdiction, for want of facts to support such order, a motion may be made to vacate the judgment rendered after trial, and the order made upon such motion is appealable, and reviewable upon a bill of exceptions, as an order made after judgment. Huntington Park Improvement Co. v. Superior Court, 17 Cal. App. 692; 121 Pac. 701.

Modifying or vacating judgments or orders. An order setting aside a judgment, entered by the clerk, even if only a judgment in form, and invalid, is appealable (Livermore v. Campbell, 52 Cal. 75); as is also an order refusing to set aside and vacate a judgment: it is a special order made after final judgment. McCourtney v. Fortune, 42 Cal. 387; Hibernia Sav. & L. Soc. v. Cochran, 6 Cal. Unrep. 821; 66 Pac. 732. An order refusing to set aside a judgment, where an appeal upon the judgment roll would not present all the facts upon which the motion is based, is appealable (De la Montanya v. De la Montanya, 112 Cal. 101; 53 Am. St. Rep. 165; 32 L. R. A. 82; 44 Pac. 345); as is also an order denying a motion made under §§ 663, 663a, ante, to vacate and set aside the judgment, as not supported by the findings (Taylor v. Darling, 19 Cal. App. 232; 125 Pac. 249); but an order refusing to set aside a judgment, on the ground that findings had not been waived, and there were no findings to support it, is not appealable (Gregory v. Gregory, 3 Cal. Unrep. 836; 32 Pac. 531); nor is an order refusing to set aside a judgment, on the ground that no findings or conclusions of law were filed, and that they were not waived, where such ground existed before the judgment was entered, and would have been reviewable upon an appeal from the judgment (Mantel v. Mantel, 135 Cal. 315; 67 Pac. 758); nor is an order refusing to set aside a judgment, and to enter a different judgment on the findings, appealable. Birch v. Cooper, 136 Cal. 636; 69 Pac. 420.

Regarding writs. Any error committed in issuing a writ of possession, or in a subsequent order refusing to set it aside, is reviewable upon appeal, and cannot be corrected by mandamus. Gutierrez v. Superior Court, 106 Cal. 171; 39 Pac. 530. An order refusing to quash an execution is a special order made after judgment, and appealable (Gilman v. Contra Costa County, 8 Cal. 52; 68 Am. Dec. 290); as is also an order re-

fusing a motion of persons in possession of lands sold under foreclosure of a mortgage, who were not notified of an ex parte order granting a writ of assistance to a purchaser at the sale, to restrain the sheriff from executing the writ; and the fact that the motion was, in effect, a motion to vacate the order granting the writ and to recall the writ, does not justify the dismissal of the appeal from the order refusing the motion. Pignaz v. Burnett, 119 Cal. 157; 51 Pac. 48. An order granting a writ of assistance is appealable. Davis v. Donner, 82 Cal. 35; 22 Pac. 879; Gordon v. Graham, 153 Cal. 297; 95 Pac. 145. A writ of prohibition to prevent an order directing payment from the estate of a decedent, on the ground that the statute under which the court is proceeding has been repealed, will not issue, since such order, if made, would be reviewable by appeal under the third subdivision of this section. Cross v. Superior Court, 2 Cal. App. 342; 83 Pac. 815. A judgment of the superior court granting or denying a writ of mandate is appealable (Knowles v. Thompson, 133 Cal. 245; 65 Pac. 468; Palache v. Hunt, 64 Cal. 473; 2 Pac. 245; Heinlen v. Phillips, 88 Cal. 557; 26 Pac. 366); as is also an order denying a writ of review. Beaumont v. Samson, 4 Cal. App. 701; 89 Pac. 137.

In probate. An order in probate proceedings, refusing compensation for extraordinary services by an executor, is not a special order made after final judgment and is not appealable (Estate of Walkerly, 94 Cal. 352; 29 Pac. 719); nor is an order of the probate court, refusing to quash an execution, appealable. Blum v. Brownstone, 50 Cal. 293. Neither an original order directing the place of interment of the body of a deceased person, nor an order refusing to vacate such order, is appealable. Estate of Seymour, 15 Cal. App. 287; 114 Pac. 1023. An order requiring a distributee to restore property received under a final decree of distribution is not appealable as a special order made after final judgment. Iversen v. Superior Court, 115 Cal. 27; 46 Pac. 817.

Jurisdiction of probate appeals. Appeals lie only in such probate matters as may be provided by statute (Estate of Hathaway, 111 Cal. 270; 43 Pac. 754; Estate of Winslow, 128 Cal. 311; 60 Pac. 931); and the only appealable orders in probate matters are those designated in this section. Estate of Edelman, 148 Cal. 233; 113 Am. St. Rep. 231; 82 Pac. 962; Estate of Walkerly, 94 Cal. 352; 29 Pac. 719; Estate of Bouyssou, 1 Cal. App. 657; 82 Pac. 1066. The third subdivision of this section is the only authority for an appeal in any probate matter (Estate of Seymour, 15 Cal. App. 287; 114 Pac. 1023): the second subdivision, relative to appeals from orders made after final judgment, is not applicable to probate proceedings. Estate of Wittmeier, 118 Cal. 255; 50 Pac. 393; Estate of Seymour, 15 Cal. App. 287; 114 Pac. 1023. Wherever an order or decree involves a construction of the proper exercise of the duties of a trustee or administrator, or presents a question as to his right or power to comply therewith, or wherever obedience thereto might subject him to liability, he may appeal. Estate of Welch, 106 Cal. 427; 39 Pac. 805. An order directing an administratrix to allow her name to be used by a creditor of the estate, in a suit to set aside a conveyance of the decedent as having been made to defraud his creditors, is not appealable (Estate of Ohm, 82 Cal. 160; 22 Pac. 927); nor is an order commanding the dismissal of an action brought against the executor of an estate, and directing the discharge of the administrator, upon the settlement of an account not yet filed. Estate of Bullock, 75 Cal. 419; 17 Pac. 540. A statement on appeal from a probate court must specify the particular errors or grounds upon which the appellant intends to rely. Estate of Boyd, 25 Cal. 511.

Order appointing administrator. An appeal may be taken from an order appointing an administrator. Estate of Davis, 151 Cal. 318; 121 Am. St. Rep. 105; 86 Pac. 183; 90 Pac. 711. A public administrator, who has applied for appointment as administrator, has a right to appeal from an adverse order appointing another administrator, and non-resident heirs may join in such appeal. Estate of Graves, 8 Cal. App. 254; 96 Pac. 972. The provision of the third subdivision of this section, that a judgment or order granting, refusing, or revoking letters testamentary or of administration, was directed toward orders appointing general administrators, and not toward orders appointing special administrators; therefore an order appointing a special administrator is not appealable. Estate of Carpenter, 73 Cal. 202; 14 Pac. 677; but see contra, Estate of Crozier, 65 Cal. 332; 4 Pac. 109.

Regarding appointment of guardian. An order appointing a guardian of a minor is appealable (Guardianship of Get Young, 90 Cal. 77; 27 Pac. 158; Ex parte Miller, 109 Cal. 643; 42 Pac. 428); as is also an order appointing a guardian of a person alleged to be incompetent, to manage his property, and the alleged incompetent is an "aggrieved party," who has a right of appeal from such order (In re Moss, 120 Cal. 695; 53 Pac. 357); but an order setting aside an order appointing a guardian ad litem for an incompetent person, is not appealable. Estate of Hathaway, 111 Cal. 270; 43 Pac. 754.

Special administrator may appeal. A special administrator, with authority to preserve and protect the estate, has authority to appeal to the supreme court in a suit in equity. Davey v. Mulroy, 7 Cal. App. 1; 93 Pac. 297.

Regarding probate of wills. Prior to the amendment of this section in 1901, an order refusing to revoke probate of will was not appealable (Estate of Montgomery, 55 Cal. 210; Estate of Sbarboro, 70 Cal. 147; 11 Pac. 563; Estate of Hathaway, 111 Cal. 270; 43 Pac. 754; Estate of Winslow, 128 Cal. 311; 60 Pac. 931); but now an order refusing the probate of a will is appealable (Estate of Hughston, 133 Cal. 321; 65 Pac. 742; Hartmann v. Smith, 140 Cal. 461; 74 Pac. 7), under the third subdivision of this section, and not under the first subdivision. Estate of Fay, 145 Cal. 82; 104 Am. St. Rep. 17; 78 Pac. 340. The only appealable orders in probate matters are those designated in the third subdivision of this section; and an order dismissing a contest of the probate of a will after probate is appealable. Estate of Edelman, 148 Cal. 233; 113 Am. St. Rep. 231; 82 Pac. 962. An order dismissing the contest of a proved will is, in effect, an order refusing to revoke the probate of the will, and appealable (Mahoney v. Superior Court, 140 Cal. 513; 74 Pac. 13); but an order revoking an order refusing to admit a will to probate is not appealable. Estate of Bouyssou, 1 Cal. App. 657; 82 Pac. 1066. For orders previous to the change in the statute, see Estate of Sbarboro, 70 Cal. 147; 11 Pac. 563. An order denying a motion for a new trial in a contest over the probate of a will is appealable, where there is an appeal from a judgment or order in such contest (Hartmann v. Smith, 140 Cal. 461; 74 Pac. 7; and see Estate of Spencer, 96 Cal. 448; 31 Pac. 453); as is also an order directing the payment of attorney's fees to the unsuccessful proponent of a will. Mousnier v. Superior Court, 159 Cal. 663; 115 Pac. 221.

Regarding trustee in will. An order vacating an order substituting a trustee for the one appointed in a will is not appealable. Estate of Moore, 86 Cal. 58; 24 Pac. 816.

Regarding setting aside of property. An order setting apart, or refusing to set apart, a homestead to a widow is appealable (Estate of Burns, 54 Cal. 223; Gruwell v. Seybolt, 82 Cal. 7; 22 Pac. 938; Estate of Harrington, 147 Cal. 124; 109 Am. St. Rep. 118; 81 Pac. 546); and the right to have such order reviewed for error is lost by failure to appeal therefrom. Gruwell v. Seybolt, 82 Cal. 7; 22 Pac. 938. An order refusing to vacate, in part, an order setting apart a homestead, is not appealable (Estate of Cahill, 142 Cal. 628; 76 Pac. 383); nor is an order of the probate court, setting aside its own proceedings, upon the application of the surviving wife to have the homestead set aside to her, made before the final order, appealable. Estate of Johnson, 45 Cal. 257. An order setting aside a homestead in insolvency proceedings, and such personal property as is exempt, is appealable. Noble v. Superior Court, 109 Cal. 523; 42 Pac. 155.

Regarding family allowance. An appeal lies from an original order granting or refusing to grant a family allowance (Estate of Overton, 13 Cal. App. 117; 108 Pac. 1021; Estate of Harrington, 147 Cal. 124; 109 Am. St. Rep. 118; 81 Pac. 546; Estate of Stevens, 83 Cal. 322; 17 Am. St. Rep. 252; 23 Pac. 379; Estate of Nolan, 145 Cal. 539; 79 Pac. 428); and this rule applies to an order directing the payment of a family allowance for a widow, in the case of an insolvent estate, for a period subsequent to one year after the granting of letters testamentary or of administration (Estate of Treat, 162 Cal. 250; 121 Pac. 1003); but no appeal can be taken from an order discontinuing a family allowance. Estate of Overton, 13 Cal. App. 117; 108 Pac. 1021. The special administrator of the estate of a deceased person may appeal from an order directing him to pay arrearages in the family allowance, which had accrued since the suspension of the general administrator, and also from a decree of partial distribution. Estate of Welch, 106 Cal. 427; 39 Pac. 805. An order directing one who has been appointed guardian of the estate of a minor, but who has never given bonds, to pay for the maintenance of the minor, is appealable. Murphy v. Superior Court, 84 Cal. 592; 24 Pac. 310.

Regarding probate sales. An order of the probate court, directing the sale of real property, is appealable (Stuttmeister v. Superior Court, 71 Cal. 322; 12 Pac. 270; and see Estate of Corwin, 61 Cal. 161); as is also an order directing or refusing to direct a conveyance of real estate by an executor or administrator (Estate of Corwin, 61 Cal. 160; Estate of Bazzuro, 161 Cal. 71; 118 Pac. 454); and an order directing a resale of real property, which had been sold by the administrator and the sale confirmed (Estate of Boland, 55 Cal. 310); and an order confirming a sale of real property, made under a power of sale in the will, and directing a conveyance thereof to be made (Estate of Pearsons, 98 Cal. 603; 33 Pac. 451); and an order setting aside a prior order confirming the sale of land belonging to the estate of a deceased person (Estate of West, 162 Cal. 352; 122 Pac. 953); but an order of the probate court, directing an executor to proceed with the sale of real property, previously ordered to be sold, is not appealable. Estate of Martin, 56 Cal. 208. An order refusing the confirmation of a sale of real property, and refusing to hear evidence thereon, is, in effect, an order against directing the sale or conveyance of real estate, and is appealable. Estate of Leonis, 138 Cal. 194; 71 Pac. 171. Under the former statute, an order of the probate court refusing to set aside an order for the sale of real property was not appealable. Estate of Smith, 51 Cal. 563. An order authorizing an executor to mortgage the lands of the estate is an order direct-

ing the conveyance of real property, and is appealable. Estate of McConnell, 74 Cal. 217; 15 Pac. 746. An order dismissing a petition for an order that the executor of an estate return to the petitioner the purchase-money paid for real estate of the testator, in pursuance of an order of the court confirming the sale of such estate, is not appealable. Estate of Williams, 3 Cal. Unrep. 788; 32 Pac. 241.

Regarding settlement of accounts of executors and administrators. An order settling the account of an executor is not a final judgment, within the meaning of the first subdivision of this section (Estate of Franklin, 133 Cal. 584; 65 Pac. 1081); but, under the third subdivision, such an order is appealable (Estate of Richmond, 9 Cal. App. 402; 99 Pac. 554; Estate of Sanderson, 74 Cal. 199; 15 Pac. 753; Estate of Rose, 80 Cal. 166; 22 Pac. 86; Estate of Grant, 131 Cal. 426; 63 Pac. 731), if the appeal is taken within sixty days (Estate of Sanderson, 74 Cal. 199; 15 Pac. 753; § 1715, post), irrespective of the amount involved, and though a decree of distribution is made at the same time (Estate of Delaney, 110 Cal. 563; 42 Pac. 981), and although the letters of administration have been revoked. Estate of McPhee, 154 Cal. 385; 97 Pac. 878. An interlocutory order settling the account of an administrator, but not discharging him from his trust, is appealable. Estate of Rose, 80 Cal. 166; 22 Pac. 86. An order of a probate court, setting aside an order by which the annual account of an executor was allowed, is not appealable (Estate of Dunne, 53 Cal. 631; Estate of Cahalan, 70 Cal. 604; 12 Pac. 427); nor is an order vacating a prior order settling the final account of an administrator. Estate of Hickey, 121 Cal. 378; 53 Pac. 818.

Regarding distribution. A decree of final distribution is appealable (Estate of Wiard, 83 Cal. 619; 24 Pac. 45; Daly v. Pennie, 86 Cal. 552; 21 Am. St. Rep. 61; 25 Pac. 67); as is also an order decreeing a partial distribution of an estate, upon the petition of the legatees (Estate of Mitchell, 121 Cal. 391; 53 Pac. 810); therefore relief against an erroneous decree cannot be had in equity (Daly v. Pennie, 86 Cal. 552; 21 Am. St. Rep. 61; 25 Pac. 67); but an order refusing to postpone a decree of final distribution is not appealable (Estate of Burdick, 112 Cal. 387; 44 Pac. 734); nor is an order declaring an executor or administrator in contempt for disobedience of a decree of distribution (Estate of Wittmeier, 118 Cal. 255; 50 Pac. 393); nor an order vacating a decree of final distribution (Estate of Murphy, 128 Cal. 339; 60 Pac. 930); nor an order vacating a decree of distribution and the settlement of the final account of the executor (Estate of Calahan, 60 Cal. 232); nor an order refusing to vacate and set aside a decree of final distribution, and denying a new trial (Estate of Wiard, 83 Cal. 619; 24 Pac. 45); nor an order refusing to set aside and vacate an order of distribution, and to settle the final account of an executor. Estate of Lutz, 67 Cal. 457; 8 Pac. 39.

Regarding payment of claims. An order directing the payment of a claim by an administrator is appealable: no limitation as to the amount of the debt or claim being made by statute, the fact that the claim is less than three hundred dollars does not impair the right of appeal. Ex parte Orford, 102 Cal. 656; 36 Pac. 928. An order directing the payment of a preferred claim against an estate is appealable, notwithstanding a previous adjudication that it is a preferred claim, from which no appeal has been taken (Estate of Smith, 117 Cal. 505; 49 Pac. 456); and an order dismissing a petition to have an administrator show cause why a claim that has been allowed should not be paid, is appealable. Estate of McKinley, 49 Cal. 152. The word "claim" includes a demand for counsel fees allowed by the court to the administrator for the services of his attorney (Cross v. Superior Court, 2 Cal. App. 342; 83 Pac. 815); hence, an order allowing counsel fees to the attorney of an executor is appealable. Estate of Kruger, 123 Cal. 391; 55 Pac. 1056. The demand of an attorney for compensation for services rendered an administrator during the progress of the settlement of the estate of his decedent, which is presented to the administrator, and allowed and approved by the probate court, and ordered to be paid out of the estate in the due course of administration, although not technically a "claim" against the estate within the meaning of this section, will be treated as such, and the order directing the administrator to pay it is appealable (Stuttmeister v. Superior Court, 72 Cal. 487; 14 Pac. 35); but no appeal lies from an order vacating the allowance of a claim against an estate. Kowalsky v. Superior Court, 13 Cal. App. 218; 109 Pac. 158.

New trials and appeals in probate. See also note post, §§ 1466, 1714.

Judgment in special proceeding. An appeal lies from a judgment in a special proceeding, removing an officer. Covarrubias v. Board of Supervisors, 52 Cal. 622. A final judgment in condemnation proceedings is a special proceeding, and appealable. Sacramento etc. R. R. Co. v. Harlan, 24 Cal. 334. Final orders in a special probate proceeding are not appealable, under the provision of this section, that an appeal lies from a final judgment entered in a special proceeding commenced in the superior court. Estate of Ohm, 82 Cal. 160; 22 Pac. 927.

In foreclosure suit. An order, in an ordinary foreclosure action, to empower a third person, who is not a party to the action, and who is designated as an agent of

the court, to remove and retain a certain defendant's property, is not appealable. Boca etc. R. R. Co. v. Superior Court, 150 Cal. 147; 88 Pac. 715.

In insolvency. An order setting aside an order settling an account of the assignee of an insolvent debtor, reported by a referee in an action by creditors to set aside and vacate a fraudulent assignment of the insolvent, is not a special order made after final judgment, and is not appealable. Etchebarne v. Roeding, 89 Cal. 517; 26 Pac. 1079.

Appeal dismissed when. A motion to dismiss an appeal from a judgment, on the ground that the transcript does not contain a complete judgment roll, will be denied, where, before the hearing of the motion, the defects in the judgment roll are remedied. Richardson v. Eureka, 92 Cal. 64; 28 Pac. 102. Upon appeal from an order denying a motion to vacate and set aside a judgment and an order denying a new trial, and to stay execution, the ex parte certificate of the judge, that certain papers annexed were used by the moving party on the hearing of the motion, and that he used no other evidence, but that the court, of its own motion, took notice of its records, is not the equivalent of the bill of exceptions required by the rule of the supreme court, and, in the absence of such bill, the appellant is not entitled to be heard, and the appeal will be dismissed. Ramsbottom v. Fitzgerald, 128 Cal. 75; 60 Pac. 522.

Motion to dismiss. The rule sometimes applied by the appellate court, in its discretion, that the merits of an appeal will not be considered upon a motion to dismiss, will not be applied when the motion is made on the ground that the order is not appealable. Grey v. Brennan, 147 Cal. 355; 81 Pac. 1014.

CODE COMMISSIONERS' NOTE. 1. Appeals from final judgments. An appeal lies from a judgment for contempt. Ware v. Robinson, 9 Cal. 107; Ex parte Rowe, 7 Cal. 175; see Briggs v. McCullough, 36 Cal. 542. From a judgment in a proceeding for the condemnation of land. San Francisco etc. R. R. Co. v. Mahoney, 29 Cal. 112; Sacramento etc. R. R. Co. v. Harlan, 24 Cal. 334. From a judgment in an insolvent case. People v. Rosborough, 29 Cal. 415. For a judgment for less than three hundred dollars, when the amount claimed in the complaint exceeds that sum. Solomon v. Reese, 34 Cal. 28. From a judgment rendered at chambers. Brewster v. Hartley, 37 Cal. 15; 99 Am. Dec. 237. From a judgment in certiorari cases. Morley v. Elkins, 37 Cal. 454. From a judgment in a contested-election case. Dorsey v. Barry, 24 Cal. 449; Day v. Jones, 31 Cal. 261; Knowles v. Yates, 31 Cal. 82. From a decree in a divorce case. Conant v. Conant, 10 Cal. 249; 70 Am. Dec. 717; see also Neall v. Hill, 16 Cal. 145; 76 Am. Dec. 508; Adams v. Woods, 18 Cal. 30.

2. From what orders an appeal will lie. An order setting aside a decree in equity. Riddle v. Baker, 13 Cal. 295. An order changing a judgment. Bryan v. Berry, 8 Cal. 130. An order refusing to quash an execution. Gilman v. Contra Costa County, 8 Cal. 52; 68 Am. Dec. 290. An order setting aside an execution. Bond v. Pacheco, 30 Cal. 530. An order granting an injunction. Sullivan v. Triunfo Gold etc. Min. Co., 33 Cal. 385.

3. From what orders an appeal will not lie. An order granting a nonsuit. Juan v. Ingoldsby, 6 Cal. 439. An order made before final judgment refusing to transfer a cause to a United States court. Brooks v. Calderwood, 19 Cal. 124; Hopper v. Kalkman, 17 Cal. 517. An order refusing to set aside a former order. Horn v. Volcano Water Co., 18 Cal. 141; Henly v. Hastings, 3 Cal. 341. An order overruling a demurrer. Gates v. Walker, 35 Cal. 289; Moraga v. Emeric, 4 Cal. 308; People v. Ah Fong, 12 Cal. 424. From an order admitting a party to bail under the provisions of the Habeas Corpus Act. People v. Schuster, 40 Cal. 627. From an order sustaining a demurrer. The order can only be reviewed through an appeal from the judgment. Hibberd v. Smith, 39 Cal. 145; Agard v. Valencia, 39 Cal. 292; Daniels v. Landsdale, 38 Cal. 567. In Briggs v. McCullough, 36 Cal. 542, the question was raised, but not decided, whether an appeal lies from an order made after final judgment adjudging a judgment debtor guilty of contempt for not applying his property on the execution. An order vacating an order dismissing a cause. Gates v. Walker, 35 Cal. 289. An order vacating an order of reference and the proceedings had under it. Hastings v. Cunningham, 35 Cal. 549; Johnson v. Hopkins, 6 Cal. 83; Baker v. Baker, 10 Cal. 527. From an order making a new party defendant. Beck v. San Francisco, 4 Cal. 375. From an order refusing to grant a commission to take testimony. People v. Stillman, 7 Cal. 117. From an interlocutory order, except in the cases provided by the code. De Barry v. Lambert, 10 Cal. 503. From an order of court refusing to set aside an interlocutory judgment. Stearns v. Marvin, 3 Cal. 376. From an order overruling a motion for a new trial, when the party fails to prosecute his motion before the district court. Mahoney v. Wilson, 15 Cal. 43; Frank v. Doane, 15 Cal. 304. From an order denying leave to intervene. Wenborn v. Boston, 23 Cal. 321. From an order made in an action pending in the district court staying all proceedings therein until the further direction of the court. Rhodes v. Graig, 21 Cal. 419. From an order directing a statement on motion for a new trial to be settled. Leffingwell v. Griffing, 29 Cal. 192. From an order striking out a statement on motion for a new trial. Quivey v. Gambert, 32 Cal. 304; Ketchum v. Crippen, 31 Cal. 365. From an order denying a motion to certify a statement. Genella v. Relyea, 32 Cal. 159. From a judgment of nonsuit rendered on motion of the party appealing. Sleeper v. Kelly, 22 Cal. 456. From an order overruling exceptions to a referee's report. Peck v. Courtis, 31 Cal. 207. From an order refusing to amend an order allowing time to move for a new trial. Pendegast v. Knox, 32 Cal. 73. If the plaintiff dismisses the action before trial, and the court, on defendant's motion, makes an order restoring the cause to the calendar, no appeal lies from this order. Dimick v. Deringer, 32 Cal. 488. An order made on motion to retax costs. Stevenson v. Smith, 28 Cal. 102; 87 Am. Dec. 107; Levy v. Geteeson, 27 Cal. 686; Lasky v. Davis, 33 Cal. 677; see also Meeker v. Harris, 23 Cal. 285. Orders that are not appealable can only be reviewed through an appeal from the judgment. Gates v. Walker, 35 Cal. 289.

4. Orders in partition. An appeal does not lie from an interlocutory judgment, rendered in partition, determining the interests of the several parties, and appointing a referee to make a partition, and report the same to the court. Gates v. Salmon, 28 Cal. 320. An interlocutory judgment in partition, which adjudges that one of the parties has no interest in the property, is not a final judgment as to him, from which he can appeal. Peck v. Vandenberg, 30 Cal. 11. On the 22d of April, 1863, no appeal could be taken from an interlocutory judgment, in an action for partition to be made. Nor was an appeal from such a judgment, rendered before the passage of the act, given by the act of March 23, 1864. Id.; Moulton v. Ellmaker, 30 Cal. 527. The act of 1864, allowing appeals to be taken from an interlocutory order in partition, deter-

mining the rights of several parties, and directing a partition, did not apply to judgments rendered before its passage. Peck v. Courtis, 31 Cal. 207.

5. Generally. Error must affirmatively appear. Todd v. Winants, 36 Cal. 129. If the judgment is broader than the facts alleged and found, it is no ground for a new trial. The remedy is by appeal from the judgment. Shepard v. McNeil, 38 Cal. 72. If, on an appeal from an order refusing to grant a new trial, the order is reversed, and the cause remanded for a new trial, the judgment of the court below is vacated. Fulton v. Hanna, 40 Cal. 278. A finding made upon conflicting evidence will not be disturbed on appeal. Frost v. Harford, 40 Cal. 165; Lick v. Madden, 36 Cal. 208; 95 Am. Dec. 175; King v. Meyer, 35 Cal. 646. If a demurrer is properly sustained, and the adverse party declines, after leave, to amend, the judgment will not be reversed to allow an amendment. Sutter v. San Francisco, 36 Cal. 112. For a technical variance between the evidence, findings, and pleadings, a judgment will not be reversed, if the objection is taken for the first time in the appellate court. Dikeman v. Norrie, 36 Cal. 94. A party cannot prosecute two separate and distinct remedies in the supreme court for a review of the same question at the same time. Kirk v. Reynolds, 12 Cal. 99. An appeal from a judgment, and from an order denying a new trial, may be prosecuted separately, or the two appeals may be prosecuted together. Carpentier v. Williamson, 25 Cal. 159.

§ 964. Appeals; in what cases appealed from justices' courts. The foregoing section does not apply in cases appealed from justices', police, or other inferior courts, except cases of forcible entry and detainer, and cases involving the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars.

Appeals to superior court. Post, §§ 974 et seq.
Forcible entry and detainer. Concurrent jurisdiction of justices' courts. Ante, § 113, subd. 1.

Legislation § 964. **1.** Added by Code Amdts. **1880**, p. 15.
2. Repeal by Stats. **1901**, p. 174; unconstitutional. See note ante, § 5. See ante, Legislation Chapter II.

Test of jurisdiction. Where, in an action commenced in the justice's court, the sum demanded is less than three hundred dollars, the jurisdiction of the justice, as well as the appellate jurisdiction of the supreme court, must be tested by the sum demanded in the complaint; but the costs, though more than three hundred dollars, cannot be deemed a part of the demand. Henigan v. Ervin, 110 Cal. 37; 42 Pac. 457.

Appeals from justice's court to superior court. See note post, § 974.

§ 965. Appeals by executors and administrators. When an executor, administrator, or guardian, who has given an official bond, appeals from a judgment or order of the superior court made in the proceedings had upon the estate of which he is executor, administrator, or guardian, his official bond shall stand in the place of an undertaking on appeal; and the sureties thereon shall be liable as on such undertaking.

Probate appeals. Ante, § 963, subd. 3.

Legislation § 965. **1.** Added by Code Amdts. **1880**, p. 15.
2. Amendment by Stats. **1901**, p. 171, and renumbered § 938; repeal by Stats. **1901**, p. 174; unconstitutional. See note ante, § 5. See ante, Legislation Chapter II.

Application of section. This section applies to appeals from judgments and orders made in probate proceedings; therefore the bond of an administratrix stands in the place of an undertaking on appeal, not only for the purpose of perfecting the appeal, but also to stay proceedings under the order appealed from, directing the payment of a debt or claim. Ex parte Orford, 102 Cal. 656; 36 Pac. 928; and see In re Sharp, 92 Cal. 577; 28 Pac. 783. But this section does not apply where there is nothing in the record to show that the executors, who appealed, ever gave any official bond, and where the appeal was not from an order made in proceedings had upon the estate. Pacific Paving Co. v. Bolton, 89 Cal. 154; 26 Pac. 650.

Necessity of giving undertaking on appeal. Upon an appeal by an administrator, who has given an official undertaking, from an order directing him to make a conveyance of real estate, an undertaking on appeal is unnecessary. Estate of Corwin, 61 Cal. 160. An appeal from an order of distribution by the executor of a deceased heir does not entitle such executor to claim the benefit of this section as to bonds on appeal, the appeal not being from an order made in the settlement of estate of which he is executor. Estate of Skerrett, 80 Cal. 62; 22 Pac. 85. An appeal by an administrator of an estate from an order revoking his letters is not a proceeding had upon the estate of which he is executor, within the meaning of this section, providing that no bond need be given (Estate of Danielson, 88 Cal. 480; 26 Pac. 505); nor is an appeal by a special administratrix, subsequently to her resignation, from an order disallowing her accounts, within the meaning of this section. Estate of McDermott, 127 Cal. 450; 59 Pac. 783

Interest warranting appeal. An executor or administrator has, in general, no such interest in the conflicting claims of heirs and devisees as warrant his appeal from adjudications fixing their rights and distributing the estate accordingly. Estate of Welch, 106 Cal. 427; 39 Pac. 805.

§ 966. Acts of executors and administrators, where appointment vacated. When the judgment or order appointing an executor, or administrator, or guardian, is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed.

Appointment of executor, etc., appeal from, Ante, § 963, subd. 3.

Restitution on reversal, etc. Ante, § 957.

Legislation § 966. Added by Code Amdts. **1880**, p. 15.

The original § 966 was based on Practice Act, § 359, as amended by Code Amdts. 1866–67, p. 846, and prescribed in what cases an appeal might be taken to the supreme court from a final judgment of the county court.

Acts pending appeal. A guardian has not, under this section, the right to act as such pending an appeal from the order appointing him. Coburn v. Hynes, 161 Cal. 685; 120 Pac. 26.

[§§ 967, 968. There never have been any sections with these numbers.]

§ 969. [Provided when appeal might be taken from probate court. Repealed.]

Legislation § 969. **1.** Enacted March 11, **1872**.
2. Amended by Code Amdts. **1873–74**, p. 341.
3. Amended by Code Amdts. **1877–78**, p. 104.
4. Repealed by Code Amdts. **1880**, p. 64. See post, Legislation Chapter IV.

§ 970. [Provided that administrators were not required to give undertaking on appeal. Repealed.]

Legislation § 970. **1.** Enacted March 11, **1872**.
2. Repealed by Code Amdts. **1880**, p. 64. See post, Legislation Chapter IV.

§ 971. [Provided that acts of administrator, etc., were not invalidated by reversal of order appointing him. Repealed.]

Legislation § 971. **1.** Enacted March 11, **1872**.
2. Amended by Code Amdts. **1873–74**, p. 341.
3. Repealed by Code Amdts. **1880**, p. 64. See post, Legislation Chapter IV.

CHAPTER III.

APPEALS TO SUPERIOR COURTS.

§ 974. Appeal from judgment of justice's or police court.
§ 975. Appeal on questions of law. Statement.
§ 976. Appeal on questions of fact, or law and fact.
§ 977. Transmission of papers to appellate court.
§ 978. Undertaking on appeal.
§ 978a. Filing of undertaking. Exception to and justification of sureties.
§ 979. Stay of proceedings on filing undertaking.
§ 980. Powers of superior court on appeal.
§ 981. Fees payable on filing appeal.

Legislation Chapter III. **1.** Enacted March 11, **1872**, and then contained only one section (§ 966), relating to the time when appeals might be taken to the supreme court from county courts.
2. Amended by Code Amdts. **1880**, p. 14. See ante, Legislation Chapter II.

§ 974. Appeal from judgment of justice's or police court. Any party dissatisfied with a judgment rendered in a civil action in a police or justice's court, may appeal therefrom to the superior court of the county, at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact, or both.

Notice of appeal, service of, on adverse party. See post, §§ 1010 et seq.

Legislation § 974. **1.** Enacted March 11, **1872** (based on Practice Act, § 624, as amended by Stats. 1854, Redding ed. p. 70, Kerr ed. p. 98), (1) inserting "civil action in a police or" before "justice's court"; (2) adding "at" before "any time"; (3) substituting "is" for "shall be" be-

fore "taken"; (4) inserting "or judge" after "justice"; and (5) substituting "must" for "shall" before "state."

2. Amended by Code Amdts. **1880**, p. 15, substituting "superior" for "county."

3. Amendment by Stats. **1901**, p. 175; unconstitutional. See note ante, § 5.

Jurisdiction. The steps required to perfect an appeal from a justice's court must be completed within the time prescribed, in order to give jurisdiction (Regan v. Superior Court, 14 Cal. App. 572; 114 Pac. 72; Crowley Launch etc. Co. v. Superior Court, 10 Cal. App. 342; 101 Pac. 935); but jurisdiction is acquired of an appeal from a justice's court, where all the necessary steps were taken in time (Golden Gate Tile Co. v. Superior Court, 159 Cal. 474; 114 Pac. 978); and also of an appeal from the judgment of a justice of the peace, in an action tried by a jury, although when the appeal was taken no judgment had been entered by the justice in conformity with the verdict. Montgomery v. Superior Court, 68 Cal. 407; 9 Pac. 720. On appeal from a justice's court, the appellant, who appeared in the superior court and proceeded, without objection, to a trial on the merits, cannot afterwards question the jurisdiction of the superior court on the ground that the justice had not entered the judgment in his docket at the time the appeal was taken. Montgomery v. Superior Court, 68 Cal. 407; 9 Pac. 720.

Nature of appeal determined how. Where the record on appeal from a judgment of a justice of the peace contains a statement of the case, the superior court is called upon to determine the nature of the appeal. Smith v. Superior Court, 2 Cal. App. 529; 84 Pac. 54.

Appealable judgments or orders. An appeal may be taken to the superior court on questions of law or fact, or both, from a judgment rendered in a civil action in a police court or justice's court. Simpson v. Police Court, 160 Cal. 530; 117 Pac. 553; Baird v. Justice's Court, 11 Cal. App. 439; 105 Pac. 259; Hamberger v. Police Court, 12 Cal. App. 153; 106 Pac. 894. A judgment by default in a justice's court is appealable (Tucker v. Justice's Court, 120 Cal. 513; 52 Pac. 808); but an order made by a justice of the peace, in proceedings supplementary to execution, requiring a judgment debtor to apply designated property to the satisfaction of the judgment, is not in the nature of a judgment, and is not appealable: the omission of all mention of "orders," in this section, is significant, and shows that there was no intention to give an appeal therefrom (Wells v. Torrance, 119 Cal. 437; 51 Pac. 626); nor is an order of a justice of the peace vacating a judgment appealable (Weimmer v. Sutherland, 74 Cal. 341; 15 Pac. 849); nor an order vacating an order granting a motion to open a judgment. Merriman v. Walton, 105 Cal. 403; 45 Am. St. Rep. 50; 30 L. R. A. 786; 38 Pac. 1108. The mere entry of the verdict of a jury by the justice, in his docket, is not the entry of the judgment, and will not support an appeal taken from the judgment. Thomson v. Superior Court, 161 Cal. 329; 119 Pac. 98.

Time of appeal. The time for an appeal from a justice's judgment begins to run upon its "rendition"; from the judgment of a court of record, it runs from the "entry" of judgment. Thomson v. Superior Court, 161 Cal. 329; 119 Pac. 98; June v. Superior Court, 16 Cal. App. 126; 116 Pac. 293. The time within which to appeal from a judgment of a justice's court is not prolonged by any proceedings in such court. Hollenbeak v. McCoy, 127 Cal. 21; 59 Pac. 201. An appeal taken after the entry of the verdict, but before the entry of the judgment, is premature, and the superior court does not acquire jurisdiction thereof. Thomson v. Superior Court, 161 Cal. 329; 119 Pac. 98; June v. Superior Court, 16 Cal. App. 126; 116 Pac. 293.

How perfected. To perfect an appeal from a justice's court, a notice of appeal must be filed with the justice, a copy of such notice must be served upon the adverse party, and a written undertaking must be filed; and all these things are jurisdictional, and must be done within thirty days after the rendition of the judgment. Stimpson Computing Scale Co. v. Superior Court, 12 Cal. App. 536; 107 Pac. 1013; Crowley Launch etc. Co. v. Superior Court, 10 Cal. App. 342; 101 Pac. 935. None of the jurisdictional prerequisites to an appeal from a justice's court can be dispensed with; nor can any of them be supplied, if not done; nor remedied, if fatally defective, after the time limited by statute. McKeen v. Naughton, 88 Cal. 462; 26 Pac. 364; McCracken v. Superior Court, 86 Cal. 74; 24 Pac. 845; Coker v. Superior Court, 58 Cal. 177.

Rules of court as to appeal. The superior court may, by rule, require an appellant from a justice's court, within thirty days after the filing of the transcript upon appeal, to deposit with the clerk the sum of six dollars for his costs upon the appeal, under penalty, for failure to do so, of a dismissal of the appeal, upon motion, after notice to the appellant. Behymer v. Superior Court, 18 Cal. App. 464; 123 Pac. 340.

Notice of appeal. An appeal is taken by filing and serving a notice of appeal. Jeffries Co. v. Superior Court, 13 Cal. App. 193; 109 Pac. 147; Moffat v. Greenwalt, 90 Cal. 368; 27 Pac. 296. A notice of appeal from a justice's court is sufficient if signed by the appellant personally, or by any one he may select for that purpose: the attorney of record need not sign it. Totton v. Superior Court, 72 Cal. 37; 13 Pac. 72. Where an appeal is taken from the whole of a justice's judgment, the notice of appeal is not required to state whether the appeal is taken upon questions

of law or fact. Rauer's Law etc. Co. v. Superior Court, 10 Cal. App. 423; 102 Pac. 547. A mistake in the date of a judgment, in a notice of appeal served on a respondent, is not material, where the judgment is otherwise correctly described. Sherman v. Rolberg, 9 Cal. 17. The notice of appeal is not conclusive as to the nature or character of the appeal. Smith v. Superior Court, 2 Cal. App. 529; 84 Pac. 54. A declaration in a notice of appeal from a justice's court, that it is taken both upon questions of law and fact, is not conclusive: such a declaration cannot vary the fact. Peacock v. Superior Court, 163 Cal. 701; 126 Pac. 976.

Service of notice. A copy of the notice of appeal must be served on the adverse party (Green v. Rogers, 18 Cal. App. 572; 123 Pac. 974), to render the appeal effectual, and to give the appellate court jurisdiction (Trobock v. Caro, 60 Cal. 301; Matthews v. Superior Court, 70 Cal. 527; 11 Pac. 665); and a judgment of affirmance, rendered without such service, is erroneous (Trobock v. Caro, 60 Cal. 301); but the party upon whom the law requires notice to be served may voluntarily appear and submit himself to the jurisdiction of the court; and his appearance is a waiver of the want of notice. Matthews v. Superior Court, 70 Cal. 527; 11 Pac. 665. A notice of appeal from a judgment of a justice of the peace may be served on the adverse party personally, although he was represented in the justice's court by an attorney; and where the adverse party is a corporation, service on the manager thereof is sufficient to give the superior court jurisdiction. Pacific Coast Ry. Co. v. Superior Court, 79 Cal. 103; 21 Pac. 609. Where, in an action in a justice's court against married women on an express contract, their husbands were joined as parties, but judgment was rendered only against the wives, upon an appeal by the wives the husbands are not adverse parties upon whom notice of appeal is to be served. Terry v. Superior Court, 110 Cal. 85; 42 Pac. 464. Adverse parties are those who, by the record, appear to be interested in the judgment, so that they will be affected by its reversal or nullification; therefore parties not served with summons in a justice's court, and not having appeared, are not parties to the judgment, and are not adverse parties upon appeal so that it was incumbent that they should be served with notice of appeal. Terry v. Superior Court, 110 Cal. 85; 42 Pac. 464; Bullock v. Taylor, 112 Cal. 147; 44 Pac. 457. An intervener, if there is such under justice court practice, and a defendant in an action in a justice's court are adverse parties, and must be served with notice of appeal. Rossi v. Superior Court, 114 Cal. 371; 46 Pac. 177.

Filing of notice. The filing of the notice of appeal with the justice of the peace is a jurisdictional prerequisite to the appeal. Coker v. Superior Court, 58 Cal. 177. The notice of appeal is not required to be filed prior to the service of a copy thereof upon the adverse party, nor need the undertaking thereon be filed simultaneously with the notice. Hall v. Superior Court, 71 Cal 550; 12 Pac. 672. The marking of the filing of the notice of appeal by a justice of the peace is not the only competent evidence of the filing of the paper; nor is the absence of an entry in the justice's docket to that effect conclusive proof that it had not been filed. Williams v. Superior Court, 5 Cal. Unrep. 598; 47 Pac. 783.

Failure of sureties to justify. An appeal is taken by filing a notice of appeal with the justice, and serving a copy on the adverse party: the fact that the sureties did not justify does not prevent the appeal from having been taken. Moffat v. Greenwalt, 90 Cal. 368; 27 Pac. 296.

Liability of sureties. Where the bond given upon an appeal from a judgment of a justice's court is conditioned that if the appeal should be dismissed, the sureties will pay the judgment and costs, the sureties take the risk that the appeal may be erroneously dismissed. Nolan v. Fidelity etc. Co., 2 Cal. App. 1; 82 Pac. 1119.

Effect of appeal. The effect of an appeal from a judgment of a justice's court is to vacate the judgment, and to require all the issues of fact between the plaintiff and the defendant to be tried anew in the superior court. Rossi v. Superior Court, 114 Cal. 371; 46 Pac. 177.

Conclusiveness of judgment on appeal. The judgment of a superior court, on appeal from a justice's court, though erroneous, is final and conclusive, where no excess of jurisdiction appears, and where there is no remedy by appeal. Karry v. Superior Court, 162 Cal. 281; 122 Pac. 475.

Dismissal of appeal. Failure to take an appeal within thirty days after the rendition of judgment in justices' courts is ground for dismissal. Hollenbeak v. McCoy, 127 Cal. 21; 59 Pac. 201. The dismissal of an appeal from an erroneous judgment of a justice of the peace has the effect to affirm such erroneous judgment, and to put it beyond attack for any error which could have been availed of on appeal. Ritzman v. Burnham, 114 Cal. 522; 46 Pac. 379.

Appeal from recorder's court. The code makes no provision for an appeal from a recorder's court, but, under the provisions of the Municipal Corporation Act, such an appeal is taken in the same manner as appeals from justices' courts. Regan v. Superior Court, 14 Cal. App. 572; 114 Pac. 72.

Action on judgment. An independent action in the superior court on a money judgment rendered in a justice's court is barred, under §§ 336, 685, ante, upon the expiration of five years after their entry.

Heinlen Co. v. Cadwell, 3 Cal. App. 80; 84 Pac. 443.

Police court may appeal from superior court. A police court may appeal from a judgment of the superior court, prohibiting it from proceeding in a civil action, of which it has concurrent jurisdiction with justices of the peace, and be relieved from any writ improperly issued so prohibiting it. Simpson v. Police Court, 160 Cal. 530; 117 Pac. 553.

Civil jurisdiction of justices of the peace. See note ante, § 112.

Statement unnecessary when. Upon an appeal from a justice's court, upon questions of law, where the alleged errors appear in the copy of the justice's docket, or in the copies of papers sent up by the justice, as required by this section and § 977, post, there is no necessity for a statement. Southern Pacific R. R. Co. v. Superior Court, 59 Cal. 471.

Transfer of copy of docket. Where all the papers in the case, on an appeal from a judgment of a justice's court, have been transferred, except a copy of the justice's docket, the superior court has jurisdiction to order the transfer of such copy of the docket, under this section. Burgess v. Superior Court, 2 Cal. Unrep. 741; 13 Pac. 166.

Remand of cause, where appeal is upon questions of law alone. See note post, § 980.

Waiver of failure to serve or defects in service of process by appeal from justice's court to court where trial must be de novo. See note 34 L. R. A. (N. S.) 661.

CODE COMMISSIONERS' NOTE. An appeal does not lie from an order made by a justice of the peace, directing property alleged to have been stolen, and discovered and brought before the justice by a peace-officer, by virtue of a search-warrant issued by the justice, to be delivered to the owner. People v. Halloway, 26 Cal. 651. An appeal lies from a judgment rendered in a justice's court, in an action brought to recover the penalty from an overcharge, under the provisions of the act of the 14th of April, 1863, concerning street-railroads in this state. Burson v. Cowles, 25 Cal. 535. On appeal from a justice's court, the record not showing that notice of appeal had been served on the adverse party, appellant may prove by his affidavit that it was in fact served. Mendioca v. Orr, 16 Cal. 368. The general rule regulating appeals, which provides that notice may be served on the party or his attorney, governs cases arising in justices' courts. Welton v. Garibardi, 6 Cal. 245.

§ 975. Appeal on questions of law. Statement. When a party appeals to the superior court on questions of law alone, he must, within ten days from the rendition of judgment, prepare a statement of the case and file the same with the justice or judge. The statement must contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more. Within ten days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments. The proposed statement and amendments must be settled by the justice or judge, and if no amendment be filed, the original statement stands as adopted. The statement thus adopted, or as settled by the justice or judge, with a copy of the docket of the justice or judge, and all motions filed with him by the parties during the trial, and the notice of appeal, may be used on the hearing of the appeal before the superior court.

Settlement of statement on appeal. Ante, § 650.

Legislation § 975. 1. Enacted March 11, **1872** (based on Practice Act, § 625, as amended by Stats. 1855, p. 198), (1) substituting "must" for "shall" after "he" and after "statement"; (2) inserting "or judge" after "justice" in every instance; (3) substituting (a) "stands as" for "shall be," and (b) "may" for "shall" before "be used."

2. Amended by Code Amdts. **1880**, p. 16, substituting "superior" for "county."

3. Repeal by Stats. **1901**, p. 175; unconstitutional. See note ante, § 5.

CODE COMMISSIONERS' NOTE. If a new trial is ordered by the county court, it should be had in that court. People v. Freelon, 8 Cal. 518.

§ 976. Appeal on questions of fact, or law and fact. When a party appeals to the superior court on questions of fact, or on questions of both law and fact, no statement need be made, but the action must be tried anew in the superior court.

Conduct of trial. Post, § 980.

Legislation § 976. 1. Enacted March 11, **1872** (based on Practice Act, § 626, as amended by Stats. 1854, Redding ed. p. 70, Kerr ed. p. 99), substituting "must" for "shall."

2. Amended by Code Amdts. **1880**, p. 16, substituting "superior" for "county," in both instances.

3. Repeal by Stats. **1901**, p. 175; unconstitutional. See note ante, § 5.

Appeal on question of law and fact. On an appeal from a judgment of a justice's court, on questions of both law and fact, the superior court has original jurisdiction to try the case without a statement,

if there was any trial of the issues in the justice's court, with or without jurisdiction. Armantage v. Superior Court, 1 Cal. App. 130; 81 Pac. 1033.

Procedure and jurisdiction. On an appeal on questions of both law and fact, where there has been no trial on issues of fact in the justice's court, the superior court must entertain and decide the appeal as upon questions of law alone; and the affirmance of a judgment of the justice in overruling a demurrer to the complaint is the proper method of procedure. Fabretti v. Superior Court, 77 Cal. 305; 19 Pac. 481. An appeal from a judgment of a justice's court, on questions of both law and fact, deprives the justice's court of all jurisdiction over the case, and vacates and sets aside the judgment therein, and the case is thereafter in the superior court, and the rights of the parties are to be determined by the action of that court. Bullard v. McArdle, 98 Cal. 355; 35 Am. St. Rep. 176; 33 Pac. 193. The superior court has jurisdiction to dismiss an action, on motion, on an appeal taken on questions of both law and fact. Holbrook v. Superior Court, 106 Cal. 589; 39 Pac. 936.

Jurisdiction. Where the plaintiff founds his right of action upon the allegation that the title to land agreed to be purchased by him is invalid, and, according to his own pleadings, he seeks the return of a purchase-deposit upon the ground of such invalidity, title to land is necessarily involved in the action, and original jurisdiction is not in the justice's court, but in the superior court. Bates v. Ferrier, 19 Cal. App. 79; 124 Pac. 889. Where a defendant, sued in the justice's court of the wrong county, objected to the jurisdiction by a motion to dismiss the action, and also by special demurrer, and afterwards, not waiving his motion or demurrer, in his answer to the merits, pleaded, in a separate defense, facts showing that the court had no jurisdiction, if all of his objections to the jurisdiction were overruled and the case determined upon the merits, the defendant may appeal to the superior court upon questions both of law and fact, and he is not bound to take only the question of jurisdiction to the superior court upon a statement of the case. Holbrook v. Superior Court, 106 Cal. 589; 39 Pac. 936. Where a want of jurisdiction of a justice's court appears upon the record transmitted from such court to the appellate court, an objection made by the appellant to the appellate court, trying the case upon the merits, is good if seasonably made. Bates v. Ferrier, 19 Cal. App. 79; 124 Pac. 889.

Transfer of cases to the superior court. See also note ante, § 838.

Jurisdiction of appellate court. See also note post, § 980.

Trial de novo in the superior court. See note post, § 980.

Remand of cause, where appeal is upon questions both of law and fact. See note post, § 980.

CODE COMMISSIONERS' NOTE. No appeal lies to the county court, upon questions of fact, from a judgment by default. People v. El Dorado County Court, 10 Cal. 19.

§ 977. Transmission of papers to appellate court. Upon receiving the notice of appeal, and on payment of the fees of the justice or judge, payable on appeal and not included in the judgment, and filing an undertaking as required in the next section, and after settlement or adoption of statement, if any, the justice or judge must, within five days, transmit to the clerk of the superior court, if the appeal be on questions of law alone, a certified copy of his docket, the statement as admitted or as settled, the notice of appeal, and the undertaking filed; or, if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions, and all other papers filed in the cause, the notice of appeal, and the undertaking filed; and the justice or judge may be compelled by the superior court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice or judge by the party or his attorney. In the superior court, either party may have the benefit of all legal objections made in the justice's or police court.

Legislation § 977. 1. Enacted March 11, **1872** (based on Practice Act, § 627, as amended by Stats. 1855, p. 198), (1) inserting "or judge" after "justice," in each instance, (2) inserting after "next section" the words "and after settlement or adoption of statement, if any," (3) substituting "must" for "shall" before "within," and (4) inserting, at end, "or police" before "court."

2. Amended by Code Amdts. **1880,** p. 16, substituting "superior" for "county," in each instance.

3. Amended by Stats. **1897,** p. 210, inserting (1) "payable on appeal and not included in the judgment" before "and filing," (2) "and after settlement or adoption of statement, if any," after "section," (3) "all" before "other papers," and (4) changing comma to semicolon before "and the justice."

4. Amendment by Stats. **1901**, p. 175; unconstitutional. See note ante, § 5.

Payment of costs and fees. The payment of the costs of the action is one of the conditions upon which an appeal is allowed from a judgment of a justice of the peace. McDermott v. Douglass, 5 Cal. 89. A party appealing from a judgment of a justice of the peace must pay all the fees of the justice, including those incurred by the respondent as well as by the appellant on the trial, and those on appeal, before the justice can be compelled to forward the papers to the clerk of the superior court. Webster v. Hanna, 102 Cal. 177; 36 Pac. 421; and see Bray v. Redman, 6 Cal. 287. The provision of this section, in reference to the payment of fees, refers to the making out of the papers; the payment or the tender of the fees does not strictly constitute a condition of appeal, but a condition precedent to sending up the papers, and this condition may be waived by the justice, and the fees paid at any time, so as to bring the case up before the superior court within the period limited by the rules of that court. People v. Harris, 9 Cal. 571.

Transmission of papers required when. No statement is required on an appeal taken on questions of both law and fact, but the justice certifies and transmits all the papers in the cause, including a copy of his docket, to the superior court, and the action is tried anew in that court. Nail v. Superior Court, 11 Cal. App. 27; 103 Pac. 902.

Right to compel. It is the duty of the justice, under this section, to send up the notice of appeal received by him; and the action of the superior court in refusing to allow an appellant the opportunity of moving to compel the justice to send it up, by peremptorily dismissing the appeal, is error. Sherman v. Rolberg, 9 Cal. 17.

Return of papers to justice. When the papers upon an appeal from a justice's court have been properly filed in the superior court, the justice has no power to recall them for any purpose, nor has the superior court any authority to cause them to be returned to the justice. Budd v. Superior Court, 14 Cal. App. 256; 111 Pac. 628.

CODE COMMISSIONERS' NOTE. 1. Payment of costs. One of the conditions upon which an appeal is allowed, is payment of costs. McDermott v. Douglass, 5 Cal. 89. The fees must be paid, or tendered unconditionally. People v. Harris, 9 Cal. 571. But the justice may waive payment, and if he sends up the record without payment, it is no ground for dismissal. Bray v. Redman, 6 Cal. 287.

2. Generally. If the justice fails to send up the notice of appeal, it is error to refuse to allow appellant the opportunity of moving to compel the justice to send it up, by peremptorily dismissing the appeal. Sherman v. Rolberg, 9 Cal. 17. The omission of the words "to pay to" will not invalidate an appeal bond; if it did, leave should be granted to file a new bond. Billings v. Roadhouse, 5 Cal. 71. An appeal is made by filing and serving the notice of appeal. Both must be done to complete the appeal. A failure to notify the adverse party is fatal. Whipley v. Mills, 9 Cal. 641. See generally, People v. Freelon, 8 Cal. 517.

§ 978. **Undertaking on appeal.** An appeal from a justice's or police court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on the appeal; or, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of property, including costs, when the judgment is for the recovery of specific personal property, and must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from, and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the superior court. When the action is for the recovery of or to enforce or foreclose a lien on specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the superior court, and will obey any order made by the court therein. When the judgment appealed from directs the delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be com-

mitted, any waste thereon, and that if the appeal be dismissed or withdrawn, or the judgment affirmed, or judgment be recovered against him in the action in the superior court, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof; or that he will pay any judgment and costs that may be recovered against him in said action in the superior court, not exceeding a sum to be fixed by the justice of the court from which the appeal is taken, and which sum must be specified in the undertaking. A deposit of the amount of the judgment, including all costs appealed from or of the value of the property, including all costs in actions for the recovery of specific personal property, with the justice or judge, is equivalent to the filing of the undertaking, and in such cases, the justice or judge must transmit the money to the clerk of the superior court, to be by him paid out on the order of the court.

Undertaking on appeal. Compare ante, § 941.
Sureties.
1. **Justification.** Ante, § 948.
2. **Qualification.** Post, § 1057.

Legislation § 978. 1. Enacted March 11, **1872,** based on Practice Act, § 628, as amended by Stats. 1860, p. 305, which had a final sentence (see § 978a, infra), reading, "The adverse party may, however, except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice before whom the appeal is taken, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal shall be regarded as if no such undertaking had been given." The changes made in adopting the section in 1872 consisted in (1) substituting (a) "or police court is not" for "court shall not be," and (b) "must" for "shall," in each instance; (2) omitting (a) "said" before "action in the county court," and (b) the first part of the sentence now beginning "A deposit," which read, "The undertaking shall be accompanied by the affidavits of the sureties that they are residents of the county, and are each worth the amount specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; or the bond shall be executed by a sufficient number of sureties who can justify, in the aggregate, to an amount equal to double the amount specified in the bond, or"; (3) substituting "or judge is," after "justice," for "and such deposit shall be"; (4) inserting "or judge" after "justice," in each instance; (5) omitting "in this act mentioned" before "and in such cases"; and (6) omitting "however" before "except," in the final sentence, quoted supra.

2. Amended by Code Amdts. **1880,** p. 16, (1) substituting "superior" for "county," in each instance; (2) in sentence beginning "When the action," inserting "or to enforce or foreclose a lien on" before "specific personal"; (3) adding the sentence beginning "When the judgment"; (4) in final sentence, quoted supra, omitting "before whom the appeal is taken" before "within five days."

3. Amendment by Stats. **1901,** p. 175; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1909,** p. 1064, (1) in first sentence, omitting "the" after "value of," and (2) omitting the final sentence, quoted from Practice Act, supra.

Construction of section. The word "or," in the first sentence of this section, joining the clauses referring, respectively, to the undertaking for costs on appeal and the undertaking for a stay of proceedings, manifestly must be construed as meaning "and"; and the former undertaking is therefore a prerequisite, without which no effectual appeal is taken. McConky v. Superior Court, 56 Cal. 83. The provision of this section, that an appeal is not effectual for any purpose unless an undertaking is filed, implies that when the undertaking is filed the appeal is effectual. Moffat v. Greenwalt, 90 Cal. 368; 27 Pac. 296. The amendment to this section in 1880 did not repeal, by implication, § 926, ante. Swem v. Monroe, 148 Cal. 741; 83 Pac. 1074. This section adds a further condition to the perfecting of the appeal, and all the steps required to perfect it must be completed within thirty days. Regan v. Superior Court, 14 Cal. App. 572; 114 Pac. 72.

Condition of undertaking. The condition of the bond is not affected by the point raised on appeal. Nolan v. Fidelity etc. Co., 2 Cal. App. 1; 82 Pac. 1119.

Approval of undertaking. Where a justice of the peace fails to reject an appeal bond promptly, his subsequent disapproval of it is ineffectual, and the appellate court will hold that the bond was approved. People v. Harris, 9 Cal. 571.

Deposit in lieu of undertaking. This section does not provide for a deposit in lieu of the undertaking on appeal: such a provision is made by § 926, ante. Pacific Window Glass Co. v. Smith, 8 Cal. App. 762; 97 Pac. 898. An appeal from a judgment of a justice's court is perfected by the deposit, with the justice, of money in lieu of the undertaking on appeal, under § 926, ante, and such money need not be transmitted to the superior court as provided by this section. Laws v. Troutt, 147 Cal. 172; 81 Pac. 401. A deposit of money may be made in lieu of an undertaking on appeal; and it cannot be withdrawn after the statutory time for filing an undertaking, and should be transmitted to the clerk of the superior court as security on the appeal. Mullen v. Hunt, 67 Cal. 69; 7 Pac. 121. A deposit, with the justice, of the requisite amount of money, gives the superior court jurisdiction of the

appeal (Pacific Window Glass Co. v. Smith, 8 Cal. App. 762; 97 Pac. 898), although the sum deposited greatly exceeds the amount required (Thomas v. Hawkins, 12 Cal. App. 327; 107 Pac. 578); but the superior court has no jurisdiction if the deposit made is in a sum less than one hundred dollars. Swem v. Monroe, 148 Cal. 741; 83 Pac. 1074.

Liability of sureties. The liability of the sureties upon an undertaking to stay proceedings, pending an appeal from the judgment of a justice's court, is not affected by the fact that there was a misnomer of the defendant in the body of the judgment, which was amended by the justice, pending the appeal, where such undertaking correctly describes the judgment. Adler v. Staude, 136 Cal. 182; 68 Pac. 599.

Action upon undertaking. The assignment of a judgment only, without the assignment of the undertaking on appeal therefrom, does not pass to the assignee any right of action upon the undertaking on appeal, whether the judgment was assigned pending the appeal or after it had become final. Chilstrom v. Eppinger, 127 Cal. 326; 78 Am. St. Rep. 46; 59 Pac. 696. The failure to file the undertaking on appeal from a judgment of a justice of the peace within thirty days after the rendition of the judgment is good ground for dismissing the appeal, but will not defeat a recovery on a stay bond given at any time before the dismissal of the appeal. Nolan v. Fidelity etc. Co., 2 Cal. App. 1; 82 Pac. 1119.

Allegations of complaint. The undertaking on appeal from a justice's court to the superior court to stay execution is an independent and absolute contract on the part of the sureties, and on dismissal of the appeal they become liable to pay the amount of the judgment and all costs; and to discharge themselves from such liability, they must show that the judgment has been satisfied, either by a return of the property, or by payment of the amount of the judgment and costs; and in an action against the sureties on such undertaking, it is not necessary to the sufficiency of the complaint to allege the issuance and return of the execution unsatisfied, or that notice of the dismissal of the appeal was given, or that demand was made prior to the commencement of the action, or that a delivery of the property could not be had, or that any order was made by the superior court which the appellant failed or refused to obey. Pieper v. Peers, 98 Cal. 42; 32 Pac. 700. An allegation, in an action on a stay bond given on an appeal from a judgment of a justice's court, that "judgment was rendered," etc., instead of "judgment was duly made and given," etc., is sufficient. Nolan v. Fidelity etc. Co., 2 Cal. App. 1; 82 Pac. 1119.

Undertaking for costs. An appeal is perfected, or made effectual, by filing an undertaking "for the payment of the costs on appeal." Jeffries Co. v. Superior Court, 13 Cal. App. 193; 109 Pac. 147. An undertaking on appeal from a money judgment, in a greater sum than one hundred dollars, and conditioned for the payment of the costs on appeal, is sufficient to confer jurisdiction on the superior court, though it also purports to be given to stay execution. Edwards v. Superior Court, 159 Cal. 710; 115 Pac. 649. The expression, "all costs," in an undertaking conditioned to pay the amount of the judgment and all costs, etc., includes the costs on appeal. Jones v. Superior Court, 151 Cal. 589; 91 Pac. 505. The superior court has no jurisdiction to entertain an appeal, where no bond for costs, or deposit in lieu thereof, was given. Stimpson Computing Scale Co. v. Superior Court, 12 Cal. App. 536; 107 Pac. 1013; Thomas v. Hawkins, 12 Cal. App. 327; 107 Pac. 578. A bond on attachment, given months prior to the appeal, though undertaking to pay damages and costs awarded on appeal, is not a good undertaking on appeal. Stimpson Computing Scale Co. v. Superior Court, 12 Cal. App. 536; 107 Pac. 1013.

Time for filing undertaking. See note post, § 978a.

CODE COMMISSIONERS' NOTE. When the appeal bond is presented, the justice must act promptly; if he receives the bond without objection, it will be too late to disapprove it next day. People v. Harris, 9 Cal. 571. If the sureties are excepted to, and appear before the justice, and the party then states that he knows them to be good, and that he excepted to them for the sole reason that his attorney told him to do so, he waives their justification. Blair v. Hamilton, 32 Cal. 50.

§ 978a. Filing of undertaking. Exception to and justification of sureties. The undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given.

Legislation § 978a. Added by Stats. **1909**, p. 1065. Compare ante, Legislation § 978, par. 1.

Construction of section. This section is not to be construed as if the word "immediately" were added to the end of the first sentence thereof. Golden Gate Tile Co. v. Superior Court, 159 Cal. 474; 114 Pac. 978.

Time of filing undertaking. The undertaking must be filed within the prescribed time from the rendition of the judgment, to give jurisdiction. Lane v. Superior Court, 5 Cal. App. 762; 91 Pac. 405; McKeen v. Naughton, 88 Cal. 462; 26 Pac. 354. The time for filing the undertaking does not begin to run at the time of the rendition of the judgment: it begins to run at the time of the filing of the notice of appeal, and continues for five days after the filing of such notice. Rigby v. Superior Court, 162 Cal. 334; 122 Pac. 958. The filing and service of the notice of appeal is, in legal effect, a notice that, under the law, the appellant must file his undertaking within five days thereafter, to make his appeal prima facie effective. Jeffries Co. v. Superior Court, 13 Cal. App. 193; 109 Pac. 147. The undertaking must be filed within five days after the perfecting of the appeal. Stimpson Computing Scale Co. v. Superior Court, 12 Cal. App. 536; 107 Pac. 1013. As the notice of appeal, under § 974, ante, may be filed at any time within thirty days after the rendition of the judgment appealed from, it necessarily follows that the time for filing the undertaking does not stop with the expiration of such thirty days, but may, in some cases, be filed as much as five days after the thirty-day period has elapsed. Rigby v. Superior Court, 162 Cal. 334; 122 Pac. 958.

Filing of undertaking. The filing of a written undertaking on appeal from a judgment of a justice's court is a jurisdictional prerequisite to the appeal. McKeen v. Naughton, 88 Cal. 462; 26 Pac. 354. Under this section, it is not required that the undertaking on appeal shall be filed before or at the time of service and filing of the notice of appeal. Coker v. Superior Court, 58 Cal. 177. Where a notice of appeal from a judgment of a justice's court was filed one day after the service thereof, and the undertaking on appeal was filed four days after the filing of the notice, and these several acts were done within the time limited by statute, the appeal was regularly taken: the mere order in which the acts are done is not material. Hall v. Superior Court, 68 Cal. 24; 2 Pac. 509. Where the undertaking on appeal was delivered and left at the office of the justice of the peace within the statutory period of thirty days, but was not received nor marked "Filed" by him until two days after that time, the appeal will not be dismissed. Perkins v. Superior Court, 4 Cal. Unrep. 788; 37 Pac. 780.

Notice of filing. Notice of the filing of the undertaking must be given. Stimpson Computing Scale Co. v. Superior Court, 12 Cal. App. 536; 107 Pac. 1013. It is not a step in the perfecting of the appeal, but merely a part of the collateral proceeding to justify (Jeffries Co. v. Superior Court, 13 Cal. App. 193; 109 Pac. 147); nor is it essential to the jurisdiction of the superior court, of the appeal (Rigby v. Superior Court, 162 Cal. 334; 122 Pac. 958; Widrin v. Superior Court, 17 Cal. App. 93; 118 Pac. 550; Blake v. Superior Court, 17 Cal. App. 52; 118 Pac. 448; Jeffries v. Superior Court, 13 Cal. App. 193; 109 Pac. 147; but see Green v. Rogers, 18 Cal. App. 572; 123 Pac. 974); and the omission to give notice is a mere irregularity, as no time is fixed within which the notice is to be given, and no penalty is attached to the failure to give it. Blake v. Superior Court, 17 Cal. App. 51; 118 Pac. 448; Jeffries v. Superior Court, 13 Cal. App. 193; 109 Pac. 147.

Result of absence of undertaking. The superior court cannot, in the absence of any undertaking on appeal, take a deposit in lieu of a bond; nor can it take a new bond. Stimpson Computing Scale Co. v. Superior Court, 12 Cal. App. 536; 107 Pac. 1013; Bergevin v. Wood, 11 Cal. App. 643; 105 Pac. 935.

Exception to sureties. Exception to the sufficiency of the sureties upon the undertaking on appeal must be made within five days after the filing of the undertaking, without reference to any notice of its filing. Jeffries Co. v. Superior Court, 13 Cal. App. 193; 109 Pac. 147; Widrin v. Superior Court, 17 Cal. App. 93; 118 Pac. 550. A party excepting to the sufficiency of the sureties must file his notice of exception with the justice: no such exception is complete until such notice is filed; and where such notice has been filed, the justice should hold the papers for a further period of five days to allow justification to be made. Budd v. Superior Court, 14 Cal. App. 256; 111 Pac. 628. The objection to the sufficiency of the sureties may be waived, but such waiver must be made within the five days. Crowley Launch etc. Co. v. Superior Court, 10 Cal. App. 342; 101 Pac. 935.

Filing exception to sureties. The filing of an exception to the sureties, with a justice of the peace, after the appeal is taken, is not sufficient to require the sureties to justify, since such exception must be served on the appellant. Reynolds v. County Court, 47 Cal. 604.

Notice of justification. Notice for the justification of sureties, at a time more than five days after the service of the notice of exception to them, is ineffectual to confer jurisdiction of the appeal upon the superior court. Randall v. Superior Court, 19 Cal. App. 184; 124 Pac. 1058.

Justification. The adverse party is allowed five days after the filing of notice excepting to the sufficiency of sureties, within which to submit his sureties for the purpose of having them justify; and a justification within five days after the filing of the notice, though more than seven days after the service thereof, is in time. Budd v. Superior Court, 14 Cal. App. 256; 111 Pac. 628. After a case in the justices' court of the city and county of San Francisco has been assigned for trial to a particular justice thereof, the sureties on an undertaking, after due notice to the adverse party, may justify before any other justice of the same court. Werner v. Superior Court, 161 Cal. 209; 118 Pac. 709. The qualification by the sureties upon an undertaking for costs on appeal is, in the absence of exception, a full and complete justification. Jeffries Co. v. Superior Court, 13 Cal. App. 193; 109 Pac. 147. The justification of sureties on undertakings may be waived by the failure of the party excepting to appear at the time set for justification. Budd v. Superior Court, 14 Cal. App. 256; 111 Pac. 628; Blair v. Hamilton, 32 Cal. 49. A motion to dismiss an appeal from a justice's court to the superior court, because of the failure of sureties to justify, is properly denied, where the excepting party was not present at the time fixed for justification. Budd v. Superior Court, 14 Cal. App. 256; 111 Pac. 628. The justification of sureties after notice is not a necessary step in taking an appeal. Jeffries Co. v. Superior Court, 13 Cal. App. 193; 109 Pac. 147.

Effect of failure to justify. Where the sureties fail to justify in time, after they have been excepted to, the appeal must be regarded as if no undertaking had been given. Crowley Launch etc. Co. v. Superior Court, 10 Cal. App. 342; 101 Pac. 935; Lane v. Superior Court, 5 Cal. App. 762; 91 Pac. 405; McCracken v. Superior Court, 86 Cal. 74; 24 Pac. 845. The provision of this section, that unless the sureties justify within five days after an exception has been taken to their sufficiency, the appeal must be regarded as if no undertaking had been given, is to be construed, not as having the effect, ipso facto, of vacating an appeal already completed, but as giving to the respondent the right to move for its dismissal on the ground that since it was taken it had become ineffectual. Moffat v. Greenwalt, 90 Cal. 368; 27 Pac. 296. The sureties on an undertaking on appeal from a judgment of a justice's court are liable on their undertaking on the dismissal of the appeal, although they failed to justify. Moffat v. Greenwalt, 90 Cal. 368; 27 Pac. 296.

New undertaking. The superior court has power to authorize the appellant to file a new undertaking on appeal, in lieu of an undertaking insufficient in form. Gray v. Superior Court, 61 Cal. 337. Where the sufficiency of the sureties upon an undertaking on appeal from a justice's court is excepted to, the appeal cannot be perfected by filing a new undertaking, without notice to the adverse party. Wood v. Superior Court, 67 Cal. 115; 7 Pac. 200; Herting v. Superior Court, 10 Pac. 514. The signing of an undertaking on appeal, by a new surety, in place of one who fails to justify, does not render the undertaking sufficient, where he is not mentioned in the body of the undertaking, nor otherwise made a party thereto; and such defective undertaking cannot be made effective by the action of the superior court in allowing the appellant to file a new undertaking. Bennett v. Superior Court, 113 Cal. 440; 45 Pac. 808. A defective undertaking on appeal may be cured by the filing, in the superior court, of a sufficient undertaking, in pursuance of leave first obtained from that court. Werner v. Superior Court, 161 Cal. 209; 118 Pac. 709. A superior court has no jurisdiction to allow a new bond to be filed after it has dismissed an appeal. Bergevin v. Wood, 11 Cal. App. 643; 105 Pac. 935.

New undertaking on appeal to supreme court. See note ante, § 954.

Jurisdiction to order justification. An order requiring sureties to justify before the superior judge, where the court commissioner before whom they had justified had not taken the oath of office, is within the jurisdiction of the superior court. Gray v. Superior Court, 61 Cal. 337. The superior court has no power to extend the time within which the sureties on an undertaking on appeal from a judgment of a justice's court may justify; and § 1054, post, has no application in such case. McCracken v. Superior Court, 86 Cal. 74; 24 Pac. 845.

Waiver of justification. The failure of the respondent to appear at the time set for the justification of sureties, to whom he has excepted, is a waiver of such justification. Bank of Escondido v. Superior Court, 106 Cal. 43; 39 Pac. 211.

Justification of new sureties. The superior court, where a new undertaking is given on appeal thereto, may order the sureties to appear and justify before it. Gray v. Superior Court, 61 Cal. 337.

§ 979. Stay of proceedings on filing undertaking. If an execution be issued on the filing of the undertaking staying proceedings, the justice or judge must, by order, direct the officer to stay all proceedings on the same. Such officer must, upon payment of his fees for services rendered on the

execution, thereupon relinquish all property levied upon and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

Legislation § 979. 1. Enacted March 11, 1872 (based on Practice Act, § 629), (1) omitting "all" before "proceedings," (2) inserting "or judge" after "justice," and (3) substituting "must" for "shall" after "officer."

2. Repealed by Code Amdts. 1880, p. 64, in repealing original code chapters IV and V, q.v., Legislation IV, V, post.

3. Re-enacted by Code Amdts. 1880, p. 17.

CODE COMMISSIONERS' NOTE. An order staying execution cannot be reviewed on certiorari. Coulter v. Stark, 7 Cal. 244.

§ 980. Powers of superior court on appeal. Upon an appeal heard upon a statement of the case, the superior court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial. When the action is tried anew, on appeal, the trial must be conducted in all respects as other trials in the superior court. The provisions of this code as to changing the place of trial, and all the provisions as to trials in the superior court, are applicable to trials on appeal in the superior court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the superior court, after notice, may order the appeal to be dismissed, with costs; and if it appear to such court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding twenty-five per cent of the judgment appealed from. Judgments rendered in the superior court on appeal shall have the same force and effect and may be enforced in the same manner as judgments in actions commenced in the superior court.

Amendments. Ante, § 473.
Trial de novo. See ante, § 976.
New trial. Ante, §§ 656 et seq.

Legislation § 980. 1. Enacted March 11, 1872 (based on Practice Act, § 367, as amended by Stats. 1854, Redding ed. p. 66, Kerr ed. p. 93), (1) substituting (a) "a" for "the" (of Kerr's ed.; Redding prints the article "a") before "statement," (b) "such" for "said" before "judgment," (c) "must" for "shall" after "trial," (d) "code" for "act," and (e) "are" for "shall be" before "applicable"; (2) omitting "shall" after "appeal"; and (3) inserting "may" before "be enforced."

2. Amended by Code Amdts. 1880, p. 17, (1) in first sentence, changing "county" to "superior"; (2) in sentence beginning "When," (a) adding "other" before "trials," and (b) changing "district" to "superior"; (3) in sentence beginning "The provisions," (a) before "court," in first instance, changing "district" to "superior," and (b) in second instance, "county" to "superior"; (4) in sentence beginning "For," (a) changing "county" to "superior," and (b) adding, after "dismissed," the words "with costs; and if it appear to such court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding twenty-five per cent of the judgment appealed from"; and (5) in sentence beginning "Judgments," (a) changing, before "court on appeal," "county" to "superior," (b) adding "shall" after "appeal," and (c) changing "district" to "superior" at end of section.

3. Amendment by Stats. 1901, p. 176; unconstitutional. See note ante, § 5.

Constitutionality of section. An appeal from a justice's court to the superior court of the county in which the action was brought cannot be transferred for trial to the superior court of any other county; the provision of this section, purporting to authorize such a transfer, is in conflict with article VI, § 9, of the constitution. Luco v. Superior Court, 71 Cal. 555; 12 Pac. 677; and see Gross v. Superior Court, 71 Cal. 382; 12 Pac. 264.

Construction of section. The provision of this section, that, upon an appeal on questions of law alone, the superior court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify, any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial, confers upon the superior court, plenary appellate jurisdiction, and there are no other provisions which limit it in the exercise of that jurisdiction. Maxson v. Superior Court, 124 Cal. 468; 57 Pac. 379.

Jurisdiction of superior court. The superior court acquires no jurisdiction of an appeal from a justice's court, where the undertaking on appeal was prematurely filed before the filing of the notice of appeal. Goodman v. Superior Court, 19 Cal. App. 457; 126 Pac. 185. A defendant, who, after appealing to the superior court upon questions of law and fact, seasonably challenges the jurisdiction of the court to try the action upon its merits, by reason of want of jurisdiction of the justice's court over the subject-matter of the action,

appearing upon the face of the record, is entitled to a judgment or order dismissing the action for want of jurisdiction to try it upon its merits. Bartnett v. Hull, 19 Cal. App. 91; 124 Pac. 885. Parties cannot waive jurisdiction of the subject-matter, nor confer it by consent. Stimpson Computing Scale Co. v. Superior Court, 12 Cal. App. 536; 107 Pac. 1013. Where a justice of the peace has no jurisdiction of a case, but an appeal is taken to the superior court, and the case is there heard de novo, without objection to the jurisdiction, the judgment of the superior court cannot be questioned. Nolan v. Hentig, 138 Cal. 281; 71 Pac. 440; Bates v. Ferrier, 19 Cal. App. 79; 124 Pac. 889. Upon appeal from the judgment of a justice of the peace, the court of review may admit proof supplemental to the record, in aid of its jurisdiction. Los Angeles v. Young, 118 Cal. 295; 62 Am. St. Rep. 234; 50 Pac. 534.

What orders reviewable. The superior court may review all orders affecting the judgment appealed from. Baird v. Justice's Court, 11 Cal. App. 439; 105 Pac. 259; Hamberger v. Police Court, 12 Cal. App. 153; 106 Pac. 894; Clark v. Minnis, 50 Cal. 509. The superior court may review the order refusing to transfer the cause, and, in a proper case, may direct the justice to enter an order transferring the cause. Clark v. Minnis, 50 Cal. 509. An order of a justice of the peace, refusing to set aside a sale of property under execution, will be presumed to have been correct, unless the contrary appears; the action of the justice may be reviewed by the superior court upon an appeal from the judgment. Peterson v. Weissbein, 65 Cal. 42; 2 Pac. 730. An order of a justice of the peace, refusing to dissolve an attachment, is not reviewable in the superior court. Nail v. Superior Court, 11 Cal. App. 27; 103 Pac. 902.

Affirmance or reversal of judgment. Where, in an action in a justice's court, the defendant, who was served with the summons, but not with a copy of the complaint, appeared specially to move to set aside the service, and the motion was granted and judgment entered against the plaintiff, who took an appeal, and the defendant appeared specially in the superior court for the purpose of moving to dismiss the appeal, the superior court has jurisdiction only to affirm or reverse the judgment, and has no power to make the order in question. Southern Pacific R. R. Co. v. Superior Court, 59 Cal. 471. Where there has been no trial in fact, there is no evidence to be embodied in a statement of the case; but the superior court is authorized to reverse the judgment, if error appears in the copy of the justice's docket, or in the papers and files sent up from the justice's court. Miklanschutz v. Superior Court, 16 Cal. App. 227; 116 Pac. 376. Upon an appeal from an order setting aside the service of summons in a justice's court, the superior court cannot order a new trial, because the action has not been tried; the superior court, therefore, has jurisdiction merely to affirm or reverse the justice's judgment. Southern Pacific R. R. Co. v. Superior Court, 59 Cal. 471. Where an appeal is taken from a judgment of a justice of the peace, to the superior court, upon a question of law, upon a record showing that evidence was adduced by both parties, which clearly showed that the right of possession and title to the land mentioned in the plaintiff's case was involved, it is the duty of the superior court to reverse the judgment. King v. Kutner-Goldstein Co., 135 Cal. 65; 67 Pac. 10. Upon an appeal to the superior court upon a question of law alone, where there has been no trial of issues of fact, but the ruling of the justice's court, upon demurrer to the complaint, is held erroneous, the superior court, on reversing the cause, cannot retry the cause; but such reversal does not have the effect of dismissing the action, and the superior court may remand the cause, with instructions to the justice's court to overrule the demurrer, with leave to the plaintiff to amend if so advised. Maxson v. Superior Court, 124 Cal. 468; 57 Pac. 379.

New trial proper when. Where a nonsuit has been granted on the trial of an appeal from a justice's court, the superior court has jurisdiction to grant a new trial. Massman v. Superior Court, 71 Cal. 582; 12 Pac. 685. Upon an appeal from a judgment in a justice's court, setting aside a judgment previously rendered and dismissing the action, the superior court cannot affirm the judgment set aside, which was not appealed from and which has ceased to exist: its jurisdiction is limited to a review of the judgment appealed from, and if of the opinion that the court erred in vacating the previous judgment, it should reverse the judgment appealed from and order a new trial. Sherer v. Superior Court, 94 Cal. 354; 29 Pac. 716. Where an appeal to a superior court is based on questions of law alone, the proper procedure is to remand the cause for trial in the justice's court. Smith v. Superior Court, 2 Cal. App. 529; 84 Pac. 54. The superior court, upon an appeal on questions of law alone, has jurisdiction to review the rulings of the justice's court, and to remand the cause, with directions to the lower court to proceed in accordance with the decision of the appellate court. Maxson v. Superior Court, 124 Cal. 468; 57 Pac. 379. Upon an appeal from a judgment of a justice's court, taken on questions of both law and fact, the superior court has no authority to remand the cause to the justice's court for a trial de novo: it should proceed with the trial, and in case

of refusal, it may be compelled to do so by mandamus. Acker v. Superior Court, 68 Cal. 245; 9 Pac. 109; 10 Pac. 416. An appeal from a judgment of a justice's court granting a nonsuit, though taken on questions of both law and fact, presents a question of law only, and the superior court, upon reversal, properly refused to grant a trial de novo, and remanded the case for a new trial. Smith v. Superior Court, 2 Cal. App. 529; 84 Pac. 54. The effect of a stipulation, in a justice's court, for a trial upon the merits, is to treat the case as at issue, and, after such a stipulation, the superior court has jurisdiction to vacate a judgment taken by default, and to remand the case to the justices' court for trial upon the merits. Miklauschutz v. Superior Court, 16 Cal. App. 226; 116 Pac. 376.

Trial de novo in the superior court. A new trial on appeal, on a question of law alone, is properly ordered to be had in the superior court. Curtis v. Superior Court, 63 Cal. 435; People v. Freelon, 8 Cal. 517. Where the want of jurisdiction of the justice's court appears upon the record transmitted to the superior court, the appellant's objection to the superior court's trying the case anew upon the merits is good, if seasonably made. Bates v. Ferrier, 19 Cal. App. 79; 124 Pac. 889. A new trial of a cause in the superior court on appeal cannot be had, unless there has been a trial of issues of fact in the justice's court. Maxson v. Superior Court, 124 Cal. 468; 57 Pac. 379; and see People v. County Court, 10 Cal. 19; Funkenstein v. Elgutter, 11 Cal. 328; Southern Pacific R. R. Co. v. Superior Court, 59 Cal. 471; Rickey v. Superior Court, 59 Cal. 661; Myrick v. Superior Court, 68 Cal. 98; 8 Pac. 648. Upon an appeal from a judgment of a justice's court, in favor of an intervener and the defendant, the plaintiff has the right not only to have the superior court pass upon the sufficiency of his demurrer to the complaint in intervention without any statement of the case, but also to have tried de novo all the issues of fact that were presented in the justice's court. Rossi v. Superior Court, 114 Cal. 371; 46 Pac. 177. The erroneous entry of a judgment of dismissal against the plaintiff does not deprive him of his right to appeal upon questions of both law and fact, so as to have his cause tried de novo in the superior court. Peacock v. Superior Court, 163 Cal. 701; 126 Pac. 976. After a trial upon the merits and a final judgment in the justice's court, an appeal on questions of law and fact will compel a trial de novo in the superior court. Smith v. Superior Court, 2 Cal. App. 529; 84 Pac. 54. Where an appeal is taken "on questions of fact" or "on questions of both law and fact," the action must be tried anew in the superior court. Armantage v. Superior Court, 1 Cal. App. 130; 81 Pac. 1033; Ketchum v. Superior Court, 65 Cal. 494; 4 Pac. 492. When an appeal from a justice's court is perfected, upon questions of both law and fact, the case is removed to the superior court for a trial de novo, and the superior court must try the case as if there had been no trial in the justice's court. Kraker v. Superior Court, 15 Cal. App. 651; 115 Pac. 663. It is the duty of the superior court, when an appeal to it has been duly perfected, to determine the case as if it had been commenced by the plaintiff therein. Rabin v. Pierce, 10 Cal. App. 734; 103 Pac. 771. Upon appeal from a justice's court, the trial in the superior court is anew, and must be conducted, in all respects, as other trials in the superior court. Nail v. Superior Court, 11 Cal. App. 27; 103 Pac. 902. All the provisions of this code, relative to the trial of cases which have been commenced within the original jurisdiction of the superior court, are made applicable to the trial de novo of cases within its appellate jurisdiction; therefore the allowance of amendments to pleadings is a matter within its discretion. Ketchum v. Superior Court, 65 Cal. 494; 4 Pac. 492. The power given to try the action anew does not give the superior court jurisdiction to review the action of the justice's court in an ancillary proceeding, such as an attachment, but the trial must be conducted in the superior court in all respects as other trials in the superior court; and the judgment rendered on the appeal has the same effect as if the action had been commenced in the superior court, and as if there had been no trial in the justice's court. Nail v. Superior Court, 11 Cal. App. 27; 103 Pac. 902. Where the superior court, without authority, dismisses an appeal taken to it from a justice's court, the order of dismissal may be annulled on writ of review, when the case will stand for trial de novo in the superior court. Kraker v. Superior Court, 15 Cal. App. 654; 115 Pac. 663.

Judgment necessary to appeal. The superior court has no jurisdiction of an appeal from a justice's court, in which there was a trial by jury, but no judgment had been entered in the docket in conformity with the verdict when the appeal was taken. June v. Superior Court, 16 Cal. App. 126; 116 Pac. 293.

Dismissal for delay in filing papers. The superior court has jurisdiction to adopt and enforce a rule that the record and transcript on appeal from a justice's court must be filed within ten days after the perfecting of the appeal, and that, in default thereof, the appeal will be dismissed on motion; and its order dismissing an appeal in conformity with such rule cannot be annulled upon certiorari. McKay v. Superior Court, 86 Cal. 431; 25 Pac. 10.

For failure to perfect or prosecute appeal. The power of the superior court to dismiss an appeal with costs, etc., applies only to cases wherein there was a failure technically to perfect the appeal; and where an appeal has not been properly perfected, all that the superior court can do is to dismiss it. Rabin v. Pierce, 10 Cal. App. 734; 103 Pac. 771.

Dismissal for failure to prosecute appeal. A failure to produce in the appellate court a duly certified copy of the docket of the justice of the peace, is a failure to prosecute the appeal, within the meaning of this section, and is a ground for the dismissal of the appeal. People v. Elkins, 40 Cal. 642. Where the defendant has appealed to the justice's court, on questions of law and fact, the superior court is without jurisdiction to dismiss the appeal for want of prosecution, and to render a judgment for the plaintiff below. Kraker v. Superior Court, 15 Cal. App. 651; 115 Pac. 663. The superior court has no power to dismiss an appeal for want of prosecution by the appellant. Rabin v. Pierce, 10 Cal. App. 734; 103 Pac. 771.

Municipal court could dismiss. The municipal court of appeals had jurisdiction to dismiss appeals from justices' courts (Alexander v. Municipal Court, 2 Cal. Unrep. 390; 4 Pac. 961); and it had power to dismiss an appeal for failure to prosecute it; and such dismissal, although erroneous, could not be reviewed on certiorari. Alexander v. Municipal Court, 66 Cal. 387; 5 Pac. 675.

Effect of dismissal. Where a premature appeal is dismissed by the superior court, although the motion was not made upon that ground, it cannot be compelled to proceed with the trial of the case (June v. Superior Court, 16 Cal. App. 126; 116 Pac. 293); but where the superior court erroneously dismisses an appeal on the theory that it has no jurisdiction, mandamus lies to compel it to hear and decide the cause. Peacock v. Superior Court, 163 Cal. 701; 126 Pac. 976; Blake v. Superior Court, 17 Cal. App. 51; 118 Pac. 448; Widrin v. Superior Court, 17 Cal. App. 93; 118 Pac. 550. The superior court can vacate its erroneous order of dismissal. Edwards v. Superior Court, 159 Cal. 710; 115 Pac. 649.

Papers not returnable to justice. Where the papers upon appeal have once been properly filed in the superior court, the justice has no power to recall them for any purpose; nor has the superior court any authority to cause the papers to be returned to the justice. Budd v. Superior Court, 14 Cal. App. 256; 111 Pac. 628.

Transmission of judgment. A certified copy of the judgment of the superior court, rendered upon an appeal, including its directions to the justice's court, is sufficient for the transmission of the judgment to the justice's court. Maxson v. Superior Court, 124 Cal. 468; 57 Pac. 379.

Petition for rehearing. A petition for a rehearing, after a judgment rendered upon an appeal from a justice's court, is unknown to the law, or to the practice of the superior court. Fabretti v. Superior Court, 77 Cal. 305; 19 Pac. 481.

Prohibition. An appeal from a justice's court will not be disturbed on prohibition, where the superior court has jurisdiction. Budd v. Superior Court, 14 Cal. App. 256; 111 Pac. 628.

CODE COMMISSIONERS' NOTE. Cullen v. Langridge, 17 Cal. 67; People v. Harris, 9 Cal. 573; Hunter v. Hoole, 17 Cal. 418; Escolle v. Merle, 9 Cal. 94; Cunningham v. Hopkins, 8 Cal. 33.

§ 981. **Fees payable on filing appeal.** No appeal taken from a judgment rendered in a police or justice court in civil matters shall be effectual for any purpose whatever unless the appellant shall, at the time of filing the notice of appeal, pay in addition to the fee payable to the justice of the peace on appeal, the fees provided by law to be paid to the county clerk for filing the appeal and for placing the action on the calendar in the superior court. Upon transmitting the papers on appeal, the justice or judge shall transmit to the county clerk the sum thus deposited for filing the appeal in the superior court and for placing the action on the calendar. No notice of appeal shall be filed unless the fees herein provided for are paid in accordance with the provisions of this section.

Legislation § 981. Added by Stats. **1915**, p. 236.

CHAPTER IV.

APPEALS FROM PROBATE COURTS.

CHAPTER V.

APPEALS TO COUNTY COURTS.

Legislation Chapters IV, V. 1. Enacted March 11, **1872.** See §§ 969–971, §§ 974–980, ante.

2. Repealed by Code Amdts. **1880**, p. 64, by an act repealing Chapters IV, V.

TITLE XIV.

MISCELLANEOUS PROVISIONS.

Chapter I. Proceedings against Joint Debtors. §§ 989–994.
II. Offer of Defendant to Compromise. § 997.
III. Inspection of Writings. § 1000.
IV. Motions and Orders. §§ 1003–1007.
V. Notices, and Filing and Service of Papers. §§ 1010–1019.
VI. Costs. §§ 1021–1039.
VII. General Provisions. §§ 1045–1059.

CHAPTER I.

PROCEEDINGS AGAINST JOINT DEBTORS.

§ 989. Parties not summoned in action on joint contract may be summoned after judgment.
§ 990. Summons in that case, what to contain, and how served.
§ 991. Affidavit to accompany summons.
§ 992. Answer. What it may contain.
§ 993. What constitute the pleadings in the case.
§ 994. Issues, how tried. Verdict, what to be.

§ 989. Parties not summoned in action on joint contract may be summoned after judgment. When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in section four hundred and fourteen, those who are not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons.

Cognate provisions. Ante, §§ 383, 414, 579.

Joining persons severally liable upon instrument. Ante, § 383.

Summons served on one defendant out of several, plaintiff may proceed against him alone. Ante, § 414.

Judgment against some defendants, proceeding continuing against others. Ante, § 579.

Release of one joint debtor does not discharge others. Civ. Code, § 1543.

Legislation § 989. Enacted March 11, **1872**; based on Practice Act, § 368 (New York Code, § 375), substituting "four hundred and fourteen" for "thirty-two."

Construction of chapter. An action under this chapter is really an action on the original joint contract, and matters of defense in respect to the judgment are merely incidental to the action. Tay v. Hawley, 39 Cal. 93. Proceedings under this chapter, for the purpose of binding a partner by a judgment recovered against his copartner, are in the nature of an action upon a judgment; and neither the pleadings nor the judgment in the original action can be amended. Waterman v. Lipman, 67 Cal. 26; 6 Pac. 875; Cooper v. Burch, 140 Cal. 548; 74 Pac. 37. Proceedings under this chapter furnish the exclusive mode by which a defendant, who was not served with summons, can be bound by the judgment, and they necessarily imply that he is not already bound, and he is not a proper party to an action on judgment. Were it not for this statute, no action could be maintained against him on the original contract, for the reason that it would be merged in the first judgment, and the merger is restrained only for the purpose and to the extent of enabling the proceedings to be had as prescribed in this statute. These provisions would be useless if an action could be maintained on the judgment against a defendant not served in the former action. Tay v. Hawley, 39 Cal. 93.

Defendants not served, how bound by judgment. A judgment against the defendants served in an action against several defendants jointly may be entered, and those not served may be brought in and bound by proceedings under this chapter. Roberts v. Donovan, 70 Cal. 108; 9 Pac. 180. Where a judgment is rendered against a party upon several promissory notes signed by him, and one of the notes is also signed by two other persons, who are made parties defendant, but who were not served with process and do not appear, such other persons may be brought into court to show cause why they should not be bound by the judgment, to the extent of the note which they signed, and they may be declared bound by it. Sneath v. Griffin, 48 Cal. 438.

Jurisdiction over joint debtor. The jurisdiction that a court acquires over a joint debtor not served, after a judgment

against other joint debtors, is limited to an order for him to show cause why he should not be bound to the same extent as his co-obligors, by the judgment already entered against them. Cooper v. Burch, 140 Cal. 548; 74 Pac. 37; and see Tay v. Hawley, 39 Cal. 93. Under this section, when a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, those not originally served may be brought in and bound by the judgment already entered against their co-obligors. Melander v. Western National Bank, 21 Cal. App. 462; 132 Pac. 265.

Right of incoming defendant to plead. A demurrer to the original complaint by an incoming defendant is not provided for by statute, and the defendant is, in express terms, denied the right to plead the statute of limitations; and this is perfectly proper, if the complaint is to remain intact for all purposes, but no good reason can be suggested for it, if it might be amended, because, as the amendment might change the cause of action from a suit upon a written instrument to one on parol contract, an opportunity would then, for the first time, be open either to the defendant or his co-obligors to avail themselves of the benefit of the statute. Cooper v. Burch, 140 Cal. 548; 74 Pac. 37.

Judgment against alleged copartners. Proceedings under this chapter, for the purpose of binding a partner by a judgment recovered against his copartner, are in the nature of an action upon a judgment; and neither the pleadings nor the judgment in the original action can be amended. Waterman v. Lipman, 67 Cal. 26; 6 Pac. 875. In a suit against two defendants, alleged to be copartners, in which summons is served on one only, a judgment against the other cannot be rendered: the remedy of the plaintiff is by proceedings under this chapter. Feder v. Epstein, 69 Cal. 456; 10 Pac. 785. A judgment recovered in a sister state, against several defendants as copartners, directing that it be enforced against the joint property of all the defendants, and against the separate property of one, who was the only one served, is not void as to such defendant, and action may be maintained thereon in this state. Stewart v. Spaulding, 72 Cal. 264; 13 Pac. 661.

Judgment against joint debtors. See note post, § 994.

Effect of judgment against co-trespasser as bar to action against others. See note 54 Am. Dec. 205.

Effect of judgment against one joint tort-feasor upon liability of the other. See note 58 L. R. A. 410.

Validity and effect as against defendant not personally served within the state of a judgment in personam against joint debtors. See note 35 L. R. A. (N. S.) 312.

§ 990. Summons in that case, what to contain, and how served. The summons, as provided in the last section, must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner, and returnable within the same time, as the original summons. It is not necessary to file a new complaint.

Summons, contents, service, etc., of. Ante, §§ 407, 410 et seq.

Legislation § 990. Enacted March 11, **1872** (based on Practice Act, § 369), substituting (1) "must" for "shall," in both instances, and (2) "is not" for "shall not be," in the last sentence.

Due process in service on joint debtors. See note 50 L. R. A. 595.

§ 991. Affidavit to accompany summons. The summons must be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon.

Legislation § 991. Enacted March 11, **1872** (based on Practice Act, § 370), substituting (1) "must" for "should," and (2) "must" for "shall."

§ 992. Answer. What it may contain. Upon such summons, the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, by reason of any defense existing at the commencement of the action.

Answer, generally. Ante, § 437.

Legislation § 992. 1. Enacted March 11, **1872** (based on Practice Act, § 371), changing "limitation" to "limitations."

2. Amendment by Stats. **1901**, p. 176; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 600, substituting "by reason of any defense existing at the commencement of the action" for "except a discharge from such liability by the statute of limitations"; the code commissioner saying, "This removes the prohibition against the pleading of the statute of limitations if that defense existed at the commencement of the action."

§ 993. What constitute the pleadings in the case. If the defendant, in his answer, denies the judgment, or sets up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, constitute the written allegations in the case; if he denies his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, constitute such written allegations, subject to the right of the parties to amend their pleadings as in other cases.

Legislation § 993. **1.** Enacted March 11, **1872** (based on Practice Act, § 372), omitting "shall" before "constitute," in both instances.

2. Amendment by Stats. **1901**, p. 177; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 600, (1) substituting (a) "denies" for "deny," in both instances, and (b) "sets" for "set"; and (3) adding "subject to the right of the parties to amend their pleadings as in other cases"; the code commissioner saying, "thus entitling the parties to amend their pleadings as in other cases and changing the rule adopted in Waterman v. Lippman, 67 Cal. 26."

§ 994. Issues, how tried. Verdict, what to be. The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon.

Trial. Ante, §§ 607–645.

Legislation § 994. Enacted March 11, **1872** (based on Practice Act, § 373), (1) substituting "must" for "shall," and (2) inserting "not exceeding" before "the amount."

Judgment. After a judgment against joint debtors, the only judgment that can be rendered against a joint debtor appearing after judgment is one for such an amount as remains unsatisfied on the original judgment. Cooper v. Burch, 140 Cal. 548; 74 Pac. 37.

CHAPTER II.

OFFER OF DEFENDANT TO COMPROMISE.

§ 997. Proceedings on offer of the defendant to compromise after suit brought.

§ 997. Proceedings on offer of the defendant to compromise after suit brought. The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein, specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.

Offer.
1. Not an admission. Post, § 2078.
2. Equivalent to tender. Post, § 2074.
Compare ante, § 895.
Judgment by confession. Post, § 1132.

Legislation § 997. **1.** Enacted March 11, **1872**; based on Practice Act, § 390 (New York Code, § 385), (1) substituting (a) "must" for "shall" before "thereupon" and before "pay," and (b) "is to" for "shall" before "be deemed," and (2) "cannot" for "shall not," in both instances.

2. Amended by Code Amdts. **1873–74**, p. 342, (1) substituting "the offer, with proof," for "the summons, complaint, and offer, with an affidavit," and (2) inserting "upon the trial" after "evidence."

3. Amendment by Stats. **1901**, p. 177; unconstitutional. See note ante, § 5.

Construction of section. The true meaning of this section, authorizing the clerk to enter judgment upon an offer on the part of the defendant to suffer judgment for a specified sum, is, that he can enter judgment only where the offer is made after action is brought by the filing of the complaint, and while pending; and where a party hands to the clerk the complaint, offer of judgment, and notice of acceptance of the offer, at the same time, and the clerk thereupon enters judgment, it is void, and not merely irregular; to hold otherwise would simply be to hold that

the safeguards which the law has thrown around confessions of judgment by a debtor, and which cautionary provisions are for the security of creditors, are nugatory. Crane v. Hirshfelder, 17 Cal. 582. The clear meaning of this section is, that the plaintiff shall have five days in which to consider the proposal made by the defendant, and if, in the meantime, without acceptance by the plaintiff in the manner prescribed, the trial shall have regularly progressed and been concluded, the offer of compromise, as against the plaintiff, simply goes for naught. Scammon v. Denio, 72 Cal. 393; 14 Pac. 98.

Time of making offer. The plaintiff may proceed to trial on the day set, without regard to the defendant's offer, where such offer is made within five days prior to the time, as at that time the offer is of no avail, and the defendant cannot, by making the offer on the eve of trial, when plaintiff is all prepared, and his expenses nearly all incurred, compel him, on the spur of the moment, to determine whether he shall yield a part of what he may consider a just and legal claim, or run the hazard of losing all his costs and necessary disbursements, and having judgment against him for the costs of the other party. Scammon v. Denio, 72 Cal. 393; 14 Pac. 98.

Manner of making offer. In an action of tort, the defendant has the right to offer to permit the plaintiff to take judgment in a specified sum, but should not accompany his pleading of tender with explanatory, apologetic, or extenuating matters in no way going to the defense of the action. Basler v. Sacramento Gas etc. Co., 158 Cal. 514; 111 Pac. 530. In an action brought to recover state and county taxes, the clerk of the superior court has no power, notwithstanding an order of court, to enter a judgment for a single sum, which is less than the amount alleged in the complaint to be due for state tax, county tax, penalties, etc.; and the district attorney, by accepting an offer to allow a judgment for less than the amount fixed by the state board, cannot estop the state from claiming such amount; but where the action is brought to recover several sums to be specified in the judgment, an offer may be made to allow judgment for one of such sums, or for sums less than the respective sums claimed in the complaint, but in order to authorize the clerk to enter a judgment for the amounts named in the offer, it must be specified in the offer in what sum judgment will be allowed for state and in what sum for county taxes. Sacramento County v. Central Pacific R. R. Co., 61 Cal. 250.

Tender made to whom. A tender, pending suit, may be made to the opposite party personally, and need not be made to his attorney, whose authority to control the suit does not preclude such tender. Ferrea v. Tubbs, 125 Cal. 687; 58 Pac. 308.

Effect of refusal of tender. A tender of the amount due on a debt secured by mortgage, made after the debt falls due, does not release the lien of the mortgage; if the tender was made in good faith, and was intended to be kept good, the mortgagor could have paid the money into court on the commencement of a proceeding to compel the mortgagee to accept it, and to satisfy the mortgage. Himmelmann v. Fitzpatrick, 50 Cal. 650. The refusal by the plaintiff, pending his appeal from a judgment, of a valid tender made to him by the defendant, operates as a release by the plaintiff, as judgment creditor, of all interest which would otherwise have accrued thereon after the date of the tender. Ferrea v. Tubbs, 125 Cal. 687; 58 Pac. 308. Where a tender is made of the full amount due, before suit is brought, which tender is kept good and brought into court, the judgment should be for the plaintiff for the amount tendered, and for the defendant for costs. Curiac v. Abadie, 25 Cal. 502. In an action to enforce the specific performance of an agreement to issue stock, where the defendant, before suit, tenders such stock as the court finds it was, under the terms of contract, to deliver, and keeps such tender good, judgment should be for the plaintiff for such stock, and for the defendant for costs. Williams v. Ashurst Oil etc. Co., 144 Cal. 619; 78 Pac. 28.

Offer to accept less than full amount revoked how. An offer of the obligee to accept, in full satisfaction, less than the amount due him, made before the commencement of the suit on the obligation, is revoked by the commencement of the suit, if not accepted before that time. Peachy v. Witter, 131 Cal. 316; 63 Pac. 468.

Agreement to settle. An agreement to settle a claim upon which suit has not been begun, is not supported by a sufficient consideration, when the party seeking to enforce it knew his claim to be groundless, and did not assert it in good faith. Snowball v. Snowball, 164 Cal. 476; 129 Pac. 784.

Duty of clerk in entering judgment. In entering judgments, the clerk acts merely in a ministerial capacity: he must follow closely the forms provided by law for the exercise of the power conferred upon him, or his acts are invalid. Old Settlers Investment Co. v. White, 158 Cal. 236; 110 Pac. 922.

Recovery of costs. A defendant, who pleads a tender, to entitle himself to costs, must not only aver a tender, but also aver that he has always been and is ready to pay the sum tendered, and the money must be brought into court. Bryan v. Maume, 28

Cal. 238. The failure of the plaintiff to accept an offer of compromise does not preclude him from the right to recover costs, although the judgment rendered in his favor is for a less amount than the offer, if the trial is concluded within five days after the offer was made. Scammon v. Denio, 72 Cal. 393; 14 Pac. 98. The plaintiff may recover costs accruing in his favor before an offer of judgment by the defendant, although he may recover a less favorable judgment than was offered. Douthitt v. Finch, 84 Cal. 214; 24 Pac. 929. Where a plaintiff, after the refusal of an offer to compromise, recovers a judgment within the superior court's jurisdiction, but less than the amount offered, he is not entitled to costs. Murphy v. Casey, 13 Cal. App. 781; 110 Pac. 956.

Right to attorneys' fees. An insufficient tender, in an answer to an action to foreclose a mortgage, cannot defeat the right to attorneys' fees. McCoy v. Buckley, 11 Cal. App. 241; 104 Pac. 705.

CODE COMMISSIONERS' NOTE. The cognovit was good as an admission in pais after answer filed. It might be different if the cognovit was set aside by the court upon good cause shown. If judgment had been entered upon the cognovit, and by its authority, then the amount acknowledged would have been the sum of the judgment. But where, upon declaration and answer denying the facts alleged, the acknowledgment is used as evidence, interest may be given by way of damages. Hirschfield v. Franklin, 6 Cal. 609. We think that the true meaning of the statute authorizing judgment to be entered by the clerk upon an offer on the part of the defendant to suffer judgment for a specified sum, etc., is that judgment can be entered only when the offer is made after action is brought and while pending. To hold that a party may make out a complaint, and then get the defendant to acknowledge service, and to offer to pay all or a portion of an assumed demand, and then for the plaintiff to file these papers as parts of an entire arrangement with the clerk and have him enter judgment, which would be binding, is simply to hold that the safeguards which the law has thrown around confessions of judgment by a debtor, and which cautionary provisions are for the security of creditors, are nugatory. A judgment entered under such circumstances would be void, and not merely irregular. This case is distinguished from the case of Patrick v. Montader, 13 Cal. 434, which was a case of mere irregularity not affecting the jurisdiction. Crane v. Hirshfelder, 17 Cal. 584.

CHAPTER III.

INSPECTION OF WRITINGS.

§ 1000. A party may demand inspection and copy of a book, paper, etc.

§ 1000. A party may demand inspection and copy of a book, paper, etc. Any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness.

Items of an account. Ante, § 454.
Compelling production of books, etc. Post, §§ 1985 et seq. See also post, §§ 1938, 1939.
Contempt. Post, §§ 1209 et seq.

Legislation § 1000. 1. Enacted March 11, **1872:** based on Practice Act, § 446 (New York Code § 388), substituting "is" for "shall" in last sentence.

2. Amended by Code Amdts. **1873–74,** p. 342, (1) substituting "entries of accounts in any book, or of any document" for "any book, document"; (2) inserting "the entries of accounts of" after "exclude"; (3) inserting "or the" before "document," in second sentence; and (3) substituting "them" for "it" after "resume" and after "alleges."

3. Amended by Code Amdts. **1880,** p. 72, omitting "or a county judge," after "or a judge thereof," in first line.

Construction of section. The only provision in this code, in the nature of a bill of discovery, other than §§ 1459, 1460, post, applying to probate proceedings, is contained in this section. Levy v. Superior Court, 105 Cal. 600; 29 L. R. A. 811; 38 Pac. 965. This section cannot be so used as to draw a drag-net of inspection through all the books of the other party, under the ostensible motive of trying to catch something which the other side had testified was not there, in the mean time exposing all the private business of the defendant, his dealings with persons other than the plaintiff, his method of conducting his affairs, perhaps his financial condition, and other matters vitally important to his welfare: there is no warrant in law for such a forcible violation of a person's

privacy. Ex parte Clarke, 126 Cal. 235; 77 Am. St. Rep. 176; 46 L. R. A. 835; 58 Pac. 546.

Showing required to obtain order. There must be a substantial showing that the document or book sought for contains material evidence in favor of the party asking for it: an inquisitorial examination was not contemplated by the framers of the statute. Ex parte Clarke, 126 Cal. 235; 77 Am. St. Rep. 176; 46 L. R. A. 835; 58 Pac. 546.

Order granted when. Originally, an order for the production of a paper, document, or book was made only when the document was one declared on in the bill or set up as a defense, or where the party asking for it had an interest in the document itself, as where it was a contract between the parties and only one copy existed, or where the instrument was, in the very nature of things, material evidence, as where it was alleged to be forged or altered, and that it would on its face show the facts alleged, or where the books belonged to both parties, as in a suit between partners, or principal and agent, or trustee and beneficiary; but, afterwards, such orders were extended so as to include other grounds for the production of papers, but the principles applicable generally to the forced production of papers are as above stated. Ex parte Clarke, 126 Cal. 235; 77 Am. St. Rep. 176; 46 L. R. A. 835; 58 Pac. 546.

Undue inquisition. A court is bound to protect a party against undue inquisition into his affairs; and it would be difficult to imagine a more striking instance of undue inquisition than an order compelling a defendant to produce for inspection all his books, upon the mere suspicion, against positive evidence to the contrary, that they might possibly contain some evidence favorable to the plaintiff, and without pointing to any particular part of the books over which this suspicion was supposed to hover. Ex parte Clarke, 126 Cal. 235; 77 Am. St. Rep. 176; 46 L. R. A. 835; 58 Pac. 546.

Inspection of original documents. Where the defendant has forgotten the execution of the instruments alleged, or doubts the correctness of their description or copy in the complaint, he should, before answering, take the requisite steps to obtain an inspection of the original. Curtis v. Richards, 9 Cal. 34. Whether a copy of the contract upon which an action is based is or is not set forth in the complaint, the defendant may always demand and obtain an inspection of the original by pursuing the course prescribed in this section; and if, upon such inspection, it appears that the complaint misrepresents the contract, or has omitted a substantial part of it, such misrepresentation or omission is a matter of defense, but it is not available as a ground of general demurrer, because it does not appear upon the face of the complaint. Byrne v. Luning Co., 4 Cal. Unrep. 895; 38 Pac. 454. Where deeds or other documents have been admitted in evidence, the opposing counsel have a right to inspect them at any time during the progress of the trial: it will not be inferred on appeal that no damage resulted from a refusal to permit such inspection. Pope v. Dalton, 40 Cal. 638. Copies of records, called for in the taking of a deposition, in which such copies are incorporated, are as admissible as any other part of the deposition, without a production of the original records. Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668; 87 Pac. 27.

Production of documents by witness. The production of documents by a witness, when his examination discloses the possession of or control over the same, is within the meaning of the last sentence of this section. Morehouse v. Morehouse, 136 Cal. 332; 68 Pac. 976.

Power to compel production of books and papers. See note 41 Am. St. Rep. 388.

Effect of calling for and inspecting document to make it admissible in evidence. See note 33 L. R. A. (N. S.) 552.

CODE COMMISSIONERS' NOTE. A court may order a party to produce books and papers before the court. Barnstead v. Empire Mining Co., 5 Cal. 299. The opposing counsel have the right to inspect, at any time during the progress of the trial, all papers, books, deeds, or other documents which have been admitted in evidence. Pope v. Dalton, 40 Cal. 638.

CHAPTER IV.

MOTIONS AND ORDERS.

§ 1003. Order and motion defined.
§ 1004. Motions and orders, where made.
§ 1005. Notice of motion. When must be given.
§ 1006. Transfer of motions and orders to show cause.
§ 1007. Order for payment of money, how enforced.

§ 1003. Order and motion defined. Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

Motion.

1. **Heard before court commissioners.** Ante, § 259, subd. 1.
2. **Notice of.** Post, § 1005.

Order.

1. **Enforcement.** Ante, § 128, subd. 4.
2. **Final effect of, as estoppel.** Post, § 1908.
3. **Renewing application for.** Ante, §§ 182, 183.
4. **Vacating.** Ante, § 937.

Legislation § 1003. Enacted March 11, 1872; re-enactment of Practice Act, § 515 (New York Code, § 400).

Construction of section. In the enactment of this section there was no intention of abolishing the power of a court of equity to pronounce what in equity practice was called an interlocutory decree or decretal order, but only to provide that that which finally determined the rights of the parties should be called a judgment, and that every other direction of a court or judge, made or entered in writing, should be denominated an order. Thompson v. White, 63 Cal. 505.

Conflict of sections. No prohibition of such intermediate determinations by a court of equity as the exigencies of a case may demand is made by this section, and it is not in conflict with § 187, ante. Thompson v. White, 63 Cal. 505.

Order, defined and illustrated. In a legal sense, an order means a decision given in an action pending, and during the progress thereof. Nellis v. Justices' Court, 20 Cal. App. 394; 129 Pac. 472. An order, as distinguished from a final judgment, is the judgment or conclusion of the court upon any motion or proceeding. Estate of Rose, 80 Cal. 166; 22 Pac. 86. An order is the judgment or conclusion of the court or judge upon any motion or proceeding, and includes cases where affirmative relief is granted, or where relief is denied. Gilman v. Contra Costa County, 8 Cal. 52; 68 Am. Dec. 290. An order is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice, or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment. Loring v. Illsley, 1 Cal. 24; Estate of Smith, 98 Cal. 636; 33 Pac. 744. The action of the court upon the demand for a change of the place of trial is an order. Bohn v. Bohn, 16 Cal. App. 182; 116 Pac. 568. A paper signed by the justices of the supreme court, extending the time to file a transcript, is an order of court, before the filing thereof. Desmond v. Faus, 83 Cal. 134; 23 Pac. 303. An order of sale of mortgaged premises, for the entire debt, after its maturity, made upon motion after judgment of foreclosure and sale, is an order made after judgment. Byrne v. Hoag, 126 Cal. 283; 58 Pac. 688. A judgment refusing to admit a will to probate is not a final judgment, but an order of the court, and an order subsequent thereto is not an order made after final judgment. Estate of Smith, 98 Cal. 636; 33 Pac. 744. A mere memorandum, entered in the rough minutes of the clerk, is not an order. Brownell v. Superior Court, 157 Cal. 703; 109 Pac. 91. A ruling made during the progress of a trial, either admitting or excluding evidence, is not an order, within the meaning of this section. McGuire v. Drew, 83 Cal. 225; 23 Pac. 312. A mere declaration by the judge, that an injunction is no longer in force, not being a "direction," does not constitute an "order." Devlin v. Rydberg, 132 Cal. 324; 64 Pac. 396. An order is not a judgment. Scott v. Shields, 8 Cal. App. 12; 96 Pac. 385. An interlocutory decree is an order, and not a judgment, in so far that, except where expressly provided by statute, an appeal does not lie, but it may be reviewed upon an appeal from the judgment. Watson v. Sutro, 77 Cal. 609; 20 Pac. 88. An interlocutory decree settling the account of an administrator, is not a final judgment, but a mere order. Estate of Rose, 80 Cal. 166; 22 Pac. 86. An order of a justice of the peace, under proceedings supplementary to execution, requiring the judgment debtor to apply designated property to the satisfaction of the judgment, does not constitute a judgment, within the meaning of § 974, ante. Wells v. Torrance, 119 Cal. 437; 51 Pac. 626.

Character of order as determined by its contents. The character of the court's action or direction is to be determined by the nature of the action itself, considered in the light of the authority of the court in the premises, rather than by what it is designated by the court: a direction for a further sale of mortgaged premises, under § 728, ante, is an order, although designated by the court a "decree of foreclosure and order of sale." Byrne v. Hoag, 126 Cal. 283; 58 Pac. 688. Where an order, required to be made by the court, is entitled and filed in the court, and bears the seal of the court, it will not be considered as an order of the judge at chambers, although in drafting the order the judge employs the introductory phrase, "It appearing to me," and in the testatum clause says, "In witness whereof, I have hereunto set my hand," etc. Oaks v. Rodgers, 48 Cal. 197.

Ex parte orders. The substitution of an executor, upon the suggestion of the death of a party to the action, may be made upon an ex parte application. Campbell v. West, 93 Cal. 653; 29 Pac. 219. An ex parte order allowing an intervention may be properly made. Kimball v. Richardson-Kimball Co., 111 Cal. 386; 43 Pac. 1111.

Discretion of court in making order. Where the allowance of an order rests in the discretion of the court, the exercise of the power must, in a great degree, depend upon the special circumstances of the case, and be so governed as to prevent delays and to promote justice; and where no meritorious defense is asserted, and no leave to answer is asked, in the court be

low, the appellate court will not reverse the judgment and open the case for another trial. Thornton v. Borland, 12 Cal. 439.

Jurisdiction presumed. Where a court makes an order, and it does not appear upon the face of the record that it did not have jurisdiction to make it, it will be presumed, in a collateral attack, that the parties were before the court, and that the proper proceedings were had to authorize the court to make the order. Clark v. Sawyer, 48 Cal. 133.

Entry of orders. The order of the court should be entered in such terms as to express with precision the object to be attained. Jenkins v. Frink, 27 Cal. 337. It is the duty of the clerk to enter the motion, and the order made thereon, in the minutes of the court, and the entry should state, in substance, the grounds on which the motion is based, as stated by counsel making it, but these grounds need not, in all cases, be entered in full in the minutes; and if counsel refers to any document filed in the case for a statement of the grounds of the motion, the entry may, and for the sake of brevity should, refer to the same document. Williams v. Hawley, 144 Cal. 97; 77 Pac. 762. An order to the clerk to enter in the minutes, nunc pro tunc, an order alleged to have been made in open court, cannot properly be made by the judge at chambers, where there is nothing in the record to show that such order was made. Hegeler v. Henckell, 27 Cal. 491. An order nunc pro tunc may be made to correct a mistake in failing to enter an order which was actually made, or which should have been made as a matter of course; but an omission to make an order dispensing with an appeal bond cannot be supplied by an order nunc pro tunc after the time for making it has elapsed. Estate of Skerrett, 80 Cal. 62; 22 Pac. 85. Where an order appealed from was actually made, but was not entered upon the record, the appellate court may grant leave to have an order entered nunc pro tunc certified up, and if it appears to be the proper order, it is sufficient. Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222; 15 Am. St. Rep. 50; 22 Pac. 594. The proof of service of summons may be amended, after judgment entered, by inserting a fact omitted from the affidavit, and order allowing such amendment entered nunc pro tunc as of a date before judgment. Woodward v. Brown, 119 Cal. 283; 63 Am. St. Rep. 108; 51 Pac. 2. The court has jurisdiction to have an order entered nunc pro tunc, substituting parties plaintiff; and its action in making such order is conclusive against any collateral attack. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074. The clerk has no authority to enter upon the minutes of the court a certified copy of an order, without any direction of the court therefor. Devlin v. Rydberg, 132 Cal. 324; 64 Pac. 396. The validity of an order does not depend upon the entry by the clerk, but upon the fact that the order has been made; and whenever it is shown that an order has been made by the court, it is as effective as if it had been entered of record by the clerk. Niles v. Edwards, 95 Cal. 41; 30 Pac. 134. There is no provision of law requiring that all orders of a court shall be entered at length in its minutes, in order that they may be effective; and every direction of a court or judge is an order, whether merely made in writing or entered in the minutes; but if it is not entered, it should be filed, so that it may form a part of the record in the case. Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109.

Orders proved by records. The records of a court are the best evidence, and the only evidence, of the orders made by it. Clark v. Crane, 57 Cal. 629.

Certified copy of order. A certified copy of an order required to be furnished on an appeal should be furnished and certified by the clerk of the court making the order, and in whose minutes it is entered. Mansfield v. O'Keefe, 133 Cal. 362; 65 Pac. 825.

Contempt for disobeying order. A party is not in contempt of court for not complying with an unauthorized or unlawful order. Hennessy v. Nicol, 105 Cal. 138; 38 Pac. 649.

Modifying or vacating orders. A conditional order, vacating a sale by assignees in insolvency, cannot be amended so as to become absolute, without notice to the purchaser. Thompson v. Superior Court, 119 Cal. 538; 51 Pac. 863. An order made without notice may be set aside without notice; hence, if an order, made without notice, setting aside an order also made without notice, is void, it follows that the first order was also void. Coburn v. Pacific Lumber etc. Co., 46 Cal. 32. Orders improvidently and unintentionally made may be set aside, but the parties interested have a right to be heard on the question, and are entitled to notice; that a given order was so made will not be presumed on appeal, but the fact must be affirmatively shown. Wunderlin v. Cadogan, 75 Cal. 617; 17 Pac. 713. An order made through inadvertence or mistake may be set aside; and if the question of mistake or inadvertence is disputed, the decision of the judge upon any controverted fact is not open to review. People v. Curtis, 113 Cal. 68; 45 Pac. 180. An interlocutory decree, or decretal order, may be entered in equity cases, and in cases other than those in partition; it is not conclusive, but may be modified on the final hearing, as the law and the evidence may require. Thompson v. White, 76 Cal. 381; 18 Pac. 399.

An order obtained by means of an artifice and trick practiced upon the court may be set aside by the court that made it. Page v. Page, 77 Cal. 83; 19 Pac. 183. The judge of the court, having made an order upon which the parties have acted, cannot, without any statutory authority, change his mind and discharge his order: such action of the judge would lead to great uncertainty, inconvenience, and in some cases to wrong and injustice; hence, a judge, having directed a stay of execution upon the giving of an undertaking, cannot arbitrarily set aside his stay after the order is perfected. Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222; 15 Am. St. Rep. 50; 22 Pac. 594.

Motion and application, defined. A motion is an application for an order. Brownell v. Superior Court, 157 Cal. 703; 109 Pac. 91. A motion is an application for an order or direction of the court not included in a judgment. Estate of Harrington, 147 Cal. 124; 109 Am. St. Rep. 118; 81 Pac. 546. The application made upon the demand for a change of the place of trial is designated a motion. Bohn v. Bohn, 16 Cal. App. 179; 116 Pac. 568. "Motion" and "application" are really the same thing. Weldon v. Rogers, 151 Cal. 432; 90 Pac. 1062.

What constitutes a motion. A motion is properly an application for a ruling or order, made viva voce to a court or judge. It is distinguished from the more formal applications for relief by petition or complaint. The grounds of the motion are often required to be stated in writing and filed, and in practice the form of the application itself is often reduced to writing and filed; but the making up and filing of the application itself is not the making of a motion. If nothing more were done, it would not be error in the court entirely to ignore the proceeding. The attention of the court must be called to it, and the court must be moved to grant the order. People v. Ah Sam, 41 Cal. 645. A verified petition to compel a receiver to pay over funds to the petitioner is in the nature of a motion, in which the moving party makes a prima facie case by his sworn statement; and it is immaterial whether the statement be termed a complaint, or a petition in the nature of a complaint, or an affidavit, it being evidence which is to be met at the hearing upon the order to show cause; and if not so met, the court is authorized to treat the statements of the verified petition as established facts. California Title Insurance etc. Co. v. Consolidated Piedmont Cable Co., 117 Cal. 237; 49 Pac. 1.

Motion may be made by whom. One who is not a party to a proceeding cannot make a motion therein. Estate of Aveline, 53 Cal. 259.

Successive motions. A motion to open a default and a motion to vacate a judgment may be separate and distinct from each other, and depend upon a different record, and seek a different relief; and a party is not precluded from making one of these motions because the other has been denied. Thompson v. Alford, 128 Cal. 227; 60 Pac. 686.

Time to file counter-affidavits on motion. The granting of time to file counter-affidavits on motion is a matter within the discretion of the court. Pierson v. McCahill, 22 Cal. 127.

Judicial notice in determining motion. In all motions before a judge, during the progress of a trial, he may act on his own knowledge in regard to things which, in their nature, are better known to himself than they could be to others. Southern California Motor Road Co. v. San Bernardino Nat. Bank, 100 Cal. 316; 34 Pac. 711.

Leave to renew motion. If, after the decision of a motion, it is desired to present any new facts for the consideration of the court, the proper practice is to ask for leave to renew the motion; and if it is desired to review the action of the court upon an appeal, it is sufficient to present the order in connection with a bill of exceptions containing the matter upon which the court based its action. Harper v. Hildreth, 99 Cal. 265; 33 Pac. 1103. Leave to renew a motion may be given after the original motion has been denied. Hitchcock v. McElrath, 69 Cal. 634; 11 Pac. 487; and see Kenney v. Kelleher, 63 Cal. 442. It is quite usual, when a motion is denied, which the moving party desires to renew, to have the entry show that it was denied without prejudice; but leave to renew need not be given at the time of the denial: it may be given at any time afterwards, as well; and when given, it may be acted upon. Bowers v. Cherokee Bob, 46 Cal. 279. Leave to renew a motion may be given after the original motion is denied, and the granting or refusal of leave is within the legal discretion of the court, and will not be interfered with, except in case of abuse; and it is not an abuse of discretion to grant leave upon the same facts more fully stated. Kenney v. Kelleher, 63 Cal. 442. In all ordinary motions, where the jurisdiction is not limited by statute, it is discretionary with the court or judge hearing and denying the motion, to grant leave for its renewal; and this discretionary power will be presumed to have been properly exercised, unless the contrary appears. Hitchcock v. McElrath, 69 Cal. 634; 11 Pac. 487; and see Bowers v. Cherokee Bob, 46 Cal. 279. It is within the discretion of the court to allow a motion to be renewed, although it had previously been denied. Mace v. O'Reilley, 70 Cal. 231; 11 Pac. 721. The doctrine of res adjudicata, in its strict sense, does not apply to motions made in the course of practice, such as a motion for an alias writ

of possession, or a motion for an order requiring a sheriff to execute a writ; and the court may, upon proper showing, allow a renewal of such a motion, once decided; but such leave will not be granted unless a new state of facts has arisen since the former hearing, or the facts were not then presented by reason of surprise or excusable neglect of the moving party. Ford v. Doyle, 4 Cal. 635; Bowers v. Cherokee Bob, 46 Cal. 279; Kenney v. Kelleher, 63 Cal. 442; Estate of Harrington, 147 Cal. 124; 109 Am. St. Rep. 118; 81 Pac. 546.

Error in granting motion. On motion for a new trial, it is irregular for the court, without hearing or notice, to reverse its first judgment and render a contrary one. Mitchell v. Hackett, 14 Cal. 661. The absence of counsel for the opposing party, at the time set for the hearing of the motion, which resulted in a certain order, does not cure or waive error therein. Lybecker v. Murray, 58 Cal. 186.

Grounds of motion and of review. The provision of the statute indicating the general ground or reason upon which the motion may be based, as that an attachment may be discharged upon the ground that the writ was improperly issued, does not obviate the necessity of specifying the points of objection upon which the moving party will rely; and if the point be stated, it may be possible for the opposite party to answer it, and the object of the rule is to give him a fair opportunity to do so. Freeborn v. Glazer, 10 Cal. 337. The particular grounds upon which it will be based should be stated in the motion for a new trial: there may be ample grounds for granting the motion for one reason, and none whatever for another. Williams v. Hawley, 144 Cal. 97; 77 Pac. 762. The only ground upon which a motion for a nonsuit can be reviewed upon appeal is that specifically stated when the motion was made. Bronzan v. Drobaz, 93 Cal. 647; 29 Pac. 254. Where a statement of errors of law occurring at the trial, and of the insufficiency of the evidence to justify the findings, in the bill of exceptions, shows the grounds of the motion for a new trial, a reference thereto is a sufficient statement of the grounds of the motion. Williams v. Hawley, 144 Cal. 97; 77 Pac. 762. An appeal will not be dismissed for want of a sufficient undertaking, where such is not made the ground of the motion, as, had such ground been stated, it might have been made to appear that the undertaking was waived. Clarke v. Mohr, 125 Cal. 540; 58 Pac. 176. Where the granting of a motion is proper on one of the grounds stated, the court may disregard the other grounds. Toy v. Haskell, 128 Cal. 558; 79 Am. St. Rep. 70; 61 Pac. 89. The grounds need not be stated at length in making an oral motion, but the court must, in some way, be informed thereof, and this may be done by reference to some paper on file in the action. Williams v. Hawley, 144 Cal. 97; 77 Pac. 762. A motion in an action for wrongful death, that all proceedings be stayed until some other heir or heirs are brought in as parties, is properly denied, in the absence of a showing of the existence of any other heirs. Salmon v. Rathjens, 152 Cal. 290; 92 Pac. 733.

Mandamus to compel determination of motion. Mandamus will issue from the supreme court to compel a superior judge to hear and determine a motion, made in an action pending in his court, for a change of venue to the place of residence of the defendant. Hennessy v. Nicol, 105 Cal. 138; 38 Pac. 649.

What entry or record is necessary to complete order. See note 28 L. R. A. 621.

CODE COMMISSIONERS' NOTE. There appears to be no statute of limitations against a motion. It may be made at any time when there is no unreasonable delay. Reynolds v. Harris, 14 Cal. 668; 76 Am. Dec. 459. Objection is made that there was a want of due notice of the motion. Verbal notice, it is true, is not such notice as the statute requires. When the statute speaks of notice, it means written notice, or notice in open court, of which a minute is made by the clerk. Borland v. Thornton, 12 Cal. 448. An application for an order is a motion. Jenkins v. Frink, 27 Cal. 337. If a party, in his notice of motion, asks for a specific relief, or for such further order as may be just, the court may afford any relief compatible with the facts of the case. People v. Turner, 1 Cal. 152. An appeal lies from an order made by a judge at chambers, setting aside an execution, etc. Bond v. Pacheco, 30 Cal. 530. See also § 166, ante, notes 3, 4, 5, 6, 8, commenting on Bond v. Pacheco, 30 Cal. 530, and Larco v. Casaneuava, 30 Cal. 563.

§ 1004. Motions and orders, where made.

Motions must be made in the county, or city and county, in which the action is pending. Orders made out of court may be made by the judge of the court in any part of the state.

Power of judge at chambers. Ante, §§ 165, 166, 176.

Court commissioner's control of ex parte motions. Ante, § 259, subd. 1.

Legislation § 1004. 1. Enacted March 11, **1872**; based on Practice Act, § 516 (New York Code, § 401), which read: "Motions shall be made in the county in which the action is brought, or in an adjoining county in the same district." When enacted in 1872, § 1004 read: "Motions must be made in the county in which the action is pending, or in an adjoining county in the same judicial district. Orders made out of court may be made by the judge of the court in any part of the state."

2. Amended by Code Amdts. **1880**, p. 12.

Construction of section. This section only prescribes the venue of such motions as may be made out of court, but it does not say what such motions are. Larco v. Casaneuava, 30 Cal. 560.

What business must be transacted in court. The general rule is, that all judicial business must be transacted in court;

the authority to transact such business out of court is exceptional, and does not exist, unless expressly authorized by statute. Carpenter v. Nutter, 127 Cal. 61; 59 Pac. 301. It is absolutely essential to the validity of a judgment, that it be rendered by a court of competent jurisdiction, at the time and place and in the form prescribed by law. Norwood v. Kenfield, 34 Cal. 329. An order for alimony and the custody of children, pendente lite, can only be made by the court in which the action for divorce is pending. Bennett v. Southard, 35 Cal. 688.

Business done in chambers. An order dispensing with an undertaking on appeal by a municipal officer may be made by a judge of the superior court from which the appeal is taken, by a writing signed by him during the progress of another trial, and filed in the case, but not entered in the minutes of the court. Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109. An order extending the time for the preparation of a statement or bill of exceptions should be made by the judge who tried the case; such order need not be made in court, and it may be made by the judge in any part of the state. Matthews v. Superior Court, 68 Cal. 638; 10 Pac. 128. A judge's chambers are not confined to the place for the usual transaction of judicial business not required to be done in open court, but chamber business may be done wherever the judge may be found, within the proper jurisdiction of the court. Estate of Lux, 100 Cal. 593; 35 Pac. 341; and see Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109.

Acts of judge as acts of court. Under the present constitution, whenever a judge of the superior court is present at the place designated for the transaction of judicial business, and there assumes to transact such business, his acts may be considered as the acts of the court of which he is a judge. Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109.

Court, defined. The term "court," as used in this code, means, sometimes, the place where the court is held; sometimes, the tribunal itself; sometimes, the individual presiding over the tribunal; in many cases it is used synonymously, as well as interchangeably, with the term "judge"; and whether the act is to be performed by the judge or the court, is generally to be determined by the character of the act, rather than by the designation. Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109.

CODE COMMISSIONERS' NOTE. Where the judge who tried the cause goes to the county in his district not adjoining the one where the trial was had, to hold court, before the time for filing amendments to the statement on motion for a new trial has expired, the moving party prosecutes the motion with due diligence, if he brings the same to a hearing when the judge returns or first holds court in a county adjoining the one in which the case was tried. Warden v. Mendocino County, 32 Cal. 658. Section 137 of the Civil Code (concerning divorces) provides that the court where the action is pending may make an order for the support of the wife and the maintenance of the children during the progress of the action. Section 1004 of the Code of Civil Procedure provides that: "Motions must be made in the county in which the action is pending, or in an adjoining county in the same judicial district. Orders made out of court may be made by the judge of the court in any part of the state." An order for alimony and for the custody of the children during the pendency of the suit, can only be made by the court in which the action for divorce is pending. It was held that the statute concerning divorces did not authorize the judge at chambers to make the order, and the application must be made to the court. Section 1004 of this code, above quoted, applies only to such motions as the judge is authorized to hear at chambers, and what these motions are has been defined in Bond v. Pacheco, 30 Cal. 532; and in Larco v. Casaneuava, 30 Cal. 564; see Bennett v. Southard, 35 Cal. 691; see notes to § 166, ante.

§ 1005. Notice of motion. When must be given. When a written notice of a motion is necessary, it must be given, if the court is held in the county in which at least one of the attorneys of each party has his office, five days before the time appointed for the hearing; otherwise, ten days. When the notice is served by mail, the number of days before the hearing must be increased one day for every twenty-five miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all thirty days; but in all cases the court, or a judge thereof, may prescribe a shorter time.

Written, notice must be. Post, § 1010.
Order made without notice. Ante, § 937.
Service of papers, generally. Post, §§ 1010 et seq.

Legislation § 1005. 1. Enacted March 11, **1872**; based on Practice Act, § 517 (New York Code, § 402), which read: "When a written notice of a motion is necessary, it shall be given, if the court be held in the same district with both parties, five days before the time appointed for the hearing; otherwise, ten days; but the court or judge may, by an order to show cause, prescribe a shorter time." When § 1005 was enacted in 1872, (1) "must" was substituted for "shall"; and (2) after the words "ten days," the section was changed to read, beginning a new sentence, "When the notice is served by mail, the number of days before the hearing must be increased one day for every twenty-five miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all ninety days; but the court, or judge, or county judge, may prescribe a shorter time."

2. Amended by Code Amdts. **1880**, p. 13, to read as at present, except for the amendment of 1907.

3. Amendment by Stats. **1901**, p. 177; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 601, (1) substituting "is held in the county in which at least

one of the attorneys of each party has his office" for "be held in the same county, or city and county with both parties"; the code commissioner saying, "The amendment allows the notice of motion to be for five days whenever the court is held in the county in which one of the attorneys has his office. This is the rule of court already adopted in most jurisdictions of the superior court, and the amendment makes the practice uniform throughout the state."

Application of section. This section has no application in cases where a party receives notice to which he is not entitled; and where the court chooses to give notice, it may be of such length as the court sees fit. Mudd v. Mudd, 98 Cal. 320; 33 Pac. 114.

Necessity of notice. A rule of court establishing regular days for the hearing of motions, does not dispense with the notice required by the code. Bohn v. Bohn, 164 Cal. 532; 129 Pac. 981.

Motions placed on calendar how. A motion to change the place of trial, like a demurrer filed, goes upon the calendar, to be called for hearing in the regular order of business. Bohn v. Bohn, 16 Cal. App. 182; 116 Pac. 568.

Notice, what constitutes. An order to show cause why a commission to take testimony should not issue, when served upon the adverse party, is equivalent to a notice of motion, and no further notice is required. Dambmann v. White, 48 Cal. 439.

Form and contents of notice. A demand for a change of the place of trial is not such a motion as requires written notice, under this section. Bohn v. Bohn, 16 Cal. App. 182; 116 Pac. 568.

Waiver of written notice. Even if written notice were necessary upon an application for a change of the place of trial, it is waived where counsel appears and resists the application. Bohn v. Bohn, 16 Cal. App. 182; 116 Pac. 568.

Notice of motion as affecting order. Where a party, in his notice of motion served on the adverse party, asks for a specific relief, or for such other or further order as may be just, the court may afford any relief compatible with the facts of the case presented. People v. Turner, 1 Cal. 152. A notice of a motion to discharge a writ of attachment should specify the grounds of the motion, and wherein it will be urged that the writ was improperly issued: a notice of motion to dissolve an attachment, "because the said writ was improperly issued," is insufficient. Freeborn v. Glazer, 10 Cal. 337. A notice of motion for judgment upon the pleadings, specifying that it would be made "upon the pleadings, papers, files, and records in said action, and upon the ground that the answer on file herein constitutes no defense to the cause of action, or any portion thereof, stated in complaint," is sufficient, and states a proper ground for the motion. Hearst v. Hart, 128 Cal. 327; 60 Pac. 846.

Time of notice. The non-residence of the plaintiff cannot affect or extend the time required for the service of notice of a motion to dissolve an attachment. Finch v. McVean, 6 Cal. App. 272; 91 Pac. 1019. Where the notice of an application by a plaintiff for an injunction was given for a shorter time than that prescribed, and the defendant does not appear to the motion, the order granting the injunction must be deemed to have been made without notice, and the defendant may, ex parte, apply to the court to dissolve it. Johnson v. Wide West Mining Co., 22 Cal. 479. A filed motion to retax costs need not be served; but notice of the hearing of the motion must be given for five days, unless the court, by order, shortens the time. Furtinata v. Butterfield, 14 Cal. App. 25; 110 Pac. 962.

Notice is not motion. The notice of motion is distinct from the motion itself, and notice alone is not sufficient, on appeal, to show the making of the motion. Herrlich v. McDonald, 80 Cal. 472; 22 Pac. 299. The mere giving of notice is not a proceeding in court; and where the place of trial of an action is changed, it is not necessary to the validity of a motion to dissolve an injunction that the court in which notice was made had jurisdiction at that time: it is sufficient if it had jurisdiction when the motion was made. Younglove v. Steinman, 80 Cal. 375; 22 Pac. 189.

Notice as part of record. A motion may be made orally, though it is better practice to have it made in writing, or entered in the minutes of the court; but in every case where it is desired to review a motion on appeal, it should be made part of the record by a bill of exceptions, showing that the motion was made, and the ground upon which it was made: it is not sufficient to embody the notice of the motion in the record, for such notice is distinct from the motion itself; and error in the granting of a motion must be made affirmatively to appear in the record. Herrlich v. McDonald, 80 Cal. 472; 22 Pac. 299.

Time for making motion. A reasonable time for the making of a motion is, in the absence of a statutory limitation, a question largely within the discretion of the trial court. Frank Co. v. Leopold & Ferron Co., 13 Cal. App. 59; 108 Pac. 878.

Extension of time for filing of papers. The statutes fixing the time for the filing of papers are merely directory, and it is always within the power of the court, in the exercise of a proper discretion, to extend the time fixed by law, whenever the ends of justice demand such extension. Wood v. Forbes, 5 Cal. 62.

CODE COMMISSIONERS' NOTE. The supreme court has always held, that statutes, fixing the time for filing papers in a cause, are merely directory, and that the court has it always in its power, in the exercise of a proper discretion, to extend the time fixed by law whenever the ends of justice would seem to demand such an extension. Wood v. Forbes, 5 Cal. 62. Notice of an application by plaintiff,

for an injunction, must be given for the length of time prescribed in § 1005 of this code. If given for a shorter time, and defendant does not appear, he may regard the injunction thus obtained as granted without notice, and move to dissolve the same under § 532, ante. Johnson v. Wide West Mining Co., 22 Cal. 479. If there is any ambiguity in the terms of the notice, rendering its meaning doubtful, the construction must be most strongly against the plaintiff who gave the notice. Carpentier v. Thurston, 30 Cal. 125. It is regular and proper to suggest the death of a party in any court and at any stage of the proceedings. It has now been suggested, and it is our duty to stop, whether there is any motion to dismiss or not. It is said, however, that we cannot act upon the affidavit, because the appellant was entitled to five days' or more notice of the motion to dismiss, also, to a service of the affidavit of the moving party. This might have been a good objection to hearing the motion at all, at the time it was made, or until notice should be given and service made. But no such objection was made at the time the motion was submitted. The motion was submitted on its merits, on briefs to be filed, and the objection of want of notice is now made in the briefs for the first time. The objection was therefore waived by not taking it in time. The object of the notice is, that the party may not be taken by surprise; that he may come with counter-affidavits, or be otherwise prepared to meet it. There was evidently no surprise in this case, and the motion was submitted on its merits. As in the case of Sanchez v. Roach, 5 Cal. 248, the affidavit of the death of the defendant was not contradicted, and it appears that he died before the service of the notice of appeal, and that all of the proceedings since the verdict, except the entry of judgment in accordance with it, are ineffectual for any purpose as against the defendant. See Judson v. Love, 35 Cal. 464. Motion to dismiss appeal as to party deceased. Id.

§ 1006. Transfer of motions and orders to show cause. When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or on the return-day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge, before whom it might originally have been brought.

Notice of motion. Ante, § 1005.

Legislation § 1006. Enacted March 11, 1872; re-enactment of Practice Act, § 518 (New York Code, § 404).

Notice of transfer. The transfer of a case from one department of the superior court, where the same is pending, to another department of the same court, upon the application of a party to the action, should be upon notice to the opposite party; but such is not the rule where the judges, for the more convenient dispatch of business, or for any other reason they may deem necessary, make an order assigning or transferring cases for trial to any one or more of the several departments of such court. Bell v. Peck, 104 Cal. 35; 37 Pac. 766.

§ 1007. Order for payment of money, how enforced. Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment.

Enforced by execution. Ante, §§ 681 et seq.
Contempt. Post, §§ 1209 et seq.

Legislation § 1007. Enacted March 11, 1872.

Construction of section. This section is merely a cumulative remedy for the enforcement of an order to pay money, as for the enforcement of a fine in a proceeding for contempt. Ex parte Karlson, 160 Cal. 378; Ann. Cas. 1912D, 1334; 117 Pac. 447.

Order for alimony or attorneys' fees. An execution may be issued, in a divorce case, upon an order allowing alimony or attorneys' fees. Robinson v. Robinson, 79 Cal. 511; 21 Pac. 1095. An execution may be issued for alimony allowed by a decree or order of the court, without first giving the defendant an opportunity to show cause why he had not obeyed the order. Van Cleave v. Bucher, 79 Cal. 600; 21 Pac. 954. An order allowing alimony and counsel fees, pendente lite, in divorce proceedings, and providing for the enforcement thereof by execution, is appealable. Sharon v. Sharon, 75 Cal. 1; 16 Pac. 345.

Fine for contempt. A fine imposed for contempt of court is a judgment or order for the payment of money, and may be enforced by execution. In re Tyler, 64 Cal. 434; 1 Pac. 884.

Decree of distribution. A decree of distribution is not such a judgment or order for the payment of money against an administrator as may be enforced by execution. Estate of Kennedy, 129 Cal. 384; 62 Pac. 64.

CHAPTER V.

NOTICES, AND FILING AND SERVICE OF PAPERS.

§ 1010. Notices and papers, how served.
§ 1011. When and how served.
§ 1012. Service by mail, when.
§ 1013. Service by mail, how.
§ 1014. Appearance. Notices after appearance.
§ 1015. Service on non-residents.
§ 1016. Preceding provisions not to apply to proceeding to bring party into contempt.
§ 1017. Service by telegraph.
§ 1018. [No section with this number.]
§ 1019. Service of pleadings in action for divorce for adultery.

§ 1010. Notices and papers, how served. Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based. If any such paper has not previously been served upon the party to be notified and was not filed by him, a copy of such paper must accompany the notice. Notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, when not otherwise provided by this code.

Legislation § 1010. 1. Enacted March 11, 1872; based on Practice Act, § 519, which read: "Written notices and other papers, when required to be served on the party or attorney, shall be served in the manner prescribed in the next three sections, when not otherwise provided; but nothing in this title shall be applicable to original or final process, or any proceedings to bring a party into contempt." When enacted in 1872, § 1010 read: "Notices must be in writing, and notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, when not otherwise provided by this code."

2. Amendment by Stats. 1901, p. 177; unconstitutional. See note ante, § 5.

3. Amended by Stats. 1907, p. 601; the code commissioner saying, "Requires the notice to state when, and the grounds and papers upon which, the motion will be made. Codifies what the actual practice is to-day, and what is generally provided for in rules of court."

Necessity of notice. An application, under § 709, ante, by a surety who has paid more than his share of a judgment, for execution against his co-sureties, must be upon notice, under this section and those following. Davis v. Heimbach, 75 Cal. 261; 17 Pac. 199. Where a statute or contract requires the giving of notice, and there is nothing in the context, or in the circumstances of the case, to show that any other form of notice was intended, personal notice will be required. Stockton Automobile Co. v. Confer, 154 Cal. 402; 97 Pac. 881.

Necessity of written notice. Where a statute speaks of notice of a motion, a written notice is meant, or a notice in open court, of which a minute is made by the clerk. Borland v. Thornton, 12 Cal. 440. It is essential that the notice in a legal proceeding shall be in writing, in order that the rights of the party to be affected by it shall be protected, as, otherwise, in many cases, mischievous results would follow: any other practice should therefore be discountenanced. Flateau v. Lubeck, 24 Cal. 364. A substitution of attorneys, by order of the court, involves judicial action, and the requirement of a notice as the basis of such order necessarily implies the exercise of sufficient discretion to determine that the proper notice has been given; such notice must be in writing, and contain a statement of the relief sought, and be given at lease five days before the hearing. Rundberg v. Belcher, 118 Cal. 589; 50 Pac. 670. The settlement of a bill of exceptions in a criminal case must be upon written notice; and § 1171 of the Penal Code, providing for the settlement of a bill upon at least two days' notice, must be construed with this section. Page v. Superior Court, 122 Cal. 209; 54 Pac. 730. Notice of appearance, given for a client by his attorney, need not necessarily be in writing (Salmonson v. Streiffer, 13 Cal. App. 395; 110 Pac. 144); but, in an action in a justice's court, the notice setting the cause for trial is jurisdictional, and must be given in writing (Elder v. Justice's Court, 136 Cal. 364; 68 Pac. 1022); and such notice must form a part of the record; and there must be an entry thereof, and of the mode in which it is given, in the justice's docket, in order to authorize him to proceed upon the trial of the case and render a judgment therein. Jones v. Justice's Court, 97 Cal. 523; 32 Pac. 575.

Object and waiver of written notice. The object of a written notice, and the only purpose it can subserve, is to bring home to the party knowledge of a fact upon which he is called upon to act; but the right to a written notice, like any other civil right, may be waived. Barron v. Deleval, 58 Cal. 95.

Shortening time of notice. An order shortening the time of notice, by the judge, will, in the absence of a showing to the contrary, be deemed, upon appeal, to have been made for sufficient cause. California Mortgage etc. Bank v. Graves, 129 Cal. 649; 62 Pac. 259; and see Dambmann v. White, 48 Cal. 39.

Effect of actual notice. An appeal may be dismissed for the causes mentioned in the statutes, after notice; the court may

err as to the kind or length of the notice; but if the appellant had notice in fact, the order of dismissal is not void; the notice is not the means by which jurisdiction was obtained, for that had already been acquired by the appeal. People v. Elkins, 40 Cal. 642. A provision in a judgment for a forfeiture of the plaintiff's rights within twenty days after written notice of the entry of the judgment if no redemption should be made within that period, must be construed as requiring a separate written notice expressly intended for the purpose of starting the period of time mentioned in the judgment; and a mere incidental recital of the rendering of the judgment, in a notice of motion for a new trial, is not a sufficient compliance with the terms of the judgment respecting written notice, nor is the actual knowledge by the plaintiff of the rendition of the judgment material upon the question of such compliance. Byrne v. Hudson, 127 Cal. 254; 59 Pac. 597.

Notice of appearance. The giving of any mere notice, other than express notice of appearance, does not constitute a notice of appearance. Salmonson v. Streiffer, 13 Cal. App. 395; 110 Pac. 144.

Notice of decision or entry of judgment. Where, under the various code provisions, notice of a decision is required to be given, written notice is usually intended; and the principle involved in nearly all the cases, relating to the time within which to perform certain acts, where time is given after notice of the decision, is substantially the same, and the seeming discrepancies between a few of the cases is to be found in the fact of confounding the question as to what is a sufficient service of notice, with the very distinct one of a waiver of notice, and what amounts to such waiver. Forni v. Yoell, 99 Cal. 173; 33 Pac. 887. It was formerly held that a party intending to move for a new trial had a right to wait for a notice in writing of the decision from the adverse party, before giving notice of his intention, and that he was entitled to such notice of the decision before he was called upon to act, although he was present in court when the decision was rendered, waived findings, and asked for a stay of proceedings on the judgment: it was not enough that the party had knowledge of the judgment or order; nor was oral communication, presence in court, or hearing decision announced or order or judgment declared, sufficient (Biagi v. Howes, 66 Cal. 469; 6 Pac. 100); but, by later decisions, under § 659, ante, which provides that a motion for a new trial must be made within ten days after "notice of the decision," where it appears affirmatively that the party moving had actual notice of the decision, no formal service of a written notice by the opposite party is necessary (California Improvement Co. v. Baroteau, 116 Cal. 136; 47 Pac. 1018); and written notice of judgment may be waived (Gardner v. Stare, 135 Cal. 118; 67 Pac. 5; Gray v. Winder, 77 Cal. 525; 20 Pac. 47; Waddingham v. Tubbs, 95 Cal. 249; 30 Pac. 527); but where the record shows no legal waiver, an affidavit of the opposite party cannot be used to show actual notice or knowledge of the fact that the decision has been rendered: the intent of the statute requires written notice, and cannot be thus defeated. Mallory v. See, 129 Cal. 356; 61 Pac. 1123. To set the time in motion within which the appellant must serve and file his notice of intention to move for a new trial, the respondent must serve upon the attorney for the appellant a written notice of the decision. Estate of Richards, 154 Cal. 478; 98 Pac. 528. A notice of intention to move for a new trial, by the party in whose favor judgment has been rendered, served upon the adverse party, which contains the title of the cause, and which states that "a motion will be made to set aside and vacate the decision and judgment heretofore rendered and entered herein," contains a sufficient notice in writing that a decision of the court had theretofore been rendered to require the adverse party to serve and file his notice of intention to move for a new trial within ten days thereafter. Waddingham v. Tubbs, 95 Cal. 249; 30 Pac. 527; Forni v. Yoell, 99 Cal. 173; 33 Pac. 887; and see Mallory v. See, 129 Cal. 356; 61 Pac. 1123. The service of a copy of the findings and judgment upon the attorneys of the defeated party, after the entry of the judgment, is sufficient notice of the entry of the judgment. Kelleher v. Creciat, 89 Cal. 38; 26 Pac. 619.

Waiver of notice. Waiver of notice may be made by the party entitled thereto. Forni v. Yoell, 99 Cal. 173; 33 Pac. 887. Written notice of the overruling of a demurrer is not required; but conceding that such notice is required, it is waived by the attorney for the party appearing in court at the hearing and applying for leave to answer within a certain time. Barron v. Deleval, 58 Cal. 95. Written notice of the overruling of a demurrer is waived by the presence in court of the attorney for the demurring party, at the time of the ruling thereon. Wall v. Heald, 95 Cal. 364; 30 Pac. 551. Where a party appears and argues a motion, he cannot complain that sufficient notice thereof was not given him. Naylor v. Adams, 15 Cal. App. 353; 114 Pac. 997. Where the defendant was present in court when an application was made to file an amended proof of service of summons nunc pro tunc, and raised no objection for want of previous notice of the application, but proceeded to argue the question at length and took an exception to the ruling, his action was, in effect, a waiver of the notice. Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509.

Waiver of notice of decision and entry of judgment. The object of the law is to give ten days after actual knowledge of the decision in which to give notice of intention to move for a new trial, and that object is fully attained when the record shows that the party entitled to notice has acted in court upon actual knowledge of the decision: such action constitutes a waiver of formal notice; and a notice of motion for a new trial, given fourteen years after such waiver, is too late, though no formal written notice of the decision was ever given, and though some of the parties moving for a new trial were minors at the time of the waiver. Gray v. Winder, 77 Cal. 525; 20 Pac. 47. A defendant, who gave notice of a motion to dismiss an action, upon the ground that the findings and decision of the court upon the final submission of the action have been filed for more than six months without entry of judgment, must be held to have waived notice of the decision as of the time of making such motion. Forni v. Yoell, 99 Cal. 173; 33 Pac. 887. By taking an appeal from a judgment, without waiting for notice of the decision, the losing party waived such notice; and a notice of intention to move for a new trial, given more than ten days thereafter, came too late. People v. Center, 9 Pac. Coast L. J. 776. Mere knowledge that a decision has been given is not the equivalent of notice; but the giving of actual notice may be waived by the party entitled to it. The evidence of such waiver must be clear and uncontradicted, and not dependent upon oral testimony or ex parte affidavits. The rule would seem to be, that written notice of the filing of the decision is in all cases required, unless waived by facts appearing in the records, files, or minutes of the court. A written admission, by the party entitled to notice, of knowledge that the decision had been made, filed with the clerk, or entered upon the minutes of the court, dispenses with the necessity of giving such notice, and a motion to the court, or other proceeding, by a party, which presumes his knowledge that the decision has been made, and by which he seeks to protect his own interest as against the right of the other party under the decision, is a waiver of his right to a notice of the decision. Gardner v. Stare, 135 Cal. 118; 67 Pac. 5; Mallory v. See, 129 Cal. 356; 61 Pac. 1123; Forni v. Yoell, 99 Cal. 173; 33 Pac. 887. A losing party moving for a stay of execution, which is granted, and asking further findings, which are made, all of which appears in the minutes of court, waives a formal notice of the decision, and by such action must be held to have had actual knowledge thereof. Gray v. Winder, 77 Cal. 525; 20 Pac. 47; Gardner v. Stare, 135 Cal. 118; 67 Pac. 5. Notice of the decision must be held to have been waived, where the prevailing party had actual knowledge thereof, and participated in and opposed the motion for a new trial. Mullally v. Irish-American Benevolent Society, 69 Cal. 559; 11 Pac. 215. The statutory provision requiring written notice is subject to the rule, that any one may waive the advantage of a law intended solely for his benefit; and when a party acts as if he had formal notice of a decision, such acts constitute a waiver of such formal notice. Mallory v. See, 129 Cal. 356; 61 Pac. 1123; and see Gray v. Winder, 77 Cal. 525; 20 Pac. 47. Actual notice of the entry of an order, judgment, or decree appealed from, established by the record, dispenses with or waives written notice thereof. Estate of Keating, 158 Cal. 109; 110 Pac. 109.

Service of notice. The service of written notices and other papers, except original and final process, subpoenas, writs, etc., must be made upon the attorney of a party, where he has appeared by attorney. People v. Alameda Turnpike Road Co., 30 Cal. 182. Where notice is required to be given, but the person to be served is not indicated in the statute, the plain inference is, that the party intended is the one who is to be proceeded against. Davis v. Heimbach, 75 Cal. 261; 17 Pac. 199. The statute defining the duties of a sheriff does not give to nor impose upon him exclusively the duty of serving all process and notices, but merely requires that he shall serve all notices and process directed to him or placed in his hands for service. Hibernia Sav. & L. Soc. v. Clarke, 110 Cal. 27; 42 Pac. 425. Where the record of a justice's court shows service of a written notice of the time of trial, it cannot, upon certiorari, be contradicted by evidence dehors the record. Los Angeles v. Young, 118 Cal. 295; 62 Am. St. Rep. 234; 50 Pac. 534.

Affidavit served with notice. An affidavit of one of the defendants, served with notice of a motion to vacate a judgment by default, though not embodied in the notice, is a substantial compliance with this section. Broderick v. Cochran, 18 Cal. App. 202; 122 Pac. 972. An affidavit not referred to in the notice of motion to set aside a default, filed after submission, cannot be considered on appeal, although filed by leave of court. Forrest v. Knox, 21 Cal. App. 363; 131 Pac. 894.

Waiver of objections to service. An acknowledgment of service, indorsed on a notice of appeal, "Due service of a copy of the within notice is hereby accepted to have been made," stating day, month, and year, merely admits that the notice was served at a certain date, and is not a waiver of an objection that service was made too late. Towdy v. Ellis, 22 Cal. 650. The objection of a district attorney, that no notice of the settlement of a bill of exceptions in a criminal case was given, is not overcome by proof that verbal notice thereof was given to his clerk, and cannot be deemed waived, where the proposed bill

was not served upon the district attorney, and he did not know of its preparation or existence until after its presentation to the judge. Page v. Superior Court, 122 Cal. 209; 54 Pac. 730. A notice of motion to quash the service of summons must specify the objections made to the service of process; otherwise such objections must be deemed to have been waived. Dickinson v. Zubiate Mining Co., 11 Cal. App. 656; 106 Pac. 123.

Correcting record, with or without notice. During term-time, when terms of court were held, the record could be amended in any manner, so as to be made conformable to the facts; but after the expiration of the term, it could be amended only where the record itself showed error; and in such cases the record could not be amended unless it contained something to amend by. Branger v. Chevalier, 9 Cal. 172. All courts of record have the inherent power to correct their records so that they shall conform to the actual facts and speak the truth of the case, and such correction may be made at any time, either upon the motion of the court itself or at the instance of any party interested in the matter; ordinarily, a court would require notice of the motion to be given to all parties interested, but it has the power to make the correction without such notice. Crim v. Kessing, 89 Cal. 478; 23 Am. St. Rep. 491; 26 Pac. 1074. Clerical misprisions, which are apparent upon the record, may be corrected by the court, on its own motion, with or without notice. Dickey v. Gibson, 113 Cal. 26; 54 Am. St. Rep. 321; 45 Pac. 15. Clerical misprisions in the judgment, the record affording the evidence thereof, may be corrected at any time by the court, upon its own motion, or upon motion of an interested party, with or without notice; but where an inspection of the record does not show error, notice of a motion to amend the judgment will be required to be given the parties to be affected thereby. Seaman v. Bonslett, 118 Cal. 93; 62 Am. St. Rep. 226; 50 Pac. 272.

Appeal. A finding or ruling as to notice, made upon conflicting evidence, will not be disturbed upon appeal. Rauer v. Silva, 128 Cal. 42; 60 Pac. 525.

Definition of motion and order. See note ante, § 1003.

§ 1011. When and how served. The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office; or, if it is not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of not less than eighteen years of age, if his residence is in the same county with his office; and if his residence is not known, or is not in the same county with his office, or being in the same county it is not open, or there is not found thereat any person of not less than eighteen years of age, then by putting the same, inclosed in a sealed envelope, into the post-office directed to such attorney at his office, if known; otherwise to his residence, if known; and if neither his office nor his residence is known, then by delivering the same to the clerk of the court for the attorney;

2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of not less than eighteen years of age; and, if his residence is not known, by delivering the same to the clerk of the court for such party.

Service, on attorney. Post, § 1015.

Sheriff serving, duty of, to exhibit. See Pol. Code, § 4169.

Coroner to serve, when sheriff a party. See Pol. Code, § 4172.

Elisor may be appointed to execute, when. See Pol. Code, § 4173.

Sheriff, justified when. See Pol. Code, § 4168.

Legislation § 1011. 1. Enacted March 11, 1872, in exact language of Practice Act, § 520 (New York Code, § 409), which read: "The service may be personal, by delivery to the party or attorney, on whom the service is required to be made, or it may be as follows: 1st. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open, so as to admit of such service, then by leaving them at the attorney's residence, with

some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope, into the post-office, directed to such attorney: 2d. If upon a party, it may be made by leaving the notice or other paper at his residence between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, inclosed in an envelope, into the post-office directed to such party."

2. Amendment by Stats. **1901**, p. 178; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907**, p. 602; the code commissioner saying, "Changes the hours during which notice may be served at an attorney's office in his absence, so that the hours shall be from nine to five instead of from eight to six; excuses the leaving of papers at an attorney's residence if in a county other than that of his office; provides means of service when his residence is in another county, or when neither his office nor his residence is known."

Construction of chapter. The notice of appeal may be served personally, or in any of the other modes prescribed by this chapter. Columbet v. Pacheco, 46 Cal. 650.

Service upon adverse party or his attorney. An order to show cause why a judgment should not be set aside must be served upon the adverse party or his attorney: and the setting aside of the judgment upon such order, without service, is void. Vallejo v. Green, 16 Cal. 160.

Personal service. The delivery which constitutes a personal service, under this section, need not be made by the individual who is attempting to make the service, but can be effected through a clerk or messenger, or through any agency by which a delivery can be made, and when the notice is so delivered, the service becomes a personal service; the fact that the person upon whom the service is to be made resides or has his office in a different place from that of the person making the service does not require that the service shall be made by mail, nor preclude a personal service, and the person seeking to make the service can avail himself of any agency, such as an express company or the post-office, with as much effect as if he had employed any other messenger, and notice through such agency renders the service personal, and the proof of such delivery establishes a personal service. Heinlen v. Heilbron, 94 Cal. 636; 30 Pac. 8. The receipt of a notice served by mail, when admitted by the party or proved, amounts, in law, to a personal service. Shearman v. Jorgensen, 106 Cal. 483; 39 Pac. 863.

Admission of personal service. A written statement at the foot of the notice of appeal, "Service admitted," giving the date, and signed by the attorneys of the adverse party, means that personal service was admitted. Brown v. Green, 65 Cal. 221; 3 Pac. 811.

Service upon one having charge of office. Where a notice of appeal was left in a conspicuous place upon the desk in the office of the attorney for the party to be served, during his absence therefrom, and in the presence of the person in charge of the office at the time, and after calling his attention to the paper thus served, the notice was, in contemplation of law, left with a person having charge of the office, as provided in this section, and the service was sufficient. People v. Perris Irrigation Dist., 142 Cal. 601; 76 Pac. 381. The clerk or other person in charge of the office of the attorney of the adverse party, upon whom the statute permits a written notice to be served, has no implied authority to waive the written notice, or to bind his principal by any agreement in reference to the case. Page v. Superior Court, 122 Cal. 209; 54 Pac. 730.

Service at residence or by mail. The service by mail authorized by this section does not contemplate a delivery as a part of the service, as by the provision of § 1013, post, the service is complete at the time of deposit in the post-office; such a service is termed a substituted service, and is intended to take the place of, and to be equivalent in point of law and in effect to, a personal service; but, as such service is contrary to the general rule, it is incumbent upon a party who would avail himself of such substituted service, to have it clearly appear upon the record that the case is one in which such service is permitted, and that the mode pointed out by the statute for making such service has been strictly followed. Heinlen v. Heilbron, 94 Cal. 636; 30 Pac. 8. Absence from the state, of a purchaser at sheriff's sale, does not excuse the service of notice of motion to set aside the sale; personal service is not required: the notice may be served by leaving it at his residence, if known, with some person of suitable age and discretion, or, if his residence is not known, by inclosing it in an envelope and depositing it in the post-office, addressed to him. Eckstein v. Calderwood, 34 Cal. 658. In the case of known residence in the same city, the service must be made at such place, as prescribed in this section: service by mail is improper. Koyer v. Benedict, 4 Cal. App. 48; 87 Pac. 231.

Constructive service. In all cases in which the statute allows a constructive service, or in which jurisdiction may be obtained by a prescribed form of notice, of which the real party in interest had no actual notice, and did not appear or subject himself to the jurisdiction of the court, the mode of service prescribed by the statute must be strictly pursued. Petition of Tracey, 136 Cal. 385; 69 Pac. 20.

Service by posting. Service of notice by posting upon the property affected constitutes an exception to the rule requiring personal notice, and he who would avail himself thereof must establish by proof the facts bringing the case within the exception. Hall v. Capps, 107 Cal. 513; 40 Pac. 809.

Service on Sunday or holiday. The service of a proposed statement is not invalid or void because made on a Sunday or on a legal holiday, although it need not have been made until the following day; nor is such service "judicial business," within the meaning of § 5 of article VI of the constitution. Reclamation District v. Hamilton, 112 Cal. 603; 44 Pac. 1074.

Objections to service. An objection, that an amended complaint was served on the appellant personally, and not on his attorney, must be taken in the lower court by motion, and will not be entertained for the first time on appeal. Campbell v. West, 93 Cal. 653; 29 Pac. 219. Notice of the presentation of a proposed statement or bill of exceptions, and the amendments thereto, to the judge for settlement, pursuant to § 650, ante, is essential; and subsequent notices of the fact of presentation, after it has been made, and of a time for settlement, are too late, and it is error for the judge to settle the statement or bill, against the objection of the adverse party. Witter v. Andrews, 122 Cal. 1; 54 Pac. 276.

Defective service, power of court. The premature service of a notice of intention to move for a new trial, or the failure to serve such notice, cannot deprive the appellate court of jurisdiction to hear an appeal from an order denying the motion, nor constitute ground for dismissing the appeal. Bell v. Staacke, 137 Cal. 307; 70 Pac. 171. Under no circumstances is the discretion of the court in striking out an answer, not served in the mode prescribed by statute, to be exercised arbitrarily, but it must be governed by legal rules, in order to do justice according to law, or to the analogies of law, as near as may be, and it must be exercised, within these limitations, so as to promote substantial justice in the case. Lybecker v. Murray, 58 Cal. 186; and see Ex parte Hoge, 48 Cal. 3; Ex parte Marks, 49 Cal. 680. It is error to strike out an answer filed in time, but not served until two days afterwards. Lybecker v. Murray, 58 Cal. 186.

Service, and not proof of service, gives jurisdiction. The fact of the service, and not the proof of the service, gives the court jurisdiction; and where the service was in fact made, but proof thereof is defective or insufficient, the court may allow the proof of service to be amended and filed nunc pro tunc as of the date of the judgment. Herman v. Santee, 103 Cal. 519; 42 Am. St. Rep. 145; 37 Pac. 509. The fact of the service of notice, rather than the evidence thereof, gives the court jurisdiction, and service of a notice of appeal may be shown in other modes than by being incorporated in the transcript. Sutter County v. Tisdale, 128 Cal. 180; 60 Pac. 757.

Proof of service, sufficiency of. The record must contain evidence of the service of the notice of intention to move for a new trial, or it must clearly appear therefrom that service of the notice was waived. Calderwood v. Brooks, 28 Cal. 151. Proof of service, not personal, must show a strict compliance with the requirements of the statute; and where made by leaving the notice at the attorney's office, it must appear whether it was left with his clerk, or with the person in charge, or in a conspicuous place therein, and that at the time of service the attorney was absent. Doll v. Smith, 32 Cal. 475. In case of constructive service, by leaving the notice in a conspicuous place in the office, the proof must show that the attorney served was at such time absent from his office. Dalzell v. Superior Court, 67 Cal. 453; 7 Pac. 910. A statement on the back of a notice of motion for a new trial, signed by the attorney of the moving party stating that the notice was served at a certain time, is not evidence of service. Calderwood v. Brooks, 28 Cal. 151. Where a decree recites due service of notice by publication or by posting, such recital is sufficient to prove service, as against a collateral attack. Crew v. Pratt, 119 Cal. 139; 51 Pac. 38. The proof of service of a notice of appeal, originally defective, may be cured by an affidavit filed in pursuance of leave granted for that purpose. Schloesser v. Owen, 134 Cal. 546; 66 Pac. 726. The notice of setting a cause for trial in a justice's court is jurisdictional, and must be served as prescribed in this chapter, and proof of such service is as essential as in case of the summons; the notice cannot be verbal, and cannot be waived by conversation over the telephone, in which the attorney for the defendant consented to the setting of the case. Elder v. Justice's Court, 136 Cal. 364; 68 Pac. 1022.

Proof of service by affidavit. The service of a notice, if not shown by an official certificate, or by the admission of the party served, must be proved by the affidavit of some competent person, and the affidavit of a third person is entitled to as much weight as that of the party or his attorney. Moore v. Besse, 35 Cal. 184. An affidavit of service of notice upon an attorney is insufficient to show constructive service, by leaving the notice at his office, if his absence from his office is not deducible from the facts stated. Dalzell v. Superior Court, 67 Cal. 453; 7 Pac. 910. An affidavit stating that the affiant left a true copy of the notice at the office of the attorneys for the defendant, naming them, is insufficient to prove service of the notice. Gallardo v. Atlantic etc. Telegraph Co., 49 Cal. 510. The affidavit of service, in cases other than actual personal service, must show that all the requirements of the law to effect service have been complied with, and also the existence of the conditions authorizing service in

the mode adopted. Mohr v. Byrne, 131 Cal. 288; 63 Pac. 341. An affidavit of service, stating that the notice was served on the attorney for the respondent by leaving it on the desk of the attorney, in the front room of his law office, between the hours of eight in the morning and six in the afternoon, and that there was no person in said front room at the time, is insufficient to show constructive service of the notice upon the attorney during his absence from his office. Dalzell v. Superior Court, 67 Cal. 453; 7 Pac. 910. A new affidavit of service, free from objection, may be filed, by leave, in the appellate court, to obviate an objection to the original proof of service. Martin v. Orñelas, 139 Cal. 41; 72 Pac. 440. The fact of service of notice of appeal from a justice's court may be proved by affidavit, pending a motion to dismiss. Dalzell v. Superior Court, 67 Cal. 453; 7 Pac. 910.

What constitutes personal service. See note 16 L. R. A. 200.

First and last days in computing time on motions and orders. See note 49 L. R. A. 222.

CODE COMMISSIONERS' NOTE. 1. Service on attorney, where attorneys have been changed. If the attorney in an action is changed, but no regular substitution made, in the manner pointed out by § 285 of this code, all notices may be served on the attorney of record. Grant v. White, 6 Cal. 55; Roussin v. Stewart, 33 Cal. 208; see § 285, ante, and notes.

2. Evidence of service of notice. The following indorsement appeared upon the notice of the defendant's motion for a new trial: "Service admitted of the within notice, Nov. 17th, 1863. Served D. C., Nov. 17th, 1863, by sending notice in envelope (paying postage) directed to D. C. San Francisco. W. H. F." The notice was signed by "W. H. F., attorney for the defendant." The indorsement affords no evidence of the service, for it is not an admission by the plaintiff of service, and the service by mail is not verified by the certificate of an officer authorized to make service, nor by the affidavit of any person. Service upon a party may be personal, or by leaving the notice at his residence, or by mail, if his residence is not known. It does not appear that the plaintiff's residence was unknown, and therefore the service by mail did not constitute a legal service. Calderwood v. Brooks, 28 Cal. 154.

3. Waiver of service of notice. If it is not shown by the record that the party opposing an application for new trial proposed any amendments to the statement, or participated in its settlement, it will be presumed that he waived service of notice. Calderwood v. Brooks, 28 Cal. 154.

4. When acknowledgment of service does not waive objection that service was made too late. It is claimed that the appeal from the order refusing a new trial was not taken within sixty days after the order was made, and that therefore the appeal from that order must be dismissed. To this it is replied, that the respondent has waived this objection by the terms of his acceptance of the service of notice of appeal, which is in these words: "Due service of a copy of the within notice is hereby accepted to have been made this twentieth day of February, 1863," and we are referred to the cases of Talman v. Barnes, 12 Wend. 227, and Struver v. Ocean Ins. Co., 9 Abb. Pr. 23. In those cases it was held that an admission of "due service of a notice" is a waiver of the objection that it was not served in time. In this case the acceptance only admits that the notice was duly served at a certain date, and cannot be considered as a waiver of the objection. Towdy v. Ellis, 22 Cal. 657.

5. Affidavit of service of notice of appeal may contain what. The affiant, in his affidavit of service, says he "served the within notice on the plaintiff, by leaving a copy of the same at the office of J. G. D., plaintiff's attorney, in the town of Red Bluff, on the 23rd day of July, 1866." This affidavit fails to show a number of facts essential to constitute a valid service. It does not appear whether the attorney was absent, or whether any clerk was present, or anybody in charge of the office or not. If the attorney is present, the service must be personal; if a clerk, or some one in charge of the office, it is necessary to leave the notice with such clerk, or person in charge. If no one is present, it must be left "in a conspicuous place in the office." In this instance, for aught that appears to the contrary, it may have been put in the stove, or some other place where it was not likely to be found. If there was no person in the office, service could only be effected by leaving the notice "between the hours of eight in the morning and six in the afternoon." The time when the notice was left does not appear. The affidavit fails to show these essential facts, and therefore fails to show a valid service. Doll v. Smith, 32 Cal. 476.

6. Service of notice of appeal supplying proof of service pending appeal. The statute does not expressly provide how proof of service of the notice of appeal must be made. It is not doubted that the certificate of the sheriff, or the admission of the respondent's attorney, is competent proof of service; but it is insisted that service cannot be proved by the affidavit of a third person. The practice of proving service by affidavit has prevailed for many years, and, so far as we are apprised, without objection to the present time. Service of the notice, if not shown by an official certificate, or by the admission of the party served, must be proven by the affidavit of some competent person. No reason is suggested, and none occurs to us, why less value should be assigned to the affidavit of a third person than to that of the appellant or his attorney. The affidavit on which the appellant relies for proof of service is defective. The affiant, acting in behalf of the appellant and his attorneys, mailed a copy of the notice at Santa Cruz, directed to respondent's attorneys at San Francisco; but he does not state that he, or those for whom he acted, resided at Santa Cruz. This code (§ 1012) provides that "service by mail may be made when the person making the service, and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail." The notice of appeal is signed by appellant's attorney, and he, and not his agent, must be regarded as "the person making the service." Schenck v. McKie, 4 How. Pr. 245. No presumption arises that he resided at Santa Cruz from the circumstance that the action was tried at that place. The fact that he resided there should have been shown by the affidavit, under the rule that a party relying upon substituted service must show a strict compliance with the requirements of the statute. People v. Alameda Turnpike Road Co., 30 Cal. 182; Doll v. Smith, 32 Cal. 475. The counsel did not offer to supply the facts omitted from the affidavit. We have heretofore indicated the course to be pursued in this respect. When the notice of appeal has been properly served, whether by personal or substituted service, the appellant, upon the hearing of the respondent's motion to dismiss the appeal on the ground that there is no proof of service, or that the proof is defective, may move for leave to supply the omitted proof. Upon leave being granted, the appellant may file in the court below the requisite affidavit, or official certificate of service, and a certified copy thereof may be annexed to the record in this court. This proof may be made and the certified copy procured before the hearing of the respondent's motion, when there is sufficient time after the defect is discovered. Moore v. Besse, 35 Cal. 186, 187.

§ 1012. Service by mail, when. Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail.

Legislation § 1012. **1.** Enacted March 11, **1872**, in the exact language of Practice Act, § 521 (New York Code, § 410).

2. Amended by Code Amdts. **1873–74**, p. 343, inserting "or have their offices" after "reside."

Sufficiency of affidavit of service. To bring a case within this section, it must be shown by affidavit that the parties "reside or have their offices in different places"; if they have a known residence in the same city, § 1011, ante, is applicable. Koyer v. Benedict, 4 Cal. App. 48; 87 Pac. 231. An affidavit of service by mail is insufficient, if it does not show that the attorneys for the plaintiff and the defendant reside in different places and that there is a regular communication by mail between them. Rubenstine v. Superior Court, 18 Cal. App. 128; 122 Pac. 820; Linforth v. White, 129 Cal. 188; 61 Pac. 910. Service by mail, of notice of default in a justice's court, is insufficient, if it fails to show that the person who made the service and the person served resided or had offices at different places. Townsend v. Parker, 21 Cal. App. 317; 131 Pac. 766.

Service by mail. See note post, § 1013.

CODE COMMISSIONERS' NOTE. See note 6 to § 1011, ante; Moore v. Besse, 35 Cal. 186. A party relying upon a service by mail or otherwise than by actual service on the proper person, must show a strict compliance with the requirements of the statute. Bross v. Nicholson, 1 How. Pr. 158; Schenck v. McKie, 4 How. Pr. 247; also Anonymous, 1 Hill (N. Y.), 217, 218; Smith v. Acker, 23 Wend. 677; Birdsall v. Taylor, 1 How Pr. 89; Paddock v. Beebee, 2 Johns. Cas. (N. Y.) 117. It will be observed that by § 1012 of this code, service by mail is good only where the person making the service, and the person on whom it is to be made, reside in different places between which there is no regular communication by mail. The affidavit of P. does not show that there was a regular communication by mail between his place of residence and the place of residence of defendant's attorneys, nor that there was any communication whatever by mail between the two places, and we cannot judicially know or intend there was. The affidavit fails to show that the service attempted to be made was effectual. Where service is sought to be made by mail, it should appear that the conditions on which its validity depends had existence, otherwise the evidence must be held insufficient to establish the fact of service. People v. Alameda Turnpike Road Co., 30 Cal. 184.

§ 1013. Service by mail, how. In case of service by mail, the notice or other paper must be deposited in the post-office, in a sealed envelope, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address; such extension, however, not to exceed thirty days in all.

Distance. Ante, § 1005.

Legislation § 1013. **1.** Enacted March 11, **1872**; based on Practice Act, § 522, as amended by Stats. 1861, p. 497, which read: "In case of service by mail, the notice, or other paper, shall be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid. And in such case, the time of service shall be increased one day for every twenty-five miles distance, between the place of deposit and the place of address; provided, that service in any case shall be deemed complete at the end of ninety days from the date of its deposit in the post-office." When § 1013 was enacted in 1872, it read the same as at present, except for the amendments of 1873–74 and 1907.

2. Amended by Code Amdts. **1873–74**, p. 343. (1) inserting "office or" after "his"; (2) changing semicolon to comma after "deposit" and after "address."

3. Amendment by Stats. **1901**, p. 173; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 602. (1) inserting "in a sealed envelope" after "post-office," and (2) substituting "thirty" for "ninety"; the code commissioner saying, "Directs that notices deposited in the post-office be inclosed in sealed envelopes, and substitutes 'thirty' for 'ninety' in the last line."

Application of section. This section applies, according to its terms, where some act must be done or right exercised within a certain number of days after service, and not to the right to be present at a proceeding, of which a prescribed notice must be given; hence, it does not apply to a notice of the time set for the justification of the sureties on an appeal bond (Brown v. Rouse, 115 Cal. 619; 47 Pac. 601); nor does it apply where notice that a cause has been set for trial has been given by mail; and the party so notified cannot claim the time given by this section after the mailing of such notice, before a legal trial can be had. Eltzroth v. Ryan, 91 Cal. 584; 27 Pac. 932. The time of filing a paper, such as a notice of appeal, where the same is forwarded to the

clerk by mail, is not extended by the provisions of this section. McDonald v. Lee, 132 Cal. 252; 64 Pac. 250. This section has been applied to the service of amendments to a proposed bill of exceptions to be used on motion for a new trial. Prefumo v. Russell, 148 Cal. 451; 83 Pac. 810.

Essentials of service by mail. A notice of appeal need not be deposited in the post-office at any particular place: the only essentials are residence or offices in different places, and a regular mail communication between the place of mailing and the place of destination. Luck v. Luck, 83 Cal. 574; 23 Pac. 1035.

Person making service. Where service is made by mail, and the notice of appeal is signed by the appellant's attorney, he, and not his agent who deposits the paper in the post-office, must be regarded as the person making the service. Moore v. Besse, 35 Cal. 184.

Service is complete when. The service of notice of appeal is complete at the time of the deposit in the post-office, where the service is made by mail; and the time to file the undertaking on appeal commences to run from the time of such deposit. Brown v. Green, 65 Cal. 221; 3 Pac. 811.

Sufficiency of affidavit of service. Service by mail is good only where the person making the service, and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail; and a party relying upon such service must show a strict compliance with the requirements of the statute; and if the affidavit of service does not show that there was a regular communication by mail between such places, nor that there was any communication whatever between the two places, the court cannot judicially know or intend that there was, and the proof of service is insufficient. People v. Alameda Turnpike Road Co., 30 Cal. 182. A party relying upon service by mail, or otherwise than by actual service upon the proper person, must show a strict compliance with the requirements of the statute; and the affidavit of service should show that the person making the service and the person served resided or had their offices at different places, between which there was regular communication by mail. People v. Alameda Turnpike Road Co., 30 Cal. 182; Moore v. Besse, 35 Cal. 183; Linforth v. White, 129 Cal. 188; 61 Pac. 910. Where the affidavit of the proof of service by mail fails to show that the person making the service and the person on whom it is made reside or have their offices in different places, between which there is a regular communication by mail, it is insufficient. Hogs Back Consol. Mining Co. v. New Basil Consol. Mining Co., 63 Cal. 121. The affidavit must show where the parties reside; and if both the party making the service and the party served reside or have their offices in the same place, the service should be personal. Cunningham v. Warnekey, 61 Cal. 507.

Effect of insufficient proof of service. A default entered on insufficient proof of service by mail will be vacated and set aside. Hogs Back Consol. Mining Co. v. New Basil Consol. Mining Co., 63 Cal. 121.

Admission of service. The admission of service of notice of appeal as of a certain day is an admission that service was made on that day, although the party making the service and the party served resided or had their offices in different counties. Brown v. Green, 65 Cal. 221; 3 Pac. 811. Proof of service in the record, that a copy of the notice of appeal had been deposited in the post-office, addressed to the attorney of the respondent, at a place confessedly not his office or place of residence, is insufficient, for the reason that the appellant has failed to show that any notice of appeal has been served; jurisdiction, however, does not depend upon the proof of service, but upon the fact that service has been made; and on a motion to dismiss an appeal upon the ground that the record does not show a sufficient service of the notice, the appellant may show by other proof that the notice was properly served, and an affidavit by the attorney for the respondent, that he actually received such notice through the post-office, is sufficient. Heinlen v. Heilbron, 94 Cal. 636; 30 Pac. 8.

Time and distance computed how. Under this section and § 650, ante, where notice of a decision is served by mail upon the attorney of the adverse party, whose office and residence are distant seventy miles from the place of deposit, the latter has twelve days from the date of the deposit within which to serve and file a notice of his intention to move for a new trial. Sullivan v. Wallace, 73 Cal. 307; 14 Pac. 789. The distance between the place of mailing the notice and the place to which it is addressed is a question of fact, to be determined by proper evidence; and the act of the legislature defining the legal distances from each county seat to the state capitol, etc., has no application, being made for the purpose of computing the mileage allowances for certain officers. Neely v. Naglee, 23 Cal. 154.

CODE COMMISSIONERS' NOTE. See § 1005. If a notice is served by mail, the distance which it is required to travel is a fact to be determined by proper evidence. Neely v. Naglee, 23 Cal. 154.

§ 1014. Appearance. Notices after appearance. A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice

of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail.

Appearance, waiver of summons. Ante, §§ 406, 416.

Notice of subsequent proceedings, how given. Post, § 1015.

Appearance in forcible entry and detainer, before day fixed. See post, § 1170.

Legislation § 1014. Enacted March 11, 1872; based on Practice Act, § 523 (New York Code, § 414), substituting (1) "appears" for "shall be deemed to appear," (2) "is" for "shall be," and (3) "is" for "be" before "imprisoned."

Object of section. This section was intended to settle all disputes as to what shall constitute an appearance. Vrooman v. Li Po Tai, 113 Cal. 302; 45 Pac. 470; McDonald v. Agnew, 122 Cal. 448; 55 Pac. 125; Salmonson v. Streiffer, 13 Cal. App. 395; 110 Pac. 144; Western Lumber etc. Co. v. Merchants' Amusement Co., 13 Cal. App. 4; 108 Pac. 891; and see Steinbach v. Leese, 27 Cal. 295.

Construction of section. The words "answers" and "demurs," as used in this section, are obviously words of enumeration, and, on appeal, the court will not, on recognized principles, interpolate into the text, notices of motions for new trials, notices of appeal, or any other paper served incidentally in the conduct of judicial proceedings, the direct and principal purpose of which is to give notice, not of appearance, but of a step taken, or about to be taken, in the cause. Steinbach v. Leese, 27 Cal. 295.

What constitutes appearance. A defendant cannot appear in an action so as to give the court jurisdiction of his person, except by answering, demurring, or giving the plaintiff written notice that he appears. Steinbach v. Leese, 27 Cal. 295. Verbal authority to enter judgment, given by a defendant to a plaintiff, is not an appearance in the action, nor a power of attorney to confess judgment: it cannot take the place of an answer upon the judgment roll, so as to dispense with the summons and return as part thereof. Siskiyou County Bank v. Hoyt, 132 Cal. 81; 64 Pac. 118. The written consent of the defendant to the entry of judgment as prayed, signed by his attorney, constitutes a sufficient appearance. Foote v. Richmond, 42 Cal. 439. An unfiled stipulation that the plaintiff may at any time enter a default of the defendant, and take judgment thereon, and that execution should be stayed while specified payments were made, is in lieu of an answer admitting the allegations of the complaint, and is a consent to the jurisdiction of the court, and to the entry of the appearance of the defendant, and of judgment after the time limited by statute, and estops the defendant from insisting upon a dismissal of the action, on the ground that the plaintiff has not served the summons within three years, or prosecuted the action with diligence. Cooper v. Gordon, 125 Cal. 296; 57 Pac. 1006. A stipulation extending the time to plead, if it could be considered as an appearance, must be made before the expiration of the three years prescribed by § 581, ante, or it cannot be held a bar to a dismissal. Grant v. McArthur, 137 Cal. 270; 70 Pac. 88. The taking and filing of a stipulation extending the time to answer, and accepting and acting upon an agreement contained therein to grant successive extensions in consideration of certain payments made, does not constitute an appearance. Vrooman v. Li Po Tai, 113 Cal. 302; 45 Pac. 470. A notice that the defendant will move to dissolve an attachment issued in a cause is not such an appearance in the case as will authorize a judgment by default. Glidden v. Packard, 28 Cal. 649.

Voluntary appearance confers jurisdiction. Where the court cannot acquire jurisdiction of an action, except by transfer from another court, the voluntary appearance of the defendant cannot confer jurisdiction. Descalso v. Municipal Court, 60 Cal. 296. After the voluntary appearance of a non-resident defendant, the court has jurisdiction to render a personal judgment against him. Hodgkins v. Dunham, 10 Cal. App. 690; 103 Pac. 351. The voluntary appearance of a party gives the court jurisdiction over his person, with the same effect as if he had been brought in by the service of summons; such appearance, within the three years prescribed by § 581, ante, obviates the necessity of any service of summons within that period. Union Savings Bank v. Barrett, 132 Cal. 453; 64 Pac. 713. Where an executor voluntarily appears, such appearance has the same effect as if he had been served with summons. Union Savings Bank v. Barrett, 132 Cal. 453; 64 Pac. 713. The voluntary appearance of an executor, in proceedings relating to the estate, is a waiver of the issuance and service of a citation on him. Estate of Johnson, 45 Cal. 257. Where a person, not a party to an original action, was served with copies of the order and of the papers on which it was based, requiring him to appear for examination, and he did appear and was examined, the court had jurisdiction of his person in the supplementary proceedings. Bronzan v. Drobaz, 93 Cal. 647; 29 Pac. 254.

Appearance by demurrer. A demurrer constitutes an appearance; and where a demurrer is on file, and not acted upon, a default cannot be entered. Hestres v. Clements, 21 Cal. 425; Dudley v. Superior Court, 13 Cal. App. 271; 110 Pac. 146. A defendant, by demurring to a complaint, necessarily appears and submits himself to the jurisdiction of the court, notwithstanding a recital in the demurrer to the contrary, and that his appearance is only for the purpose of demurring; and default and judgment for failure to answer after the overruling of the demurrer may be regularly entered. McDonald v. Agnew, 122 Cal. 448; 55 Pac. 125. In an action against several defendants, one of whom had not been served with summons, where a demurrer was served and filed, beginning with the words, "And now come the defendants," etc., and signed by the attorneys of record, there was an appearance of all the defendants, under this section. Rowland v. Coyne, 55 Cal. 1.

Appearance by answer. The answer of the defendants to a complaint is a voluntary appearance by them, and is equivalent to personal service upon them of the summons and a copy of complaint. Ghiradelli v. Greene, 56 Cal. 629. In probate proceedings, where a party appears and moves to dismiss on the ground of defective service of the citation, and upon the overruling of such objection, answers to the merits, such answer gives the court jurisdiction, and it is immaterial whether a citation ever issued. Abila v. Padilla, 14 Cal. 103. Where an attorney appears for only some of several defendants, and afterwards inadvertently files an answer for all, but, on discovering his mistake, obtains an order allowing him to withdraw his answer and substitute a new one limited to the defendants for whom he intended to answer, the court acquires jurisdiction only of those for whom the attorney finally appears. Forbes v. Hyde, 31 Cal. 342. A voluntary appearance is a waiver of all defects of process, even when objection is taken in the same action; and, under the practice in this state, the plaintiff, by filing his complaint, goes himself into court, and although he should not take out a summons, he cannot object to the defendant coming in and answering, any more than he can object to the defendant's voluntary appearance after he has taken out a summons which he does not serve; and quite as little can the defendant, in a collateral action, object that there is no action pending, after voluntarily putting in an answer to a complaint on file. Hayes v. Shattuck, 21 Cal. 51.

General appearance. An appearance for any purpose, other than to question the jurisdiction of the court, is general. Zobel v. Zobel, 151 Cal. 98; 90 Pac. 191. A general appearance by a defendant waives all question as to the service of process, and is equivalent to personal service. California Pine Box etc. Co. v. Superior Court, 13 Cal. App. 65; 108 Pac. 882; Western Lumber etc. Co. v. Merchants' Amusement Co., 13 Cal. App. 4; 108 Pac. 891; Hodgkins v. Dunham, 10 Cal. App. 690; 103 Pac. 351. A defendant who appears and asks some relief, which can be granted only on the hypothesis that the court has jurisdiction, submits to the jurisdiction of the court as completely as if he had been regularly served with process. Zobel v. Zobel, 151 Cal. 98; 90 Pac. 191. A motion to set aside the service of summons may be made without entering a general appearance in the action. Eldridge v. Kay, 45 Cal. 49. Where a party wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all other purposes, if he would refrain from making a general appearance; and if he should raise any other question, or ask for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance in general, though termed special. Security etc. Trust Co. v. Boston etc. Fruit Co., 126 Cal. 418; 58 Pac. 941; 59 Pac. 296. An appearance for the purpose, only, of making a motion to dismiss is not a general appearance which waives the right to make the motion. Linden Gravel Mining Co. v. Sheplar, 53 Cal. 245. Where a motion to set aside a judgment shows that relief is sought upon the ground of the excusable neglect of the defendant in not properly examining a copy of the summons and complaint, the appearance of the attorney for the defendant is general, and, in the absence of a substitution of attorneys, a notice of appeal may be served upon such attorney. Thompson v. Alford, 128 Cal. 227; 60 Pac. 686. An appearance for the purpose of making an application for a continuance or postponement of some matter pending before the court, is a general, voluntary, personal appearance, and is followed by the consequences of personal appearance. Zobel v. Zobel, 151 Cal. 98; 90 Pac. 191.

Special appearance. A defendant has the right to appear for the special purpose of moving to dismiss for a defective summons; and where the court denies the motion, a general appearance afterwards, and an answer, do not operate as a waiver of the right, nor cure the error. Lyman v. Milton, 44 Cal. 630. The provision of § 581, ante, that an action shall be dismissed if the summons is not served and returned within three years, is mandatory; and a defendant served with summons after that time is entitled to such dismissal, even though he has made default, if he has not appeared generally in the action, but only specially to demand the

dismissal. Sharpstein v. Eells, 132 Cal. 507; 64 Pac. 1080. A notice that the defendant appears in the action for the sole purpose of making a motion to quash the summons in the action, and to dismiss the action, is a sufficient appearance to entitle the defendant to be heard upon the motion. Lander v. Flemming, 47 Cal. 614. A special appearance for the purpose of quashing the summons or proof of service, is not a general submission to the jurisdiction of the court. McDonald v. Agnew, 122 Cal. 448; 55 Pac. 125. A special appearance to move to dismiss, and to procure an order extending the time to plead one day after the ruling on the motion, does not amount to an appearance authorizing the entry of a default. Kennedy v. Mulligan, 136 Cal. 556; 69 Pac. 291. A special appearance to move to strike out an amended complaint, and, ancillary to such motion, to ask for an extension of the time to move or to plead until such motion shall be disposed of, is not an appearance, within the meaning of this section. Powers v. Braly, 75 Cal. 237; 17 Pac. 197. A party ought not to be allowed the benefit of any proceeding, unless he also assumes the responsibility for it; his appearance for one purpose is a good appearance in the action; and a party should not be allowed to appear only for the purpose of moving to set aside the default, for the purpose of first moving the dismissal of the suit, and if that motion should be unsuccessful, to answer upon the merits. Douglass v. Pacific Mail S. S. Co., 4 Cal. 304. The appearance of a party for the purpose of objecting to a void judgment does not cure the defect in such judgment. Gray v. Hawes, 8 Cal. 562.

Notice of appearance. The written notice of appearance provided for in this section, is a document to be drawn up especially for that purpose, the service of which is to antedate or to be contemporaneous with the service of all other notices and papers. Steinbach v. Leese, 27 Cal. 295. A formal notice in writing, given by the defendants, and addressed to the clerk of the court, declaring that "herewith we do enter our appearance," which appearance is coupled with a consent that judgment may be entered in favor of the plaintiff as prayed for in the complaint, is a strict compliance with this section. Anglo-Californian Bank v. Griswold, 153 Cal. 692; 96 Pac. 353.

Time for filing. Neither this section nor § 581, ante, requires an appearance to be filed within any specified time. Anglo-Californian Bank v. Griswold, 153 Cal. 692; 96 Pac. 353.

Appearance by attorney. An attorney's appearance is presumably lawful, and the burden of proof rests upon the party denying such authority to sustain his denial. People v. Western Meat Co., 13 Cal. App. 539; 110 Pac. 338; Hayes v. Shattuck, 21 Cal. 51. In the absence of a statutory requirement that the authority of an attorney shall be evidenced by writing, it is always presumed that an attorney appearing and acting for a party to a cause has authority so to do; and where an appearance was made by an attorney, without objection from the parties for several years thereafter, they will not be heard to say that such appearance was unauthorized, upon the hearing of a motion to dismiss for failure to return the summons. Pacific Paving Co. v. Vizelich, 141 Cal. 4; 74 Pac. 352. An appearance by an attorney is prima facie evidence that he has been retained in the cause: it would be a dangerous practice to afford litigants an opportunity of availing themselves of the plea of mistake of counsel, in order to escape from the judgments of courts. Suydam v. Pitcher, 4 Cal. 280. Although the authority of an attorney appearing in an action is presumed, yet the court can always require evidence of his authorization, and may correct mistakes and rectify any unauthorized appearance. San Francisco Savings Union v. Long, 123 Cal. 107; 55 Pac 708. An appearance entered by an attorney, whether authorized or not, is a good and sufficient appearance to bind the party, except in those cases where fraud has been used, or it is shown that the attorney is unable to respond in damages. Suydam v. Pitcher, 4 Cal. 280. The unauthorized appearance of an attorney in an action is not a sufficient ground to disturb the judgment, unless fraud or collusion, or the insolvency of the attorney, can be shown; the remedy is against the attorney. Sampson v. Ohleyer, 22 Cal. 200. At common law, and by the express letter of our statute, an appearance by an attorney amounts to an acknowledgment or waiver of service. Suydam v. Pitcher, 4 Cal. 280. Where summons has not been served upon any one of several defendants in an action, an appearance by an attorney at the request of one of the defendants, although purporting to be in behalf of all, is not binding upon those who did not authorize the appearance. Merced County v. Hicks, 67 Cal. 108; 7 Pac. 179. Though an attorney, other than the attorney of record, may appear for an appellant in the trial court, yet such appearance does not authorize him subsequently to sign a notice of motion for a new trial, without a proper substitution in the trial court as attorney of record for the moving party; nor does the recognition of such attorney as the attorney for such party upon a former appeal operate to waive an objection to his want of authority to sign such notice. McMahon v. Thomas, 114 Cal. 588; 46 Pac. 732. A party may appear in his own proper person, or by attorney, but he cannot do both. Boca etc. R. R. Co. v. Superior Court, 150

Cal. 153; 88 Pac. 718. Where a defendant in divorce proceedings was charged with contempt of court in refusing to obey its order respecting alimony, and conceals himself to avoid the service of process, and the court orders service upon his attorney of record, who appears for him in answer to the order, and submits evidence upon the merits, without objection to the want of personal service, the court has jurisdiction over the defendant, and it was not necessary that he should appear personally, nor could he be required to be present. Foley v. Foley, 120 Cal. 33; 65 Am. St. Rep. 147; 52 Pac. 122. A party to an action must be heard in court through his attorney; and the court has not power, nor authority of law, to recognize any other person in the conduct or disposition of the case, than the attorney of record; hence, a stipulation signed by a party, providing for certain steps in the action, will be disregarded. Toy v. Haskell, 128 Cal. 558; 79 Am. St. Rep. 70; 61 Pac. 89.

Waiver of summons by appearance. Voluntary answers or demurrers to a complaint are equivalent to the due service of summons, and are a waiver of the right to take advantage of any defect in the issuance, service, or return of the summons. Adams v. Hopkins, 144 Cal. 19; 77 Pac. 712.

Waiver of service, notice, and rights. Putting in an answer is an appearance, and must be held to be a waiver of the mere formality of issuing a summons, the service of which, in such case, becomes unnecessary. Hayes v. Shattuck, 21 Cal. 51.

Waiver of notice. An appearance at the hearing of a motion, and resisting such motion on the merits, without any objection to the sufficiency of the notice of the motion, is a waiver of the usual notice of the motion. Toy v. Haskell, 128 Cal. 558; 79 Am. St. Rep. 70; 61 Pac. 89. Notice of motion to change the place of trial is not required to be given defendants who have not appeared in the action; and, if such defendants appear and take part on the hearing of such motion, they cannot be heard to complain, and must be deemed to have waived previous service of the moving papers. Wood v. Herman Mining Co., 139 Cal. 713; 73 Pac. 588. The notice of appeal corresponds to the summons, and, like the issuance of the summons, may be waived; and a voluntary appearance is equivalent to personal service of the notice; but a mere waiver of the service is insufficient: there must be given, in addition, a notice of appearance, either in person or by an attorney. Hibernia Sav. & L. Soc. v. Lewis, 111 Cal. 519; 44 Pac. 175. The requirement of § 285, ante, that notice of a change of attorneys shall be served upon the adverse party, is for the benefit of the adverse party, and may be waived by him or his attorney; and where the attorney for a respondent admitted, in writing, the service of a copy of a notice of appeal, without objecting that it was signed by an attorney other than the attorney of record of the appellant, the notice of substitution will be held to have been waived. Livermore v. Webb, 56 Cal. 489.

Waiver of rights. The special appearance of a defendant to move to strike out parts of the complaint, contemporaneously with the filing of the demurrer, whether under a rule of court or otherwise, is not a waiver of his right to move for a change of venue. Wood v. Herman Mining Co., 139 Cal. 713; 73 Pac. 588.

Waiver of irregularities, generally. An appearance by the defendant for the purpose of taking advantage of irregular summons by a motion to dismiss, is not a waiver of his rights so as to cure the defect: had he answered without any objection, he could not afterwards complain. Deidesheimer v. Brown, 8 Cal. 339. Answering after the denial of a motion to set aside the service of summons, is not a waiver of the objection upon which the motion was based. Kent v. West, 50 Cal. 185. An appearance, and a motion to set aside a judgment, upon which it is admitted that the defendant was actually served with summons, is a waiver of any irregularity in the service. Thompson v. Alford, 135 Cal. 52; 66 Pac. 983. A written notice, signed by attorneys, that "We have been retained by, and appear hereby for, the above-named defendant in the above-entitled action," is a sufficient appearance and a waiver of summons. Dyer v. North, 44 Cal. 157.

Appearance not part of judgment roll. It is not required that an appearance be made a part of the judgment roll. Western Lumber etc. Co. v. Merchants' Amusement Co., 13 Cal. App. 4; 108 Pac. 891; Brown v. Caldwell, 13 Cal. App. 29; 108 Pac. 874.

Service of notice of appeal. The notice of appeal need not be served upon a defendant who has not been served with summons nor appeared in the action. Clarke v. Mohr, 125 Cal. 540; 58 Pac. 176.

Waiver of special appearance by pleading to merits. See note 4 Ann. Cas. 290.

Appearance for purpose of moving to set aside attachment for lack of jurisdiction as general or special appearance. See note 18 Ann. Cas. 913.

Taking steps to contest a cause on the merits after a special appearance as waiver of objections to jurisdiction over the person. See note 16 L. R. A. (N. S.) 177.

CODE COMMISSIONERS' NOTE. 1. Appearance in general. If the appearance of parties is shown in general terms by the record, the appearance will be confined to those parties served with process. Chester v. Miller, 13 Cal. 558. If the defendant appears for the sole purpose of taking advantage of irregular summons by a motion to dismiss, it does not amount to a waiver of his rights so as to cure the defect; and if the motion so made to dismiss is overruled, and defendant answers, it is not such an appearance as waives the irregularity. Deidesheimer v. Brown, 8 Cal. 339; Gray v. Hawes, 8 Cal. 569. A notice given by an attorney to plaintiff's attorney that defendant will move, be-

fore a court commissioner, for the dissolution of an attachment, is not an appearance in the action. Glidden v. Packard, 28 Cal. 649. If the court orders plaintiff to appear and show cause why a judgment in his favor should not be set aside, and it is not shown that a copy of the order was served on plaintiff or his attorney, or that any notice was given of the time at which the matter was to be heard, the court must not set aside the judgment. Vallejo v. Green, 16 Cal. 160. Where a case was transferred, and jurisdiction given to a magistrate, by consent of parties, the appearance of defendant, and his consent fixing the time of trial, were a waiver of his right to be brought in by complaint and summons. Cronise v. Carghill, 4 Cal. 120. A defendant cannot appear, except by answering, demurring, or giving the plaintiff written notice that he appears; and the service of notice of appearance must antedate or bear even date with the service of all other papers. Steinback v. Leese, 27 Cal. 297.

2. **Appearance by an attorney at law.** A party to an action may appear in his own proper person, or by attorney, but he cannot do both. If he appears by attorney, such attorney must control and manage the case. Board of Commissioners v. Younger, 29 Cal. 147; 87 Am. Dec. 164. The right of an attorney of record to manage and control the action cannot be questioned by the adverse party. Board of Commissioners v. Younger, 29 Cal. 147; 87 Am. Dec. 164. It is presumed that an attorney is authorized to appear for parties for whom he enters an appearance in an action, unless something to the contrary appears. Hayes v. Shattuck, 21 Cal. 51; Willson v. Cleaveland, 30 Cal. 192; Holmes v. Rogers, 13 Cal. 191. And such action will not be reviewed on the ground of mistake, unless the mistake be without any fault or negligence of either the party or his attorney. Holmes v. Rogers, 13 Cal. 191. And the opposing party cannot deny the authority of the attorney so appearing to prosecute the action. Turner v. Caruthers, 17 Cal. 431. An appearance entered by an attorney, whether authorized or not, is a good and sufficient appearance to bind the party, except in those cases where fraud has been used, or it is shown that the attorney is unable to respond in damages. Suydam v. Pitcher, 4 Cal. 280. Even if the appearance of the attorney was wholly unauthorized, yet if there was no fraud and no allegation of insolvency, the party would not have a right to attack the judgment on that ground. Holmes v. Rogers, 13 Cal. 191; Carpentier v. Oakland, 30 Cal. 440. An attorney should communicate to his client whatever information he acquires in relation to the suit, and notice to him is constructive notice to his client. Bierce v. Red Bluff Hotel Co., 31 Cal. 160. For power and authority of attorney to bind client, etc., see §§ 283, 284, ante, and notes.

3. **Appearance of party by mistake of attorney.** Forbes v. Hyde, 31 Cal. 342; see § 406, ante, note 3.

§ 1015. Service on non-residents. When a plaintiff or a defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except service of subpœnas, of writs, and other process issued in the suit, and of papers to bring him into contempt. If the sole attorney for a party is removed or suspended from practice, then the party has no attorney within the meaning of this section. If his sole attorney has no known office in this state, notices and papers may be served by leaving a copy thereof with the clerk of the court, unless such attorney shall have filed in the cause an address of a place at which notices and papers may be served on him, in which event they may be served at such place.

Attorney.
1. **Authority of.** Ante, § 283.
2. **Duties of.** Ante, § 282.
3. **Disbarred when.** Ante, §§ 287–299.

Service, how made. Ante, § 1011.

Legislation § 1015. 1. Enacted March 11, **1872:** based on Practice Act, § 524 (New York Code, § 415), substituting "must" for "shall."

2. Amendment by Stats. **1901,** p. 179; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1907,** p. 602, (1) inserting "service" before "of subpœnas," and (2) adding the last two sentences; the code commissioners saying, "The amendment adds the last two sentences and is intended to supply a mode of serving notices and papers when the attorney for a party has been removed or suspended or has no known office within the state."

Service must be on attorney when. The provision of this section is controlling, and requires the service of the notice of appeal to be made upon the attorney of the adverse party, when such party has an attorney. Abrahms v. Stokes, 39 Cal. 150; and see Grant v. White, 6 Cal. 55. The provision of § 940, ante, that the notice of appeal shall be served upon the adverse party or his attorney, must be read in connection with this section; and such notice must be served upon the attorney of the party, and not upon the party himself. Estate of Nelson, 128 Cal. 242; 60 Pac. 772; Mohr v. Byrne, 131 Cal. 288; 63 Pac. 341; Jones v. McGarvey, 6 Cal. Unrep. 277; 56 Pac. 896. Service of a notice to dissolve an attachment must be made upon the attorney for the plaintiff. Finch v. McVean, 6 Cal. App. 272; 91 Pac. 1019. The notice of appeal must be served on the attorneys for the adverse party, who have appeared in the action. Linforth v. White, 129 Cal. 188; 61 Pac. 910.

What attorney must be served. Service of the notice of appeal on the attorney of record for the adverse party is sufficient. Matthews v. Superior Court, 70 Cal. 527; 11 Pac. 665. Service of the notice of appeal on the attorney who signed the original answer of the defendant, although another attorney signed the amended answer, where there was no substitution of attorneys, is good, although the defendant

represented by such attorney was dead at the time of service. Lacoste v. Eastland, 117 Cal. 673; 49 Pac. 1046.

Effect of service on attorney. Service of a cross-complaint on the plaintiff's attorneys sets the time running within which they must answer or demur thereto. Ritter v. Braash, 11 Cal. App. 258; 104 Pac. 592.

Service must be on party when. After the appearance of a party by attorney, only such writs and process as affect the party, as distinguished from the litigation, are required to be served upon the party personally. Finch v. McVean, 6 Cal. App. 272; 91 Pac. 1019.

Service on party in contempt proceedings. See note post, § 1016.

Effect of special appearance. The special appearance of an attorney, for the purpose of a motion before demurrer or answer, is not such an appearance as to entitle him, or the parties represented by him, to notice of subsequent motions and proceedings. Wood v. Herman Mining Co., 139 Cal. 713; 73 Pac. 588.

Waiver of notice. There may be a waiver of notice of decision; but no rule of waiver applies when written notice is served by mail or otherwise; in such cases there is nothing to waive. Estate of Richards, 154 Cal. 478; 98 Pac. 528. An application to stay execution, made on the same day on which the notice of decision was mailed by defendant to plaintiff's attorney, cannot operate as a waiver of service of the notice. Estate of Richards, 154 Cal. 478; 98 Pac. 528.

§ 1016. Preceding provisions not to apply to proceeding to bring party into contempt. The foregoing provisions of this chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

Legislation § 1016. Enacted March 11, 1872; based on Practice Act, § 519. See ante, Legislation § 1010.

Construction of code. There is no express provision in the code as to the mode of service of the order to show cause upon a corporation in contempt proceedings. Golden Gate Consol. etc. Mining Co. v. Superior Court, 65 Cal. 187; 3 Pac. 628.

Construction of section. An order to show cause why a party should not be punished for contempt is a "paper to bring a party into contempt," within the meaning of this section; and, ordinarily, the service of such paper, like that of summons, must, in the case of a corporation, be upon the president or other head of the corporation, secretary, cashier, or managing agent thereof. Golden Gate Consol. etc. Mining Co. v. Superior Court, 65 Cal. 187; 3 Pac. 628.

Necessity for service. Before a party can be brought into contempt for not complying with an order, such order must be served upon him, and the mere delivery, to a person in another state, of a certified copy of the order is not such a service as the law requires. Johnson v. Superior Court, 63 Cal. 578; Hennessy v. Nicol, 105 Cal. 138; 38 Pac. 649.

Service on attorney when. Where the officers of a corporation, charged with contempt in disobeying a legal order, willfully conceal themselves to avoid service of an order to show cause why they should not be adjudged guilty of a contempt, the court may order that service be made upon its attorney in the action. Golden Gate Consol. etc. Mining Co. v. Superior Court, 65 Cal. 187; 3 Pac. 628.

§ 1017. Service by telegraph. Any summons, writ, or order in any civil suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy of such writ, or order, or paper so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and with the same force and effect in all respects, as the original thereof might be if delivered to him, and the officer or person serving or executing the same has the same authority, and is subject to the same liabilities, as if the copy were the original. The original, when a writ or order, must also be filed in the court from which it was issued, and a certified copy thereof must be preserved in the telegraph-office from which it was sent. In sending it, either the original or the certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph bears a seal, either private or official, it is not necessary for the operator, in sending the same, to tele-

graph a description of the seal, or any words or device thereon, but the same may be expressed in the telegraphic copy by the letters "L. S.," or by the word "seal."

Legislation § 1017. Enacted March 11, **1872**; based on Stats. 1862, p. 292, § 17.

Validity of notice sent by telegraph. See note 61 L. R. A. 933.

CODE COMMISSIONERS' NOTE. Stats. 1862, p. 288.

§ 1018. [No section with this number.]

§ 1019. **Service of pleadings in action for divorce for adultery.** When in an action for divorce adultery is charged against either party and the person with whom such adultery is alleged to have been committed by such party is named in any of the pleadings, a copy of such pleadings must be personally served on such named person; or, in case such named person cannot be found, such notice of the action and of the connection of such person therewith shall be given as shall be ordered by the court; the said person so served shall have the right to appear and plead and be heard in such action in the same manner and to the same extent as the parties to the action.

Legislation § 1019. Added by Stats. **1909**, p. 974.

CHAPTER VI.

COSTS.

§ 1021. Compensation of attorneys. Costs to parties.
§ 1022. When allowed of course to plaintiff.
§ 1023. Several actions brought on a single cause of action can carry costs in but one.
§ 1024. Defendant's costs must be allowed of course, in certain cases.
§ 1025. Costs, when in the discretion of the court.
§ 1026. When the several defendants are not united in interest, costs may be severed.
§ 1027. Costs on appeal.
§ 1028. Referee's fees.
§ 1029. Continuance, costs may be imposed as condition of.
§ 1030. Costs when a tender is made before suit brought.
§ 1031. Costs in action by or against an administrator, etc.
§ 1032. Costs in a review other than by appeal.
§ 1033. Filing of and affidavit to bill of costs.
§ 1034. Costs on appeal, how claimed and recovered.
§ 1035. Interest and costs must be included by the clerk in the judgment.
§ 1036. When plaintiff is a non-resident or foreign corporation, defendant may require security for costs.
§ 1037. If such security be not given, the action may be dismissed.
§ 1038. Costs when state is a party.
§ 1039. Costs when county is a party.

§ 1021. **Compensation of attorneys. Costs to parties.** The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided.

Counsel fees.
1. Action for contribution by co-owner of irrigation-ditch. See Civ. Code, § 843.
2. Action on fencing bond. Post, § 1251.
3. Foreclosure. Post, § 1500. See post, Appendix, tit. "Mortgages."
4. Probate matter. Post, § 1718.

Costs and counsel fees.
1. Mechanics' liens. Post, § 1195.
2. Partition. Ante, §§ 796, 798, 801.

Costs in particular actions. See specific title.

Legislation § 1021. **1.** Enacted March 11, **1872**; based on Practice Act, § 494 (New York Code, § 203), as amended by Stats. 1855, p. 250, which read: "The measure and mode of compensation of attorneys and counselors shall be left to the agreement, express or implied, of the parties; but there shall be allowed to the prevailing party in any action in the supreme court, district court, superior court of the city of San Francisco, and county courts, his costs and necessary disbursements in the action, or special proceeding in the nature of an action."

2. Amendment by Stats. **1901**, p. 179; unconstitutional. See note ante, § 5.

Application of section. The sections comprising this chapter, providing for costs generally, have no application to proceedings in probate, the costs of which are regulated by § 1720, post, which must prevail, as being a later special enactment in relation to costs in such proceedings. Estate of Olmstead, 120 Cal. 447; 52 Pac. 804.

Attorneys' fees as part of relief granted. Counsel fees are not recoverable by the prevailing party, either in an action at law or in a suit in equity, except where expressly allowed by statute. Estate of Olmstead, 120 Cal. 447; 52 Pac. 804; and see Miller v. Kehoe, 107 Cal. 340; 40 Pac. 485; Bates v. Santa Barbara County, 90 Cal. 543; 27 Pac. 438. The measure and amount of compensation of attorneys and counselors is left to the agreement of the parties.

Engel v. Ehret, 21 Cal. App. 112; 130 Pac. 1197. Counsel fees cannot be allowed as a part of the judgment, unless expressly authorized by law. Bates v. Santa Barbara County, 90 Cal. 543; 27 Pac. 438. Where property was pledged to secure notes which provided for reasonable attorneys' fees in an action thereon, the pledgee, in a subsequent action to foreclose the pledge, is entitled to the attorneys' fees allowed in a former action upon the notes, as against the assignee of the pledgor; but where there was no further express stipulation for attorneys' fees in case of foreclosure or sale of the pledged property, no further fees can be recovered in the action to foreclose the lien and to have the interest of the assignee of the pledgor declared subject thereto. Commercial Savings Bank v. Hornberger, 140 Cal. 16; 73 Pac. 625. Where a judgment has been rendered in an action, without a provision for attorneys' fees, and the judgment has become final by affirmance upon appeal, the trial court cannot, upon motion therefor, order the amount expended by the plaintiff for attorneys' fees to be paid to him out of the money for which judgment was rendered, and which has been paid in to court in satisfaction of the judgment. Wickersham v. Crittenden, 103 Cal. 582; 37 Pac. 513. Counsel fees not paid can in no case be recovered as damages; but the prevailing party in an action of replevin cannot recover counsel fees, even though paid, as damages for the taking and withholding or detention of the property, or for its conversion, where no other expense than counsel fees appears to have been incurred in the pursuit of the property. Hays v. Windsor, 130 Cal. 230; 62 Pac. 395. Attorneys' fees are not recoverable in an action for conversion, as damages incurred in the pursuit of the property, under § 3336 of the Civil Code, nor as costs in the action. Nicholls v. Mapes, 1 Cal. App. 349; 82 Pac. 265. Where there is no agreement to pay counsel fees, or that property upon which a lien is sought to be foreclosed shall be security therefor, the court cannot allow counsel fees as a part of its judgment. Commercial Savings Bank v. Hornberger, 140 Cal. 16; 73 Pac. 625. Courts of equity will, in proper cases, and where justice requires it, allow attorneys' fees as part of the relief granted. Estate of Olmstead, 120 Cal. 447; 52 Pac. 804; and see Alemany v. Wensinger, 40 Cal. 288; Wickersham v. Crittenden, 103 Cal. 582; 37 Pac. 513; Miller v. Kehoe, 107 Cal. 340; 40 Pac. 485. Counsel fees may be awarded, in some suits in equity, in the discretion of the court; but where the parties in such suits are hostile litigants, and each employs his own attorney and contests the main issues of the case, the refusal of the court to allow the successful party his attorney's fees is not an abuse of discretion. Salmina v. Juri, 96 Cal. 418; 31 Pac. 365. The costs of litigation, including reasonable fees to counsel, in a proceeding for the sale of property held in trust, are a proper charge on the trust fund, and should be allowed by the court. Alemany v. Wensinger, 40 Cal. 288. Counsel fees cannot be allowed the losing party in an action by the assignee of an insolvent to recover property on the theory that the defendant held such property in trust, where the defendant contested in good faith for the purpose of having the ownership of the property judicially determined. Sanger v. Ryan, 122 Cal. 52; 54 Pac. 522. The provision for attorneys' fees in § 1195 post, as it read before the amendment of 1911, was unconstitutional. Builders' Supply Depot v. O'Connor, 150 Cal. 265; 119 Am. St. Rep. 193; 11 Ann. Cas. 712; 17 L. R. A. (N. S.) 909; 88 Pac. 982; Mannix v. Tryon, 152 Cal. 31; 91 Pac. 983. The statute concerning libel, allowing the same counsel fees to the prevailing party, plaintiff or defendant, is not subject to any constitutional objection. Skrocki v. Stahl, 14 Cal. App. 1; 110 Pac. 957. Counsel fees cannot be allowed an executor for services rendered in probating the will, except as an incident to some judgment or order of the court; the probate judge is clothed with discretion to order costs to be paid "by any party to the proceedings, or out of the assets of the estate, as justice may require," and this discretion cannot be exercised until there is something upon which it may be based; hence, until a will has been admitted to or denied probate, the court has no power to appropriate the funds of the estate to aid either the proponent or the contestant. Henry v. Superior Court, 93 Cal. 569; 29 Pac. 230; Estate of Olmstead, 120 Cal. 447; 52 Pac. 804; and see Estate of Marrey, 65 Cal. 287; 3 Pac. 896; Estate of Parsons, 65 Cal. 240; 3 Pac. 817; Estate of Jessup, 80 Cal. 625; 22 Pac. 260; Henry v. Superior Court, 93 Cal. 569; 29 Pac. 230. Attorneys' fees are no part of the costs that may be allowed or taxed against a party on the contest of a will. Estate of Olmstead, 120 Cal. 447; 52 Pac. 804. The general rule is, that counsel fees are not recoverable as costs, by the prevailing party, either in actions at law or in suits in equity; in equity, the ordinary costs are awarded or withheld, in the discretion of the court; and where counsel fees are allowed, it generally proceeds on the ground of the contumacy of the party, or that the relief granted would be ineffectual without such allowance. Williams v. MacDougall, 39 Cal. 80. Counsel fees are not recoverable as costs; and a special prayer for costs does not include counsel fees; nor does a stipulation in a mortgage, making counsel fees a charge secured by the mortgage, make such charge part of the costs of the action. Brooks v. Forrington, 117 Cal. 219; 48 Pac. 1073.

Determination of amount of attorneys' fees. Where there is conflicting evidence as to the value of the services rendered by the attorney, and the amount allowed by the court finds support in the evidence, such amount will not be disturbed on appeal. Estate of Levinson, 108 Cal. 450; 41 Pac. 483. The amount of an attorney's fee, where the allowance of such is proper, must be determined by the court, and no evidence of the value of the services rendered is necessary. Woodward v. Brown, 119 Cal. 283; 63 Am. St. Rep. 108; 51 Pac. 2. The court, without hearing any testimony, may determine what amount will be reasonable as counsel fees, in cases where such are recoverable. McNamara v. Oakland Building etc. Ass'n, 131 Cal. 336; 63 Pac. 670. In partition proceedings, in fixing the amount of the attorney's fees and the referee's fees, the trial court is allowed a wide discretion, and the order will not be disturbed on appeal, unless a clear abuse of discretion is shown. Treadwell v. Treadwell, 134 Cal. 158; 66 Pac. 197.

Retaining-fee of attorney. An attorney is always entitled to his retaining-fee in advance, unless he stipulates to the contrary; and in an action against an attorney for negligence, it is only necessary to aver generally that he was retained; but if it is alleged that he was retained in consideration of a certain sum, it must also be averred that he was paid the same. Cavillaud v. Yale, 3 Cal. 108; 58 Am. Dec. 388.

Lien of attorney for his fee. An attorney has, by law, no lien for his services, upon a judgment recovered in favor of his client: he must recover therefor in the ordinary mode, by an action. Gage v. Atwater, 136 Cal. 170; 68 Pac. 581. An attorney has no lien upon a judgment recovered by him in favor of his client, for a quantum meruit compensation for his services. Ex parte Kyle, 1 Cal. 331; Mansfield v. Dorland, 2 Cal. 507; Russell v. Conway, 11 Cal. 93. Where a mortgage provides for the payment of a promissory note, but does not purport to secure the payment of attorneys' fees, a stipulation in the mortgage for counsel fees does not authorize the making of such fees a lien upon the property, nor the inclusion of them in the decree of sale. Irvine v. Perry, 119 Cal. 352; 51 Pac. 544.

For his costs. An attorney has no lien for costs in an action, by which he can disturb the satisfaction of the judgment entered by his client. Hogan v. Black, 66 Cal. 41; 4 Pac. 943.

Action by attorney for his fee. An attorney may have an action to recover the amount agreed upon, or the value of his services, where he is employed by a person capable of making a contract which shall bind him or those whom he may represent; and the fact of the existence of the contract, and the amount agreed upon or value, may be submitted to a jury. Cole v. Superior Court, 63 Cal. 86; 49 Am. Rep. 78.

Right to and liability for costs. Where a transferee, pending a suit, permits it to be prosecuted in the name of the original parties, there is no rule of law that prevents them from recovering the costs of suit. Crittenden v. San Francisco Savings Union, 157 Cal. 201; 107 Pac. 103. Where four parties, having each brought an action against certain defendants, made separate and distinct agreements to submit the matters in controversy to arbitration, and at the hearing a common trial of the several causes was agreed upon, and damages were awarded to the plaintiffs severally for different amounts, and an award was made to them jointly for the amount of the costs, and the defendants paid the damages as awarded, but refused to pay the costs, the defendants are not estopped from disputing the validity of the award as to costs jointly awarded against them, either by consenting to a common trial or by paying the separate sums awarded as damages. Springer v. Schultz, 64 Cal. 454; 2 Pac. 32. Where a mortgagee is made a defendant with the owners of the fee, and unites with them in contesting an action, he is, with them, liable for the costs, should they fail in their defense. Pinheiro v. Bettencourt, 17 Cal. App. 111; 118 Pac. 941. A married woman is liable for costs in an action brought by her as sole plaintiff, concerning her separate property. Leonard v. Townsend, 26 Cal. 435. The acceptance of a continuance, granted upon condition that the party asking it pay designated items of costs, is tantamount to an agreement to pay the sums imposed. Bashore v. Superior Court, 152 Cal. 3; 91 Pac. 801.

Statutory right to costs. The right to recover costs is purely statutory, and their recovery is governed by the statute in force at the time the right to have them taxed occurs. Begbie v. Begbie, 128 Cal. 154; 49 L. R. A. 141; 60 Pac. 667; Meyer v. Perkins, 20 Cal. App. 661; 130 Pac. 206. The right of the prevailing party to costs is statutory; and all the costs in the action may be recovered by the plaintiff if he recovers judgment for more than three hundred dollars upon any one cause of action, and the costs of a second trial are recoverable by the plaintiff in such case notwithstanding the withdrawal upon appeal of the cause of action then tried. Fox v. Hale etc. Mining Co., 122 Cal. 219; 54 Pac. 731. In the absence of a statute allowing costs, none can be recovered by either party. Williams v. Atchison etc. Ry. Co., 156 Cal. 140; 134 Am. St. Rep. 117; 19 Ann. Cas. 1260; 103 Pac. 885; Meyer v. Perkins, 20 Cal. App. 661; 130 Pac. 206; Duley v. Peacock, 17 Cal. App. 418; 119 Pac. 1086; Murphy v. Casey, 13 Cal. App. 781; 110 Pac. 956; Linforth v. San Francisco Gas

etc. Co., 9 Cal. App. 434; 99 Pac. 716. The "percentage act" of February 9, 1866, allowing the prevailing party five per cent on the amount recovered in certain actions tried in San Francisco, was not repealed on the adoption of the codes (Whitaker v. Haynes, 49 Cal. 596); and was constitutional. Corwin v. Ward, 35 Cal. 195; 95 Am. Dec. 93. The party ultimately prevailing in the action is entitled to recover from the losing party the costs of previous trials, where legitimate and properly taxed. Senior v. Anderson, 130 Cal. 290; 62 Pac. 563. The statute does not specify what shall constitute costs. Bond v. United Railroads, 20 Cal. App. 124; 128 Pac. 786.

Costs as incident to judgment. Costs are an incident to the judgment, to be taxed by the clerk or the court, and cannot be given by the jury by way of damages. Shay v. Tuolumne Water Co., 6 Cal. 286. Costs are but a part of and incident to the judgment; and if the court, by abatement of the action, loses power to render any judgment in the case, it is powerless to render any judgment for the costs incurred therein; and upon the abatement of an action or appeal by the death of a party, there can be no judgment for costs in favor of the survivor. Begbie v. Begbie, 128 Cal. 154; 49 L. R. A. 141; 60 Pac. 667.

Interest on costs. The costs incurred by a plaintiff upon a former trial, which form part of the final decree, do not carry interest. Huellmantel v. Huellmantel, 124 Cal. 583; 57 Pac. 582.

Stay of execution, and retaxing costs. Where items are included in the cost-bill, which are not properly taxable, it affords no just ground for refusing to issue an execution or to recall one: the remedy is by motion to retax. Meeker v. Harris, 23 Cal. 285. Where a judgment for costs has been executed by the sheriff, the court is authorized to stay the execution in the hands of the sheriff, until an application can be made to the court to retax and adjust the costs. Ex parte Burrill, 24 Cal. 350. Where the court, in the exercise of its discretion, divided the costs so as to award to each party the costs incurred in the trial of issues found in favor of each, if one of the issues was erroneously found in favor of the defendant, the cost of the trial of that issue should be retaxed in favor of the plaintiff. Bathgate v. Irvine, 126 Cal. 135; 77 Am. St. Rep. 158; 58 Pac. 442.

Waiver of costs. Where the fees and expenses of a sheriff for the keeping of property held under a writ of attachment are not claimed by the plaintiff in the memorandum of costs, and are not included in the judgment, the failure so to claim and include them in the manner required by the statute is a waiver of such costs, and precludes a recovery thereof from the defendant. Hotchkiss v. Smith, 108 Cal. 285; 41 Pac. 304.

Costs in case of appeal. Where the judgment in the first trial is reversed upon appeal, and a new trial had, the costs of the first trial are part of the final bill of costs. Visher v. Webster, 13 Cal. 58; Stoddard v. Treadwell, 29 Cal. 281. An applicant for a writ of review from the appellate court to the superior court and a judge thereof, to compel the certification of a transcript of the record, must pay to the clerk of the latter court the fees fixed by law for making and certifying the return of the writ; and the clerk cannot be required to perform that service without prepayment of the fees therefor. I. X. L. Lime Co. v. Superior Court, 143 Cal. 170; 76 Pac. 973.

Appeal as to costs. An error of the court, in refusing to allow a party costs, cannot be reviewed on an appeal from an order denying a new trial: such error can be reviewed or corrected only on appeal from the judgment. Stevenson v. Smith, 28 Cal. 102; 87 Am. Dec. 107. A question as to costs, not made in the trial court, nor embraced in the grounds of the appeal, will not be considered by the appellate court. Stoddard v. Treadwell, 29 Cal. 281. A mistake in the computation of interest, or taxation of costs, cannot be attacked for the first time on appeal: the party complaining must first move in the trial court to correct the computation, or to retax the costs, and thus obtain, distinctly, the judgment of that court upon the disputed items, before resort can be had to a higher tribunal. Guy v. Franklin, 5 Cal. 416. The allowance of costs in a suit in equity is within the discretion of the court, and, without a statement or bill of exceptions, that discretion will not be reviewed upon appeal. Faulkner v. Hendy, 103 Cal. 15; 36 Pac. 1021. Though costs were ascertained and adjudged after the entry of the judgment by the clerk, yet the law considers such action of the court as having preceded the final judgment, and such action may therefore be reviewed on appeal from the judgment. Lasky v. Davis, 33 Cal. 677. A judgment for costs only, for or against any one of the parties, plaintiff or defendant, is not a final judgment, and an appeal from such a judgment must be dismissed upon motion. Nolan v. Smith, 137 Cal. 360; 70 Pac. 166. Where a judgment allows costs, but does not fix the amount thereof, and this was done afterwards, upon a motion to retax costs, and after the court had stricken out the cost-bill, the subsequent orders are proceedings relating to the judgment, and become a part of it, and the error in allowing costs may be corrected upon appeal from the judgment, by striking out the costs allowed. Quitzow v. Perrin, 120 Cal. 255; 52 Pac. 632. An appellant cannot raise the question as to the proper adjustment of costs, where the appeal is upon the judgment roll alone. Ma-

dera County v. Raymond Granite Co., 139 Cal. 128; 72 Pac. 915. An order striking out a cost-bill, made after the rendition and entry of final judgment, is appealable, and can be reviewed without an appeal from the judgment. Yorba v. Dobner, 90 Cal. 337; 27 Pac. 185. A special order, made after entry of judgment, reducing such judgment by striking out the costs, is appealable. Elledge v. Superior Court, 131 Cal. 279; 63 Pac. 360. A special order after judgment, refusing to strike out a cost-bill in the superior court, in a case appealed from a justice's court, is not appealable to the supreme court, although the cost-bill amounts to over three hundred dollars. Henigan v. Ervin, 110 Cal. 37; 42 Pac. 457. An order denying defendant's motion to strike out plaintiff's cost-bill is not an order directing the payment of money, within the purview of §942, ante; and a bond executed in double the amount of the cost-bill, upon appeal from such order by the defendant, has no statutory authority, and cannot operate to stay execution; and the plaintiff is not entitled to judgment against the sureties thereon, upon motion, that being a summary remedy created by the statute, and applicable only to undertakings allowed by it. Reay v. Butler, 118 Cal. 113; 50 Pac. 375. The memorandum of costs forms no part of the judgment roll; and the court, having only the judgment roll before it, cannot review an order to retax costs. Kelly v. McKibben, 54 Cal. 192.

Amount as test of appellate jurisdiction. Where an action is dismissed upon the motion of the plaintiff, and judgment is entered in favor of the defendant for costs, the plaintiff can appeal only as to the portion of the judgment awarding costs; and where the amount of the costs is less than three hundred dollars, the supreme court has no jurisdiction. Oullahan v. Morrissey, 73 Cal. 297; 14 Pac. 864. In all cases, legal or equitable, where the appellate court has jurisdiction of the matter brought in controversy in the lower court, the appealability of an order made before or after final judgment is not controlled or affected by the amount involved; hence, where the trial court has jurisdiction of an action to quiet title, the supreme court has jurisdiction of an appeal from an order striking out a cost-bill in an amount less than three hundred dollars. Sierra Union Water etc. Co. v. Wolff, 144 Cal. 430; 77 Pac. 1038; and see Harron v. Harron, 123 Cal. 508; 56 Pac. 334; 128 Cal. 303; 60 Pac. 932; Southern California Ry. Co. v. Superior Court, 127 Cal. 417; 59 Pac. 789; Elledge v. Superior Court, 131 Cal. 279; 63 Pac. 360.

Allowance of costs in equity and at law. See note 16 Am. Dec. 405.

What recoverable as costs. See note 88 Am. Dec. 181.

Allowance of costs in mandamus. See note 30 Am. St. Rep. 561.

Constitutionality of statutes requiring prepayment or taxation as costs of jury fees. See notes 5 Ann. Cas. 930; 12 Ann. Cas. 378.

Taxation as costs of fees, mileage, etc., of witness subpœnaed, but not called on to testify. See note 6 Ann. Cas. 1017.

Expense of procuring bond in action as item of taxable costs. See notes 19 Ann. Cas. 1261; 48 L. R. A. 591.

Constitutionality of statutes allowing attorney's fees to successful party. See note 79 Am. St. Rep. 178.

Validity of statute allowing taxation as costs of attorney's fees in action for personal service. See note 17 Ann. Cas. 282.

CODE COMMISSIONERS' NOTE. An attorney has a lien for his costs upon a judgment recovered by him, which may be enforced upon giving notice to the adverse party not to pay the judgment until the amount of costs be paid; and in some cases where there has been collusion between the parties to cheat the attorney, the court has required the client to satisfy them. But this practice is confined to some certain and fixed amount allowed to an attorney by statute, and is not extended to cases where an attorney or counselor claims a quantum meruit compensation for his services. In this state we have no statute giving costs to attorneys, and they must consequently recover for their services in the ordinary mode. Ex parte Kyle, 1 Cal. 331; see also Mansfield v. Dorland, 2 Cal. 507; Russell v. Conway, 11 Cal. 103. Plaintiffs, before the action was commenced, agreed to give their attorneys, as compensation, one third of the judgment, with costs. After judgment was obtained and execution issued, the plaintiffs compromised with defendant for less than the amount of the judgment, and entered satisfaction upon the record. And it was decided that the attorneys had no lien upon the judgment, and could not disturb the satisfaction entered by the plaintiffs. Mansfield v. Dorland, 2 Cal. 507. An attorney is entitled to his retaining fee in advance, unless he stipulates to the contrary. Cavilland v. Yale, 3 Cal. 108; 58 Am. Dec. 388. In a suit for compensation as attorney in a certain proceeding, it is not competent to prove the value of the attorney's services in another proceeding. A person who is not a lawyer cannot be a competent witness to prove the value of legal services. Hart v. Vidal, 6 Cal. 56. As to how receivers, authorized to employ counsel (and to stipulate that the compensation of such counsel shall be left to the court), should provide for the payment of such compensation to counsel, see Adams v. Woods, 8 Cal. 306. In suits by attorneys to recover compensation for legal services, unskillful or negligent conduct, or the skill employed in the case, is an important inquiry. A suit may be won, and yet the attorney be guilty of great negligence. Bridges v. Paige, 13 Cal. 642. The allowance of costs rests in the discretion of the court of original jurisdiction. And where, on sustaining a demurrer to a complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, the court gave judgment for the defendant for full costs, including a jury fee. It was not such an abuse of discretion as to warrant interference by the supreme court. Harvey v. Chilton, 11 Cal. 119. A mortgage contained a stipulation for all the costs of foreclosure, including counsel fees, not exceeding five per cent of the amount due. The limitation of five per cent was held to apply to counsel fees alone, and the complainant could recover the whole of his costs by operation of the statute, and independently of any stipulation. Gronfier v. Minturn, 5 Cal. 492. A person having an interest in mortgaged premises, subsequent to the mortgage, is a proper party to the foreclosure suit, but cannot be made liable for the costs of foreclosure beyond those occasioned by his own separate defense. Luning v. Brady, 10 Cal. 267. If the plaintiff in ejectment recovers judgment, he is entitled to the costs, although his recovery is for only a portion of the demanded premises. Havens v. Dale, 30 Cal. 547. If a judgment for

plaintiff is not given by the appellate court, and a new trial is awarded, if plaintiff recovers judgment on the second trial, he is entitled to his costs in the court below, incurred on the first trial. Stoddard v. Treadwell, 29 Cal. 281. If the entry of several judgments increases the costs, it might be ground for retaxing or apportioning them. Lick v. Stockdale, 18 Cal. 219. Where a judgment is against two, but only one appeals, and the appeal is dismissed with twenty per cent damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The clerk below can issue execution for these damages and costs. McMillan v. Vischer, 14 Cal. 241. Where costs are imposed as condition for reopening a case after the adjournment of the term, the acceptance of the costs of the opposite party is not a consent to have the cause reinstated. Carpentier v. Hart, 5 Cal. 406. Costs, by way of indemnity, should not be taxed in case of a nonsuit. Rice v. Leonard, 5 Cal. 61. A mandamus is not the proper remedy when an inferior court refuses to enter a judgment for costs. The party should appeal, or sue for his costs. Peralta v. Adams, 2 Cal. 595. An error in computing interest or taxing costs cannot be attacked for the first time in an appellate court. The party complaining must move in a court below to retax the costs, etc., and thus obtain distinctly the judgment of the court of original jurisdiction upon the disputed items, before resort can be had to a higher tribunal. Guy v. Franklin, 5 Cal. 417. The judgment of the supreme court, on appeal, and costs consequent thereon, is final, and the court below cannot prevent immediate execution of the judgment of this court so remitted. The clerk of the supreme court, in entering up the judgment, adds the words "with costs," and annexes to the remittitur a copy of the bill of costs filed; these words are a sufficient awarding of costs for the clerk below to issue an execution. Marysville v. Buchannan, 3 Cal. 212. In an action to compel execution of conveyance, a demand before the commencement of the action is only material as affecting costs. Unless plaintiff demanded the execution of the deed, he would not be entitled to costs. Jones v. Petaluma, 36 Cal. 230. Before granting an order to release a party from a judgment against him, the court should, as a condition precedent, require him to pay all costs accruing to the adverse party up to the time of service and filing of notice of motion therefor. Leet v. Grants, 36 Cal. 288.

§ 1022. When allowed of course to plaintiff. Costs are allowed of course to the plaintiff, upon a judgment in his favor, in the following cases:

1. In an action for the recovery of real property;

2. In an action to recover the possession of personal property, where the value of the property amounts to three hundred dollars or over; such value shall be determined by the jury, court, or referee by whom the action is tried;

3. In an action for the recovery of money or damages, when plaintiff recovers three hundred dollars or over;

4. In a special proceeding;

5. In an action which involves the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine.

Costs.

1. Discretionary when. Post, §§ 1025, 1027.
2. In action for usurpation of franchise. See ante, §§ 809, 810.
3. In partition. See ante, §§ 768, 769, 771, 796, 799.

Subd. 2. Personal property. Value. Post, § 1025.

Subd. 3. Money or damages. Post, § 1025.

Subd. 4. Special proceeding, generally. Post, §§ 1063–1821.

Legislation § 1022. Enacted March 11, 1872; based on Practice Act, § 495 (New York Code, § 304), as amended by Stats. 1869–70, p. 65, (1) in introductory paragraph, substituting "are" for "shall be" before "allowed"; (2) in subd. 3, changing "where" to "when"; and (3) in subd. 4, omitting at end, after "proceeding," the words "in the nature of an action."

Construction of section. The words "of course," as used in this section, mean "as a matter of right"; and in the cases herein provided for, the question of costs is not left to the discretion of the court: they follow the judgment. Schmidt v. Klotz, 130 Cal. 223; 62 Pac. 470.

Actions for recovery of real property. Under the first and fifth subdivisions of this section, the plaintiff in an equitable suit, the purpose of which is to recover real property, is, upon a judgment in his favor, entitled to his costs as a matter of right: such action involves the title to real estate. Coffman v. Bushard, 164 Cal. 663; 130 Pac. 425. An action to quiet title to a right of way being an action involving the title to or the possession of real estate, the prevailing party therein is entitled to costs: a direction that each party pay his own costs is erroneous. Schmidt v. Klotz, 130 Cal. 223; 62 Pac. 470. An action involving the protection of an easement over defendant's land, in which issue is joined upon the easement, is within the fifth subdivision of this section, and the plaintiff, though he recovers only a portion of the title or possession involved, is to be allowed his costs as of course; the form of the action, and the fact that equitable relief is sought, are immaterial. Hoyt v. Hart, 149 Cal. 722; 87 Pac. 569. The allowance of costs does not depend upon the form or nature of the action, but upon the fact whether the case comes within the terms of the statute relating to costs; therefore, in an action to quiet title, where the plaintiff recovers as to any part of the property involved, although judgment is in favor of the defendant for part, the plaintiff is entitled to recover his costs as of course. Sierra Union Water etc. Co. v. Wolff, 144 Cal.

430; 77 Pac. 1038. Where the defendant took issue with the plaintiff and appellant as to the latter's ownership in fee, and the latter was decreed to be the owner in fee, he is entitled to his costs as a matter of right. Petitpierre v. Maguire, 155 Cal. 242; 100 Pac. 690. An action involving the protection of an easement over the defendant's land, in which issue is joined upon the easement, is an action involving the title to or the possession of real estate, within the fifth subdivision of this section. Hoyt v. Hart, 149 Cal. 722; 87 Pac. 569. An action to annul a deed made by a testator, in his lifetime, to the defendant, brought by the heirs at law, who were devisees under the will, is an action involving the title to the land, and in which the prevailing party is entitled to costs as a matter of right. Gibson v. Hammang, 145 Cal. 454; 78 Pac. 953. In an action to determine the priority of water rights, the amount of damages recovered is immaterial, as affecting the costs. Marius v. Bicknell, 10 Cal. 217; Esmond v. Chew, 17 Cal. 336. In an action to foreclose mechanics' liens in San Francisco, the prevailing parties formerly were entitled to recover, as costs, the percentage on the amount recovered, as fixed by the act of February 9, 1866. Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 114; 38 Pac. 635.

Right to costs in other actions. Where the grantee, who is a necessary party to an action for the foreclosure of a mortgage, contests his personal liability for a deficiency, he is liable for costs in the action, when failing in that defense. Tulare County Bank v. Madden, 109 Cal. 312; 41 Pac. 1092. Upon mandamus against a county treasurer, the costs of the proceeding are properly chargeable against the defendant personally. Power v. May, 123 Cal. 147; 55 Pac. 796. The fact that an undertaking is dispensed with, upon an appeal by a county auditor, who is contesting a claim against a county as illegal, does not necessarily imply that a personal judgment for costs or damages may not be rendered against him on the merits of the case for refusal to issue the warrant improperly, without just cause to doubt the validity of the claim. Lamberson v. Jefferds, 116 Cal. 492; 48 Pac. 485; Power v. May, 123 Cal. 147; 55 Pac. 796. Where the owner of a building, in an action to foreclose a mechanic's lien, pays into court, before the trial of the action, the residue of the fund properly remaining in his hands as due to the contractor, to be applied toward payment of the claimants of liens, he is not liable for interest or costs. Hooper v. Fletcher, 145 Cal. 375; 79 Pac. 418.

Amount of recovery as controlling costs. The only limitation upon the right of the prevailing party to recover costs incurred by him, whether the recovery is for the whole or a portion of his claim, or whether his claim is made up of one or of several causes of action, is, that he shall have recovered three hundred dollars or over. Fox v. Hale etc. Mining Co., 122 Cal. 219; 54 Pac. 731. The ad damnum clause in a complaint constitutes the test of jurisdiction; and while it may be that the true amount may sometimes be increased for the purpose of bringing the case within the jurisdiction of the superior court, yet the inevitable consequence of not being able to recover the jurisdictional sum, so as to carry costs, will probably be sufficient to prevent such practice from becoming common, and the saving of costs will compensate the defendants in the rare instances in which they may be first brought into the superior court instead of the justice's court. Greenbaum v. Martinez, 86 Cal. 459; 25 Pac. 12. Computation of the amount of recovery as controlling costs means the damages assessed by the jury eo nomine, exclusive of the costs which they may arbitrarily find. Shay v. Tuolumne Water Co., 6 Cal. 286. The amount recovered or demanded does not control the question of costs in cases where superior and justices' courts have concurrent jurisdiction. Clark v. Brown, 141 Cal. 93; 74 Pac. 548. Ordinarily, the only penalty for the recovery of less than the jurisdictional amount is the loss of the costs. Pratt v. Welcome, 6 Cal. App. 475; 92 Pac. 500. Costs cannot be awarded to a plaintiff, where his recovery is reduced to less than three hundred dollars by a counterclaim. Poswa v. Jones, 21 Cal. App. 664; 132 Pac. 629. In an action to recover several judgments for proportionate amounts of a debt of a corporation, there is no authority for a joint judgment for costs against all the defendants; and if the plaintiff does not recover a judgment, either joint or several, for three hundred dollars or over, he is not entitled to recover costs. Derby v. Stevens, 64 Cal. 287; 30 Pac. 820. Where no question is made of the good faith of the plaintiff in bringing a suit in a superior court for a sum exceeding three hundred dollars, the only penalty for a recovery of less than the jurisdictional amount is the loss of the costs. Pratt v. Welcome, 6 Cal. App. 475; 92 Pac. 500.

Costs after dismissal. The plaintiff, where the answer seeks no affirmative relief, has an unqualified right to dismiss his action upon tender of the clerk's fee for entering the dismissal; the court has no jurisdiction to order the clerk not to enter the dismissal until the plaintiff shall have paid the costs of the defendant, and to order the case reset for trial upon the refusal of the plaintiff to comply with such condition; the costs which follow the dismissal cannot be made a prerequisite con-

dition of the entry of dismissal. Hopkins v. Superior Court, 136 Cal. 552; 69 Pac. 299.

Costs on judgment by confession. See note post, § 1025.

CODE COMMISSIONERS' NOTE. 1. Costs in action for recovery of real property. In ejectment, if plaintiff recovers judgment, he is entitled to costs, even if he recovers a part only of the demanded premises. Havens v. Dale, 30 Cal. 547. If, in an action concerning water privileges and damages for diversion of water, judgment is rendered for less than two hundred dollars, it will carry costs. Marius v. Bicknell, 10 Cal. 217.

2. Costs in action to recover personal property. If the plaintiff in a suit for recovery of possession of personal property takes the property at the commencement of the action, and the defendant asks a return of it, and the defendant was entitled to the property at the commencement of the action, but his right to possession of the property ceased and rested in the plaintiff before trial, the judgment should leave the property in plaintiff's possession, but award costs to defendant. O'Connor v. Blake, 29 Cal. 312. A defendant in replevin who recovers judgment, the jury failing to find the value of the property to exceed two (now three) hundred dollars, is nevertheless entitled to his costs, where the plaintiff's complaint states its value at a sum exceeding that amount. Edgar v. Gray, 5 Cal. 267.

3. Costs in action for recovery of money or damages. The party obtaining judgment in an action for the recovery of money or damages, is entitled to his costs, and the court has no discretion in awarding them. Stoddard v. Treadwell, 29 Cal. 281. Costs of a suit form no part of the matter in dispute, and the supreme court has no jurisdiction of an appeal, if the amount involved is less than three hundred dollars, although the costs added thereto may increase it beyond that sum. Dumphy v. Guindon, 13 Cal. 30; overruling Gordon v. Ross, 2 Cal. 157; see Zabriskie v. Torrey, 20 Cal. 174; Meeker v. Harris, 23 Cal. 286; see also § 44, ante, note 6. Costs will not be given plaintiff, unless he recovers judgment for the sum of three hundred dollars in an action for money or damages. Costs are incident to the judgment, and cannot be given by the jury by way of damages. Shay v. Tuolumne Water Co., 6 Cal. 286. The position of the appellant is, that the jury, having found that the ditch was not a nuisance, the case is to be regarded, so far as the costs are concerned, as a simple action for damages for injuries to the property of the plaintiff. If this position be correct, no costs were taxable to either party under the statute, the damages recovered being less than two hundred dollars. Votan v. Reese, 20 Cal. 90.

4. Generally. Formerly the value of the property mentioned in subdivision 2, and the amount to be recovered by plaintiff under subdivision 3, was fixed at two hundred dollars, instead of three hundred dollars, and the decisions quoted above were rendered when the law stood thus.

§ 1023. Several actions brought on a single cause of action can carry costs in but one. When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the party proceeded against in the other actions were, at the commencement of the previous action, openly within this state; but the disbursements of the plaintiff must be allowed to him in each action.

Several parties, who might have been joined as defendants. Ante, § 383.

Legislation § 1023. 1. Enacted March 11, **1872:** based on Practice Act, § 496 (New York Code, § 304), substituting (1) "can" for "shall" after "costs," and (2) "must" for "shall" before "be allowed."

2. Amendment by Stats. **1901,** p. 180; unconstitutional. See note ante, § 5.

Construction of section. Where several acts of tort-feasors contribute to the same injury, there can be but one satisfaction in damages therefor; yet if the acts are not joint, the case is not within this section, which prevents the recovery of costs in more than one action, where the defendants, sued separately, might have been joined as defendants; and in such case, where the judgment and costs against one of the wrong-doers had been paid and satisfied, though the judgment for damages against the other wrong-doers is also satisfied and extinguished thereby, yet the plaintiff is entitled to recover the costs of a separate action against the other wrong-doers. Butler v. Ashworth, 110 Cal. 614; 43 Pac. 4, 386.

CODE COMMISSIONERS' NOTE. If an action was commenced against several defendants, and there was a judgment in their favor, they cannot all be allowed separate costs, but can only recover jointly, as though there had been but one defendant. Rice v. Leonard, 5 Cal. 61. In ejectment, if the entry of such several judgments increases the costs, it might be ground for retaxing or apportioning them. Lick v. Stockdale, 18 Cal. 219.

§ 1024. Defendant's costs must be allowed of course, in certain cases. Costs must be allowed of course to the defendant upon a judgment in his favor in the actions mentioned in section ten hundred and twenty-two, and in special proceedings.

Special proceedings, generally. Post, §§ 1063–1821.

Legislation § 1024. 1. Enacted March 11, **1872:** based on Practice Act, § 497 (New York Code, § 305), substituting (1) "must" for "shall," (2) "ten hundred and twenty-two" for "four hundred and ninety-five," and (3) "in special proceedings" for "in a special proceeding in the nature of an action."

2. Amendment by Stats. **1901,** p. 180; unconstitutional. See note ante, § 5.

Costs for defendant upon judgment in his favor. The defendant can recover

costs only "upon a judgment in his favor." Fox v. Hale etc. Mining Co., 122 Cal. 219; 51 Pac. 731.

Where plaintiff nonsuited. Where the plaintiff is nonsuited upon a jury trial, the jury fees may properly be made payable by the plaintiff. Fairchild v. King, 102 Cal. 320; 36 Pac. 649.

Against cross-complainant. Where persons, by their cross-complaint filed in an action to quiet title, make it necessary for another party to such action to continue his appearance in court, he may recover whatever costs he is thus compelled to incur, from the parties who unjustly bring or keep him in court. Summerville v. March, 142 Cal. 554; 100 Am. St. Rep. 145; 76 Pac. 388.

Against intervener. An intervener, by filing his complaint in intervention, makes the relator a defendant thereto, and upon judgment in favor of the relator against the intervener, the relator is entitled to recover costs against him. People v. Campbell, 138 Cal. 11; 70 Pac. 918.

Where defendant recovers less than three hundred dollars. Upon the failure of the plaintiff to recover in an action, costs are to be allowed as of course to the defendant, notwithstanding the recovery, by the defendant, of less than three hundred dollars upon his counterclaim. Davis v. Hurgren, 125 Cal. 48; 57 Pac. 684.

In suit for injunction. In a suit for an injunction, where all the issues made by the pleadings are found for the defendant, he is entitled to judgment for his costs. Van Horn v. Decrow, 136 Cal. 117; 68 Pac. 473. In an action to determine the title to land, and to enjoin the defendant from trespassing upon the same and from asserting any title thereto, and the court decides that the plaintiff has no cause of action, the defendant is entitled to his costs. Lawrence v. Getchell, 2 Cal. Unrep. 267; 2 Pac. 746.

In replevin. A defendant in replevin, who recovers judgment, the jury failing to find the value of the property to be greater than the amount necessary to carry costs, is nevertheless entitled to costs, where the plaintiff's complaint states its value at a sum exceeding that amount. Edgar v. Gray, 5 Cal. 267.

In action to determine title. Where the court, in an action to determine title, decides that the plaintiff has no cause of action, the defendant is entitled, as of course, to his costs and disbursements. Lawrence v. Getchell, 2 Cal. Unrep. 267; 2 Pac. 746.

In suits for specific performance. A suit for the specific performance of contract to convey land involves the title to real estate, and therefore the defendant is entitled to costs against the plaintiff as a matter of right, upon a judgment in his favor; and where specific performance is refused because of the fraudulent misrepresentations of the plaintiff, and the defendant is free from blame, costs to the defendant follow as of course. Kelly v. Central Pacific R. R. Co., 74 Cal. 565; 16 Pac. 390.

Joint judgment for costs. Costs, by way of indemnity, should not be taxed in case of a nonsuit; the statute looks to an actual determination of the cause upon its merits; so, where an action has been commenced against several defendants, and there has been a judgment in their favor, they are not all entitled to recover costs, but can recover only jointly, as though there had been but one defendant. Rice v. Leonard, 5 Cal. 61. Defendants, who were sued jointly, but who answered separately, may be awarded a joint judgment for costs. Leadbetter v. Lake, 118 Cal. 515; 50 Pac. 686.

§ 1025. Costs, when in the discretion of the court. In other actions than those mentioned in section ten hundred and twenty-two, costs may be allowed or not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court; but no costs can be allowed in an action for the recovery of money or damages, when the plaintiff recovers less than three hundred dollars, nor in an action to recover the possession of personal property, when the value of the property is less than three hundred dollars.

Proceedings by execution creditor to appraise homestead, costs of. See Civ. Code, § 1259.

Legislation § 1025. 1. Enacted March 11, **1872**; based on Practice Act, § 498 (New York Code, § 306), as amended by Stats. 1865–66, p. 847, substituting (1) "ten hundred and twenty-two" for "four hundred and ninety-five," and (2) "can" for "shall" before "be allowed."

2. Amendment by Stats. **1901**, p. 180; unconstitutional. See note ante, § 5.

Costs in discretion of court when. Where costs are allowed to the prevailing party as a matter of course, their allowance does not rest in the discretion of the court, but they follow the judgment: the allowance of costs rests in the discretion of the court, only in such cases as are provided for by statute. Stoddard v. Treadwell, 29 Cal. 281. Where there has been no tender of indemnity before suit on a lost promissory note, the plaintiff is not entitled to costs, unless the defendant has waived a tender, in which case the costs are in the discretion of the court. Randolph v. Har-

ris, 28 Cal. 561; 87 Am. Dec. 139. The discretion conferred upon the court by this section does not justify the allowance of costs not properly chargeable as such, such as for the making of maps, surveys, etc. Bathgate v. Irvine, 126 Cal. 135; 77 Am. St. Rep. 158; 58 Pac. 442. A plaintiff who fails to recover against a defendant is not entitled to any costs, notwithstanding the fact that they were largely incurred in defending against a counterclaim of such defendant, upon which the defendant also failed to recover; in such case the court is allowed no discretion as to costs. Benson v. Braun, 134 Cal. 41; 66 Pac. 1. In an action to abate a nuisance, whether considered as a suit in equity, or as a special proceeding by virtue of constitutional provisions and the statute, the allowance of costs lies in the discretion of the court. McCarthy v. Gaston Ridge Mill etc. Co., 144 Cal. 542; 78 Pac. 7. In an action to quiet title to the waters of a stream, the part of the decree therein, that neither party recover costs, is within the equitable discretion of the court. Gutierrez v. Wege, 145 Cal. 730; 79 Pac. 449. The trial court has power to disallow the costs of taking depositions, where it appears that such taking was unnecessary. Lomita Land etc. Co. v. Robinson, 154 Cal. 36; 18 L. R. A. (N. S.) 1106; 97 Pac. 10. The allowance of costs lies in the discretion of the court in actions of foreclosure (Irvine v. Perry, 119 Cal. 352; 51 Pac. 544), and also in actions for divorce. Brenot v. Brenot, 102 Cal. 294; 36 Pac. 672.

Costs in equity cases. The general rule, that in suits in equity the costs may be apportioned according to the discretion of the court, has been modified in this state by statutory provisions regulating the allowance of costs. Hoyt v. Hart, 149 Cal. 722; 87 Pac. 569; Beal v. Stevens, 72 Cal. 451; 14 Pac. 186. In suits in equity, costs are discretionary, both in the trial court and in the appellate court. Forsyth v. Butler, 152 Cal. 396; 93 Pac. 90; Beal v. Stevens, 72 Cal. 451; 14 Pac. 186. Costs, in suits in equity, are always in the discretion of the court, and, whether they are granted or withheld, they are but as incident to and no part of the relief sought: a party getting the relief sought may be compelled to pay costs. Abram v. Stuart, 96 Cal. 235; 31 Pac. 44. In suits in equity, in which the right to divert and use certain waters is involved, costs are allowed, apportioned, or withheld in the discretion of the court. Gallatin v. Corning Irrigation Co., 163 Cal. 405; Ann. Cas. 1914A, 74; 126 Pac. 864; Beal v. Stevens, 72 Cal. 451; 14 Pac. 186. In an action for an injunction, where the issues for the determination of which the costs were chiefly incurred were decided against the plaintiff, the action of the trial court in granting a judgment in favor of the defendants for their costs is not an abuse of discretion, although the injunction is granted in favor of the plaintiff. Abram v. Stuart, 96 Cal. 235; 31 Pac. 44. In an action for an injunction, costs lie in the discretion of the court. Esmond v. Chew, 17 Cal. 336.

Costs against co-defendants. Where both husband and wife, as defendants, answer in an action to set aside a deed to the wife, and judgment is rendered for the plaintiff, costs are properly charged against both defendants. Collins v. O'Laverty, 136 Cal. 31; 68 Pac. 327.

Against trust fund. A trust fund may be charged with the costs of an action to preserve the fund. Alemany v. Wensinger, 40 Cal. 288.

Judgment for less than three hundred dollars. Costs are not allowable, in the superior court, in any case in which the judgment is for less than three hundred dollars, regardless of whether such judgment is awarded after the issues are actually tried, or is entered without trial by the agreement of the parties. Murphy v. Casey, 13 Cal. App. 781; 110 Pac. 956; Bemmerly v. Smith, 136 Cal. 5; 68 Pac. 97; Quitzow v. Perrin, 120 Cal. 255; 52 Pac. 632; Edwards v. Crepin, 68 Cal. 37; 8 Pac. 616. Costs cannot be awarded to a plaintiff, when his money is reduced to less than three hundred dollars by a counterclaim. Poswa v. Jones, 21 Cal. App. 664; 132 Pac. 629. The act of March 23, 1872, concerning actions for libel and slander, did not give a plaintiff recovering judgment any costs beyond the amount allowed by the general law; therefore, a plaintiff in such an action, who recovered less than three hundred dollars, was not entitled to costs. Jacobi v. Baur, 55 Cal. 554. In an action for damages and for an injunction, where the injunction is denied, a judgment for less than three hundred dollars does not carry costs. Himes v. Johnson, 61 Cal. 259; Brown v. Delavau, 63 Cal. 303. The provision of this section, that costs cannot be allowed in an action for the recovery of money or damages, where the plaintiff recovers less than three hundred dollars, evidently applies to both parties to the action, and forbids the recovery of costs by either party. Anthony v. Grand, 101 Cal. 235; 35 Pac. 859; Frese v. Mutual Life Ins. Co., 11 Cal. App. 387; 105 Pac. 265. An action to foreclose a lien is an action in equity, and costs are properly allowed therein, against the necessary parties to the action, who appear and make affirmative defenses against the claim of the plaintiff, notwithstanding judgment is for less than three hundred dollars, and in such case the superior court has concurrent jurisdiction with that of justices of the peace, and the plaintiff is entitled to costs, whether he seeks re-

lief in one jurisdiction or the other. Clark v. Brown, 141 Cal. 93; 74 Pac. 548. The recovery of a judgment for less than three hundred dollars affects only the question of costs, and not the jurisdiction of the court, where the ad damnum clause of the complaint is for a greater amount. Sullivan v. California Realty Co., 142 Cal. 201; 75 Pac. 767. Where the plaintiff, in an action for money, recovers less than three hundred dollars, he is not entitled to costs, and the allowance of costs in such case is erroneous; but where no costs are in fact entered in the judgment, and a blank space after the provision therefor is left unfilled, the error is harmless. Boland v. Ashurst Oil etc. Co., 145 Cal. 405; 78 Pac. 871.

Costs as controlled by damages. In an action for damages for trespass on real property, and for an injunction to restrain threatened waste, the equitable awarding of costs is not controlled by the amount of damages recovered. Bemmerly v. Smith, 136 Cal. 5; 68 Pac. 97.

Cost of transcript. Where no application appears to have been made to the superior judge, directing the official court reporter to transcribe the evidence, a party who has paid cash to such reporter to procure a transcript of the evidence, is not entitled to recover the same as costs. Blair v. Brownstone Oil etc. Co., 20 Cal. App. 316; 128 Pac. 1022.

Payment of costs as prerequisite to relief. A condition that the defendant shall pay the plaintiff's costs, in an order granting a new trial, is sufficiently complied with, where the defendant tendered the real amount of costs within the time limited by the order, although less than the amount stated in the judgment, and thereafter moved to retax the costs. Higuerra v. Bernal, 46 Cal. 580. A condition that plaintiff shall pay a certain amount of costs, in an order granting him a new trial, cannot be complained of by the defendant, nor does it indicate that the act of the court in granting the new trial was erroneous. Anglo-Nevada Assurance Corp. v. Ross, 123 Cal. 520; 56 Pac. 335; and see Brooks v. San Francisco etc. Ry. Co., 110 Cal. 173; 42 Pac. 570. Where an order was made, setting aside a judgment for want of jurisdiction, by reason of a false return of service of summons, costs cannot be imposed. Waller v. Weston, 125 Cal. 201; 57 Pac. 892. In condemnation proceedings, the only requirement of the statute is the payment of the sum of money assessed, within thirty days after final judgment, which excludes the idea that the payment of interest on such amount, or the payment of costs, is included. San Francisco etc. Ry. Co. v. Leviston, 134 Cal. 412; 66 Pac. 473. In an action to enforce a resulting trust in land, where the proof showed the plaintiff entitled to a conveyance only upon the payment of the defendant's lien, which payment he had not tendered, he is not entitled to such relief, except upon payment of costs. Bell v. Solomons, 142 Cal. 59; 75 Pac. 649.

Costs of appeal. The appellate courts have a discretion to determine what are the necessary costs incurred upon the appeal, notwithstanding the memorandum of costs claimed upon the appeal is filed in the lower court. Blair v. Brownstone Oil etc. Co., 20 Cal. App. 316; 128 Pac. 1022. The allowance or disallowance of items for expense and disbursements incurred upon the trial of an action must be left, in nearly every instance, to the discretion of the judge before whom the cause was tried, subject to review upon appeal; and the same principle applies to its taxation of expenses in the appellate court. Bond v. United Railroads, 20 Cal. App. 124; 128 Pac. 786; Blair v. Brownstone Oil etc. Co., 20 Cal. App. 316; 128 Pac. 1022. Where, upon appeal from the judgment, and an order denying a new trial, the order is affirmed, but the cause is remanded, with directions to modify the judgment, and no directions concerning the costs of appeal, the clerk's power is limited, under the rules of the supreme court, to the entry of judgment for costs, only on the appeal from the judgment. Crittenden v. San Francisco Savings Union, 157 Cal. 201; 107 Pac. 103.

CODE COMMISSIONERS' NOTE. See note to § 1022, ante. Costs in equity are always in the discretion of the court, and, whether granted or not, are but incidents to, and no part of, the relief sought. Gray v. Dougherty, 25 Cal. 282. In an action for damages to a mining claim, and for an injunction, plaintiffs obtained judgment for one hundred dollars, and costs taxed at $——, a perpetual injunction being granted also. All costs of trial were denied, except as to costs accrued by reason of the injunction granted, and it was held that this is a case where the allowance of costs is in the discretion of the court below. Esmond v. Chew, 17 Cal. 336. In an action upon a lost note, if indemnity was not tendered by plaintiff before suit brought, he cannot recover costs, unless the defendant has waived the tender, and then costs rest in the discretion of the court. Randolph v. Harris, 28 Cal. 562; 87 Am. Dec. 139. When surety by mortgage, without personal liability, not to be taxed with costs, in an action to foreclose the mortgage and subject the securities in his hands to the payment of the notes. See facts of the case. Van Orden v. Durham, 35 Cal. 148. The county court may render judgment against appellant for costs, on dismissal of an attempted appeal from a judgment of a justice's court, by reason of the failure of appellant to perfect his appeal, or for want of jurisdiction of the subject-matter of the appeal. Blair v. Cummings, 39 Cal. 669; People v. County Court of Placer County, Sup. Ct. Cal., October term, 1869 (not reported). In a proceeding for the sale of property held in trust for religious or charitable purposes, the costs of litigation and reasonable counsel fees are a proper charge upon the trust fund, and should be allowed out of it by the court. Alemany v. Wensinger, 40 Cal. 289; see Von Schmidt v. Huntington, 1 Cal. 55.

§ 1026. When the several defendants are not united in interest, costs may be severed. When there are several defendants in the actions mentioned in section ten hundred and twenty-two, not united in interest, and making separate defenses by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.

Judgment, for some defendants. Ante, § 578.
Costs, where several defendants. Ante, § 1023.

Legislation § 1026. **1.** Enacted March 11, **1872**; based on Practice Act, § 499 (New York Code, § 306), substituting (1) "ten hundred and twenty-two" for "four hundred and ninety-five," and (2) "must" for "shall."

2. Repealed by Stats **1901**, p. 180; unconstitutional. See note ante, § 5.

§ 1027. Costs on appeal. The prevailing party on appeal shall be entitled to his costs excepting when judgment is modified, and in that event the matter of costs is within the discretion of the appellate court. The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with said appeal and the preparation of the record for the appeal, including the costs of printing briefs; provided, however, that no amount shall be allowed as costs of printing briefs in excess of fifty dollars to any one party. The appellate court may reduce costs in case of the insertion of unnecessary matter in the record.

Legislation § 1027. **1.** Enacted March 11, **1872**; based on Practice Act, § 500 (New York Code, § 306), and then read: "§ 1027. In the following cases the costs of appeal is [sic] in the discretion of the court: 1. When a new trial is ordered; 2. When a judgment is modified."

2. Amended by Stats. **1913**, p. 1033.

Costs included what. The costs upon appeal are properly the costs in the appellate court, and the costs of making up the appeal in the court below, including the cost of making out the transcript; and where a case is remanded for further proceedings, and the costs are awarded in the appellate court in general items, costs upon appeal, only, are meant, with the costs of the former trial left to abide the event of the suit. Gray v. Gray, 11 Cal. 341. A transcript of the reporter's notes, used for the purpose of preparing the statement on motion for a new trial, cannot be taxed as costs upon appeal. Bank of Woodland v. Hiatt, 59 Cal. 580.

Costs, where judgment is modified. Where the judgment is modified because of an apparent error, which the appellant might have had corrected in the trial court on motion, the respondent will not be taxed with costs. Cassin v. Marshall, 18 Cal. 689; Noonan v. Hood, 49 Cal. 293.

Costs of frivolous appeal. The costs of appeal, and damages for delay as part of the costs of appeal, will be allowed, where the only error upon the record is a trivial clerical error in the computation of interest; such an appeal is essentially frivolous, as the error would have been corrected by the trial court, upon its attention being called to it. Rountree v. I. X. L. Lime Co., 106 Cal. 62; 39 Pac. 16.

Of former appeal. In awarding judgment to a plaintiff after a second trial, it is error to include the costs of a former appeal, upon which costs were awarded to the defendant. Huellmantel v. Huellmantel, 124 Cal. 583; 57 Pac. 582.

Certificate to transcript. The supreme court has not the power to compel the respondent's counsel to agree to the certification of the transcript upon appeal, regardless of the merits or outcome of the appeal, under absolute penalty for refusal; and its rule does not relieve the appellant from the duty of advancing the cost of the clerk's certification of the transcript, nor relieve him from the burden of paying such cost if his appeal is not successful, but allows the respondent the privilege of saving possible expense if the appeal is successful, and precludes the appellant from recovering such cost if the transcript is not presented to the respondent for approval. Loftus v. Fischer, 113 Cal. 286; 45 Pac. 328; 114 Cal. 131; 45 Pac. 1058.

Power of appellate court to award costs on dismissal of appeal for want of jurisdiction. See note 13 Ann. Cas. 1048.

CODE COMMISSIONERS' NOTE. In an action for ejectment, the court below rendered judgment for possession and damages, the finding not authorizing a judgment for damages, yet the whole judgment for both possession and damages was affirmed in the supreme court, upon respondent's remitting the damages, and paying the costs of appeal. Doll v. Feller, 16 Cal. 433. If judgment of the court below is reversed, and a new trial had, the costs of the first trial are part of the final bill of costs. Visher v. Webster, 13 Cal. 58. A judgment for too much interest will be modified by the supreme court in that particular, and then be permitted to stand at appellant's cost. Where the supreme court modifies the judgment below for an apparent error, which appellant might have had corrected below, by specific motion, respondent will not be taxed with costs. Cassin v. Marshall, 18 Cal. 689; Tyron v. Sutton, 13 Cal. 491. Judgment being

affirmed in part and reversed in part, the respondent was allowed his costs in the court below, but made to pay the costs of the appeal. Cole v. Swanston, 1 Cal. 51; 52 Am. Dec. 288. The costs upon appeal are, properly, the costs in this court, and the cost of making up the appeal in the court below, including the cost of making out the transcript. The costs of the former trial are not included, but abide the event of the suit. Gray v. Gray, 11 Cal. 341. Where a judgment of the court was incorrect in part, and its judgment accordingly modified, the appellants recover the costs of their appeal. Welch v. Sullivan, 8 Cal. 512. The person who is responsible for the erroneous proceedings, after the remittitur was sent down from the supreme court, must pay the costs of those proceedings, and the costs consequent on a second appeal caused by them. Argenti v. San Francisco, 30 Cal. 458. When the case is remanded by the supreme court for further proceedings, and costs are awarded in general terms, the costs awarded include only the costs made on the appeal to the supreme court. The costs of the former trial are not included, but abide the event of the suit. Ex parte Burrill, 24 Cal. 350; Gray v. Gray, 11 Cal. 341. If the printed transcript in the supreme court is unnecessarily long, the party who is to blame for this will be adjudged to pay the costs of printing thus unnecessarily incurred, or a share thereof. People v. Holden, 28 Cal. 129. Action in which each party made to pay his own costs on appeal. See Bradbury v. Barnes, 19 Cal. 120. In which costs of motion in supreme court not allowed. Swain v. Naglee, 19 Cal. 127. In which appellant paid costs in supreme court. Jungerman v. Bovee, 19 Cal. 354. In which appellant made to pay costs, although the judgment is reversed. Reniff v. The Cynthia, 18 Cal. 669. Judgment affirmed as to a mandamus, but reversed as to costs. McDougal v. Roman, 2 Cal. 80. Costs on partial success. See Brooks v. Calderwood, 34 Cal. 563.

§ 1028. Referee's fees. The fees of referees are five dollars to each for every day spent in the business of the reference; but the parties may agree, in writing, upon any other rate of compensation, and thereupon such rates shall be allowed.

Reference, generally. Ante, §§ 638–645.
Referees.
1. In partition, compensation of. Ante, §§ 768, 796.
2. In probate. Post, § 1508.

Legislation § 1028. Enacted March 11, 1872 (based on Practice Act, § 504), substituting "are" for "shall be" before "five."

Discretion of court. The court has a wide discretion in fixing the compensation of a referee, and is not restricted to the allowance of five dollars per day. Mesnager v. De Leonis, 140 Cal. 402; 73 Pac. 1052.

§ 1029. Continuance, costs may be imposed as condition of. When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

Postponement, generally. Ante, §§ 595, 596.

Legislation § 1029. Enacted March 11, 1872, in the exact language of Practice Act, § 505, as amended by Stats. 1855, p. 251.

Discretion of court. The imposition of costs upon granting a continuance on account of the sudden illness of the attorney of the party making the request, is not an abuse of discretion. Eltzroth v. Ryan, 91 Cal. 584; 27 Pac. 932.

What costs may be imposed. The court has a right to impose costs, other than those properly taxable, as a condition for postponing the trial, and to proceed therewith upon the refusal of the party applying for the postponement to comply therewith. Pomeroy v. Bell, 118 Cal. 636; 50 Pac. 683.

Imposition of terms on granting continuance. See note Ann. Cas. 1913A, 308.

§ 1030. Costs when a tender is made before suit brought. When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for plaintiff, the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

Tender. Post, § 2076.
Offer to compromise. Ante, § 997.

Legislation § 1030. Enacted March 11, 1872 (based on Practice Act, § 506), (1) omitting "the" before "plaintiff," in first instance, and (2) substituting (a) "cannot" for "shall not" before "recover," and (b) "must" for "shall" before "pay."

CODE COMMISSIONERS' NOTE. If tender was made of the amount due before action and kept good during action, the judgment should be for plaintiff, but the defendant is entitled to costs. Curiac v. Abadie, 25 Cal. 502. Defendant must not only plead tender before the suit brought, but that he has always been and now is ready and willing to pay the same, and the money should be brought into court. Bryan v. Maume, 28 Cal. 239. The tender can be made only by a party in interest. See Mahler v. Newbaur, 32 Cal. 168; 91 Am. Dec. 571. On the subject of tender generally, see Civ. Code, §§ 1485–1505, and notes. The rules heretofore existing, as to the effect of offer of performance, are somewhat modified, and in many respects altogether changed.

§ 1031. Costs in action by or against an administrator, etc. In an action prosecuted or defended by an executor, administrator, trustee of

express trust, or a person expressly authorized by statute, costs may be recovered as in action by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense.

Costs against executor, etc. Post, § 1509.

Legislation § 1031. 1. Enacted March 11, 1872; based on Practice Act, § 507 (New York Code, § 317), substituting (1) "must" for "shall," and (2) "directs" for "shall direct."
2. Amendment by Stats. 1901, p. 180; unconstitutional. See note ante, § 5.

Construction of section. This section does not forbid the taxation of a memorandum of costs against an executor, in an action prosecuted or defended by him, but merely provides that such costs must, by the judgment, be made chargeable only upon the estate, unless the court directs the same to be paid by the executor. Reay v. Butler, 99 Cal. 477; 33 Pac. 1134. When a judgment for costs should be against an administrator, and when it should be "made chargeable only upon the estate," are questions about which this section and § 1509, post, are somewhat conflicting. Leonis v. Leffingwell, 126 Cal. 369; 58 Pac. 940.

No conflict between this section and § 1509, post. See note post, § 1509.

Costs against trust property. Where an action was brought by the plaintiff as trustee of an express trust, and there was no charge of bad faith or mismanagement on his part, costs are chargeable only against the trust property. Sterling v. Gregory, 149 Cal. 117; 85 Pac. 305.

Against executor. In the absence of a special statute as to costs against an executor, they should be imposed upon him individually, leaving him to seek an allowance for payment thereof from the probate court. Meyer v. O'Rourke, 150 Cal. 177; 88 Pac. 706. When a judgment is rendered against an executor for costs, but such costs are not made chargeable against the estate, it amounts to a personal judgment against the executor, which may be enforced by execution. Stevens v. San Francisco etc. R. R. Co., 103 Cal. 252; 37 Pac. 146. Where an action to quiet title against an executor is contested by him, and judgment is for the plaintiff, the court has a discretion to award costs against the executor personally, though there was no finding of mismanagement or bad faith; and he cannot, upon appeal, have them removed from his individual shoulders and cast upon the estate he represents. Meyer v. O'Rourke, 150 Cal. 177; 88 Pac. 706.

Effect of waiver as against executor. The fact that the plaintiffs, at the hearing of the motion for a change of venue, waived their claim for costs against the executors personally, and agreed to look to the estate alone for them, does not affect the right of the executors to a change of venue to the county of their residence. Thompson v. Wood, 115 Cal. 301; 47 Pac. 50.

CODE COMMISSIONERS' NOTE. Executors and administrators are individually responsible for costs recovered against them; but they must not be reimbursed for such costs in their administration accounts, unless it appears that the action has been prosecuted or resisted without just cause. Hicox v. Graham, 6 Cal. 169.

§ 1032. Costs in a review other than by appeal. When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case.

Special proceedings, generally. Post, §§ 1063–1821.
Costs on appeal. Ante, § 1027; post, § 1034.

Legislation § 1032. Enacted March 11, 1872 (based on Practice Act, § 508), substituting "must" for "shall."

CODE COMMISSIONERS' NOTE. It will be observed that § 509 of the old Practice Act has been omitted. This was intentional, and the tax heretofore known as the court tax is no longer a cost charge.

§ 1033. Filing of and affidavit to bill of costs. The party in whose favor the judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict, or notice of the decision of the court or referee, or, if the entry of the judgment on the verdict or decision be stayed, then, before such entry is made, a memorandum of the items of his costs and necessary disbursements in the

action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within five days after notice of filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers. By the decision of the court, or referee, herein referred to, is meant the signing and filing of the findings of fact and conclusions of law.

Legislation § 1033. **1.** Enacted March 11, **1872**; based on Practice Act, § 510, as amended by Stats. 1855, p. 251, which read: "The party in whose favor judgment is rendered, and who claims his costs, shall deliver to the clerk of the court, within two days after the verdict or decision of the court, a memorandum of the items of his costs and necessary disbursements in the action or proceeding; which memorandum shall be verified by the oath of the party, or his attorney, stating that the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding." When § 1033 was enacted in 1872, "must" was substituted for "shall," in both instances.

2. Amended by Code Amdts. **1873–74**, p. 343, to read as at present, except for the amendment of 1899.

3. Amended by Stats. **1899**, p. 22, adding the last sentence.

4. Amendment by Stats. **1901**, p. 181; unconstitutional. See note ante, § 5.

Construction of section. The provisions of this section are not intended to be directory; no right is created, apart from the remedy provided for its enforcement, and in respect to this remedy, there is no room for construction; and failure to comply with the provisions of the section not only extinguishes the remedy, but forfeits the right itself. Chapin v. Broder, 16 Cal. 403. The object of this section is to give the prevailing party, who claims costs, five days after he has knowledge of the verdict or decision in which to serve and file his memorandum; should he have knowledge of such decision, it would be an idle act to require the service of notice of that fact; and where such party gives notice of the decision to the opposite party for the purpose of starting the time within which the motion for a new trial can be made, he must be held to have had notice of the decision, and to have waived any formal notice thereof. O'Neil v. Donahue, 57 Cal. 226. This section is not to be construed literally, so as to subvert the settled practice of serving and filing a written notice of the motion to tax the costs, specifying the objections to the cost-bill, and the time when the application to the court or judge will be made to correct or strike it out: such practice is a substantial compliance with the statute. Carpy v. Dowdell, 129 Cal. 244; 61 Pac. 1126. This section must be invoked in aid of § 1034, post, to prevent the latter section from being unconstitutional, as allowing property to be taken without notice or an opportunity to be heard. Bell v. Superior Court, 150 Cal. 31; 87 Pac. 1031.

Repeal of statute. The act of 1871–72, providing that the party demanding a jury shall pay the fees thereof, in case they shall be discharged without finding a verdict, but that such fees may be recovered as costs on his obtaining a judgment afterwards, and that no further proceedings shall be allowed until the fees are paid, was not repealed on the adoption of the codes. Carpenter v. Jones, 121 Cal. 362; 53 Pac. 842.

Time of filing cost-bill. In an action at law, a cost-bill should be filed within five days after the verdict, unless the entry of judgment thereon was stayed, or the case was reserved for argument upon briefs, in which case, if filed prior to the entry of the judgment, it would be in time. Bedolla v. Williams, 15 Cal. App. 738; 115 Pac. 747. A ruling of the trial court, granting a motion for a nonsuit on the contest of a will, is not the judgment of the court, and the proponents' cost-bill is filed in time if filed within five days after the judge signed the draft of the form of the judgment, which was afterwards entered in the minute-book. Estate of Purcell, 164 Cal. 300; 128 Pac. 932. Where a cost-bill and the judgment are filed on the same day, it must be presumed that the filing of the cost-bill preceded the entry of the judgment. Bedolla v. Williams, 15 Cal. App. 738; 115 Pac. 747. Where the entry of judgment is stayed, a memorandum of costs may be filed at any time before such entry is made. Taylor v. McConigle, 120 Cal. 123; 52 Pac. 159.

Extension of time. An extension of time to file a cost-bill may be granted by the trial judge. Beilby v. Superior Court, 138 Cal. 51; 70 Pac. 1024.

Failure to file. The recovery of costs is a matter regulated exclusively by statute, and the mode pointed out for that purpose must be strictly pursued. Chapin v. Broder, 16 Cal. 403. The omission from this section of that clause of the original § 510 of the Practice Act, which provided that a failure by the prevailing party to file his memorandum of costs within the time limited should be deemed a waiver of his costs, is not a material defect; the code contemplates that such shall be the result, since the only costs the clerk is authorized to insert in the judgment are

those claimed, and "taxed or ascertained," in the manner provided. Riddell v. Harrell, 71 Cal. 254; 12 Pac. 67; and see Chapin v. Broder, 16 Cal. 403. Conceding, without deciding, that relief can be granted for inadvertence or excusable neglect in failing to file a cost-bill in time, under § 473, ante, such relief will not be granted upon an affidavit showing mere forgetfulness to file it in time, owing to press of other business. Dow v. Ross, 90 Cal. 562; 27 Pac. 409; Galindo v. Roach, 130 Cal. 389; 62 Pac. 597. A judgment for costs, entered by the clerk, in the absence of the filing or service of a memorandum of costs, is without jurisdiction, and void; and a party failing to file his memorandum waives all claim for costs. Riddell v. Harrell, 71 Cal. 254; 12 Pac. 67; and see Chapin v. Broder, 16 Cal. 403.

Waiver of notice. The right to written notice of the actual time of the filing of a cost-bill may be waived. Bell v. Thompson, 8 Cal. App. 483; 97 Pac. 158.

Who may verify. An attorney who verifies the memorandum need not be the attorney of record, but it is sufficient if he was employed to assist in the case: any one who has knowledge of the facts may verify the memorandum. Yorba v. Dobner, 90 Cal. 337; 27 Pac. 185; and see Burnham v. Hayes, 3 Cal. 115; 58 Am. Dec. 389.

Striking out cost-bill. Where a party, entitled to costs, neglects to serve and file his memorandum thereof until more than five days have elapsed after he has knowledge of the decision of the court, though no written notice of it has been served upon him, the filing is too late, and the costs will be stricken out on motion. Dow v. Ross, 90 Cal. 562; 27 Pac. 409; and see Mallory v. See, 129 Cal. 356; 61 Pac. 1123. Although the allowance or disallowance of items of costs incurred upon the trial of an action must be left, in nearly every case, to the discretion of the trial court, and the memorandum of costs, when properly verified, should, unless controverted, control the decision of the court, where the charges appear on their face to be for proper and necessary disbursements, yet, where any charges do not so appear, the burden of proof is on the party claiming the costs, and, in the absence of evidence justifying and sustaining the charges, they should be stricken out on motion. Miller v. Highland Ditch Co., 91 Cal. 103; 27 Pac. 536; Barnhart v. Kron, 88 Cal. 447; 26 Pac. 210. A cost-bill filed before the filing of the findings and the entry of judgment is premature, and will be stricken out on motion. Sellick v. De Carlow, 95 Cal. 644; 30 Pac. 795. A motion to strike out a cost-bill will be denied, where it was filed in time, and there is no tenable objection to it. Bedolla v. Williams, 15 Cal. App. 738; 115 Pac. 747.

Amendment. After the expiration of the time limited by this section for serving and filing a memorandum of costs, an amendment of such memorandum cannot be had so as to insert additional items of disbursement; nor can a judgment for such additional items be rendered, in the absence of a showing that the omission was excusable on some of the grounds mentioned in § 473, ante. Galindo v. Roach, 130 Cal. 389; 62 Pac. 597. An order allowing an amendment to a cost-bill, made after the time had passed for filing a cost-bill but in furtherance of justice, and where notice of such order was had and no objection made, is effective. Legg & Shaw Co. v. Worthington, 157 Cal. 488; 108 Pac. 284.

Motion to tax costs. The time of notice of the hearing of a motion to retax costs may, under § 1005, ante, be shortened by the court. Furtinata v. Butterfield, 14 Cal. App. 25; 110 Pac. 962. The universal practice has been to serve and file written notice of the motion to tax the cost-bill as the equivalent of filing a motion within five days, and on the day designated in the notice, or on the day to which the hearing should have been postponed, to call up the notice and make the motion viva voce, a note of the motion being made by the clerk in his minutes: this practice is a sufficient compliance with the statute. Kishlar v. Southern Pacific R. R. Co., 134 Cal. 636; 66 Pac. 848. A filed motion to retax costs need not be served. Furtinata v. Butterfield, 14 Cal. App. 25; 110 Pac. 962.

Motion to tax or retax costs. It is sufficient, in the notice of a motion to have the costs taxed by the court, to specify certain items of costs in the cost-bill as objected to, and to state that they are not legally chargeable as costs, and were not necessary disbursements in the action; it is not necessary that any affidavit shall accompany the notice, this section does not specify what the motion must contain, nor upon what kind of evidence it shall be heard, but, upon the hearing of the motion, any competent evidence, oral or written, may be presented to the court. Senior v. Anderson, 130 Cal. 290; 62 Pac. 563; Lomita Land etc. Co. v. Robinson, 154 Cal. 36; 18 L. R. A. (N. S.) 1106; 97 Pac. 10.

Necessity of including items in cost-bill. The fees of the officers of the court must be claimed in the memorandum of costs; and, in the absence of such memorandum, the clerk has no authority to insert such fees in the judgment. Chapin v. Broder, 16 Cal. 403. Counsel fees allowed in an action of slander, in addition to the other costs, must be included in the cost-bill as filed, or they are waived. McKinney v. Roberts, 2 Cal. Unrep. 532; 8 Pac. 3.

Costs allowed by referee, but not by court. Costs allowed by a referee against a garnishee, but not allowed in the order of court confirming the report, cannot be collected in an action on the judgment.

Bronzan v. Drobaz, 93 Cal. 647; 29 Pac. 254.

Costs relating to common fund. Costs may be allowed in a suit in equity, for the preservation or distribution of a fund, where all the parties have a common interest. Hays v. Windsor, 130 Cal. 230; 62 Pac. 395.

Witness fees. The payment of a fee to a witness, who attends by request, though not served with a subpœna, is a necessary disbursement, as much so as when paid to a witness who has been subpœnaed. Linforth v. San Francisco Gas etc. Co., 9 Cal. App. 434; 99 Pac. 716. Fees of witnesses subpœnaed in good faith, but not sworn on the trial, may be allowed as costs: it may have been that their testimony became unnecessary by reason of a modification of the pleadings, or the exclusion by the court of the testimony offered. Randall v. Falkner, 41 Cal. 242. A party in whose favor judgment is rendered, who voluntarily attends the trial without being subpœnaed by the opposite party, and while there is called as a witness by the latter, is not entitled to witness fees or mileage. Beal v. Stevens, 72 Cal. 451; 14 Pac. 186. The fees of witnesses who refused to receive the same cannot be allowed as costs; nor can any charge be made in the cost-bill for filing the same. Linforth v. San Francisco Gas etc. Co., 9 Cal. App. 434; 99 Pac. 716. The right to witness fees is statutory, and a party is required to pay only those fees which are authorized. Naylor v. Adams, 15 Cal. App. 353; 114 Pac. 997. The statute fixes the fees of witnesses; and the allowance of a further sum to a physician, who testified as an expert, cannot be allowed to an administrator. Estate of Levinson, 108 Cal. 450; 41 Pac. 483. An expert witness, not called by the court nor by agreement of the parties, may be allowed the usual fees for attendance, where he is in attendance, but not for his services as an expert. Linforth v. San Francisco Gas etc. Co., 9 Cal. App. 434; 99 Pac. 716. Expert witnesses should be allowed only the usual fees for daily attendance and mileage as witnesses, and the costs allowed cannot properly include their pay as experts, nor the expenses incurred by them in making surveys or preparing maps, not ordered by the court. Bathgate v. Irvine, 126 Cal. 135; 77 Am. St. Rep. 158; 58 Pac. 442. The power of the judge to order payment of witness fees must be given by a statute uniform throughout the state. Turner v. Siskiyou County, 109 Cal. 332; 42 Pac. 434.

Depositions. Where depositions are necessary, the costs of taking them may be allowed (Lomita Land etc. Co. v. Robinson, 154 Cal. 36; 18 L. R. A. (N. S.) 1106; 97 Pac. 10), and are properly included in the cost-bill of the party taking them. California etc. Co. v. Schiappa-Pietra, 151 Cal. 732; 91 Pac. 593. The cost of taking depositions forms no part of the damages in an action for conversion, and should be determined in the cost-bill. Nicholls v. Mapes, 1 Cal. App. 349; 82 Pac. 265.

Transcript of testimony, and copies of papers. Items of costs paid without consent of the parties or by order of the court, for a transcript of the reporter's notes and for copies of excluded papers withdrawn, are improper, and should be rejected upon taxation of costs. Senior v. Anderson, 130 Cal. 290; 62 Pac. 563. Where the transcript of the testimony was written up under a previous order of the court, directing that the expense be borne equally by both sides, the prevailing party is entitled to include the amount paid by him for such expense as part of the costs in the case. Bell v. Pleasant, 145 Cal. 410; 104 Am. St. Rep. 61; 78 Pac. 957. An item of costs, paid for copies of numerous papers, which were not offered in evidence, and the need of which was not explained, nor shown to have been reasonably apprehended, should be stricken out. Senior v. Anderson, 130 Cal. 290; 62 Pac. 563.

Printing of briefs. The printing of briefs to be used upon appeal cannot be taxed either as costs or as disbursements. Bond v. United Railroads, 20 Cal. App. 124; 128 Pac. 786; Blair v. Brownstone Oil etc. Co., 20 Cal. App. 316; 128 Pac. 1022. An item of costs charged for "printing points" does not represent an obligation of the defendant, and the plaintiff is not authorized to include it in the bill for the amount due. Hibernia Sav. & L. Soc. v. Behnke, 121 Cal. 339; 53 Pac. 812.

Expense of filing mechanic's lien. The expense of filing mechanics' liens is properly included as part of the costs and disbursements, upon foreclosure thereof. Builders' Supply Depot v. O'Connor, 150 Cal. 265; 119 Am. St. Rep. 193; 11 Ann. Cas. 712; 17 L. R. A. (N. S.) 909; 88 Pac. 982.

Premium on bond. The charge of a surety company for a replevin bond is not a proper item in a cost-bill. Williams v. Atchison etc. Ry. Co., 156 Cal. 140; 134 Am. St. Rep. 117; 19 Ann. Cas. 1260; 103 Pac. 885.

Insurance-money. Insurance-money, paid by a sheriff on attached property, is not a proper item of costs. Galindo v. Roach, 130 Cal. 389; 62 Pac. 597.

Including costs in judgment. No distinction is made between the fees of officers of the court and other expenses, and disbursements of every character are placed upon the same footing; a party entitled to costs is required to claim them in a particular manner, and when properly claimed, it is the duty of the clerk to include them in the judgment, but, until they are so claimed, he is not vested with any authority for that purpose. Chapin v. Broder, 16 Cal. 403. Where the

statute provides that the clerk shall include the costs in the judgment, he has no authority to insert the amount of the costs in the judgment at some subsequent time, as his authority terminates with the entry of the judgment, and if, by mistake or otherwise, the costs are omitted, the remedy is by motion to amend the judgment; no title passes to the purchaser of land sold upon execution under such a judgment. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418; and see Chapin v. Broder, 16 Cal. 403. The insertion of costs in the judgment is a mere ministerial act of the clerk, which can be performed only in the cases where the statute allows it. Riddell v. Harrell, 71 Cal. 254; 12 Pac. 67; Chapin v. Broder, 16 Cal. 403.

Payment of costs as condition. The payment of reporter's fees, where a jury has been discharged, cannot be required as a condition of setting the cause for a second trial. Carpenter v. Jones, 121 Cal. 362; 53 Pac. 842. The refusal of the clerk to indorse any filing upon the decision and judgment until after the filing of the cost-bill, upon the alleged ground that the calendar fee had not been paid, cannot prejudice the rights of the party filing the cost-bill. Beck v. Pasadena Lake Vineyard etc. Co., 130 Cal. 50; 62 Pac. 219.

Deposit of jury fees. The court may require the party demanding a jury to deposit the fees. Bank of Lassen County v. Sherer, 108 Cal. 513; 41 Pac. 415.

Decision, defined. In cases where a nonsuit is granted, the "decision" referred to in this section must be understood to mean a judgment entered upon a motion. Estate of Purcell, 164 Cal. 300; 128 Pac. 932.

CODE COMMISSIONERS' NOTE. This section has been held not to apply to costs on appeal to the supreme court. Gray v. Gray, 11 Cal. 341. If the opposing party fail to file his cost-bill, or to give notice within the proper time, the vacation of the judgment is not on that account absolute. Gregory v. Haynes, 21 Cal. 443. If items are included in the bill of costs which are not properly taxable, the party should move to amend or retax the costs, and no just grounds are afforded for refusing to issue an execution or recalling one. Meeker v. Harris, 23 Cal. 285. If the original bill of costs is filed within the time prescribed, an amendment allowed after the time relates back to the time of filing, and forms a part of the original. An affidavit by the attorney of the party accompanying the bill of costs is good. Burnham v. Hays, 3 Cal. 115; 58 Am. Dec. 389. A memorandum of the costs should be filed in the office of the clerk of the court below at the time of filing the remittitur there, or within the time specified by the statute thereafter. Ex parte Burrill, 24 Cal. 350; see also Eaton v. Palmer, 11 Cal. 341. The court cannot add to the judgment the costs of the prevailing party after the time for filing the same has expired, and after an appeal has been perfected. If it does so, the proper and only remedy is by an appeal from the order. Jones v. Frost, 28 Cal. 245. If the costs on appeal are not entered on the judgment-docket in the court below, they are not a lien on property until the levy of an execution. Or if the clerk's and sheriff's fees were inserted in the judgment, when not so claimed, the judgment is so far void, and may be attacked collaterally. Chapin v. Broder, 16 Cal. 403.

§ 1034. Costs on appeal, how claimed and recovered.

Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed by the preceding section, and thereafter he may have an execution therefor as upon a judgment.

Remittitur. Ante, § 958.

Legislation § 1034. 1. Enacted March 11, **1872**; based on Practice Act, § 665, as amended by Stats. 1854, Redding ed. p. 73, Kerr ed. p. 103, which read: "Whenever costs are awarded to a party by an appellant [sic] court, such party may have an execution for the same on filing remittitur with the clerk of the court below; and it shall be the duty of such clerk, whenever the remittitur is filed, to issue the execution upon application therefor, and whenever costs are awarded to a party by an order of any court, such party may have an execution therefor in like manner as upon a judgment."

2. Amendment by Stats. **1901**, p. 181; unconstitutional. See note ante, § 5.

Construction of section. This section, standing alone, would be unconstitutional, because of its failure to provide for notice and an opportunity for the adverse party to be heard, but this is avoided by construing it with § 1033, ante, so as to require service of the memorandum of costs upon the opposite party, and an opportunity for retaxation before execution can properly be issued thereupon. Bell v. Superior Court, 150 Cal. 31; 87 Pac. 1031.

Cost-bill filed in trial court. A memorandum of the costs upon appeal is not necessary to be filed in the supreme court, upon a judgment awarding costs: such costs should be claimed in the trial court. Gray v. Gray, 11 Cal. 341. The memorandum of costs indorsed on the remittitur by the clerk of the supreme court should not be regarded as a sufficient memorandum of costs; and if the prevailing party intends to collect the fees for filing the notice of appeal and the expenses of preparing the transcript of the record, these should be embodied in a memorandum of costs and filed with the clerk of the trial court, at the time of filing the remittitur there, or within the time thereafter prescribed by the statute in other cases. Ex parte Burrill, 24 Cal. 350.

Costs, where land involved is sold. Where land involved in actions is sold pending appeal, and the transferee permits the prosecution of the action to be continued in the name of the original par-

ties, those parties may recover costs of suit. Crittenden v. San Francisco Savings Union, 157 Cal. 201; 107 Pac. 103.

Transcript of evidence as costs. The allowance of costs on appeal includes, in addition to the costs and disbursements paid and incurred up to the entry of judgment, only such costs and disbursements as the appellant was put to by reason of the taking of the appeal; therefore the reporter's transcript of the evidence, when not ordered by the court, although used in preparing the record on appeal, is not a proper item to be recovered upon the reversal of the judgment. Bank of Woodland v. Hiatt, 59 Cal. 580.

Transcript on appeal. The appellant may be limited in his recovery of costs for the transcript on appeal, where a much briefer record would have been sufficient. Estate of Pease, 149 Cal. 167; 85 Pac. 149. Where an appellant includes in the transcript irrelevant matter, he cannot recover costs for procuring or printing the same. Sichel v. Carrillo, 42 Cal. 493. The cost of printing a transcript will not be taxed against the respondent, by reason of having proposed amendments to the statement, by incorporating therein the greater part of the evidence in the case, for the purpose of showing that the exclusion of the testimony sought to be stricken out would not change the result. Duffy v. Duffy, 104 Cal. 602; 38 Pac. 443. Where a judgment is reversed, additional costs will not be imposed on the respondent on account of his inserting in the transcript a large amount of unnecessary matter, as by the reversal he will be required to pay the expense of printing the same. Estate of Robinson, 106 Cal. 493; 39 Pac. 862.

Costs of printing briefs. See note ante, § 1033.

Execution for costs. Where costs are awarded by the judgment of the appellate court, the clerk of the trial court, upon the going down of the remittitur, must attach it to the judgment roll, and enter a minute of the judgment on the docket, against the original entry; the judgment thereafter stands as the judgment of the trial court, and, on the application of the party in whose favor it is given, the clerk must issue execution, and in doing so, he acts, not by authority of the trial court, but of the appellate court. McMann v. Superior Court, 74 Cal. 106; 15 Pac. 448.

Statute of limitations. The statute of limitations, as to costs awarded by the appellate court, commences to run from the entry thereof in the docket. McMann v. Superior Court, 74 Cal. 106; 15 Pac. 448.

Application for modification of judgment as to costs. Where a party desires a modification of the judgment as to costs, the proper application therefor should be made within the time allowed for filing a petition for a rehearing. Gray v. Gray, 11 Cal. 341. A judgment may be modified as to costs. Petitpierre v. Maguire, 155 Cal. 242; 100 Pac. 690.

Costs upon reversal or modification. Upon the reversal or modification of a judgment or order appealed from, without any direction as to the costs of appeal, the clerk of the trial court should enter upon the record, and insert in the remittitur, a judgment that the appellant recover the costs of appeal. Crittenden v. San Francisco Savings Union, 157 Cal. 201; 107 Pac. 103.

Power of trial court after case is remanded. Where, upon appeal from the judgment and from an order denying a new trial, the order is affirmed, but the cause is remanded, with directions to modify the judgment, and no directions concerning the costs of appeal, the clerk has no authority to enter upon the record, or to insert in the remittitur on the appeal from the order, a judgment that the appellant recover the costs of such appeal; under the rules of the supreme court, his power is limited to the entry of judgment for costs only on the appeal from the judgment. Crittenden v. San Francisco Savings Union, 157 Cal. 201; 107 Pac. 103. The trial court cannot vacate or set aside a judgment for costs on appeal, docketed in conformity with the rules of the supreme court and § 958, ante; but it may set aside such judgment, so as to make it conform to the judgment upon appeal. Chapman v. Hughes, 3 Cal. App. 622; 86 Pac. 908. Though the clerk of the supreme court enters upon the record, and inserts in the remittitur on each of two appeals, one from the judgment and the other from an order denying a motion for a new trial, a direction that the appellant recover the costs thereof, the trial court errs in striking out the memorandum of costs filed in connection with the appeal from the judgment, where the order denying a new trial was affirmed, but the cause was remanded with directions to modify the judgment. Crittenden v. San Francisco Savings Union, 157 Cal. 201; 107 Pac. 103.

Taxation by superior court of expenses in appellate court. See note ante, § 1025.

CODE COMMISSIONERS' NOTE. On the request of the successful party, the clerk of the court below must issue an execution for the costs included in the memorandum, and the costs of the clerk of the supreme court as certified by him on the remittitur. Ex parte Burrill, 24 Cal. 350; Mayor etc. of Marysville v. Buchanan, 3 Cal. 212; People v. Jones, 20 Cal. 50. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed, with twenty per cent damages, the damages with the costs are not a part of the original judgment, and the redemptioner is not bound to pay them on redemption from a sale under the judgment. The court below can issue execution for the damages and costs. McMillan v. Vischer, 14 Cal. 241.

§ 1035. Interest and costs must be included by the clerk in the judgment. The clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket of the judgment.

Interest on judgments. See Civ. Code, §§ 1917, 1918, 1920.

Legislation § 1035. Enacted March 11, **1872**; based on Practice Act, § 511 (New York Code, § 310), as amended by Stats. 1861, p. 494, substituting (1) "must" for "shall" in the three instances, and (2) "are" for "shall be" before "taxed."

Construction of section. Cases where the judgment is not rendered immediately on the rendition of the verdict, or on the filing of the findings of facts found by the court or referee, are provided for by this section. Gray v. Palmer, 28 Cal. 416.

Interest. The provisions of this section create a right to interest from the rendition of the judgment, in the party in whose favor the decision is made, and he cannot be deprived of such right because the court formulates the judgment to be entered, instead of leaving it to the action of the clerk alone. Barnhart v. Edwards, 128 Cal. 572; 61 Pac. 176. Interest on a note sued on should be computed, at the rate fixed in the note, from its maturity to the date of the decision, and the amount thereof added to the principal; the resulting sum thereafter bears interest at the legal rate. United States Nat. Bank v. Waddingham, 7 Cal. App. 172; 93 Pac. 1046; Guy v. Franklin, 5 Cal. 416. Where the settlement of an account by the court involves the amount due upon a note, it should embrace the whole amount due for principal and interest at that date, and that amount should bear interest thereafter, as a whole, at the legal rate, and not according to the rate stipulated in the note. Murdock v. Clarke, 88 Cal. 384; 26 Pac. 601. Where the clerk delays to enter judgment for nearly two years after the rendition thereof, he should then enter the judgment as of the time of its rendition for the amount due at the commencement of the action, with interest to the date of entry. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692; 75 Pac. 564. A judgment entered on a verdict should be for the amount of the verdict, with interest, at the legal rate, from the day on which it was returned by the jury; and the clerk has no authority to include in the amount of the judgment the interest which has accrued on the verdict from the time of its rendition until the time of the entry of judgment, and provide that such gross amount shall thereafter bear legal interest. Alpers v. Schammel, 75 Cal. 590; 17 Pac. 708. Where judgment was not entered until one year after the rendition of the verdict, the clerk should include therein interest on the amount of the verdict from the time of its rendition. Golden Gate Mill etc. Co. v. Joshua Hendy Machine Works, 82 Cal. 184; 23 Pac. 45. In a final decree, interest at seven per cent per annum, without compounding, upon unpaid alimony allowed in a former decree, may be allowed from the date of maturity of each installment. Huellmantel v. Huellmantel, 124 Cal. 583; 57 Pac. 582. In an action to enforce a mechanic's lien, the contractor is entitled to interest on the respective payments to be made under the contract, from the dates when they became due, and not upon the gross amount, from the commencement of the action. Knowles v. Baldwin, 125 Cal. 224; 57 Pac. 988. In an action of quantum meruit, interest is not allowed until judgment is rendered: interest cannot be allowed upon unliquidated demands before judgment. American-Hawaiian Engineering etc. Co. v. Butler, 17 Cal. App. 764; 121 Pac. 709; Burnett v. Glas, 154 Cal. 249; 97 Pac. 423. Where a judgment is modified upon appeal, reducing the amount thereof, interest is properly computed from the time of the original rendition of the judgment (Clark v. Dunnam, 46 Cal. 204): the correction by the superior court, in such case, is not a new decision upon the issues. Barnhart v. Edwards, 128 Cal. 572; 61 Pac. 176.

Insertion of costs in judgment. The insertion of costs in the judgment is a mere ministerial act of the clerk, depending entirely upon the filing of a memorandum for its authority; and where no memorandum is served on the opposite party, and none filed, a judgment for costs is void. Riddell v. Harrell, 71 Cal. 254; 12 Pac. 67; and see Chapin v. Broder, 16 Cal. 403. The insertion, in the decree, of the amount of costs as claimed by the plaintiff, before they are taxed or properly ascertained, is a mere clerical misprision, not affecting the validity of the decree, nor the order of sale issued thereon; and the subsequent taxing of the costs by the court is an amendment and a curing of the error (Janes v. Bullard, 107 Cal. 130; 40 Pac. 108); and an order reducing the amount of the costs erroneously entered by the clerk, without awaiting the deter-

mination of a motion to retax the costs, also operates to cure such error. Foley v. California Horseshoe Co., 115 Cal. 184; 56 Am. St. Rep. 87; 47 Pac. 42.

Interest on judgment. See note 17 L. R. A. 612.

CODE COMMISSIONERS' NOTE. A judgment can properly bear interest only from the time it is pronounced. If there be interest due on the demand on which the action is brought, it should be included in the judgment when entered. Bibend v. Liverpool Fire etc. Ins. Co., 30 Cal. 78. Where the judgment of the court below is reversed, and the case remanded for further proceedings, and costs are awarded in general terms, the costs awarded include only the costs made on the appeal to the supreme court. The costs of the former trial abide the event of the suit. The clerk of the court below can issue an execution for the costs included in the memorandum and the costs as certified by the clerk of the supreme court on the remittitur. Ex parte Burrill, 24 Cal. 350. Costs constitute a part of the judgment, and though ascertained and adjudged by the court after an entry of the judgment by the clerk may have been made, yet the law considers such action of the court as having preceded the final judgment. Lasky v. Davis, 33 Cal. 677. After a judgment is entered and the record completed, the clerk has no power to fill up the blank left for costs. The court alone is competent to relieve, by amendment, where costs are omitted. Chapin v. Broder, 16 Cal. 403. Without any express contract in writing, made by the testator, providing for a higher rate of interest then ten per cent per annum, the executors have no authority to consent to the entry of a judgment bearing a greater rate of interest than ten per cent per annum; and must be charged with the excess of interest in their final account. Estate of Isaacs, 30 Cal. 105. In ejectment, if the plaintiff recovers judgment, he is entitled to full costs, notwithstanding he recovers a less interest than he sued for. Havens v. Dale, 30 Cal. 547. And although the answer admitted his right to the interest recovered, but raised an issue on the question of the ouster from the part recovered. Lawton v. Gordon, 37 Cal. 203.

§ 1036. When plaintiff is a non-resident or foreign corporation, defendant may require security for costs. When the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action or special proceeding must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action or special proceeding, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action or special proceeding stayed until such new or additional undertaking is executed and filed.

Qualification of sureties. Post, § 1057.

Legislation § 1036. **1.** Enacted March 11, **1872**; based on Practice Act, § 512 (New York Code, § 303), (1) substituting "must" for "shall" before "be stayed," and (2) "is" for "be" before "filed" and before "executed."

2. Amendment by Stats. **1901**, p. 181; unconstitutional. See note ante, § 5.

3. Amended by Stats. **1903**, p. 187, adding "or special proceeding" after "action," in each instance.

Construction of code sections. This section vests the defendant with the right to security for costs, and the court cannot, against his will, deprive him of it; nor, by application of the principle, Expressio unius est exclusio alterius, does this section prevent the court from requiring security for costs as a condition for allowing an amendment to the complaint, under § 473, ante. Clune v. Sullivan, 56 Cal. 249. An order requiring security for costs to be filed within ten days is ineffectual for any purpose, because, under this section and § 1037, post, the parties have thirty days in which to file the undertaking to secure costs. Estate of Dean, 149 Cal. 487; 87 Pac. 13. The amount of the bond, as well as the conditions thereof, are prescribed by the code, and the court has no power to change either; nor has it power to deprive the defendant of his right to the bond, against his will, such right being vested in him by the statute; and when the demand for security for costs is made, the law itself enjoins further proceedings on the part of the plaintiff until the demand is complied with according to the provisions of the code; and after the undertaking or bond, in the sum and in the form specified, is given, a new or additional undertaking may be ordered by the court, when the first is deemed insufficient; but the court has no power to dispense with the giving of the first bond or undertaking. Meade v. Bailey, 137 Cal. 447; 70 Pac. 297.

Insufficient bond on appeal. An undertaking on attachment, given months prior to the appeal, by a foreign corporation, to secure damages and costs on appeal, is not a sufficient bond on appeal. Stimpson Computing Scale Co. v. Superior Court, 12 Cal. App. 536; 107 Pac. 1013.

Right of defendant to demand security for costs after answer. See note 8 Ann. Cas. 944.

Sufficiency of cost bond with respect to form and contents. See note Ann. Cas. 1913D, 575.

CODE COMMISSIONERS' NOTE. Defendant served on plaintiff, a non-resident, notice to give security for costs, the notice not being accompanied with an order staying proceedings, and on the next day judgment was rendered for

defendant, and plaintiff appealed to the supreme court. Motion to dismiss the appeal was denied, because, after judgment, it came too late. The undertaking on appeal was sufficient security for costs subsequently incurred. Comstock v. Clemens, 19 Cal. 77.

§ 1037. If such security be not given, the action may be dismissed. After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action or special proceeding to be dismissed.

Legislation § 1037. 1. Enacted March 11, 1872, in exact language of Practice Act, § 514.
2. Amendment by Stats. 1901, p. 181; unconstitutional. See note ante, § 5.
3. Amended by Stats. 1903, p. 188, inserting "or special proceeding" after "action."

Construction of section. A contest to revoke the probate of a will is not an action provided for in this section; and, in such a proceeding, a non-resident contestant is not required to give the security for costs. Estate of Joseph, 118 Cal. 660; 50 Pac. 768.

Time for giving security. An order requiring additional security to be given within ten days is ineffectual, where the statute allows thirty days to comply with such an order. Estate of Dean, 149 Cal. 487; 87 Pac. 13.

Dismissal of action. Where the notice to give security for costs is not accompanied with an order staying proceedings, and, on the day after service thereof, judgment is rendered, a motion for dismissal, made after the appeal is taken, will not be granted; the motion comes too late, and the undertaking on appeal is sufficient security for costs subsequently incurred. Comstock v. Clemens, 19 Cal. 77. A judgment of dismissal for failure to file the undertaking is not upon the merits, and only concludes the matter then directly adjudged, and is not a bar to a subsequent action, founded upon the same cause of action, by the same plaintiff, after becoming a resident of the state. Rosenthal v. McMann, 93 Cal. 505; 29 Pac. 121.

§ 1038. Costs when state is a party. When the state is a party, and costs are awarded against it, they must be paid out of the state treasury.

No security required of state. Post, § 1058.
Legislation § 1038. Enacted March 11, 1872.

Construction of section. This section deals merely with costs, as such: it does not include counsel fees for services rendered in an action to which the state is a party. Sullivan v. Gage, 145 Cal. 759; 79 Pac. 537.

Costs payable by state when. Where an execution issued on a judgment against a defaulting purchaser of state lands was returned unsatisfied, the cost of publication of summons, taxed properly as costs against the defendant, must be paid by the state out of the general fund. Lawrence v. Booth, 46 Cal. 187.

Liability of state for costs. See notes 8 Ann. Cas. 398; 42 L. R. A. 41.

§ 1039. Costs when county is a party. When a county is a party, and costs are awarded against it, they must be paid out of the county treasury.

No security required of county. Post, § 1058.
Legislation § 1039. Enacted March 11, 1872.

Personal judgment against county auditor. The fact that an undertaking is dispensed with upon an appeal by a county auditor, who is contesting, as illegal, a claim against a county, does not necessarily imply that a personal judgment for costs or damages may not be rendered against him on the merits of the case for refusal to issue the warrant improperly, without just cause to doubt the validity of the claim. Lamberson v. Jefferds, 116 Cal. 492; 48 Pac. 485.

CHAPTER VII.

GENERAL PROVISIONS.

§ 1045. Lost papers, how supplied.
§ 1046. Papers without the title of the action, or with defective title, may be valid.
§ 1046a. Filing of papers nunc pro tunc.
§ 1047. Successive actions on the same contract, etc.
§ 1048. Consolidation of several actions into one.
§ 1049. Actions, when deemed pending.
§ 1050. Actions to determine adverse claims, and by sureties.
§ 1051. Testimony, when to be taken by the clerk.
§ 1052. The clerk must keep a register of actions.
§ 1053. Two of three referees, etc., may do any act.
§ 1054. Time within which an act is to be done may be extended.
§ 1055. Action against officer for official acts.
§ 1056. Corporations may become sureties on undertakings and bonds.
§ 1057. Undertakings mentioned in this code, requisites of.
§ 1057a. Justification by corporate security on bonds. Procedure. County clerk to issue certificate. Fee.
§ 1058. People of state not required to give bonds when state is a party.
§ 1059. Surety on appeal substituted to rights of judgment creditor.

§ 1045. Lost papers, how supplied. If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.

Legislation § 1045. Enacted March 11, **1872.**

Construction of section. The fact that the summons in an action was lost for a time cannot make any difference, on a motion to dismiss under § 581, ante: the remedy for such loss is provided for in this section. Grant v. McArthur, 137 Cal. 270; 70 Pac. 88.

Appellate court cannot substitute copy. The appellate court has no control over the records of the trial court, and in case of the loss of the judgment roll, an order substituting copies thereof is within the province of the trial court. Buckman v. Whitney, 28 Cal. 555.

Presumption of substitution. Where the judgment roll contains a copy of a paper, instead of the original, it will be inferred that the original had been lost, and that a copy was substituted therefor by order of the court upon a proper showing. Sichler v. Look, 93 Cal. 600; 29 Pac. 220.

Effect of substitution. An order authorizing copies of papers to be filed is a determination that they are correct copies of the originals, and the copies thus substituted are entitled to the same weight as original papers. Hibernia Sav. & L. Soc. v. Matthai, 116 Cal. 424; 48 Pac. 370; and see Knowlton v. Mackenzie, 110 Cal. 183; 42 Pac. 580.

Discretion of court, and practice. The substitution of papers, or of pleadings, is always within the discretion of the court, and no notice of the motion to apply therefor need be given, when the notice can be of no use. Benedict v. Cozzens, 4 Cal. 381. Where a pleading in a pending action is lost, its place can only be supplied by motion based upon affidavits showing what the lost pleading contained, and the service of personal notice, upon the opposite party, of the intention to move, which notice must be sufficiently explicit to advise him of what is intended, as well as to enable him to controvert the affidavits submitted. People v. Cazalis, 27 Cal. 522.

Evidence where judgment roll is lost. The judgment-book should be admitted as competent evidence of the matters considered and passed upon by the court in case the judgment roll in the action is lost. Simmons v. Threshour, 118 Cal. 100; 50 Pac. 312.

Review on appeal. Where the judgment roll, or any part of the record in the trial court, has been lost, the trial court, upon proper proof, may supply its place by copies, and direct that the proved copies be substituted for the lost papers, and that they shall constitute the record, or portion of it lost; here the functions of the trial court end; and if either party is dissatisfied with an order of the trial court in supplying a lost record, it may be reviewed by an appeal from the order. Buckman v. Whitney, 28 Cal. 555.

Disposition of appeal, where without fraud of appellant, the record is lost. See note 25 L. R. A. (N. S.) 860.

CODE COMMISSIONERS' NOTE. Buckman v. Whitney, 24 Cal. 267; Buckman v. Whitney, 28 Cal. 555.

§ 1046. Papers without the title of the action, or with defective title, may be valid. An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.

Legislation § 1046. Enacted March 11, **1872:** based on Practice Act, § 531 (New York Code, § 406), substituting "is" for "shall be."

Title of notice. A notice of the taking of a deposition is not invalid by reason of

an error in the title of the cause, where no other suit was pending between the parties named, and no one was misled by the defective title. Mills v. Dunlap, 3 Cal. 94. A notice of intention to move for a new trial, directed to and served on the attorneys who were attorneys for all of the plaintiffs, is not rendered insufficient because the name of one of the plaintiffs was inadvertently omitted in the caption of the notice. Cook v. Sudden, 94 Cal. 443; 29 Pac. 949. A notice of appeal, which is duly entitled as to the court and the department thereof in which the action was tried, and which intelligibly refers to the number of the case and to the judgment and order denying the defendant's motion for a new trial, is not invalidated because of a mistake in the christian name of the plaintiff in the title of the cause in such notice. Butler v. Ashworth, 100 Cal. 334; 34 Pac. 780.

Of affidavit. It is not necessary that the affidavit upon which a writ of mandate is issued shall contain the title of the action or proceeding in which it is made: such affidavit, not duly entitled, is as valid as if it were. McCrary v. Beaudry, 67 Cal. 120; 7 Pac. 264. An affidavit on motion for a change of venue, attached to both the notice and the demand, not fully stating the title of the action, but referring to the "above-entitled action," must be held to refer to the action entitled in the notice and the demand, and is sufficient, under this section. Watt v. Bradley, 95 Cal. 415; 30 Pac. 557.

New undertaking, where first one defective. Where an appeal is bona fide, and not taken for delay, appellate courts will always permit a new undertaking to be filed, where the original is defective. Coulter v. Stark, 7 Cal. 244.

CODE COMMISSIONERS' NOTE. Mills v. Dunlap, 3 Cal. 94.

§ 1046a. Filing of papers nunc pro tunc. In all cases brought under the provisions of any act providing for the establishment and quieting of title to real property in cases where the public records in the office of the county recorder have been, or shall hereafter be, lost or destroyed, in whole or in any material part by flood, fire or earthquake, all papers filed under order of court nunc pro tunc as of the date when they should have been filed, shall have the same force and effect as if filed on the date when they should have been filed.

Legislation § 1046a. Added by Stats. **1909**, p. 1055.

Nunc pro tunc entry of judgment. See note 4 Am. St. Rep. 828.

§ 1047. Successive actions on the same contract, etc. Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

Action, defined. Ante, § 22.

Legislation § 1047. Enacted March 11, **1872**, in the exact language of Practice Act, § 525.

Application of section. The rule stated in this section has no application to actions for additional damages on account of some particular breach involved in a former action. Abbott v. 76 Land and Water Co., 161 Cal. 42; 118 Pac. 425.

Breach of contract. The absolute repudiation, by the vendor, of a contract for the sale of land is a single breach, complete at the time of such repudiation, and a single and entire cause of action at once arises: it is not a continuous breach, giving rise to new causes of action as long as it continues. Abbott v. 76 Land & Water Co., 161 Cal. 42; 118 Pac. 425.

Splitting entire demand into several causes of action. See note 24 Am. Dec. 61.

Right of buyer to maintain separate action for non-delivery of each installment under entire contract. See note 3 L. R. A. (N. S.) 1042.

Right to sue on separate items of account for goods sold on stated periods of credit. See note 13 L. R. A. (N. S.) 529.

§ 1048. Consolidation of several actions into one. Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.

Legislation § 1048. Enacted March 11, **1872**; based on Practice Act, § 526 (New York Code, § 167), omitting "into one" after "consolidated."

Actions that might have been joined. Where the causes of action sued on in several actions might have been united in one action, the court may order a consolidation. Smith v. Smith, 80 Cal. 323; 21 Pac. 4; Wolters v. Rossi, 126 Cal. 644; 59 Pac. 143. A party cannot be deprived of the right to attorneys' fees under the Vrooman Act by a consolidation of the actions. Realty Construction etc. Co. v. Superior Court, 165 Cal. 543; 132 Pac. 1048.

Suits upon distinct causes. The appellate court will not consolidate suits brought

upon distinct causes of action. Wallace v. Eldredge, 27 Cal. 498.

Jurisdiction after consolidation. A justice's court has jurisdiction of three separate actions to recover the same property, the value of which is within the jurisdictional amount, after the same are consolidated. Cariaga v. Dryden, 29 Cal. 307.

Evidence after consolidation. Depositions taken in any one of the actions consolidated are admissible on the trial after consolidation. Wolters v. Rossi, 126 Cal. 644; 59 Pac. 143.

Mechanic's lien cases. Upon the consolidation of actions to foreclose mechanics' liens, the plaintiffs become actors against each other, as well as against the owners, and each is entitled to reduce or to avoid the lien of the others by any evidence that would have that effect; and the nonsuit of one plaintiff as to certain defendants, merely determines that he is entitled to nothing as against those defendants, and he still remains a party to the consolidated action as against the owners or the other lien claimants. Kennedy & Shaw Lumber Co. v. Dusenbery, 116 Cal. 124; 47 Pac. 1008.

Appeal. An irregular order, consolidating actions, will not be reviewed on appeal, unless an exception was taken in the lower court. Bangs v. Dunn, 66 Cal. 72; 4 Pac. 963.

Consolidation of actions. See note 58 Am. Dec. 508.

CODE COMMISSIONERS' NOTE. But the supreme court will not consolidate actions brought upon distinct causes of action. Wallace v. Eldredge, 27 Cal. 498.

§ 1049. Actions, when deemed pending. An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

Legislation § 1049. 1. Enacted March 11, 1872.
2. Amendment by Stats. **1901**, p. 182; unconstitutional. See note ante, § 5.

Construction of code sections. This section does not purport to prescribe a rule of evidence, but merely to determine the condition of an action after judgment has been rendered, and, inferentially, the effect of the judgment. Cook v. Ceas, 143 Cal. 221; 77 Pac. 65. It has no bearing upon the construction to be given § 336, ante. Feeney v. Hinckley, 6 Cal. Unrep. 666; 64 Pac. 408.

What actions included. An action for divorce is included in this section, and, under the authority to grant alimony pendente lite, the court may make an allowance after judgment has been entered. Grannis v. Superior Court, 143 Cal. 630; 77 Pac. 647. The settlement of a guardian's account is a proceeding, within the meaning of this section, and is pending until the time allowed for appeal therefrom has expired. Cook v. Ceas, 143 Cal. 221; 77 Pac. 65.

Pendency continues how long. An action is deemed to be pending from the time that a complaint is filed. Ex parte Joutsen, 154 Cal. 540; 98 Pac. 391. An action is pending after the entry of default, and until the entry of final judgment (Abadie v. Lobero, 36 Cal. 390), and while an appeal from the judgment is pending, or until the time for such an appeal has expired. People v. Bank of San Luis Obispo, 159 Cal. 65; Ann. Cas. 1912B, 1148; 112 Pac. 866. Until the time for an appeal has expired, if the judgment has not been sooner satisfied, the action is, under this section, to be deemed as pending, and the proceedings therein are admissible, under proper pleadings, in abatement of a subsequent action for the same cause. Harris v. Barnhart, 97 Cal. 546; 32 Pac. 589. The sustaining of a demurrer to a complaint does not render the action one no longer pending. Ex parte Joutsen, 154 Cal. 540; 98 Pac. 391. An action is not pending after the judgment has been satisfied. Delger v. Jacobs, 19 Cal. App. 197; 125 Pac. 258. A motion to be substituted as a party defendant is a recognition of the action as a pending one. Anderson v. Schloesser, 153 Cal. 219; 95 Pac. 885.

Effect on later action. The judgment in an action pending, the time for appeal from which not having expired, cannot constitute a bar to recovery in another action between the same parties, relating to the same subject matter. Naftzger v. Gregg, 99 Cal. 83; 37 Am. St. Rep. 23; 33 Pac. 757. While an action is pending as provided by this section, the judgment rendered therein cannot be a bar to the prosecution of a subsequent action. Story v. Story & Isham Commercial Co., 100 Cal. 41; 34 Pac. 675. Though a former judgment cannot be pleaded in bar to another action or cross-complaint for the same cause while the former action is pending, yet the pendency of the action is good ground for a continuance of the later action until the former action is finally determined, and would be good ground for dismissal of the later action, in which a cross-complaint is filed upon the same cause of action. Brown v. Campbell, 100 Cal. 635; 38 Am. St. Rep. 314; 35 Pac. 433.

Satisfaction of judgment. The satisfaction of a judgment makes it final, though the time for appeal has not expired; and, where necessary to sustain the judgment against the sureties on an injunction bond, it will be presumed, in the absence of allegation or showing to the contrary, that

the judgment was satisfied. Alaska Improvement Co. v. Hirsch, 119 Cal. 249; 47 Pac. 124. A forced payment by execution sale against a non-consenting judgment debtor cannot be held such satisfaction of the judgment as will abridge any of his rights upon or under appeal. Warner Bros. Co. v. Freud, 131 Cal. 639; 82 Am. St. Rep. 400; 63 Pac. 1017; Kenney v. Parks, 120 Cal. 22; 52 Pac. 40; Vermont Marble Co. v. Black, 123 Cal. 21; 55 Pac. 599; Yndart v. Den, 125 Cal. 85; 57 Pac. 761.

Sale of mortgaged property pending appeal. Where an appeal was taken from a judgment foreclosing a mortgage, without a stay of execution, and the mortgagee made a sale, pending the appeal, at which time he became the purchaser, and afterwards conveyed the title, pending the appeal, to the respondent, the effect of the reversal of the judgment is to nullify the title in the hands of the respondent, who was bound to take notice of all the proceedings in the cause and of the defeasible title of his grantor. Di Nola v. Allison, 143 Cal. 106; 101 Am. St. Rep. 84; 65 L. R. A. 419; 76 Pac. 976.

Evidence on plea of abatement. Where an answer contains a plea of abatement by reason of the pendency of another action, and also a defense on the merits, the better practice is, to require the defendant to present his evidence on the plea of abatement at the opening of his defense. Leonard v. Flynn, 89 Cal. 535; 23 Am. St. Rep. 500; 26 Pac. 1097.

Jurisdiction after entry of judgment. The jurisdiction of the court over the subject-matter of the suit and the parties is exhausted by the entry of final judgment, unless preserved in some mode authorized by statute; such judgment is conclusive not only as to the relief granted, but also as to the relief withheld or denied, and thereafter any further judgment or other proceeding materially involving the judgment is a mere nullity. White v. White, 130 Cal. 597; 80 Am. St. Rep. 150; 22 Pac. 1062. The court loses jurisdiction over the cause when the judgment becomes final, and it cannot thereafter set aside or modify the judgment, unless by the express authority of some statute; the reason for the rule being, that there must be some finality in legal proceedings, and a period beyond which they cannot extend, and the safety and tranquillity of the parties requiring that their interests shall not be constantly suspended, nor their repose liable to be disturbed at any moment, at the discretion of the court. Brackett v. Banegas, 99 Cal. 623; 34 Pac. 344. The pendency of an action, by virtue of this section, until the time for appeal has passed, has not the effect to authorize the trial court to amend or alter its judgment after it has been finally entered in that court. O'Brien v. O'Brien, 124 Cal. 422; 57 Pac. 225. The modification of a judgment or supplemental decree, changing the property rights of the parties in a divorce suit, cannot be made after the decree has become final and the time for appeal has passed, where no reservation of right to make the same was made in the decree, if such reservation could be made. O'Brien v. O'Brien, 130 Cal. 409; 62 Pac. 598; and see Howell v. Howell, 104 Cal. 45; 43 Am. St. Rep. 70; 37 Pac. 770. The rendition of judgment in a suit for divorce does not exhaust the jurisdiction of the court: it may grant allowances to the wife during the pendency of an appeal, and until the judgment becomes final. Bruce v. Bruce, 160 Cal. 28; 116 Pac. 66; Dunphy v. Dunphy, 161 Cal. 87; 118 Pac. 445. The power of the trial court to make an allowance to a wife for her support, as alimony, or for the purpose of defending or prosecuting an action for divorce, is not exhausted upon the rendition of the judgment, but may be exercised at any time during the pendency of an appeal. Bohnert v. Bohnert, 91 Cal. 428; 27 Pac. 732.

Finality of judgment. Although a judgment may be final with reference to the court which pronounced it, and, as such, be the subject of an appeal, yet it is not necessarily final with reference to the property or rights affected, so long as it is subject to appeal and liable to be reversed; and a judgment, in order to be admissible in evidence for the purpose of proving facts therein recited, must be a final judgment in the cause, and if the action in which the judgment is rendered is still pending, necessarily the judgment is not final. Hills v. Sherwood, 33 Cal. 474; Estate of Blythe, 99 Cal. 472; 34 Pac. 108. Until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal. Gillmore v. American Central Ins. Co., 65 Cal. 63; 2 Pac. 882; Feeney v. Hinckley, 134 Cal. 467; 86 Am. St. Rep. 290; 66 Pac. 580. A final adjudication of the subject-matter is not made by a judgment for costs only, for or against one of the parties, plaintiff or defendant. Nolan v. Smith, 137 Cal. 360; 70 Pac. 166.

Judgment as evidence. The effect of a judgment as evidence of the matters determined by it is suspended by an appeal, even though its execution is not stayed. Di Nola v. Allison, 143 Cal. 106; 101 Am. St. Rep. 84; 65 L. R. A. 419; 76 Pac. 976. The operation of a final judgment is suspended by an appeal therefrom, and, pending such appeal, the judgment is not admissible in another case as evidence, even between the same parties. Harris v. Barnhart, 97 Cal. 546; 32 Pac. 589. Only a final judgment upon the merits prevents a further contest upon the same issue, and becomes evidence in another issue, between the same parties or their privies;

and until a final judgment is reached, the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing, as a bar or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the question at issue; whenever the judgment fails to fix and determine the ultimate rights of the parties, whenever it leaves room for a final decision yet to be made, it is not admissible in another action, for the plain reason that it has finally decided and settled nothing: until the judgment comes, no man can know what the ultimate decision will be. Estate of Blythe, 99 Cal. 472; 34 Pac. 108. A judgment of divorce is not available in any civil action involving the status of the parties as unmarried persons, until the expiration of the time limited for appeal. Estate of Wood, 137 Cal. 129; 69 Pac. 900. Upon an application for a writ of assistance, the judgment is admissible in evidence, although an appeal therefrom is pending. California Mortgage etc. Bank v. Graves, 129 Cal. 649; 62 Pac. 259.

Attack on judgment. The fact that the case is no longer "pending" interferes in no way with any attack on the judgment, based upon any reason for which the judgment should be held absolutely void. Fox v. Townsend, 2 Cal. App. 193; 83 Pac. 272.

Statute of limitations. The statute of limitations does not begin to run against an action upon the judgment from the date of its entry, but only after the lapse of the period within which an appeal might be taken from the judgment, if none is taken therefrom, or after the final determination following an appeal so taken. Feeney v. Hinckley, 134 Cal. 467; 86 Am. St. Rep. 290; 66 Pac. 580.

Accrual of cause of action upon judgment. A cause of action upon a judgment does not accrue until the judgment becomes final. Hills v. Sherwood, 33 Cal. 474; Feeney v. Hinckley, 134 Cal. 467; 86 Am. St. Rep. 290; 66 Pac. 580.

Motion for new trial as stay. A motion for a new trial does not stay or suspend the operation of a final judgment in the cause, in the absence of an order of the court to that effect. Harris v. Barnhart, 97 Cal. 546; 32 Pac. 589.

When action is pending. See note Ann. Cas. 1912A, 843.

§ 1050. Actions to determine adverse claims, and by sureties. An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property, upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as a surety.

Quieting title to realty. Ante, §§ 738 et seq.
Surety may compel principal to perform obligation. See Civ. Code, § 2846.

Legislation § 1050. Enacted March 11, 1872 (based on Practice Act, § 527), (1) omitting "the" before "plaintiff," and (2) susbtituting "a surety" for "security."

Construction of section. The action contemplated by this section was intended as a substitute for the proceeding in chancery to compel the creditor to sue, and it may be doubted whether any other action by the surety against the creditor is allowed. Dane v. Corduan, 24 Cal. 157; 85 Am. Dec. 53. Where the claim, though adverse, is not upon an obligation between the parties, but is an obligation or duty of a third party to one of them, this section does not apply. Gagossian v. Arakelian, 9 Cal. App. 571; 99 Pac. 1113.

Action to determine adverse claim. A plaintiff, by bringing an action to test a claim made against him, cannot deprive the defendant of his right of action: were he permitted to do so, the defendant would be deprived of the remedies of arrest and attachment, either of which, in a proper case, may be resorted to; and the fact that the plaintiff gave an injunction bond does not matter. King v. Hall, 5 Cal. 83. Where, in an action to determine an adverse claim made by the defendant, he sets up a promissory note and demanded payment thereon, and the plaintiff replied, alleging fraud in procuring the note, the action is one purely statutory and equitable, in which a jury trial cannot be demanded as a matter of right, although legal issues, incidental to the equitable issue, must be determined in arriving at a decision. Taylor v. Ford, 3 Cal. Unrep. 297; 24 Pac. 942. In an action to determine an adverse claim which the defendant asserted against the plaintiff upon a promissory note, where the defendant filed an answer and cross-complaint which was, in form and substance, a complaint upon the note, with a prayer for judgment against the plaintiff for the amount due thereon, a jury trial should be allowed, unless waived. Taylor v. Ford, 92 Cal. 419; 29 Pac. 441. In order that a court may try and conclusively settle all adverse claims to property sought to be applied to the satisfaction of a judgment, all known adverse claimants should have an opportunity to be heard; otherwise they will not be bound by any order made. Deering v. Richardson-Kimball Co., 109 Cal. 73; 41 Pac. 801.

Action of quia timet. A bank, which has paid checks claimed by the depositor to be forgeries, may maintain an action to determine its liability therefor. German Sav. & L. Soc. v. Collins, 145 Cal. 192; 78 Pac. 637.

Action against county or state. One county may maintain an action against another county, under the County Government Act, as for money had and received, in a proper case, after the presentation of its claim to the board of supervisors of the latter. Colusa County v. Glenn County, 117 Cal. 434; 49 Pac. 457. A complaint, alleging that an ordinance under which a tax was imposed is void, and that a claim under such ordinance is made upon the plaintiff for the payment of the tax, and praying that such ordinance be declared void, cannot be sustained, under this section, as the state and its political subdivisions cannot be sued, except as specially authorized by statute, and general language creating new remedies or prescribing procedure does not authorize such actions. Whittaker v. Tuolumne County, 96 Cal. 100; 30 Pac. 1016.

Determining amount due on mortgage. Where the consideration for a part of the property conveyed, a portion of the purchase price of which was secured by mortgage, fails, the mortgagor may, under this section, maintain an action to determine the amount due on the mortgage, and in such case the court may determine the amount to which the plaintiff is entitled, and reduce the note and mortgage accordingly. Hoffman v. Kirby, 136 Cal. 26; 68 Pac. 321.

Burden to maintain claim. The ordinary rule is, that the plaintiff is the party charged with the duty of diligence in prosecuting the action as the issues are presented, and whenever an issue of law or of fact is presented, the duty is upon the plaintiff diligently to pursue the action; but in an action brought under this section, by one person against another, for the purpose of determining an adverse claim made by the latter, the rule is modified, and the burden is cast upon the defendant to set forth and maintain his claim, and it might be said that he would not come within the reason of the rule. Mowry v. Weisenborn, 137 Cal. 110; 69 Pac. 971.

Action by and subrogation of surety. A decree of equity, obtained at the suit of a surety, and requiring the creditor to sue the principal debtor, is not a bar to an action against the surety, though the creditor fails to sue the principal debtor, unless the surety specifically performs the conditions imposed by the decree. Dane v. Corduan, 24 Cal. 157; 85 Am. Dec. 53. Where a complaint alleges that the plaintiff became surety for the payment of rent under a lease, and prays that the amount due be ascertained, and that the principal be compelled to pay the same, a judgment exonerating the plaintiff from all liability and awarding him costs cannot be sustained. McDougald v. Argonaut Land etc. Co., 117 Cal. 87; 48 Pac. 1021. Where the property of the maker of a note is attached in an action against him and his indorser, and an undertaking for the release of such property is conditioned that the sureties will pay any judgment that may be recovered against the maker of the note, such sureties cannot, on paying the judgment, be subrogated to any right not possessed by their principal, and they cannot take an assignment of the judgment and enforce it against the indorser. March v. Barnet, 121 Cal. 419; 66 Am. St. Rep. 44; 53 Pac. 933. In an action by a surety to have the amount due the creditor ascertained, and to compel the principal to pay the same, the creditor may set up the obligation and obtain judgment for the amount due him; and the plaintiff having brought the suit, asking relief in equity, the court, having obtained jurisdiction, will decide the whole case, and not permit litigation by piecemeal. McDougald v. Hulet, 132 Cal. 154; 64 Pac. 278. Where a void judgment is entered against a surety upon an undertaking on appeal, which the surety voluntarily pays, the principal to the undertaking, who had indemnified the surety against loss, cannot maintain a suit in equity to charge the custodians of the money, as trustees for the surety, and for its repayment to the surety. More v. Churchill, 155 Cal. 368; 101 Pac. 9.

General principles of interpleader and when maintainable. See note 35 Am. Dec. 695.

Right of interpleader. See note 91 Am. St. Rep. 593.

Necessity that bill or complaint in interpleader show that alleged claim has reasonable basis on which to rest. See note Ann. Cas. 1913C, 1196.

Interpleader by one having contract with one of parties defining his rights or obligations as to subject-matter. See note 10 L. R. A. (N. S.) 748.

CODE COMMISSIONERS' NOTE. Smith v. Sparrow, 13 Cal. 596; King v. Hall, 5 Cal. 82; Dane v. Corduan, 24 Cal. 157; 85 Am. Dec. 53.

§ 1051. Testimony, when to be taken by the clerk.

On the trial of an action in a court of record, if there is no shorthand reporter of the court in attendance, either party may require the clerk to take down the testimony in writing.

Legislation § 1051. Enacted March 11, 1872; based on Practice Act, § 663. The code commissioners say this section was based on Practice Act, § 633, but that section related to an entirely different matter; namely, requiring justices of the peace to receive moneys collected by the constable or sheriff. The section, however, was undoubtedly based on Practice Act, § 663, as amended by Stats. 1854, Redding ed. p. 73, Kerr ed. p. 102, § 75, which read: "On the trial of any action in a court of record, either party may require the clerk to take down the testimony in writing."

Testimony taken down by clerk. Testimony taken down by the clerk, and his

statement in respect to the decision of court, cannot take the place of a bill of exceptions, nor be used as a record on appeal. Gunter v. Geary, 1 Cal. 462; Pierce v. Minturn, 1 Cal. 470; Castro v. Armesti, 14 Cal. 38. A reference, in a statement on appeal, to the evidence as taken down by the clerk, with the consent of the parties, is sufficient, the evidence being in the transcript: the statement need not contain the evidence. Darst v. Rust, 14 Cal. 81.

CODE COMMISSIONERS' NOTE. The evidence taken down by the clerk is no part of the record, unless made so by a bill of exceptions. Wilson v. Middleton, 2 Cal. 54; Pierce v. Minturn, 1 Cal. 470; Gunter v. Geary, 1 Cal. 462; Castro v. Armesti, 14 Cal. 38.

§ 1052. The clerk must keep a register of actions. The clerk must keep among the records of the court a register of actions. He must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein.

Records of court. Ante, §§ 668, 672, 683.

Legislation § 1052. Enacted March 11, **1872** (based on Practice Act, § 528), substituting "must" for "shall," in both instances.

What must be set out in register of actions. The matters required to be set out in the register are those which form a proper connection between the pleadings and the judgment, and such that the legislature has deemed proper to be evidenced by a permanent memorandum thereof. Von Schmidt v. Widber, 99 Cal. 511; 34 Pac. 109.

§ 1053. Two of three referees, etc., may do any act. When there are three referees, or three arbitrators, all must meet, but two of them may do any act which might be done by all.

References, and trials by referees. Ante, §§ 638–645.

Arbitrations, generally. Post, §§ 1281–1290.

Legislation § 1053. Enacted March 11, **1872** (based on Practice Act, § 529), substituting "must" for "shall."

§ 1054. Time within which an act is to be done may be extended. When an act to be done, as provided in this code, relates to the pleadings in the action, or the undertakings to be filed, or the justifications of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the service of notices other than of appeal, the time allowed by this code, unless otherwise expressly provided, may be extended, upon good cause shown, by the judge of the superior court in and for the county in which the action is pending, or by the judge who presided at the trial of said action; but such extension shall not exceed thirty days, without the consent of the adverse party; except that when it appears to the judge to whom said application is made, that the attorney of record for the party applying for said extension is actually engaged in attendance upon a session of the legislature of this state, as a member thereof; in which case it shall be the duty of said judge to extend said time until said session of the legislature adjourns, and thirty days thereafter.

Time.

1. **Computation of time.** See ante, § 12.
2. **Extension of.** Ante, § 473.

Continuance during attendance upon legislature. See ante, § 595.

Legislation § 1054. 1. Enacted March 11, **1872;** based on Practice Act, § 530 (New York Code, § 407), as amended by Stats. 1861, p. 591, which read: "The time within which an act is to be done, as provided in this act, shall be computed by excluding the first day, and including the last; if the last day be Sunday, it shall be excluded. When the act to be done relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the service of notices, other than of appeal, or the preparation of statements, or of bills of exceptions, or of amendments thereto, the time allowed by this act may be extended, upon good cause shown, by the court in which the action is pending, or the judge thereof, or in the absence of such judge from the county in which the action is pending, by the county judge; but such extension shall not exceed thirty days, beyond the time prescribed by this act, without the consent of the adverse party." When enacted in 1872, § 1054 read as follows: "When the act to be done relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the service of notices, other than of appeal, the time allowed by this code may, before the time expires, be extended, upon good cause shown, by the court in which the action is pending, or the judge thereof, but such extension cannot exceed twenty days."

2. Amended by Code Amdts. **1873–74,** p. 344, (1) changing "the" to "an" before "act," (2) inserting (a) "the" before "sureties," (b) "as provided in this code" after "to be done," and (c) "the preparation of statements, or of bills of exceptions, or of amendments thereto, or to," after "sureties," (3) omitting "before the time expires" before "be extended," (4) inserting "or, in the absence of such judge from the county in which the action is pending, by the county judge," after "judge thereof," (5) substituting "thirty" for "twenty" before "days," and (6) adding

"without the consent of the adverse party," at the end of section.

3. Amended by Code Amdts. **1880**, p. 7, (1) changing "the" to "a" before "judge thereof," and (2) omitting "or in the absence of such judge from the county in which the action is pending, by the county judge."

4. Amended by Stats. **1889**, p. 45, substituting "the judge of the superior court in and for the county in which the action is pending, or by the judge who presided at the trial of said action" for "court in which the action is pending or a judge thereof."

5. Amended by Stats. **1895**, p. 12, adding the exception.

6. Amendment by Stats. **1901**, p. 182; unconstitutional. See note ante, § 5.

7. Amended by Stats. Extra Sess. **1906**, p. 9, (1) in first clause, substituting "justifications" for "justification," in the phrase "or the justifications of sureties"; (2) adding a proviso, at the end of the exception added in 1895, reading, "provided, however, that from and after the passage of this act to and including the twenty-eighth day of February, nineteen hundred and seven, the judge shall have power to extend the foregoing time as to any matter enumerated in this section for not exceeding ninety days, and shall also have power during said period to extend by order, for not exceeding ninety days, the time for filing and serving notices of appeal and for the performance of any act in any action or special proceeding required by this code to be done within a specified time."

8. Amended by Stats. **1915**, p. 203, (1) in first clause, (a) striking out "of statements, or," from the phrases "or the preparation of statements, or of bills of exceptions," and (b) inserting "unless otherwise expressly provided," after the words "the time allowed by this code"; (2) striking out the proviso added in 1906 (which see, par. 7, supra).

Construction of section. There is no time "within which an act is to be done," within the meaning of this section; hence, it has no application in the case of publication of summons. Savings and Loan Society v. Thompson, 32 Cal. 347. This section simply limits the power of the court to extend the time for giving notices or for the service of proposed statements or bills of exception without the consent of the adverse party; it does not limit the authority of attorneys under § 283, ante, nor prescribe the exclusive mode for giving notices or making service. Simpson v. Budd, 91 Cal. 488; 27 Pac. 758. The provision of § 940, ante, that an appeal is ineffectual for any purpose unless an undertaking is filed within five days, is subject to the provision of this section, that the time for filing an execution may be extended not exceeding thirty days. Wadsworth v. Wadsworth, 74 Cal. 104; 15 Pac. 447. Where the time for the doing of an act has not been extended by order of court, such act must be done within the time prescribed. Tregambo v. Comanche Mill etc. Co., 57 Cal. 501.

Application of section. This section is limited, by its terms, to cases where time is allowed by some provision of the code for the doing of some act, and was designed to enable the court or judge to grant time additional to that allowed by the code, upon good cause shown. Vestal v. Young, 147 Cal. 715; 82 Pac. 381. It has no application to an act required to be done in a justice's court, in order to perfect an appeal to the superior court; hence, an order by the superior court, extending the time for the justification of the sureties on an undertaking on appeal, filed in a justice's court, is void. McCracken v. Superior Court, 86 Cal. 74; 24 Pac. 845. Nor has this section any application to the time which the court may allow in which the plaintiff may file an amended complaint; and the extension of time allowed therefor is within the discretion of the court. Vestal v. Young, 147 Cal. 715; 82 Pac. 381. The service and filing of a memorandum of costs is fairly within a proper construction of this section, being substantially a notice "other than of appeal." Beilby v. Superior Court, 138 Cal. 51; 70 Pac. 1024.

Power of court to extend time. Where time has been extended by stipulation of the parties, the court has power to grant a further extension, not exceeding thirty days, if the application is made before the time as extended by stipulation has expired. Curtis v. Superior Court, 70 Cal. 390; 11 Pac. 652. The consent of the adverse party to one extension of time beyond thirty days does not give the judge any additional authority to make any further extensions. Bunnel v. Stockton, 83 Cal. 319; 23 Pac. 301. An extension of time to plead, for a certain time after the receipt of the remittitur in another case, is void, and beyond the power of the court, to any extent beyond the thirty days permitted by this section. Baker v. Superior Court, 71 Cal. 583; 12 Pac. 685. In cases to which this section applies, an extension can be granted only within the period during which the right to give a notice is still alive. Union Collection Co. v. Oliver, 162 Cal. 755; 124 Pac. 435. It is essential that any order extending time shall be made before the party seeking such extension is in default; and if he permits the time within which he may act to elapse without acting, any subsequent order giving him time to act does not avail to revive his right. Freese v. Freese, 134 Cal. 48; 66 Pac. 43. Where the statute absolutely fixes the time within which an act must be done, it is peremptory; the act cannot be done at any other time, unless during the prescribed time it has been extended by an order made for that purpose, under authority of law. Connor v. Southern California Motor Road Co., 101 Cal. 429; 35 Pac. 990; and see Tregambo v. Comanche Mill etc. Co., 57 Cal. 501; Wills v. Rhen Kong, 70 Cal. 548; 11 Pac. 780. When a statute fixes the time within which an act must be done, the court has no power to enlarge it, although it relates to a mere matter of practice; thus, where a statute declares that a judge at chambers may grant a new trial if application is made within ten days after judgment, an order granting an applica-

tion, made on the eleventh day, is void. Roush v. Van Hagen, 17 Cal. 121. The statute providing that an act must be done within a certain time, or within such further time as may be granted, is peremptory, and an omission to perform the act is a waiver of the right conferred. Easterby v. Larco, 24 Cal. 179. An order extending time cannot be made by a disqualified judge. Johnson v. German American Ins. Co., 150 Cal. 336; 88 Pac. 985.

Time to plead. An order extending the time of the moving party to plead, until one day after the decision of the motion to vacate the service of summons, is an attempt to extend the time to plead, beyond the thirty days, without the consent of the plaintiff, and is void. Kennedy v. Mulligan, 136 Cal. 556; 69 Pac. 291. An order extending the time to answer, until after the decision of a motion relating to the complaint, but not fixing the date for filing the answer, must be held to grant such time as the court might fix when it ruled upon such motion, or in case no time was then fixed, a reasonable time thereafter, which, by analogy, would be the statutory time allowed for answering in other cases; hence, a default entered immediately after the denial of such motion is unauthorized. Willson v. Cleaveland, 30 Cal. 192. Orders attempting to extend the time to plead, more than thirty days, are in excess of jurisdiction, and, there being no plain, speedy, and adequate remedy, are reviewable on certiorari. Gibson v. Superior Court, 83 Cal. 643; 24 Pac. 152; Baker v. Superior Court, 71 Cal. 583; 12 Pac. 685. The fact that the defendant relied upon an order extending his time to plead, which was in excess of the jurisdiction of the court, is an important fact to be considered upon a motion to set aside a default. Kennedy v. Mulligan, 136 Cal. 556; 69 Pac. 291. No advantage can be taken of the court's act in extending time to plead, demur, or move, beyond thirty days, if within the time covered by stipulation between the parties. Voorman v. Superior Court, 149 Cal. 266; 86 Pac. 694.

Notice of motion for new trial. Before the expiration of the ten days allowed by statute within which to move for a new trial, the court, or a judge thereof, may extend the time, not exceeding thirty days, within which to serve and file a notice of the motion; but such extension cannot be made after the time fixed by statute has expired. Burton v. Todd, 68 Cal. 485; 9 Pac. 663. The time for service of notice of intention to move for a new trial may be extended within the limits of this section. Estate of Richards, 154 Cal. 478; 98 Pac. 528. The time named in an order extending the time to give notice of intention to move for a new trial commences to run at the expiration of the ten days allowed by statute for the notice, no reference having been made to the date of the order as the point of time from which the extension was to be computed. Emeric v. Alvarado, 64 Cal. 529; 2 Pac. 418. An order extending the time to prepare and file a motion for a new trial has the effect of extending the time to prepare and file a notice of motion for such new trial. Cottle v. Leitch, 43 Cal. 320. Where the transcript fails to show that any objection was made in the trial court to the hearing of a motion for a new trial on the ground that it came too late, the appellate court will presume that the time was extended by consent of the parties. Patrick v. Morse, 64 Cal. 462; 2 Pac. 49.

Statement and bill of exceptions on motion for new trial. This section has no applicability, where express provision is made for a particular subject in another section; as, where the section regarding the time for filing a statement on motion for a new trial provides that no extension for a longer period than twenty days shall be made. Cottle v. Leitch, 43 Cal. 320. The judge who tries the case has power to make an order extending the time to prepare and serve a statement or bill of exceptions on motion for a new trial. Matthews v. Superior Court, 68 Cal. 638; 10 Pac. 128. An order extending the time within which to prepare a statement on motion for a new trial, carries with it the same extension of time to serve the statement. Bryant v. Sternfeld, 89 Cal. 611; 26 Pac. 1091. The time to prepare and serve a bill of exceptions may be extended thirty days, in addition to the ten days allowed by § 659, ante. Moffat v. Cook, 65 Cal. 236; 3 Pac. 805. A judge cannot grant an extension of time to present a bill of exceptions, exceeding in the aggregate a period of thirty days, without the consent of the opposite party; nor can he grant two or more extensions of thirty days each, nor an extension of time after the moving party has made default. Cameron v. Arcata etc. R. R. Co., 129 Cal. 279; 61 Pac. 955. An extension of time in which to prepare a statement on motion for a new trial, though within the limit of thirty days, is void, if the time previously allowed to the moving party had fully elapsed while the mover was in default. Freese v. Freese, 134 Cal. 48; 66 Pac. 43. An order granting a party time within which to file a statement to be used on a motion for a new trial, made before a notice of intention to move for a new trial has been given, must be construed as extending the time from the date of the order, and not from the time the notice is given. Easterby v. Larco, 24 Cal. 179; Jenkins v. Frink, 27 Cal. 337. Proposing amendments to a statement on motion for a new trial, filed too late, will not operate as a consent to a void extension of time,

if an objection is at the time expressly reserved: the better practice is, to reserve such objection, rather than to move to strike the statement from the files. Cottle v. Leitch, 43 Cal. 320. The court has power, under this section and the third subdivision of § 659, ante, to extend the time within which to give notice of the time for presenting a proposed statement on motion for a new trial, and amendments thereto, to the judge for settlement, and to extend the time for the settlement of the same for a corresponding period, the only requisite being that when such notice is given, the adverse party must have five days' notice of the presentation. Douglas v. Southern Pacific Co., 151 Cal. 242; 90 Pac. 538.

Statement on appeal. Neither the court nor judge has power to extend the time for appellant to make and file a statement on appeal from a judgment more than thirty days beyond the twenty days allowed by law, without the consent of the other party; but an order extending the time more than thirty days beyond the twenty days allowed by law, is good for the thirty days, without the consent of the other party. Bryan v. Maume, 28 Cal. 238. An adverse party does not consent to an extension of time for more than thirty days because he fails to object thereto; nor, if a statement on appeal is not filed and served in time, does he waive the default by not returning the copy of the statement served on him. Bryan v. Maume, 28 Cal. 238.

Affidavits on motion for new trial. An application for an extension of time within which to file affidavits on motion for a new trial should show substantially what the intended affidavits will contain; should indicate the misconduct of the jury; should state the nature of the newly discovered evidence, etc. People v. Winthrop, 118 Cal. 85; 50 Pac. 390. Under the first subdivision of § 659, ante, the court has power to extend the time for filing affidavits on motion for a new trial to more than thirty days beyond the statutory time: the limitation on the court's power of extending time in other classes of cases, imposed by § 1054, has no application to such a case. Oberlander v. Fixen, 129 Cal. 690; 62 Pac. 254.

Notice of appeal. The reason for excepting matters of appeal from the power to extend the time was, that to allow an extension of time to file a notice of appeal would be, virtually, to allow the court the power to extend the time for taking an appeal. Harper v. Minor, 27 Cal. 107.

To file undertaking on appeal. The time to file an undertaking on appeal may be extended. Schloesser v. Owen, 134 Cal. 546; 66 Pac. 726.

Notices other than of appeal. Under this section, the power given to superior courts, and the judges thereof, to extend the time for the service of notices, other than notices of appeal, includes the power to extend the time for filing such notices. Burton v. Todd, 68 Cal. 485; 9 Pac. 663. Under this section, there may be an extension of time in which to give actual notice. Douglas v. Southern Pacific Co., 151 Cal. 242; 90 Pac. 538.

Order may be made where. An order extending time need not be made in court: it may be made in any part of the state, by the judge of the court. Matthews v. Superior Court, 68 Cal. 638; 10 Pac. 128.

Made how. An order extending the time fixed by statute should, in all cases, be in writing, and either entered on the minutes of the court, in open session, or signed by the judge, and filed with the papers in the case within the time prescribed. Campbell v. Jones, 41 Cal. 515. Although the code does not require that an order extending time shall be filed or served, yet the correct practice is to file and serve it; and where a default was entered before the expiration of the time as extended, the plaintiff being ignorant of the order, it should be opened upon payment of costs. Swift v. Canovan, 47 Cal. 86.

Computation of time. Where the last day of the period of extension fixed by an order is Sunday, that day should be excluded; that is to say, it is not to be computed as any portion of the time granted by the order, but is a supplementary day superadded by law. Muir v. Galloway, 61 Cal. 498. Where the time in which to serve a bill of exceptions, as extended by order of the court, expires on Sunday, the moving party has the following Monday in which to make the service; and, notwithstanding previous orders have been made extending the time for service for twenty days, the court has power, on such Monday, to grant a further extension of ten days. Frassi v. McDonald, 122 Cal. 400; 55 Pac. 139. A stipulation extending the time to answer for the week ending July 4th, that day and the next being holidays, has the effect of permitting an answer to be filed on Monday, July 6th, and a default entered on that day is premature. Crane v. Crane, 121 Cal. 99; 53 Pac. 433. A fraction of a day may be regarded when the question relates to the relative order of occurrences happening on the same day, involving the legality or priority of prior rights; but it is not to be regarded when measuring or computing the time from one date to another. Scoville v. Anderson, 131 Cal. 590; 63 Pac. 1013.

Power of judge pro tem. to extend time given for preparing or filing bill of exceptions. See note 42 L. R. A. (N. S.) 623.

CODE COMMISSIONERS' NOTE. Computation of time. See § 12 of this code, and note. The word "month" means a calendar month, unless otherwise expressed. § 17, subd. 6, of this code; Savings and Loan Society v. Thompson, 32 Cal. 347.

§ 1055. Action against officer for official acts. If an action is brought against any officer or person for an act for the doing of which he had theretofore received any valid bond or covenant of indemnity, and he gives seasonable notice thereof in writing to the persons who executed such bond or covenant, and permits them to conduct the defense of such action, the judgment recovered therein is conclusive evidence against the persons so notified; and the court may, on motion of the defendant, upon notice of five days, and upon proof of such bond or covenant, and of such notice and permission, enter judgment against them for the amount so recovered and costs.

Legislation § 1055. **1.** Enacted March 11, **1872**; based on Practice Act, § 645, which read: "If an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereon (sic) to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties; and the court or judge in vacation may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs." When § 1055 was enacted in 1872, (1) "is" was substituted for "be" before "brought," (2) "gives" for "give," (3) "thereof" for "thereon," and (4) "is" for "shall be" before "conclusive."

2. Amended by Code Amdts. **1880**, p. 73, substituting (1) "be" for "is" before "brought," (2) "give" for "gives," and (3) "shall be" for "is" before "conclusive."

3. Amendment by Stats. **1901**, p. 182; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 309; the code commissioner saying, "The amendment extends the provisions of the section to all persons entitled to rely upon bonds of indemnity, instead of restricting such provisions to the sheriff, as in the present section."

Jurisdiction of motion for judgment. A motion for a several judgment against the sureties upon an indemnity bond, where the several liability of each surety is less than three hundred dollars, is not without the jurisdiction of the superior court, the motion not being an independent action against the sureties, but simply a supplemental motion, made for judgment against the sureties, in an action, of which the superior court had jurisdiction, and in which it had already proceeded to judgment against the sheriff as a defendant. Moore v. McSleeper, 102 Cal. 277; 36 Pac. 593.

Notice to indemnifier. Full notice should be given to the indemnifier, of the pendency of the suit, what will be required of him, and the consequences liable to follow his failure to defend the action; mere knowledge or information is entirely insufficient; and unless the party to the action so notifies the indemnifier, a reasonable time before the trial, he may well suppose that the party needs no assistance from him, and may rely upon that supposition. Sampson v. Ohleyer, 22 Cal. 200. Where judgment is recovered against a sheriff for an act done by virtue of his office, he cannot afterwards have judgment against the sureties on the indemnifying bond upon a notice of five days, unless he gave them written notice of the action against him. Dennis v. Packard, 28 Cal. 101.

Judgment on indemnifying bond. A motion for a judgment against the sureties on an indemnity bond may be made under this section, although the judgment is a several judgment, in different amounts, against the sureties on the bond, the obligation of the sureties being for several different amounts, for which they have become liable on the bond. This section should be construed as authorizing the entry of judgment against the sureties for the amount named in the bond, and for which each has become liable, but not to exceed the amount recovered, including costs of the action. Moore v. McSleeper, 102 Cal. 277; 36 Pac. 593. The provision of this section, making the judgment conclusive evidence against the indemnifier, when notified of the action, is founded upon the principle, that, under such circumstances, the action is, in substance, against the indemnifier, and that he has, in that action, an opportunity to make any defense that may exist; therefore, where the indemnifier has been notified of the action, he cannot maintain a bill in equity to set aside the judgment, except under such conditions as would have enabled him to maintain it had he been the nominal as well as the real party defendant in the first action. Dutil v. Pacheco, 21 Cal. 438; 82 Am. Dec. 749. The recovery of a judgment against a sheriff is a sufficient showing for a prima facie case against the sureties; and the burden is upon them to show that the judgment has been satisfied by themselves, or by a return of the property sued for, or that the property with which to satisfy it is, or should be, still in the possession of the sheriff. Moore v. McSleeper, 102 Cal. 277; 36 Pac. 593.

Conclusiveness against indemnitors of judgments against principals. See note 22 Am. St. Rep. 204.

When surety becomes liable on contract of indemnity. See note 1 Am. Dec. 47.

Duty and liability of officer on receiving a bond of indemnity. See note 15 Am. St. Rep. 315.

CODE COMMISSIONERS' NOTE. Dennis v. Packard, 28 Cal. 101; Dutil v. Pacheco, 21 Cal. 438; 82 Am. Dec. 749. An indemnifying bond takes effect from its delivery. Buffendeau v. Brooks, 28 Cal. 641.

§ 1056. Corporations may become sureties on undertakings and bonds. In all cases where an undertaking or bond, with any number of sureties, is

authorized or required by any provision of this code, or of any law of this state, any corporation with a paid-up capital of not less than one hundred thousand dollars, incorporated under the laws of this or any other state of the United States for the purpose of making, guaranteeing, or becoming a surety upon bonds or undertakings required or authorized by law, or which, by the laws of the state where it was originally incorporated has such power, and which shall have complied with all the requirements of the law of this state regulating the formation or admission of these corporations to transact such business in this state, may become and shall be accepted as security or as sole and sufficient surety upon such undertaking or bond, and such corporate surety shall be subject to all the liabilities and entitled to all the rights of natural persons' sureties; provided, that the insurance commissioner shall have the same jurisdiction and powers to examine the affairs of such corporations as he has in other cases; shall require them to file similar statements and issue to them a similar certificate. And whenever the liabilities of any such corporation shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up in sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency, and he shall publish the same once a week for three weeks, in a daily San Francisco paper. And, until such deficiency is paid up, such company shall not do business in this state. In estimating the condition of any such company, the commissioner shall allow as assets only such as are allowed under existing laws at the time, and shall charge as liabilities, in addition of eighty per cent of the capital stock, all outstanding indebtedness of the company, and a premium reserve equal to fifty per centum of the premiums charged by said company on all risks then in force.

Legislation § 1056. Added by Stats. **1889**, p. 215; a codification of the act of Stats. 1885, p. 114, entitled "An Act to facilitate the giving of bonds required by law." The original code § 1056 (based on Practice Act, § 646) was repealed by Code Amdts. 1880, p. 111, and provided for the prosecution of actions in the Spanish language in the counties of Monterey, San Luis Obispo, Santa Barbara, Los Angeles, and San Diego.

Construction of code sections. The provisions of this section and § 1057, post, do not make the acceptance of such surety corporation as sole and sufficient surety upon an undertaking imperative, no matter what the disparity between its amount and the amount of the corporation assets, but it may be required, upon exception to its sufficiency as surety, under § 948, ante, to show surplus assets equal to the amount of its undertaking. Fox v. Hale etc. Mining Co., 97 Cal. 353; 32 Pac. 446.

Execution of surety bond. An undertaking on appeal, signed in behalf of the corporation surety, by its second vice-president and its assistant secretary, with the seal of the corporation affixed, will not be held void, as not being properly signed, in the absence of anything to show that such officers were not authorized to sign and deliver the undertaking. Gutziel v. Pennie, 95 Cal. 598; 30 Pac. 836.

Designation of agent by foreign surety corporation. When a foreign surety corporation has filed with the insurance commissioner the designation of its agent, as required by § 616 of the Political Code, that is all that is required of it in the matter of naming an agent upon whom process may be served, to entitle it to do business in this state; and the certificate of the commissioner is prima facie evidence that the surety company has complied with the requirement of that section, although it does not expressly so state. Gutzeil v. Pennie, 95 Cal. 598; 30 Pac. 836.

§ 1057. Undertakings mentioned in this code, requisites of. In any case where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must, except in the case of such a corporation as is mentioned in the next preceding section, require the sureties to accompany it with an affidavit that they are each residents and householders, or freeholders, within the state, and are each worth the sum specified in the undertaking or bond, over and above all their just debts and liabilities,

exclusive of property exempt from execution; but when the amount specified in the undertaking or bond exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than the amount specified in the undertaking or bond, if the whole amount is equivalent to that of two sufficient sureties. Any corporation such as is mentioned in the next preceding section, may become sole surety on such bond. No such corporation must be accepted in any case as a surety when its liabilities exceed its assets as ascertained in the manner provided in section ten hundred and fifty-six. Whenever an undertaking has been given and approved in any action or proceeding, and it is thereafter made to appear to the satisfaction of the court that any surety upon such undertaking has for any reason become insufficient, the court may, upon notice, order the giving of a new undertaking, with sufficient sureties, in lieu of such insufficient undertaking. In case such new undertaking so required shall not be given within the time required by such order, or in case the sureties thereon fail to justify thereon when required, all rights obtained by the filing of such original undertaking shall immediately cease.

Applied to guardians. Post, § 1809.

Legislation § 1057. 1. Enacted March 11, **1872**; based on Practice Act, § 650, as amended by Stats. 1854, Redding ed. p. 71, Kerr ed. p. 100, § 62, which read: "In all cases where an undertaking with sureties is required by the provisions of said act, the judge, justice, clerk, or other officer taking the same, shall require the sureties to accompany the same, with an affidavit that they are each worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; provided, that when the amount specified in the undertaking exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties." When § 1057 was enacted in 1872, (1) "this code, the" was substituted for "said act," (2) the words "judge, justice, clerk, or other" were omitted, (3) "must" was substituted for "shall," in both instances, (4) "it" was substituted for "the same" after "accompany," (5) the words "are each residents and householders or freeholders within the state, and" were added, and (6) "but" was substituted for "provided that" before "when the amount."

2. Amended by Stats. **1889**, p. 216, to read as at present, except for the amendment of 1907.

3. Amendment by Stats. **1901**, p. 183; unconstitutional. See note ante, § 5.

4. Amended by Stats. **1907**, p. 308, (1) substituting (a) "is" for "be" before "equivalent," (b) "sole surety on such bond" for "one of such sureties," (c) "must" for "shall" before "be accepted," (d) "when" for "whenever" before "its liabilities," (e) omitting "shall" before "exceed," and (2) adding the last two sentences; the code commissioner saying, "The change consists in the addition of the last two sentences, and authorizes the court to exact a new undertaking in any case in which it is shown that any surety on a bond has become insufficient, thus avoiding all possible doubt of the court's power in the premises."

Sufficiency of undertaking. An affidavit to a stay bond, which fails to state that the sureties are freeholders or householders, omits an element essential to the validity of the bond. Maze v. Langford, 16 Cal. App. 743; 117 Pac. 929. An undertaking on attachment is insufficient to sustain the writ, if the affidavit of the sureties omits to state the material fact that they are householders or freeholders; and a writ issued upon an undertaking, not accompanied by an affidavit of the sureties, as required by this section, is irregularly and improperly issued, and must be discharged upon application. Tibbet v. Tom Sue, 122 Cal. 206; 54 Pac. 741. The requirement of this section, that the sureties shall justify by affidavit, is intended solely for the protection of the obligees; and it does not lie in the mouth of the sureties to object to the sufficiency of the bond, because of their failure to comply with this provision. Carpenter v. Furrey, 128 Cal. 665; 61 Pac. 369.

Justification and qualification of sureties. A prima facie justification of the sureties is established by the affidavit required by this section; and where no counter-showing is made against the sufficiency of sureties, the justification will be deemed complete. Bank of Escondido v. Superior Court, 106 Cal. 43; 39 Pac. 211. The qualification of sureties on a bond, as distinguished from their justification, is a material part of the bond. Maze v. Langford, 16 Cal. App. 743; 117 Pac. 929.

Waiver of justification of sureties. See note ante, § 978a.

Bond of surety corporation. Surety corporations are exempted, by the provisions of this section, from annexing to their undertakings the usual affidavit required of natural persons, as to being freeholders, etc.; but from the language of another provision of the section, it seems to be implied that the undertakings of such a corporation shall be accompanied by an affidavit showing that its liabilities do not exceed its assets, computed according to the rule of the statute; that is, the corporation may execute bonds in such amount as other provisions of the statute author-

ize. Fox v. Hale etc. Mining Co., 97 Cal. 353; 32 Pac. 446. Any corporation organized for the purpose of carrying on the business of becoming a surety on bonds and undertakings is included within the term "surety companies," and is authorized to become the sole surety on any undertaking or bond required by any law of this state, and may be accepted as such by the approving authority in lieu of a bond with natural persons as sureties. San Luis Obispo County v. Murphy, 162 Cal. 588; Ann. Cas. 1913D, 712; 123 Pac. 808.

Filing of new undertaking. Where an objection is made to the sufficiency of the undertaking, as that the affidavit fails to state that the sureties are freeholders or householders, the defect may be supplied by filing a new undertaking in the appellate court, as provided by § 954, ante. Schacht v. Odell, 52 Cal. 447.

CODE COMMISSIONERS' NOTE. The affidavit is sufficient if it substantially complies with this section. Taaffe v. Rosenthal, 7 Cal. 514. An undertaking stands on the same footing with a bond. Canfield v. Bates, 13 Cal. 606. If the undertaking is defective, but has been given in good faith, the court should permit the party to file a sufficient one. Cunningham v. Hopkins, 8 Cal. 33; Coulter v. Stark, 7 Cal. 244; Bryan v. Berry, 8 Cal. 130. An undertaking executed by plaintiff to the defendant by a wrong name, may be sued upon by the defendant, and he may describe it as given to him, and show that he was the party intended. Morgan v. Thrift, 2 Cal. 563.

§ 1057a. Justification by corporate security on bonds. Procedure. County clerk to issue certificate. Fee. Whenever the surety on a bond or undertaking authorized or required by any law of this state is a corporation of the state or a foreign corporation, authorized to become surety on bonds or undertakings in the state, and exception is taken to the sufficiency of such surety as required by law, such corporate surety may justify on such bond or undertaking as follows:

Any agent, attorney in fact, or officer of such corporation shall submit to the court, judge, officer, board or other person before whom the justification is to be made:

First—The original, or a certified copy of, the power of attorney, by-laws or other instrument showing the authority of the person or persons who executed the bond or undertaking to execute the same;

Second—A certified copy of the certificate of authority issued by the insurance commissioner as required by section 596 of the Political Code, showing that the corporation is authorized to transact business;

Third—A certificate from the county clerk of the county or city and county in which the bond or undertaking is filed, showing that the said certificate of authority has not been surrendered, revoked, canceled, annulled or suspended, or in the event that it has been, that renewed authority to act under such certificate has been granted, as provided for in section 625a of the Political Code;

Fourth—A financial statement showing the assets and liabilities of such corporation at the end of the quarter calendar year next preceding the date of the execution of the bond or undertaking; such financial statement must be verified under oath by the president, or a vice-president and attested by the secretary or an assistant secretary of such corporation.

Upon complying with the foregoing provisions and it appearing that the bond or undertaking was duly executed, that the corporation is authorized to transact business in the state, and that its assets exceed its liabilities in an amount equal to or in excess of the amount of the bond or undertaking, the justification of the surety shall be complete and it shall be accepted as the sole and sufficient surety on the bond or undertaking.

The county clerk of any county or city and county shall, upon request, issue the certificate hereinbefore provided for, which certificate shall state whether or not the certificate of authority of such corporation has been surrendered, revoked, canceled, annulled or suspended, and in the event that

it has, whether or not renewed authority to act under such certificate of authority has been granted as provided in section 625a of the Political Code. For each certificate issued the county clerk shall receive a fee of fifty cents to be paid by the person obtaining the certificate.

Legislation § 1057a. Added by Stats. **1911**, p. 412. The act adding this section had a repealing clause at the end thereof, reading, "All laws and parts of laws and all sections of either of the codes in conflict herewith are hereby expressly repealed."

§ 1058. People of state not required to give bonds when state is a party. In any civil action or proceeding wherein the state, or the people of the state, is a party plaintiff, or any state officer, in his official capacity or on behalf of the state, or any county, city and county, city, or town, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the state, or the people thereof, or any officer thereof, or of any county, city and county, city, or town; but on complying with the other provisions of this code the state, or the people thereof, or any state officer acting in his official capacity, have the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code.

Costs, against state or county. Ante, §§ 1038, 1039.

Legislation § 1058. 1. Enacted March 11, **1872**; based on Stats. 1856, p. 26, and Stats. 1863–64, p. 261.

2. Amended by Code Amdts. **1880**, p. 76, inserting "city and county" after "county."

Necessity of bond by state. The state, when it is a party defendant, comes within the exemption of this section, as well as when it is a party plaintiff. San Francisco Law etc. Co. v. State, 141 Cal. 354; 74 Pac. 1047.

By county. An ordinance of a county, providing that in an action by the county to recover a license tax a writ of attachment may issue without bonds, is in harmony with this section, and also with § 3360 of the Political Code, and is not void as being a special law regulating the practice of courts of justice. San Luis Obispo County v. Greenberg, 120 Cal. 300; 52 Pac 797.

By county officer. Although county officers are not mentioned in this section, yet, where the county is the real party in interest, and is represented by a county officer, not acting in his individual right, but in behalf of the county, the case is within the reason of the rule prescribed by this section. Lamberson v. Jefferds, 116 Cal. 492; 48 Pac. 485. A county officer, who is defendant in a suit, and appeals, is not exempted from filing an undertaking on appeal (Von Schmidt v. Widber, 3 Cal. Unrep. 835; 32 Pac. 532); but the court has refused to dismiss the appeal of a county auditor, representing the county, where no undertaking was given. Lamberson v. Jefferds, 116 Cal. 492; 48 Pac. 485.

By city and county. This section applies to the city and county of San Francisco. Morgan v. Menzies, 60 Cal. 341.

By board of education. The board of education of a city and county must give an undertaking on appeal. Mitchell v. Board of Education, 137 Cal. 372; 70 Pac. 180.

By corporation. A corporation joining with a municipality in an appeal is not relieved from the necessity of filing a proper undertaking, and, in the absence of such undertaking, the appeal of such corporation will be dismissed. Meyer v. San Diego, 130 Cal. 60; 62 Pac. 211.

Undertaking by city and county is void. An undertaking on attachment, given by a city and county, is in contravention of the policy of the law, and therefore void as a common-law bond. Morgan v. Menzies, 60 Cal. 341.

CODE COMMISSIONERS' NOTE. Stats. 1864, p. 261; 1856, p. 26.

§ 1059. Surety on appeal substituted to rights of judgment creditor. Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgment, in all respects as if he had recovered the same.

Subrogation of surety on appeal bond. See ante, § 709.

Legislation § 1059. Added by Code Amdts. **1873–74**, p. 344.

Reimbursement of surety. Payment must be made by a surety, before he can proceed under this section; he can be reimbursed, under it, only for what he has expended. Estate of Hill, 67 Cal. 238; 7 Pac. 664.

INDEX.

INDEX.

VOL. I. PARTS I, II. §§ 1–1059.

A

ABANDONMENT.
Action, of, nonsuit, § 581.

ABATEMENT.
Action not abated by death, disability, or transfer when, § 385.
Alienation or termination of title pending action, effect of, §§ 740, 747.
Continuance of action against successor or representative, § 385.
Nuisance, of, § 731.
Partition proceedings, effect of death or insolvency of party, § 763.
Pleas in, § 430.
Successive actions, right to maintain, § 1047.
Termination of plaintiff's title pending suit, verdict and judgment in case of, § 740.

ABBREVIATIONS.
Use of, in judicial proceedings, § 186.

ABSENCE. See Absentee.
Chief justice of supreme court, of, proceedings in case of, § 46.
Evidence, of, motion to postpone trial, § 595.
Judge, of, proceedings in case of, § 139.
Judge, of, settlement of bill or statement, § 653.
Justice of peace, of, reassignment and transfer of action, § 90.
Order in absence of party deemed excepted to, § 647.
Presiding justice of peace, substitute, § 85.
Publication of summons in case of, §§ 412, 413.
State, from, running of statute, § 351.
Superior judge, of, authority of court commissioner, § 259.
Superior judge, of, holding court by another, § 160.
Trial in absence of party, § 594.
Waiver of jury by, § 631.
Witness, of, postponement of trial for, § 595.

ABSENTEE. See Absence.
Publication of summons, §§ 412, 413.

ABSTRACT OF JUDGMENT.
In justice's court, § 897.
Justice's, filing, in superior court, § 898.
Justice's, filing, in superior court, issuing execution on, § 899.
Justice's, lien of where filed with recorder, § 900.
Justice's, no lien unless filed with recorder, § 900.

ABSTRACT OF TITLE.
In partition, §§ 799, 800.
In partition, cost of, allowed when, § 799.

ACCIDENT.
New trial on ground of, § 657.

ACCOUNT. See Accounting.
Bill of particulars. See Bill of Particulars.
Copies of, right to take. See Inspection of Writings.
Copy, giving to adverse party on demand and effect of refusal, § 454.
Delivery of copy to adverse party, §§ 454, 886.
Exhibiting original and delivering copy to adverse party, § 886.
Further, when court may order, § 454.
General or defective, further account, § 454.
Inspection of. See Inspection of Writings.
Interlocutory judgment ordering, time to appeal, § 939.
Items of, need not be pleaded, § 454.
Judge may receive, at chambers, § 166.
Limitation of action on, § 344.
Pleading, how to state account in, § 454.
Pleading in justice's court, § 886.
Reference of, on judgment by default, § 585.
Reference of, powers and duties of referee, § 639.
Reference of, when ordered, § 639.

ACCOUNTING. See Account.
Rents and profits after execution, for, § 707.

ACCUSATION.
Attorney, accusation against, §§ 290–297. See Attorney.

ACKNOWLEDGMENT.
Certificate of redemption, acknowledgment of, § 703.
Court commissioner's power to take, § 259.
Debt, acknowledgment so as to remove bar of statute, § 360.
Justice of peace may take, § 179.
Justice of supreme court may take, § 179.
Police judge may take, § 179.
Satisfaction of judgment, of, § 675.
Superior judge may take, § 179.

ACTIONS.
Abatement not worked by death, disability, or transfer when, § 385.
Abatement of. See Abatement.

ACTIONS. (Continued.)
Alienation of realty not to prejudice, § 747.
Appeal, action deemed pending during, § 1049.
By whom prosecuted, § 30.
Civil and criminal, actions are, § 24.
Civil, arises out of obligations or injuries, § 25.
Civil, definition of, §§ 22, 30.
Code, effect of on pending actions, § 8.
Commenced by filing complaint, § 405.
Complaint. See Complaint.
Consolidation of, when may be ordered, § 1048.
Criminal, Penal Code provides for prosecution of, § 31.
Deposit in court. See Deposit in Court.
Determine adverse claims, to, § 1050.
Dismissal of. See Dismissal.
Division of actions, into civil and criminal, § 24.
Executor or administrator may sue without joining beneficiaries, § 369.
Extension of time, in general, § 1054.
Form of, one only, § 307.
Interpleader, when and how maintained, § 386.
Intervention, how and when effected, § 387.
Is civil or criminal, § 24.
Joined, what actions may be, § 427. See Joinder of Actions.
Judicial remedies, defined, § 20.
Justices' courts, in. See Justices' Court.
Kinds of, § 24.
Limitation of, §§ 312–362. See Limitation of Actions.
Lis pendens, § 409.
Local, what are, § 392.
Merger of civil and criminal, § 32.
Misjoinder of, demurrer for, §§ 430, 444.
Nonsuit. See Nonsuit.
Notice of pendency of action affecting real property, § 409.
Paper with defective title, when valid, § 1046.
Particular actions. See the particular title.
Parties, other, when court may order in, § 389.
Parties to. See Parties.
Pending, as ground for demurrer, § 430.
Pending, deemed to be during appeal, § 1049.
Pending, how affected by code, § 8.
Pending, when deemed to be, § 1049.
Place of, §§ 392–400. See Place of Trial.
Pleadings in. See Pleadings.
Real party in interest to prosecute, § 367.
Realty, to recover injuries to, § 392.
Realty, to recover, where brought, § 392.
Receiver may bring and defend, § 568.
Register of, must be kept by clerk, § 1052.
Register of, what to be entered in, § 1052.

ACTIONS. (Continued.)
Remedies, defined, § 20.
Remedies divided into actions and special proceedings, § 21.
Ships, against, §§ 813–827. See Shipping.
Special proceeding included under, in statute of limitation, § 363.
State, actions against. See State.
Successive actions, right to maintain, § 1047.
Surety, by, § 1050.
Survival of, § 385.
Survival of, statute of limitation, §§ 353, 355.
Title of, § 426.
Title of, paper with defective, when valid, § 1046.
Transfer of, §§ 397–400. See Place of Trial.
Transitory, § 395.
Trustee may sue without joining beneficiaries, § 369.
When commenced, § 350.

ACTION TO QUIET TITLE. See Quieting Title.

ADJOURNMENT.
Amendment in justice's court, adjournment on, § 859.
Construed as recesses, and not to prevent court's sitting, § 74.
Continuance. See Continuance.
Holidays, on, § 135.
Holiday, to, proceedings in case of, § 135.
In justice's court, §§ 873–877.
Judge, absence of, adjournment by clerk, § 139.
Superior court, of, § 74.
Supreme court, of, § 48.
Trial in police court, § 931.
While jury out, § 617.
While jury out, sealed verdict, § 617.

ADMIRALTY. See Shipping.

ADMISSION.
Attorney, admission to practice, §§ 275–280. See Attorney, I.
By failure to verify answer, § 446.
Continuance, denial of on admission of evidence, § 595.
Contract set out in answer, when deemed admitted, § 448.
Evidence, admission of, denial of continuance, § 595.
Service of summons, of, § 415.
Written instruments in complaint deemed admitted when, §§ 447–449.

ADMONITION.
Of jury, on separation, § 611.

ADULTERY. See Divorce.
Co-respondent, copy of pleadings to be served on, § 1019.
Co-respondent, may appear and be heard, § 1019.

ADULTERY. (Continued.)
Co-respondent, notice, where cannot be found, how given, § 1019.

ADVERSE CLAIM.
Personal property, to, action to determine, § 1050.
Quieting title, §§ 738–751. See Quieting Title.
Real property, parties defendant, § 380.
Real property, to, action to determine, § 738.
Writ of possession, right to, on recovery, § 380.

ADVERSE POSSESSION.
Descent cast, right of possession not affected by, § 327.
Disabilities, action after ceasing of, § 328.
Disabilities excluded from time to commence actions, § 328.
Disabilities not to exceed twenty years, § 328.
Disabilities suspending statute enumerated, § 328.
Entry, sufficiency of, as a claim, § 320.
Entry, action on, when to be brought, § 320.
Entry under claim of title deemed adverse, § 322.
Improvements as a set-off, § 741.
Inclosure and boundaries, § 325.
Infant, against, § 328.
Judgment, under, §§ 322, 323.
Landlord and tenant, presumption as to tenant's possession, § 326.
Landlord and tenant, relation of, as affecting, § 326.
Lunatic, against, § 328.
Mesne profits, § 336.
Mining claim, inclosure of, § 325.
Occupation deemed under legal title, unless adverse, § 321.
Occupation under claim of title not founded on writing, § 324.
Occupation under judgment, when adverse, §§ 322, 323.
Occupation under written instrument, when adverse, §§ 322, 323.
Possession presumed in holder of legal title, § 321.
Possession not under instrument, extends how far, § 324.
Possession of part, whether possession of whole, §§ 322, 323.
Prisoner, against, § 328.
Redemption of mortgage, §§ 346, 347.
Seisin within five years necessary, §§ 318, 319.
State, against, §§ 315, 317.
Taxes, payment of, necessary to, § 325.
What constitutes, under claim of title not written, § 325.
Written instrument, not founded on, §§ 324, 325.
Written instrument or judgment, under, §§ 322, 323.

AFFIDAVIT. See subject in question.
Affirmations. See Affirmation.
Amendment, for order to allow, § 473.
Appeal, a part of record on, § 661.
Arrest, for, of defendant, § 481.
Arrest, for, of defendant in justice's court, § 862.
Arrest, on motion to vacate order of, or to reduce bail, § 503.
Attachment, for, § 538.
Attachment, for discharge of, § 557.
Attachment, for, in justice's court, § 866.
Change of judges, for, on ground of bias, etc., § 170.
Changing place of trial in justices' courts, for, § 833.
Claim for exemption from jury duty, of, § 202.
Continuance, on motion for, § 595.
Costs, of, § 1033.
Court commissioner may take, § 259.
Defective title to, validity, § 1046.
Defendant, for trial in proper county, § 396.
Deputy justice's clerk, authority of, to take, § 86.
Injunction, for vacating or modifying, § 532.
Judicial officers may take, § 179.
Juror may make, of misconduct of jury, § 657.
Justice of peace may take, §§ 86, 179.
New trial, motion for, on affidavit, procedure, § 659. See New Trial.
New trial, motion for, when made on, § 658.
Particular proceedings, affidavits in. See particular title.
Plaintiff's, denying execution of instrument set out in answer, § 448.
Police judge may take, § 179.
Postponement of trial, for, in absence of witness, § 595.
Prejudice, of, § 170.
Publication of summons, for, § 412.
Publication of summons, for, as part of judgment-roll, § 670.
Redemptioner from execution, of, § 705.
Referee, on objections to appointment of, § 642.
Relief from default judgment in justice's court, for, § 859.
Replevin, in, §§ 510, 519, 520.
Service of summons, of, § 415.
State a party, when, § 446.
Summons to joint debtor after judgment, for, § 991.
Superior judge may take, § 179.
Supreme court justice may take, § 179.
Sureties, of, § 1057.
Sureties, of, on bond to stay money judgment, § 942.
Title, want of, or defective, effect of, § 1046.
Transfer of action to another justice of peace, on ground of interest, etc., for, § 90.

AFFIDAVIT. (Continued.)
Vacating or modifying injunction, for, § 532.
Value, of, in claim and delivery, does not bind officer when, § 473.
Verification of pleadings, § 446.
Who may take, §§ 86, 179, 259.

AFFINITY. See Consanguinity.
Judge or justice, as disqualifying, § 170.
Juror, as disqualifying, § 602.
Meaning of, § 17.
Receiver, as disqualifying, § 566.
Referee, as disqualifying, § 641.

AFFIRMATION.
Court commissioner, power of, to take, § 259.
Oath includes, § 17.
Oaths. See Oaths.

AFFIRMATIVE RELIEF.
Dismissal, where affirmative relief asked, § 581.
When granted, § 666.

AFFRAYS.
Justice's court has jurisdiction over, § 115.

AGENCY.
Authority of agent to buy or sell realty, to be written, § 973.
Default judgment, examination of agent of plaintiff, § 585.
Joint authority, majority may act, § 15.
Referee, relation of, disqualifies, § 641.
Relationship of principal and agent disqualifies juror, § 602.
Replevin, from agent, § 512.
Replevin, service of order on agent, § 512.

AGREEMENTS. See Contracts.

ALIAS.
Execution from justice's court, § 903.
Summons from justice's courts, §§ 846, 847.
Summons, time for issuance of, § 408.
Summons will issue when, § 408.

ALIEN.
Admission as attorney, declaration of intention to become citizen, § 275.
Admission of attorney from foreign country, § 279.
Limitation of actions affecting, § 354.

ALIENATION.
Effect of, on action, §§ 740, 747.

ALLEGATIONS. See Answer; Complaint; Pleading.
Denials of, how made, § 437.
If not controverted, deemed admitted, § 462.
In particular actions. See particular title.

ALLEGATIONS. (Continued.)
In pleadings against joint debtors, § 993.
Material, what are, § 463.
Redundant, sham, and irrelevant, striking out, § 453.
To be liberally construed, § 452.
Variance, §§ 469–471. See Variance.
When deemed admitted, § 462.
When deemed controverted, § 462.

ALMSHOUSE.
Officer or attendant exempt from jury duty, § 200.

AMBIGUITY.
Pleading, in, demurrer for, §§ 430, 444.

AMENDMENT.
Allowance of, power of court, § 473.
Answer, before, effect of, § 472.
Answer, before, right of, § 472.
Answer to, time for, §§ 432, 472.
Attachment, of writ, affidavit or undertaking, § 558.
Bill of exceptions, to, § 650. See Exceptions.
Code, of, how made, § 19.
Complaint, defendant must answer, § 432.
Complaint, failure to answer, default, § 432.
Complaint, filing and serving amendments, §§ 432, 472.
Complaint, of, proceedings on, § 432.
Conclusions of law, of, § 663.
Copy of amendments, filing and serving, § 432.
Default for failure to answer, § 432.
Demurrer, after, of course, § 472.
Demurrer, before, § 472.
Demurrer to, § 472.
Fictitious name, § 474.
Filing of, § 472.
How made, § 472.
Justice's court, adjournment and costs on amendment in, § 859.
Justice's court, amendment in, § 859.
Justice's court, in. See Justices' Courts, V.
Mistake in any respect, correcting by, § 473.
New parties, bringing in by, § 389.
Notice of, what may be allowed after, § 473.
Of course, without costs, § 472.
Order allowing or refusing deemed excepted to, § 647.
Orders, power of court to amend, § 128, subd. 8.
Party, adding or striking out name of, § 473.
Party, correcting mistake in name of, § 473.
Pleading, of, time for, from what time runs, § 476.
Pleading, of, when there is a variance, §§ 469, 470.

AMENDMENT. (Continued.)
Pleadings, of, to bring in necessary parties, § 389.
Pleadings, of, on demurrer in justice's court, § 858.
Pleadings, to, in general, § 473.
Power of courts generally, § 128, subd. 8.
Process, of, power of court, § 128.
Right to amend once as of course and without costs, § 472.
Serving of, § 472.
Statement, amendments to, §§ 659, 661.
Striking out name of party, § 473.
Supplemental pleadings, § 464.
Supplemental pleadings. See Supplemental Pleadings.
Terms may be imposed, § 473.
Time for, power to extend, § 1054.
To pleadings or proceedings generally, § 473.
Variance, in case of, §§ 469, 470.
What amendments may be allowed, § 473.
What may be allowed after notice, § 473.

ANCHORAGE.
Vessels liable for, § 813.

ANIMALS.
When and to what extent exempt from execution, § 690.

ANOTHER ACTION PENDING.
Ground for demurrer, § 430.

ANSWER. See Pleadings.
Abatement, plea in, § 430.
Absence of, what relief granted plaintiff, § 580.
Account, items of, § 454.
Admissions of allegations by failure to deny, § 462.
Allegations. See Allegations.
Allowing, after time limited by code, § 473.
Allowing, after judgment, where summons not served, § 473.
Allowing, where demurrer overruled, § 472.
Amended complaint, failure to, default, § 472.
Amended complaint, to, time for, § 472.
Amended pleading, to, § 472.
Amendment of, §§ 472, 473.
Answering to part of complaint and demurring to balance, § 441.
Appearance, answer is, § 1014.
Complaint, amended, to, § 432.
Construction of, § 452.
Contains what, § 437.
Counterclaims, §§ 437–440.
Counterclaims, may contain several, § 441.
Counterclaims. See Counterclaim.
Cross-complaint, § 442.
Cross-complaint, demurrer to answer to, § 422.
Cross-complaint. See Cross-complaint.

ANSWER. (Continued.)
Cross-complaint, answer or demurrer to, §§ 422, 442.
Default for failure of, when entered, § 585. See Default.
Defective heading to, § 1046.
Defense not raised by, waived, §§ 434, 439.
Defenses, may contain as many as defendant has, § 441.
Defenses must be stated separately, § 441.
Defenses to refer to causes of action they answer, § 441.
Demand for inspection of instruments and refusal of, § 449.
Demur to part of complaint and reply to part, § 441.
Demurrer and, at same time, § 431.
Demurrer, matters not appearing on face of complaint, § 433.
Demurrer not waived by answer at same time, § 472.
Demurrer overruled, allowing answer, § 472.
Demurrer, overruling, time to answer runs from notice, § 476.
Demurrer to, §§ 422, 443, 444.
Demurrer to, ground of, § 444.
Demurrer to, overruling, facts of answer deemed denied, § 472.
Demurrer to, time to file, § 443.
Disclaimer, § 739.
Filed, must be, § 465.
General denial puts in issue, what, § 437.
General denial, when sufficient, § 437.
Generally, § 437.
Genuineness of instruments, how controverted, § 448.
Genuineness of instruments, when admitted, §§ 447, 448.
Genuineness of instruments, when not admitted, § 449.
Information and belief, denial on, § 437.
In particular actions. See particular title.
Irrelevant, may be stricken out, § 453.
Joint debtor brought in after judgment, of, § 992.
Justice's court, in, § 852. See Justices' Courts, V.
Lost, how supplied, § 1045.
Material allegations in complaint, not controverted, deemed true, § 462.
Material allegations, what are, § 463.
New matter, may contain, § 437.
New matter in, deemed denied, § 462.
Objection not appearing on complaint, may be taken by, § 433.
Objections to complaint waived when, § 434.
Particular proceeding, in. See particular title.
Plea in abatement, § 430.
Pleading, as a, § 422.
Police court, in, oral or written, § 931.
Police court, when may be made, § 931.

ANSWER. (Continued.)
Redundant matter, striking out, § 453.
Served, must be, § 465.
Shall contain what, § 437.
Sham, may be stricken out, § 453.
Signature to, § 446.
Specific denial, when necessary, § 437.
Striking out sham and irrelevant answers, § 453.
Supplemental, when allowed, § 464.
Supplemental pleadings. See Supplemental Pleadings.
Time for, § 407.
Time for, allowing, after time limited by code, § 473.
Time for, extending, §§ 473, 1054.
Time, power of court to extend, § 1054.
Unverified complaint, general denial, § 437.
Variance, amendment, allowing, in case of, §§ 469, 470.
Verification of, § 446.
Verified complaint, failure to verify answer, § 446.
Verified complaint, specific denial necessary, § 437.
Waiver of objections not taken by, § 434.
Waiver of summons by, § 406.
What to contain, § 437.
Written instrument, setting out, in, §§ 448, 449.
Written instrument, when complaint sets forth, §§ 447–449.

APPEALS.
I. Parties to; code provisions govern.
II. Jurisdiction of supreme court; who may appeal, and in what cases may be taken.
III. Within what time to be taken.
IV. How taken; notice, undertaking, or deposit.
V. Questions, how presented for review; on transcript prepared by clerk; alternative method; record on appeal.
VI. Effect of appeal; stay of proceedings.
VII. Dismissal of appeal.
VIII. Hearing and review; preference; briefs.
IX. Judgment on; remedial powers; reversal.
X. Rehearing and hearing in bank.
XI. Costs and damages on appeal.
XII. Remittitur.
XIII. Appeals from inferior courts.
XIV. Miscellaneous.

I. Parties to; code provisions govern.
Appellant, definition of, § 938.
Appellant, who is, § 938.

APPEALS. I. Parties to; code provisions govern. (Continued.)
Judgment reviewable as code prescribes, § 936.
Order reviewable as code prescribes, § 936.
Parties, how designated, § 938.
Respondent, definition of, § 938.
Respondent, who is, § 938.

II. Jurisdiction of supreme court; who may appeal, and in what cases may be taken.
Accounts, order settling, § 963.
Any aggrieved party may appeal, § 938.
Attachment, orders relating to, § 963.
Attorney, judgment suspending, is reviewable, § 287.
Attorney or representative may appeal on death of party entitled to, § 941b.
Causes in which may be taken, § 963.
Debt or claim against estate, order for payment of, § 963.
Distribution of estate, order relating to, § 963.
Divorce, interlocutory decrees in, § 963.
Executor's or administrator's account, order settling, § 963.
Family allowance, order relating to, § 963.
Guardian's account, order settling, § 963.
Homestead, order on report of appraisers, § 963.
Homestead, order relating to, § 963.
Injunctions, orders relating to, § 963.
Interlocutory decrees in divorce, § 963.
Interlocutory decree in partition, § 963.
Interlocutory decree or order in suit to redeem, § 963.
Judgments from which may be taken, § 963.
Judgment, order vacating may be reviewed on appeal, § 663a.
Jurisdiction of supreme court, §§ 51, 52, 53, 963. See Supreme Court.
Legacy or distributive share, order for payment of, § 963.
Letters testamentary or of guardianship, orders relating to, § 963.
May be taken in what cases, § 963.
New trial, appeal from orders respecting, § 963.
New trial, order for, made by court without application of parties, § 662.
Orders from which may be taken, § 963.
Partition, orders in, § 963.
Place of trial, orders relating to change of, § 963.
Probate, orders in, § 963. See Wills.
Receiver, appeal from appointment of, § 963.
Sale or conveyance of realty, order relating to, § 963.
Special orders after final judgment, § 963.

APPEALS. II. Jurisdiction of supreme court; who may appeal, and in what cases may be taken. (Continued.)
Superior court, judgments on appeal to, what appealable, § 964.
Wills, orders or decrees relating to, § 963.
Who may appeal, § 938.

III. Within what time to be taken.

Alternative method, under. See post, V.
After rendition of judgment or order and before formal entry not to be dismissed, § 939.
Attachment, order respecting, § 939.
Attachment, within what time appeal to be taken to continue, § 946.
Change of venue, order relating to, § 939.
Evidence, time for appeal to review, § 939.
Final judgment, § 939.
Final judgment, orders after, § 939.
In various cases, § 939.
Injunctions, order respecting, § 939.
Interlocutory judgment, § 939.
Judgment on appeal from inferior court, § 939.
New trial, order relating to, time for appeal, § 939.
Partition, order respecting report of referee, § 939.
Receiver, order relating to, § 939.
Special order made after final judgment, § 939.
Where proceedings on motion for new trial are pending, § 939.
Within what time may be taken, § 939.

IV. How taken; notice, undertaking, or deposit.

Alternative method, under. See post, V.
Deposit in lieu of undertaking, §§ 940, 941, 948, 949.
Deposit, waiver of, § 948.
How taken, generally, § 940.
Notice of, § 940.
Notice of, appellant must furnish copy, §§ 950–952.
Notice of, filing and serving, § 940.
Notice of, need not be served on party defaulting or not appearing, § 650.
Notice of, time for, cannot be extended, § 1054.
Undertaking, attachment, on appeal from, § 946.
Undertaking, certificate of filing of or waiver of, § 953.
Undertaking, conditions of, § 941.
Undertaking, dispensing with or limiting, when appellant is executor, trustee, etc., § 946.
Undertaking, exception may be made to sureties, § 948.
Undertaking, exception to sureties, time for, § 948.
Undertaking, executor, official bond sufficient, § 965.
Undertaking, how certified, § 953.

APPEALS. IV. How taken; notice, undertaking, or deposit. (Continued.)
Undertaking, in cases not specified, § 949.
Undertaking, insufficient, dismissal, § 954.
Undertaking, insufficient, new bond, § 954.
Undertaking, justification of sureties, and time for, § 948.
Undertaking, justification of sureties, execution on failure of, § 954.
Undertaking, may be in one instrument or several, § 947.
Undertaking, necessary, unless waived, § 940.
Undertaking, new bond, justification of sureties and effect of failure to justify, § 950.
Undertaking, new bond, on loss or destruction of, § 954.
Undertaking, new bond on sureties becoming insufficient, § 950.
Undertaking, official bond of guardian sufficient, § 965.
Undertaking, requisites of, § 941.
Undertaking, sureties, judgment, where payable in specified kind of money, § 942.
Undertaking, sureties, stipulation for judgment against, in several amounts, § 942.
Undertaking, sureties, subrogation of, § 1059.
Undertaking, time of filing, § 940.
Undertaking, time to file, extension of, § 1054.
Undertaking to stay proceedings. See post, VI.
Undertaking, waiver of, §§ 940, 948.
Undertaking, where judgment directs payment of money, § 942.
Undertaking, where judgment directs delivery of documents or personalty, § 943.
Undertaking, where judgment directs appointment of receiver, § 943.
Undertaking, where judgment directs sale of personalty on foreclosure, § 943.
Undertaking, where judgment directs sale or delivery of realty, § 945.
Undertaking, where judgment for sale of mortgaged premises and payment of deficiency, § 945.

V. Questions, how presented for review; on transcript prepared by clerk; alternative method; record on appeal.

Affidavit, part of record on, § 661.
Alternative method, death of party entitled to appeal, right of attorney to take, § 941b.
Alternative method, effect of, § 941c.
Alternative method, notice, how entitled, § 941b.
Alternative method, notice need not be served on parties or attorneys, § 941b.

APPEALS. V. Questions, how presented for review; or transcript prepared by clerk; alternative method; record on appeal. (Continued.)

Alternative method, time for appeal where proceedings on motion for new trial pending, § 941b.
Alternative method, notice transfers cause to higher court without further action, § 941b.
Alternative method, notice to identify judgment, order or decree, § 941b.
Alternative method, notice, what to state, § 941b.
Alternative method, notice, within what time to file, § 941b.
Alternative method, provided for, § 941a.
Alternative method, taken by filing notice, § 941b.
Bill of exceptions, appellant must furnish, when, § 950.
Bill of exceptions. See Exceptions.
Certificate of clerk as to correctness of transcript, § 953.
Certification of undertakings and copies, § 953.
Copies, how certified, § 953.
Findings of referee, how reviewed, § 645.
Judgment, bill of exceptions from order vacating, how prepared, § 663a.
Judgment roll, what constitutes, § 670.
Judgment roll. See Judgment Roll.
Papers, dismissal for failure to furnish, § 954.
Papers to be used on appeal from judgment, § 950.
Papers to be used on appeal from judgment rendered on appeal, § 951.
Papers to be used on appeal from orders, except orders granting new trials, § 951.
Papers to be used on appeal from order granting new trial, § 952.
Record on, what constitutes, on appeal from order on motion for new trial, § 661.
Transcript by clerk and reporter, appeal on, in lieu of bill of exceptions, § 953a.
Transcript by clerk and reporter, briefs to print portions of the record referred to, § 953c.
Transcript by clerk and reporter, clerk to transmit to higher court, § 953c.
Transcript by clerk and reporter, court to require reporter to repair, § 953a.
Transcript by clerk and reporter, duty of reporter, § 953a.
Transcript by clerk and reporter, examination, approval and certification, § 953a.
Transcript by clerk and reporter, filing of, § 953c.
Transcript by clerk and reporter, need not be printed, § 953c.
Transcript by clerk and reporter, notice by clerk that it has been prepared and filed, § 953a.

APPEALS. V. Questions, how presented for review; on transcript prepared by clerk; alternative method; record on appeal. (Continued.)

Transcript by clerk and reporter, notice by clerk that it will be presented to judge, § 953a.
Transcript by clerk and reporter, notice itself transfers cause to higher court, § 941b.
Transcript by clerk and reporter, notice need not be served, § 941b.
Transcript by clerk and reporter, notice of filing and settlement, § 953a.
Transcript by clerk and reporter, notice to prepare, contents of, § 953a.
Transcript by clerk and reporter, notice to prepare, time to file, § 953a.
Transcript by clerk and reporter, part of judgment roll, § 953a.
Transcript by clerk and reporter, personal arrangement with reporter for compensation, § 953b.
Transcript by clerk and reporter, presentment to judge, § 953a.
Transcript by clerk and reporter, respondent may incorporate what papers, § 953a.
Transcript by clerk and reporter, specifying matters desired to be incorporated in, § 953a.
Transcript by clerk and reporter, stipulations to omit matters, § 953a.
Transcript by clerk and reporter, undertaking to pay cost of, § 953b.
Transcript by clerk and reporter, what may contain, § 953a.
Transcript by clerk and reporter, what papers may be incorporated, § 953a.

VI. Effect of appeal; stay of proceedings.

Action is deemed pending during, § 1049.
Alternative method of appeal, effect of, § 941c.
Attachment, undertaking to continue, § 946.
Authority of lower court where order directs sale of perishable property, § 949.
Effect of appeal, and the giving of security, § 946.
Effect of appeal from judgment that one was intruding into office or franchise, § 949.
Effect of appeal from order on motion for change of venue, § 949.
Effect of appeal from order that corporation permit inspection of books, § 949.
Effect of, on attachment, § 946.
Effect of, on power of court below, § 946.
Execution, property levied on, released by, § 946.
Judgment for delivery of documents or personalty, stay of, what necessary, § 943.
Lien of judgment ceases on appeal, § 671.

APPEALS. VI. Effect of appeal; stay of proceedings. (Continued.)
Releases property from levy unless undertaking filed, § 946.
Stay of judgment on, how affects lien of judgment, § 671.
Stay, perfection of appeal is not, in what cases, § 949.
Stay, perfection of appeal operates as, when, § 949.
Stay, what necessary where judgment directs execution of conveyance or other instrument, § 944.
Stays proceedings below, § 946.
Undertaking to stay deficiency judgment, § 945.
Undertaking to stay judgment appointing receiver, § 943.
Undertaking to stay judgment directing foreclosure of chattel mortgage, § 943.
Undertaking to stay judgment for delivery of documents or personal property, § 943.
Undertaking to stay judgment for payment of money, § 942.
Undertaking to stay judgment for sale or delivery of realty, § 945.
Undertaking to stay judgment of foreclosure and for payment of deficiency, § 945.
Undertaking to stay money judgment, affidavits of sureties, § 942.
Undertaking to stay money judgment, liability of sureties, § 942.
Undertaking to stay money judgment, requisites, § 942.

VII. Dismissal of appeal.
Effect of, as an affirmance of judgment or order, § 955.
For failure to furnish requisite papers, § 954.
Insufficient undertaking, § 954.
Insufficient undertaking, new undertaking, § 954.
Lost or destroyed bond, new bond, § 954.
New undertaking, justification of sureties and effect of failure to justify, § 954.
Not to be dismissed because taken after rendition of judgment or order and before formal entry, § 939.
Sureties becoming insufficient, § 954.
When will be dismissed, and when not, § 954.

VIII. Hearing and review; preference; briefs.
Appealable order or decision not reviewable on appeal from judgment, § 956.
Brief on appeal on transcript by clerk and reporter to print parts of record referred to, § 953c.
Contested election cases, preference given to, § 57.
Error not presumed prejudicial, § 475.

APPEALS. VIII. Hearing and review; preference; briefs. (Continued.)
Errors not affecting substantial rights disregarded, § 475.
New trial, order on motion, right to review on appeal from judgment, § 956.
Orders reviewable on appeal from judgment, § 956.
Probate proceedings, preference given, § 57.
Questions reviewable where alternative method of taking appeal adopted, § 941c.
Review of finding as to claims of mariners, § 826.
Review, what subject to, § 956.
What may be reviewed on appeal from judgment, § 956.

IX. Judgment on; remedial powers; reversal.
Certificate from supreme court to be attached to judgment roll, § 958.
Certifying judgment to court below, § 958.
Court may take what action, § 956.
Decision to be in writing, § 53.
Error disregarded unless substantial rights affected, § 475.
Judgment on appeal, certificate of, attachment or entry of, § 958.
Judgment, when becomes final, § 4.
Judgment. See Supreme Court.
Minute of judgment to be entered on docket in court below, § 958.
Modifying judgment on, § 957.
New trial, passing on question of law involved, § 53.
Order, judgment on, proceedings below, on receipt of certificate, § 958.
Powers of supreme court, §§ 53, 957.
Remedial powers of appellate court, §§ 53, 957.
Remedy of appellant on reversal where property sold on execution, § 957.
Reversal of judgment, restitution of rights, § 957.
Reversal, new action, within what time may be brought, § 355.
Reversal not decreed, except for substantial errors, § 475.
Reversal of judgment, rights of execution purchaser on, § 708.
Reversal of order appointing guardian, validity of acts, § 966.
Reversal of order appointing executor, validity of acts, § 966.
Reversal, restitution where property sold under execution, § 957.

X. Rehearing and hearing in bank.
Ordering case to be heard in bank, § 44.
Rehearing, § 44.

XI. Costs and damages on appeal.
Costs of, discretionary with court in what cases, § 1027.

APPEALS. XI. Costs and damages on appeal. (Continued.)
Costs on, how claimed and recovered, § 1034.
Costs on review, other than by appeal, § 1032.
Costs, prevailing party entitled to, § 1027.
Costs, what allowed as, § 1027.
Costs, where judgment is modified, § 1027.
Damages, when appeal for delay, §§ 957, 980.
Memorandum of, filing and serving, § 1034.

XII. Remittitur.

Certificate from supreme court attaching to judgment roll, § 958.
Certifying judgment to court below, § 958.
Judgment to be remitted to court from which appeal taken, § 53.
Minute of judgment to be entered on docket in court below, § 958.
Order, judgment on, proceedings of clerk on receiving certificate from supreme court, § 958.
Proceedings on, generally, § 958.
Remittiturs in transferred cases, § 56.

XIII. Appeals from inferior courts.

Bond, justification of sureties on, §§ 92, 978a.
Bond, time to file, § 978a.
Code, provisions of, applicable, § 980.
Code provisions not applying to appeals, § 959.
Costs, § 980.
Damages, where taken for delay, § 980.
Deposit in lieu of undertaking, § 978.
Dismissal, § 980.
Docket of justice of peace must contain receipt of notice of, § 911.
Docket of justice of peace to contain receipt of bond on appeal, § 911.
Fees, justice to pay fees collected to county clerk, § 981.
Fees, notice of appeal not to be filed until fees are paid, § 981.
Fees of county clerk to be paid before appeal effectual, § 981.
Fine for not transmitting papers, § 977.
Hearing, what may be used on, § 975.
How taken, §§ 92, 974.
Judgment, effect and enforcement of, § 980.
Judgment of superior court on, what appealable, § 964.
Justice's court, in. See, also, Justices' Courts. XXIII.
Notice, filed with justice's clerk, § 92.
Notice of, filing and serving, § 974.
Notice, what to state, § 974.
Objections made in justice's or police court, § 977.
Papers to be filed with justice's clerk, § 92.
Powers of superior court, § 980.

APPEALS. XIII. Appeals from inferior courts. (Continued.)
Proceedings in superior court on, § 980.
Provisions of code applicable, § 980.
Provisions of code not applicable, § 959.
Questions both of law and fact, action to be tried anew, § 976.
Questions both of law and fact, no statement necessary, § 976.
Questions of fact, action tried anew, § 976.
Questions of fact, no statement necessary, § 976.
Questions of law, hearing, what may be referred to on, § 975.
Questions of law, original statement stands where no amendment proposed, § 975.
Questions of law, statement, contents of, § 975.
Questions of law, statement, amendments to, § 975.
Questions of law, statement, settlement of, §§ 92, 975.
Questions of law, statement, time to file, § 975.
Relinquishment of property levied on where undertaking filed, § 979.
Statement and amendments, settlement of, §§ 92, 975.
Stay of proceedings, officers' fees, § 979.
Stay of proceedings on filing undertaking, § 979.
Supreme court, appeal to, from justice's court, § 964.
Sureties, exception to, and justification of, §§ 92, 978a.
Time for appeal, §§ 939, 974.
Transfer of papers, what papers to be transmitted, § 977.
Transmission of papers, § 977.
Transmission of papers, compelling the, § 977.
Trying cause anew, § 980.
Undertaking, requisites of, § 978.
Undertaking, notice of filing to be given, § 978a.
Undertaking, sureties on, adverse parties may except to, § 978a.
Undertaking, sureties, time to except to, § 978a.
Undertaking, sureties, justification of, § 978a.
Undertaking, sureties, effect of failure to justify, § 978a.
Undertaking, when to be filed, § 978a.
Who may make, § 974.

XIV. Miscellaneous.

Death pending, extension of time to sue, § 355.
Probate proceedings, appeals in. See Wills.

APPEARANCE.
Answer is, § 1014.
Attorney, appearance by, § 1014.

APPEARANCE. (Continued.)
Attorney, appearance by without authority, § 287.
Attorney, on accusation for removal, §§ 292, 293.
Bill of exceptions need not be served on party not appearing, § 650.
Cures defective service, § 582.
Defendant, of, equivalent to personal service, § 416.
Demurrer is, § 1014.
Effect of, where summons not issued or served, § 581a.
Infants. See Infants.
Insane persons. See Insane Persons.
Joint contract, appearance where one defendant appears or is served, § 406.
Justice's court, place of trial where defendant voluntarily appears, § 833.
Justice's court, in, time for, § 845.
Justices' courts, in. See Justices' Courts' XV.
Justices' courts in townships of two hundred and fifty thousand, appearance in, § 100.
Justice's court, trial in, when party fails to appear, § 884.
Justice's court, waiver of summons by, § 841.
Legislature, before. See Legislature.
Notice of, § 1014.
Notice need not be given defendant not appearing unless imprisoned, § 1014.
Notice to be given to party or his attorney after, § 1014.
Notice waived by, § 1306.
Proceedings to compel, in supplementary proceedings, § 715.
Summons, time for, to be inserted in, § 407.
Time for, § 407.
Time for where order of arrest on summons, § 845.
Trial of actions on, § 581a.
Vessels, actions against, who may appear and defend, § 821.
Waiver of findings by failure to appear, § 634.
Waiver of jury trial by failure to make, §§ 631, 883.
Waiver of summons by, §§ 406, 416.
What constitutes, § 1014.

APPELLANT.
Who is, § 936.

APPLICATIONS.
Repeated, for same order, forbidden, §§ 182, 183.

APPORTIONMENT.
Partition expenses, of, § 798.
Superior court, apportionment of business on extra session, § 67b.

APPRAISEMENT.
Appointment of appraisers at chambers, § 166.
Homestead, of, appeal from report, §§ 939, 963.

ARBITRATION.
Arbitrators, all must meet, but majority may act, § 1053.
Award, majority may agree upon, § 1053.

ARGUMENT.
Appeal, on. See Appeals, VIII.
Case may be brought before court for, when, § 665.
Entry of order reserving case for argument on special verdict, § 628.
Order of counsels', § 607.
Reserving case for, §§ 661, 665.

ARMS.
Exemption of arms, uniforms, and accouterments, § 690.

ARREST AND BAIL.
I. Arrest.
II. Bail.

I. Arrest.

Affidavit and order of arrest to be delivered to sheriff, and copy to defendant, § 484.
Affidavit for, §§ 481, 862.
Appearance, time for, where order of arrest on summons, § 845.
Arrested party, application by, for postponement of trial in justice's court, § 876.
Code prescribes only mode of, § 478.
Concealment, removal or disposal of personalty, as ground of, § 479.
Defendant, when subject to, § 479.
Embezzlement, for, § 479.
Entry of judgment in justice's court when defendant subject to, § 893.
Escape, liability of sheriff, § 501.
Execution, arrest on, § 682.
Filing order of arrest, return and copy of undertaking, § 492.
Fine or penalty, in action for, § 479.
Fraud, for, § 479.
Grounds for, § 479.
How made, § 485.
Joinder of action for, with action for injury to character or person, § 427.
Judgment debtor, of, §§ 682, 684.
Juror, to compel attendance, § 238.
Justice's court, in, §§ 861–865. See Justices' Courts, VIII.
Limit on right of, § 478.
Malicious, joinder of action with action for injury to character or person, § 427.
Manner of, prescribed by code, § 478.
Motion to vacate, § 503.
Motion to vacate, affidavit, § 503.
Motion to vacate, when granted, § 504.
Notice must be given defendant not appearing, who is under, § 1014.
Order for, when to be given defendant, § 484.
Order of, by whom made, § 480.
Order of, filing, § 492.
Order of, form of, § 483.

ARREST AND BAIL. I. Arrest. (Continued.)
Order of, undertaking of plaintiff, § 482.
Order of, when made, § 483.
Order, service of, § 484.
Order, to be given to sheriff, § 484.
Quo warranto, in, § 804.
Rescue of defendant, liability of sheriff, § 501.
Sheriff, liability of on escape, § 501.
Sheriff, returns, etc., § 492.
Supplementary proceedings, arrest of debtor when ordered, § 715.
Undertaking for, §§ 482, 862.
Usurpation of office, arrest of usurper, § 804.
Vacating arrest, §§ 503, 504.
When defendant about to leave state, § 479.
When defendant about to remove or dispose of property, § 479.
When property concealed or disposed of, § 479.

II. Bail.

Acceptance of undertaking by sheriff, § 492.
Acceptance, refusal by plaintiff to accept bail, § 492.
Acceptance, refusal, failure to serve notice of, operates as acceptance, § 492.
Allowance of, exonerates sheriff, § 496.
Allowance of, manner of, § 496.
Conditions of, § 487.
Defendant discharged on giving, § 486.
Delivery of undertaking to sheriff, § 492.
Deposit, certificate of, §§ 497, 498.
Deposit, defendant discharged on giving, §§ 486, 497.
Deposit, how applied or disposed of, § 500.
Deposit instead of bail, § 497.
Deposit, payment into court by sheriff, liability for default, § 498.
Deposit, substituting bail for, § 499.
Deposit, to be applied to satisfy judgment, § 500.
Deposit when bail reduced, § 497.
Exonerated by death or imprisonment of defendant, § 491.
Exonerated by surrender of defendant when, and when not, §§ 488, 489.
Exoneration by legal discharge of defendant from obligation, § 491.
Failure to object to, § 492.
Filing of undertaking, §§ 482, 492.
How given, § 487.
How proceeded against, § 490.
Judgment against sheriff, proceedings on, § 502.
Justification, § 494.
Justification, manner of, §§ 494, 495.
Justification, notice, § 493.
New undertaking when other bail given, § 493.
Qualifications of, §494.
Reduction, defendant may move for, § 503.

ARREST AND BAIL. II. Bail. (Continued.)
Reduction, motion for, affidavit, § 503.
Reduction, when granted, § 504.
Sheriff, liability of on escape, § 501.
Sheriff, proceedings on judgment against sheriff as bail, § 502.
Sheriff when liable as, and his discharge, § 501.
Substituting for deposit, § 499.
Sureties, liability of, § 487.
Surrender by defendant himself, § 488.
Surrender of defendant, time for, and how accomplished, §§ 488, 489.
Surrender of defendant by bail, §§ 488, 489.
Time to serve, notice of rejection of, § 492.
Undertaking of bail, provisions and conditions of, § 487.
Undertaking, original, sheriff to retain, until filed, § 492.
Undertaking, sheriff to file copy of with clerk of court, § 492.

ASSAULT.
Jurisdiction of justice's court, § 115.
Limitation of action for, § 340.

ASSEMBLY.
To present impeachments, § 37.

ASSESSMENT.
Claim and delivery, affidavit as to, in, § 510.
Costs of course in action involving, §§ 1022, 1024.
Limitation of action for stock sold for, § 341.
Limitation of action to contest, § 349.

ASSIGNMENT.
Bill or note, effect on defenses, § 368.
Chose, of, not to prejudice defense, §§ 368, 385.
Counterclaim not barred by, when, § 440.
Cross-demand not barred by, § 440.
Not to prejudice right of set-off, § 368.
Redemptioner to produce copy of, § 705.
Transfer of interest does not abate action, § 385.
Transfer of interest in action, proceedings on, § 385.

ASSISTANCE.
Execution, generally, § 682.
Writ of possession, right to, in suit to determine adverse claim, § 380.

ASSOCIATES. See Association.
Judgment against, binds joint property of associates, § 388.
Judgment binds individual property of parties served, § 388.
Judgment in action against, effect of, § 388.
May be sued under common name, § 388.
Summons, how served in suit against, § 388.

ASSOCIATION. See Associates.
Service on, § 411.

ASYLUMS.
Officer or attendant exempt from jury duty, § 200.

ATTACHMENTS.
I. Issuance, form, and contents.
II. Undertaking on.
III. What may be attached.
IV. Levy; property, how attached; lien of.
V. Garnishment.
VI. Claim of property; preferred claims.
VII. Release; discharge; judgment for defendant.
VIII. Sale of property; disposition of property or proceeds; increase or deficiency; collection of debts and credits.
IX. Inventory and return by sheriff.
X. Miscellaneous provisions.

I. Issuance, form, and contents.
Affidavit, amendment of, § 558.
Affidavit for, what to contain, § 538.
Amendment of writ, § 558.
Directed to sheriff, § 540.
Form of, § 540.
Justices' courts, in. See Justices' Courts, VIII.
Several writs may issue to different sheriffs or constables, § 540.
Time to issue, § 537.
When and in what cases may issue, § 537.
What writ to state, § 540.

II. Undertaking on.
Amendment of, § 558.
Amount of, § 539.
Delivered to defendant on judgment in his favor, § 553.
Exception to sureties, § 539.
Generally, § 539.
Justification of sureties, § 539.
Requisites, § 539.
Vacating, for failure of sureties to justify, § 539.

III. What may be attached.
Corporation, shares of stock may be attached, § 541.
Debts may be attached, § 541.
Exemption from. See Executions.
Vessels, attachment of. See Shipping.
What property subject to, § 541.

IV. Levy; property, how attached; lien of.
Attorney to give written instructions what to attach, § 543.

ATTACHMENTS. IV. Levy; property, how attached; lien of. (Continued.)
Credits, how attached, § 542.
Custody, personal property must be taken in, when, § 542.
Debts, how attached, § 542.
Exemption of property from. See Executions.
Growing crops, § 542.
Lien, attachment is, on realty, § 542a.
Lien ceases when judgment stayed on appeal, § 671.
Lien, duration of, § 542a.
Lien, extension of, § 542a.
Lien, proceedings on attachment barred after three years, § 542a.
Personal property, how attached, § 542.
Personal property not susceptible of manual delivery, how attached, § 542.
Personal property susceptible of manual delivery, how attached, § 542.
Real property, how attached, § 542.
Recorder to index attachment of realty, § 542.
Shares of stock, how attached, § 542.
Writ to be executed without delay, § 542.

V. Garnishment.
Credits on personalty in possession of third person, attachment of, § 543.
Debts and credits, how attached, § 542.
Examination of defendant, delivery of property to sheriff after, § 545.
Examination of defendant on oath, § 545.
Garnishee, citation to appear, § 545.
Garnishee, examination of, on oath, § 545.
Garnishee, liability of, § 544.
Garnishee not delivering up property, liability of, § 544.
Garnishee, service on, §§ 542, 543.
Memorandum of credits, garnishee to give, § 546.
Memorandum, party refusing, to pay costs, § 546.

VI. Claim of property; preferred claim.
Third person, property claimed by, how tried, § 549.

VII. Release; discharge; judgment for defendant.
Delivery of undertaking, property, or money to defendant, when judgment in his favor, § 553.
Discharge, at what time may be moved for, § 556.
Discharge, because improperly or irregularly issued, § 558.
Discharge, collection by sheriff, receipt of sheriff a discharge, § 547.
Discharge, defendant may apply for, wholly or in part, § 554.

ATTACHMENTS. VII. Release; discharge; judgment for defendant. (Continued.)
Discharge, grounds for, §§ 556, 558.
Discharge, motion because of irregularity, amendment, effect on motion, § 558.
Discharge, motion for, affidavit, counter-affidavit, and evidence, § 557.
Discharge, motion for, notice of, § 554.
Discharge, motion for, when may be made, §§ 554, 556.
Discharge on judgment for defendant, § 553.
Discharge, recording and indexing certified copy of order, § 559.
Judgment for defendant, what to be delivered to him, where no appeal perfected, § 553.
Release of, delivery of property and proceeds to defendant, § 554.
Release of, on giving undertaking, §§ 537, 554.
Release of, on real property, manner of, § 560.
Release of, on real property, recording, §§ 559, 560.
Release of, on realty, recording and indexing certified copy of order, § 559.
Release of, proceedings for, § 554.
Release of, proceedings for, before whom taken, § 554.
Release of property on judgment for defendant, § 553.
Release of, undertaking for, terms and conditions of, §§ 554, 555.
Release of, undertaking for, justification of sureties, §§ 554, 555.
Release of, undertaking of defendant, amount of, §§ 540, 555.
Release of, upon what terms granted, § 555.
Release of, when granted, §§ 554, 555.
Undertaking by defendant, when suit may be brought on, § 552.
Undertaking of defendant, amount of, § 540.

VIII. Sale of property; disposition of property or proceeds; increase or deficiency; collection of debts and credits.
Accounts collected, receipt of sheriff for, § 547.
Accounts may be collected without suit, § 547.
Balance due, execution for, §§ 550, 551.
Balance due, how collected, §§ 551, 552.
Credits attached, collection by sheriff, § 547.
Debts attached, collection by sheriff, § 547.
Delivery of property or proceeds to defendant when judgment satisfied, §§ 550, 551.
Judgment, sheriff to satisfy, out of proceeds, § 550.
Judgment, sheriff to satisfy, out of what property, § 550.

ATTACHMENTS. VIII. Sale of property; disposition of property or proceeds; increase or deficiency; collection of debts and credits. (Continued.)
Perishable property, how sold, § 547.
Perishable property, proceeds of, § 550.
Sale of property, manner of, § 548.
Sale of property, may be as under execution, § 548.
Sale of property, notice, §§ 548, 550.
Sale of property under execution, § 550.
Sale of property where interests of parties require, § 548.

IX. Inventory and return by sheriff.
Inventory, full, sheriff to make, § 546.
Inventory, how made, § 546.
Memorandum of property, §§ 545, 546.
Return of writ, manner of, § 559.
Return of writ, time for, § 559.
Return, what to state, § 546.

X. Miscellaneous provisions.
Appeal does not stay unless undertaking filed, § 946.
Appeal from order respecting, time for, § 939.
Appeal lies from order respecting, § 963.
Judgment for plaintiff, how satisfied, § 550.
Juror, compelling attendance by attachment, § 238.
Justice's court, attachment in, §§ 866–869. See Justices' Courts, VIII.
Recorder, how to index attachments, § 542.

ATTORNEY.
I. Admission; license; who may act as; disqualification; roll of attorneys.
II. Compensation of.
III. Appointment of.
IV. Change and substitution of; death of.
V. Duties and powers of.
VI. Removal or suspension.
VII. Miscellaneous provisions.

I. Admission; license; who may act as; disqualification; roll of attorneys.
Admission after examination, § 277.
Admission, certificate of, and license, § 277.
Admission, examination of candidates for, § 276.
Admission from other state or country, §§ 277, 279.
Admission, oath on, § 278.
Admission to practice law on diploma from college of law of St. Ignatius University, § 280b.
Admission on diploma from Hasting College of Law, § 280a.
Admission on diploma from Leland Stanford Junior University, § 280b.
Admission on diploma from San Francisco Law School, § 280b.

ATTORNEY. I. Admission; license; who may act as; disqualification; roll of attorneys. (Continued.)
Admission on diploma from University of Santa Clara, § 280b.
Admission on diploma from University of Southern California, § 280b.
Admission on diploma from Young Men's Christian Association Law College of San Francisco, § 280b.
Admission, qualifications for, § 275.
Admission, testimonials as to good moral character, § 276.
Admission, who may be admitted as, § 275.
Alien, declaration of intention to become citizen, § 275.
Contempt, practicing without license, § 281.
Disqualification, judge or justice having acted as, § 170.
Disqualification of county clerk to practice, § 171.
Disqualification of judge to practice, § 171.
Disqualification, receiver, attorney disqualified to be, when, § 566.
Disqualification, justice not to practice before another justice, § 103.
Examination of, § 276.
License, may practice without, in what courts, § 281.
License of attorney, §§ 277–279.
License, oath of attorney, indorsement of, on, § 278.
License, practicing without, is contempt, § 281.
License, practicing without, penalty for, § 281.
List of attorneys, clerks of district courts of appeal to transmit to supreme court, § 280.
Roll, attorney must sign, § 280.
Roll of, how kept, § 280.
Roll of, clerk of district courts of appeal to keep list of, § 280.
Receiver, disqualification of attorney to act as, § 566.
Roll of, striking name from, § 299. See post, VI.
What courts attorneys may practice in, § 277.
Who may act as, in justice's court, § 842.
Who may act as, in police court, § 281.
Who may not act as, in justice's court, § 96.

II. Compensation of.
Compensation of, left to parties, § 1021.
Fee as costs in action for wages in justice's court, § 924.
Fees in foreclosure suit, § 726.
Fees in partition, §§ 796, 798.
Fees, in partition proceedings as costs, § 763.
Fees where injunction vacated or dissolved in case involving waters, § 532.

ATTORNEY. (Continued.)

III. Appointment of.
Appointment of, to represent party in partition, § 763.
Partition, appointment of attorney in, § 763.

IV. Change and substitution of; death of.
Ceasing to act, notice to appoint substitute, § 286.
Death of attorney, notice to appoint substitute, § 286.
Removal of, notice to appoint substitute, § 286.
Right to change attorney, § 284.
Substitution, how made, § 284.
Substitution, notice of, § 285.

V. Duties and powers of.
Attachment, attorney may give written instructions what to attach, § 543.
Authority of, § 283.
Authority to acknowledge satisfaction of judgment, § 283.
Authority to bind client, § 283.
Authority to receive money, and discharge claim, § 283.
Death of party entitled to appeal, right of, to appeal, § 941b.
Duties of, generally, enumerated, § 282.
Jury duty, exempt from, § 200.
May practice in what courts, § 277.
Pleadings, subscribing and verifying, § 446.
Receiver, disqualification to act as, § 566.
Replevin, may require sheriff to take property in, § 511.
Retraxit, authority to enter, § 581.
Satisfaction of judgment by, § 675.
Service may be on, when, and when not, § 1015.
Service of intervention on, § 387.
Service on, for non-resident, § 1015.
Service on, manner of, § 1011.
Service where attorney has no known office in state, § 1015.
Stipulations of, § 283.
Verification of pleading by, § 446.
Waiver of jury by attorney, § 631.

VI. Removal or suspension.
Accusation, answer to, §§ 293, 294, 296.
Accusation, appearance to, § 293.
Accusation, citation to answer, § 292.
Accusation, contents of and what to recite, § 292.
Accusation, demurrer to, § 295.
Accusation, denial of, may be oral, without oath, § 295.
Accusation, objection, no particular form necessary, § 295.
Accusation, objection to or denial of, § 294.
Accusation, objection to, to be written, § 295.
Accusation, refusal to answer, proceedings on, § 297.

ATTORNEY. VI. Removal or suspension. (Continued.)
Accusation, service of, § 292.
Accusation, service by publication, when allowed and manner of, § 292.
Accusation, service of and answer to, § 292.
Accusation to be verified, § 291.
Accusation to be written, § 290.
Accusation, what must state, § 291.
Appearance after accusation, § 293.
Appearance, want of, proceedings on, § 293.
Appearing without authority, § 287.
Citation, § 292.
Conviction of crime, removal for, § 287.
Conviction of felony or misdemeanor, clerk to transmit copy of to supreme court, § 288.
Grounds for, § 287.
Judgment, §§ 297, 299.
Judgment on plea of guilty, § 297.
Judgment on refusal to answer, § 297.
Judgment reviewable on appeal by supreme court, § 287.
Lending name to another, removal for, § 287.
Notice to appoint substitute on removal or suspension, § 286.
Plea of guilty, proceedings on, § 297.
Proceedings, how instituted, § 289.
Proceedings taken upon information of another, when, § 289.
Proceedings, when to be taken by court, § 289.
Reference to take deposition, § 298.
Removal or suspension, order may be reviewed on appeal, § 287.
Removal or suspension, what courts may order, § 287.
Service where removed or suspended from practice, § 1015.
Striking name from roll, § 299.
Trial on denial of charges, § 297.

VII. Miscellaneous provisions.
Argument, order of, at trial, § 607.
Attendance of, on legislature, postponement of trial for, § 595.
Contempt for practicing without license, § 281.
Conviction of crime, certificate thereof to supreme court, § 288.
Death of, notice to appoint substitute, § 286.
Exemption from jury duty, § 200.
Exemption of property of, § 690.
Judge pro tempore, attorney may be selected to act as, § 72.
Legislature, continuance of trial during attendance of, attorney at, § 595.
Legislature, extension of time during attendance on, § 1054.
List of attorneys to be transmitted to supreme court, § 280.
Receiver, disqualification of attorney to act as, § 566.
Supreme court, attorneys of, who are, § 275.

ATTORNEY-GENERAL.
Election of, where prescribed, § 262.
May practice in what courts, § 277.
Need not verify pleadings, § 446.
Powers and duties of, prescribed by Political Code and Penal Code, § 262.
Usurping office or franchise, action by, against party, §§ 803–810. See Usurpation of Office.

AUCTION.
Bids. See Bids.
Execution, sale on, refusal of purchaser to pay, §§ 695, 696.
Execution sale to be at, § 694.
Partition sale to be at, § 775.
Sale of attached vessel at, § 824.

AUTHENTICATION.
Seal, affixing, to authenticated copies, § 153.

AWARD. See Arbitration.

B

BAGGAGE.
Sheriff may not interfere with, on attachment of vessel, § 820.

BAIL. See Arrest and Bail.

BAILIFF.
Of supreme court, provisions relating to, §§ 265, 266.

BANKRUPTCY.
Jurisdiction of superior court in cases of, § 76.
Jurisdiction of supreme court in cases of, § 52.

BANKS.
Dissolution. See Corporations.
Limitation of action against, for deposit, § 348.
Limitation of action for payment of forged or raised check, § 340.

BATTERY.
Jurisdiction of justice's court, § 115.
Limitation of action for, § 340.

BENEFICIARY.
Need not be joined as plaintiff, § 369.

BEQUESTS. See Wills.

BICYCLES.
Exemption of, § 690.

BID.
Execution sale, at, §§ 694–697.
Liability of sheriff, § 697.
Officer may refuse, when, § 696.
Refusal to pay, §§ 695–697.

BILL OF COSTS. See Costs.

BILL OF EXCHANGE. See Negotiable Instruments.
Complaint may be copy of, § 853.

BILL OF EXCEPTIONS. See Exceptions.

BILL OF PARTICULARS.
Account, items of, need not be pleaded, § 454.

BILL OF PARTICULARS. (Continued.)
Demand for, § 454.
Duty to furnish on demand, § 454.
Failure to furnish, evidence of, precluded, § 454.
Further, where ordered, § 454.

BLANKS.
Papers issued by justice of peace to be without, except subpœnas, § 920.

BOARD.
Majority may act, § 15.

BOARD OF SUPERVISORS.
Selection of jurors, § 204.

BOAT. See Shipping.

BOND. Surety; Undertaking.
Action on, justice's jurisdiction, § 112.
Administrator's. See Executors and Administrators, III.
Appeal. See Appeal, IV.
Appeal in justice's court, on. See Appeals, XIII; Justices' Courts, XXIII.
Approval by judge at chambers, § 166.
Chambers, judge may approve at, § 166.
City or town need not give, § 1058.
Claim of property, bond on. See Executions.
Commissioner's or elisor's, under sale on foreclosure, §§ 726, 729.
Copy of, as complaint in justice's court, § 853.
Corporation as surety, §§ 1056, 1057.
Court commissioner, power to take and approve, § 259.
Executor's. See Executors and Administrators, III.
Fraudulent conveyance, bond by grantee in suit to set aside. See Fraudulent Conveyances.
Indemnity. See Indemnity.
Injunction, bond on vacation or modification of, § 532.
Injunction, respecting waters, vacated, bond in case of, § 532.
Injunction, on. See Injunctions.
Issuance of for public improvements, taxpayer cannot enjoin, § 526a.
Justice's clerk, of, § 86.
Limitation in action on, § 340.
Municipalities need not give, § 1058.
New, failure to file, where sureties become insufficient, rights cease, § 1057.
New, may be required where sureties become insufficient, § 1057.
Not required of state, county, city, town, or officer, § 1058.
Officer need not give, in action in official capacity, § 1058.
Qualifications of sureties, § 1057.
Receiver, of. See Receivers.
Requisites of, in general, § 1057.
Sale of, bonds for public improvements cannot be enjoined, § 526a.
Several actions on, costs and disbursements in case of, § 1023.

BOND. (Continued.)
State or municipalities need not give, § 1058.
Surety companies. See Surety Companies.
Taxpayer cannot enjoin issuance or sale of for public improvements, § 526a.
Time to file, power to extend, § 1054.
Vacation or modification of injunction, bond on, § 532.

BOOKS.
Copies from, right to take. See Inspection of Writings.
Inspection may be ordered and copy taken, § 1000.
Inspection of, right of. See Inspection of Writings.
Judgment-book to be kept, § 668.

BOUNDARY.
Adverse possession, § 325.
Change of, succession of justices of peace, § 107.

BREACH OF PEACE.
Jurisdiction, § 115.

BREACH OF PROMISE.
To marry, sitting of court, private, § 125.

BRIDGES.
Cutting trees or timber to repair, damages, § 734.

BRIEFS.
On appeal. See Appeals, VIII.

BUILDING AND LOAN ASSOCIATION.
Exemption of shares of stock, § 690.
No limitation to action to recover money or property deposited with § 348.

BUILDINGS.
Exemption of building material, § 690.

BURNT OR DESTROYED RECORDS OR DOCUMENTS.
Nunc pro tunc order, papers filed under, effectual, § 1046a.
Proceedings to establish title, papers filed nunc pro tunc under order effectual, § 1046a.

BUSINESS.
Associates may be sued by common name, § 388.

C

CALENDAR.
Causes must remain on, till when, § 593.
Clerk must enter causes on, § 593.
Dropping causes from, § 593.
Injunction, preference of hearing and trial, § 527.
Restoring causes to, § 593.

CAPACITY.
Want of, a ground of demurrer, § 430.

CARRIER.
Vessels, liability of, on contract to carry, § 813.

CAUSE OF ACTION. See Actions.

CERTIFICATE.
Appeal, certificate to transcript, § 953.
Attorney's admission and license, of, §§ 277, 278.
Certified copies. See Certified Copies.
Clerk's, of jurors drawn, § 219.
Deposit, instead of bail, certificate of, § 497.
Execution sale, of, §§ 698, 699, 700a.
Phonographic reporter's competency, of, § 270.
Redemption, of, § 703.
Seal, to, § 153.
Service of summons, of, § 415.

CERTIFIED COPIES. See Certificate.

CERTIORARI. See Review.

CESTUI QUE TRUST. See Trusts.
Need not be joined as plaintiff, § 369.

CHALLENGE. See Jurors.

CHAMBERS.
Duty of sheriff to provide, § 144.
Power of court at, § 176.
Power of judges at, §§ 165, 166.
Writs and process, necessary, may be issued at, § 166.

CHANGE OF VENUE. See Place of Trial.

CHARITABLE ORGANIZATIONS.
Officers or employees of, exempt from jury duty, § 200.

CHATTEL MORTGAGE.
Undertaking on appeal from order of foreclosure, § 943.

CHECKS.
Limitations in action on forged or raised check, § 340.

CHIEF JUSTICE. See Supreme Court Justices.

CHILDREN. See Infant.

CHOSE IN ACTION.
Assignment of, not to prejudice defense, § 368.

CITATION.
Attorney, to answer accusation, § 292.
Garnishee, to, § 545.

CITIZEN.
Bailiffs and secretaries of supreme court shall be, § 265.
Justice of peace shall be, § 159.

CITY. See Municipal Corporation.

CITY AND COUNTY.
Action by or against, stipulation as to place of trial, § 394.
Transfer of actions by or against, § 394.
Venue of actions against, § 394.

CITY ATTORNEY.
Nuisance, may sue to abate, § 731.

CITY ATTORNEY. (Continued.)
Nuisance, city attorney and district attorney have concurrent right to abate, § 731.
Nuisance, to abate, when directed by supervisors, § 731.

CIVIL ACTION. See Actions.

CLAIM AND DELIVERY.
Affidavit for, must state what, § 510.
Affidavit for, necessary, § 510.
Affidavit for, when and where filed, § 520.
Affidavit misstating value does not bind sheriff or sureties, § 473.
Affidavit, who to make, § 510.
Agent, service of order on, § 512.
Agent, taking property from, § 512.
Alternative judgment in favor of plaintiff or defendant, § 667.
Answer, claim to be made before, § 509.
Application to be made party in action to recover personalty, § 389.
Claim of property, duty of sheriff, § 519.
Concealed property, how taken, § 517.
Costs of course allowed when, § 1022.
Costs when recovery less than three hundred dollars, § 1025.
Damages for detention, § 667.
Delivery to defendant, § 515.
Delivery to plaintiff, §§ 514, 515.
Delivery, when may be claimed, § 509.
Fees and expenses for taking and keeping, § 518.
Issues of fact, how tried in, § 592.
Judgment in action against sheriff or sureties should give real value, § 473.
Judgment in the alternative, for plaintiff or defendant, § 667.
Justice's court, in, § 870. See Justices' Courts, XVIII.
Justice's court, in, where to be brought, § 832.
Limitation of action of, § 338.
Notice, when and where filed, § 520.
Plaintiff, when may claim property, § 509.
Possession, duty of sheriff to take, § 512.
Property, how kept by sheriff, § 518.
Protection of plaintiff in possession after delivery to him, § 521.
Redelivery, defendant excepting to sureties cannot reclaim property, §§ 513, 514.
Redelivery, failure to claim, delivery of property to plaintiff, § 514.
Redelivery, undertaking, justification of sureties, § 515.
Redelivery, undertaking of defendant, § 514.
Redelivery, when defendant entitled to, § 514.
Requisition to sheriff to take property, § 511.
Service of copy of affidavit, notice and undertaking, upon whom and how made, § 512.
Service of order on defendant, § 512.

CLAIM AND DELIVERY. (Continued.)
Sheriff, duty of, to take possession, § 512.
Sheriff, fees of, § 518.
Sheriff, liability for defendant's sureties, § 515.
Sheriff, liability of, for plaintiff's sureties, § 513.
Sheriff, liability to third person, § 512.
Sheriff may show true value in action against him, § 473.
Sheriff's return, § 520.
Sheriff to retain property, pending justification of defendant's sureties, § 575.
Third person, claim of property by, § 519.
Third person, claim of property by, affidavit, § 519.
Third person, claim of property by, undertaking of plaintiff, § 519.
Third person, claim of property by, validity, § 519.
Time when delivery may be demanded, § 509.
Title, effect of judgment on, § 1908.
Undertaking, action on, sureties may show real value, § 473.
Undertaking of defendant, § 514.
Undertaking of plaintiff, exception to sureties, defendant cannot reclaim property afterwards, §§ 513, 514.
Undertaking of defendant, justification of sureties, § 515.
Undertaking of defendant, justification of sureties, failure of, § 515.
Undertaking of defendant, liability of sheriff for sureties, § 515.
Undertaking of plaintiff, § 512.
Undertaking of plaintiff, and proceedings in serving order, § 512.
Undertaking of plaintiff, exception to sureties, § 513.
Undertaking of plaintiff, exception to sureties, failure to make, waiver by, § 513.
Undertaking of plaintiff, qualification of sureties, § 516.
Undertaking of plaintiff where third person claims property, § 519.
Undertaking, responsibility of sheriff for plaintiff's sureties, § 513.
Undertaking, when and where filed, § 520.
Verdict in, requisites of, § 627.
Verdict in, what to find and assess, § 637.
When lies, § 509.
Who may maintain action, § 509.

CLAIM OF PROPERTY.
In attachment, § 549.
In execution, §§ 689, 694. See Execution.
In replevin, § 519.

CLAIMS.
Adverse, §§ 738–751. See Adverse Claim.
Preferred, claims for wages are, § 825.

CLERGYMEN.
Exemption of, from jury duty, § 200.

CLERK.
Absence of judge, duty in case of, § 139.

CLERK. (Continued.)
Appeal, notice to clerk on, § 953a.
Appeal, transmission of record on, § 953c.
Calendar, entry of causes of, § 593.
Certified list of jurors to be filed with, § 208.
County clerk. See County Clerk.
Deposit in court, duties of. See Deposit in Court.
Election of, where prescribed, § 262.
Judgment, to enter, § 664.
Judgment, time to enter, § 664.
Judgment-book to keep, § 668.
Judgment-docket, to keep, §§ 671–673.
Judgment roll, to make up, § 670.
Jury, drawing of, §§ 215, 219.
Justice's, § 86–97. See Justice's Clerk.
Must enter causes on calendar, § 593.
Must indorse on complaint, what, § 406.
Must keep register of actions, § 1052.
Partition sale, to invest proceeds of, § 789.
Partition sale, duty of, on investment, § 791.
Register of actions, to keep, § 1052.
Register of actions, what to be entered in, § 1052.
Roll of attorneys, to keep, § 280.
Seal of court, to keep, § 152.
Service may be made on, when, § 1015.
Supreme court, election of, § 262.
Supreme court, of, § 262.
Testimony, to take, when no shorthand reporter, § 1051.

CLOSED DOORS.
Trial with, § 125.

CLOUD ON TITLE. See Quieting Title.
Parties in action to remove, § 381.

CODE OF CIVIL PROCEDURE.
Action pending, how affects, § 8.
Amendment of, § 19.
Cited, enumerated, etc., how, § 19.
Construction of provisions in derogation of common law, § 4.
Construction of provisions similar to existing laws, § 5.
Construction of words and phrases, § 16.
Construction of. See Construction.
Construed liberally, § 4.
Continuation of existing statutes, § 5.
Divided into four parts, § 1.
Establishes law on subjects to which it relates, § 4.
Forms and rules of pleading prescribed by, § 421.
Is continuation of statutes and common law, § 5.
Justice's court, sections applicable to, § 925.
Limitation statute, how code affects, § 9.
No statute continued in force because consistent with, § 18.
Not retroactive, § 3.
Office, repeal of, by code, § 7.
Penal Code, provides for prosecution of criminal action, § 31.

CODE OF CIVIL PROCEDURE. (Continued.)
Private statutes not repealed by, § 18.
Repeal by, does not affect existing rights, § 18.
Repeal by, does not revive former laws, § 18.
Repealing effect, § 18.
Retroactive effect, § 3.
Rights existing or accrued not affected by, § 18.
Rights not affected by, § 8.
Statutes consistent with, effect on, § 18.
Statutes in derogation of common law, construction of, § 4.
Statutes not expressly continued in force repealed by, § 18.
Statutes repealed by, § 18.
Tenure of office, how affected by, §§ 6, 7.
When takes effect, § 2.
Words in, construction of. See Words and Phrases.

CODICIL.
Will includes, § 17.

COLOR OF TITLE. See Adverse Possession.

COMMISSION.
To take testimony. See Deposition.

COMMISSIONER. See Court Commissioner.
Findings of, force and effect of, § 644.
Findings, judgment on, § 644.
Foreclosure, suits for, commissioners in, § 726.
Insurance. See Insurance Commissioner.

COMMON LAW.
Code continuation of, § 5.
Statutes in derogation of, construction of, § 4.

COMPENSATION. See Salary.
Attorney's generally, § 1021. See Attorneys, II.
Commissioner's at foreclosure sale, § 729.
Elisor's, for summoning jurors, § 228.
Judge presiding over extra session of superior court, § 67b.
Partition proceedings, in. See Partition.
Referees, § 1021.

COMPLAINT. See Justices' Courts; Pleading.
Action commenced by filing, § 405.
Action commenced when filed, § 350.
Allegations, material, not controverted, deemed true, § 462.
Allegations, material, what are, § 463.
Amended, answer to, § 472.
Amended, filing and service of, § 472.
Amended, in partition, § 761.
Amended of course, § 472.
Amendment of, §§ 472, 473. See Amendment.
Answer to, shall contain what, § 437. See Answer.

COMPLAINT. (Continued.)
Boats, in actions against, §§ 814, 815.
Causes of action to be separately stated, § 427.
Cloud on title, § 738.
Conditions precedent, § 457.
Contains what, § 426.
Death, § 385.
Default of defendant, judgment cannot exceed amount demanded, § 580.
Defective heading, § 1046.
Demand for inspection of instruments and refusal of, § 449.
Demurrer, sustaining, time to amend, § 476.
Demurrer to, §§ 422, 430, 431.
Demurrer to. See Demurrer.
Description of real property, in ejectment, § 455.
Ejectment, in, description of property, § 455.
Fictitious name, when party may be sued by, § 474.
First pleading of plaintiff, § 425.
Genuineness of instruments, how controverted, § 448.
Genuineness of instruments in, when admitted, § 447.
Genuineness of instrument, when not admitted, § 449.
In particular actions. See particular title.
Indorsed, how, § 406.
Indorsement on by clerk of day, year and month of filing, § 406.
Joinder, what actions may be joined, § 427.
Judgment roll as part of, § 670.
Justice's court, in. See Justices' Courts, V.
Libel, how stated in, § 460.
Liberally construed, § 452.
Lost, how supplied, § 1045.
Material allegations not controverted taken as true, § 462.
New matter in answer deemed denied, § 462.
Objection not appearing on, may be taken by answer, § 433.
Objections to, what cannot be waived, § 434.
Objections, when deemed waived, § 434.
Particulars of claim, § 454.
Partition,in, § 753.
Pleading, as a, § 422.
Police court, in, §§ 929–931.
Quo warranto, in, requisites, § 804.
Service of, copy to be served on each defendant, § 410.
Service of, with summons, § 410.
Ships, in actions against, §§ 814, 815.
Signature to, § 446.
Slander, how stated in, § 460.
Statement of cause of action, how made, § 426.
Statutes pleaded how, § 459.
Supplemental, in partition, § 761.
Supplemental, when allowed, § 464.

COMPLAINT. (Continued.)
Time, power of court to extend, § 1054.
Variance, amendment, §§ 469, 470.
Verification not necessary where state, county, or officer a party, § 446.
Verification of, § 446.
Verification of. See Verification.
Verified, in action against ship, § 815.
What to contain, § 426.
Written instruments, demand for inspection, § 449.

COMPOUNDING.
See Compromise.

COMPROMISE.
Costs on offer of, § 997.
Guardians or guardians ad litem, authority to compromise claim, § 372.
Judgment, entry of, on acceptance of offer, § 997.
Offer of, as evidence, §§ 895, 997.
Offer of, before trial in justice's court, and its effect, § 895.
Offer of, how made, and its effect, § 997.
Receiver may, § 568.

COMPUTATION.
Of time § 12.
Superior judge of years of office of, § 69.

CONCEALED.
Defendant, service, how made on, § 412.
Property, possession of, how demanded, § 517.

CONCLUSIONS OF LAW. See Court Commissioners; Findings; Reference.
Erroneous, vacation of judgment, §§ 663, 663½.

CONCURRENT JURISDICTION.
Justices' courts and superior courts, § 113.
Justices' courts and superior courts, in cases of forcible entry, § 113.

CONDITIONS.
Precedent, how pleaded, §§ 457, 459.

CONDUCTOR.
Exempt from jury duty, § 200.

CONFESSION OF JUDGMENT. See Justices' Courts, XX.

CONFLICTING CLAIMS.
Quieting title to. See Quieting Title.

CONFLICT OF LAWS.
Attachment, § 537.
Injunction to stay proceedings in foreign state, § 526.
Limitation of actions, § 361.

CONSANGUINITY. See Affinity.
Judge or justice, as disqualifying, § 170.
Juror, as disqualifying, § 602.
Receiver, as disqualifying, § 566.
Referee, as disqualifying, § 641.

CONSENT.
Waiver of findings by, § 634.
Waiver of jury by, § 631.

CONSENT. (Continued.)
Want of, reference ordered on motion when, § 639.

CONSOLIDATION.
Of actions, when may be ordered, § 1048.

CONSTABLES.
Attorney, constable may not act as, in justice's court, § 842.
Exemption of property of, § 690.
Limitation of action against, § 339.

CONSTITUTION.
Attorneys to support, § 282.

CONSTRUCTION.
Code continuation of statutes and common law, § 5.
Code liberally construed, § 4.
Code, of, rules of, §§ 4, 5, 7.
Code, of. See Code of Civil Procedure.
Instruments. See Contracts.
Particular words. See Words and Phrases.
Phrases, of, § 16. See Words and Phrases.
Pleadings, liberally construed, § 452.
Statutes in derogation of common law, § 4.
Statutes, of. See Statutes.
Technical words and phrases, of, § 16.
Words, as to tense, gender, number, § 17.
Words, of, § 16. See Words and Phrases.
Words, particular, in code, § 17. See Words and Phrases.

CONSTRUCTIVE NOTICE. See Notice.

CONSTRUCTIVE SERVICE.
Service by publication. See Summons.

CONTEMPT.
Attorney, practicing law without license, § 281.
Disobedience of order for inspection of writings, § 1000.
Justice's court, in, §§ 906–910. See Justices' Courts, XVII.
Non-residents, service of papers, § 1015.
Power of judicial officer to punish for, § 178.
Practicing law without license, § 281.
Repeated applications for orders, § 183.
Second application for order a, § 183.
Service of process in, §§ 1015, 1016.
Subsequent applications for orders refused by another judge, § 183.
Supplementary proceedings, disobeying orders in, § 721.
Writings, disobedience to order for inspection of, § 1000.

CONTINUANCE.
Absence of attorney, § 595.
Absence of evidence, showing required, § 595.
Absence of judge, proceedings on, § 139.
Absence of party, § 595.
Absence of witness, admission as to testimony, § 595.
Absence of witness, affidavit, what to state, § 595.
Absence of witness, procedure, § 595.

CONTINUANCE. (Continued.)
Adjournment. See Adjournment.
Affidavit for, § 595.
Attorney, party or witness attending on legislature, § 595.
Costs may be imposed as condition of, § 1029.
Deposition of witnesses may be taken on, § 596.
Depositions taken on, as evidence, § 596.
Jury, continuance of cause when jury required, § 214.
Jury, demand of, continuance of cause, § 214.
Justice's court, §§ 873–877. See Justices' Courts, XIII.
Legislature, attendance of attorney, party, or witness on, § 595.
Mining property, continuance of action involving, to do development work, § 595.
Order refusing deemed excepted to, § 647.
Partition, continuance in, for purpose of determining respective claims, § 774.
Temporary restraining order, continuance of hearing, § 527.

CONTRACTS.
Adverse claim arising out of, action to determine, § 1050.
Arrest, defendant when subject to, in action on, § 479.
Attachment, when ground for, § 537.
Breach of, not enjoined where not specifically enforceable, § 526.
Issues of fact, how tried in actions arising out of, § 592.
Joinder of actions arising out of, § 427.
Joinder of persons severally liable, § 383
Joint. See Joint Contracts.
Limitation of action on unwritten, § 339.
Limitation of action on written, § 337.
Limitation of action on written, executed out of state, § 339.
Obligation arises from contract or operation of law, § 26.
Obligation, definition, § 26.
Seal. See Seal.
Set out in answer, when deemed admitted, § 448.
Several actions on, costs and disbursements in case of, § 1023.
Specific kind of money, contract payable in, § 667.
Successive actions on, § 1047.

CONTRIBUTION. See Surety.
Judgment debtors, among, right of, § 709.
Judgment debtors, contribution among, how enforced, § 709.

CONVEYANCE. See Deeds.

CONVICTION.
Attorney, conviction of crime, proceedings on, § 288.

COPARCENERS.
Any number may sue or defend for all, §§ 381, 384.
Joinder of, as parties, §§ 381, 384.

COPARCENERS. (Continued.)
Parties in suits concerning, §§ 381, 384.
Partition. See Partition.

COPY.
Amendments, copies to be served, § 432.
Demanding, of writing, § 1000.
Lost paper, of, when may be used, § 1045.
Lost pleading or paper, supplied by copy, § 1045.
Record, copy requires seal, § 153.
Writing, demanding copy of, § 1000.
Writing, pleadings, effect of setting forth in, §§ 447–449.

CORONER.
Election of, where prescribed, § 262.
Limitation of action against, § 339.
Powers and duties of, prescribed by Political Code and Penal Code, § 262.

CORPORATION.
Appeal from order directing inspection of books, etc., as a stay, § 949.
Attachment of stock, §§ 541, 532.
Dissolution, receiver, at whose instance appointed, § 565.
Dissolution, receiver, duties of, § 565.
Dissolution, receiver of, when appointed, §§ 564, 565.
Execution, stocks, etc., subject to, § 688.
Foreign, new or additional security for costs, § 1036.
Foreign, publication of summons, §§ 412, 413.
Foreign, security for costs, § 1036.
Foreign, security for costs, dismissal where not given, § 1037.
Foreign, security for costs may be required, § 1036.
Foreign, security for costs, stay until filed, § 1036.
Foreign, security for costs, time to give, § 1037.
Foreign, service of summons on, § 411.
Injunction to suspend business of, necessity of notice, § 531.
Juror, relationship to officer of corporation as a disqualification, § 602.
Limitation of actions against directors and stockholders, § 359.
Limitation of action to recover stock sold for delinquent assessment, § 341.
Proceedings against corporation unlawfully exercising franchise, § 803.
Quo warranto, § 803.
Receiver for, on insolvency or forfeiture, § 564.
Receiver upon dissolution of, §§ 564, 565.
Shares in corporation, how levied on, § 688.
Stock and interest in, subject to execution, § 688.
Stock, attachment of, §§ 541, 542.
Stock sold for delinquent assessment, limitation of action to recover, § 341.
Stockholders, limitation of actions against, § 359.
Summons, publication, §§ 412, 413.
Summons, service on, § 411.

CORPORATION. (Continued.)
Surety, corporation as. See Surety.
Surety or guarantor, as, §§ 1056, 1057.
Usurpation of franchise by, action against, § 803. See Usurpation of Office or Franchise.
Verification of pleading by officer of, § 446.
Verification, who may make, § 446.

COSTS.
Actions expressly authorized by statute, costs in, § 1031.
Affidavit of, § 1033.
Allowance of, authorized, § 1021.
Allowed defendant, of course, in what actions, § 1024.
Allowed plaintiff, of course, in what actions, § 1022.
Amendment for variance, costs on, §§ 469, 470.
Amendment, imposition of terms on allowance of, §§ 473, 859.
Amendment of pleading, of course, without, § 472.
Amount of recovery as determining right to, §§ 1022, 1025.
Answer, after time, imposition of terms, § 473.
Answer, imposing costs, on allowance of, § 472.
Answer, sham, on striking out, § 453.
Appeal, frivolous, on, §§ 957, 980.
Appeal, of, discretionary with court in what cases, § 1027.
Appeal, on, execution therefor, § 1034.
Appeal, on, how claimed and recovered, § 1034.
Appeal, on, memorandum of, filing and service, § 1034.
Appeal, on, memorandum, verification, § 1034.
Appeal, on review of special proceedings other than by appeal, § 1032.
Appeal, remittitur, costs after, § 1034.
Appeal to superior court, on, § 980.
Appeal, on. See, also, Appeals, XI.
Apportionment of, § 1025.
Assessment, action involving validity, §§ 1022, 1024.
Attachment, on refusal to give memorandum, § 546.
Attorneys' fees, in action in justice's court for wages, § 924.
Attorneys' fees, in foreclosure, § 726.
Attorneys' fees, in injunction suits, § 532.
Attorneys' fees, in partition, §§ 763, 796, 798.
Attorneys' fees. See Attorneys, II.
Bill of, contents of, § 1033.
Bill of, filing and serving, time for, § 1033.
Bill of, motion to tax, § 1033.
Bill of, notice of motion to tax, time to file, § 1033.
Bill of, verification of, §§ 1033, 1034.
Change of venue in justice's court, costs on, § 836.
Change of venue, who to pay, § 399.

COSTS. (Continued.)
Compromise, costs when offer of, rejected, §§ 895, 997.
Continuance, costs may be imposed as a condition of, § 1029.
Corporation, non-resident, undertaking for costs, § 1036.
County, against, how paid, § 1039.
Damages, costs in actions for, §§ 1022, 1025.
Default judgment includes, § 585.
Defendant, allowed, of course, in what actions, § 1024.
Defendants, several, not united in interest, costs, § 1026.
Discretionary, are, in what cases, §§ 1025, 1027.
Execution purchaser refusing to comply with bid, liability for, § 695.
Executors, actions by and against, §§ 1031, 1059.
Fees of referee, amount of, § 1028.
Fees of shorthand reporters, § 274.
Fine, municipal, action involving validity of, §§ 1022, 1024.
Foreclosure suit, in, § 726.
Frivolous appeal, on, §§ 957, 980.
Garnishee refusing to give memorandum of credits subject to, § 546.
Judgment by default, allowance of, § 585.
Judgment, costs to be included in, § 1035.
Judgment, insertion of, in, § 1035.
Judgment, relief from, imposition of terms, §§ 473, 859.
Justice's court, in, included in judgment, § 896.
Justice's court, in, on amendment of pleadings, § 859.
Justice's court, in, prevailing party entitled to, § 924.
Justice's court, in, where offer of compromise, § 895.
Justice's court, in, §§ 91, 896, 924. See Justices' Courts, XXII.
Money, costs in action for recovery of, §§ 1022, 1025.
Non-resident plaintiff a foreign corporation, undertaking for, § 1036.
Nonsuit, on, § 581.
Of course, to defendant, in what cases, § 1024.
Of course, to plaintiff, in what cases, § 1022.
Partition, in, §§ 768, 769, 771, 796, 799. See Partition.
Partition, of, a lien on shares of parceners, § 796.
Plaintiff allowed, of course, in what actions, § 1022.
Poor litigants, waiver of fees, § 91.
Postponement of trial, on, § 1029.
Quiet title, not allowed on default or disclaimer, § 739.
Quo warranto, in, § 809.
Real estate, actions involving title to or possession of, §§ 1022, 1024.
Real property, in action for recovery of, §§ 1022, 1024.
Referee's fees, §§ 768, 1028.

COSTS. (Continued.)
Remittitur, filing costs after, § 1034.
Review of special proceedings, other than by appeal, on, § 1032.
Security, additional or new, or non-resident or a foreign corporation, § 1036.
Security for, in justices' courts, § 923.
Security not given for, action dismissed, § 1037.
Security, time to give for, § 1037.
Security, when plaintiff non-resident or a foreign corporation, § 1036.
Security where plaintiff non-resident or a foreign corporation, stay until given, § 1036.
Separate defenses, costs in case of, § 1026.
Several actions brought on single cause, carry costs in but one, § 1023.
Several defendants not united in interest, costs, § 1026.
Sham answer, costs on striking out, § 453.
Shorthand reporter, fees of, § 271.
Special proceedings, costs of course in, §§ 1022, 1024.
Special proceedings, costs of review of, other than by appeal, § 1032.
State, awarded against, how paid, § 1038.
Statute, costs in actions expressly authorized by, § 1031.
Tax, impost, or assessment, action involving validity, §§ 1022, 1024.
Tender, how affects, § 1030.
Three hundred dollars, not allowed when recovery less than, § 1025.
Transfer of action to another court, for, § 399.
Trustees, in actions by and against, § 1031.
Undertaking, additional, when plaintiff non-resident, § 1036.
Undertaking, when plaintiff non-resident or foreign corporation, § 1036.
Usurpation of office or franchise, costs in action for, §§ 809, 810.
Verification of memorandum of costs, § 1033.
Wages, attorneys' fees as in actions for in justices' courts, § 924.
When allowed in discretion of court, § 1025.
When tender made before suit, § 1030.

CO-TENANTS.
Any number may sue or defend for all, §§ 381, 384.
Parties, claimants under common source of title may unite, § 381.
Parties in suit concerning, §§ 381, 384.
Partition and disribution of estates of decedents. See Estates of Decedents.
Partition, may sue for, § 752.
Partition, §§ 752–801. See Partition.
Waste, liability for, § 732.

COUNSEL. See Attorney.

COUNTERCLAIM.
Answer may contain as many counterclaims as defendant may have, § 441.
Answer to contain, § 437.
Assignment, when does not bar, § 440.

COUNTERCLAIM. (Continued.)
Basis for, what is, § 438.
Controverted, allegations are deemed, when, § 462.
Cross-complaint. See Cross-complaint.
Cross-demand, when deemed compensated, § 440.
Cross-demand. See Cross-demand.
Death, when does not bar, § 440.
Deemed denied, § 462.
Demurrer to, and grounds of, §§ 443, 444.
Demurrer to, time to file, § 443.
Dismissal in case of, § 581.
Judgment when affirmative relief demanded, § 666.
Judgment when counterclaim exceeds plaintiff's demand, § 666.
Jury must find amount of recovery when, § 626.
Justice's court, in, §§ 855, 856, 886. See Justices' Courts, VI.
Misjoinder, demurrer for, § 444.
Must arise out of what transaction or obligation, § 438.
Omission to set up, effect of, §§ 439, 856.
Separately stated, must be, § 441.
Transaction which must arise out of, § 438.
Verdict on counterclaim for money to find amount, § 626.
Waiver by failure to set up, §§ 439, 856.
What constitutes, § 438.
When to be set up, § 438.

COUNTY.
Actions affecting, transfer of, to another, county, § 394.
Actions affecting, where brought, § 394.
Bond, need not give, in action, § 1058.
Change in boundary, succession of justice, § 107.
Complaint must show where filed, § 426.
Costs against, how paid, § 1039.
Enjoining illegal expenditures or waste by officers, § 526a.
Includes city and county, § 17.
Injunction by, undertaking not required, § 529.
Limitation in actions on claims rejected by supervisors, § 342.
New, justice has authority of predecessor, § 916.
Officers of, exempt from jury duty, § 200.
Summons, service of on, § 411.
Summons must state where complaint filed, § 407.
Venue, action brought in wrong county, change of, § 396.
Venue, action brought in wrong county, trial of, § 396.
Venue of actions by or against, § 394.
Venue of action by or against city and county, § 394.
Verification of pleadings by, § 446.
Verification not necessary where action is by, § 446.

COUNTY CLERK.
Authenticated copy of documents, seal necessary to, § 153.

COUNTY CLERK. (Continued.)
Certified list of jurors, to be placed with, § 208.
Deposit in court, duties of. See Deposit in Court.
Disqualification to practice law, § 171.
Duty of, as to list of jurors, § 209.
Election of, where prescribed, § 262.
Fees of, prepayment of on appeal to superior court, § 981.
Investment in name of, of proceeds in partition sale, § 789.
Investment in name of, of proceeds of partition sale, duty of, § 791.
Law partner, cannot have, § 171.
Service may be made on, when, § 1015.
See Clerk.

COUNTY COURT.
Transfer of books, records, and actions to superior court, § 79.

COUNTY TREASURER. See Treasury.
Deposit in court must be paid to, § 573.

COURSE OF PROCEEDING.
When code does not specifically provide for, §187.

COURT COMMISSIONER.
Appointment, § 258.
Compensation of, §§ 259, 729.
Death of, elisor to execute deed, § 726.
Fees of, §§ 259, 729.
Findings, exceptions to, § 645.
Foreclosure, appointment of, on, § 726.
Law partner, cannot have, § 172.
May not grant injunction, § 259.
Not to have partner practicing law, § 172.
Number of commissioners, § 258.
Oath of, on foreclosure, § 729.
Powers of, § 259.
Powers of, limitation on, § 259.
Qualifications, § 258.
Reference may be made to. See Reference.
Reference to, report to be made within twenty days, § 643.
Report, findings of fact, and conclusions of law, separately stated, § 643.
Report of conclusions, § 259.
Report of conclusions, exceptions to, § 259.
Review of finding, §§ 259, 645.
Sale, report of, § 729.
Sale under foreclosure, fees on, § 729.
Seal of, § 259.
Seal, authentication of act with, § 259.
Undertaking of, on foreclosure, § 729.

COURT REPORTER. See Phonographic Reporters.

COURTS.
Abbreviations, use of, § 186.
Absence of judge, proceedings in case of, § 139.
Adjournment for absence of judge, § 139.
Adjournment for holidays, § 135.
Adjournment of, while jury out, § 617.
Always open for what purposes, §§ 73, 134, 617.

COURTS. (Continued.)
Breach of promise of marriage, private sittings in actions for, § 125.
Calendar, § 593. See Calendar.
Chambers, powers at. See Chambers.
Change in place of holding, §§ 142–144.
Change in place of holding, parties must appear, § 143.
Change in place of holding, when judge may order, § 142.
Classification of, § 33.
Contempt in justice's court. See Justices' Courts, XVII.
Criminal conversation, private sitting in action for, § 125.
Days on which, may be held, § 133.
Days on which, may not be open, § 134.
Decision of, facts found and conclusions of law must be stated separately, § 633.
Decision of on question of fact, filing, § 632.
Decision of, on question of fact must be written, § 632.
Decision, time for giving, § 632.
Deposit in court. See Deposit in Court.
Divorce, private sitting in actions for, § 125.
Duties and powers incident to, §§ 128–130.
English, proceedings to be in, § 185.
Enumeration of courts of justice, § 33.
Extra sessions of superior courts. See Superior Courts.
Figures, use of, § 186.
Holidays, courts not open, except for what purposes, § 134.
Holidays, holding court on day following, § 135.
Impeachment, of judges. See Impeachment.
Injunction to stay proceedings in, when granted, and when not, § 526.
Issues triable by, §§ 591, 592.
Judges. See Judges.
Judicial days, §§ 133–135.
Judicial remedies defined and classified, §§ 20, 21.
Jurisdiction, means to carry into effect, § 187.
Jurisdiction of. See Jurisdiction.
Justice's. See Justices' Courts.
Motions refused for informality, second application, § 182.
Non-judicial days, § 134.
Non-judicial days, appointments on, § 135.
Oaths, power to administer, § 128.
Officers of, powers and duties prescribed by Political Code and Penal Code, § 262.
Order, refusal of, second application, § 182.
Orders. See Orders.
Place of holding, provisions respecting, §§ 142–144.
Police court, provided for in Political Code, § 121.

COURTS. (Continued.)
Power of, to which an action is transferred, § 399.
Power to amend and control process, § 128.
Power to compel attendance of witnesses, § 128.
Power to compel obedience to judgments, orders, process, § 128.
Power to control ministerial officers, § 128.
Power to enforce order, § 128.
Power to provide means to carry jurisdiction into effect, § 187.
Powers and duties incident to, §§ 128–130.
Probate. See Probate Court.
Process, power to amend and control, § 128.
Process. See Process.
Publicity of proceedings, §§ 124, 125.
Record, courts of, what are, § 34.
Records. See Records.
Reporter, §§ 268–274. See Phonographic Reporter.
Rooms, directing sheriff to provide suitable, § 144.
Rooms, suitable, provided by sheriff, expense, how payable, § 144.
Rules, power of court of record to make, § 129.
Rules, take effect when, § 130.
Rules of. See Courts; Rules.
Seal of, failure of supervisors to provide, order on sheriff, § 151.
Seal of, supervisors to provide, § 151.
Seal of, supervisors failure to provide, order on sheriff, § 151.
Seals, what courts shall have, § 147.
Seals of. See Seal.
Seduction, private sittings in actions for, § 125.
Sessions of, § 73. See Superior Court; Supreme Court.
Sittings, public, § 124.
Sittings, private, may be held in what cases, § 125.
Subsequent applications for orders refused, contempt, § 182.
Subsequent applications for orders refused, when prohibited, § 182.
Superior. See Superior Court.
Supreme. See Supreme Court.
Vacancy, proceedings not affected by, § 184.
What are the courts of justice, § 33.

COURTS OF IMPEACHMENT. See Impeachment.

CREDITORS. See Debtors.
Defrauding, arrest, § 479.
Receiver, appointment of, in action by, § 564.
Redemption, right of, §§ 701, 702.

CRIME.
Conviction of, as ground for removal of attorney, § 287.

CRIMINAL ACTION. See Actions.
Holidays, court may exercise powers of magistrate on, § 134.
Limitation of action on undertaking given in, § 340.
Penal Code provides for § 31.

CRIMINAL CONVERSATION.
Civil or criminal, actions are, § 24.
Sitting of court, private, § 125.

CRIMINAL LAW.
Holiday, court may act as magistrate on, § 134.
Imprisonment, effect on statute of limitations, § 352.
Juvenile court, § 131.
Jury, manner of impaneling, § 251.
Penal Code provides for prosecution of criminal action, § 31.
Probationary treatment of juvenile offenders, § 131.

CROSS-COMPLAINT.
Answer to, §§ 422, 442.
Counterclaim. See Counterclaim.
Cross-demand. See Cross-demand.
Demurrer to, §§ 422, 442.
Demurrer to answer to, §§ 422.
Necessary parties, to bring in, § 389.
One of defendants' pleadings, § 422.
Service of, § 442.
Summons must be issued and served on parties who have not appeared, § 442.
When proper, § 442.

CROSS-DEMAND. See Counterclaim; Cross-complaint.
Assignment does not bar, when, § 440.
Death of party does not affect, § 440.
Omission to set up, fatal, § 439.
When cross-demands deemed compensated, § 440.

CURRENCY.
Recovering specific, § 667.

CUSTODY.
Abstract of title in partition, custody of, § 799.

CUSTOM.
Local, governs actions concerning mining claims, § 748.
Mining customs, usages, or regulations, admissibility of, § 748.

D

DAMAGES.
Amount, stating in complaint, § 426.
Appeal, damages for delay, §§ 957, 980.
Complaint, stating amount in, § 426.
Costs in actions for, §§ 1022, 1025.
Death of human being, for, § 377.
Default, on judgment by, § 585.
Excessive, as ground for new trial, § 657.
Execution, recovery by purchaser at for injury to property, § 746.
Exemplary, unmarried female may recover, for seduction, § 374.

DAMAGES. (Continued.)
Forcible or unlawful entry or detainer, treble damages in, § 735.
Improvement, setting off value of, § 741.
Injunction respecting waters, vacated or modified when bond for damages given, § 532.
Issues of fact, how tried in action for damages, § 592.
Joinder of claims for, § 427.
Jury, when to be assessed by, on failure to answer, § 585.
Libel, § 461.
Must be claimed in complaint, § 426.
Neglect causing death, damages, § 377.
Neglect, damages for death caused by, limitation of action, § 339.
Nuisance, for, § 731.
Realty, for injury to, after execution sale and before delivery, purchaser may recover, § 746.
Replevin, in, for detention, § 667.
Seduction, for, § 374.
Sheriff, liability of, § 682.
Slander, § 461.
Treble, for waste, trespass, etc., §§ 732–735.
Treble, in forcible entry, § 735.
Trees or timber, cutting or carrying away, §§ 733–734.
Trespass, treble, in, §§ 733, 734.
Usurpation of office, for, § 807.
Waste, treble, for, § 732.
Wrongful death, for, § 377.

DAYS.
Holidays. See Holidays.
Judicial, §§ 133–135.

DEATH. See Estates of Decedents; Guardian and Ward.
Abatement of action by, § 385.
Action for, who may bring, §§ 376, 377. See Wrongful Death.
Adverse possession, effect of death on, § 327.
Attorney, of, notice to appoint successor, § 286.
Bail exonerated by death of defendant, § 491.
Child, of, who may sue for, § 376.
Continuance of action against successor or representative, § 385.
Counterclaim not barred by, when, § 440.
Court commissioner, appointment of elisor to execute deed, § 726.
Damages for, § 377.
Decision or verdict, death after, and before judgment, § 669.
Elisor, appointment to execute deed on death of commissioner, § 726.
Execution after, § 686.
Heirs may sue for, § 377.
Infant, who may sue for, and who liable, § 376.
Judge, of, settlement of bill of exceptions or statement in case of, § 653.
Limitation, effect of, §§ 327, 353, 355.

DEATH. (Continued.)
Limitation, extension of time to sue, §§ 353, 355.
Limitation of action for, § 340.
Negligence, caused by, who may sue for, § 377.
Negligence, child, death caused by, who may sue, § 376.
Partition, death pending proceedings, effect of and proceedings on, §§ 763, 766.
Party entitled to appeal, of, right of attorney or representative to appeal, § 941b.
Party, of, effect on action, § 385.
Place of trial in action for wrongful death, § 395.
Possession, right of, not affected by, § 327.
Representative may sue for, § 377.
Set-off not affected, § 440.
Survival of actions, § 385.
Verdict, death after and before decision, § 669.
Who may sue for, §§ 376, 377.

DEBTOR. See Creditors; Debts.
Action to compel satisfaction of debt for which one bound as surety, § 1050.
Appointment of receiver in action by creditor, § 564.
Arrest. See Arrest and Bail.
Attachment. See Attachments.
Execution. See Execution.
Supplementary proceedings. See Supplementary Proceedings.
Relationship of, disqualifies jury, § 602.

DEBTS. See Attachments; Execution; Supplementary Proceedings.
Attachment of, §§ 541, 542.
Compromise. See Compromise.
Contribution among debtors, § 709.
Creditors. See Creditors.
Debtors. See Debtor.
Executions, seizure on, § 688.
Receiver may collect, § 568.

DECEDENTS' ESTATES. See Estates of Decedents.

DECISION.
Appeals, on. See Appeals, IX; Supreme Court.
Death after decision and before judgment, § 669.
Deemed excepted to, § 647.
Demurrer, on, notice of, § 476.
Exceptions to, how presented, settled, or allowed, § 650.
Exceptions to, when to be taken, § 646.
Facts and conclusions separately stated, § 633.
Judgment. See Judgment.
Meaning of, § 1033.
Must be filed within thirty days, § 632.
Must be in writing, §§ 49, 632.
On motion for new trial, § 660.
Referees, findings of. See Reference.
When subject to review on appeal, § 956.

DECISION OF REFEREE.
Findings of fact and law must be separately stated, § 643.

DECLARATION. See Evidence.
Oath includes, § 17.

DECLARATION OF INTENTION.
Attorney, alien, § 275.

DEEDS.
Mortgage not deemed, § 744.
Sheriff's, § 703. See Sheriff's Deed.

DEFAULT.
Account, how taken or examined, when necessary, § 585.
Actions on contracts for money or damages, clerk to enter, § 585.
Against non-resident, § 585.
Amendments, default for failure to answer, § 432.
Amount of judgment in action on contract for money or damages, § 585.
Bill of exceptions need not be served on party defaulting, § 650.
Costs on, § 585.
Damages, assessment of, on, § 585.
Demand alleged, proof of, § 585.
Entry of, clerk to enter when, § 585.
Entry of judgment on, clerk to enter, when, § 585.
Examination of plaintiff or agent, § 585.
For failure to answer, § 585.
For failure to answer amended complaint, §§ 432, 872.
Includes costs, § 585.
Judgment by, cannot exceed amount demanded, § 580.
Judgment by, relief from, in justice's court, § 859.
Judgment by, relief that may be granted in case of, § 585.
Judgment roll in case of, § 670.
Justice's court, in. See Justices' Courts, XX.
Non-resident, default judgment against, proceedings on, § 585.
Plaintiff to apply to court for relief when, § 585.
Procedure in case of, § 585.
Procedure where service by publication, § 585.
Proof, court hears, when, § 585.
Quiet title, costs not allowed where defendant does not answer, § 739.
Quieting title against unknown owners, default not entered, § 751.
Reference, when may be ordered, § 585.
Relief cannot exceed amount demanded, § 580.
Relief from judgment by, § 473.
Summons, publication of, proceedings and judgment in case of, § 585.
What papers need not be served on party defaulting, § 650.
What relief may be awarded plaintiff, § 580.
When entered, § 585.

DEFECT.
In account, further account may be ordered, § 454.
In pleadings, when disregarded, § 475.
Of parties, ground for demurrer, § 430.

DEFENDANT. See Parties.
Pleadings of, § 422.
Summons where defendants reside in different counties, § 406.

DEFENSES. See Answer.
Assignment not to prejudice, § 368.
Must be separately stated, § 441.
Order of, at trial, § 607.
Particular actions. See particular title.
Several, how stated, § 441.
Several may be stated in answer, § 441.
Written instrument, founded on, § 448.

DEFICIENCY JUDGMENT.
On foreclosure of mortgage, § 726. See Foreclosure of Mortgage.
Undertaking to stay, § 945.

DEFINITION. See Words and Phrases.
Action, § 22.
Affinity, § 17.
Appellant, § 938.
Civil action, § 30.
Complaint in justice's court, § 853.
Decision of court or referee, § 1033.
Defendant, § 308.
Depose, § 17
Docket, § 672.
Exception, § 646.
General verdict, § 624.
Grand jury, § 192.
Injunction, § 525.
Injury to person, § 29.
Injury to property, § 28.
Issue, §§ 588, 878.
Judgment, § 577.
Judicial remedies, § 20.
Jury, § 190.
Jury of inquest, § 195.
Material allegations, § 463.
Month, § 17.
Motion, § 1003.
New trial, § 656.
Nuisance, § 731.
Obligation, § 26.
Order, § 1003.
Person, § 17.
Personal property, § 17.
Plaintiff, § 308.
Pleadings, § 420.
Process, § 17.
Property, § 17.
Real property, § 17.
Redemptioner, § 701.
Respondent, § 938.
Seal, § 14.
Section, § 134.
Special proceedings, § 23.
Special verdict, § 624.
State, § 17.
Testify, § 17.
Trial jury, § 193.
Trustee, § 369.

DEFINITION. (Continued.)
United States, § 17.
Verdict, § 624.
Will, § 17.
Writ, § 17.

DELIVERY. See Claim and Delivery.

DEMAND.
For bill of particulars, § 454.
Inspection of written instrument, demand for, § 449.
Relief, demand of, in complaint, § 426.

DEMURRER.
Accusation in proceeding to remove attorney, to, § 295.
Answer, allowing, where demurrer overruled, § 472.
Amended pleading, to, § 472.
Answer and, at same time, § 431.
Answer, filing of, not a waiver of demurrer, § 472.
Answer, to, §§ 422, 443.
Answer, to, grounds for, § 443.
Answer, to, overruling, facts of answer deemed denied, § 472.
Answer, to part of, § 443.
Answer to part and demurrer to part, § 441.
Answer, to, time for, § 432.
Appearance, demurrer is, § 1014.
As a pleading, § 422.
Complaint, may be taken to whole or any part of, § 431.
Complaint, to, must specify grounds, § 431.
Complaint, to, time for, § 430.
Counterclaim, to, §§ 443, 444.
Cross-complaint, demurrer to answer to, § 422.
Cross-complaint, to, §§ 422, 442.
Grounds for, §§ 430, 431.
Grounds of, to be specified, § 431.
Intervention, to, § 387.
Issues raised by, § 589.
Judgment on, proceedings after, § 636.
Judgment roll, copy of order on, is part of, § 670.
Justice's court, in, §§ 854, 856–858, 860. See Justices' Courts, V.
Objection to complaint waived when, § 434.
Order sustaining or overruling, deemed excepted to, § 647.
Overruled, allowing answer, § 472.
Overruling demurrer to answer, facts alleged deemed denied, § 472.
Overruling, imposition of terms in allowing answer, § 472.
Overruling, time to answer runs from notice, § 476.
Sustaining, time to amend runs from notice, § 476.
Time for, extending, §§ 473, 1054.
Time within which may be taken to answer, § 443.
Time within which must be taken to complaint, § 430.

DEMURRER. (Continued.)
To what pleadings may be taken, § 422.
Waived, not, by filing answer at same time, § 472.
Waiver, by failure to demur, § 434.
Waiver of summons by, § 406.
When defendant may demur, § 430.
Whole or part of complaint, may be taken to, § 431.

DENIAL. See Answer.

DENTISTS.
Exemption of property of, § 690.

DEPOSE.
Includes what, § 17.

DEPOSIT. See Deposit in Court.
Appeal to superior court, on, § 978.
In lieu of bail, §§ 497–500. See Arrest and Bail.
In lieu of undertaking, on appeal, §§ 940, 941, 948.
Instead of undertaking, in justice's court, § 926.

DEPOSIT IN COURT.
Appointment of clerk to receive, how long continues, and revocation of, § 573.
Appointment of clerk to receive, to be filed with treasurer, § 573.
By one interpleading, § 386.
Clerk depositing money with treasurer not discharged until certificate of auditor that duplicate receipt filed, § 188.
Clerk to deposit money with treasurer and file duplicate receipt with auditor, § 188.
Clerk of court, money deposited with treasurer, by, how withdrawn, § 188.
Conditions of, § 572.
Defendant may make, and ask for order of substitution when, § 386.
Moneys to be delivered to clerk or deputies, § 573.
Must be paid to clerk and deposited with county treasurer, § 573.
Of proceeds of partition, § 773.
Of surplus after foreclosure, § 727.
Of surplus on sale of boat, § 825.
On appeal, §§ 926, 940, 941, 948.
Order for, how enforced, § 574.
Payment to county treasurer, his liability therefor, § 573.
Payment to county treasurer, how kept by him, § 573.
Sheriff required to take money when, § 574.
Sheriff to deposit bail money in court, § 498.
Treasurer, duties of, § 573.
Treasurer liable for, on official bond, § 572.
Trustee, by, § 572.
When court may order, § 572.

DEPOSITION.
Continuance, deposition of witness on, as evidence, § 596.

DEPOSITION. (Continued.)
Continuance, deposition of witnesses may be taken on, § 596.
Court commissioner may take, § 259.
Depose, defined, § 17.
Jurors, on deliberation, may not take with them, § 612.
Justice of peace may take, § 179.
Justice of supreme court may take, § 179.
Justice's court, postponement of trial, testimony may be taken on, § 876.
Police judge may take, § 179.
Postponement of trial, deposition of witness on, admissible, § 596.
Postponement of trial, testimony may be taken on, §§ 596, 876.
Reference to take, in proceeding to remove attorney, § 298.
Superior judge may take, § 179.
Supreme judge may take, § 179.
Witness' testimony may be taken on postponement of trial, §§ 596, 876.

DEPUTY CLERK. See Clerk.

DEPUTY SHERIFF. See Sheriff.

DESCENT.
Right or possession not affected by descent cast, § 327.

DESCRIPTION.
Boundaries. See Boundary.
Real property, in pleading, § 455.
Survey, description of property in order for, § 743.

DESTROYED RECORDS AND DOCUMENTS. See Burnt or Destroyed Records or Documents.

DETINUE.
Limitation of action of, § 338.

DIRECTOR.
Limitation of action against, § 359.

DISABILITY.
Action not abated by, § 385.
Infant. See Infant.
Insane persons, of. See Insane Persons.
Judgment in suit to quiet title conclusive notwithstanding, § 750.
Justice's, proceedings thereon, § 922.
Justice's, reassignment and transfer of action, § 90.
Married women, of. See Married Women.
Presiding justice's, substitute, § 85.
Superior judge's, holding court by another, § 160.
Statute of limitations, effect on, § 328. See Limitation of Actions.

DISBURSEMENTS. See Costs.

DISCLAIMER.
In action to quiet title, costs not allowed, § 739.

DISCONTINUANCE.
Entering, § 581.

DISCRETION OF COURT.
Costs of appeal, when in, § 1027.
Costs on postponement of trial are in, § 1029.
Expenses of referees in partition, §§ 768, 796.
On allowance of costs, § 1025.
Order of trial, § 607.
To order reference in accusation against attorney, § 298.

DISMISSAL. See Appeals, VII; Judgments.
Consent of party, dismissal on, § 581.
Court may grant, on its own motion, when, §§ 581a, 583.
Court may grant, when, §§ 581, 581a.
Either party may take, when, § 594.
How made, § 581.
In justice's courts, § 890. See Justices' Courts, XI.
Notice of motion, § 583.
Of action, grounds for, §§ 581, 581a, 583.
On motion of party, when granted, §§ 581, 581a, 583.
Plaintiff, when may dismiss, § 581.
Provisional remedy, undertaking, delivery to defendant, and action on, § 581.
Security for costs, for failure of foreign corporation to give, § 1037.
Summons, failure to serve and return, § 581a.
Summons, failure to serve and return, where defendant absent or conceals himself, § 581a.
To be entered in clerk's register when, § 581.
To be entered on minutes of court when, § 581.
Transfer of action, dismissal after where fees not paid, § 581b.
Transfer of action, filing transferred pleadings anew without fee after dismissal, § 581b.

DISQUALIFICATION. See Affinity; Consanguinity.
Jurors, of, § 602.
Justices and judges, of, §§ 170, 833.
Justices and judge, change of place of trial. See Place of Trial.
Justices or judge, waiver of, § 170.
Receiver, of. See Receiver.
Referees, of, § 641.

DISTRIBUTION. See Estates of Decedents.

DISTRICT ATTORNEY.
Nuisance, city attorney and district attorney have concurrent right to abate, § 731.
Nuisance, may sue to abate, § 731.
Nuisance, to abate, when directed by supervisors, § 731.

DISTRICT COURT.
Transfer of books, records, and actions to superior court, § 79.

DISTRICT COURTS OF APPEAL.
Applicant for admission to practice, to examine, § 276.
Attorneys admitted to supreme court may practice in, § 277.
Examination of attorneys by, § 276.
Who entitled to practice law in, § 277.

DISTRICT OF COLUMBIA.
Included in terms "state" and "United States," § 17.

DIVORCE.
Adultery, pleadings to be served on co-respondent, § 1019.
Adultery, co-respondent may appear and be heard, § 1019.
Adultery, notice how given co-respondent who cannot be found, § 1019.
Complaint, facts required to be stated, § 426a.
Interlocutory decree in, appealable, § 963.
Interlocutory decree in, time to appeal from, § 940.
Jurisdiction of proceedings for, § 76.
Sitting of court, private, § 125.

DOCKET.
Entries made how, § 672.
Execution may issue on, of predecessor, § 916.
How kept, § 672.
Inspection, open for public, § 673.
Is what, § 672.
Judgment, how and when entered, § 671.
Justices of peace, of, §§ 911–918. See Justices' Courts, X.
Redemptioner must produce, § 705.
Satisfaction, entering, § 675.
Transcript of, when filed in another county, judgment becomes lien there, § 674.
What to contain, § 672.

DOCTORS. See Physicians.

DOCUMENT.
Burnt. See Burnt or Destroyed Records or Documents.
Production and inspection of. See Inspection of Writings.

DOMICILE. See Residence.

DRAINAGE DISTRICT.
Disqualification of judge or justice in actions in relation to and proceedings on, § 170.

DRUGGIST.
Exempt from jury duty, § 200.

E

EARNINGS.
Exemption of, § 690.

EJECTMENT.
Alienation pending suit does not prejudice, § 747.
Costs of course, when allowed, §§ 1022, 1024.

EJECTMENT. (Continued.)
Description of property in complaint, § 455.
Improvements as set-off, § 741.
Joinder of causes of action with, § 427.
Measurement of shafts, tunnels, etc., on land, § 742.
Mining claims, evidence of custom and usage, § 748.
Parties, §§ 380, 381.
Parties defendant, unknown, claims of, how determined, §§ 749–751.
Parties defendant, who may be joined as, § 379.
Summons to unknown defendants, §§ 750, 751.
Survey of land in dispute, liability for injury done by, § 743.
Survey of land, order for, entry under, §§ 742, 743.
Survey of land, order for, what to contain and how served, § 743.
Survey of land, order may issue for, § 742.
Termination of plaintiff's title pending suit, effect of, § 740.
Unknown claimants, determining title of, § 751.
Unknown claimants, summons to, §§ 750, 751.
Verdict in, § 625.
Writ of possession, § 380.
Writ of possession or assistance. See Assistance.

ELECTIONS.
Attorney-general, § 262.
Clerk of supreme court, § 262.
Contest, appeal, preference of hearing in supreme court, § 57.
Coroners, § 262.
County clerk, § 262.
Holiday, day on which election is held is, § 10.
Justices of peace in township, time of, § 103.
Preference given to contested election cases on appeal, § 57.
Public officers, of, prescribed by Political Code, § 262.
Reporter of decisions of supreme court, § 262.
Sheriffs, § 262.
Superior judges, election of § 65.
Supreme judges, election of § 40.

ELISOR.
Appointment of, in foreclosure suits. See Foreclosure.
Appointment of, to execute deed on death of court commissioner, § 726.
Compensation of, for summoning jurors, § 228.
Summoning jurors to complete panel, §§ 226, 227.
Summoning jury forthwith, § 226.
To sell encumbered property, § 726.

EMBEZZLEMENT.
Arrest for, § 479.
Arrest in justice's court in case of, § 861.
Reference in, provisions as to do not affect jurisdiction of railroad commission, § 640.
Reference in, residence of referees where public body is plaintiff, § 640.

EMPLOYMENT. See Master and Servant.

ENGINEER.
Exempt from jury duty, § 200.

ENGLISH LANGUAGE.
Proceedings in court to be in English, § 185.

ENTRY.
Judgment, entry of. See Judgments.
Real estate, on, limitation of action, §§ 320, 328.
Verdict, of, §§ 625, 628.

EQUITY.
Adverse claim, action to determine, § 1050.
Quieting title. See Quieting Title.

ERROR.
In law, as ground for new trial, § 657.
Injury not presumed from, § 473.
Not affecting substantial rights, disregarded, § 475.
Not presumed prejudicial, § 475.

ESCAPE.
Liability of sheriff, § 501.
Limitation of action for, §§ 339, 340.

ESTATE.
Estates for life. See Life Estates.
Estate for years. See Tenant for Years.

ESTATE FOR LIFE. See Life Estates.

ESTATE FOR YEARS. See Tenant for Years.

ESTATE IN COMMON. See Co-tenants; Partition.

ESTATES OF DECEDENTS. See Executors and Administrators; Probate Court.
Appealability of order relating to distribution, § 963.
Appealability of order relating to homestead, § 963.
Appeal lies from order directing or refusing partition, § 963.
Appeal lies from order relating to payment of claims, § 963.
Appeal lies from order refusing partition of estate, § 963.
Appeal lies from what orders respecting new trials and appeals, § 963.
Appraisers may be appointed at chambers, § 166.
Costs, liability of executor for, § 1031.
Inventory may be received at chambers, § 166.

ESTATES OF DECEDENTS. (Continued.)
Order for sale of property, appeal lies from, § 963.
Payment of debts, appealability of order relating to, § 963.

EVICTION.
Of execution purchaser, redress, § 708.

EVIDENCE. See Depositions; Variance; Witnesses.
Clerk to take testimony when no shorthand reporter, § 1051.
Compromise, evidence of order of, not admissible, §§ 895, 997.
Copies from books, account, etc., right to take, § 1000.
Disregard of evidence, court may, on its own motion, grant new trial, § 662.
Docket-book of justice, entries in, as evidence, § 850.
Errors in rulings disregarded unless substantial injury, § 475.
Examination of witnesses. See Witnesses.
Execution-book as evidence, § 683.
Exception, order on motion to strike out evidence deemed excepted to, § 647.
Exception, ruling on objection to evidence deemed excepted to, § 647.
Exclusion of witnesses from courtroom, § 125.
Inspection and production of documents. See Inspection of Writings.
Insufficiency of evidence as ground for new trial, § 657.
Justice's docket, prima facie, § 912.
Local customs and usages in actions concerning mining claims, § 748.
New trial for disregard evidence, § 662.
Newly discovered evidence, as ground for new trial, § 657.
Notice, refusal to produce books and papers, exclusion of evidence, § 1000.
Notice, refusal to produce books and papers, presumption on, § 1000.
Offering further evidence after original case closed, § 607.
Order of introducing, § 607.
Order of, where several defendants, § 607.
Rebuttal, § 607.
Reporter's notes, prima facie, § 273.
Reports of phonographic reporter, prima facie correct, § 273.
Ruling on objection to, deemed excepted to, § 647.
Striking out order granting or denying, deemed accepted to, § 647.
Usage, § 748.
Variance. See Variance.
View of premises by jury, § 610.
Will, admissible where action to quiet title involves gift or trust under, § 738.
Writings, inspection and production of. See Inspection of Writings.

EXCEPTIONS.
Absence of party, decision in, deemed excepted to, § 647.

EXCEPTIONS. (Continued.)
After judgment, how settled, § 651.
Bill of, all exceptions relied on to be contained in, § 650.
Bill of, amendments to, adverse party may propose, § 650.
Bill of, amendments to, if none prepared, bill may be presented without notice, § 650.
Bill of, amendments to generally, § 650.
Bill of, amendments to, time to file, § 650.
Bill of, amendments to, service of, § 650.
Bill of, amendments to, time to serve, extension of, § 1054.
Bill of, application for new trial, when may be made on, § 658.
Bill of, certifying, § 650.
Bill of, decision by tribunal other than a judge, presentment, settlement and signing, § 649.
Bill of, decision other than by judicial officer, presentment and settlement of, § 650.
Bill of, delivery to absent judge, § 650.
Bill of, delivery to clerk, and duty of, § 650.
Bill of, delivery to judge, § 650.
Bill of, engrossing, time for, § 650.
Bill of, evidence, how much to be stated, § 648.
Bill of, evidence, substance of reporter's notes only to be stated, § 648.
Bill of, filing with clerk, § 650.
Bill of, how prepared on appeal from order vacating judgment, § 663a.
Bill of, may be settled and signed after officer or judge ceases to be such, § 653.
Bill of, must contain what, § 650.
Bill of, on trial before referee, preparation, service, amendment, and settlement, § 650.
Bill of, preparation, manner of, § 650.
Bill of, preparation, time for, § 650.
Bill of, preparation, time, extension of, § 650.
Bill of, presentation and settlement on decision by judicial officer other than judge, § 653.
Bill of, presenting to judge, time of, and notice of, §§ 649, 650.
Bill of, presentment of, delivery to clerk and duty of clerk, § 650.
Bill of, presentment of, to be presented to judge or delivered to clerk, § 650.
Bill of, referee, presentment and settlement where case tried before, § 650.
Bill of, refusal to allow, application to supreme court to prove same, § 652.
Bill of, service of, § 650.
Bill of, service of certified bill, time for, § 650.
Bill of, service of, not necessary on party defaulting or not appearing, § 650.
Bill of, settlement by officer other than judge, § 649.
Bill of, settlement by referee, § 650.

EXCEPTIONS. (Continued.)
Bill of, settlement by supreme court, manner and effect of, § 652.
Bill of, settlement of, engrossing and certifying, § 650.
Bill of, settlement, notice of, § 650.
Bill of, settlement, notice unnecessary, when, § 650.
Bill of, settlement, on death, disqualification, absence or refusal of judge or officer, § 653.
Bill of, settlement of, procedure, § 650.
Bill of, settlement of, signing and filing of, §§ 649, 650.
Bill of, settlement of, striking out redundant and useless matter, § 650.
Bill of, settlement, service on adverse party, § 650.
Bill of exceptions, settlement of, notice of time of, § 650.
Bill of, settlement, time of, judge to designate, § 650.
Bill of, settlement to be made at time designated, § 650.
Bill of, settlement, to decision after judgment, § 651.
Bill of, settlement without notice to adverse party, § 650.
Bill of, signature by judge or referee, § 650.
Bill of, striking out redundant matter, § 650.
Bill of, time, extension of, § 1054.
Bill of, to decision after judgment, settlement of, § 651.
Bill of, to decision by officer other than judge, §§ 649, 650.
Bill of, to decision may be presented at time made, § 649.
Bill of, to decision, to be signed by judge and filed with clerk, § 649.
Bill of, what to contain, § 650.
Continuance, order refusing, deemed executed to, § 647.
Court commissioners' findings, exception to, how made, § 645.
Decisions after judgment, bill of exceptions, preparation and settlement of, § 651.
Decisions after judgment, exceptions, how presented, settled, and allowed, § 651.
Decision other than by a judge, presentment, settlement and signing of bill of exceptions, §§ 649, 650.
Defined, § 646.
Demurrer, order sustaining or overruling, deemed excepted to, § 647.
Documents on file, how incorporated, § 648.
Filing with clerk, § 649.
Final decision deemed excepted to, § 647.
Form of, generally, § 648.
Form of, when made on insufficiency of evidence, § 648.
Insufficiency of evidence, on ground of, requisites, § 648.

EXCEPTIONS. (Continued.)
Interlocutory order or decision deemed excepted to, § 647.
Judge out of office may settle, § 653.
Matters deemed excepted to, § 647.
Order or decision from which appeal lies deemed excepted to, § 647.
Order, when deemed excepted to, § 647.
Pleading, amendment, order allowing or refusing, deemed excepted to, § 647.
Pleading, order striking out, deemed excepted to, § 647.
Referee's findings, to, how made, § 645.
Referee, presentment and settlement of bill of exceptions where case tried before, § 650.
Settlement of, time for, §§ 649, 650.
Signing by judge or judicial officer, § 649.
Statement on appeal. See Statement.
Statement on motion for new trial. See New Trial.
Sureties, to. See Surety.
Time for, § 646.
Verdict deemed excepted to, § 647.
What deemed excepted to, § 647.

EXECUTION. See Supplementary Proceedings.
After five years, § 685.
Against the person, § 632.
Amount of property to be seized, § 691.
Any debtor of defendant may pay creditor when, § 716.
Appeal, remedy on reversal where property on execution, § 957.
Appeal, restitution where property sold under, and judgment reversed, § 957.
Assistance, writ of. See Assistance.
Attached property may be sold as under, when, § 548.
Attached property, sale under, § 550.
Book as evidence, § 683.
Book, how kept and what to contain, § 683.
Book, open to inspection, § 683.
Claim of property, bond, amount of and conditions in, § 710½.
Claim of property, bond, claimant may give and release property, § 710.
Claim of property, bond, estimate of value and new bond, § 712½.
Claim of property, bond, filing and serving of, § 711.
Claim of property, bond, justification, approval and disapproval, §§ 712, 712½.
Claim of property, bond, justification, manner of, § 713.
Claim of property, bond of, objections to, §§ 711½, 712½.
Claim of property, bond, when becomes effectual, § 713½.
Claim of property, how made, § 689.
Claim of property, indemnity and undertaking on, § 689.
Claim of property, new bond on disapproval of old, §§ 712, 712½.

EXECUTION. (Continued.)
Claim of property, proceedings where portion of realty to be sold is claimed, § 694.
Company, interests in, how levied on, § 688.
Contribution among defendants, right of and how enforced, § 709.
Corporation, shares in, how levied on, § 688.
Costs on appeal, for, § 1034.
Counties, issuing to different, at same time, § 687.
County, issuing to another, right of and procedure, § 687.
Credits, how levied on, § 688.
Death of party, when may issue after, § 686.
Debts, how levied on, § 688.
Dormant judgment, on, § 685.
Enforcement, when judgment requires performance of particular act, § 684.
Enforcement, when judgment requires sale of property, § 684.
Enforcing order by, § 1007.
Excess in proceeds, how disposed of, § 691.
Executed how, § 691.
Exempt, what property is, § 690.
Form of, § 682.
Gold-dust, how returned, § 688.
Inspection, execution-book open to, § 683.
Issuance after death, § 686.
Issuance of, after five years, § 685.
Issuance of, time of, § 681.
Issuance, time of, when stayed or enjoined, § 681.
Issuance, to whom issued when affecting realty which becomes part of another county, § 687.
Issuance, to whom issued when property required to be delivered, § 687.
Issuance, to whom may issue, § 687.
Issue, may, to any sheriff, § 687.
Issue of, where judgment for delivery of property, § 682.
Issued to different county, how executed, § 682.
Issues in name of people, § 628.
Issuing to different counties at same time, § 687.
Judgment barred by limitation, on, § 685.
Judgment, manner of enforcing, § 684.
Judgments against officers, how enforced, § 710.
Justice's court, from, §§ 901–905. See Justices' Courts, XXI.
Justice's judgment docketed in superior court, on, § 899.
Leasehold when subject to redemption after sale on execution and when not, § 700a.
Levy, amount of property to be seized, § 691.
Levy, defendant may indicate property when, § 691.
Levy, how made, §§ 682, 688, 691.

EXECUTION. (Continued.)
Levy, property in hands of heirs, tenants, trustees, etc., § 682.
Levy, property subject to, § 688.
Levy to be made only on part of property, if sufficient, § 691.
Levy, until, property not affected by, § 688.
Levy, writ, how executed, §§ 682, 688, 691.
Limitation, judgment barred by, § 685.
Limitation of action against officer for money collected upon, § 339.
Limitation of action against officer for seizure, § 341.
May issue to any sheriff, § 687.
May issue at same time to different counties, § 687.
Money, amount and kind of, payable in, § 682.
Money, execution for, how levied, § 684.
Money, order for payment of, enforceable by, § 1007.
Name of people, issues in, § 682.
Order of court, enforcing by, § 1007.
Payment by any creditor, sheriff's receipt, § 716.
Payment in specific kind of money, how executed, § 682.
People, to issue in name of, § 682.
Performance of act, how enforced, § 684.
Person, against the, after return unsatisfied, § 684.
Person, against the, how executed, §§ 682, 684.
Personal property, how subjected to, §§ 682, 684.
Possession, writ of. See Assistance.
Property, how subjected to, §§ 682, 684, 688.
Property in hands of heirs, tenants, trustees, etc., § 682.
Property not affected by, until levy, § 688.
Property not capable of manual delivery, how levied on, § 688.
Property, what subject to, § 688.
Real property, how subjected to, §§ 682, 684, 688.
Receiver in aid of, § 564.
Record of, as evidence, § 683.
Recording and indexing, where realty levied on, § 683.
Redemption, action by redemptioner for accounting of rents and profits, § 707.
Redemption by a redemptioner, § 703.
Redemption by judgment debtor, § 703.
Redemption, certificate of, filing and recording, § 703.
Redemption, judgment creditor may redeem estate of decedent, § 1505.
Redemption, leasehold sold under execution, when subject of and when not, § 700a.
Redemption, notice of, giving and filing of, § 703.
Redemption, notice to be filed with recorder when, § 703.

EXECUTION. (Continued.)
Redemption of realty, who may effect, § 701.
Redemption, payment in kind of money specified in judgment, § 704.
Redemption, payments may be made to whom, § 704.
Redemption, property subject to, with what exception, § 700a.
Redemption, rents and profits a credit on, § 707.
Redemption, rents and profits, action for accounting, § 707.
Redemption, rents and profits, time, extension of, where purchaser fails to account, § 707.
Redemption, restraining waste until time expires, § 707.
Redemption, right of, § 700a.
Redemption, successive redemptions, amount to be paid, § 703.
Redemption, successive redemptions authorized, § 703.
Redemption, successive redemptions, time for, § 703.
Redemption, tender equivalent to payment, § 704.
Redemption, time within which may be had, §§ 702, 703.
Redemption, time, extension of where purchaser fails to account, § 707.
Redemption, what property not subject of, § 700a.
Redemptioner, affidavit by, § 705.
Redemptioner, defined, § 701.
Redemptioner, what he must do to redeem, § 705.
Redemptioner, what must pay, §§ 702, 703.
Redemptioners, who may redeem, § 701.
Release of property, how effected, § 688.
Rents and profits from time of sale till redemption, § 707.
Rents and profits from time of sale to execution, accounting for, § 707.
Rents and profits from time of sale to redemption, statement of, § 707.
Requisites of, § 682.
Return, gold-dust to be returned as money, § 688.
Return of, recording where realty levied on, § 683.
Returnable to whom, § 683.
Returnable when, § 683.
Sale, absolute in what cases, § 700a.
Sale, after sufficient property sold, sale to stop, § 694.
Sale, between what hours to be held, § 694.
Sale, certificate of, §§ 698, 699.
Sale, certificate of, filing duplicate with recorder, § 700a.
Sale, certificate of sale, sheriff to give, § 700a.
Sale, certificate of, what to contain, § 700a.
Sale, damages to realty, purchaser may recover for, § 746.

EXECUTION. (Continued.)
Sale, deed, purchaser, when entitled to, § 703.
Sale, delivery of property not susceptible of manual delivery, § 699.
Sale, delivery of property susceptible of manual delivery, § 698.
Sale, enjoining injury to property after, and before conveyance, § 745.
Sale, evicted purchaser, remedy of, § 708.
Sale, excess in proceeds, how disposed of, § 691.
Sale, how conducted, § 694.
Sale, judgment directing, how enforced, § 684.
Sale, manner of, §§ 693, 694.
Sale, notice, how given, § 692.
Sale, notice in case judgment specifies kind of money payable in, § 692.
Sale, notice in case of perishables, § 692.
Sale, notice in case of personalty, § 692.
Sale, notice in case of realty, § 692.
Sale, notice, penalty for defacing or taking down, § 695.
Sale, notice where judgment payable in specified kind of money, § 692.
Sale, notice, without, penalty, § 693.
Sale, officer, liability for proceedings on refusal of purchaser to pay, § 697.
Sale, officer or deputy not to purchase, § 694.
Sale, order of, judgment debtor may direct, § 694.
Sale, personalty, delivery of and certificate, § 698.
Sale, personalty, manner of, § 694.
Sale, property not susceptible of delivery, certificate of sale, § 699.
Sale, purchaser, eviction from property, rights on, § 708.
Sale, purchaser, failure to get possession because of irregularity, rights of, § 708.
Sale, purchaser, failure to get possession, revival of judgment in favor of, § 708.
Sale, purchaser may recover damages for injuries to realty, § 746.
Sale, purchaser, rights of, on a reversal or discharge of judgment, § 708.
Sale, purchaser, rights of, where property attached, § 700.
Sale, purchaser, title of, § 700.
Sale, purchaser, waste by, restrained, § 706.
Sale, real property, manner of, § 694.
Sale, real property, on claim of portion by third person, § 694.
Sale, real property, rents from time of sale until redemption, § 707.
Sale, refusal of purchaser to pay, liability of, § 695.
Sale, refusal of purchaser to pay, liability of sheriff, § 697.
Sale, refusal of purchaser to pay, proceedings on, § 695.
Sale, refusal of purchaser to pay, subsequent bid refused, § 696.
Sale, relation of title of purchaser, § 700.
Sale, to be at public auction, § 694.
Sale, to be in separate lots or parcels, § 694.
Sale, to cease when sufficient property sold, § 694.
Sale, what bids may be refused, § 696.
Sale, what title passes, § 700.
Sale, when absolute, § 700a.
Sale, when conveyance to be made, § 703.
Satisfaction of judgment by return of, § 675.
Sheriff's deed, when purchaser entitled to, § 703.
Ships, against, application of proceeds, § 825.
Stay of, power of court as to, § 681a.
Subrogation by debtor paying, § 709.
Subrogation of surety paying, § 709.
Supplementary proceedings, §§ 714–721. See Supplementary Proceedings.
Third person, claim of property by, § 689.
Time of, issuance after five days, § 685.
Time within which may issue, § 681.
Time within which may issue, when stayed or enjoined, § 681.
To issue in name of people, § 682.
To whom may issue, § 687.
To issue to whom, when concerns real property, § 687.
To whom to issue, when property required to be delivered, § 687.
Until levy, property not affected by, § 688.
Vessels, against, application of proceeds, § 825.
Waste, enjoining, after sale on execution and before conveyance, § 745.
Waste may be restrained until time to redeem expires, § 706.
Waste, what is not, § 706.
What liable to be seized on, § 688.
What property exempt from, § 690.
What to contain, § 682.
What to require, § 682.
Who may issue, § 682.
Whom to be directed to, § 682.
Writ of, how executed, § 691.
Writ to require what of sheriff, § 682.

EXECUTION-BOOK, § 683.

EXECUTORS AND ADMINISTRATORS. See Estates of Decedents; Probate Court; Wills.
Accounting and settlement, appealability of order relating to, § 963.
Account may be received at chambers, § 166.
Action by, beneficiaries need not be joined, § 369.
Action by, within what time may be brought, §§ 353, 355.
Actions against, within what time may be brought, § 353.
Appeal from justice's judgment, dispensing with bond, § 946.

EXECUTORS AND ADMINISTRATORS. (Continued.)
Appeal lies from order revoking or refusing to revoke letters testamentary, etc., § 963.
Appeal lies from what order respecting, § 963.
Appointment, certificate of, seal, § 153.
Bond, judge may approve, at chambers, § 166.
Bond, stands as security on appeal, § 965.
Code sections governing appointment, powers and duties, § 304.
Costs, allowance of, to, § 1031.
Costs, individually liable for, when, § 1031.
Costs in actions by or against executors, liability for, § 1031.
Death caused by negligence, may sue for, § 377.
Death pending appeal, extension of time to sue, § 355.
Death, wrongful, may sue for, § 377.
Dispensing with security on appeal, § 946.
Execution after death of party, executor may have issued, § 686.
Execution, issuance of, after death, § 686.
Extension of time to sue on death of person, § 353.
Judge may issue letters of chambers, § 166.
Judgment after death, how paid, § 669.
Letters of administration, appeal lies from order granting or refusing, § 963.
Letters testamentary, appeal lies from order granting or refusing, § 963.
Liability of executor for costs, § 1031.
Limitation of action by or against, §§ 353, 355.
May sue without joining persons beneficially interested, § 369.
Negligence causing death, may sue for, § 377.
Official bond, sufficient, § 965.
Orders relating to issuing, refusing to issue, or revoking letters, appealable, § 963.
Reversal of order appointing, validity of acts, § 966.
Revocation, appeal lies from order revoking or refusing to revoke letters testamentary, etc., § 963.
Substitution of, as party, § 385.
Suspension, judge may suspend at chambers, § 166.
Wrongful death, may sue for, § 377.

EXEMPLARY DAMAGES. See Damages.

EXEMPTION.
Answer of insurance company claiming, what to state, § 437a.
From jury duty, § 200.
From jury duty, affidavit, § 202.
Judgment against officers, how enforced, § 710.

EXEMPTION. (Continued.)
What property exempt from execution, § 690.

EXHIBITS.
Demand for inspection of original, and refusal of, § 449.
Genuineness of instruments annexed to pleadings, when admitted, §§ 447, 448.
Genuineness or instruments annexed to pleadings, when not admitted, § 449.

EXONERATION.
Of bail, §§ 488, 489, 491.

EX PARTE ORDERS.
Vacation and modification of, § 937.

EXPRESS AGENT.
Exempt from jury duty, § 200.

EXTENSION OF TIME.
In general, § 1054.

EXTRA SESSIONS.
Of superior court. See Superior Court.

F

FACTS.
Conclusions of law not supported by finding of fact, setting aside judgment for, § 663.
Errors in, setting aside judgment for, § 663.
Findings of. See Findings.
Instructions. See Instructions.
Insufficiency of, ground for demurrer, § 430.
Issue of fact, how it arises, § 590.
Issues of fact, by whom tried, § 592. See Issues.
Question of fact not arising upon pleading, reference of, § 639.
Reference to ascertain, § 638.
Reference to try issues of fact, § 638.
Special issues not made by pleadings, how tried, § 309.
To be stated in complaint, § 426.
When general or special may be given, § 625.

FALSE IMPRISONMENT.
Limitation of action for, § 340.

FARMER.
What property of, exempt from execution, § 690.

FATHER. See Parent and Child.

FEDERAL COURTS.
Judgment, limitation of action on, § 336.
Proceedings in, not stayed by injunction, § 526.

FEES.
Appeal to superior court, justice to pay fees collected to county clerk, § 981.
Appeal to superior court, prepayment of county clerk's fees in case of, § 981.
Attorney, of, not chargeable as costs generally, § 1021.

FEES. (Continued.)
Attorney, of, left to agreement of parties, § 1021.
Attorneys, generally. See Attorneys, II.
Costs. See Costs.
Court commissioner's, § 259.
Filing transcript of judgment against officer, fee for, § 710.
Justice's court, in, § 91.
Justice's court, in, collection, report, and payment into treasury, §§ 103, 103b.
Justice's court, in, payment of, § 91.
Justices, fees of, report of and payment into treasury, § 103.
Justices in cities of second class, of, § 102a.
Justices' courts. See Justices' Courts, XXII.
Officer's when proceedings stayed on appeal to superior court, § 979.
Official reporter's, § 274.
Referees', §§ 768, 1028.
Transfer of actions, dismissal where fees not paid, § 581b.
Transfer of actions, filing transferred pleadings anew without fee after dismissal, § 581b.
Venue, on change of, § 399.

FELONY.
Conviction of attorney of, certificate thereof to supreme court, § 288.
Conviction of, suspension or removal of attorney, §§ 287, 289.

FEMININE.
Masculine gender includes, § 17.

FERRY.
Keeper of, exempt from jury duty, § 200.

FICTITIOUS NAME.
Suing party by, § 474.

FIDUCIARY RELATION.
Judgment for money received in, payable in same kind of money, § 667.

FIGURES.
Numbers may be expressed by figures, or numerals, § 186.

FILING.
Pleadings subsequent to complaint, § 465.

FINDINGS. See Court Commissioner; Reference.
Commissioner's, effect and force of, § 644.
Commissioner's, judgment on, § 644.
Conclusions of law inconsistent with, vacation of judgment, § 663.
Conclusions of law not supported by findings of fact, setting aside judgment for, § 663.
Judgment on, § 633.
Judgment roll, as part of, § 670.
Must be in writing, and filed within thirty days, § 632.
Notice of motion to set aside judgment for errors in, how made, and hearing of, § 663½.
Of fact and conclusions of law must be stated separately, § 633.

FINDINGS. (Continued.)
Of fact may be waived how, § 634.
Referee's, effect and force of, §§ 644, 645.
Referee's, how excepted to and reviewed, § 645.
Referee's, judgment on, § 644.
Referee's, must state conclusions of law and fact separately, § 643.
Referees to report within twenty days, § 643.
Service of, § 634.
Signing of, constitutes decision, § 1033.
Signing of, judge not to sign until five days after service of on other party, § 634.
Waived by consent in writing, § 634.
Waived by failure to appear, § 634.
Waived by oral consent in court, entered in minutes, § 634.
Waived, how findings of fact are, § 634.

FINE. See Penalty.
Arrest for, in justice's court, § 861.
Arrest in action for, § 479.
Claim and delivery, affidavit in relation to, § 510.
Contempt, for, before justice of peace, § 909.
Costs of course, in action involving, §§ 1022, 1024.
Juror, for failure to attend, § 238.
Justice's court, recovery in, § 112.
Justices in cities of second class, disposition of fines by, § 102a.
Police court, violation of ordinance, § 932.
Transmitting papers on appeal to superior court, for not, § 977.
Usurpation of office, for, § 809.

FIRE.
Burnt records or documents. See Burnt or Destroyed Records or Documents.
Nunc pro tunc filing of papers destroyed by, § 1046a.

FIRE COMPANY.
Apparatus pertaining to, exempt, § 690.

FIRE DEPARTMENT.
Actions for damages or on contract to be brought against city, § 390.
Apparatus of, exemption of, § 690.
Members of department cannot be sued for damages or on contract, § 390.
Members of, exempt from jury duty, § 200.

FIREMEN.
Exemption of from jury duty, § 200.

FISHERMAN.
What property of, exempt, § 690.

FISHING-BOAT.
Exemption of, § 690.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.
Appeal in, jurisdiction of supreme court, § 52.
Damages, treble, in, § 735.
Evidence, what may be given, § 838.

FORCIBLE ENTRY AND UNLAWFUL DETAINER. (Continued.)
Execution, justice may grant stay not to exceed ten days, § 901a.
Jurisdiction, concurrent, of superior and justice's court, § 113.
Jurisdiction in cases of, §§ 76, 113.
Jurisdiction of justice's court, §§ 113, 838.
Jurisdiction of supreme court in case of, § 52.
Justice's court, jurisdiction of, §§ 113, 838.
Justice's court, summons may be served out of county, § 848.
Rent, treble damages, § 735.
Summons in justice's court may be served out of county, § 848.
Treble damages in, § 735.

FORECLOSURE OF MORTGAGE.
Action, but one allowed for recovery of debt, § 726.
Action to be in accordance with code, § 726.
Appeal from decree of foreclosure of mortgage of personalty, bond on, § 943.
Appeal lies from interlocutory judgment in action to redeem, § 963.
Attorneys' fees, § 726.
But one action for recovery of debt, § 726.
Chattel mortgage, of, undertaking on appeal from, § 943.
Commissioner, appointment of, § 726.
Commissioner, compensation of, § 729.
Commissioner, conduct of sale, § 726.
Commissioner, death, disqualification, absence of, elisor, § 726.
Commissioner, oath and undertaking of, §§ 726, 729.
Commissioner, powers and duties of, §§ 726, 729.
Commissioner, report of, affidavits showing notice of time and place of sale, § 729.
Commissioner, report of, force of, § 729.
Commissioner, report of, to contain what, § 729.
Commissioner, report, time to make, § 729.
Commissioner, report of, verification of, § 729.
Conveyance, mortgage not deemed to be, whatever its terms, so as to avoid, § 744.
Costs and expenses, § 726.
Debt falling due at different times, proceedings in case of, § 728.
Decedent's estate, deficiency judgment, § 1578.
Decedent's estate, mortgage of, § 1578.
Decedent's estate, redemption, § 1505.
Deficiency judgment, estate of decedent, § 1578.
Deficiency judgment, how entered, § 726.
Deficiency, personal liability for, § 726.
Deficiency judgment, when entered, § 726.
Elisor, powers and duties of, § 726.

FORECLOSURE OF MORTGAGE. (Continued.)
Elisor to sell, oath and undertaking of, § 726.
Elisor, when appointed, § 726.
Exclusive remedy, § 726.
Injunction to prevent injury to property pending, § 745.
Installments, proceedings when debt payable in, § 728.
Interlocutory judgment in action to redeem, time for appeal, § 939.
Lis pendens, filing, § 409.
Necessary, whatever the terms of the investment, § 744.
Parties, who need not be made, § 726.
Personal property, foreclosure of mortgage, bond on appeal, § 943.
Place of trial, § 392.
Pleading written instruments, §§ 447–449.
Proceedings, in general, § 726.
Proceedings when debt falls due at different times, § 728.
Receiver, appointment of, § 564.
Redemption, note of record of mortgage to be produced, § 705.
Redemption of estate of decedent, § 1505.
Redemption. See Executions; Mortgages.
Sale, manner of, § 726.
Sale may be directed, § 726.
Sale of land in several counties, manner of, § 726.
Surplus, disposition of, § 727.
Surplus money to be deposited in court, § 727.
Undertaking on appeal where judgment decrees sale of personalty on foreclosure, § 943.
Undertaking to stay, on appeal, § 945.
Unrecorded conveyances and encumbrances, § 726.
Waste, enjoining, § 745.

FOREIGN CORPORATION.
Costs, new or additional security, § 1036.
Costs, security for, dismissal for failure to file, § 1037.
Costs, security for, time to give, § 1037.
Costs, stay until security for, filed, § 1036.
Security for costs may be required, § 1036.
Service on, § 411.
Summons, publication, §§ 412, 413.
Surety, acting as. See Surety.

FOREIGN JUDGMENTS.
Proceedings in sister state on, not stayed, § 526.

FOREIGN LAWS.
Statutes of limitations, § 361.

FOREIGN RESIDENT.
Summons, how served on, § 412.

FOREIGNER. See Alien.

FORFEITURE.
Justice's court, recovery of, in, § 112.
Lease, of, §§ 1161, 1179. See Landlord and Tenant.

FORFEITURE. (Continued.)
Limitation of action on, §§ 338, 340.
Limitation of action to recover from stockholders or directors, § 359.
On sale under execution, without notice, § 693.
Place of trial in action for, § 393.
Venue where offense committed on waters in several counties, § 395.

FORGERY.
Limitations in actions against bank paying forged or raised check, § 340.

FORMS. See Forms of Action; Forms of Pleading.
Abstract of judgment, § 897.
Notice of hearing in justice's court, § 850.
Process issued by justice's clerks in townships in counties of seventh class, § 103b.
Satisfaction of mortgage, form of, § 675a.
Seal of superior court, of, § 149.

FORMS OF ACTION.
But one form, § 307.

FORMS OF PLEADING.
Code prescribes, § 421.

FRANCHISE.
Action against party usurping, § 803.
Usurpation of, proceedings by attorney-general, § 803.
Usurpation, §§ 802–810. See Usurpation of Office and Franchise.

FRAUD.
Arrest for, § 479.
Arrest for, in justice's court, § 861.
Limitation of actions for, § 338.
Limitation of actions, how affected by, § 338.
Receiver, appointment of, § 564.

FRAUDULENT CONVEYANCE.
Appointment of receiver in action to vacate, § 564.
Bond by grantee on suit to set aside, filing of, and serving copy, § 677½.
Bond by grantee on suit to set aside, form, condition, and amount of, § 677.
Bond by grantee on suit to set aside, manner of justification of sureties, § 679½.
Bond by grantee on suit to set aside, objections to sureties, § 678.
Bond by grantee on suit to set aside, new bond may be given when, § 679.
Bond by grantee on suit to set aside, when becomes effective, § 680.
Bond by grantee on suit to set aside, judgment, when may be rendered on, § 680½.
Bond by grantee on suit to set aside, objection that estimated value less than market value, proceedings on, §§ 678, 679.
Bond by grantee on suit to set aside, sureties, justification, approval and disapproval, §§ 678, 678½, 679½.

FRAUDULENT CONVEYANCE. (Continued.)
Bond, grantee may give, on suit to set aside, § 676.
Bond on suit to set aside, grantee giving may convey or encumber, § 676.

FUNDS. See Receivers.
Restraining illegal expenditure of, § 526a.

FURNITURE.
Exempt from execution, § 690.

FUTURE.
Included in present tense, § 17.

FUTURE ESTATES.
Protecting in partition, § 781.

G

GARNISHMENT. See Attachment.
Garnishee, when liable to plaintiff, § 544.

GENDER.
Of words in code, construction of, § 17.

GENERAL DENIAL. See Answer.

GIFT.
Actions involving validity of gifts under will. See Wills.
Action to quiet title, involving gift under will, will admissible, § 738.
Action to quiet title, involving validity of gift under will, conclusiveness of determination, § 738.
Action to quiet title, validity of gift under will may be determined, § 738.

GOLD-DUST.
Levy on under execution, how returned, § 688.

GOVERNOR.
Direction to attorney-general to bring quo warranto, § 803.
Judge, appointing, to preside over extra session of superior court, § 67a.
Request of, to superior judge to hold court for another, § 160.
Vacancy in superior court, governor to fill, § 70.

GRAND JURY.
Ballot-box, depositing name in, § 209.
Constituted, how, § 242.
Defined, § 192.
Drawing, certifying, and listing, § 241.
Drawing names by clerk, § 242.
Drawing of, order for, § 241.
Drawn, how, § 241.
Impaneled, when may be, § 241.
Impaneling, §§ 241–243.
Impaneling, manner of, prescribed by Penal Code, § 243.
List of jurors, by whom and when made, § 204.
List of, to be placed with county clerk, § 204.
Names of jurors, how drawn, § 242.

GRAND JURY. (Continued.)
Names of jurors not drawn to be placed on list for succeeding year, § 211.
Names of jurors not impaneled to be replaced in box, § 241.
Names to be drawn from grand-jury box, § 211.
Number of jurors, §§ 192, 241, 242.
Number of times to be drawn each year, § 241.
Order for, § 241.
Panel, how filed, § 242.
Selecting and listing of grand jurors required, § 204.
Superior court may direct drawing of, when, § 241.
When may be impaneled, § 241.
Who competent to act, § 198.
Who not competent to act, § 199.

GROWING CROPS.
Attachment of, § 542.

GROWING TREES.
Damages for cutting or injury, §§ 733, 734.

GUARANTOR. See Surety.

GUARDIAN AD LITEM. See Infant; Insane Persons.
Appointment of, in justice's court, § 843.
Appointment of, where general guardian, § 372.
Compromise of case, authority of as to, § 372.
For infant, when may be appointed, § 372.
For lunatic, how appointed, §§ 373, 843.
Infant or insane person to appear by general guardian, or by, § 372.
When may be appointed, § 372.

GUARDIAN AND WARD.

I. Who entitled to act; appointment; practice.
II. Letters of guardianship.
III. Qualification; bond.
IV. Powers, duties, and liabilities; actions.
V. Partition of property.
VI. Accounting.
VII. Appeals.
VIII. Termination of authority.
IX. Miscellaneous provisions.

Guardian ad litem. See Guardian ad Litem.
Insane persons, of. See Insane Persons.

I. Who entitled to act; appointment; practice.
Appointment, certificate of, to be sealed, § 153.
Appointment, chambers, power to appoint in, § 166.
Appointment, code sections governing, § 304.

GUARDIAN AND WARD. I. Who entitled to act; appointment; practice. (Continued.)
Appointment in justice's court. See Justices' Courts, XV.
Appointment of guardian ad litem. See Guardian ad Litem.
Chambers, power to grant special letters at, § 166.
Insane person, appointment of guardian for. See Insane Persons.
Juror, relation of guardian and ward as affecting qualification of, § 602.
Referee, relation of guardian and ward as affecting qualification of, § 641.

II. Letters of guardianship.
Appeal lies from orders granting or refusing, § 963.
Appeal lies from orders revoking or refusing to revoke, § 963.

III. Qualification; bond.
Bond, may be approved at chambers, § 166.
Bond, official, sufficient on appeal by guardian, § 965.

IV. Powers, duties, and liabilities; actions.
Appearance by, in justice's court, for infant or incompetent, § 843.
Code sections governing powers and duties, § 304.
Compromise of case, authority as to, § 372.
Death of ward, guardian may sue, § 376.
Death of ward, who may be sued, § 376.
Guardians ad litem. See Guardians ad Litem.
Infant to appear by, or by guardian ad litem, § 372.
Injury to ward, guardian may sue for, § 376.
Injury to ward, who may be sued, § 376.
Insane person appears by general guardian or guardian ad litem, § 372.
Powers and duties, code sections governing, § 304.
Proxies, guardian may give, § 321b.
Relationship of guardian disqualifies referee, § 641.
Seduction of ward, guardian may sue for, § 375.
Service of summons on guardian, § 411.
Share of infant on partition, payment of, to guardian, §§ 793, 794.
Share of insane person on partition, payment of, to guardian, § 794.
Shares of stock of infant or insane person, guardian to represent, § 313.
Waste, liability for, § 732.

V. Partition of property.
Partition, consent by guardian to and execution of release by, § 795.
Partition, guardian may assent to, § 795.

GUARDIAN AND WARD. V. Partition of property. (Continued.)
Partition of property, guardian cannot purchase, except for ward, § 783.
Partition of property, release by guardian, § 795.
Partition, securities for purchase money may be taken in name of guardian, § 777.
Partition, share of infant, payment of to guardian, §§ 793, 794.

VI. Accounting.

Appealability of order relating to, § 963.

VII. Appeals.

Appeal by guardian, official bond sufficient, § 965.
Appeal from order respecting letters, time for, § 939.
Appeal lies from order relating to, § 963.
Order and judgments relating to guardianship appealable, § 963.
Reversal of order appointing guardian, validity of acts, § 966.

VIII. Termination of authority.

Chambers, power of judge to suspend guardian at, § 166.

IX. Miscellaneous provisions.

Juror, guardian or ward disqualified to act as, § 602.
Referee, relationship of guardian and ward disqualifications, § 641.

H

HABEAS CORPUS.
Superior court or judge may issue, § 76.
Supreme court may issue, § 51.
Supreme judge, issuance of, by, § 54.

HASTINGS LAW SCHOOL.
Diploma from, effect of, § 280a.

HEARING. See Trial.
New trial, on motion for, § 660. See New Trial.
Particular proceeding, in. See particular title.

HEARSAY. See Evidence.

HEIRS. See Estates of Decedents.
May sue for wrongful death, § 377.

HIGHWAY.
Cutting trees or timber to repair, damages, § 734.
Injuring trees, etc., in, §§ 733, 734.
Partition proceedings affecting, § 764.

HOLIDAYS.
Acts not to be done on, § 13.
Acts which may be done on, §§ 10, 134.
Adjournment to non-judicial day, proceedings in case, § 135.
Computation of time, if last day falls on holiday, it is excluded, § 12.

HOLIDAYS. (Continued.)
Courts may perform what acts on, § 134.
Courts not open on, except when, § 134.
Holding court on day following, § 135.
Injunctions, writs of, may be issued and served on, § 76.
Judicial days, § 133.
Holiday falling on next day celebrated, §§ 10, 11.
Non-judicial days, § 134.
Performance on day following, § 13.
Prohibition, writ of, may be issued and served on, § 76.
Saturday afternoon a half-holiday, § 10.
Saturday afternoon, what acts may be done on, § 10.
Saturday afternoon, process may be issued, filed or served on, § 10.
Saturday afternoon, written instruments may be executed, served or filed on, § 10.
School holidays enumerated, § 10.
School, power of school boards to declare, § 10.
Schools, exercises to be held on holidays by, § 10.
What days are, § 10.

HOMESTEAD.
Appraisers' report, appeal from, § 963.
Association, exemption of shares in, § 690.

HOSPITALS.
Limitations in actions by state for hospital dues, § 345.
Officer or attendant exempt from jury duty, § 200.

HOUSEHOLDER.
Exemption of property, § 690.

HUSBAND AND WIFE. See Divorce; Marriage.
Action by for damages to wife, consequential damages to husband recoverable without separate statement, § 427.
Married women as parties. See Married Women.
Married woman may sue or be sued alone when, § 370.
Married women. See Married Women.
Wife as party, husband, when to be joined, § 370.
Wife may defend action against herself and husband, § 371.

I

ILLNESS. See Sickness.

IMPEACHMENT.
Court of, impeachment to be presented by assembly, § 37.
Court of, is court of record, § 34.
Court of, is the senate, § 36.
Court of, jurisdiction of, § 37.
Court of, officers of senate are officers of, § 38.
Court of, procedure provided in Penal Code, § 39.

IMPEACHMENT. (Continued.)
Court of, senate, quorum of, what constitutes, § 36.
Court of, senators to be upon oath, § 36.

IMPRISONMENT. See Arrest.
Bail are exonerated by imprisonment of defendant, § 491.
Civil actions, in. See Arrest and Bail.
Debtor in supplementary proceedings, of, § 715.
Judgment debtor, of, § 682.
Limitations of actions, how affected by, § 352.
Statute of limitations, effect on, § 353.

IMPROVEMENT BONDS.
Sale of cannot be enjoined by taxpayer, § 526a.

IMPROVEMENTS.
Apportionment of, in partitions, §§ 763, 764.
Ejectment, as set-off in, § 741.
Partition of site of town or city, in, § 763.

INADVERTENCE.
Relief from, by amendment, § 473.

INDEMNITY.
Judgment against principal, conclusive against surety, when, § 1055.
Judgment against sheriff, conclusiveness against sureties, § 1055.
Judgment, entry of against surety on five days' notice, § 1055.
Sheriff, indemnity to, on claim of property, § 689.

INDEX.
To justice's docket, § 913.

INDICTMENTS.
Appellate jurisdiction in cases of, § 52.

INDORSEMENT.
Complaint, on by clerk, § 406.

INFANT. See Guardian ad litem; Parent and Child.
Adverse possession against, § 328.
Appearance of, in justice's court, by guardian, § 843.
Appears by general guardian or guardian ad litem, § 372.
Guardian ad litem for, §§ 372, 373. See Guardian ad Litem.
Guardian ad litem in justice's court, how and when appointed, § 843.
Guardian ad litem, when appointed, § 372.
Juvenile offenders. See Probation Officers.
Limitations of action, effect of infancy, §§ 328, 352. See Limitation of Action.
Partition, sale, guardian not to be interested in, except for infant, § 783.
Partition sale on credit, security in name of guardians, § 777.
Partition, sale, payment of proceeds of, to guardian, § 793.

INFANT. (Continued.)
Partition, unequal, compensation, § 792.
Party, as. See Guardian ad Litem.
Probationary treatment of juvenile offenders, § 131.
Service of summons on, § 411.
Wrongful death of or injury to, who may sue for, § 376.
Wrongful death of, who liable for, § 376.

INFORMATION.
In action for usurpation of office, § 803.

INFORMATION AND BELIEF.
Denial of allegation on, § 437.

INJUNCTION.
Affidavits or verified complaint, may be issued on, § 527.
Affidavits, service of, § 527.
Affidavits, what to show, § 527.
Answer, after, must be on notice or order to show cause, § 528.
Appeal from order respecting, time for, § 939.
Appeal lies from what orders respecting, § 963.
Bonds for public improvements, issuance or sale of cannot be enjoined, § 526a.
Conclusiveness of judgment against sureties on bond, § 532.
Corporation to suspend business of, necessity of notice, § 531.
Corporation, to suspend business of, when state a party, § 531.
Court commissioner may not grant, § 259.
Court in which action brought may grant, § 525.
Defined, § 525.
Definition of injury to person, § 29.
Definition of injury to property, § 28.
Denied in what cases, § 526.
Dissolution, §§ 532, 533.
Dissolution, affidavits, § 532.
Dissolution, evidence, § 532.
Dissolution, notice, § 532.
Dissolution, procedure, § 532.
Dissolution where water rights concerned, damages and counsel fees, § 532.
Dissolution, where water rights involved, on giving bond, § 532.
Enforceable as order of court where granted by judge, § 525.
Execution, enjoining injury after sale and before conveyance, § 745.
Execution, enjoining, time for issuance in case of, § 681.
Foreclosure, injury to property enjoined pending, § 745.
Funds, illegal expenditure of city or county, restraining, § 526a.
Granted by judge, enforceable as order of court, § 525.
Granted in what cases, § 526.
Grounds for granting, § 526.
Hearing, § 530.
Holidays, may be issued and served on, § 76.

INJUNCTION. (Continued.)
Irreparable injury, restraining, § 526.
Judge may grant, § 525.
Judge, order by judge enforced as court order, § 525.
Judgment, where waters involved, includes damages and attorneys' fees, § 532.
Kinds of, § 27.
Limitation of action, effect on, § 356.
May be issued or served any day, § 134.
Modifying, §§ 532, 533. See post, this subject.
Modifying, notice of, § 532.
Notice, necessity of, before enjoining business of corporation, § 531.
Notice of motion to modify or dissolve, § 532.
Notice, where granted after answer, § 528.
Nuisance, against, § 731.
Officers, action to restrain illegal expenditure or waste by, § 526a.
Order to show cause, procedure, § 530.
Order to show cause, restraining order pending hearing, § 530.
Order to show cause, when issued, § 529.
Order to show cause, where granted after answer, § 528.
Preliminary, affidavits of parties, filing and serving, § 527.
Preliminary, granted on what papers, § 527.
Preliminary, granted on what showing, § 527.
Preliminary, granting of, procedure, § 527.
Preliminary, hearing, precedence of, § 527.
Preliminary, notice of, § 527.
Preliminary, time of granting, § 527.
Preliminary, trial, precedence of, § 527.
Preliminary, trial to be set for earliest day possible, § 527.
Restraining defendant until decision, § 528.
Restraining order, when issued, § 530.
Sunday, writ may be served on, § 76.
Taxpayer, action by, to restrain illegal expenditure by officer, § 526a.
Taxpayer, action by, to restrain waste by officer, § 526a.
Taxpayer cannot enjoin issuance or sale of bonds by officer, § 526a.
Temporary, disqualified judge may issue pending appointment of and action by another judge, § 170.
Temporary restraining order, cause to be set for trial at earliest possible date and have precedence, § 527.
Temporary restraining order, dissolution where applicant not ready to proceed or fails to serve papers, § 527.
Temporary restraining order, continuance of hearing, right of defendant to, § 527.

INJUNCTION. (Continued.)
Temporary restraining order granted without notice, time of return of, § 527.
Temporary restraining order, hearing given precedence over other matters, § 527.
Temporary restraining order, hearing on, duty to proceed and dismissal, § 527.
Temporary restraining order, hearing, party obtaining must be ready to proceed, § 527.
Temporary restraining order, notice of to be given, § 527.
Temporary restraining order, notice, when may be granted without, § 527.
Temporary restraining order, procedure, § 527.
Temporary restraining order, service of complaint, affidavits and points and authorities, § 527.
Undertaking, exception to sureties, § 529.
Undertaking, judgment conclusive against sureties in suit on bond, § 532.
Undertaking, justification of sureties, § 529.
Undertaking, not required of married woman in suit against husband, § 529.
Undertaking, not required of state, county, or city, § 529.
Undertaking required, § 529.
Vacating or modifying, § 533.
Vacating or modifying, affidavit, § 532.
Vacating or modifying, evidence, § 532.
Vacating or modifying, in cases involving waters, damages, attorneys' fees, § 532.
Vacating or modifying, in cases involving water rights on giving bond, § 532.
Vacating or modifying, notice of, § 532.
Vacating or modifying, procedure, § 532.
Waste, §§ 526, 745.
Waste after execution sale and before conveyance, § 745.
Waste, enjoining, § 526.
Waste of public money or property by officer, right to enjoin, § 526a.
Waste pending foreclosure of mortgage, § 745.
Waste, pending time to redeem, enjoined, § 706.
Waters, dissolving or modifying, on giving bond, § 532.
Waters, diversion, increase or diminution, not enjoined on giving bond, when, § 530.
Waters, enjoining diversion or use of, refusing injunction, on giving bond, § 530.
Waters, injunction against diversion or use of, notice of application for, § 530.
Waters, suit involving, attorney's fee on vacating or dissolving, § 532.
What is, § 525.
When denied, § 526.
When diversion of waters not enjoined on giving bond, § 530.

INJUNCTION. (Continued.)
When may be granted, § 526.
Who may grant, § 525.

INJURIES.
Child, to, father, mother or guardian may sue for, § 376.
Civil action arises from, § 25.
Death, causing, §§ 376, 377. See Wrongful Death.
Issues of fact, how tried, § 592.
Joinder of claims for, § 427.
Kinds of, enumerated, § 27.
Liability for, after sale on execution, § 746.
Liability of steamers and vessels for, § 813.
Liability, on entry for survey of land, § 742.
Place of trial in actions for, §§ 395, 832.
To child, father, etc., may sue for, § 376.
To person, defined, § 29.
To property, defined, § 28.

INQUEST.
Jury of, defined, § 195.
Jury of, how summoned, §§ 235, 254.
Jury of. See Jury.
Manner of impaneling jury of, § 254.

INSANE ASYLUM.
Limitations in actions by state for hospital dues, § 345.

INSANE PERSONS. See Guardians.
Adverse possession against, § 328.
Appear by general guardian or guardian ad litem, § 372.
Appearance by, in justice's court, by guardian, § 843.
Guardians, generally. See Guardian and Ward.
Guardian ad litem, appointment of, although there is a general guardian, § 372.
Guardian ad litem for, how appointed, § 373.
Guardian ad litem in justice's court, how and when appointed, § 843.
Guardian ad litem to appear by, or by guardian, § 372.
Guardian ad litem, when appointed, § 372.
Guardian may receive proceeds of partition, § 794.
Limitation of action, §§ 328, 352.
Partition, insanity of person pending, effect of, and proceedings, § 763.
Partition proceedings, death of party, effect of and proceedings on, § 763.
Partition, payment of proceeds of, to guardian, § 794.
Service of summons on, § 411.

INSANITY. See Insane Persons.
Effect of, on limitation of actions, §§ 328, 352.

INSOLVENCY. See Bankruptcy.
Supreme court, jurisdiction of over, §§ 52, 76.

INSPECTION OF WRITINGS.
Contempt for disobedience to order respecting, § 1000.
Copies of books, accounts, writings, etc., right to take, § 1000.
Docket of judgment open for inspection, § 673.
Execution-book is open to inspection, § 683.
Notice on order to produce writings, § 1000.
Presumption on refusal to comply with order for, § 1000.
Refusal of inspection, its effect, §§ 449, 1000.
When may be demanded, § 1000.
Written instrument, demand for, § 449.

INSTRUCTIONS.
Cost of taking down and transcribing, chargeable against county, § 274a.
Courts open any day to give, § 134.
Erroneous, disregarded, unless substantial rights affected, § 475.
Exception to, giving of, refusing or modifying instruction deemed excepted to, § 647.
Further, after jury retired, § 614.
General nature and requisites of, § 608.
Holidays, may be given on, § 134.
Law, court may state such matters of law as it deems necessary, § 608.
May be taken down and transcribed, § 274a.
Modifying, giving, or refusing to give, deemed excepted to, § 647.
New trial, for disregard or misapprehension of, § 662.
Special, duty of court respecting, § 609.
Testimony, court stating, to inform jury they are exclusive judges of facts, § 608.
Written statement of points of law, court to furnish, when, § 608.
Written statement of points of law, Court to sign, when, § 608.

INSTRUMENTS. See Construction; Contracts.
Demand for inspection, § 449.
Pleaded how, in justice's court, §§ 886, 887.
Pleading, genuineness of, how admitted or controverted, §§ 447–449.

INSURANCE.
Exemption of moneys arising from life insurance, § 690.
Insurers in separate policies may be joined, § 383.
Several judgments, where insurers on different policies joined, § 383.

INSURANCE COMMISSIONER.
Corporation formed to act as surety, examination into, by insurance commissioner, and duties of, § 1056.

INSURANCE COMPANIES.
Answer claiming exemption from liability, what to state, § 437a.

INSURRECTION.
Change of place of holding court, on account of, § 142.

INTEREST.
Disbursements in partition proceedings, on, § 801.
Disqualifying judge or justice, § 170.
Foreclosure, debt falling due at different times, § 728.
Judgment, insertion of, in, § 1035.
Judgment, on, §§ 682, 1035.
Rebate, on foreclosure, § 728.
Receiver, funds in hands of, may be invested upon interest, § 569.
Redemptioner must pay what, §§ 702, 703.
Referee, interest disqualifying, § 641.

INTERLOCUTORY JUDGMENTS.
Appeal, time for, § 939.
Appealability of, § 963.
Order of decision deemed excepted to, § 647.

INTERPLEADER.
When and how maintained, § 386.

INTERVENTION.
Answer to, § 387.
Demurrer to, § 387.
Services of, on parties and attorneys, § 387.
Time to answer or demur, § 387.
When and how effected, § 387.
Who may intervene, § 387.

INVENTORY.
Of attached property, § 546.

INVESTMENTS.
Receiver, funds in hands of may be invested upon interest, § 569.

IRREGULARITY.
Of proceedings, ground for new trial, § 657.
Effect of, in proceedings on judicial sale, § 708.

IRRELEVANT MATTER.
May be stricken out, § 453.

IRRIGATION.
Injunction to prevent diversion, refusal on giving bonds, § 532.

ISSUES.
Bringing to trial, § 594.
By whom tried, and order of trial, § 592.
Calendar, § 593.
Defined, § 588.
Fact, issues, of how tried, § 592.
Fact, jury, how waived, § 631.
Fact, notice of hearing, § 594.
Fact, of, how arises, § 590.
Fact, of, reference, § 592.
Fact, of, trial of, by court, § 592.

ISSUES. (Continued.)
Fact, tried by jury, generally, § 592.
General denial puts in issue what, § 437.
In proceedings against joint debtor after judgment, how tried, § 994.
Justices' courts, in. See Justices' Courts, XIV.
Kinds of, § 588.
Law, issue of, to be first tried, § 592.
Law, of, how tried, § 591.
Law, of, how tried in justice's court. § 881.
Law, of, proceedings after determination of, § 636.
Law, raised by demurrer, § 589.
Reference of, when ordered, § 638.
Special, not made by pleading, how tried, § 309.
When arise, § 588.

ITEMS.
Account, of, need not be pleaded, § 454. See Account.

J

JOINDER.
Misjoinder, demurrer for, § 430.
Of causes of action, what permitted, § 427.
Parties, of. See Parties.
What actions may be joined, § 427.

JOINT AUTHORITY. See Majority.
Majority may act, § 15.

JOINT CONTRACT.
Action on, in justice's court, service outside of county, § 848.
Appearance, by other, where one defendant appears, § 406.
Service of summons or appearance, where one or more appear, § 406.

JOINT DEBTORS.
Appearance by other, where one or more appear, § 406.
Contribution, § 709.
Judgment in proceedings after judgment against a joint debtor, not to exceed amount remaining unsatisfied, § 994.
New complaint need not be filed in proceedings against, after judgment, § 990.
Not summoned in original action may be summoned after judgment, § 989.
Proceedings against, after judgment, amendment of pleadings, § 993.
Proceedings against, after judgment, answer, § 992.
Proceedings against, after judgment, defenses, § 992.
Proceedings against, after judgment, issue, how tried, § 994.
Proceedings against, after judgment, new complaint need not be filed, § 990.
Proceedings against after judgment, verdict not to exceed amount unsatisfied, § 994.

JOINT DEBTORS. (Continued.)
Proceedings against, after judgment, what constitutes the pleadings, § 993.
Several, part served may be proceeded against, § 414.
Summons, service and return of, § 990.
Summons to, after judgment, affidavit for, § 991.
Summons to, after judgment, what to contain, § 990.
Those served may be proceeded against, § 414.

JOINT-STOCK COMPANIES.
Non-resident, service of summons on, § 411.

JOINT TENANTS. See Co-tenants; Partition.
Any number may sue or defend for all, §§ 381, 384.
Parties in suits concerning, §§ 381, 384.
Partition, may sue for, § 752.
Waste, liability for, § 732.

JUDGES. See Courts; Justices of the Peace; Probate Court; Superior Court; Superior Judge; Supreme Court Justice.
Absence of, adjournment, § 139.
Absence of, proceedings in, § 139.
Acknowledgments, may take, § 179.
Affidavit of prejudice, proceedings on, § 170.
Affidavits, may take, § 179.
Attorney acting as judge pro tempore, oath, authority, and powers of, § 72.
Attorney, agent or solicitor, not to act as, § 171.
Attorney may be selected to act as judge pro tempore, § 72.
Bill of exceptions. See Exceptions.
Chambers, powers at, §§ 165, 166. See Chambers.
Change of, for bias, etc., procedure, § 170. See Place of Trial.
Changing place of holding court, §§ 142, 143.
Decision, meaning of, § 1033.
Depositions, may take, § 179.
Directing sheriff to provide suitable rooms, § 144.
Disqualification, affidavit of, proceedings on, § 170.
Disqualification, changing place of trial for, §§ 397, 398.
Disqualification, disqualified judge may issue temporary injunction pending appointment of new judge, § 170.
Disqualification of, change of trial for, procedure. See Place of Trial.
Disqualification of, designation of another judge to act, § 170.
Disqualification of judge, proceedings on, § 170.
Disqualification to practice law, § 171.
Disqualification to sit or act, what matters amount to, § 170.
Disqualification, waiver of, § 170.

JUDGES. (Continued.)
Election of superior judges, § 65.
Election of supreme justices, § 40.
Exemption of property of, § 690.
Incidental powers and duties of courts, §§ 128–130.
Law, not to practice, § 171.
Means to carry jurisdiction into effect, § 187.
Opinions. See Opinions.
Partner practicing law, not to have, § 172.
Powers of, at chambers, §§ 165, 166.
Powers of judicial officers in conduct of proceedings, § 177.
Powers of, out of court, § 176.
Powers may be enforced by contempt proceedings, § 178.
Pro tempore, causes may be tried before, § 72.
Pro tempore, qualifications and appointment of, § 72.
Pro tempore, proceedings before, effect of, § 72.
Pro tempore oath of, § 72.
Residence of superior judges, § 158.
Rules, power to make, § 129.
Rules, when take effect, § 129.
Subsequent applications for orders refused, when prohibited, § 182.
Superior court. See Superior Court.
Vacancy in office does not affect proceedings, § 184.

JUDGMENT. See Execution; Judgment Roll; Probate Court.
Acknowledgment of satisfaction, any judge or justice may take, § 179.
Actions on, how pleaded, § 456.
Administrator or executor, against. See Executors and Administrators.
Adverse claim, determining, §§ 739 et seq. See Quieting Title.
Adverse possession under, what constitutes, §§ 322, 323.
Affirmative relief to defendant, § 666.
Against one party, may be, and action proceed as to others, § 579.
Answer, absence of, what relief granted plaintiff, § 580.
Appeal, costs on, when judgment modified, § 1027.
Appeal from final judgment, what papers to be used on, § 950.
Appeal from interlocutory, time for, § 939.
Appeal from. See Appeals.
Appeal from orders after final, § 963.
Appeal from, time for, § 939.
Appeal may be taken from what, § 963.
Appeal, reversal of, not decreed except for substantial error, § 475.
Appeal to superior court, force and effect of judgment on, § 980.
Appeal to superior court. See Appeals, XIII.
Appealability of interlocutory judgments, § 963.

JUDGMENT. (Continued.)
Arrest of debtor, §§ 682, 684.
Associates in business, against, effect of, § 388.
Attachment, in, how satisfied, § 550.
Attorney's authority to acknowledge satisfaction of, § 283.
Attorney, on accusation against. See Attorneys, VI.
Barred by limitation, execution on, § 685.
Bill of exceptions, settling after, § 651.
Book, decrees to be entered in, § 658.
Book to be kept by clerk, § 668.
Claim and delivery, in. See Claim and Delivery.
Clerk, duty to enter judgment, § 664.
Conclusive as to whom, in partition, § 766.
Conclusiveness of. See Res Adjudicata.
Contribution among debtors, § 709.
Copy of, as part of judgment roll, § 670.
Costs, insertion of, in, § 1035.
Counterclaim exceeding plaintiff's demands, judgment, § 666.
Counterclaim, judgment where affirmative relief demanded, § 666.
Death of party before judgment, but after decision, § 669.
Death of party before judgment, but after decision, not a lien, § 669.
Death of party, when execution may issue after, § 686.
Decision, exceptions to, how presented, settled, or allowed, § 650.
Decision from which appeal may be taken deemed excepted to, § 647.
Decision, meaning of, § 1033.
Decision means signing and filing of findings of fact and conclusions of law, § 1033.
Decision must be written, § 632.
Decision to be filed within thirty days after submission, § 632.
Decision. See Decision.
Deemed excepted to, § 647.
Default. See Default.
Defined, § 577.
Demurrer, on, proceedings after, § 636.
Dismissal. See Dismissal.
Docket, how kept, § 672.
Docket is what, § 672.
Docket, open for inspection, § 673.
Docket, what to contain, § 672.
Docketing, § 671.
Dormant, execution on, § 685.
Election contest. See Elections.
Enforcing, manner of, § 684.
Entry of, § 671.
Entry of, duty of clerk, § 664.
Entry of, judgment ineffectual until, § 664.
Entry of judgment rendered on special verdict, § 628.
Entry of judgment upon decision, § 633.
Entry of judgment upon verdict, time of, § 664.
Excepted to, final decision deemed, § 647.
Execution on, § 682.

JUDGMENT. (Continued.)
Execution on, after five years, § 685.
Execution on dormant, § 685.
Execution on, power of court to stay, § 681a.
Execution. See Execution.
Expires when, §§ 671, 674, 681, 685.
Extra sessions of superior court, of, effect of, § 67b.
Filing transcript with recorder of another county, § 674.
Findings, conclusions of law not supported by. See Vacation, post, this title.
Findings, judgment on, § 633.
Findings of fact and conclusions of law, to be stated separately, § 633.
Findings. See Findings.
Foreign, effect of. See Res Adjudicata.
How carried into effect. See Execution.
Interest included in, § 1035.
Interest, insertion of, in, § 1035.
Interest on, §§ 682, 1035.
Interlocutory, appeal lies from, § 963.
Interlocutory, decision deemed excepted to, § 647.
Interlocutory judgment, appeal, time to take, § 939.
Joint debtors, proceedings against, after judgment, §§ 989–994.
Joint debtors, those served may be proceeded against, § 414.
Joint debtors. See Joint Debtors.
Judgment-book, clerk to keep, § 670.
Judgment roll, what papers constitute, § 670.
Judgment roll. See Judgment roll.
Jurisdiction, burden of proving where judgment pleaded, § 456.
Justices' courts, in. See Justices' Courts, XX.
Lien continues how long in another county, § 674.
Lien, duration of, § 671.
Lien, none, on death before judgment and after decision, § 669.
Lien of, in another county, when transcript filed there, § 674.
Lien on estate of decedent, when not, § 669.
Lien on real property in another county, § 674.
Lien, stay on appeal, effect on, § 671.
Lien, when begins, § 671.
Limitation of action on, § 336.
Limitation of action, on reversal of, § 355.
Limitation on, enforcing after five years, § 685.
May be against one party and action proceed as to others, § 579.
May be for or against one or more of the parties, § 578.
May determine rights of parties on each side as between themselves, § 578.
Merits, to be on, except when, § 582.
Mistake, impeaching foreign judgment for, § 1915.

JUDGMENT. (Continued.)
Money or currency, contract payable in specified kind of, § 667.
Money or currency, particular kind of, received in fiduciary capacity, § 667.
New trial. See New Trial.
Nonsuit, grounds for, § 581.
Nonsuit may be entered when, § 581.
Nonsuit, §§ 581, 582. See Nonsuit.
Occupation of land under, when adverse, § 322.
Officers, judgment against, how enforced, § 710.
Particular proceedings. See particular title.
Payable in kind of money alleged in complaint, § 667.
Payable in kind of money received by person in fiduciary relation, § 667.
Payable in kind of money specified in obligation, § 667.
Payable in specified kind of money, notice at execution sale, § 692.
Pleading, § 456.
Pleading, jurisdictional facts, § 456.
Proceedings after, against joint debtor not summoned in original action, §§ 989–994.
Receiver to carry into effect, § 564.
Receiver, when appointed after, § 564.
Referee's finding, on, § 644.
Referee's report in partition, judgment in. See Partition.
Relief from, for mistake, inadvertence, surprise etc., § 473.
Relief from, when defendant not personally served, § 473.
Relief that can be awarded plaintiff, § 580.
Remitting to superior court on case transferred to supreme court, § 56.
Remittitur from supreme court, § 958.
Rendered in cause appealed to superior court, force of, § 980.
Replevin, alternative, judgment in, § 667.
Replevin, in. See Replevin.
Res adjudicata. See Res Adjudicata.
Review of. See Appeal.
Reviving after five years, § 685.
Reviving in favor of purchaser under execution, § 708.
Revivor of, when execution purchaser evicted, § 708.
Satisfaction, attorney may acknowledge, § 283.
Satisfaction of, acknowledgment or indorsement of, § 675.
Satisfaction of by attorney, § 675.
Satisfaction of, by return of execution, § 675.
Satisfaction of, how made, § 675.
Setting aside, in equity, § 473.
Settling bill of exceptions after, § 651.
Special verdict, judgment on, to be entered, § 628.
Sureties, conclusiveness against, § 1055.
Sureties, entry of, against, on five days' notice, § 1055.

JUDGMENT. (Continued.)
Time for entering, when postponed, § 664.
Time for entering, when trial by jury, § 664.
Termination of right pending action, judgment in case of, § 740.
Time for entry, § 671.
Time to enter judgment on verdict, § 664.
Transcript filed in any county, judgment becomes lien there, § 674.
Transferred cases, in, proceedings after, § 400.
Vacated, judgment may be, and another judgment entered when, § 663.
Vacation of, appeal from order bill of exceptions, how prepared, § 663a.
Vacation, in what cases superior court may vacate its judgment, § 663.
Vacation, motion for, notice of, § 663a.
Vacation, motion for, when to be made, § 663a.
Vacation, notice of intention, what to state, § 663a.
Vacation of, grounds for, § 663.
Vacation of, motion for hearing and notice, § 663a.
Vacation of, notice of motion for, time to file, § 663a.
Vacation of, order granting, how reviewed on appeal, § 663a.
Vacation of special verdict, judgment on, § 663.
Vacation, relief from, time of motion for, § 473.
Verdict, judgment on, when to be entered, § 664.
Verdict, special, entry of judgment on, § 628.
Verdict, special, judgment on to be entered, § 628.
When defendant entitled to affirmative relief, § 666.

JUDGMENT-BOOK.
Decrees to be entered in, § 668.
To be kept by clerk, § 668.

JUDGMENT BY DEFAULT. See Default.

JUDGMENT ROLL.
A part of record on appeal, § 661.
Appellant must furnish, § 950.
Judgment on appeal to be attached to, § 958.
Transcript by clerk and reporter in bill of exceptions is part of, § 953a.
What papers constitute, generally, § 670.

JUDICIAL DAYS. See Holidays.
What are, and what are not, §§ 133–135.

JUDICIAL OFFICER. See Judges.
Acknowledgments and affidavits, may take, § 179.
Contempts, may punish for, § 178.
Enumeration of powers, § 177.
Exempt from jury duty, § 200.
Incidental powers and duties of, §§ 176–179.

JUDICIAL OFFICER. (Continued.)
In general, §§ 156–161.
Jurisdiction, means to carry into effect, § 187.
Partner practicing law, not to have, § 172.
Powers of, as to conduct of business, § 177.
Powers of, out of court, § 176.
Settlement of bill of exceptions by, § 653.
Vacancy, effect of, § 184.

JUDICIAL REMEDY. See Remedies.

JUDICIAL SALE. See Execution.

JURISDICTION. See Courts; Justices' Courts, II.
Acquired at what stage of proceeding, § 416.
Appearance cures want of service, § 581.
Appearance is equivalent to service, § 416.
Authority of court where no procedure provided, § 187.
Concurrent, of justices' and superior courts, in what cases, § 113.
Court of impeachment, of, § 37.
Demurrer for want of, § 430.
Judgment when amount in excess of remitting excess, § 894.
Justice of peace, of. See Justices' Courts, II.
Means to carry into effect, § 187.
Objection of want of, cannot be waived, § 434.
Pleading judgment, jurisdictional facts, § 456.
Superior court. See Superior Court.
Supreme court. See Supreme Court.
Transferred cause, § 399.
Waived, not, by failure to object, § 434.

JUROR. See Jury.
Admonition, on separation, § 611.
Affidavit of, misconduct of jury, § 657.
Attendance of, compelling, by attachment, § 238.
Attendance of, how enforced, § 238.
Ballot-box, §§ 215, 219.
Challenge, either party may, § 601.
Challenge for cause, grounds for, § 602.
Challenge, how tried, § 603.
Challenge in justices' courts, § 885.
Challenge is to individual jurors, § 601.
Challenge, parties to join in, when, § 601.
Challenge, peremptory, how taken, § 601.
Challenge, peremptory, number of, § 601.
Challenge, peremptory or for cause, is, § 601.
Challenge, who may be examined as witness on, § 613.
Clerk's certificate and list of, to be delivered to sheriff, § 219.
Clerk's certificate of drawing, § 219.
Clerk to call list of jurors summoned, § 246.
Clerk, when shall draw, § 215.

JUROR. (Continued.)
Competent, who are, § 198.
Competent, who are not, § 199.
Debtor and creditor, relationship of, disqualifies, § 602.
Deliberation, may decide in court or retire, § 613.
Deliberation of, how conducted, § 613.
Deliberation of, what papers, etc., may or may not take with, § 612.
Deliberation, three fourths can find verdict, § 613.
Deposit of names in grand and trial jury-box, § 209.
Disobedience by, punishment of, § 238.
Drawing, and summoning forthwith, how and when done, § 226.
Drawing, by clerk, how conducted, §§ 219, 600.
Drawing, by clerk, preservation of ballots drawn, § 219.
Drawing, by clerk, rejection of names, § 219.
Drawing, clerk's certificate of, § 219.
Drawing, clerk to draw in presence of court, § 215.
Drawing, clerk to draw names from box, § 600.
Drawing, clerk to preserve ballots, § 220.
Drawing, clerk, when to draw, § 215.
Drawing, for courts of record, §§ 214–220.
Drawing, jury, when to be drawn, § 214.
Drawing, names, copying and certifying, § 219.
Drawing, names of jurors not drawn to be replaced in box, § 220.
Drawing, names to be drawn from jury-box, § 211.
Drawing, order for, what to specify, § 214.
Drawing, order for, when made, § 214.
Drawing, proceedings when jurors dead, insane, incompetent, etc., § 219.
Drawing, superior judge may direct jury to be drawn, § 241.
Elisor, compensation for summoning jurors, § 228.
Elisor, summoning of jurors by, §§ 226, 227.
Excuse from service, grounds for, § 201.
Excuses, hearing of, § 246.
Exempt from jury duty, who are, § 200.
Exemption to serve as, affidavit of, § 202.
Exemption to serve as, how claimed, § 202.
Fine for non-attendance, § 238.
Illness of juror, proceedings on, § 615.
Impaneling jury. See Jury.
Inquest, how summoned, § 235. See Inquest.
Insufficient number of jurors, proceedings in case of, §§ 226, 227.
Justice's or police court, for, how summoned, §§ 230, 231.
Justice's or police court, summoning, return of officer, § 232.
List of, by whom and when made, § 204.

JUROR. (Continued.)
List of, clerk to dispose of, how, § 209.
List of, clerk's duty as to, § 209.
List of, how made and kept, §§ 205, 206.
List of, number of names, § 206.
List of, to be placed with county clerk, § 208.
Misconduct of. See Jury.
Names of jurors not drawn to be placed on list for succeeding year, § 211.
Names of persons not serving to be replaced, § 220.
Names to be written on slips and kept in sealed box, § 246.
Oath of, § 604.
Omissions of certain names from lists, § 219.
Order for, clerk, when to draw, § 215.
Order of judge for drawing jury, § 214.
Polling, § 618.
Polling, disagreement on, proceedings, § 618.
Qualifications and exemptions of, §§ 198–202.
Referee, disqualified as, § 641.
Regular jurors to serve one year, § 210.
Regular jurors, who are, § 210.
Selecting and returning for courts of record, §§ 204–211.
Selection of, § 204.
Selection of, how made, § 205.
Selection of, in proportion to population, § 206.
Selection of, lists to contain how many names, § 206.
Selection of, who may be selected, § 205.
Selection of, who to make, § 204.
Separation, §§ 611, 613.
Service as a juror previously as a disqualification, § 602.
Sheriff, list to be given to, for service, § 219.
Sheriff, list to summon how, § 225.
Sheriff to summon, return of list, § 225.
Sick, proceedings in case of, § 615.
Summoning, for courts not of record, §§ 230–232.
Summoning, for courts not of record, officer's return, § 232.
Summoning, for courts of record, §§ 225–228.
Summoning, for justices' or police courts, § 230.
Summoning juries of inquest, § 235.
Summoning, to complete panel, § 227.
Superior judge may direct jury to be drawn, § 241.
To serve one year, § 210.
Verdict of. See Verdict.
When may be drawn and summoned forthwith, § 226.
Who competent to act as, § 198.
Who exempt from jury duty, § 200.
Who may be excused from jury duty, § 201.
Who not competent to act as, § 199.

JURY. See Juror.
Adjournment of court while jury out, § 617.
Admonition, on separation, § 611.
Agreement upon verdict, proceedings in case of, § 618.
Changing place of trial, for impartial, § 397.
Courts open any day to discharge, § 134.
Court open for every purpose connected with cause submitted to, § 617.
Defined, § 190.
Definition of trial, § 193.
Deliberation, duty of officer in charge, § 613.
Deliberation, how conducted, § 613.
Deliberation of, what papers, etc., may and may not take with them, § 612.
Deliberation, three fourths can find a verdict, § 613.
Discharge before verdict, retrial of cause, § 616.
Discharge of, may be discharged on holiday, § 134.
Docket of justice of peace must contain demand for, § 911.
Drawing. See Juror.
Exempt from jury duty, who are, § 206.
Formation of, § 600.
Grand jury, defined, § 192.
Grand jury, §§ 241–243. See Grand Jury.
Holiday, may be discharged on, § 134.
Impaneling grand juries, §§ 241, 242.
Impaneling, in courts not of record, §§ 250, 251.
Impaneling, in criminal case, must be as prescribed by Penal Code, §§ 247, 251.
Impaneling, in justices' and police courts, manner of, §§ 250, 251.
Impaneling trial jurors in courts of record, §§ 246, 247.
Impaneling trial jury, manner of, §§ 246, 247.
Impartial trial, change of venue for want of, § 397.
Inquest, how summoned, § 235.
Inquest, impaneling jury of, § 254.
Inquest, jury of, defined, § 195.
Inquest. See Inquest.
Issues of fact to be tried by, § 592.
Justice's court, in. See Justice's Courts, XVI.
Kinds of, § 191.
May decide in court or retire and deliberate, § 613.
Misconduct of, affidavit of jury, § 657.
Misconduct of, new trial, § 657.
Must find amount of recovery when, §§ 626, 627.
Number of grand jury, § 192.
Number of trial jury, § 194.
Ordinance, action for violation of, jury trial, § 932.
Panel, counties having several judges, common panel drawn when, § 248.

JURY. (Continued.)
Panel, counties having several judges, panel in attendance may serve before any judge, § 248.
Panel, counties having several judges, separate panels for each judge, when drawn, § 248.
Panel, counties having several judges, separate panel, not to serve another judge, § 248.
Panel, summoning jurors to complete, § 227.
Police court, when defendant entitled to, in civil action, § 932.
Polling, § 618.
Polling, proceedings where jury disagree, § 618.
Polling, verdict complete if no disagreement, § 618.
Postponement of trial in justice's court when jury demanded, § 874.
Powers of, generally, § 190.
Quieting title, jury trial in action for, § 738.
Recovery, must find amount of, when, §§ 626, 627.
Separation, §§ 611, 613.
Sick juror, proceedings in case of, § 615.
Summoning. See Juror.
Trial by, of special issue not made by pleadings, § 309.
Trial by, when, and how waived, § 631.
Trial jury, defined, § 193.
Trial. See Trial.
Verdict, how declared, § 618.
Verdict, informal or insufficient, proceedings on, § 619.
Verdict, prevented, retrial of cause, § 616.
Verdict, sealed, § 617.
Verdict, sealed, rendered during adjournment, § 617.
Verdict, three fourths can find, §§ 613, 618.
Verdict of, §§ 624–628. See also Verdict.
View by, of premises, § 610.
Waived, how, § 631.
Waiver by failure to appear, § 631.
Waiver by oral consent in open court entered in minutes, § 631.
Waiver by written consent filed with clerk, § 631.
What cases to be tried by unless jury waived, §§ 592, 631.
Waiver of, § 592.

JURY OF INQUEST. See Inquest.

JUSTICE'S CLERK.
Cities and counties, appointment, § 86.
Cities and counties, attorney, disqualification to act as, § 96.
Cities and counties, bond, additional, § 86.
Cities and counties, bond and oath, § 86.
Cities and counties, cashier, appointment and salary, § 86.
Cities and counties, civil service laws, clerk and assistants entitled to benefits of after six months' service, § 86.

JUSTICE'S CLERK. (Continued.)
Cities and counties, deputies, appointment of, § 86.
Cities and counties, deputies, authority of, to take affidavits and oaths, § 86.
Cities and counties, deputies, clerks and messengers, number, appointment and salaries, § 86.
Cities and counties, deputies, liability for, § 86.
Cities and counties, disqualification to act as attorney, § 96.
Cities and counties, docket, duty to keep, § 93.
Cities and counties, fees paid in actions, duty as to, § 91.
Cities and counties, holds office during good behavior, § 86.
Cities and counties, may administer oaths and take affidavit, § 86.
Cities and counties, minutes of proceedings, filing, § 93.
Cities and counties, oath and bond, § 86.
Cities and counties, office hours, § 88.
Cities and counties, records of proceedings of courts, shall keep, § 89.
Cities and counties, powers of clerk and of his deputies, § 86.
Cities and counties, salaries of clerks and assistants, how paid, § 86.
Cities and counties, salaries of clerk and assistants to be in lieu of fees, § 86.
Cities and counties, subpœnas, issue by clerk, § 87.
Cities and counties, term of office, § 86.
Cities of second class, clerks, appointment, term of office, bond and powers, § 101.
Cities of second class, clerks, duties of, §§ 101, 102.
Cities of second class, clerk, fees, fines and penalties, § 102a.
Cities of second class, clerk, office hours, § 99.
Cities of second class, clerk, offices and rooms for, § 99.
Cities of second class, clerks, salaries of, § 102b.
Cities of second class, clerks, salaries to be in lieu of fees, § 102b.
Cities of second and one-half class class, clerk, appointment, confirmation, term of office and bond, § 103½.
Cities of second and one-half class, clerk, powers and duties, § 103½.
Cities of second and one-half class, clerk, salary of, § 103½.
Cities of third class, appointment and term of office, § 103½.
Cities of third class, bond of, § 103½.
Cities of third class, duties and powers of, § 103½.
Cities of third class, justices in, to have clerk, § 103½.
Cities of third class, salary, § 103½.
Docket. See Justices' Courts, X.
Townships of between 250,000 and 400,000, clerk and deputies, appointment and term of office, § 101.

JUSTICE'S CLERK. (Continued.)
Townships between 250,000 and 400,000, clerk and deputies, salaries of, § 102b.
Townships in counties of seventh class, all pleadings and papers to be filed with, § 103b.
Townships in counties of seventh class, appointment, number, term of office, § 103b.
Townships in counties of seventh class, clerk and deputies, salaries of, § 103b.
Townships in counties of seventh class, fees, collection, report and payment into treasury, § 103b.
Townships in counties of seventh class, deputies, appointment, term of office, duties, powers and salaries, § 103b.
Townships in counties of seventh class, form of process issued by, § 103b.
Townships in counties of seventh class, oath and bond, § 103b.
Townships in counties of seventh class, office hours, § 103b.
Townships in counties of seventh class, powers and duties of, § 103b.
Townships in counties of seventh class, supervisors to provide suitable offices, § 103b.
Townships, power to administer oaths, § 103a.
Townships, power to issue summons and writs, § 103a.

JUSTICES' COURTS. See Justice's Clerk; Justices of the Peace.
I. Nature of; holding of, and sessions; code provisions applicable; number of.
II. Jurisdiction.
III. Attorneys in, who may act as.
IV. Actions, how commenced; assignment of causes in.
V. Pleadings.
VI. Counterclaim.
VII. Summons.
VIII. Attachments; arrest.
IX. Process; subpœnas.
X. Dockets; records; minutes.
XI. Compromise; dismissal.
XII. Place of trial.
XIII. Continuance.
XIV. Trial; practice; rules; issues.
XV. Appearance; appearance by guardian.
XVI. Jury.
XVII. Contempt.
XVIII. Particular actions in.
XIX. Verdict.
XX. Judgments.
XXI. Executions and supplementary proceedings.
1. Executions.
2. Supplementary proceedings.
XXII. Costs; fees; undertakings.
XXIII. Appeals.

I. Nature of; holding of, and sessions; code provisions applicable; number of.
Always open, §§ 89, 104.
Are courts of peculiar and limited jurisdiction, § 925.
Cities of second class, sessions of, § 99.
Code provisions applicable to, §§ 869, 870, 925.
Number of, in townships, § 103.
Number of, at least one court in each township, § 103.
Number of, two may be established in townships by supervisors, when, § 103.
Place of holding, § 104.
Record, justices' courts are not courts of, § 34.
Sessions, number of, § 85.
Sessions, where held, § 104.
Townships between 250,000 and 400,000, sessions of court, § 99.

II. Jurisdiction.
Action for collection of licenses, § 103.
Action in wrong jurisdiction, objection to, appeal, § 890.
Action in wrong jurisdiction, objection to, waiver, § 890.
Certifying cases to superior court, § 92.
Cities, jurisdiction of, § 103.
Cities of first and one-half class, jurisdiction of, § 103.
Cities of second class, jurisdiction of, §§ 99, 100, 103.
Cities of third classs, jurisdiction of, § 103.
Cities of fourth class, jurisdiction of, § 103.
Civil, §§ 112, 838.
Civil, includes what causes, § 112.
Concurrent with superior court, § 113.
Criminal jurisdiction, § 115.
Does not extend to ships, seamen's wages, etc., § 114.
Evidence not admissible upon what questions, § 838.
Excess, remission of, § 894.
Forcible entry and detainer, jurisdiction in, § 838.
In general, §§ 89, 103.
In townships, § 103.
Not to trench upon jurisdiction of courts of record, § 114.
Ordinance, jurisdiction for violation of, § 103.
Restricted, § 114.
Ships, proceedings against, does not extend to, § 114.
Territorial extent, §§ 94, 106.
Townships, jurisdiction and powers of, § 103.

JUSTICES' COURTS. II. Jurisdiction. (Continued.)
Townships between two hundred and fifty thousand and four hundred thousand, jurisdiction of, § 99.
Transfer to superior court, jurisdiction of superior court, § 838.
Violation of ordinance, § 103.
When amount found due exceeds, excess remitted, § 894.
Wrong, objection to action in, § 890.

III. Attorneys in, who may act as.
Attorney may practice without license in, § 281.
License not necessary to practice, § 281.
Power of attorney to act as counsel in justice's court, § 96.
Who may act as, § 842.
Who may not act as, § 96.

IV. Actions, how commenced; assignment of causes in.
Action commenced by filing complaint, § 839.
Assignment of causes by presiding justice, §§ 89, 90.
Reassignment and transfer of actions, § 90.

V. Pleadings.
Actions, how entitled, § 89.
Actions in, form, § 89.
Amended pleading, adverse party may answer or demur, § 860.
Amended pleading, answer or demurrer to, time to file, § 860.
Amended pleading, failure to answer, proceedings on, § 872.
Amendment of pleadings, adjournment on, §§ 859, 874.
Amendment of pleadings, costs as a condition, § 859.
Amendment of pleadings, demurrer, § 858.
Amendment of pleadings, in general, § 859.
Amendment of pleadings on demurrer sustained, time for, § 858.
Amendment of pleadings, right of, § 859.
Answer in, § 852.
Answer in, plaintiff may demur to, when, § 857.
Answer may contain what, § 855.
Answer, time for appearance of defendant, § 845.
Answer, time to, § 845.
Answer, when demurrer overruled, § 858.
Answer, in general. See Answer.
Complaint, action commenced by filing, § 839.
Complaint, date of filing, indorsement of, § 840.
Complaint, defined, § 853.
Complaint, filing, commences action, § 839.
Complaint in, § 852.

JUSTICES' COURTS. V. Pleadings. (Continued.)
Complaint may be copy of instrument, § 853.
Complaint, in general. See Complaint.
Copy of account, bill, note, bond, or other instrument as complaint, § 853.
Demurrer, generally, § 852.
Demurrer, amending pleadings, where sustained, § 858.
Demurrer, judgment by default after, § 872.
Demurrer, proceedings where sustained or overruled, § 858.
Demurrer sustained, dismissal on failure to amend, § 890.
Demurrer to answer, § 852.
Demurrer to answer, grounds for, § 857.
Demurrer to answer, proceedings on, § 858.
Demurrer to answer, sustaining, proceedings on failure to amend answer, § 872.
Demurrer to answer, time for, § 857.
Demurrer to complaint, § 852.
Demurrer to complaint, overruling, proceedings on failure to answer, § 872.
Demurrer to complaint, proceedings on, § 858.
Demurrer to complaint, time for, § 854.
Demurrer, in general. See Demurrer.
Dismissal on failure to amend where demurrer sustained, § 890.
Exhibiting original and furnishing copy of instrument to adverse party, § 886.
Instrument attached to complaint or filed with clerk, admitted, unless denied under oath, § 887.
Pleading written instrument, genuineness admitted when, § 887.
Pleadings, amendment in general, § 859.
Pleadings, amendment on demurrer. § 858.
Pleadings, entry of oral, § 851.
Pleadings in, are what, § 852.
Pleadings, filing of, §§ 89, 851.
Pleadings, form of, § 851.
Pleadings, oral, § 851.
Pleadings, verification, § 851.
Pleadings, what are allowed, § 852.
Pleadings, in general. See Pleading.

VI. Counterclaim.
Answer may contain, § 855.
Counterclaim upon account or instrument for payment of money, exhibiting original and furnishing copy, § 886.
Dismissal in case of, § 890.
Omission to set up, fatal, § 856.

VII. Summons.
Alias, form of, § 846.
Alias, number of, § 847.
Alias, time for appearance, § 846.
Alias, time to issue, § 847.
Alias, when may issue, § 846.
Blanks, to be issued without, § 920.
County, cannot ordinarily be served outside of, § 848.

JUSTICES' COURTS. VII. Summons. (Continued.)
County, may be served outside, in what cases, § 848.
County, service outside of, certificate to summons, § 849.
County, service outside of, manner of, §§ 848, 849.
County, service outside of, publication of, § 849.
County, service outside of, return of, § 849.
Directed to defendant, § 844.
How served, § 849.
Indorsement of attorney's name, § 844.
In general. See Summons.
May be waived how, § 841.
Must contain what, § 844.
Must issue within year, § 840.
Parties, summons must name, § 844.
Process. See also post, IX.
Return of, §§ 87, 849.
Service outside of county, manner of, §§ 848, 849.
Territorial limitation on service of, § 848.
Time for appearance, specification of, § 845.
To be issued without blanks, § 920.
To be served out of county, certificate to, § 849.
Waiver by appearing and pleading, § 841.
Waiver of, by writing, § 841.
What to contain, § 844.
Who may serve, § 849.

VIII. Attachment; arrest.

Arrest and imprisonment, when defendant subject to, judgment to state fact, § 893.
Arrest, entry of judgment when defendant subject to, § 893.
Arrest, judgment where defendant subject to, § 893.
Arrest of defendant, affidavit for, § 862.
Arrest of defendant, certificate of, § 864.
Arrest of defendant, discharge on giving bond, § 876.
Arrest of defendant, females cannot be arrested, § 861.
Arrest of defendant, for embezzlement, § 861.
Arrest of defendant for fraud, § 861.
Arrest of defendant, grounds for, § 861.
Arrest of defendant in action for fine or penalty, § 861.
Arrest of defendant, officer must notify plaintiff, § 864.
Arrest of defendant, undertaking for, § 862.
Arrest of defendant, when may be ordered, § 861.
Arrest where defendant about to depart from state, § 861.
Arrested defendant, custody of, § 865.
Arrested defendant, discharge of on continuance at plaintiff's request, § 876.
Arrested defendant must be taken before justice at once, § 863.

JUSTICES' COURTS. VIII. Attachment; arrest. (Continued.)
Arrested defendant, postponement at request of, undertaking, § 876.
Arrested defendant, proceedings if justice absent, disqualified, etc., § 863.
Attachment, affidavit for, § 866.
Attachment, affidavit, what to state, § 866.
Attachment, direction of writ to sheriff, § 868.
Attachment, sections of code applicable to, § 869.
Attachment, in what cases issued, § 866.
Attachment, issuance of, duty of sheriff, § 866.
Attachment, issuance of, time of, § 866.
Attachment, substance of writ § 868.
Attachment to be issued on affidavit, § 866.
Attachment to be served out of the county, certificate to, § 868.
Attachment, undertaking on, § 867.
Attachments, form of, and contents, § 868.
Attachments, several writs may issue at same time, § 868.
Attachments, to whom directed, § 868.
Attachments, what to require, § 868.

IX. Process; subpœna.

All papers, except subpœnas, to be issued without blanks, § 920.
Cities of second class, process return of, § 100.
Process, by whom issued, § 91.
Process may issue to any part of county, § 919.
Process, on whose order to issue, § 91.
Process, over what territory reaches, §§ 93, 106.
Process, returnable to whom, § 89.
Process, service of, by sheriff and deputy, § 87.
Process upon docket of predecessor, § 916.
Subpœna, clerk may issue, § 87.
Subpœna, issuance and service of, § 87.
Subpœna may issue to any part of county, § 919.
Subpœna to be issued without blanks, § 920.
Successor has power of predecessor to issue, § 916.
Summons. See ante, VII.
Townships between two hundred and fifty thousand and four hundred thousand, process, issuance and return of, §§ 100, 101, 102.

X. Dockets; records; minutes.

Docket, a public record, §§ 93, 914.
Docket, clerk to keep, and what to contain, § 93.
Docket, date of trial and hearing to be entered on, § 850.
Docket, deposited where, on vacancy, and before successor appointed, § 915

JUSTICES' COURTS. X. Dockets; records; minutes. (Continued.)
Docket, entries in, force and effect of, § 93.
Docket, entries in, time of making, § 912.
Docket, entries prima facie evidence, §§ 850, 912.
Docket, entries to be under title of action, § 912.
Docket, entries where one justice sits for another, § 922.
Docket, entry of date of mailing notice of hearing on, § 850.
Docket, every justice must keep, § 911.
Docket, how kept, § 93.
Docket, index to docket must be kept, § 913.
Docket, index to, how kept, § 913.
Docket must be delivered to successor or county clerk, § 914.
Docket of predecessor, process or execution on, § 916.
Docket, to contain what, §§ 911, 913.
Filing papers and pleadings, § 89.
Minutes of proceedings, justice shall take and certify to clerk, § 93.
Papers to be kept as public records, § 914.
Record of proceedings kept in clerk's office, § 89.
Records and official papers to be delivered to successor, § 914.
Townships between 250,000 and 400,000, papers, transcripts of records in, issuing, signing and certifying, § 102.
Townships between 250,000 and 400,000, pleadings and papers filing and record of, § 102.
Transcript of entries in docket prima facie evidence, § 912

XI. Compromise; dismissal.

Compromise, costs in case of offer of, § 895.
Compromise, effect of accepting offer to, § 895.
Compromise, effect of refusing offer to, § 895.
Compromise, evidence not admissible, § 895.
Dismissal, actions may be dismissed when, § 890.
Dismissal, failure to amend, where demurrer sustained, § 890.
Dismissal for failure to make appearance, § 890.
Dismissal, judgment of, where action in wrong jurisdiction, § 890.
Dismissal, voluntary, § 890.
Dismissal, want of prosecution, § 890.
Dismissal, where counterclaim or affirmative relief sought, § 890.
Dismissal where provisional remedy allowed, delivery of bond to defendant, § 890.
Dismissal without prejudice, in what cases may be entered, § 890.

JUSTICES' COURTS. (Continued.)

XII. Place of trial.

Changing, affidavits, § 833.
Changing, because of interest, § 90.
Changing, costs on, § 836.
Changing, effect of order changing, § 836.
Changing, for disqualification, § 833.
Changing, grounds for, § 833.
Changing, limitation on right to change, § 834.
Changing, power of court to which case transferred, § 836.
Changing, proceedings after, § 836.
Changing, to what court cause may be transferred, § 835.
Changing, transmitting papers, § 836.
Claim and delivery, where to be brought, § 832.
Generally, § 832.
In what township or city, § 832.
Non-resident, action against, to be commenced in what, § 832.
Replevin, action in, to be commenced where, § 832.
Township or city, action may be commenced in what, § 832.
Transfer of proceedings, § 90.
Transfer to superior court, effect of, § 838.
Transfer to superior court, in what cases required, § 838.
Transfer to superior court, proceedings on, § 838.
Where parties voluntarily appear and plead without summons, § 832.
Where several jointly or jointly and severally bound, § 832.

XIII. Continuance.

Admission of evidence, effect of, on motion for, § 876.
Affidavit and showing necessary, § 876.
Deposition of witnesses, on postponement of trial, § 876.
Depositions of witnesses present, § 876.
Grounds of, § 876.
Length of, § 876.
Length of, where granted on court's own motion, § 874.
Not granted for more than ten days, unless upon undertaking to pay judgment, § 877.
Trial, adjournment not to be over twenty-four hours, § 873.
Trial, continuance of, without adjournment, § 873.
Trial, court may postpone of own motion when, § 874.
Trial, postponement by consent of parties, § 875.
Trial, postponement by court of own motion, grounds for, § 874.
Trial, postponement for amendment of pleadings, § 874.
Trial, postponement for want of testimony, affidavit as to evidence, § 876.

JUSTICES' COURTS. XIII. Continuance. (Continued.)
Trial, postponement for want of testimony, when denied, § 876.
Trial, postponement on court's own motion, length of, § 874.
Trial, postponement upon application of arrested party, undertaking, § 876.
Trial, postponement upon application of party, deposition of witness, § 876.
Trial, postponement upon application of party, for want of testimony, § 876.
Trial, postponement upon application of party, grounds for, § 876.
Trial, postponement upon application of party, how obtained, § 876.
Trial, postponement upon application of party, length of, § 876.
Trial, postponement upon application of party under arrest, § 876.
Trial, postponement upon application of plaintiff discharges defendant under arrest, § 876.
Trial, postponement when jury demanded, § 874.
Where defendant under arrest, § 876.

XIV. Trial; practice; rules; issues.
Date of trial and hearing to be entered in docket, § 850.
Evidence not admissible upon what questions, § 838.
Exhibiting original instrument and delivering copy of adverse party, § 886.
Hearing, date of, to be entered in docket, § 850.
Hearing, fixing day of, § 850.
Hearing, notice by mail, manner of, § 850.
Hearing, notice by mail, when permitted, § 850.
Hearing, notice of, date of mailing to be entered in docket, § 850.
Hearing, notice of, form of, § 850.
Hearing, notice of, returning and filing, § 850.
Hearing, notice of, service of, § 850.
Hearing, notice of, time of, § 850.
Hearing, notice of, to be given, § 850.
Issue of fact, how raised, § 880.
Issue of fact tried by court where jury waived, § 882.
Issue of fact tried by jury, unless waived, § 882.
Issue of law, how raised, § 879.
Issue of law triable by court, § 881.
Issues, classified, § 878.
Issues, defined, § 878.
Issues, how arise, § 878.
Notice of trial, form and service, § 850.
Notice of trial, return and entry of, § 850.
Notice, to whom given, § 850.
One hour in which to appear after time fixed in notice, § 850.
Practice, general doctrines regulating, § 95.

JUSTICES' COURTS. XIV. Trial; practice; rules; issues. (Continued.)
Rules, power to make and limitations on, § 95.
Rules, when to go into effect, § 95.
Trial, continuance of, without adjournment, § 873.
Trial, continuance or adjournment of. See ante, XIII.
Trial, date to be entered on docket, § 850.
Trial may proceed when party fails to appear, § 884.
Trial must commence within hour, § 873.
Trial, notice of, entry of service in docket, § 850.
Trial, notice of, evidence of service, § 850.
Trial, notice of, form of, § 850.
Trial, notice of, form and service thereof, § 850.
Trial, notice of, how served, § 850.
Trial, notice of, how served where party has appeared by attorney, § 850.
Trial, notice of, time of service, § 850.
Trial, notice of, to be given, § 850.
Trial, notice of, to whom given, § 850.
Trial, notice of, return and filing of, § 850.
Trial, notice of, when may be served by mail, § 850.
Trial, notice of, who may serve, § 850.
Trial, parties entitled to one hour in which to appear, § 850.
Trial, time when must be commenced, § 873.

XV. Appearance; appearance by guardian.
Appearance, dismissal for failure to make, § 890.
Appearance, failure of, trial may proceed on, § 884.
Appearance, hour for, § 850.
Appearance, fixing time for trial, § 850.
Appearance of defendant, time for, § 845.
Appearance, parties entitled to one hour for, § 850.
Appearance, voluntary, place of trial, § 832.
Appearing and pleading, waiver of summons by, § 841.
Guardian ad litem, how appointed for defendant, § 843.
Guardian ad litem, how appointed for plaintiff, § 843.
Guardian ad litem, time of appointment of, § 843.
Guardian may appear for infant or lunatic, § 843.
Infant may appear by guardian, § 843.
Insane person may appear by guardian, § 843.
Parties entitled to one hour to appear at trial, § 850.
Parties may appear in person or by attorney, § 842.

JUSTICES' COURTS. XV. Appearance; appearance by guardian. (Continued.)
Time for appearance where alias summons issued, § 846.
Townships of between 250,000 and 400,000, appearance in, § 100.

XVI. Jury.

Docket must contain names of jury and demand for, § 911.
Impaneling jury in, § 250.
Impaneling, manner of, §§ 250, 251.
Issue of fact to be tried by jury, unless waived, § 882.
Jurors, challenges are peremptory or for cause, § 885.
Jurors, challenges for cause, grounds for, § 885.
Jurors, challenges for cause to be tried by justice, § 885.
Jurors, challenges, three peremptory allowed, § 885.
Jurors, how summoned, §§ 230, 231.
List of jurors summoned to be called, § 250.
Manner of impaneling, § 251.
Names to be drawn from box, § 250.
Names to be written on slips, and folded and placed in box, § 250.
Postponement of trial where jury demanded, § 874.
Proceedings in forming, § 250.
Summoning jury in justice's court, §§ 230–232.
Summoning, of, officer's return, § 232.
Waived by consent, § 883.
Waived by failure to appear, § 883.
Waived by failure to demand, § 883.
Waived how, § 883.

XVII. Contempt.

Conviction must be entered in docket, § 910.
Disobedience to order or process, § 906.
Disorderly conduct, § 906.
Fine or imprisonment for, § 909.
In presence of justice, proceedings for, § 907.
In presence of justice, punished summarily, § 907.
In what cases justice may punish for, § 906.
Not in presence of justice, proceedings for, § 908.
Punishment for, § 909.
Rescuing person or property, § 906.
What acts are, § 906.
Witnesses, disobedience by, § 906.

XVIII. Particular actions in.

Account, action on, exhibition and inspection of, § 886.
Account, action on, furnishing copy, § 886.
Bill of particulars, § 454.
Claim and delivery, action, where to be brought, § 832.

JUSTICES' COURTS. XVIII. Particular actions in. (Continued.)
Claim and delivery, in, code sections applicable, § 870.
Claim and delivery, plaintiff may claim delivery of property, § 870.
Claim and delivery, procedure, § 870.
Genuineness of instrument sued on, admitted when, § 887.
Joint obligation, action on, service outside of county, § 848.
Licenses, actions for collection of, § 103.
Written instruments, action on, exhibition and inspection, § 886.
Written instruments, action on, furnishing copy, § 886.

XIX. Verdict.

Docket must contain, § 911.
Judgment on, to be entered at once, § 891.

XX. Judgments.

Abstract, filing in county of defendant's residence, § 905.
Abstract, filing in superior court, right to execution, § 899.
Abstract may be filed in office of county clerk of county where rendered, § 898.
Abstract of judgment, filing and docketing in superior court, § 898.
Abstract of judgment, form of, § 897.
Abstract of judgment, justice to give on request, § 897.
Abstract of judgment must be recorded to create lien on lands, § 900.
Abstract, time of receiving, clerk to note and enter, § 898.
Arrest and imprisonment, when defendant subject to, judgment to state fact, § 893.
Arrest, judgment where defendant subject to, § 893.
By default, amount of, § 871.
By default, proceedings on, § 871.
By default, relief for mistake, surprise, neglect, § 859.
By default, relief from, affidavit, § 859.
By default, relief from, time to apply, § 859.
By default, when defendant fails to answer amended complaint, § 872.
By default, when demurrer to answer sustained, § 872.
By default, when demurrer to complaint overruled, § 872.
By default, when rendered, § 871.
Confession of judgment may be entered, § 112.
Confession of, may be entered in any court, § 889.
Dismissal, judgment of, when action in wrong jurisdiction, § 890.
Dismissal without prejudice, in what cases may be entered, § 890.
Dismissal. See ante, XI.
Docketing, in superior court, right of, § 898.

JUSTICES' COURTS. XX. Judgments. (Continued.)
Docketing, in superior court, right to execution, § 899.
Docket must contain, § 911.
Entered, must be within thirty days of submission, § 892.
Entry of, judgment ineffectual for any purpose until, § 893.
Entry of, judgment to be entered at close of trial by court, § 892.
Entry of, manner of, § 893.
Entry of, must be entered within ten days after submission, § 892.
Entry, verdict, judgment upon, to be entered at once, § 891.
Excess, remission of, and entry of judgment for residue, § 894.
Lien of, extends how long, § 900.
Lien of judgment on land, extent of, § 900.
Lien on land from time of filing abstract, § 900.
Lien of, duration of, § 900.
Lien of, filing successive abstracts and continuing lien, § 900.
Lien on land, not, unless abstract filed in county, § 900.
Remitting amount in excess of jurisdiction, § 894.
Rendered, judgment to be within thirty days of submission, § 892.
Rendition of, notice of, time to serve, § 893.
Rendition of judgment, notice of, justice to give to parties, § 893.
Rendition of, notice of, judgment, how given, § 893.
Verdict, judgment on, to be entered at once, § 891.

XXI. Executions and supplementary proceedings.

1. Executions.

Alias, may be issued, § 903.
Blanks, to be issued without, § 920.
Boundaries, change of, justice may issue execution on docket of predecessor, § 916.
Contents of, § 902.
Date, § 902.
Directions, what to contain, § 902.
Docket must contain statements relating to, § 911.
Docketing judgment in superior court, execution in case of, § 899.
Duty of officer receiving, § 904.
Form of, § 902.
In another county, § 905.
Manner of executing, § 904.
May issue within five years, § 901.
New county, justice may issue execution on docket of predecessor, § 916.
On judgment docket in superior court, § 899.
Power of officer receiving, § 904.
Renewal, manner of, § 903.
Renewal of, authorized, § 903.

JUSTICES' COURTS. XXI. Executions and supplementary proceedings. 1. Executions. (Continued.)
Renewal, successive renewals, § 903.
Stay of, not to exceed ten days, § 901a.
Stay of, power to grant, § 901a.
Subscription, § 902.
Successor in office may issue, § 901.
Time within which may issue, § 901.
To be issued without unfilled blanks, § 920.
To contain statement of what, § 902.
To whom directed, § 902.
Upon docket of preceding justice, § 916.
Who may issue, § 901.

2. Supplementary proceedings.

Supplementary proceedings authorized in, § 905.
Supplementary proceedings, provisions of code applicable, § 905.

XXII. Costs; fees; undertakings.

Costs, attorney's fee in action for wages, § 924.
Costs, deposit or security may be required for, § 923.
Costs, in cases compromise offered before trial, § 895.
Costs included in judgment, § 896.
Costs, justice to tax, § 897.
Costs, prevailing party entitled to what, § 924.
Deposit instead of undertaking, § 926.
Fee, attorney's recovering as costs in action for wages, § 924.
Fees, collection and report of, § 103.
Fees for issuance and service of process, § 91.
Fees, inability to pay, § 91.
Fees, judgment not to be rendered until paid, § 91.
Fees, payment in advance, § 91.
Fees, payment in advance, when excused, § 91.
Security for costs, justice may require, § 923.
Undertaking, deposit in lieu of, § 926.

XXIII. Appeals.

Attachment when only continued in force by, § 946.
Bond, dispensing with on appeal by executor, trustee, etc., § 946.
Certificates, transcripts and other papers, § 92.
Docket to contain what, § 911.
How taken, § 92.
Judgments of superior court on, what appealable, § 964.
Notice, filing of, § 92.
Papers to be filed, § 92.
Power of lower court to proceed after, § 946.
Property levied on, release of, where sureties excepted to, § 946.
Property released from execution, § 946.
Statements, who to settle, § 92.

JUSTICES' COURTS. XXIII. Appeals. (Continued.)
Stays all proceedings upon judgment or order, § 946.
Superior court, from matter taken to, time for, § 939.
Superior court, proceedings brought into, appealability, § 964.
Sureties, justification of, § 92.
To superior court, §§ 974–980. See Appeals.
To supreme court, § 964.
Transcripts in cases certified to superior court, §§ 92, 838.

JUSTICES OF THE PEACE. See Justices' Courts.

I. Generally.
II. In cities and in cities and counties.
III. In townships.

I. Generally.

Acknowledgment, affidavit, deposition, may take, § 179.
Attachment, issuance of. See Justices' Courts, VIII.
Blanks must be filled in all papers issued by, except subpœnas, § 920.
Boundaries, change of, power over proceedings begun before predecessor, § 916.
Change of venue for bias, etc., procedure, § 170.
Citizen, justice must be, § 159.
Clerk, §§ 86 et seq. See Justice's Clerk.
Constable may not act as attorney, § 842.
County, new, creation of, power of justice over proceedings begun before predecessor, § 916.
Death, papers, records and dockets to be deposited where, § 915.
Deposition, may take, § 179.
Disability or absence of, attendance of another justice, adjournment resuming jurisdiction, § 922.
Disability or absence of, attendance of another justice, entry of proceedings, § 922.
Disability or absence of, attendance of another justice in his behalf, § 922.
Disability or absence of, attendance of another justice, powers of, § 922.
Disqualification of, what matters amount to, § 170.
Disqualification to practice law, § 171.
Disqualification of, proceedings on, § 170.
Disqualification, waiver of, § 170.
Disqualified, transfer of cause to another, § 398.
Docket. See Justices' Courts, X.
Expiration of office, must deliver papers and dockets to successor, § 914.
Moneys collected, must receive and pay same to parties, § 921.
Not to have law partner, § 172.

JUSTICES OF THE PEACE. I. Generally. (Continued.)
Not to practice before justice's court, § 171.
Police judge, act conferring power to act as, § 115, note.
Process. See Justices' Courts, IX.
Qualification of, § 159.
Residence of, § 159.
Salary, oath that no cases undecided over thirty days before drawing, § 892.
Subpœnas. See Justices' Courts, IX.
Successor has authority of predecessor, § 916.
Successor, power and authority over existing proceedings, § 916.
Successor, when superior court shall designate, § 918.
Successors of others, what justices are, §§ 98, 107, 916, 917.
Term of office, § 110.
Transfer of action to another court, manner of, §§ 398, 399.
Vacancy, papers and dockets to be deposited where, § 915.

II. In cities and in cities and counties.

Cities and counties, absence or disability, reassignment and transfer of action, § 90.
Cities and counties, any justice may hold court, § 85.
Cities and counties, attorney at law, must be, § 85.
Cities and counties, attorney, right to appear as, before, § 96.
Cities and counties, attorney, when not to act as, § 96.
Cities and counties, clerk of, not to act as attorney, § 96.
Cities and counties, clerk of. See Justice's Clerk.
Cities and counties, disqualification to act as attorney, § 96.
Cities and counties, election of, § 85.
Cities and counties, elector of city and county, must be, § 85.
Cities and counties, fees, payment into treasury, § 91.
Cities and counties, minutes of proceedings, to keep, § 93.
Cities and counties, minutes, to be certified, returned and filed, § 93.
Cities and counties, number of, § 85.
Cities and counties, number of sessions, § 85.
Cities and counties, office-rooms, how provided, § 88.
Cities and counties, office and office hours, § 88.
Cities and counties, offices, expense of, how met, § 88.
Cities and counties, pleadings and papers to be certified, returned and filed, § 93.
Cities and counties, presiding, appointment and removal, § 85.

JUSTICES OF THE PEACE. II. In cities and in cities and counties. (Continued.)
Cities and counties, presiding, assignment of causes by, §§ 89, 90.
Cities and counties, presiding, disability or absence of, substitute, § 85.
Cities and counties, presiding justice, salary of, § 97.
Cities and counties, qualifications of, § 85.
Cities and counties, rooms, attendants and supplies to be furnished, § 88.
Cities and counties, salary of, § 97.
Cities and counties, salary to be sole compensation, § 97.
Cities and counties, sheriff and deputies, ex-officio officers, § 87.
Cities and counties, sheriff may be directed to furnish rooms, etc., § 88.
Cities and counties, succession of justices, transfer of records, etc., § 98.
Cities and counties, successors of others, what justices are, §§ 98, 917.
Cities and counties, successors, powers and jurisdiction of, §§ 98, 916.
Cities and counties, supervisors to furnish suitable rooms, § 88.
Cities, officers to be provided for, § 103.
Cities of first class, fees, report and payment into treasury, § 103.
Cities of first class, justices must have been admitted to practice law, § 103.
Cities of first class, justices not to practice before another justice or have law partner, § 103.
Cities of first class, justices, salaries are sole compensation, § 103.
Cities of first class, salaries, how paid, § 103.
Cities of first and one-half class, fees, report of and payment into treasury, § 103.
Cities of first and one-half class, justices in, number of, § 103.
Cities of first and one-half class, justices, powers, § 103.
Cities of first and one-half class, justices, must have been admitted to practice, § 103.
Cities of first and one-half class, justices not to practice before another justice or have law partner, § 103.
Cities of first and one-half class, salaries are sole compensation, § 103.
Cities of first and one-half class, justices, salaries of, § 103.
Cities of second class, fees, report of and payment into treasury, § 103.
Cities of second class, justices, powers, § 103.
Cities of second class, justices not to practice before another justice or have law partner, § 103.
Cities of second class, justices must have been admitted to practice, § 103.
Cities of second class, justices, number of, §§ 99, 103.

JUSTICES OF THE PEACE. II. In cities and in cities and counties. (Continued.)
Cities of second class, justices, office hours, § 99.
Cities of second class, justices, powers and authority, § 100.
Cities of second class, justices, salaries of, § 103.
Cities of second class, justices, salaries are sole compensation, § 103.
Cities of second class, justices, salaries to be in lieu of fees, § 102b.
Cities of second class, offices and rooms for, § 99.
Cities of second class, powers, § 99.
Cities of second class, presiding justice, § 99.
Cities of second and one-half class, fees, report of and payment into treasury, § 103.
Cities of second and one-half class, justices not to practice before another justice or have law partner, § 103.
Cities of second and one-half class, justices must have been admitted to practice, § 103.
Cities of second and one-half class, justices, number of, § 103.
Cities of second and one-half class, justices, salaries of, § 103.
Cities of second and one-half class, justices, salaries are sole compensation, §§ 103, 103½.
Cities of third class, clerk, appointment, confirmation, term of office and bond, § 103½.
Cities of third class, clerk, powers and duties of, § 103½.
Cities of third class, clerk, salary of, § 103½.
Cities of third class, fees, report of and payment into treasury, § 103.
Cities of third class, justices, powers, § 103.
Cities of third class, justices not to practice before another or to have law partner, § 103.
Cities of third class, justices must have been admitted to practice, § 103.
Cities of third class, justices, number and election of, § 103.
Cities of third class, justices, salaries of, § 103.
Cities of third class, justices, salaries are sole compensation, §§ 103, 103½.
Cities of fourth class, fees, report of and payment into treasury, § 103.
Cities of fourth class, powers, § 103.
Cities of fourth class, justices, number and election of, § 103.
Cities of fourth class, justices, salaries of, § 103.
Cities of fourth class, salaries are sole compensation, § 103.

III. In townships.
Change in boundaries of township or county, succession of justices, § 107.

JUSTICES OF THE PEACE. III. In townships. (Continued.)
Election of, § 103.
Eligibility, admission to practice law, § 103.
Eligibility, general requirements, § 159.
Holding court for another justice, effect of proceedings, § 105.
Holding court for another, entries in docket, § 105.
Holding court for another, power of, § 105.
Jurisdiction of, § 106.
Not to have law partner, § 103.
Not to practice before another justice, § 103.
Salaries, how paid, § 103.
Salary to be sole compensation, § 103.
Succession of justices, on change of boundaries, § 107.
Successor, on change of boundaries, § 107.
Successors of others, what justices are, §§ 107, 916, 917.
To be provided with suitable offices, § 103.
Townships between two hundred and fifty thousand and four hundred thousand, composed of six justices, § 99.
Townships between two hundred and fifty thousand and four hundred thousand, fees, accounting for and payment into treasury, § 102a.
Townships between two hundred and fifty thousand and four hundred thousand, fees, fines and penalties become property of county, § 102a.
Townships between two hundred and fifty thousand and four hundred thousand, fees to be paid in advance, § 102a.
Townships between two hundred and fifty thousand and four hundred thousand, office hours, § 99.
Townships between two hundred and fifty thousand and four hundred thousand, powers and duties of, §§ 100, 101, 102.
Townships between two hundred and fifty thousand and four hundred thousand, powers of justices, § 99.
Townships between two hundred and fifty thousand and four hundred thousand, presiding justice of, § 99.
Townships between two hundred and fifty thousand and four hundred thousand, rooms for, duty of supervisors, § 99.
Townships between two hundred and fifty thousand and four hundred thousand, salary is in lieu of fees, § 102b.
Townships between two hundred and fifty thousand and four hundred thousand, salary of justices, § 102b.
Vacancies, how filed, § 111.
What justice may hold court for another, § 105.
Where held, § 104.

JUSTICES OF SUPERIOR COURT. See Judges; Superior Court; Superior Judges.

JUSTICES OF SUPREME COURT. See Supreme Court Justices.

JUSTIFICATION OF SURETY. See Surety.
By surety company, § 1057a.

JUVENILE OFFENDERS.
Probationary treatment of juvenile offenders, § 131.
Probation officer, appointment of, § 131.
Probation officer, powers and duties of, § 131.
Probation officer, receives no compensation, § 131. See Probation Officers.

L

LAKE.
Venue of action for offense on lake situated in several counties, § 393.

LANDLORD AND TENANT.
Adverse possession between, § 326.
Joinder of landlord as party defendant, where tenant in possession, § 379.
Leasehold of less than two years not subject to redemption after sale on execution, § 700a.
Leasehold, when subject to redemption after sale on execution, § 700a.
Presumption as to tenant's possession, § 326.
Rents. See Rents.
Ward, lease of estate of. See Guardian and Ward, V.

LARCENY.
Petit, justice has jurisdiction of, § 115.

LAW. See Code of Civil Procedure; Statutes.
Conclusions of, erroneous, vacation of judgment, § 663.
Conclusions of. See Conclusions of Law; Findings.
Decision against, as ground for new trial, § 657.
Error in, as ground of new trial, § 657.
Instructions. See Instructions.
Issues of, §§ 588–594. See Issues.
Issues of, by whom tried, § 592.
Issues of, to be first disposed of, § 592.
Judgment for defendant on issue of, reference, when ordered, § 636.
Judgment for plaintiff on issue of, proceedings after, § 636.

LEASE. See Landlord and Tenant; Rents.
Infant, of property of. See Guardian and Ward, V.

LEASEHOLD.
Execution, sale on, of lease of less than two years, absolute, § 700a.
When subject to redemption after sale on execution, § 700a.

LEGISLATIVE ACTS.
By municipality, not enjoined, § 526.

LEGISLATURE.
Continuance because of attendance of party, witness, or attorney on legislature, § 595.
Extension of time during attendance, § 1054.
Impeachment, §§ 36–39. See Impeachment.

LELAND STANFORD JUNIOR UNIVERSITY.
Admission to practice law on diploma from, § 280b.

LETTER OF ATTORNEY. See Power of Attorney.

LETTERS PATENT. See Patent.

LEVEE DISTRICTS.
Disqualification of judge or justice in actions in relation to, and proceedings on, § 170.

LEVY. See Execution.

LIBEL.
Answer, § 461.
Complaint, § 460.
Justification, § 461.
Limitation of action for, § 340.
Mitigating circumstances, evidence of, § 461.
Pleading in actions for, §§ 460, 461.

LIBRARY.
Exempt from execution, § 690.

LICENSE.
Attorney's, §§ 277–281.
Jurisdiction of justice's court of suits for collection of, § 103.

LIEN.
Action to foreclose, in justice's court, summons may be served out of county, § 848.
Action to foreclose, on realty, where brought, §§ 78, 392. See Foreclosure of Mortgage.
Appeal lies from interlocutory judgment in action to redeem, § 963.
Attachment, ceases when judgment stayed on appeal, § 671.
Attachment of, § 542a. See Attachments, IV.
Death, judgment after, not a lien, § 669.
Defendant's, pleading, in partition, § 758.
Dismissal in action to enforce, failure to serve and return summons, § 581a.
Interlocutory judgment in action to redeem, time for appeal, § 939.
Judgment after death, not to be a, § 669.
Judgment, effect of appeal, § 671.
Judgment in another county, when transcript filed there, § 674.
Judgment, when begins and when expires, §§ 671, 674.

LIEN. (Continued.)
Justice, judgment of, lien of, § 900. See Justices' Courts, XX.
Justice's court, action to enforce, in, § 113.
Justice's judgment a lien on realty when, § 900.
Partition. See Partition.
Place of trial of suit to foreclose, § 392.
Realty, action to enforce lien against, to be brought in county where land is, § 78.
Redemption from, note of record, to be produced, § 705.
Redemption from, procedure, § 705.
Redemption, lienor may redeem, § 701.
Redemptioner must pay what, §§ 702, 703.
Vessels, on, § 813. See Shipping.

LIFE ESTATE.
Partition. See Partition.
Setting off in partition, § 770.
Waste, liability of tenant for, § 732.

LIMITATION OF ACTION.
Absence from state, how affects running of statute, § 351.
Absence, leaving state after action accrues, effect of, § 351.
Account, action, when accrues, § 344.
Account, mutual, open and current, §§ 337, 344.
Account, open book-account, § 337.
Acknowledgment must be in writing, § 360.
Action already commenced not affected by statute, § 362.
Action barred before code takes effect, § 362.
Action barred by foreign statute, § 361.
Action barred, not affected by statute, § 362.
Action can only be commenced within times prescribed in codes, § 312.
"Action" includes special proceeding, § 363.
Action, when commenced, § 350.
Action commenced before code takes effect, § 362.
Actions for relief not specifically provided for, § 343.
Actions other than for recovery of realty, limitations generally, § 335.
Administrators or executors, actions by and against, § 353.
Adverse possesssion. See Adverse Possession.
Aliens, effect of war, § 354.
Answer, how pleaded, § 458.
Appeal, time for taking, § 939.
Appeals, reversal on, time for commencing new action, § 355.
Assault, for, § 340.
Assessment, action to recover stock sold for, § 341.
Assessment under local improvement, contest of, § 349.
Bail bond, § 340.

LIMITATION OF ACTION. (Continued.)
Bank, payment of forged or raised check, § 340.
Banks, deposits in, § 348.
Battery, § 340.
Bond in criminal action, § 340.
Book-account, open, § 339.
Building and loan associations, no limitation to recover deposits in, § 348.
Burden of proving action is barred, § 458.
Cases not specifically provided for, § 343.
Check, payment of forged or raised, § 340.
City, action against, for damages by mob or riot, § 340.
Claim and delivery, § 338.
Code, actions can only be commenced within times prescribed in, § 312.
Code, actions already commenced or barred not affected by, § 362.
Code, effect of, on existing statute, § 9.
Code, time already run at passage of, deemed part of limitations prescribed by, § 9.
Conflict of laws as to, § 361.
Constable, against, §§ 339, 340.
Contest of assessment under local improvement act, § 349.
Contract not founded upon instrument in writing, § 339.
Contract, written, executed out of state, § 339.
Contracts, not in writing, § 339.
Conversion, § 338.
Coroner, against, § 339.
Corporation, action to recover stock sold for delinquent assessment, § 341.
County, on claim against, rejected by supervisors, § 342.
Criminal action, undertaking given in, § 340.
Current account, § 344.
Damages for death, § 340.
Damages for seizing or detaining property by tax-collector, § 341.
Death, § 340.
Death of party, action by or against representative, §§ 353, 355.
Death of party, effect of, §§ 353, 355.
Depositor, action for payment of raised or forged check, § 340.
Deposits in bank or trust company, § 348.
Detinue, § 338.
Directors, for penalty or forfeiture, against, § 359.
Disabilities, absence from state, § 351.
Disabilities affecting operation of statute, §§ 328, 352, 354.
Disabilities, effect of two or more, § 358.
Disabilities, injunction staying action, effect of, § 356.
Disabilities, statutory prohibition of action, effect of, § 356.
Disability must exist when action accrues, § 357.
Entry on land, within what time must be made, § 320.

LIMITATION OF ACTION. (Continued.)
Escape, §§ 339, 340.
Execution from justice's court, time to issue, § 901.
Execution, non-payment of money collected on, § 339.
Execution on barred judgments, § 685.
Execution, time to issue, §§ 681, 685.
Existing causes of action not affected by, § 362.
Extension of time, in general, § 1054.
False imprisonment, § 340.
Five year limitations, §§ 336, 347.
Four year limitations, §§ 337, 343.
Foreign statute of, bar of, § 361.
Forfeiture, for, §§ 338, 340, 359.
Fraud, § 338.
Fraud, statute, when begins to run, § 338.
Grantee of state, action by, § 316.
Grant, void, by state, action to recover property, § 317.
Hospital dues, actions by state for, § 345.
Imprisonment, effect on, §§ 328, 352.
Infant, effect of statute on, §§ 328, 352.
In general, § 312.
Injunction staying commencement of action, effect of, § 356.
Insanity, effect of statute, §§ 328, 352.
Judgment barred by, execution on, § 685.
Judgment of Federal court, § 336.
Judgments, § 336.
Landlord and tenant, relatioin of, as affecting, § 326.
Leaving state after action accrues, § 351.
Liability created by statute, § 338.
Libel, for, § 340.
Liens on vessels, § 813.
Loan society, against, § 348.
Local improvement act, contest of assessment under, § 349.
Lunatic, concerning, §§ 328, 352, 1272.
Married women, effect of statute on, § 352.
Mesne profits of realty, § 336.
Mistake, § 338.
Mistake, statute, when begins to run, § 338.
Mob or riot, for, against municipality, § 340.
Mortgage, action to redeem, § 346.
Mortgage, where several mortgages, and some not entitled to redeem, § 347.
Municipality, contest of assessmeut by, under local improvement act, § 349.
Mutual account, on, § 344.
Negligence, damages for death caused by, § 340.
Negligence, injury, because of, § 340.
New promise must be in writing, § 360.
Obligations in writing, §§ 337, 339.
Obligations not in writing, § 339.
No provision for, running in case of, § 343.
Officer, against, §§ 339 341.
Officer, for escape, against, §§ 339, 340.

LIMITATION OF ACTION. (Continued.)
Officer, for money collected upon execution, against, § 339.
Officer, for seizing goods for taxes, against, § 341.
Officer, in relation to property seized, § 341.
Officer de facto, against, § 341.
One year limitation, § 340.
Other states, limitation laws of, § 361.
Open account, § 344.
Patent to land, §§ 316, 317.
Patentee of state, by, §§ 316, 317.
Patentee of state, by, void patent, § 317.
Penalty, §§ 338, 340, 359.
People. See post, State, this title.
People, action by state or on behalf of, § 345.
Personal actions, limitations in, generally, § 335.
Personal property, action for detaining or injuring, § 338.
Personal property, tax-collector seizing, § 341.
Pleading the statute, how done, § 458.
Prisoner, concerning, §§ 328, 352.
Profits, mesne, of real property, § 336.
Prohibition of action, effect of, § 356.
Qui tam action, § 340.
Real property, action by grantee of state, §§ 316, 317.
Real property, action by state, §§ 315, 317.
Real property, action by state to recover void grant, § 317.
Real property, action to redeem mortgage, §§ 346, 347.
Real property, actions other than for recovery of, limitations generally, § 335.
Real property, disabilities excluded from time to commence actions, § 328.
Real property, disabilities not to exceed twenty years, § 328.
Real property, disabilities suspending operation of, § 328.
Real property, disabilities, time to sue after ceasing of, § 328.
Real property, entry on, action must be brought within one year thereafter, § 320.
Real property, entry on, must be made within five years, § 320.
Real property, mesne profits of, § 336.
Real property, occupation deemed under legal title unless adverse, § 321.
Real property, occupation under written instrument or judgment, when adverse, §§ 322, 323.
Real property, payment of taxes, § 325.
Real property, people, actions by, in respect to, § 315.
Real property, possession not under instrument extends how far, § 324.
Real property, possession of part, whether possesssion of whole, §§ 322, 323, 324.
Real property, possession, presumption as to, § 321.
Real property, right of possession not affected by descent cast, § 327.
Real property, seisin, necessary to maintain or defend action, §§ 318, 319.
Real property, seisin, rents, § 319.
Real property, seisin, within five years, §§ 318, 319.
Real property, trespass on, § 338.
Real property, what constitutes adverse possession under claim of title not written, § 325.
Real property, what constitutes adverse possession under written instrument or judgment, § 323.
Redemption for, § 346.
Redemption where several mortgagors, some not entitled to redeem, § 347.
Relief not otherwise provided for, § 343.
Rents, what seisin necessary in action or defense arising out of, § 319.
Replevin, in, § 338.
Retroactive, statute is not, § 362.
Reversal of judgment, effect of, § 355.
Reversal, on appeal, time for new action, § 355.
Revival of debt, § 360.
Riot, § 340.
Savings bank, deposits in, § 348.
Seduction, § 340.
Seisin, within five years to recover possession of real property, §§ 318, 319.
Sheriff, against, §§ 339, 340, 341.
Sister state, limitation laws of, § 361.
Six months' limitations, §§ 341, 342.
Slander, § 340.
Special proceeding included under "action," § 363.
State, actions for hospital dues, § 345.
State, actions generally, § 345.
State, actions in name of, or for benefit of, § 345.
State, by, for penalty or forfeiture, § 340.
State, by respecting real property, § 315.
State, by, respecting real property, void patent, § 317.
State, grantee of, action by, § 316.
State, on contract executed out of, § 339.
State, on contract executed within, § 337.
Statute, action on, § 340.
Statute, liability created by, § 338.
Statutory penalty or forfeiture, § 340.
Stock sold for delinquent assessment, § 341.
Stockholders for penalty or forfeiture, against, § 359.
Stockholders, action to enforce liability, § 359.
Summons, for issue and return of, § 581.
Tax-collector, for seizing goods, § 341.
Three year limitations, §§ 338, 345.
Thirty day limitations, § 349.
Time within which an act is to be done may be extended, § 1054.
Title insurance policy, action on when accrues, § 339.

LIMITATION OF ACTION. (Continued.)
Title insurance policy, action on when barred, § 339.
Trespass on land, for, § 338.
Trespass to personalty, for, § 338.
Trover, for, § 338.
Trust company, deposits in, § 348.
Two year limitations, § 339.
Undertaking in criminal action, on, § 340.
Unwritten obligation, on, § 339.
Use and occupation, § 336.
War, effect of, on running of statute, § 354.
What law governs, § 362.
When action is commenced, § 350.
Where not otherwise specified, § 343.
Writing executed in this state, § 337.
Writing executed out of state, § 339.
Writen obligation or liability, § 337.

LIS PENDENS.
Filing of, § 409.
Filing of, in suit to quiet title, §§ 749, 751.
Notice from, § 409.
Partition, in, § 755.
Plaintiff in partition to record notice of, § 755.

LOAN SOCIETY.
Limitation of actions against, § 348

LOCAL IMPROVEMENT ACT.
Limitation of action to contest assessment, § 349.

LOS ANGELES CITY.
Justice's clerk in. See Justices' Courts.
Justice's court in. See Justices' Courts.
Justices of the peace in. See Justices' Courts.

LOS ANGELES COUNTY.
Additional judges, appointment, term of office, and election, § 67a.
Additional judges, creation of three for, § 67a.
Additional judges, salaries, § 67a.
Judgment, order, etc., of any session of court as effective as if all judges presided, § 67a.
Presiding judge, election, duties, and removal of, § 67a.
Sessions of superior court of, § 67a.
Superior court, any one or more of judges may hold court, § 67a.
Superior court, judgments and orders of any session as effective as if all judges presided, § 67a.
Superior court, number of judges of, § 67a.
Superior court, number of sessions of, § 67a.
Superior court, presiding judge, selection and removal of, § 67a.
Superior court, six additional judges, appointment, terms of office and salaries, § 67a.
Superior judges, number of, §§ 66, 67a.

LOST DOCUMENTS.
Burnt records and documents. See Burnt or Destroyed Records or Documents.
Papers, how supplied, § 1045.
Summons, issuance of alias, § 408.

LUNATIC. See Insane Persons.

M

MAGISTRATE.
Courts open any day to exercise power of, in criminal action, § 134.

MAIL.
Notice of hearing in justice's court, service by, § 850.
Service by. See Service.

MAIL-CARRIER.
Exempt from jury duty, § 200.

MAJORITY.
Arbitrators, may act, § 1053.
Joint authority, majority may act, § 15.

MALICIOUS MISCHIEF.
Justice's court has jurisdiction over, § 115.

MALICIOUS PROSECUTION.
Joinder of actions, § 427.

MANDAMUS.
Chambers, supreme court justice not to grant at, § 165.
Superior court or judge may issue, § 76.
Supreme court justice may not grant, at chambers, § 165.
Supreme court may issue, § 51.
What courts may issue, § 51.

MARINERS. See Shipping.

MARITIME LAW. See Shipping.

MARK.
Included in signature or subscription, § 17.
Signature by, to be witnessed by two persons, § 17.

MARRIAGE. See Divorce; Husband and Wife; Married Woman.
Affinity, meaning of, § 17.
Breach of promise, private sittings, § 125.
Limitation of actions, effect of, on, § 352.

MARRIED WOMAN. See Husband and Wife; Marriage.
Actions by or against, husband, when to be joined, § 370.
Injunction by, undertaking not necessary, § 529.
Limitation of actions in cases of, § 352.
May defend action against herself and husband, § 371.
May sue or be sued alone when, § 370.
Parties, as, joinder of husband, § 370.
Wife as party, husband, when to be joined, § 370.

MASCULINE.
Includes feminine, etc., § 17.

MASTER AND SERVANT.
Attorney's fee, allowing, as costs in action for wages, § 924.
Relationship of, disqualifies juror, § 602.
Relationship of, disqualifies referee, § 641.

MATERIAL ALLEGATIONS. See Pleading.

MATERIAL OBJECTS.
Jury may be taken to view the premises, § 610.

McENERNEY ACT. See Burnt or Destroyed Records or Documents.

MECHANICS' LIENS.
Property of mechanic, exemption of, § 690.

MEMORANDUM.
Of attached property, §§ 545, 546.
Of costs, on appeal, § 1034.
Of costs, to be furnished, § 1033.

MENTALLY INCOMPETENT. See Insane Persons.

MERGER.
Of civil and criminal remedies, § 32.

MERITS.
Judgments to be on, § 582.

MESNE PROFITS.
Limitation of actions for, § 336.

METES AND BOUNDS.
Description by, § 455.

MILITARY OFFICER.
Exempt from jury duty, § 200.

MINERS. See Mines and Mining.
What property of exempt, § 690.

MINES AND MINING.
Action to recover mine, survey of tunnels, shafts, and drifts, § 742.
Continuance of action in involving, to do development work, § 595.
Exemption of miner's property, § 690.
Local rules govern actions, § 748.
Mining customs, proof of, in actions concerning mining claims, § 748.
Survey, entry under, §§ 742, 743.
Survey, liability for injury done by, § 743.
Survey, order for, what to contain, and how served, § 743.

MINISTER.
Exempt from jury duty, § 200.

MINOR. See Infant; Probation Officer.

MINUTES.
Of court, motion for new trial, when made on, § 658.
Of proceedings in justice's court, § 93.

MISCONDUCT OF JURY.
New trial for, § 657.

MISDEMEANOR.
Conviction of attorney, certificate thereof to supreme court, § 288.
Conviction of, removal of attorney, §§ 287, 289.
Jurisdiction of justices, § 115.
Number of trial jury, § 194.

MISJOINDER. See Parties; Pleading.

MISTAKE.
As ground for relief from default judgment in justice's court, § 859.
In pleading, amendment correcting, § 473.
Limitation of action, how affected by, § 338.
Relief from judgment or order on ground of, § 473.

MOB.
Limitation of action against municipality for, § 340.

MONEY.
Action or counterclaim for, verdict to find amount, § 626.
Adverse claim to, action to determine, § 1050.
Costs, allowance of, in action for, §§ 1022, 1025.
Deposit in court. See Deposit in Court.
Execution for, how levied, § 684.
Execution, how carried into effect where payable in specific kind of, § 682.
Execution sale, notice, where judgment payable in specific kind of, § 692.
General or special verdict discretionary in action for recovery of, § 625.
Order for payment of, may be enforced by execution, § 1007.
Specified kind of, in judgments, § 667.

MONTH.
Means calendar month, § 17.

MORTGAGE.
Accounting on redemption by one of several mortgagors, § 347.
Adverse possession bars action to redeem by mortgagor, § 346.
Appeal lies from interlocutory judgment in action to redeem, § 963.
Chattel, foreclosure, bond on appeal, § 943.
Conveyance, mortgage not deemed to be, whatever its terms, § 744.
Foreclosure, action for, must be brought where, § 392.
Foreclosure, appointment of receiver, § 564.
Foreclosure of chattel, bond on appeal, §943.
Foreclosure of, §§ 726–729. See Foreclosure of Mortgages.
Interlocutory judgment in action to redeem, time for appeal, § 939.
Limitation of action to redeem, § 346.
Limitation of action to redeem, when two or more mortgages, § 347.
Place of trial of suit to foreclose, § 392.

MORTGAGE. (Continued.)
Purchase-money in partition, mortgage for, § 777.
Redemption by one of several mortgagors, § 347.
Redemption, note of record to be produced, § 705.
Redemption of part of premises, limitation of action, § 347.
Redemption, right of action for, against mortgagee in possession. § 346.
Satisfaction, form of, § 675a.
Satisfaction, time of entry of, § 675a.
Satisfaction to be entered after sale, § 675a.

MOTHER. See Parent and Child.
Death of child, may sue for, § 376.
Injury of child, may sue for, § 376.
Seduction, may sue for, § 375.

MOTIONS. See Order.
Attachment, to discharge, §§ 556, 557.
Defined, §§ 1003.
Informality, refused for, second application, § 182.
Injunction, to vavate or modify, § 532.
Judgment, to vacate, § 663.
New trial, for. See New Trial.
Notice of, copies of papers on which based to be served with, § 1010.
Notice of, time for, when served by mail, § 1005.
Notice of, time to be given, § 1005.
Notice of, what to state, § 1010.
Postpone trial, to, for absence of testimony, § 595.
Reference ordered on, in what cases, § 639.
Repetition of, second application where refused for informality, § 182.
Repetition of where refused may be punished for contempt, § 183.
Repetition of where refused prohibited, § 182.
Repetition permitted where refused for informality, § 182.
Transfer of motion to another judge, when may be made, § 1006.
Where to be made, § 1004.

MULTIPLICITY OF SUITS.
Injunction to prevent, § 526.

MUNICIPAL CORPORATIONS.
Action by, transfer of, to another county, § 394.
Action by or against, stipulation as to place of trial, § 394.
Action by, place of trial of, § 394.
Assessment under local improvement act, limitation of action to contest, § 349.
Bond, need not give, in action, §§ 526, 1058.
City and county. See City and County.
Cutting or injuring trees in, damages for, § 733.
Enjoining illegal expenditures or waste by officers, § 526a.
Funds, restraining illegal expenditure of, § 526a.

MUNICIPAL CORPORATIONS. (Continued.)
Injunction by, undertaking not required, § 529.
Legislative act by, not enjoined, § 526.
Limitation of action against, for damages by mob or riot, § 340.
Limitation of action to contest local assessment, § 349.
Ordinance, how pleaded in police court, § 929.
Partition of property included in site of, § 763.
Partition proceedings affecting streets, § 763.
Partition, proceedings in where site of city or town included within exterior boundaries of property, § 763.
Service of summons on, § 411.
Venue, change of, on actions by, § 394.
Venue of actions against, § 394.

MUNICIPAL COURT OF APPEALS.
Transfer of books, papers, and actions to superior court, § 79.

MUNICIPAL CRIMINAL COURT.
Transfer of books, papers, and actions to superior court, § 79.

MUSIC TEACHERS.
Exemption of property of, § 690.

N

NAME.
Complaint must contain, § 426.
Fictitious, suing party by, § 474.
Summons must contain, § 407.
Verdict, each juror's must be entered, § 628.

NATIONAL GUARD.
Members of, exempt from jury duty, § 200.

NATURALIZATION.
Superior courts have power of, § 76.

NECESSARY PARTIES. See Married Women.

NE EXEAT.
Abolished, § 478.

NEGLIGENCE. See Death; Injuries; Wrongful Death.
Action for by husband and wife, consequential damages to husband recoverable without separate statement, § 427.
Causing death, who liable, §§ 376, 377.
Causing death, who may sue for, §§ 376, 377.
Damages for death, § 377.
Excusable, as ground for relief from default in justice's court, § 859.
Father may sue for injury to minor child, § 376.
Fire department, action for damages will not lie against, § 390. See Fire Department.
Issues of fact, how tried in action for injuries, § 592.

NEGLIGENCE. (Continued.)
Limitation of action for damages for death caused by, § 340.
Place of trial of action for, § 395.
Relief from judgment or order on ground of excusable, § 473.

NEGOTIABLE INSTRUMENT.
Assignment of bill or note, effect on defenses, § 368.
Attached to complaint or filed with clerk, admitted, unless denied under oath, § 887.
Complaint on in justice's court may be copy of, § 853.
Joinder of parties in suits respecting, § 383.
Set-off, cross-demands deemed compensated, § 440.
Several actions on, costs and disbursements in case of, § 1023.
Transfer of, not affected by set-off, § 368.

NEUTER.
Included in masculine, § 17.

NEWLY DISCOVERED EVIDENCE.
New trial, § 657. See New Trial.

NEW MATTER.
Answer may contain, § 437.
Answer, in, deemed controverted, § 462.
In answer, deemed denied, § 462.

NEW PARTIES.
Bringing in, § 389.

NEW PROMISE.
Effect on limitation, § 360.

NEWSPAPER.
Proof of publication of summons, § 415.

NEW TRIAL.
Abuse of discretion, § 657.
Accident or surprise, for, § 657.
Affidavit, motion, when made on, § 658.
Affidavits, motion on, counter-affidavits, § 659.
Affidavits, motion on, counter-affidavits, power to extend time to serve and file, § 659.
Affidavits, motion on, counter-affidavits, time to file and serve, § 659.
Affidavits, motion on, time to file and serve, § 659.
Affidavits, motion on, time to file and serve, power to extend, § 659.
Affidavits, motion on, to be filed with clerk and served on other party, § 659.
Affidavits, motion to be made on, in what cases, § 658.
Appeal from order granting, papers to be used on, § 952.
Appeal from order respecting, time for, § 939.
Appeal lies from order granting, § 963.
Appeal, reviewing order on motion for new trial on appeal from judgment, § 956.
Appeal, review of order on court's own motion on, § 662.

NEW TRIAL. (Continued.)
Appeals. See Appeals.
Application for, when may be made on bill of exceptions, § 658.
Application for, when may be made on minutes of court, § 658.
Application for, when must be made on affidavit, § 658.
Bill of exceptions, motion, when made on, § 658.
Bill of exceptions on motion for, may be used on appeal, § 950.
Bill of exceptions. See Exceptions.
By order of court, § 662.
Chance verdict, § 657.
Costs of appeal discretionary where new trial granted, § 1027.
Court may order, without application of parties, when, § 662.
Court's own motion, order for new trial on, § 662.
Damages, excessive, § 657.
Decision against law, § 657.
Defined, § 656.
Discretion, abuse of, § 657.
Error in law, for, § 657.
Evidence, for insufficient, § 657.
Evidence, for newly discovered, § 657.
Excessive damages, for, § 657.
Fair trial, prevention of, § 657.
Grounds for, § 657.
Hearing of motion, time for, § 660.
Hearing of motion to be at earliest practical time, § 660.
Hearing of motion, what pleadings, orders and evidence may be referred to on, § 660.
Hearing on motion for, proceedings where no report or certified transcript of the evidence, § 660.
Hearing on motion for, precedence of, § 660.
Hearing on motion, if evidence not transcribed, reporter to attend and read notes, § 660.
Irregularity of proceedings, § 657.
Jury, for misconduct of, § 657.
Law, decision against, § 657.
Minutes of court, motion, when made on, § 658.
Misconduct of jury, for, § 657.
Misconduct of jury may be shown by affidavits of jurors, § 657.
Motion for, failure to decide within three months equivalent to denial of motion, § 660.
Motion for, to be based on what papers, § 658.
Motion for to be decided within three months, § 660.
Motion for to be determined at earliest practicable moment, § 660.
Motion for to be made on affidavits in what cases, § 658.
Motion for to be made on minutes of court in what cases, § 658.
Newly discovered evidence, § 657.

NEW TRIAL. (Continued.)
Notice of intention to move for, time for filing and serving cannot be extended, § 659.
Notice of intention to move for, time to file and serve, § 659.
Notice of intention to move for, what to contain, § 659.
Order for may be made on court's own motion, when, § 662.
Order for on court's own motion, § 662.
Order preventing fair trial, § 657.
Papers, upon what motion based, § 658.
Passion or prejudice, on court's own motion, for, § 667.
Statement, motion when made on, § 658.
Statement need not be served on party defaulting or not appearing, § 650.
Statement on appeal. See Statement.
Statement settled after motion for, may be used on appeal, § 950.
Surprise, for, § 657.
Time for appeal where proceedings on motion for new trial are pending, §§ 939, 941b.
Time to decide motion for, § 660.
Time to file notice of intention to move for, § 659.
Time to hear motion for, § 659.
Verdict, chance, § 657.
Verdict, prevention of, new trial in case of, § 616.
When may be granted, § 657.
When verdict prevented, § 616.

NON-JUDICIAL DAY. See Holidays.

NON-RESIDENT.
Attachment of, § 537.
Contempt, § 1015.
Corporation. See Foreign Corporations.
Costs, dismissal for failure to give security, § 1037.
Costs, new or additional security for, § 1036.
Costs, security for, may be required, § 1036.
Costs, security for, time to give, § 1037.
Costs, staying proceedings until security filed, § 1036.
Default judgment, proceedings on, § 585.
Partition affecting, §§ 757, 762, 788, 789.
Place of trial of action against, § 395.
Pleadings of, by whom and how verified, § 446.
Publication of summons, §§ 412, 413, 757.
Service on, manner of, § 1015.
Subpœnas, § 1015.

NONSUIT.
Affirmative relief, effect of claim to on nonsuit at instance of plaintiff, § 581.
Consent of party, on, § 581.
Counterclaim, effect of, on nonsuit at instance of plaintiff, § 581.
Court may grant, when, § 581.
Grounds for, § 581.
Merits, in what cases judgments to be on, § 582.
On failure of party to appear, § 581.

NONSUIT. (Continued.)
On failure to prove case for jury, § 581.
On motion of parties, when granted, § 581.
On plaintiff abandoning action, § 581.
Order granting or denying, deemed excepted to, § 647.
Provisional remedy, undertaking, delivery to defendant, and action on, § 581.
When may be entered, § 581.

NOTARY.
Seals, records, and furniture exempt, § 690.

NOTES. See Negotiable Instruments.

NOTICE. See subject in question.
Administration, of application for letters of. See Executors and Administrators.
Appeal, of, § 940.
Appeal to superior court, of, § 974.
Appearance, notice must be given after, to party or his attorney, § 1014.
Appearance, notice need not be given defendant failing to make, unless under arrest, § 1014.
Appearance, notice of, § 1014.
Attached property, of sale of, §§ 548, 550.
Attached vessel, of sale of, § 824.
Attachment, notice of, motion to discharge, §§ 554, 556.
Attorney, notice to appoint substitute on death, removal, or suspension, § 286.
Attorney, of change of, § 285.
Attorney, substitution of, notice of, § 285.
Bill of exceptions, in settling, § 650.
Books, documents or papers, notice to produce and effect of refusal, § 1000.
Calendar, restoring causes to, on, § 593.
Claim and delivery, in, when and where to be filed, § 520.
Constructive, lis pendens, § 409.
Death or change of attorney, of, § 286.
Defective title, notice with, when valid, § 1046.
Execution sale, of, § 692.
Execution sale, of, liability for defacing or taking down, § 693.
Execution sale, selling without notice, § 693.
Form of, § 1010.
Form of notice of hearing in justice's court, § 850.
Hearing, justice's court, § 850. See Justice's Courts, XIV.
Hearing, notice of, § 594.
Injunction against diversion of water, notice of, § 530.
Injunction, dissolution, notice of motion, § 532.
Injunction, notice of, §§ 528, 531.
Injunction, notice of application for, §§ 527, 530.
Injunction, preliminary, notice of, § 527.

NOTICE. (Continued.)
Inspection of writings, notice of demand for, § 1000.
Judgment in justice's court, notice of rendition of, § 893. See Justices' Courts, XX.
Lien-holders, to, to appear before referee in partition, § 762.
Lis pendens, § 409. See Lis Pendens.
Mail, service by, time for, § 1005.
Motion, of, copies of papers to be served with, § 1010.
Motion, to, time for, § 1005.
Motion, of, what to state, § 1010.
Must be given defendant of all proceedings, after appearance, § 1014.
Need not be given defendant not appearing, unless under arrest, § 1014.
New trial, notice of settlement of bill of exceptions on, § 650.
New trial, notice of settlement of statement, § 659.
New trial, of intention to move for, § 659.
Non-residents, notices, upon whom served, § 1015.
Orders made without, how vacated or modified, § 937.
Partition, of, § 755.
Partition sale, of, § 775.
Redemption from execution, of, § 703.
Requisites of, § 1010.
Served how, §§ 1010, 1011.
Service of, time for, § 1005.
Service of, §§ 1011–1017. See Service.
Service, time for, extension of, § 1054.
Surety, notice of entry of judgment against, § 1055.
Temporary restraining order, notice of, § 527.
Title, want of, or defective, effect of, § 1046.
Time to answer or amend runs from, § 476.
Trial in justice's court, notice of. See Justices' Courts, XIV.
Trial, of, § 594.
Trial, of, when cause transferred to another justice's court, § 836.
Vacation of judgment, hearing of motion, time for and notice of, § 663½.
Vacation of judgment, time to serve and file, § 663½.
Vacation of judgment, to be given, § 663½.
What notices need not be served on party defaulting or not appearing, § 650.
Written, must be, § 1010.

NUISANCE.
Abating, § 731.
Action for, who may bring, § 731.
Damages for, § 731.
Defined, § 731.
Enjoining, § 731.
Judgment may provide for enjoining or abating, § 731.
Jurisdiction, superior court, § 76.

NUISANCE. (Continued.)
Jurisdiction, supreme court, § 52.
Public, city attorney may sue to abate, § 731.
Public, city attorney, to abate, when directed by supervisors, § 731.
Public, concurrent right of district attorney and city attorney to abate, § 731.
Public, district attorney may sue to abate, § 731.
Public, district attorney to abate, when directed by supervisors, § 731.
Who may sue for, § 731.

NUMBER. See Numbers.
Singular or plural words in code, construction of, § 17.

NUMBERS. See Number.
May be expressed by figures, or numerals, § 186.

NUMERALS.
Use of, § 186.

NUNC PRO TUNC.
Papers filed nunc pro tunc under order of court where records destroyed effectual, § 1046a.

O

OATH.
Affirmation, oath includes, § 17.
Attorney acting as judge pro tempore, oath of, § 72.
Attorney's, § 278.
Commissioner or elisor's, to sell encumbered property, §§ 726, 729.
Court commissioner may take, § 259.
Declaration, oath includes, § 17.
Deputy, justice's clerk, authority of, to administer, § 86.
Includes affirmation or declaration, § 17.
Judicial officers may administer, §§ 128, 177.
Juror's, § 604.
Justice's clerk's, § 86.
Justices' clerks and deputies in townships in counties of seventh class, power to administer, § 103b.
Justices' clerks in townships, power to administer, § 103a.
Particular officer, of. See particular title.
Phonographic reporter's, § 272.
Power of court to administer, § 128.
Power of judicial officer to administer, § 177.
Prisoner's, on his discharge, § 1148.
Receiver's, § 567.
Who may administer, §§ 86, 128, 177, 259.

OBJECTIONS.
Evidence, rulings on deemed to be excepted to, § 647.
To appointment of referee, how tried, § 642.

OBJECTIONS. (Continued.)
Waived, if not taken by demurrer or answer, § 434.
When taken by demurrer or answer, § 433.

OBLIGATION.
Arises from contract or operation of law, § 26.
Definition, § 26.

OFFER TO COMPROMISE.
Generally, § 997.
In justice's court, § 895.
Proceedings on, § 997.

OFFICE. See Officer.
Appeal from judgment that one is usurping office does not stay, § 949.
Exercise of public or private office not enjoined, § 526.
Repeal by code, § 7.
Tenure, how code affects, § 6.
Usurpation of, §§ 802–810. See Usurpation of Office or Franchise.
Vacancy in office of judge does not affect proceedings, § 184.
Vacancy in office of justice, supervisors to fill, § 111.
Vacancy in office of supreme court, § 42.
Vacancy in office of superior judge, § 70.

OFFICE HOURS.
Justices and deputies, § 88.

OFFICER. See Office.
Authority of majority, § 15. See Majority.
Bond, need not give, in action of official capacity, § 1058.
Contest of election. See Elections.
De facto, limitation of action against, § 341.
Enjoining illegal expenditures or waste by, § 526a.
Exempt from jury duty, § 200.
Impeachment, §§ 36–39. See Impeachment.
Joint authority, majority may act, § 15.
Judgment against, conclusive against sureties, when, § 1055.
Judgment against, how enforced, § 710.
Judicial, affidavits, etc., taking, § 179.
Judicial, contempt, power in cases of, § 178.
Judicial, controlling power of courts over proceedings, § 128.
Judicial, exempt from jury duty, § 200.
Judicial, powers of courts, generally, § 128.
Judicial, powers, etc., of, out of court, § 176.
Judicial, to have no partner practicing law, § 172.
Limitation of action against, §§ 339, 341.
Limitation of action against, for escape of prisoner, § 340.
Majority may act, § 15. See Majority.
Ministerial, powers of, prescribed where, § 262.

OFFICER. (Continued.)
Oaths, who authorized to administer, §§ 86, 128, 177, 259.
Particular officers. See particular title.
Probation. See Probation Officers.
Replevin, not bound by affidavit of value in, when, § 473.
Salaries. See Salary.
Sale or bonds by officers for public improvements cannot be enjoined, § 526a.
Secretaries of supreme court, §§ 265, 266.
Supreme court, of, §§ 262, 265, 266.
Supreme court, of, traveling expenses, § 47.
Usurpation of office, §§ 802–810. See Usurpation of Office or Franchise.
Venue of actions against, § 393.
Verification not necessary where action is by, § 446.
Verification of pleading, when officer a party, § 446.
Taxpayer can enjoin waste of public money or property, § 526a.

OFFICIAL BONDS. See Bond.

OFFICIAL REPORTER. See Phonographic Reporter.

OPINIONS.
Of supreme court to be in writing, § 49.
Superior judge, cost of taking down and transcribing chargeable against county, § 274a.
Superior judge, may be taken down and transcribed, § 274a.

ORAL INTERROGATORIES. See Depositions.

ORDER. See Motions.
Amend, power of court to, § 128.
Appeal from, time for, § 939.
Appeal from, what appealable, § 963.
Appeal from, what papers to be used on, §§ 951, 952.
Appeal from. See Appeals.
Appeal lies from special orders after final judgment, § 963.
Arrest, §§ 478–504. See Arrest and Bail.
Chambers, granting or discharge at, § 165.
Contempt, disobedience or resistance of, § 906.
Court commissioners, power to hear and make, § 259.
Deemed excepted to, when, § 647.
Defined, § 1003.
Enforcement of by execution, § 1007.
Ex parte orders, vacation and modification of, § 937.
Extra sessions of court, of, effect of, § 67b.
Inadvertence, relief from, where made through, § 473.
Injunction, to show cause why should not issue, § 530.
Inspection of writings, for, § 1000.
Judgment roll, orders striking out pleading are part of, § 670.

ORDER. (Continued.)
Jurisdiction of justice's court over violation, § 103.
Nunc pro tunc, filing under effectual, in proceedings to establish title where records burnt, § 1046a.
Out of court and without notice, how vacated or modified, § 937.
Payment of money, for, enforced by execution, § 1007.
Power of judges to grant and hear, at chambers, §§ 165, 166.
Power of judicial officers to compel obedience to, § 177.
Quo warranto, for arrest of defendant in, § 804.
Relief from, for mistake, surprise, neglect, etc., § 473.
Removal of attorney for disobeying, § 287.
Repeated applications, when a contempt, § 183.
Repeated application for, prohibited, §§ 182, 183.
Reviewed, how, § 936.
Revocation of order refused by another judge, § 183.
Summons, for publication of, § 413.
Staying execution of, power of judge, § 681a.
Surprise, relief from, § 473.
Survey, for, §§ 742, 743.
Survey of land, order for, in ejectment, §§ 742, 743.
Telegraph, service by, § 1017.
Transfer of order to show cause, when may be made, § 1006.
Where may be made, § 1004.

ORDER OF PROOF. See Evidence, XIII.

ORDINANCE.
Conditions precedent to rights under, performance of, how pleaded, § 459.
How pleaded, § 459.
How pleaded in police court, § 929.
Jurisdiction of justice of peace, § 103.
Violation of, trial, when by court and when by jury, § 932.

ORIGINAL JURISDICTION. See Superior court; Supreme Court.

P

PAPERS.
Lost, how supplied, § 1045.
Service of, §§ 1011–1017. See Service.
To be furnished by appellant on appeal, §§ 950, 953a.
What may be taken by jury on retiring, § 612.
With defective title or defective title, when valid, § 1046.

PARCENERS. See Partition.

PARENT AND CHILD.
Father may sue for death of minor, § 376.
Mother may sue for death of child when, § 376.
Mother may sue for injury to minor child when, § 376.
Seduction of daughter, father may sue for, § 375.
Seduction of daughter, mother may sue for, when, § 375.
Service of summons on parent in action against child, § 411.
Who may be sued for death or injury of minor, § 376.

PARTICULARS.
Bill of, §§ 454, 853.

PARTIES.
Abate, transfer of interest does not cause action to, § 385.
Abatement by death, etc., § 385.
Absence of, order made during, deemed excepted to, § 647.
Absence of party in attendance on legislature, continuance for, § 595.
Action to be in name of party in interest, § 367.
Adding, §§ 389, 473.
Additional, how brought in, § 389.
Administrator, as, § 369.
Administrator or executor may sue without joining beneficiary, § 369.
Adverse claim, action to determine, §§ 380, 381, 738.
Amended and supplemental pleadings to bring in necessary, § 389.
Amendment changing, § 473.
Application to be made party, by interested person, § 389.
Assignment of chose not to prejudice defense, § 368.
Associates may be sued under common name, § 388.
Associates may sue by common name, § 388.
Attendance on legislature, postponement of trial for, § 595.
Beneficiaries need not be joined when, § 369.
Bills of exchange, joinder of parties in action on, § 383.
Change of, order relating to, part of judgment roll, § 670.
Child, parent may sue for injury or death of, § 376.
Child, parent may sue for seduction of daughter, § 375.
Claimants under common source of title may unite, § 381.
Cloud on title, suit to remove, § 381.
Common interest, one may sue or defend for all, § 382.
Consent, refusal to give, making one a defendant, § 382.
Contracts, joinder of persons severally liable, § 383.
Coparceners, §§ 381, 384.
Co-tenants, §§ 381, 384.

PARTIES. (Continued.)
Co-tenants may sue or defend jointly or severally, § 384.
Co-tenants, part may sue or defend for all, §§ 381, 384.
Court may order in other, when, § 389.
Death of, when not to abate action, § 385.
Death or disability of party, effect of, § 385.
Death, substitution of representative, § 385.
Death, who may sue for, §§ 376, 377.
Defect of, demurrer for, § 430.
Defendant, definition of, § 308.
Defendant in action against vessel, § 814.
Defendant in action to determine adverse claims to realty, § 380.
Defendants, proceedings where part only served, § 414.
Defendant, improper joinder of person as, place of trial, § 395.
Defendant, substitution for, § 386.
Defendants, those united in interest to be joined as, § 382.
Defendants, who may be joined as, § 379.
Defense by one, for benefit of all, § 382.
Definition of plaintiff and defendant, § 308.
Designated as plaintiff and defendant, § 308.
Disabilities, effect on statute of limitations. See Limitation of Actions.
Disability of, when not to abate action, § 384.
Ejectment, in, summons to unknown, §§ 750, 751.
Executors may sue without joining beneficiary, § 369.
Fictitious name, substituting real name, § 474.
Fictitious name, when party may be sued by, § 474.
Fire department, actions for injuries by, § 390.
Foreclosure, to, who need not be made, § 726.
Franchise, in action for usurpation of, §§ 803, 808.
Guardian ad litem, how appointed, § 373.
Heirs may sue for wrongful death, § 377.
Husband and wife, §§ 370, 371.
Incompetent, to appear by guardian, § 372.
Infant, to appear by guardian, § 372.
Infants as. See Infant.
Insane person, to appear by guardian, § 372.
Insane persons, as. See Insane Persons.
Insurers in separate policies may be joined, § 383.
Interest, in, when to join, § 382.
Interest, real party in, to sue, § 367.
Interpleader, when and how maintained, § 386.
Intervention, how and when effected, § 387.
Intervention, who may intervene, § 387.

PARTIES. (Continued.)
Joinder, improper, of defendant, to determine place of trial, § 395.
Joinder, married woman as party, joinder of husband, §§ 370, 371.
Joinder of defendants in action to determine adverse claims to real estate, § 380.
Joinder of insurers in separate policies, § 383.
Joinder of, in suits respecting negotiable instruments, § 383.
Joinder of those united in interest, §§ 378, 382.
Joinder of those severally liable upon same obligation, § 383.
Joinder, parties holding under a common source of title, §§ 381, 384.
Joinder, sureties, § 383.
Joinder, trustee may sue without joining beneficiary, § 369.
Joint contracts. See Joint Contracts.
Joint debtors, after judgment, § 989. See Joint Debtors.
Joint tenants, §§ 381, 384.
Judge or justice who is party is disqualified, § 170.
Judgment against one, action to proceed against others, § 579.
Judgment may be for or against one or more of the, § 578.
Judgment may determine rights of parties as between themselves, § 578.
Justice's court, in, appear in person, or by attorney, § 842.
Landlord, joinder of, as defendant, where tenant in possession, § 379.
Legislature, extension of time during attendance on, § 1054.
Married woman as party, husband must be joined and when not, § 370.
Married woman may defend suit against herself and husband, § 371.
Married woman as. See Married Woman.
Misjoinder, demurrer for, § 430.
Mortgage, in action to redeem, § 346.
Names of, complaint to contain, § 426.
Names of, summons to contain, § 407.
Negligence causing death or injury, who may sue for, §§ 376, 377.
Negotiable instruments, joinder in suit on, § 383.
New, bringing in, §§ 389, 473.
Non-joinder, demurrer for, § 430.
Numerous, one or more may sue or defend for benefit of all, § 382.
Office, in action for usurpation of, §§ 803, 808.
One may sue or defend for all when, § 382.
Other, court may order in, § 389.
Parent may sue for injury or death of child, § 376.
Parent may sue for seduction of daughter, § 375.
Parent may sue whom for death or injury of child, § 376.

PARTIES. (Continued.)
Particular proceeding, in. See particular title.
Partition, in. See Partition.
Place of trial where person improperly joined as defendant, § 395.
Plaintiff, definition of, § 308.
Plaintiffs, those united in interest to be joined as, § 382.
Plaintiffs, who may be joined as, § 378.
Production of books and papers, § 1000.
Promissory notes, joinder of parties in actions on, § 383.
Quieting title, in, §§ 346, 738.
Quo warranto, in, §§ 803, 808.
Real party in interest to sue, § 367.
Redemption from mortgage, in action for, § 346.
Refusal to join, person made a defendant, § 382.
Representative may sue for wrongful death, § 377.
Representative, substitution of, § 385.
Seduction, who may sue for, §§ 374, 375.
Service on, manner of, §§ 1010, 1011.
Striking out, § 473.
Substitution of, §§ 385, 386.
Substitution of parties making claim on defendant, § 386.
Substitution of successors in interest, § 385.
Substitution, where party interpleads, § 387.
Suit by one, for benefit of all, § 382.
Sureties, joinder of, in suit on obligation, § 383.
Sureties on same or separate instruments, joinder of, § 383.
Tenants in common, §§ 381, 384.
Tenants in severalty, § 381.
Transfer of action does not abate it, § 385.
Transfer of interest, action does not abate, § 385.
Trust, suit to establish, § 381.
Trustee may sue without beneficiary, § 369.
Trustee of express trust, who is, § 369.
Trustee of express trust may sue without joining beneficiary, § 369.
Unknown, fictitious name, § 474.
Unknown, in suit to quiet title, summons to, §§ 750, 751.
Unmarried female may recover for own seduction, § 374.
Vessel, defendant in action against, § 814.
When one or more may sue or defend for all, § 382.

PARTITION.
Abstract of title, by whom made, § 800.
Abstract of title, correction of, § 800.
Abstract of title, court may order party to procure, when, § 799.
Abstract of title, custody of, § 799.
Abstract of title, expense of, § 799.
Abstract of title, generally, § 799.

PARTITION. (Continued.)
Abstract of title, how verified, § 800.
Abstract of title, keeping for inspection, § 799.
Abstract of title, notice of making, § 799.
Abstract of title, notice that it is open for inspection, § 799.
Abstract of title, plaintiff may procure, § 799.
Action for, when lies, § 752.
Action for, who may bring, § 752.
Action, where brought, § 392.
Agreement as to shares on sale, filing of, § 790.
Allotting and locating shares of parties, § 764.
Allowance for action brought or defended by one, § 798.
Allowance of expenses paid by one tenant, § 798.
Answer, admission by failure to file, § 758.
Answer in, what to contain, § 758.
Appeal from order respecting, time for, § 939.
Appeal lies from what orders respecting, § 963.
Attorney, appointment of, on death or disability of party, § 763.
Attorney appointed to represent party allowed reasonable compensation taxable as costs, § 763.
Attorneys' fees, costs include, § 796.
City included in property, proceedings in case of, § 763.
Compensation of tenant whose estate has been sold, § 778.
Compensation of tenant whose estate sold, court may fix, § 779.
Compensation, when unequal partition ordered, § 792.
Compensatory adjustment, § 792.
Complaint in case of unknown party or interest, § 753.
Complaint must set forth interests of parties, § 753.
Complaint must set forth what facts, § 753.
Complaint, where interest is unknown or contingent, § 753.
Complete, when impracticable, proceedings on, § 760.
Contingent interest, protection of, § 781.
Conveyance by co-tenant pending action, effect of, § 766.
Conveyances to be executed on confirmation of sale, § 785.
Conveyances to be recorded, § 787.
Conveyances, who are barred by, § 787.
Costs, abstract of title, §§ 799, 800.
Costs include attorneys' fees, § 796.
Costs, interest on, § 801.
Costs, judgment for, how enforced, § 796.
Costs, lien on undivided share, subject to, § 769.
Costs may be included in judgment, § 796.

PARTITION. (Continued.)
Costs of, a lien on shares of parceners, § 796.
Costs of, application of proceeds of sale to, § 771.
Costs of litigation between parties, payment of, § 796.
Costs of previous litigation, incurred by one tenant, § 798.
Costs of proceedings, apportionment of, §§ 768, 769.
Costs of, when restricted to certain parties, § 796.
Counsel fees a lien on shares, § 796.
Counsel fees, incurred by one tenant, § 798.
Death of party, effect on the judgment, § 766.
Death or disability pending, proceedings on, § 763.
Death pending proceedings, effect of, § 766.
Disbursements, interest on, § 801.
Dismissal, failure to serve and return summons, § 581a.
Division of property must be made how, § 764.
Encumbered property, application of proceeds, § 771.
Estate for life or years, tenant of, compensation awarded to, § 778.
Estate for life or years, tenant of, proceedings on refusal to accept compensation, § 779.
Estate for life or years, unknown tenant of, protection of, § 780.
Estate for life, when may be set off in property not sold, § 770.
Estate for years, when may be set off in property not sold, § 770.
Expenses, abstracts of title, §§ 799, 800.
Expenses, interest on, § 801.
Expenses of, how apportioned, §§ 768, 769, 771.
Expenses of litigation between parties, payment of, § 796.
Expenses of litigation paid by one tenant, for common benefit, allowance of, § 798.
Fees, apportionment of, §§ 768, 798.
Future interests, court must ascertain and secure, § 781.
Future interests, how protected, § 781.
Guardian cannot purchase, except for ward, § 783.
Guardian may receive proceeds of, §§ 793, 794.
Guardian of person under disability may consent to and execute releases, § 795.
Guardian receiving proceeds, must give undertaking, § 794.
Improvements, apportionment of, § 764.
Improvements, appraisement of, § 763.
Improvements by tenant, rights where site of city included in property, § 763.
Improvements by co-tenant, value of to be excluded, § 764.

PARTITION. (Continued.)
Improvements to be excluded from valuation in making allotments, § 764.
Improvements, in partition of site of town or city, prior right of purchase of, § 763.
Infant, consent by guardian to partition and release by, § 795.
Infant, securities for share of, § 777.
Infant's share, payment to guardian, §§ 793, 794.
Infant's share, taking securities for in name of guardian, § 777.
Infant, unequal partition, compensation, § 792.
Insane person, consent by guardian to partition and release by, §§ 795, 1772.
Insane person, payment of share of, to guardian, § 794.
Insanity of person, pending, proceedings on, § 763.
Interest on disbursements, § 801.
Investment of proceeds of unknown or absent owner, §§ 788, 789, 791.
Judgment in, binds whom, §§ 766, 767.
Judgment in, effect of death of party, § 766.
Judgment in, not to affect what tenants for years, § 767.
Judgment confirming report, protection of rights of persons not in being, § 766.
Judgment on report of referee, upon whom binding, § 766.
Judgment on report of referee, conclusiveness of, § 766.
Judgment to be entered on confirmation of report of referee, § 766.
Lien, appointment of referee to inquire into, § 761.
Lien, notice to be given of, on sale, § 775.
Lien of defendant, answer must set forth, § 758.
Lien on undivided interest a charge on share assigned such party, § 769.
Lien on undivided share subject to costs, § 769.
Lien, proceeds of sale to be applied to discharge of, § 771.
Lien-holder holding other securities, proceedings in case of, § 772.
Lien-holders must be made parties, or referee appointed to determine rights, § 761.
Lien-holders not of record need not be made parties, § 754.
Lien-holders, notice to appear before referee, § 762.
Lien-holders, notice to appear, how served, § 762.
Lien-holders, notice to, where absent or residence unknown, § 762.
Lien-holders, purchase by, proceedings, § 786.
Lis pendens, plaintiff to record notice of, § 755.
Lunatic's estate, §§ 792, 794, 795.

PARTITION. (Continued.)
Mortgaged property, application of proceeds of, § 771.
Must be according to rights of parties as determined by court, § 764.
Non-residents claiming lien, notice to appear, how served, § 762.
Non-residents, service on, by publication, § 757.
Notice of, § 755.
Partial, proceedings in, § 760.
Partial, when to be ordered, § 760.
Parties, death or disability of, pending the action, proceedings on, § 763.
Parties, lien-holders must be made, § 761.
Parties, non-resident, service by publication, § 757.
Parties, ordering in lien-holders, § 761.
Parties, purchasers and lien-holders not of record need not be made, § 754.
Parties, rights of all, may be ascertained, § 759.
Parties, unknown, rights of, may be considered together, § 759.
Parties, unknown owners, rights of to be considered, § 759.
Parties, unknown, service by publication, § 757.
Payments by one tenant for common benefit, allowance of, § 798.
Place of trial of suit for, § 392.
Proceedings where party dies or becomes incompetent, § 763.
Proceedings where site of city or town included within interior limits of property, § 763.
Proceedings when lien-holder purchases, § 786.
Proceeds, agreement as to, and proceedings on, § 790.
Proceeds belonging to unknown or absent party, duty of county clerk investing, § 791.
Proceeds belonging to unknown or absent party invested in county clerk's name, § 789.
Proceeds belonging to unknown parties or non-residents must be invested, § 788.
Proceeds, conflicting claims to, proceedings on, § 774.
Proceeds, deposited in court when, §§ 773, 774.
Proceeds, distribution of, §§ 771, 773, 785.
Proceeds, distribution of, party holding other securities may be compelled to exhaust, § 772.
Proceeds, guardian of infant or lunatic may receive, §§ 793, 794.
Proceeds, how disposed of to protect future interests, § 781.
Proceeds, non-residents or unknown owners of, disposition, § 788.
Proceeds of encumbered property, application of, § 771.
Proceeds, order confirming sale may direct disposition of, § 785.

PARTITION. (Continued.)
Proceeds, order directing investment of share of infant, lunatic, or non-resident, § 776.
Proceeds, payment into court, continuing cause to determine claims, § 774.
Proceeds, taking testimony to determine rights, § 774.
Referee cannot purchase at sale, § 783
Referee, new, court may appoint, §§ 763, 766.
Referee, single, powers of, § 763.
Referee to determine rights of lien-holders, § 761.
Referee to determine rights of lien-holders, notice to appear before, § 762.
Referee to determine rights of lien-holders, notice to appear before, service on absentees, § 762.
Referee to determine rights of lien-holders, report of, § 762.
Referees, allotment and division of property, § 764.
Referees, city or town site, duty in partitioning, § 763.
Referees, duties of, in making partition, § 764.
Referees, expenses and fees of, apportionment of, § 768.
Referees, number of, § 763.
Referees, one to be appointed, when, § 763.
Referees, qualifications of, § 763.
Referees, report may be confirmed, modified, or set aside, § 766.
Referees, single referee may be appointed by consent, §§ 763, 797.
Referees, single referee, powers and duties of, § 763.
Referees, surveyor, employment of, § 764.
Referees, three to be appointed, § 763.
Referees, when appointed to make, § 763.
Report, appeal from, time to take, § 739.
Report, confirmation of, judgment on, § 766.
Report may be confirmed, changed, modified or set aside, §§ 763, 766.
Report, motion to confirm, change, modify or set aside, § 765.
Report of referees, court may affirm, modify or set aside, §§ 763, 766.
Report of referees to contain what, §§ 765, 784.
Report, referees, to make, § 765.
Rights of all parties may be determined, §§ 759, 774.
Road or street, setting apart portion for, §§ 763, 764.
Road or street, setting apart portion for, effect on existing roads and streets, § 764.
Sale, agreement as to shares, filing of, § 790.
Sale, auction, to be at, § 775.
Sale, before ordering, title to be ascertained, § 759.
Sale, confirmation of, conveyances to be executed, § 785.

PARTITION. (Continued.)
Sale, confirmation or setting aside of, §§ 784, 785.
Sale, conveyance must be recorded in county, § 787.
Sale, conveyance will bar whom, § 787.
Sale, co-tenant purchasing, receipt for claim, § 786.
Sale, credit, court must direct terms of, § 776.
Sale, encumbered property, application of proceeds, § 771.
Sale, future or contingent interests, protection of, § 781.
Sale, guardian of infant or lunatic may receive proceeds, §§ 793, 794.
Sale, guardian of infant party may not be interested in, § 783.
Sale, highest bidder, sale to be to, § 775.
Sale, improvements on town site, appraisement of, § 763.
Sale, improvements on town site, prior right of purchase, § 763.
Sale, increased bid, offer of, proceedings on, § 784.
Sale, increased bid to be ten per cent, § 784.
Sale, lien-holder purchasing, receipt for claim, § 786.
Sale, lots to be sold separately, § 782.
Sale, mortgaged property, application of proceeds, § 771.
Sale, new, when ordered, § 784.
Sale, notice of, and its requisites, § 775.
Sale of site of town or city, improvements, right of co-tenant making improvements to purchase, § 763.
Sale of site of town or city, when ordered, § 763.
Sale of specific tract by tenant in common, how such land allotted, § 764.
Sale, order confirming, to direct disposition of proceeds, § 785.
Sale, order to direct investment of proceeds, § 776.
Sale, private, how conducted, § 775.
Sale, private, when may be ordered, § 775.
Sale, proceedings when lien-holders purchases, § 786.
Sale, proceeds to be applied in discharge of lien, § 771.
Sale, referee, no person to be purchaser for benefit of, § 783.
Sale, referee not to be interested in, § 783.
Sale, purchasers, who may not be, § 783.
Sale, report of, filing, § 784.
Sale, report of, referees must make, § 784.
Sale, report of, requisites of, § 784.
Sale, return of, hearing and proceedings, § 784.
Sal, rights of all persons may be ascertained, § 759.
Sale, rights of unknown parties to be ascertained, § 759.

PARTITION. (Continued.)
Sale, securities, agreement as to, and receipt and filing of, § 790.
Sale, securities, delivery of and receipt for, § 790.
Sale, securities, duty of clerk in whose name taken, § 791.
Sale, securities for purchase-money for share of infant, § 777.
Sale, securities for purchase-money, in whose name to be taken, §§ 777, 789, 790.
Sale, securities for purchase-money, referees may take, § 777.
Sale, securities, in whose name taken, §§ 789, 790.
Sale, securities taken by referee, distribution of, § 773.
Sale, setting aside of, §§ 784, 785.
Sale, tenant for life or years, compensation, consent to receive and filing and entry of, § 778.
Sale, tenant for life or years entitled to reasonable compensation, § 778.
Sale, tenant for life or years, proceedings where consent to compensation not given, § 779.
Sale, tenant for life or years, protection of rights of, § 780.
Sale, tenant for life or years, unknown, protection of rights of, § 780.
Sale, terms of, order to direct, § 776.
Sale, terms of, to be made known at time, § 782.
Sale to be at auction, § 775.
Sale, when may be ordered, § 763.
Sale, who may not purchase, § 783.
Specific tract, of, conveyed by one tenant, § 764.
Summons must be directed to whom, § 756.
Summons, publication of, description of property, § 757.
Summons, service may be by publication when, § 757.
Surveyor, fees of, apportionment of, § 768.
Surveyor may be employed, § 764.
Tenant for life or years, consent to compensation and filing and entry of, § 778.
Tenant for life or years, proceedings on refusal to accept compensation, § 779.
Tenant for life or years, to receive reasonable compensation, § 778.
Tenant for life or years, unknown, protection of rights of, § 780.
Tenants for years, when not affected by, § 767.
Townsite, proceedings on partition of, § 763.
Trial, rights of all parties may be determined, § 759.
Unequal, compensation adjudged in, § 792.
Unequal, compensation where unknown owners or infants, § 792.

PARTITION. (Continued.)
Unknown or unascertained owners, rights, how protected, §§ 763, 766.
Unknown owners, court must protect, §§ 763, 780.
Unknown owners, investment of proceeds, §§ 788, 789.
Unknown owners or interests, protection of rights of, §§ 763, 780.
Unknown owners, unequal partition, compensation, § 792.
Unknown owners, service on may be by publication, § 757.
Vested future interests to be protected, § 781.
When action may be brought, § 752.
When property includes city or town, proceedings, § 763.
Where action for, must be brought, § 392.
Who may maintain, § 752.

PARTNERSHIP.
Judicial officer not to have partner practicing law, § 172.
Juror, partner disqualified to act as, § 602.
Receiver for, § 564.
Referee, partner cannot be, § 641.
Suit, firm name, § 388.

PATENT.
Limitation of actions by patentee of state, §§ 316, 317.
Void, action to recover property, limitation of, § 317.

PENALTY. See Fine.
Arrest for, in justice's court, § 861.
Arrest in action for, § 479.
Defacing or taking down notice of execution sale, for, § 693.
Execution sale, for taking down notice of, § 693.
Execution sale without notice, for, § 693.
Justice's court, action to recover in, § 112.
Limitation of action on, §§ 338, 340.
Limitation of action to recover, from stockholders and directors, § 359.
Place of trial of action to recover, § 392.
Practicing law without license, for, § 281.
Selling under execution without notice, for, § 693.
Sheriff, liability of, § 682.
Venue of action to recover, § 393.
Venue, offense committed on waters in several counties, § 395.

PENDENCY OF ACTION. See Lis Pendens.
As ground of demurrer, § 430.
Code, effect of on pending actions, § 8.
Notice of, filing of, § 409.
When action deemed pending, § 1049.

PENSIONS.
Exemption of, from execution, § 690.

PEOPLE. See State.
Execution to be in name of, § 682.
Security, do not give, §§ 529, 1058.

PERFORMANCE.
Of conditions precedent, how averred, §§ 457, 459.
Time of, of act, may be extended, § 1054.

PERISHABLE PROPERTY.
Appeal from judgment directing sale does not stay, § 949.
Attachment of, property, how sold, § 547.
Attachment of, proceeds of sale of, duty of sheriff as to, § 547.
Attachment of, proceeds of sale of, § 550.
Notice of execution sale of, § 692.

PERSON.
Definition of injury to, § 29.
Includes corporation, § 17.
Joinder of actions for injuries to, § 427.

PERSONAL INJURIES. See Negligence.

PERSONAL PROPERTY.
Action to foreclose lien in justice's court, summons may be served out of county, § 848.
Action to recover, application to be made party, § 389.
Action to recover. See Claim and Delivery.
Adverse claim to, action to determine, § 1050.
Attachment of, manner of, § 542.
Claim and delivery. See Claim and Delivery.
Conflicting claims to, dismissal for failure to serve or return summons, § 581a.
Execution, how subjected to, §§ 682, 684.
Execution sale of, how delivered, §§ 698, 699.
Execution sale of, manner of, § 694.
Execution sale of, notice, § 692.
Includes what, § 17.
Joinder of actions concerning, § 427.
Limitation of action for injury to, § 338.

PESTILENCE.
As cause for removal of court, 142.

PETITIONS.
Particular proceedings, in. See particular title.

PETIT LARCENY.
Justice has jurisdiction of, § 115.

PHONOGRAPHIC REPORTER.
Absent, clerk to take testimony, § 1051.
Appeal, to transcribe report of trial, for purpose of, § 953a.
Appeal, transcribing report of trial for purpose of, § 953a.
Appeal, transcription of record, duty of reporter, § 953a.
Appeal, transcript on, rights and duties of reporter in relation to. See Appeals, V.
Appointment and tenure of office, § 269.
Attention to duties in person, § 271.
Attention to duties in person, excuse from, § 271.

PHONOGRAPHIC REPORTER. (Continued.)
Clerk to take down testimony where there is no, § 1051.
Compensation of, § 274.
Compensation of, how paid, 274.
Compensation of, right to demand fees in advance, § 274.
Competency, certificate of, § 270.
Competency, test of, 270.
Costs, taxing fees of reporters as, § 274.
Duties of, § 269.
Duty to attend on hearing of motion for new trial and read notes, § 660.
Examination of, as to qualifications, § 270.
Fees of, §§ 274, 274b.
Fees of, taxing as costs, 274.
Fees of, where one temporarily appointed, § 274.
Fees of, who to pay, § 274.
Instructions and opinions, appointment of reporter to transcribe where no official reporter, 274a.
Instructions and opinions, judge may order transcription and charge cost against county, § 274a.
Judges may order matter to be taken down and charged against county, § 274a.
Number of, § 269.
Oath of, § 272.
Pro tempore, oath of, § 272.
Pro tempore, fees and compensation of, § 274.
Pro tempore, report of, prima facie evidence, § 273.
Pro tempore reporter, official reporter not to be appointed, unless transcriptions are completed and filed, § 270.
Pro tempore, when appointed, § 271.
Qualifications of, and how tested, § 270.
Reference to report of, on hearing motion for new trial, § 660.
Report of, prima facie evidence, § 273.
Supreme court, for, provided for in Political Code, § 268.
Transcript of notes, prima facie correct, § 273.

PHRASES.
Interpretation of. See Words and Phrases.

PHYSICIANS.
Exempt from jury duty, § 200.
Exemption of property of, § 690.

PLACE OF HOLDING COURT.
Provisions respecting, §§ 142–144.

PLACE OF TRIAL.
Absence or disability of justice, transfer of action, § 90.
Actions in wrong county, may be tried there when, § 396.
Affidavit of prejudice, but one change allowed, § 170.
Any county, action may be tried in, unless change demanded, § 396.

PLACE OF TRIAL. (Continued.)
Appeal from order on motion for change, time for, § 939.
Appeal lies from order relating to change, § 963.
Change of, action by city or county, § 394.
Change of, affidavit of prejudice, and counter-affidavit, § 170.
Change of, affidavit of prejudice, transfer of cause on, § 170.
Change of, appeal from order does not stay, § 949.
Change of, costs of, § 399.
Change of, demand for, how made, § 396.
Change of, demand for when to be made, § 396.
Change of, disqualification of judge or justice, §§ 397, 398.
Change of, disqualification of judge where more than one judge in county, § 170.
Change of, how made, § 399.
Change of, in justices' courts. See Justices' Courts, XII.
Change of, jurisdiction of court to which transfer made, § 399.
Change of motion or order may be transferred to another judge when, § 1006.
Change of, order to show cause may be transferred to another judge, when, § 1006.
Change of, power of court to which transferred, §§ 399, 836.
Change of, stipulation as to, in action against city, county or city and county, § 394.
Change of, to what court transferred, § 398.
Change of, transmission of papers, § 399.
Change of where brought by or against city, county or city and county, § 394.
Change of, where real estate involved, transmitting, filing, docketing, and recording judgment, § 400.
Change of, where justice prejudiced, § 90.
City, action by or against, transfer of, § 394.
City, action by or against, where brough, § 394.
City, stipulation as to place of trial in action against, § 394.
Civil actions, general rules as to, § 392–395.
Claim and delivery in justice's court, § 832.
County or city and county, action against, where brought, § 394.
County or city and county, action by, transfer of, to another county, § 394.
County or city and county, stipulation as to place of trial in action against, § 394.
County where cause of action or some part thereof arose, when to be brought in, § 393.
Death, of action for wrongful, § 395.

PLACE OF TRIAL. (Continued.)
Defendant improperly joined, effect of on, § 395.
Defendant joined to have trial in his county, § 395.
Disqualification of judge or justice and proceedings on. See Judges; Superior Judge.
Foreclosure of mortgage or lien on realty, where brought, § 392.
Forfeiture, action to recover, § 393.
Forfeiture, to recover for offense on waters in several counties, § 393.
Justice's court, place of trial. See Justices' Courts, XII.
Lien on realty, venue of action to foreclose, §§ 78, 392.
May be changed when, § 397.
May be tried in any county, unless defendant objects, § 396.
Mortgage, venue of action to foreclose lien, § 392.
Motion may be transferred to another judge, when, § 1006.
Negligence, of action for injuries from, § 395.
Non-resident, when defendant is, § 395.
Offense committed on lake or stream in several counties, § 393.
Office, act done under or by virtue of, § 393.
Officer, action against, § 393.
Officer, person doing act by command of, action against, § 393.
Order to show cause may be transferred to another judge, when, § § 1006.
Partition, suit for, § 392.
Penalty, action to recover, § 393.
Penalty, to recover for offense on stream in several counties, § 393.
Quieting title, action to be brought in county where land is, § 78.
Real property, actions concerning, § 392.
Realty, place of trial, when property lies in two counties, § 392.
Realty, transfer of action to another county, proceedings after judgment, § 400.
Residence, in action for negligence or death, § 395.
Residence of defendant, when unknown, § 395.
Residence, when determines, § 395.
Residence, where defendant improperly joined, § 395.
Residence, where defendant joined to have trial in his county, § 395.
Transfer, dismissal of actions after transfer for non-payment of fees, § 581b.
Transfer, filing anew transferred pleadings without fee where action dismissed, § 581b.
Transfer to another court, costs of, § 399.
Transfer to another court, manner of, §§ 398, 399.
Transfer to another court, papers to be transmitted, § 399.
Transfer when judge disqualified, § 398.

PLACE OF TRIAL. (Continued.)
Transferred cases respecting realty, proceedings after judgment, § 400.
Transitory actions, § 395.
Waiver where action brought in wrong county, § 396.
When defendant about to leave state, § 395.
Wrong county, action brought in may be tried there unless change demanded, § 396.

PLAINTIFF. See Parties.
Pleadings of, § 422.

PLEA. See Answer.

PLEADING. See Answer; Complaint; Counterclaim; Demurrer.
Account, how to be stated, § 454.
Action is commenced by filing complaint, § 405.
Allegations not denied, when deemed controverted, § 462.
Allegations not denied, when deemed true, § 462.
Amended, filing, § 472.
Amended, service of, § 472.
Amendments, service of on party defaulting, or not appearing, § 650.
Allegations, material. See post, this subject.
Amended, to bring in necessary parties, § 389.
Amendment changing parties, § 473.
Amendment correcting mistake, § 473.
Amendment, in justice's court. See Justices' Courts, V.
Amendment of course, § 472.
Amendment of course, filing and service of, § 472.
Amendment, postponing trial in justice's court, § 874.
Amendment, time for, when demurrer sustained or overruled, § 476.
Amendment, when variance, §§ 469, 470.
Amendment without costs, § 470.
Answer. See Answer.
Bill of particulars, § 454. See Bill of Particulars.
Board, determination of, § 456.
Code prescribes forms and rules of, § 421.
Complaint. See Complaint.
Conditions precedent, performance of, §§ 457, 459.
Consolidation of actions, § 1048.
Construction of, to be liberal, § 452.
Cross-complaint, § 442. See Cross-complaint.
Cross-demand, §§ 439, 440. See Cross-demand.
Defect in, to be disregarded unless substantial rights affected, § 475.
Defendant, pleadings of, § 422.
Defined, § 420.
Demurrer, §§ 430, 431. See Demurrer.
Description of real property in, § 455.
Designation of parties to actions, § 308.

PLEADING. (Continued.)
Determination of court, officer or board, § 456.
Enlarging time for, §§ 473, 1054.
Error in, to be disregarded unless substantial rights affected, § 475.
Extension of time respecting, §§ 473, 1054.
Facts, what to be pleaded, § 426.
Fictitious name, when party may be sued by, § 474.
Filing, § 465.
Form of action, but one, § 307.
Form of, prescribed by code, § 421.
Genuineness of instrument, when admitted, §§ 447, 448.
Genuineness of instrument, when not admitted, § 449.
Heading defective, validity of, § 1046.
Inspection of instrument, demand for, and refusal of, § 449.
Instruments, genuineness of, how controverted, § 448.
Instruments, genuineness of, when admitted, § 448.
Irrelevant and redundant matter may be stricken out, § 453.
Issue not made by, how tried, § 309.
Issues. See Issues.
Items of account, need not be pleaded, § 454.
Joined, what actions may be, § 427.
Joint debtor, action against, after judgment, §§ 989, 994.
Judgment roll, as part of, § 670.
Judgments, § 456.
Justice's court, in. See Justices' Courts, V.
Libel, answer in action for, § 461.
Libel, complaint in action for, § 460.
Limitation, statute of, § 458.
Lost, how supplied, § 1045.
Material allegation defined, § 463.
Material allegation not controverted, taken as true, § 462.
Names of pleadings, § 422.
Objections to, waiver, § 434.
Officer, determination of, § 456.
Ordinance, § 459.
Ordinance in police court, § 929.
Particulars, bill of, § 454. See Bill of Particulars.
Parties, §§ 367–380. See Parties.
Performance, §§ 457, 459.
Plaintiff, pleadings of, § 422.
Private statutes, § 459.
Real property, how described, § 455.
Rule by which sufficiency governed prescribed by code, § 421.
Separately stated, causes of action to be, § 427.
Separately stated, defenses must be, § 441.
Service of, § 465.
Sham answer may be stricken out, § 453.
Slander, answer in actions for, § 461.
Slander, complaint in action for, § 460.
Special issues not made by pleadings, how tried, § 309.
Statute of limitations, § 458.
Statute, private, § 459.
Striking out, order deemed excepted to, § 647.
Striking out, orders striking out, part of judgment roll, § 670.
Striking out redundant and irrelevant matter, § 453.
Striking out sham answer, § 453.
Subscription to, § 446.
Supplemental, for revival of judgment, § 685.
Supplemental, in partition, § 761.
Supplemental, to bring in necessary parties, § 389.
Supplemental, when allowed, § 464.
Time, power of court to extend, §§ 473, 1054.
Title, defective, or want of, effect of, § 1046.
Variance, amendment, §§ 469, 470.
Variance, immaterial, how provided for, § 470.
Variance, what is not, but a failure of proof, § 471.
Variance, when material, § 469.
Variance. See Variance.
Verification, affidavit, § 446.
Verification, by attorney, § 446.
Verification, by attorney, what to state, § 446.
Verification by officer of corporation, § 446.
Verification by one other than party, § 446.
Verification, manner of, § 446.
Verification, party to make, generally, § 446.
Verification, when necessary, § 446.
Verification, who may make, when corporation a party, § 446.
Verification. See Verification.
What constitute the pleadings in proceedings against joint debtor after judgment, § 993.
What pleadings are allowed, § 422.
Written instrument in justice's court, § 886.
Written instruments, §§ 447–449.
Wrongful death, action for, § 395.

PLURAL.
Includes singular, § 17.

POLICE COURT. See Police Judge.
Action in, commenced by filing complaint, § 929.
Answer may be oral or written, § 931.
Answer, when may be made, § 931.
Appeal, judgment of superior court on, what appealable, § 964.
Appeal to superior court, §§ 974–980. See Appeals, XIII.
Attorney, license not necessary to practice as, in, § 281.
Attorney may practice without license in what courts, § 281.
Complaint, filing, § 929.
Complaint in, to be verified, § 929.

POLICE COURT. (Continued.)
Complaint to contain what, § 929.
Impaneling jury in criminal case, Penal Code governs, § 251.
Impaneling jury, manner of, §§ 250, 251.
Jurisdiction, organization and powers provided for in Political Code, § 121.
Jurors for, how summoned, §§ 230, 231.
Ordinance, how pleaded, § 929.
Ordinance, violation of, how pleaded, § 929.
Organization, jurisdiction and powers provided for in Political Code, § 121.
Proceedings conducted as in justice's court, § 933.
Provided for in Political Code, § 121.
Record, police courts are not courts of, § 34.
Seal, has, § 147.
Seal, form of, § 150.
Summons, time for issuing, § 930.
Summons, time for return of, § 930.
Trial, adjournment, § 931.
Trial by court, in what cases will be had on violating ordinance, § 932.
Trial by jury, when defendant entitled to, on violating ordinance, § 932.
Trial, time for, § 931.

POLICE JUDGE. See Police Court.
Act conferring upon justice power to act as, § 5, note.
May take acknowledgment, affidavit, deposition, § 179.

POLLING JURY.
Right of, and proceedings on, § 618.

POSSESSION.
Action involving possession of realty, publication of summons, evidence required before granting relief, § 585.
Adverse, §§ 318 et seq. See Adverse Possession.
Parties defendant, who may be joined in action for, § 379.
Personalty, actions involving possession, costs in, §§ 1022, 1024.
Realty, action to recover, costs of course allowed where, §§ 1022, 1024.
Writ of, plaintiff in action to determine adverse claim may have, § 380.
Writ of. See Assistance.

POSTPONEMENT. See Continuance; Justices' Courts, XIII.
Costs may be imposed, § 1029.
Mandamus, on, § 1090.
Trial, §§ 595, 596.
Trial, justice's court, §§ 873–876. See Justices' Courts, XIII.

POWER OF ATTORNEY.
To act as counsel in justice's court, § 96.

POWERS.
Particular person or officer, of. See particular title.

PRACTICE. See Trial.
Action, when commenced, § 350.

PRACTICE. (Continued.)
Argument, bringing up case for, § 664.
Bills of exception. See Exceptions.
Calendar. See Calendar.
Clerk taking testimony, when no shorthand reporter, § 1051.
Consolidation of actions, when may be ordered, § 1048.
Costs. See Costs.
Error disregarded, unless substantial rights affected, § 475.
Issues. See Issues.
Justice's court, of. See Justices' Courts, XIV.
Motions. See Motions.
Orders out of court without notice, how vacated or modified, § 937.
Orders. See Order.
Particular proceedings. See particular title.
Power of court where procedure not specifically provided, § 187.
Preference. See Preference.
Special issues not put in issue by pleadings, trial of, § 309.
Successive actions, right to maintain, § 1047.
Time, extension of, power as to, § 1054.
Time. See Time.
Vacancy in office of judge does not affect proceedings, § 184.

PREFERENCE.
Appeal, on. See Appeals, VIII.
Election contests, preference of, on appeal, § 57.
Injunction, hearing and trial on motion for, § 527.
New trial, preference of motion for, over other matters, § 660.
Probate appeals, preference given to, § 57.
Probate proceedings, preference of on appeal, § 57.

PRESCRIPTION. See Adverse Possession.

PRESENT.
Includes future, § 17.

PRESUMPTIONS.
Disputable, shorthand notes, prima facie correct, § 273.

PRIEST.
Exempt from jury duty, § 200.

PRIMA FACIE EVIDENCE. See Evidence.

PRIMARY EVIDENCE. See Evidence.

PRINCIPAL AND AGENT. See Agency.

PRINCIPAL AND SURETY. See Surety.

PRINTING.
Included in writing, § 17.

PRISON.
State, officer or attendant of, exempt from jury duty, § 200.

PRISONER.
Adverse possession against, § 328.
Escape, limitation of action for, § 340.
Limitation of action in case of imprisonment, §§ 328, 352.

PRIVATE SITTINGS.
In certain cases, § 125.

PRIVATE STATUTE.
How pleaded, § 459.

PROBATE COURT.
Appealability of orders of, § 963.
Appeals, preference given, § 57.
Chambers, power of court at, § 166.
Guardian, appointment of. See Guardian and Ward, I.
Power of, at chambers, § 166.
Preferences given to appeals in probate, § 57.
Transfer of books, papers, and actions to superior court, § 79.
Writs and process necessary may be issued at chambers, § 166.

PROBATION OFFICER.
Appointment, intention of act, § 131, subd. 9.
Conditions of probation, furnishing to child, § 131, subd. 11.
Conditions of probation, violation of, proceedings on, § 131, subd. 10.
Courts, in what courts to serve, § 131. subd. 12.
Creation of office of, § 131, subd. 7.
Deputies, appointment of, § 131, subd. 7.
Deputies, appointment, intention of act, § 131, subd. 9.
Deputies, additional, serve without salary, § 131, subd. 5.
Deputies, additional, appointment and removal of, § 131, subd. 5.
Deputies, allowance and payment of expenses, § 131, subd. 6.
Deputies, creation of office of deputy, § 131, subd. 7.
Deputies, duties and powers of, § 131, subd. 8.
Deputies, in what courts to serve, § 131, subd. 12.
Deputies, number of, § 131, subd. 5.
Deputies, powers of peace-officers, have, § 131, subd. 13.
Deputies, removal of, § 131, subd. 7.
Deputies, term of office, § 131, subd. 7.
Duties of, § 131, subds. 8, 10, 11.
Examining into institutions, § 131, subd. 4.
Expenses, allowance and payment of, § 131, subd. 6.
Inquiry into antecedents of offender, duty, § 131, subd. 10.
Inquiry into character, antecedents, etc., of person arrested and report to court, § 131, subd. 10.
Number of, § 131, subd. 5.
Office of, creation of, § 131, subd. 7.
Peace-officers, have powers of, § 131, subd. 13.

PROBATION OFFICER. (Continued.)
Probation committee, appointment of, § 131, subd. 1.
Probation committee, appointment of officers and deputies, § 131, subd. 7.
Probation committee, compensation, act without, § 131, subd. 3.
Probation committee, institutions, examining into, § 131, subd. 4.
Probation committee, institutions, report on, § 131, subd. 4.
Probation committee, intention of act, § 131, subd. 9.
Probation committee, number of, § 131, subd. 1.
Probation committee, oath and qualification, § 131, subd. 1.
Probation committee, term of office, § 131, subd. 2.
Probation committee, vacancies, how filled and term of appointee, § 131, subd. 2.
Records, keeping and inspection of, § 131, subd. 10.
Recommendation for or against probation, § 131, subd. 10.
Removal of, § 131, subd. 7.
Report and recommendation on child, § 131, subd. 10.
Report of violation of terms of probation, § 131, subd. 11.
Report on child released on probation, § 131, subd. 10.
Same committees, deputies and officers as under Juvenile Court Act, § 131, subd. 9.
Term of office of, § 131, subd. 7.
Terms and conditions of probation, § 131, subd. 11.
Violation of terms and conditions of probation, report of, § 131, subd. 11.

PROCEDURE. See Pleading; Practice, Trial.
Particular court in. See particular title.

PROCEEDINGS IN REM.
Judgment in action to quiet title, effect of, § 751.

PROCESS. See Summons.
Abbreviations, § 186.
Amendment of, power of court, § 128.
Chambers, power of judge at, to issue, §§ 165, 166.
Contempt, for abuse of, § 906.
Defined, § 17.
Execution of, where new county formed, § 687.
How far extends, §78.
Issuance and return of in justices' courts in townships of between 250,000 and 400,000, §§ 100, 101, 102.
Issuance, service, filing, etc., of, on Saturday afternoon, valid, § 10.
Joint debtors, to, after judgment, §§ 989–991.

PROCESS. (Continued.)
Justices' clerks and deputies in townships in counties of seventh class, issuance and form of, § 103b.
Justices' clerks in townships may issue, § 103a.
Justices' courts, from duty of sheriff and deputy to serve, § 87.
Justice's court, in, payment of fees, § 91.
Justice's court, may issue to any part of county, § 919.
Justice's court, issuance in, § 91.
Justice's court, to be issued without blanks, § 920.
Language to be used in, § 185.
Mistake, relief from, § 473.
Mode of carrying jurisdiction into effect, § 187.
Power of court to amend and control, § 128.
Power of judges at chambers to issue, §§ 165, 166.
Return of, in justice's court, §§ 87, 89.
Service by telegraph, § 1017.
Service of, must be on party, § 1015.
Service on associates in business, § 388.
Service on necessary parties ordered in by court, § 389.
Service on persons transaction business under common name, § 388.
Signifies what, § 17.
Superior court, process of, extends to all parts of state, § 78.
Telegraph, service by, § 1017.

PRODUCTION OF DOCUMENTS. See Inspection of Writings.

PROFITS.
From time of execution to redemption, § 707.
Mesne, limitation of actions for, § 336.
Holidays, may be issued and served on, § 76.
Limitation of action, effect of prohibition, § 356.
May be issued or served any day, § 134.
Superior judge or court may issue, § 76.
Supreme court justice may not grant at chambers, § 165.
Supreme court may issue, § 51.

PROMISSORY NOTES. See Negotiable Instrument.
Joinder of parties to commercial paper, § 383.

PROOF. See Evidence.

PROPERTY.
Definition of injury to, § 28.
Includes real and personal, § 17.
Joinder of actions for injuries to, § 427.

PROSECUTION.
Dismissal for want of, on court's own motion, § 583.
Dismissal of action for want of, § 583.
Failure of plaintiff to bring case to trial, dismissal, § 583.
Notice of motion to dismiss for want of, § 583.

PRO TEMPORE JUDGE. See Judges.

PRO TEMPORE REPORTER. See Phonographic Reporters.

PROVISIONAL REMEDIES. See Arrest and Bail; Attachment; Claim and Delivery; Deposit in Court; Injunction; Receiver.
Dismissal in case of, delivery of bond to defendant, § 890.
Dismissal or nonsuit, delivery of undertaking to defendant and action on, § 581.

PUBLICATION.
Default, where service by, procedure, § 585.
Judgment-roll, where summons served by, § 670.
Notice to lien-holders, on partition, service of, by, § 762.
Service or unknown or non-resident parties in partition, § 757.
Summons in partition, § 757.
Summons, of, default for failure to answer, procedure in case of, and relief granted, § 585.
Summons to unknown parties in suit to quiet title, § 750.
Summons, when and how made, §§ 412, 413. See Summons.

PUBLIC IMPROVEMENTS.
Bonds for, taxpayer cannot enjoin issuance on sale of, § 526a.

PUBLIC LAND.
Action to quiet title to, against state. See State.
Void letters patent, limitation of action to recover land, § 317.

PUBLIC OFFICER. See Officer.

PUBLIC PROPERTY.
Exemption of, § 690.

PUBLIC STATUTES. See Statutes.

Q

QUALIFICATION.
Sureties. See Surety.

QUALIFICATIONS.
Justices, of, §§ 103, 159.
Receiver, who may not be appointed as, § 566.
Referees, qualifications of, §§ 640, 641.
Superior court, of judges of, § 157.
Supreme court, of justices of, § 156.

QUESTIONS OF LAW AND FACT.
Issues of fact, how tried, § 592.
Issues of fact, to be tried by jury, unless waived, § 882.
Issues. See Issues.
Law, to be decided by court, § 591.
Writ of possession, § 380.

QUIETING TITLE.
Action involving validity of gift or trust under will, conclusiveness of determination, § 738.

QUIETING TITLE. (Continued.)
Action involving validity of gift or trust under will, will admissible, § 738.
Action lies to determine adverse claim in what cases, § 738.
Action to be brought in county where land is, § 78.
Action, who may bring, § 738.
Action by possessor, complaint, allegations, and verification, § 749.
Action by possessor, cumulative, remedy is, § 751.
Action by possessor, default, judgment not to be entered by, § 751.
Action by possessor, effect of as judgment, in rem, § 751.
Action by possessor for twenty years lies, § 749.
Action by possessor, hearing and evidence, § 751.
Action by possessor, hearing, proof of service of summons and filing of lis pendens, § 751.
Action by possessor, judgment conclusive, notwithstanding disabilities, § 750.
Action by possessor, judgment does not affect state or United States, § 751.
Action by possessor, judgment does not bind what interests, § 751.
Action by possessor, judgment in, and conclusiveness of, §§ 750, 751.
Action by possessor, judgment, effect of in rem, § 751.
Action by possessor, jurisdiction, court has, to inquire into and determine what questions, § 751.
Action by possessor, lis pendens, contents of, § 749.
Action by possessor, lis pendens, proof of filing, § 751.
Action by possessor, lis pendens to be filed, § 749.
Action by possessor, parties defendant, who to be made, § 749.
Action by possessor, summons, form and contents of, § 750.
Action by possessor, summons, personal service necessary when known, § 750.
Action by possessor, summons, publication, manner of, § 750.
Action by possessor, summons, publication of, § 750.
Action by possessor, summons, publication of, how made, § 749.
Action by possessor, summons, publication of, when authorized, § 749.
Action by possessor, summons, publication of, when deemed complete, § 751.
Action by possessor, summons, service and posting, proof of, § 751.
Action by possessor, summons, service of affidavit as to, § 750.
Action by possessor, summons, service on unknown or nonresident defendants, § 750.
Action by possessor, summons, time to issue, § 750.

QUIETING TITLE. (Continued.)
Action by possessor, unknown defendants, action against, lis pendens to be filed in ten days, § 749.
Action by possessor, unknown defendants, how may be described in complaint, § 749.
Action by possessor, unknown parties, action lies against, when, § 749.
Action by possessor, unknown parties, claims of, how determined, §§ 749–751.
Action by possessor, unknown parties, hearing of adverse claim and judgment, § 751.
Action by possessor, unknown parties, how described in complaint, § 749.
Action by possessor, unknown parties, judgment by default not entered, § 751.
Action by possessor, unknown parties, judgment conclusiveness of, §§ 750, 751.
Action by possessor, unknown parties, rights and liabilities, § 750.
Action by possessor, unknown parties, summons, how designated in, § 750.
Action by possessor, unknown parties, summons, how served, § 750.
Action by possessor, unknown parties, summons, publication of, § 750.
Action by possessor, who may bring, § 749.
Adverse claim to money or property, action to determine, § 1050.
Adverse claim, parties in suit to determine, §§ 380, 381.
Conclusiveness of determination of gift or trust in action to quiet title, § 738.
Costs, plaintiff cannot recover, on default or disclaimer, § 739.
Co-tenants may unite in suit to determine adverse claim, § 381.
Default, costs not allowed, § 739.
Disclaimer, costs not allowed, § 739.
Dismissal, failure to serve and return summons, § 581.
Entry upon survey and measurement of property, §§ 742, 743.
Gift under will, determination of validity in, § 738.
Heirs or devisees, quieting title by, § 1452.
Improvements, setting off against damages, § 741.
Injunction, when granted, § 526.
Jury trial, right to, § 738.
Landlord may be joined as party defendant where property in possession of tenant, § 379.
Money or property, action to determine adverse claim to, § 1050.
Parties, §§ 379, 738.
Parties defendant, § 380.
Parties holding under common source may join, § 381.
Party, application by interested person to be made, § 389.

QUIETING TITLE. (Continued.)
Publication of summons, evidence of possession, what necessary before relief granted, § 585.
Publication of summons, evidence required, where plaintiff relies on paper title, § 585.
Publication of summons, evidence required where title or possession involved where defendant does not answer, § 585.
State, against. See State.
Survey, etc., of property, §§ 742, 743.
Title, termination, during action, judgment in case of, § 740.
Trust under will, determination of validity, § 738.
Tunnels, shafts or drifts, entry upon, survey and measurement of, §§ 742, 743.
Who may bring, § 738.
Wills, determination of validity of gift or trust under will in, § 738.
Writ of possession, right to, on recovery, § 380.

QUI TAM ACTION.
Limitation of, § 340.

QUORUM.
Arbitrators, § 1053.
Majority may act where joint authority given, § 15. See Majority.
References, § 1053.
Senate sitting as court of impeachment, quorum of, § 36.

QUO WARRANTO. See Usurpation of Office and Franchise.
Superior court or judge may issue, § 76.

R

RAILROAD COMMISSIONERS.
Provisions as to reference in eminent domain proceedings do not affect jurisdiction of, § 640.

RAILROAD CORPORATION. See Railroads.

RAILROADS. See Railroad Corporation.
Exemption of, employees from jury duty, § 200.

REAL PROPERTY.
Acknowledgment of conveyance, any judge or justice may take, § 179.
Action affecting, landlord may be joined, where tenant in possession, § 379.
Action against state to quiet title to lands sold by state. See State.
Action involving title or possession, publication of summons, evidence required before granting relief on default, § 585.
Action respecting, must be brought where, § 392.
Action to determine conflicting claims, application to be made party, § 389.

REAL PROPERTY. (Continued.)
Action to recover, application to be made party, § 389.
Action to recover, general or special verdict discretionary, § 625.
Action to recover, possession, costs of courts allowed when, § 1022.
Action to recover. See Ejectment.
Adverse claim. See Quieting Title.
Adverse possession of, §§ 318 et seq. See Adverse Possession.
Attachment of, duration and extension of lien, § 542a.
Attachment of, manner of, § 542.
Attachment of, release, § 559.
Claimants under common source of title may unite, § 381.
Cloud on title, parties in suit to remove, § 381.
Co-extensive with lands, tenements and hereditaments, § 17.
Conflicting claims to, dismissal for failure to serve or return summons, § 581a.
Costs of course in action involving title of possession, §§ 1022, 1024.
Co-tenants, parties in suits concerning, § 381.
Defendants in action to determine adverse claims, § 380.
Definition of, § 17.
Description of, in pleading, § 455.
Ejectment. See Ejectment.
Execution affecting, to issue to whom, § 687.
Execution, how subjected to, §§ 682, 684.
Execution purchaser may recover for injury to, after sale and before delivery, § 746.
Execution on, return of, § 683.
Execution sale of, how conducted, § 694.
Execution sale, injury to, after, § 746.
Execution sale of, manner of, § 694.
Execution sale of, notice, § 692.
Execution sale of, redemption, 701.
Execution sale of, what title passes, § 700.
Executions. See Execution.
Injury to, after execution sale and before delivery, § 746.
Issues of fact, how tried in action to recover, § 592.
Joinder of claims to recover, § 427.
Judgment after death not lien on, § 669.
Judgment for delivery of, § 682,
Judgment lien on, in another county, § 674.
Judgment of justice's court a lien on, when, § 900.
Lien on, action to foreclose, where brought, §§ 78, 392.
Limitation of actions respecting. See Limitation of Actions.
Lis pendens, filing of, in action relating to, § 409.
Mortgage on, action to foreclose, where brought, § 392.
Mortgage on. See Foreclosure of Mortgages; Mortgages.

REAL PROPERTY. (Continued.)
New parties in action relating to, bringing in, § 389.
Parties in action respecting, § 379.
Partition of, §§ 752–801. See Partition.
Party, application of person to be made, in action respecting, § 389.
Place of trial of actions concerning, § 392.
Pleadings, description in, § 455.
Presumptions as to possession of, § 321.
Publication of summons in actions involving, manner of, § 749.
Publication of summons in actions involving, when authorized, § 749.
Quieting title, § 738–751. See Quieting Title.
Return of execution on, § 683.
Suit to recover. See Ejectment.
Transferred cases concerning, proceedings after judgment, § 400.
Trespass on, limitation of action for, § 338.
Undertaking on appeal to stay judgment for sale or delivery of realty, § 945.

REBUTTAL.
Evidence in, § 607.

RECEIPT.
For securities in partition proceedings, § 790.
Sheriff's for accounts collected in attachment, § 547.

RECEIVER.
Action, may bring, § 568.
Action may defend, § 568.
Appeal from order appointing receiver, time to take, § 939.
Appeal lies from order appointing, § 963.
Appointed, may be, in what cases, §§ 564, 565.
Attorney, cannot be, when, § 566.
Code sections governing appointment, powers and duties, § 304.
Collection of debts, rents, etc., § 568.
Compromise, may, § 568.
Corporation, for, at whose instance appointed, § 565.
Corporation, for, duties of, § 565.
Corporation, for, on dissolution, duties of, § 565.
Corporation, for, on dissolution, forfeiture, or insolvency, §§ 564, 565.
Creditor, appointment in action by, § 564.
Debts, may collect, § 568.
Disqualification of persons to act as, § 566.
Ex parte application for, additional untertaking, § 566.
Ex parte application for, undertaking, § 566.
Execution in aid of, § 564.
Foreclosure, appointment in, § 564.
Fraudulent purchase, appointment in action to vacate, § 564.
Funds in hands of, court can only order on consent, § 569.
Grounds for appointing, § 564.

RECEIVER. (Continued.)
Interested persons cannot be appointed, § 566.
Investment, funds in hands of, may be invested, on order of court, § 569.
Investment of funds in hands of, order for consent to, § 569.
Judgment, after, to dispose or preserve property, § 564.
Judgment, appointment after, § 564.
Judgment, to carry into effect, § 564.
Oath of, § 567.
Partnership cases, appointment in, § 564.
Party cannot be appointed without written consent, § 566.
Possession of property, § 568.
Powers, § 568.
Qualifications, who may not be appointed, § 566.
Rents, may receive, § 568.
Unclaimed fund, disposition of, § 570.
Unclaimed fund in hands of, publication of notice of, § 570.
Undertaking, additional, on appointment of, § 566.
Undertaking of, § 567.
Undertaking on appeal, to stay judgment appointing, § 943.
Undertaking on ex parte application for, § 566.
When may be appointed, §§ 564, 565.
Who may not act as, without consent of parties, § 566.

RECLAMATION DISTRICTS.
Disqualification of judge or justice in actions in relation to, and proceedings on, § 170.

RECORDERS.
Filing abstract of justice's judgment with, § 900.

RECORDING. See Registration.

RECORDS. See Evidence; Lis Pendens.
Abstract of justice's judgment must be recorded, to create lien on land, § 900.
Actions, of, clerk must keep, § 1052.
Appeal, what constitutes record on, § 661.
As evidence. See Evidence.
Attachment, release of, how recorded, § 559.
Attachment, release of, to be recorded, § 559.
Attachments, how indexed, § 542.
Attachments, recorder to index, § 542.
Copy of, seal, § 153.
Courts of, what are, § 34.
Docket, justice's, a public, § 93.
Execution, return of, § 683.
Judicial. See Judgments.
Lis pendens, § 409.
Partition, of conveyance in, § 787.
Public, dockets and papers of justice, § 914.
Register of actions, what to be entered in, § 1052.
Saturday afternoon, instruments may be recorded on, § 10.

RECORDS. (Continued.)
Transfer from old court to new, §§ 55, 79.
What constitutes, on appeal, § 661.

REDEMPTION.
Appealability from an order or decree in action to redeem from mortgage or lien, § 963.
Execution, from, §§ 701, 707. See Execution.
Execution from, notice, § 703.
Execution, from, payment of taxes, interest, liens, §§ 702, 703.
Execution, from, who may make, § 701.
Mortgage, limitation of action to redeem, § 346.
Mortgage, note of record of, to be produced, § 705.
Mortgage. See Mortgages.
Payment, to whom to be made, § 704.
What necessary to, § 705.

REFEREES. See Reference.

REFERENCE.
Account, of long, § 639.
Account, reference of, on judgment by default, § 585.
Account, reference of, powers and duties of referees, § 639.
Account, reference of questions involving, § 639.
Account, where taking of necessary after judgment for defendant on issue of law, § 636.
Agreement for, to be filed with clerk, or entered on minutes, § 638.
Agreement of parties, ordered on, in what cases, § 638.
All issues in action may be referred by consent, § 638.
All must meet, but a majority may act, § 1053.
Attorney, accusation against, § 298.
Attorney, to take depositions in proceedings to remove, § 298
Bill of exceptions, settlement by referee, § 650.
Compulsory, when may be ordered by court on its own motion, §§ 636, 639.
Consent, by, in what cases may be ordered, § 638.
Consent, reference ordered without, on motion, in what cases, § 639.
Continuance, costs may be imposed as condition of, § 1029.
Costs, filing of bill of, affidavit to, § 1033.
Costs, filing of bill of, time of, § 1033.
Cost-bill. See Costs.
Court commissioner, to, § 640.
Decision of, what constitutes, § 1033.
Default, reference, when may be ordered, § 585.
Demurrer, when ordered after judgment for defendant on, § 636.
Depositions, to take, in proceeding to remove attorney, § 298.
Eminent domain, in. See Eminent Domain.

REFERENCE. (Continued.)
Fact necessary to determination, ordered to ascertain, when, § 638.
Fact, question of, not arising upon pleadings, reference of, § 639.
Failure of parties to agree, appointment by judge, § 640.
Findings, are part of judgment roll, § 670.
Finding, effect and force of, §§ 644, 645.
Finding has force of special verdict when, § 645.
Finding, how excepted to and reviewed, § 645.
Findings of, judgment on, § 644.
For information of court, §§ 638, 639.
Issue, of, by court, § 592.
Judgment on finding, § 644.
Judgment roll, findings of referee part of, § 670.
May be ordered upon application of party or on its own motion, when, §§ 636, 639.
Motion, ordered on, in what cases, § 639.
Objections to referee, affidavits on, § 642.
Objections to referee, court to hear and dispose of, § 642.
Objections to referee, grounds of, § 641.
Ordered on motion in what cases, § 639.
Ordered upon agreement of parties in what cases, § 638.
Partition proceedings, in, §§ 761 et seq. See Partition.
Partition, to determine lien-holders' rights, § 761.
Question not arising upon pleadings, of, § 639.
Referees, additional, appointment of where original do not agree, § 640.
Referees, bill of exceptions, presentment and settlement of where case tried before, § 650.
Referees, all to meet, but majority may act, § 1053.
Referees, decision of, meaning of, § 1033.
Referees, disqualification of, grounds for, § 641.
Referees, eminent domain, in. See Eminent Domain.
Referees, fees of, amount of, §§ 768, 1028.
Referees, number of, § 640.
Referees, objection to grounds for, § 641.
Referees, objections to, procedure on, § 642.
Referees, partition, in. See Partition.
Referees, proceedings where they do not agree, § 640.
Referees, qualifications of, §§ 640, 641.
Referees, quorum, § 1053.
Referee, residence, §§ 640, 641.
Referees, what disqualifies, § 641.
Referees, who may not act as, § 641.
Report, findings of fact, and conclusions of law, separately stated, § 643.
Report to be made within twenty days, § 643.
Seamen, of claims of, § 826.

REFERENCE. (Continued.)
Special proceeding, when ordered in, § 639.
Statement on motion for new trial, when case tried before referee, § 659.
Supplementary proceedings, disobedience of, contempt, § 721.
When may be ordered upon consent of parties, §§ 638, 639.
When ordered after judgment on demurrer, § 636.
When parties do not consent, § 639.

REGISTER.
Of actions, clerk must keep, § 1052.

REGISTRATION. See Records.
Saturday afternoon, instruments may be recorded on, § 10.

REHEARING.
In supreme court, § 43.

RELATIONSHIP. See Affinity; Consanguinity.

RELEASE.
Attachment, release of. See Attachments.

RELIEF. See Judgment.

REMEDIES. See Actions.
Cumulative, action by possession to quiet title, § 751.
Cumulative, action to quiet title is, § 751.
Judicial, defined and classified, §§ 20, 21.
Merger of civil and criminal, § 32.

REMITTITUR.
Certifying to clerk of court below, § 958.
In transferred cases, § 56.

REMOVAL OF CAUSES. See Place of Trial.

RENEWAL.
Application for order, of, § 182.
Execution in justice's court, renewal of, § 903.

RENTS. See Execution; Forcible Entry and Unlawful Detainer; Landlord and Tenant.
From time of execution to redemption, § 707.
Limitation of actions respecting, §§ 319, 336.
Receiver may collect, § 568.

REPLEVIN. See Claim and Delivery.

REPORTER.
Phonographic. See Phonographic Reporter.
Supreme court decisions, § 262.
Supreme court. See Supreme Court.

RES ADJUDICATA. See Judgment.
Conclusiveness, action involving validity of gift or trust, § 738.

RESCUE.
Liability of sheriff, § 501.
When a contempt, § 906.

RESIDENCE.
Non-resident, place of action against, § 395.
Of justice of peace, § 159.
Of superior judges, § 158.

RESPONDENT.
What may require to be inserted in transcript on appeal, § 953a.
Who is, § 938.

RESTITUTION.
Of property on reversal, § 957.

RETROACTIVE.
Force of code, § 3.
Statute of limitations, § 362.

RETURN. See Execution; Summons.
Execution, of, time for, § 683.
Officer summoning jurors, of, §§ 227, 232.
Summons returned how, § 410.

REVERSAL.
On appeal. See Appeals, IX.

REVIEW.
Appeal, on. See Appeals, VIII.
Appeal, other than by, costs on, § 1032.
Chambers, powers at, §§ 165, 166.
Costs, § 1032.
Superior court or judge may issue, § 76.
Supreme court justice may not grant, at chambers, § 165.
Supreme court may issue, §§ 51, 54.

REVIVAL.
Judgment, revival of, after five years, power of court, § 685.
Judgment, revival of, in favor of execution purchaser, § 708.

RIOTS.
Justice's court has jurisdiction, § 115.
Limitation of action against municipality for, § 340.

RIVERS.
Venue of action for offense on river situated in several counties, § 393.

ROLL OF ATTORNEYS.
How kept, § 280.

ROOMS.
Courts, for. See particular court.

ROUTS.
Justice's court has jurisdiction over, § 115.

RULES.
Allowances to officers for services cannot be given by, § 129.
Courts of record may make for their government and government of officers, § 129.
Evidence, of. See Evidence.
Inconsistent with code, repealed, § 18.
Of construction of code, § 4.
Of court, courts of record may make, § 129.

RULES. (Continued.)
Of court, limitation on power to make, § 129.
Of justice's court, § 95.
Pleading, of. See Pleading.
Practice, rules of in particular proceeding. See particular title.
Superior court, time of taking effect, § 130.
Supreme court, time of taking effect, § 130.
Taxes, charges or penalties cannot be imposed by, § 129.
To be spread upon record, printed and filed with clerk of court, § 130.
When take effect, § 130.

S

SACRAMENTO COUNTY.
Number of superior judges, § 66.

SALARY.
Deputy sheriff's, in justice's courts, § 87.
Justices of the peace. See Justices of the Peace.
Justice's clerk. See Justice's Clerk.
Lien for. See Lien.

SALES. See Execution; Foreclosure of Mortgage; Partition.

SAN FRANCISCO.
Classification of judges as to terms of office, § 68.
Judgments and orders of any session held by one or more judges as effective as if all judges presided, § 67.
Number of superior judges, § 67.
Presiding judge, election and removal of, § 67
Presiding judge to distribute and prescribe order of business, § 67.
Superior court, any one or more of judges may hold court, § 67
Superior court, four additional judges, appointment, term of office and salaries, § 67.
Superior court, presiding judge, duties of, § 67.
Superior court, presiding judge to prescribe times of holding special sessions, § 73.
Superior court, proceedings of one session as effective as if all judges presided, § 67.
Superior court, sessions of, number of, § 67.

SANITY. See Insane Persons.

SAN JOAQUIN COUNTY.
Number of judges, § 66.

SANTA CLARA COUNTY.
Number of judges, § 66.

SATISFACTION.
Attorney may acknowledge, § 283.
Mortgage, foreclosure, entry of satisfaction on margin of record, § 675a.
Of judgment, how made, § 675.

SATURDAY. See Holidays.
Afternoon a half-holiday, § 10.
Afternoon, what acts valid on, § 10.

SAVINGS AND LOAN ASSOCIATION. See Corporations.

SAVINGS BANK.
Limitation of action against, § 348.

SCHOOLS.
Holidays See Holidays

SCIRE FACIAS.
Abolished, § 802.

SEAL.
Certificate of appointment of executor, administrator or guardian, necessary to, § 153.
Certificate of probate of will, necessary to, § 153.
Court commissioner, of, § 259.
Court, of, clerk to keep, § 152.
Courts, of, how provided, § 151.
Courts, of, to what documents to be affixed, § 153.
Court, of, when private seal used, § 151.
Court, superior court, form of, § 149.
Courts, what courts must have, § 147.
Defined, § 14.
Execution, to have seal, § 682.
Guardian, § 153.
Police court, of, § 150.
Record, copy of, necessary to, § 153.
Superior court, of, § 149.
Supreme court, of, § 148.
Telegram, how described in, § 1017.
To what document to be affixed, § 153.
What courts shall have, § 147.
What includes, § 14.
Writ, necessary for, § 153.

SEALED VERDICT.
Jury may bring in, when, § 617.

SEAMEN. See Shipping.
Exempt from jury duty, § 200.
Exemption of earnings of, § 690.

SEARCHER OF RECORDS.
What property of, exempt, § 690.

SECRETARY.
Of supreme court, §§ 265, 266.

SECTION.
Meaning of, § 17.
Refers to what, § 17.

SEDUCTION.
Father may sue for daughter's, § 375.
Guardian may sue for seduction of ward, § 375.
Limitation of action for, § 340.
Mother may sue for daughter's, when, § 375.
Sitting of court, private in action for, § 125.
Unmarried female may recover exemplary damages for own, § 374.
Unmarried female may sue for her own, § 374.

SEISIN.
Within five years, when necessary to recover realty, §§ 318, 319.

SENATE. See Impeachment; Legislature.

SERVANT. See Master and Servant.

SERVICE. See Process.
Accusation against attorney, service of by publication, § 292.
Appearance, equivalent to, § 416.
Appearance, defendant or his attorney entitled to notice of all proceedings after, § 1014.
Appearance, failure to make, service not necessary in case of, § 1014.
Association, on, §§ 388, 411.
Attorney, how made where attorney has no known office in state, § 1015.
Attorney, on, manner of, § 1011.
Attorney, on, where attorney removed or suspended from practice, § 1015.
Attorney, service may be on, when, and when not, § 1015.
Bill of exceptions and amendments. See Exceptions.
Bill of exceptions, of, § 650.
Clerk, may be made on, when, § 1015.
Complaint, copy of, §§ 410, 527.
Contempt proceedings, § 1016.
Corporation, on, § 411.
Expense of, included in costs, § 1021.
Injunction, of complaint and affidavit, § 527.
Mail, by, computation of time, and extension of, §§ 1005, 1013.
Mail, by, how made, §§ 1011, 1013.
Mail, by, when complete, § 1013.
Mail, by, when may be made, §§ 1011, 1012.
Need not be made if defendant does not appear, § 1014.
Non-resident, on attorney, § 1015.
Non-resident, on, manner of, § 1015.
Notice and papers, how served, § 1011.
Notice, after appearance defendant entitled to all, § 1014.
Particular proceeding, in. See particular title.
Party, on, manner of, § 1011.
Party, service, when must be on, § 1015.
Personal, may be, § 1011.
Personal, upon whom made, § 1011.
Pleadings subsequent to complaint, § 465.
Proof of, § 415.
Publication, by, §§ 412, 413, 415. See Summons.
Several defendants, some served, proceedings against those served, § 414.
Substituted. See Summons.
Summons. See Summons.
Telegraph, by, authorized, § 1017.
Telegraph, by, manner of, § 1017.
Telegraph, by, powers and duties of officers, § 1017.
Times for, extension of, § 1054.
What papers need not be served on party defaulting or not appearing, § 650.

SESSIONS.
Extra, of superior court. See Superior Court.
Supreme court, of, § 47.

SET-OFF.
Assignment of chose not to prejudice, § 368.
Bill or note, assignments not affected by set-off, § 368.
Cross-demands deemed compensated, § 440.
Cross-demands not affected by death or assignment, § 440.
Improvements, as, in ejectment, § 741.

SHAM ANSWER.
Striking out, § 453.

SHARES.
Of stock. See Corporation.

SHERIFF. See Arrest and Bail; Attachment; Execution; Justices' Courts.
Absence of judge, duty in case of, § 139.
Action against, for official acts, § 1055.
Action against, notice to sureties on bond, effect of, § 1055.
Arrest by, how made, § 485.
Attachment of vessel, §§ 819, 820.
Attorney, disqualification to act as, § 96.
Bail, discharge from liability as, § 501.
Bail, liability as, on official bond, § 502.
Bail-money to be deposited in court, § 498.
Bail, when liable as, § 501. See Arrest and Bail.
Courts, rooms, chambers, etc., for, providing, and expense of, §§ 88, 144.
Deed when to be executed, § 703.
Deposit in court, sheriff, when to take, § 574.
Deputies, in justices' courts, duties, § 87.
Deputies, in justices' courts, liability for, § 87.
Deputies, in justices' courts, salary, § 87.
Disqualification to act as attorney, § 96.
Duty to provide suitable rooms for judge, § 144.
Duty to provide rooms for justice, § 88.
Election of, where prescribed, § 262.
Escape, limitation of action against, for, § 340.
Execution, levying, liability to plaintiff, § 682.
Execution may issue to any, § 687.
Execution, not to purchase at, § 694.
Execution, penalty for selling under, without notice, § 693.
Execution sale See Execution.
Execution, writ of, requires what of, § 682.
Ex-officio officer of justice's court, § 87.
Expenses of providing suitable rooms, how paid, §§ 88, 144.
Indemnity to, on claim of property, § 689.
Indemnity to. See Indemnity.
Judgment against, conclusive against surties, when, § 1055.
Jurors, list of, to be delivered to sheriff, § 219.

SHERIFF. (Continued.)
Jurors, summoning forthwith, § 226.
Jurors, summoning to complete panel, § 227.
Justice's court, duty to provide rooms for, § 88.
Justice's court, duty to serve process, etc., issued by, § 87.
Justice's court, sheriff an officer of, § 87.
Justice's court, sheriff, attendance and duties of, § 87.
Justice's court, sheriff, deputy, duties of, § 87.
Justice's court, sheriff, deputy, salary of, § 87.
Justice's court, sheriff, ex-officio officer of, § 87.
Justice's court, sheriff, liability for deputies, § 87.
Justice's court, sheriff, liability on bond, § 87.
Justice's court, summoning jurors for, §§ 230–232.
Liability for taking property of third person under execution, § 689.
Liability on bond for duties in justices' courts, § 87.
Liability to third person in replevin, § 519.
Limitation of action against, §§ 339, 340.
Official bond, liability on, of sheriff, as bail, § 502.
Powers and duties of, prescribed by Political and Penal Codes, § 262.
Powers and duties on service of paper by telegraph, § 1017.
Receipt of, for accounts collected in attachment, § 547.
Requisition to, in replevin, § 511.
Seals for courts, duty to provide, § 151.
Summon jurors, how to, § 225.
Summoning jurors for courts of record, §§ 225–227.
Sureties' liability for default on deposit made in lieu of bail, § 498.
To notify plaintiff of arrest, § 864.

SHERIFF'S DEED.
When to be executed, § 703.

SHIPPING.
Actions relating to, against whom to be brought, § 814.
Appearance, who may enter and defend action, § 821.
Attached vessel, claims of seamen against, how proved, § 826.
Attached vessel, notice of sale, § 824.
Attached vessel, sale of, application of proceeds, § 824.
Attached vessel, sale of, application of proceeds where claim for wages involved, § 825.
Attached vessel, sale of, at auction, § 824.
Attachment of vessel, claim for wages may be asserted notwithstanding, § 825.
Attachment of vessel, clerk to issue, § 818.

SHIPPING. (Continued.)
Attachment of vessel, custody, § 820.
Attachment of vessel, discharge of, how procured, § 822.
Attachment of vessel, discharge of, on motion, § 823.
Attachment of vessel, discharge of, undertaking or deposit, § 822.
Attachment of vessel, discharge of, where claim of mariner or seaman filed, § 825.
Attachment of vessel, duty of sheriff in executing writ, § 820.
Attachment of vessel, right of, § 817.
Attachment of vessel, sheriff may not interfere with merchandise, baggage, etc., § 820.
Attachment of vessel, sheriff must execute writ without delay, § 820.
Attachment of vessel, time for, § 817.
Attachment of vessel, undertaking, § 818.
Attachment of vessel, undertaking, exception to sureties, § 821.
Attachment of vessel, undertaking, justification of sureties, § 821.
Attachment of vessel, writ, what to direct sheriff to do, § 819.
Attachment of vessel, who may defend action, § 821.
Attachment of vessel, writ to be directed to what sheriff, § 819.
Claim, mariner or seaman may file, § 825.
Claim of mariner or seaman, affidavit, § 825.
Claim of mariner or seaman, contest of, proceedings on, § 826.
Claim of mariner or seaman, failure to contest, admission, § 826.
Claim of mariner or seaman, reference of, on contest, § 826.
Claim of mariner or seaman, rights on filing, § 825.
Claim of mariner, review of finding of clerk or referee respecting, § 826.
Claim of seaman, proof of, § 826.
Claims for which vessels are liable, § 813.
Complaint against unknown owners, § 815.
Complaint must be verified in action against vessel, § 815.
Execution against ship, where claim for wages asserted, application of proceeds, § 825.
Exemption of property of master, officer, or seaman, § 690.
Fishing-boat, exemption of, § 690.
Jury duty, employee of vessel is exempt from, § 200.
Justice's court has no jurisdiction, § 114.
Lien-holders made defendants, claims to be alleged, § 814.
Lien-holders may be made defendants in actions, § 814.
Liens, duration of, § 813.
Liens on vessels, what demands constitute, § 813.
Liens, preference between, § 813.
Liens, priority of, § 813.

SHIPPING. (Continued.)
Notice of sheriff's sale, what to contain, § 827.
Owners, action to be against, § 814.
Owners unknown, designation of, in action, § 814.
Parties defendant in actions against vessel, § 814.
Parties defendant, lien-holders may be made, § 814.
Sale of vessel, notice, what to contain, § 827.
Sale, proceeds, how to be applied, §§ 824, 825.
Sale, sheriff, when to sell vessel, § 824.
Seamen's wages, exemption of, § 690.
Seamen's wages, justice's court has no jurisdiction, § 114.
Summons, service may be on master, mate, etc., when, § 816.
Summons, service to be on owners of vessel, if they can be found, § 816.
Unknown owners, action against, § 814.
Vessels are liable for what claims, § 813.
Vessels liable for injuries, § 813
Vessels liable for services, § 813.
Vessels liable for supplies, § 813.
Vessels liable for wharfage and anchorage, § 813.
Vessels liable for work and labor, § 813.
Vessels liable on contract to carry, § 813.
Wages of seamen, claim of, against attached vessel, proof of, § 826.
Wages of seamen may be asserted notwithstanding attachment of ship, how, § 825.

SHORTHAND REPORTER. See Phonographic Reporter.

SICKNESS.
Juror, proceedings in case of, § 615.
Justice, transfer of cause, § 90.
Superior judge, appointment of substitute by governor, § 160.

SIGNATURE.
Includes mark, § 17.
Mark, signature by, to be witnessed by two persons, § 17.
When admitted, §§ 446–449.
When admitted in justice's court, § 887.

SINGULAR.
Includes plural, § 17.

SISTER STATE.
Limitation laws of, § 361.
Proceedings in, on judgment of, not stayed, § 526.

SITTINGS.
Public and private, §§ 124, 125.

SLANDER.
Answer in, § 461.
Justification, § 461.
Limitation of action for, § 340.
Mitigating circumstances, evidence of, § 461.
Pleading in actions for, § 460.

SONOMA COUNTY.
Number of judges, § 66.

SOUTHERN CALIFORNIA COLLEGE OF LAW.
Diploma admits to practice without examination, § 280b.

SPECIAL ISSUE.
May be tried by jury when, § 309.
Not made by pleadings, how tried, § 309.

SPECIAL PROCEEDINGS.
"Action" includes, § 363.
Appellate jurisdiction of supreme court over, § 52.
Arbitrations. See Arbitration.
Certiorari. See Review.
Costs of course, when allowed, §§ 1022, 1024.
Costs on review, other than by appeal, § 1032.
Defined, § 23.
Depositions in. See Depositions.
Dissolution of corporations. See Corporations.
Election contest. See Elections.
Judgments in, appealability, § 963.
Jurisdiction of superior court over, § 76.
Jurisdiction of supreme court over, § 52.
Particular proceeding. See particular title.
Prohibition, writ of. See Prohibition.
Reference, when ordered in, § 639.
Remedies, divided into actions and special proceedings, § 21.
Security for costs, failure of non-resident or foreign corporation to give, dismissal, § 1037.
Security for costs required of non-resident or foreign corporation, § 1036.
What constitutes generally, § 23.
Writ of review. See Review.

SPECIAL VERDICT.
Vacation of judgment on, and entry of different judgment, § 663.

STANFORD UNIVERSITY.
Admission to practice law on diploma from, § 280b.

STATE.
Answer must be verified when state party, § 446.
Bonds not required of, §§ 529, 1058.
Costs, when state a party, paid out of treasury, § 1038.
Execution to be in name of people, § 682.
Grantee of, limitation of action, § 316.
Includes District of Columbia and territories, § 17.
Injunction by, undertaking not required, § 529.
Injunction suspending business of corporation, § 531.
Judgment in suit to quiet title does not bind, § 751.
Limitations in action for hospital dues, § 345.

STATE. (Continued.)
Limitations in actions by, generally, § 345.
Limitation of action by, for forfeiture or penalty, § 340.
Limitation of action by, respecting real property, §§ 315, 317.
Verification not necessary where a plaintiff, § 446.
Security, people do not give, §§ 529, 1058.

STATE LANDS. See Public Lands.
Action against state to quiet title to. See State.

STATEMENT. See New Trial.
Judges have same power as in settling bills of exceptions, § 653.
Justice's court, appeal from, § 92. See Appeals.
New trial, motion, when made on statement, § 658.
New trial, power of judges in settling and certifying, § 653.
Police court, statement on appeal from. See Appeals, XIII.
Proceedings on death, disqualification, absence or refusal of judge, § 653.

STATE PRISON.
Officer or attendant exempt from jury duty, § 200.

STATUTE OF LIMITATIONS. See Limitation of Actions.

STATUTES. See Code of Civil Procedure; Evidence; Law.
Code, consistent with, not continued in force, § 18.
Code, construed as continuation of statute substantially same, § 5
Code, inconsistent with, repealed, § 18.
Code, private statute not repealed by, § 18.
Code, repeal by, does not revive former law, § 18.
Code repeals statutes on matters covered by, § 18.
Code, retroactive, is not, § 3.
Conditions precedent to rights under, how pleaded, § 459.
Execution of, by officers not enjoined, § 526.
Limitation of action upon statute for penalty or forfeiture, § 340.
Not continued in force because consistent with code, § 18.
Not expressly continued in force, repealed, § 18.
Pleading private, § 459.
Private, not repealed by code, § 18
Remedies. See Remedies.
Repeal by code does not revive former laws, § 18.
Repeal of, does not revive former law, § 18.
Retroactive, code is not, § 3.
Section, meaning of, § 17.

STAY. See Appeals, VI.
Execution in justice's court, not to exceed ten days, § 901a.
Execution, of, time of, excluded in computing time within which may issue, § 681.
Execution, power of court to stay, § 681a.
Execution, power of justice to stay, § 901a.
Granting, until security given for costs, § 1036.
Injunction, when and when not granted to stay, § 526.

STEAMERS. See Shipping.

ST. IGNATIUS UNIVERSITY.
Admission to practice law on diploma from law college of, § 280b.

STENOGRAPHER. See Phonographic Reporter.

STIPULATION.
For transfer of action to another court, § 398.
Of attorney, § 283.
Place of trial, stipulation as to in action against city, county or city and county, § 394.
To omit matter from record on appeal, §953a.

STOCK. See Corporations.
Limitation of action to recover, sold for delinquent assessment, § 341.

STOCKHOLDER.
Limitation of action against, § 359.

STREAM.
Venue of action for offense on stream situated in several counties, § 393.

STREET RAILROADS.
Exemption of employees of from jury duty, § 200.

STREETS. See Highways.
Limitation of action to contest assessment under local improvement act, § 349.
Partition proceedings affecting, § 764.

STRIKING OUT.
Irrelevant and redundant matter in pleading, § 453.
Order striking out part of judgment roll, § 670.
Order striking out pleading deemed excepted to, § 647.
Sham answer, § 453.

SUBPŒNA.
Justice of peace may issue, to any part of county, § 919.
Justice's clerk may issue, § 87.
Service of, must be on party, § 1015.

SUBROGATION. Of judgment debtor, and proceedings to obtain, § 709.
Of surety on appeal bond, § 1059.
Surety, subrogation of, and proceedings to obtain, § 709.

SUBSCRIPTION.
Includes mark, § 17.

SUBSTITUTED SERVICE. See Service; Summons.

SUBSTITUTION. See Subrogation.
Attorney, of. See Attorney.
Of parties to action, §§ 385, 386.
Person making claim on defendant, substitution of, § 386.

SUCCESSIVE ACTIONS.
Right to maintain, § 1047.

SUCCESSOR.
In interest, substitution of, as party, § 385.
What justices of peace successors of others, §§ 98, 107, 917.
Who to designate succeeding justice, § 918.

SUMMARY PROCEEDINGS. See Arrest and Bail; Forcible Entry and Unlawful Detainer; Special Proceedings.
Particular writs. See subject in question.

SUMMONS. See Process; Forcible Entry and Unlawful Detainer.
Affidavit for publication, as part of judgment roll, § 670.
Alias, from justice's court, §§ 846, 847.
Alias, how issued, § 408.
Alias, time of issuance, § 408.
Alias, when will issue, § 408.
Appearance equivalent to service, §§ 416, 581a.
Appearance, waiver of summons by, § 406.
Complaint must be served with, § 410.
Contains what, § 407.
Cross-complaint, summons to be issued and served upon parties who have not appeared, § 442.
Defendants residing in different counties, issuance of summons, § 406.
Directed how, § 407.
Dismissal, failure to serve and return, where defendant absent or conceals himself, § 581a.
Dismissal for failure to return summons, § 581a.
Dismissal of action for failure to issue or return, § 581a.
Ejectment, to unknown defendants in, §§ 750, 751.
Execution of, where new county formed, § 687.
Failure to issue, dismissal of, action § 581a.
Failure to issue or return, cured by appearance, § 581a.
Failure to return, dismissal of action for, § 581a.
Failure to serve, relief from judgment and allowing answer, § 473.
Foreign corporation, service of, on, §§ 411–413.
Form of, § 407.

SUMMONS. (Continued.)
Issuance, time of, §§ 406, 581a, 750.
Issued how, § 407.
Issued under seal, § 407.
Joint contract, service where one or more appear, § 406.
Joint debtor, after judgment, affidavit for, § 991.
Joint debtors may be summoned after judgment, § 989.
Joint debtors not summoned in original action, what to contain, § 990.
Joint debtors, those served may be proceeded against, § 414.
Joint debtors. See Joint Debtors.
Judgment, relief from, and allowing answer, where summons not served, § 473.
Judgment roll, on service by publication, § 670.
Judgment roll, part of where complaint not answered, § 670.
Jurisdiction of action acquired when, § 416.
Justices' clerks and deputies in townships in counties of seventh class, issuance and form of, § 103b.
Justices' clerks in townships, power to issue, § 103a.
Justice's court, alias summons in, §§ 846, 847.
Justice's court, from, service by sheriff and deputy, § 87.
Justice's court, to be served out of county, certificate to, § 849.
Justice's court, to be served out of county, publication of, § 849.
Justice's court, to be served out of county, service and return, § 849.
Justice's court, who may serve, § 849.
Justice's court in. See Justices' Courts, VII.
Limitation on time for issuing, § 581a.
Limitation on time for return, § 581a.
Lost, alias, issuance of, § 408.
Must contain what, § 407.
Partition, in, §§ 756, 757.
Personal service, when necessary, § 411.
Police court, in, § 930.
Proof of service by admission of defendant, § 415.
Proof of service, certificate or affidavit must state what, § 415.
Proof of service, how made, § 415.
Proof of service in case of publication, § 415.
Proof of service made by person other than sheriff, § 415.
Proof of service made by sheriff, § 415.
Publication, affidavit, §§ 412, 750.
Publication, affidavit as to, filing of, certificate of residence, § 412.
Publication of, certificate of residence, effect of on right to, § 412.
Publication, concealed defendant, § 412.
Publication, depositing summons and complaint in post-office, § 413.
Publication, foreign corporation having no agent, etc., §§ 412, 413.

SUMMONS. (Continued.)
Publication, in partition, § 757.
Publication, in suit to determine adverse claim, § 750.
Publication in suit to determine adverse claim against unknown owners, § 750.
Publication, judgment roll, on service by, § 670.
Publication, manner of, § 413.
Publication, non-resident, §§ 412, 413.
Publication, order, what to direct, § 413.
Publication, personal service of complaint and summons out of state, effect of, § 413.
Publication, procedure to obtain order for, § 412.
Publication of, procedure where defendant fails to answer, § 585.
Publication, time and frequency of, § 413.
Publication, when, and how made, § 412.
Publication, when complete, § 413.
Publication, when may be ordered, § 412.
Publication of, default for failure to answer, procedure, § 585.
Quieting title, summons in action. See Quieting Title.
Relief from judgment when no personal service, § 473.
Return by person other than sheriff, § 410.
Return by sheriff, manner of, § 410.
Return, limitation of time for, § 581a.
Returned how, § 410.
Served how, § 410, 411.
Service by person other than sheriff, § 410.
Service by publication, in partition suit, § 757.
Service by sheriff, manner of, § 410.
Service by telegraph, § 1017.
Service in action against vessels, § 816.
Service of, certificate of, § 410.
Service of gives jurisdiction, § 416.
Service of, jurisdiction of defendant acquired on, § 416.
Service on county, city, or town, § 411.
Service on domestic corporation, § 411.
Service on foreign corporation, § 411.
Service on guardian, § 411.
Service on infant under fourteen, § 411.
Service on insane person, § 411.
Service on non-resident joint-stock company doing business here, § 411.
Service on part of defendants, procedure after, § 414.
Service, personal, when necessary, § 411.
Service to be on defendant personally when, § 411.
Service where parties associated in business, § 388.
Service where parties transact business under common name, § 388.
Signed by clerk, § 407.
Telegraph, transmission by, for service, § 1017.
Time to answer, § 407.
Time to issue, § 581a.
Time to return, § 581a.
Unknown defendants in ejectment, to, §§ 750, 751.
Waiver of, by appearing and pleading, § 406.
Waiver of, in writing, § 406.
What to contain, § 407.
When may be issued, § 406.
Who may serve, § 410.

SUNDAYS. See Holidays.
Are holidays, § 10.
Holiday falling on Sunday, next day celebrated, §§ 10, 11.

SUPERINTENDENT.
Of railroad, exempt from jury duty, § 200.

SUPERIOR COURT. See Courts; Judges; Probate Court; Superior Judge.
Adjournments construed as recesses, and not to prevent sitting, § 74.
Adjournment for absence of judge, duty of sheriff or clerk, § 139.
Adjournment from day to day for absence of judge, § 139.
Adjournment to next regular session, § 140.
Always open, for what purposes, §§ 73, 134, 617.
Appeal to, §§ 974–980. See Appeals, XIII.
Apportionment of business where more than one judge, §§ 66, 67.
Certified copy of list of jurors to be filed with clerk of, § 208.
Certifying cases to, from justice's court, § 92.
Chambers. See Chambers.
Costs on review, other than by appeal, § 1032.
Docketing judgment of justice's court, § 898.
Docketing judgment of justice's court, execution, § 899.
Extra sessions, apportionment of business where more than one judge, § 67a.
Extra sessions, apportionment of business where but one judge, § 67a.
Extra sessions, apportionment of business, rules relating to transfer of business, § 67a.
Extra sessions, compensation of judge presiding over, § 67a.
Extra sessions, duration of, § 67b.
Extra sessions, governor, judge designated by, to sit, § 67a.
Extra sessions, governor may designate judge to sit when, § 67a.
Extra sessions, judges may invite another judge to sit, § 67b.
Extra sessions, judgments, orders, and proceedings, effect of, § 67b.
Extra sessions of, when may be held, § 67b.
Extra sessions, place of holding, § 67b.

SUPERIOR COURT. (Continued.)
Extra sessions, powers of judge presiding over, § 67a.
Extra sessions, retransferring unfinished business, § 67b.
Extra sessions, time of holding, § 67b.
Extra sessions, who may preside over, § 67a.
Holding court by one judge for another, §§ 71, 160.
Incidental powers and duties, §§ 128–130.
Judges of. See Judges; Superior Judges.
Jurisdiction, appellate, has, in what cases, § 77.
Jurisdiction is original and appellate, § 75.
Jurisdiction, concurrent with justices' courts, § 113.
Jurisdiction, original, has, in what cases, § 76.
Jurisdiction. See Jurisdiction.
Justices of peace, shall designate which of two, is successor, when, § 918.
Mandamus, issuance of. See Mandamus.
May vacate its judgment, in what cases, § 663.
Particular county, of. See particular title.
Phonographic reporter for, §§ 269–274. See Phonographic Reporter.
Place of holding, provisions concerning, §§ 142–144.
Powers respecting conduct of proceedings, § 128.
Powers of on appeal, § 980. See Appeals, IX.
Process extends to all parts of state, § 78.
Record, superior courts are courts of, § 34.
Remitting judgment to, § 56.
Review, writ of, issuance of, by. See Review.
Rooms for, how provided and furnished, § 144.
Rules, power to make, § 129. See Rules.
Rules, when take effect, §§ 129, 130.
Seal, has, § 147.
Seal of, § 149.
Seal. See Seal.
Sessions held at county seats, § 73.
Sessions, number of, in counties having two or more judges, §§ 66, 67.
Sessions, regular, when held, § 73.
Sessions, special, when held, § 73.
Sessions of, by judge of another court, § 160.
Sessions, extra. See ante, this title.
Sittings to be public, § 124.
Sittings may be private in what cases, § 125.
Transfer of action to another court, manner of, §§ 398, 399.
Transfer of books, records, and actions to superior court, § 79.
Transfer to, from justice's court, jurisdiction, § 838.
SUPERIOR COURT. (Continued.)
Transfer to, from justice's court, when and how effected, § 838.
Vacation of judgment, grounds for, § 663. See Judgment.
Writs, power of to issue, § 76.

SUPERIOR JUDGE. See Judges; Superior Court.
Absence, illness, or disability, appointment of substitute, § 160.
Absence of, authority of court commissioner, § 259.
Absence of, proceedings in case of, § 139.
Acknowledgment, may take, § 179.
Affidavit, may take, § 179.
Attorney may be selected to act as, § 72.
Certiorari, issuance of writ of. See Review.
Chambers, at, powers of, § 166. See Chambers.
Change of, for bias, etc., procedure, § 170.
Computation of term, § 69.
Deposition, may take, § 179.
Disqualification, change of trial for, procedure. See Place of Trial.
Disqualification of, designation of another judge to act, § 170.
Disqualification, disqualified judge may issue temporary injunction pending appointment of new judge, § 170.
Disqualification of, proceedings on, § 170.
Disqualification of, what matters amount to, § 170.
Disqualified, transfer of cause to another, § 398.
Election of, §§ 65, 157.
Eligibility, § 157.
Expenses of, incurred in holding court for another, § 160.
Extra sessions of superior court. See Superior Court.
Guardianship matters, powers of, at chambers, in, § 166.
Holding court for another at request of governor, § 160.
Holding court in another county, power of, § 71.
Ineligible to any other officer or public employment, § 161.
Jurors, designating the estimated number of, § 204.
Jurors, selection of, § 204.
Law, cannot practice, § 171.
Law partner, cannot have, § 172.
Mandamus, issuance of. See Mandamus.
May hold court in another county when, § 71.
May order matter taken down in shorthand and transcribed and charged against county, § 274a.
May take acknowledgment, affidavit, deposition, § 179.
Not to have law partner, § 172.
Number of judges, §§ 65, 66, 67, 67a.
Opinions of, transcribing of and charging against county, § 274a.

SUPERIOR JUDGE. (Continued.)
Order of, directing jury to be drawn, § 214.
Order of, to impanel grand jury, § 241.
Powers out of court, § 176.
Probate. See Probate Court.
Probate matters, power of, at chambers, in, § 166.
Probation officer. See Probation Officer.
Qualifications of, § 157.
Residence, place of, § 158.
Review, writ of, issuance of. See Review.
Sickness, absence or disability, requesting some other judge to sit, § 160.
Successor to justice, superior judge, when to designate, § 918.
Term of office, § 68.
Vacancy in, appointee holds until next general election, § 70.
Vacancy in office, governor to fill, § 70.
Vacancy in, one elected to fill, holds for remainder of unexpired term, § 70.
Writs, power of, to issue, § 76.

SUPERVISORS.
Selection of jurors, §§ 204, 205.
Vacancy in office of justice, supervisors to fill, § 111.

SUPPLEMENTAL. See Pleading.
Complaint and answer, when allowed, § 464.
Complaint in partition, § 761.
Pleadings to bring in necessary parties, § 389.
Pleadings to revive judgment, § 685.

SUPPLEMENTARY PROCEEDINGS.
Arrest of debtor, when ordered, § 715.
Commitment of debtor, § 715.
Contempt for disobeying orders in, § 721.
Debtor, before whom may be required to answer, § 712.
Debtor must answer concerning property, when, §§ 714, 715.
Debtor need not answer outside of county of residence, § 714.
Debtor of defendant may pay creditor when, § 716.
Disobeying orders in, punishment, § 721.
Examination of debtor of judgment debtor, § 717.
Justice's court, in. See Justices' Courts, XXII.
Ordering property applied on execution, § 719.
Proceedings against third person asserting claim, § 720.
Proceedings against third person denying indebtedness to judgment debtor, § 720.
Proceedings to apply property on judgment, § 715.
Proceedings to compel answer, §§ 714, 715.
Proceedings to compel debtor to appear, § 715.
Proceedings where debtor of defendant denies debt, § 720.

SUPPLEMENTARY PROCEEDINGS. (Continued.)
Undertaking not to dispose of property, requiring of defendant, § 715.
Undertaking of debtor, when required to compel appearance, § 715.
Witnesses may be required to appear and testify, § 718.

SUPREME COURT. See Supreme Court Justices.
Adjournments do not prevent sittings, § 48.
Adjournment, one or more may adjourn court, § 43.
Appeal from judgment, may take what action on, § 956.
Appeals to. See Appeals.
Appellate jurisdiction of, § 52.
Apportionment of business to departments by chief justice, § 44.
Attorneys of, who are, § 275. See Attorney.
Attorneys, removal or suspension of, § 287.
Bailiffs, appointment and tenure of office, § 266.
Bailiffs, duties of, § 266.
Bailiffs, number and qualification of, § 265.
Bill of exceptions, application to, for proving, § 652.
Certiorari, issuance of. See Review.
Chambers, powers in, § 165.
Chief justice, absence of, proceedings on, § 46.
Chief justice, disability of, proceedings on, § 46.
Clerk of, § 262.
Clerk of, election of, § 262.
Concurrence of three justices necessary to transaction of business, § 54.
Consists of what, § 40.
Convening of court by chief justice or associate justices, § 45.
Court in bank, chief justice to preside, § 45.
Court in bank, convening, § 45.
Court in bank, judgment, concurrence of four justices necessary, § 45.
Court in bank, judgment, finality of, § 45.
Court in bank, judgment, rehearing, § 45.
Court in bank, ordering case to be heard by, § 44.
Court in bank, presence of four justices necessary, § 45.
Decision, all questions to be passed upon, § 53.
Decisions to be written and reasons stated, §§ 49, 53.
Department, chief justice may sit in either, § 43.
Department, disagreement of judges, transmitting case to other department or to court in bank, § 43.
Department, interchanges between judges, § 43.

SUPREME COURT. (Continued.)
Department, judgment, when becomes final, § 43.
Department, presiding justice of, § 43.
Department, rehearing case where three judges do not concur, § 43.
Department, three justices necessary to transact business, § 43.
Departments, assignment of judges to, § 43.
Departments, judgment, concurrence of three judges necessary, § 43.
Departments, judgment, rehearing, § 44.
Departments, number of, § 43.
Departments, one or more justices may adjourn, § 43.
Departments, powers of, in hearing causes, § 43.
Election contest, preference given, § 57.
Expense of rooms, etc., how defrayed, § 47.
Expenses of, appropriations for, § 47.
Expenses, traveling, § 47.
Hearing in bank after judgment in department, § 44.
Incidental powers of, §§ 128–130.
Judgment, all questions of law to be passed upon where new trial granted, § 53.
Judgment in bank, concurrence of four justices necessary, § 45.
Jurisdiction, appellate, § 52.
Jurisdiction is original and appellate, § 50.
Jurisdiction, original, § 51.
Justices of. See Supreme Court Justices.
Mandamus, issuance of. See Mandamus.
Officers of, traveling expenses, § 47.
Open always for business, § 47.
Ordering case to be heard in bank, § 44.
Phonographic reporter, provided for in Political Code, § 268.
Place of holding court, § 47.
Probate appeal, preference given, § 57.
Records, transfer of from old to new court, § 55.
Record, supreme court is court of, § 34.
Rehearing after judgment in department, §§ 44, 45.
Remedial powers of, § 53.
Remittitur, §§ 53, 56.
Reporter, duties and powers of, prescribed by Political Code and Penal Code, § 262.
Reporter of decisions, election of, § 262.
Review, writ of, issuance of. See Review.
Rooms, furniture, etc., how provided for, § 47.
Rules of, when take effect, § 130.
Rules, power to make, § 129. See Rules.
Seal, has, § 147.
Seal of, duplicates, § 148.
Seal of. See Seal.
Secretaries, appointment and tenure of office, §§ 265, 266.
Secretaries, duties of, § 266.

SUPREME COURT. (Continued.)
Secretaries, number and qualification of, § 265.
Sessions, § 47.
Terms, § 47.
Transfer of records, actions, and proceedings from old court to new court, § 55.
Traveling expenses of justices, § 47.
Vacancy, election to fill, § 42.
Vacancy in, appointee to hold until next general election, § 42.
Vacancy in, governor to fill, § 42.
What constitutes, § 40.
When and where held, § 47.
Writ of habeas corpus, any judge may issue, § 54.
Writs, concurrence of three judges necessary to issuance, § 54.
Writs, what may issue, § 51.
Where held, § 47.

SUPREME COURT JUSTICES. See Supreme Court.
Acknowledgments, may take, § 179.
Adjournment, one or more may adjourn court, § 43.
Affidavits, may take, § 179.
Bill of exceptions, power of, respecting settlement of, § 653.
Bill of exceptions, settlement by, § 652.
Chambers, powers at, § 165.
Chief justice, absence or inability of, selection of substitute, § 45.
Chief justice, convening of court by, § 45.
Chief justice, eligibility, § 156.
Chief justice to apportion business, § 44.
Classification of, for purpose of determining term of office, § 40.
Court, convening of by, § 45.
Depositions, may take, § 179.
Disqualification of, what matters amount to, § 170.
Disqualification, waiver of, § 170.
Election of judges, § 40.
Eligibility, § 156.
Expenses, traveling, of, § 47.
Ineligible to any other office or public employment, § 161.
Law, cannot practice, § 171.
Law partner, not to have, § 172.
Mandamus, issuance of. See Mandamus.
May take acknowledgment, affidavit, deposition, § 179.
Not to have law partner, § 172.
Judgment in bank, rehearing of, § 45.
Judgment in bank, when becomes final, § 45.
Judgment in department, concurrence of three justices necessary, § 43.
Judgment in department, hearing in bank of, § 44.
Judgment in department, when becomes final, § 44.
Judgment, may affirm, reverse, or modify, § 53.
Judgment, powers of supreme court in relation to, § 53.

SUPREME COURT JUSTICES. (Continued.)
Judgment to in writing, § 53.
Judgment to be remitted, § 53.
Judgment on appeal. See Appeals, IX.
Partner practicing law, not to have, § 172.
Powers of, out of court, § 176.
Qualifications of, § 156.
Remedial powers of, § 957.
Term of office, § 40.
Term of office, computation of, § 41.
Traveling expenses, § 47.

SURETY. See Bond; Surety Companies; Undertakings.
Action to compel satisfaction of debt for which surety bound, § 1050.
Affidavit of sureties, § 1057.
Affidavit of sureties, what to state, § 1057.
Appeal, on. See Appeals, IV.
Attachment, in, exception to, § 539.
Attachment, in, justification of, § 539.
Contribution, § 709.
Corporation as, deficiency of assets, proceedings in case of, § 1056.
Corporation as, jurisdiction, powers and duties of insurance commissioners over, § 1056.
Corporation as, may act with other sureties when, § 1057.
Corporation as, not to act where deficiency of assets, § 1056.
Corporations as, assets, how estimated, § 1056.
Corporations as, powers and liabilities, § 1056.
Corporations authorized to act as, §§ 1056, 1057.
Corporations, conditions requisite to acting as, § 1056.
Corporations, what may act as, § 1056.
Exception to, in attachment in justice's court, § 867.
Exception to, on appeal bond to superior court, § 978.
Exception to, on attachment of vessel, § 821.
Exception to, on appeal to supreme court. See Appeals, IV.
Exception to, on injunction, § 529.
Exception to, waiver by failure to make, §§ 513, 529.
Exception to, where bond given by grantee in suit to set aside fraudulent conveyance, § 678.
Indemnity. See Indemnity.
Injunction, upon, exception to § 529.
Insufficient, sureties becoming, new bond, failure to file, rights to cease, § 1057.
Insufficient sureties becoming, new bond may be ordered, § 1057.
Joinder of, in action on negotiable instrument, § 383.
Joinder of sureties on same or separate instruments, § 383.
Judgment against principal conclusive against, when, § 1055.

SURETY. (Continued.)
Judgment against sheriff, conclusiveness against sureties, § 1055.
Judgment, entry of, against, on five day's notice, § 1055.
Justification of, extension of time for, § 1054.
Justification of, in attachment, §§ 554, 555.
Justification of, in justice's court, § 92.
Justification of, on appeal, § 948.
Justification of, on appeal bond to superior court, § 978.
Justification of, on attachment of vessel, § 821.
Justification of, on claim and delivery, § 513.
Justification of, on giving bail, §§ 493, 494, 495.
Justification of, power of court commissioner, § 259, subd. 3.
Justification of where bond given by grantee in suit to set aside fraudulent conveyance, § 678½.
Liability of, on undertaking to stay money judgment, § 942.
New bond where sureties become insufficient, rights cease on failure to file, § 1057.
Objection to, waiver of, by failure to except, §§ 513, 529.
Paying judgment, compelling repayment, § 709.
Qualifications of sureties, § 1057.
Qualifying in several amounts, when permitted, § 1057.
Referee, surety cannot be, § 641.
Replevin bond, on, when not bound by affidavit of value, § 473.
Replevin, in, exception to, § 513.
Replevin, in, justification of, § 515.
Several amounts, sureties, when may qualify in, § 1057.
Subrogation of surety on appeal bond, § 1059.
Subrogation of surety on paying judgment, §§ 709, 1059.
Subrogation, right of, and proceedings to obtain, § 709.
Waiver of objection by failure to make, §§ 513, 529.

SURETY COMPANIES.
Certificate of authority to do business, § 1057a.
Justification by, manner of and procedure, § 1057a.
Justification, when complete, § 1057a.

SURGEONS. See Physicians.

SURPRISE.
Amendment on ground of, § 473.
As ground for relief from default judgment in justice's court, § 859.
New trial on ground of, § 657.
Relief from judgment or order on ground of, § 473.

SURVEY.
Order to allow, in action of ejectment, § 742.

SURVIVAL.
Action not abated by death, disability, or transfer, when, § 385. See Abatement.
Continuance of action against successor or representative, § 385.
Death, effect on limitations, §§ 353, 355.

SUSPENSION.
Executors or administrators, of. See Executors and Administrators.
Statute of limitations, of. See Limitation of Actions.

SUTTER COUNTY.
One superior judge for Sutter and Yuba counties, § 65.
Residence of superior judge of, § 158.

SWAMP LAND DISTRICT.
Disqualification of judge or justice in actions in relation to, and proceedings on, § 170.

T

TAXATION. See Tax-collector.
Adverse possession, payment of taxes necessary to, § 325.
Claim and delivery, affidavit in, as to taxes, § 510.
Costs in course in action involving taxes, §§ 1022, 1024.
Limitation of action against tax-collector, § 341.
Redemptioner must pay what taxes, §§ 702, 703.
Taxpayer can enjoin issuance or sale of bonds for public improvements, § 526a.

TAX-COLLECTOR.
Limitation of action against, for seizure of goods, § 341.

TEACHER.
Exempt from jury duty, § 200.
Of music, exemption of property of, § 690.

TEAMSTER.
Property of, exempt from execution, § 690.

TELEGRAPH.
Line, employee of, exempt from jury duty, § 200.
Seal, how described by telegraph, § 1017.
Service by, authorized, § 1017.
Service by, manner of, § 1017.
Service by, powers and duties of officer, § 1017.

TENANT. See Landlord and Tenant.

TENANT FOR LIFE. See Life Estate.

TENANT FOR YEARS.
Judgment in partition does not affect, § 767.
Partition. See Partition.
Setting off of estate for years in partition, § 770.
Waste, liability for, § 732.

TENANT IN COMMON.
Any member may sue or defend for all, §§ 381, 384.
Parties in suits concerning, §§ 381, 384.
Partition, §§ 752–801. See Partition.
Waste, liability for, § 732.

TENDER.
Before suit affects costs how, § 1030.
Keeping good, § 1030.
Payment, tender is equivalent to, on redemption, § 704.

TENSE.
of words in code, § 17.

TENURE OF OFFICE. See Office.

TERMS OF COURT.
Sessions of court. See Superior Court; Supreme Court.

TERRITORY.
Included under state and United States, § 17.

TESTIFY.
Includes what, § 17.

TESTIMONY. See Evidence.

THINGS IN ACTION. See Choses in Action.

TIMBER.
Damages for cutting or carrying away, §§ 733, 734.

TIME.
Action comenced when, § 350.
Alias summons, time of issuance of, § 408.
Amend, time to where demurrer sustained, § 476.
Amendments, time to answer, § 432.
Answer, after judgment where summons not served, § 473.
Answer, extension of time for, § 473.
Answer, notice in summons of time for, § 407.
Answer, time for, § 407.
Answer, time for where demurrer overruled, § 476.
Appeal, exception to sureties on, § 948.
Appeal, justification of sureties on appeal, § 948.
Appeal, notice of, time to file, § 941b.
Appeal to superior court, §§ 939, 974.
Appeal to superior court, statement on, amendments, time to file, § 975.
Appeal to superior court, statement on, time to file, § 975.
Appeal to superior court, time to file bond on, § 978a.
Appeal to superior court, transmission of papers, § 977.
Appeal to supreme court, time of taking, § 939.
Appeal to supreme court, time to take where motion for new trial pending, §§ 939, 941b.
Appeal, undertaking, time to file, § 940.
Arrest, order for, § 483.

TIME. (Continued.)
Arrested defendant, surrender of by trial, §§ 488, 489.
Attachment in justice's court, time of issuance of, § 866
Attachment, justification of sureties on undertaking to release, § 554.
Attachment, motion to discharge, §§ 554, 556.
Attachment of vessel, § 817.
Attachment, time of issuance, § 537.
Attachment, time of return, § 559.
Bill of exceptions, amendments, time to file, § 650.
Bill of exceptions, engrossing and serving time for, § 650.
Bill of exceptions, notice of presentment to judge, § 650.
Bill of exceptions, preparation and settlement, §§ 649, 650.
Bill of exceptions, proceedings in relation to. See Exceptions.
Bill of exceptions, time to prepare and serve, § 650.
Bill of exceptions, time to prepare and serve amendments, § 650.
Bill of exceptions, time to present, §§ 649, 650.
Bill of exceptions, time to present to judge, § 649.
Change of venue, of demand for, § 396.
Claim of mariner or seaman, time to contest, § 826.
Code takes effect when, § 2.
Computation of, rule for, § 12.
Computation for term of office of supreme judge, § 41.
Computation of, when service by mail, § 1013.
Computation of, when last day falls on holidays, § 12.
Contest of seaman's claim, § 826.
Continuance in justice's court, length of, §§ 874, 876.
Cost-bill, on appeal, time to file, § 1034.
Cost-bill, time to file, § 1033.
Costs, motion to tax, time for, § 1033.
Costs, security for, time to give, § 1037.
Court commissioner, report of, time to make, § 729.
Decision, time for, § 632.
Default, relief from, in justice's court, time to apply for, § 859.
Delivery of property in claim and delivery, when may be demanded, § 509.
Demurrer, extending time to file, § 473.
Demurrer, overruling, time to answer runs from notice, § 476.
Demurrer, sustaining, time to amend runs from notice, § 476.
Demurrer to answer, time for, § 443.
Demurrer, time to answer or amendment, where overruled or sustained, § 476.
Entries in justice's docket, time of making, § 912.
Exception, time of taking, § 646.
Exception to sureties, time for, §§ 513, 529.

TIME. (Continued.)
Execution, issuance, after five years, § 685.
Execution, return of, time for, § 683.
Execution, time within which to issue, § 681.
Execution, time for which judge may stay, § 681a.
Extension of, during attendance of attorney upon legislature, § 1054.
Extension of, power of court as to, §§ 473, 1054.
Findings, of service of, § 634.
Foreclosure, report of commissioner in, time to file, § 729.
Guardian ad litem, appointment in justice's court, § 843.
Holiday, computation of time where last day falls on, § 12.
Injunction prior to trial continues no longer than twelve months, § 527.
Injunction, time of granting, §§ 527, 528.
Injunction, time of issuing, § 527.
Intervention, time to answer or demur, § 387.
Justice's judgment, service of notice of rendition of, § 893.
Judgment, duration of lien, § 671.
Judgment on verdict, time of entry of, §§ 664, 671.
Judgment, relief from, time to move for, § 473.
Judgment, vacation of, hearing of motion, § 663a.
Judgment, vacation of, notice of motion, § 663a.
Justice's court, alias summons, time to issue, § 847.
Justice's court, answer or demurrer to amended pleading in, time for, § 860.
Justice's court, demurrer to answer in, time for, § 857.
Justice's court, demurrer to complaint in, time for, § 854.
Justices' courts, entry of judgment in, § 892.
Justices' courts, issuance of attachment in, § 866.
Justice's court, lien of judgment in, duration of, § 900.
Justice's court, hearing in, § 850.
Justice's court, judgment in, to be entered within ten days after submission, § 892.
Justice's court, judgment upon verdict in, to be entered at once, § 891.
Justice's court, motion to vacate judgment in, § 859.
Justice's court, notice of time in, service of, § 850.
Justice's court, postponement of trial, time of, §§ 874, 875, 876, 877.
Justice's court, stay in, not to exceed ten days, § 901a.
Justice's court, summons in, to issue within one year, § 840.
Justice's court, time for appearance, § 845.

TIME. (Continued.)
Justice's court, time for appearance where alias summons issued, § 846.
Justice's court, time for commencement of trial in, § 873.
Justice's court, time of making entries in docket, § 912.
Justice's court, time to amend in, § 858.
Justice's court, time to answer, § 845.
Justice's court, time within which execution may issue, § 901.
Justice's judgment, duration of lien of, § 900.
Justification of sureties on bail bond, notice of, § 493.
Lien of judgment filed in another county, duration of, § 674.
Lien on vessels, duration of, § 813.
Limitation on time for issuing and returning summons, § 581.
Lis pendens in suit to quiet title, time to file, § 749.
Mail, extension of time where service is by, § 1013.
Mail, where notice served by, § 1005.
"Month" means calendar month, § 17.
Mortgage, entry of satisfaction of, § 675a.
New trial, affidavits, time to file and serve, § 659.
New trial, notice of intention to move for, time to file and serve, § 659.
New trial, time to file counter-affidavits on motion for, § 659.
Notice of hearing, § 594.
Notice of justification of sureties, § 712.
Notice of motion, time of service, § 1005.
Notice of rejection of bail, § 492.
Notice, where made by mail, § 1003.
Order, relief from, time to move for, § 473.
Pending, action deemed to be, during what time, § 1049.
Police court, summons in, issuance of, § 930.
Quieting title, issuance of summons, § 750.
Redemption, §§ 702, 703, 707.
Rehearing, §§ 44, 45.
Relief against default in justice's court, application for, § 859.
Report of referee or court commissioner, time to make, § 643.
Return of temporary restraining order granted without notice, § 527.
Rules of court, time of taking effect, § 130.
Rules of supreme court take effect when, § 130.
Seaman, claim of, time to contest, § 826.
Sheriff's deed, time for issuance of, § 703.
Summons in civil action in police court, time of issuing or return, § 930.
Summons in justice's court, alias, time for issuance, § 847.
Summons in suit to quiet title, time to post copy on property, § 750.
TIME. (Continued.)
Summons, justice's court, time for issuance, § 840.
Summons in police court, issuance of, § 930.
Summons, time for issuance of, §§ 406, 581a.
Summons, time to serve, § 581a.
Summons, time for return of, § 581a.
Summons, time to answer, § 407.
Summons, time to issue, in suit to quiet title, § 750.
Summons to joint debtor after judgment, time to serve and return, § 990.
Summons, when to be issued and returned, § 581a.
Surrender by bail of arrested defendant, time for, §§ 488, 489.
Venue, of demand for change of, § 396.
Within which an act is to be done, may be extended, § 1054.
Within which summons may issue on complaint, §§ 406, 581a, 840.

TITLE.
Abstract of, in partition, §§ 799, 800.
Action involving, to real estate, costs allowed of course when, § 1022.
Action involving title to realty, publication of summons, evidence required before granting relief, § 585.
Adverse claim, action to determine, § 1050.
Code, title of, § 1.
Complaint to contain, § 426.
Co-tenants may unite in suit relating to, § 381.
Defective title or want of title on papers, effect of, § 1046.
Parties defendant in actions involving, § 379.
Quieting, §§ 738–751. See Quieting Title.
State, action against to quiet title. See State.

TITLE INSURANCE COMPANIES.
Action on policy, limitation of, § 339.

TOLL.
Costs of course in action involving, § 1022.

TOLL-GATE.
Keeper of, exempt from jury duty, § 200.

TORTS.
Definition of injury to person, § 29.
Definition of injury to property, § 28.
Joinder of actions for, § 427.
Kinds of, § 27.

TOWN.
Partition of property included in town site, § 763.
Service of summons, on, § 411.

TOWNSHIP.
Change in boundary, succession of justices, § 107.
Justices in. See Justices' Courts; Justices of the Peace.

TRANSCRIPT.
Appeal, in. See Appeals, V.
Compensation of reporter, § 274.
Justice's court, § 92.
Of docket filed in another county, judgment becomes lien there, § 674.
Of entries in justice's docket, prima facie evidence, § 912.
On transfer of cause from justice's to superior court, § 838.
Phonographic reporters, on appeal. See Appeals, V.
Phonographic reporters, prima facie correct, § 273.
Reference to, on hearing of motion for new trial, § 660.

TRANSFER.
Of action to another court, manner of, § 399.
Of action to another court, when proper, § 397.
Of interest in action, proceedings on, § 385.
Venue, change of. See Place of Trial.
Books, papers and records of, to new supreme court when new constitution adopted, § 55.
Business, of, when extra sessions of supreme court held, § 67b.

TRANSFERRED CASE.
Remittitur, § 56.

TREASURER.
Deposit in court must be paid to, § 573.
Deposit with, § 573. See Deposit in Court.
Money deposited with treasurer by clerk of court, how withdrawn, § 188.

TREBLE DAMAGES. See Damages.

TRESPASS.
Justice's court, action for, in, § 112.
Land, on, limitation of action for, § 338.
Personalty, to, limitation of action for, § 338.
Timber, cutting, damages for, §§ 733, 734.
Trees, cutting, damages for, §§ 733, 734.

TRIAL. See Instructions; Jurors; Jury; Practice.
Absence of party, bringing issue to trial in, § 594.
Adjournment. See Adjournment.
Admonition to jury on separation, § 611.
Argument, case may be brought before court for, when, § 665.
Argument, case reserved for, bringing before court, § 665.
Argument, order of, § 607.
Argument, reserving case for, §§ 664, 665.
Argument, submission of case without, § 607.
Attorney, trial of accusation against, § 297.
Calendar, causes, how must be entered on, § 953.

TRIAL. (Continued.)
Calendar, causes must remain on, till when, § 593.
Calendar, dropping cause from, § 593.
Calendar, restoring cause to, § 593.
Challenge of jurors, §§ 601–603. See Jurors.
Change of, where county designated is not proper county, § 397.
Changing place of, for convenience of witnesses, § 397.
Changing place of, for disability of judge, § 397.
Changing place of, for impartial jury, § 397.
Changing place of, grounds for, § 397.
Changing place of. See Place of Trial.
Clerk must keep register of actions, § 1052.
Clerk taking testimony, when no shorthand reporter, § 1051.
Compromise, offer of, how made, and its effect, § 997.
Conduct of, §§ 607–619.
Conduct of, powers of judge, §§ 177, 178.
Consolidation of actions, when may be ordered, § 1047.
Continuance, costs on, § 1029.
Continuance. See Continuance.
Court, by, § 631.
Decision of court, facts and conclusions of law must be stated separately, § 633.
Decision of court on question of fact, filing, time for, § 632.
Decision of court on question of fact must be written, § 632.
Deposit in court, § 573. See Deposit in Court.
Dismissal. See Dismissal.
Error disregarded unless substantial rights affected, § 475.
Evidence. See Evidence.
Exceptions, §§ 646–653. See Exceptions.
Findings of fact and conclusions of law must be stated separately, § 633.
Findings of fact may be waived how, § 634.
Findings. See Findings.
Hearing, either party may bring issue to, § 594.
Hearing in absence of party, § 594.
Hearing, notice of, § 594.
Inspection of writings, order for. See Inspection of Writings.
Instructions. See Instructions.
Issue of law, proceedings after determination of, §§ 636.
Issue, §§ 588–596. See Issues.
Issues, by whom triable, §§ 309, 591, 592.
Joint debtor, proceedings against, when not summoned in original action, §§ 989–994.
Judge, powers of, in conduct of proceedings, § 177.
Judgment on demurrer, proceedings after, § 636.
Jurors. See Jurors.

TRIAL. (Continued.)
Jury, admonition to, on separation, § 611.
Jury, deliberation of, how conducted, § 613.
Jury, deliberation of, what papers, etc., may and may not take with them, § 612.
Jury, discharge of, before verdict, retrial, § 616.
Jury, how and when waived, § 631.
Jury, polling, § 618.
Jury. See Jury.
Justice's court in. See Justices' Courts, XIV.
New, §§ 656–663½. See New Trial.
Notice of hearing, § 594.
Order of proceeding on trial, § 607.
Order of, where several defendants, § 607.
Place of. See Justices' Courts, XII; Place of Trial.
Police court, in, §§ 929–933. See Police Court.
Powers of judge in conduct of proceedings, § 177.
Private, in what cases may be had, § 125.
Referee's findings must state conclusions of law and fact separately, § 643.
Reference, §§ 638–645. See Reference.
Sick juror, proceedings in case of, § 615.
Sittings to be public, § 124.
Sittings, when may be private, § 125.
Special issue, not made by pleadings, trial of, § 309.
Statement on appeal. See Statement.
Verdict, how declared, § 618.
Verdict, informal, proceedings on, § 619.
Verdict, sealed, rendered during adjournment, § 617.
Verdict, prevented, retrial of cause, § 616.
Verdict. See Verdict.
View by jury of premises, conduct of, § 610.
View by jury of premises, when allowed, § 610.

TROVER.
Damages for cutting and carrying away trees, § 733.

TRUST COMPANIES. See Trustees; Trusts.
Limitation of actions against, § 348.

TRUSTEES. See Trust Companies; Trusts.
Appeal by, dispensing with bond, § 946.
Beneficiaries, may sue without joining, § 369.
Costs in action by and against, § 1031.
Deposit in court by, of subject of litigation, § 572.
Express trust, trustee of, who is, § 369.
Joinder of claims against, § 427.

TRUSTEES. (Continued.)
Judgment against trustee receiving particular kind of money or currency, § 667.
Appeal by trustee from justice's judgment, dispensing with bond, § 946.

TRUSTS. See Trust Companies; Trustees.
Action to quiet title involving trust under will, conclusiveness of determination, § 738.
Action to quiet title involving trust under will, will admissible, § 738.
Action to quiet title, validity may be determined, § 738.
Injunction where obligation arises from, § 526.
Parties in suit to establish, § 381.

TYPEWRITERS.
Exempt from execution, § 690.

TYPEWRITING.
Writing includes, § 17.

U

UNDERTAKING. See Bond; Surety.
Actions on, jurisdiction of, justice's court, § 112.
Affidavit of sureties, § 1057.
Appeal to superior court, on, § 978.
Appeals, §§ 940–949. See Appeals, IV.
Arrest of defendant in justice's court, for, § 862.
Arrest of defendant, on, §§ 482, 487.
Attachment, in, §§ 539, 540, 554.
Attachment in justice's court, on, § 867.
Attachment of vessel, on, § 818.
Attachment of vessel, on discharge of, § 822.
Commissioner or elisor to sell encumbered property, §§ 726, 729.
Continuance over ten days in justice's court, undertaking to pay judgment in case of, § 877.
Corporation acting as surety. See Surety.
Costs by non-resident or foreign corporation, for, § 1036.
County or city and county need not give, § 1058.
Court commissioners, power to take and approve, § 259.
Elisor, of, to sell encumbered property, § 726.
Fraudulent conveyance, by grantee on suit to set aside. See Fraudulent Conveyance.
Guardian, of, receiving proceeds of partition sale, § 794.
Indemnity. See Indemnity.
Injunction, upon, § 529.
Judgment, conclusiveness against sureties, § 1055.
Judgment, entry of, against sureties on five days' notice, § 1055.
Jurisdiction of justice in action on, § 112.

UNDERTAKING. (Continued.)
Limitation in action on, § 340.
Municipality need not give, § 1058.
New, failure to file, where sureties insufficient, rights to cease, § 1057.
New, may be required, where sureties become insufficient, § 1057.
Office, action for usurpation of, undertaking where brought on relation of private person, § 810.
Officer need not give, § 1058.
Particular proceeding, in. See particular title.
Quo warranto, in, § 810.
Receiver, of applicant for, § 567.
Receiver, on appointment of, § 566.
Replevin, in, §§ 512, 514, 519, 520. See Claim and Delivery.
Requisites of, in general, § 1057.
Several actions on, costs and disbursements in case of, § 1023.
State, county, city, town, or officer need not give, § 1058.
Supplementary proceedings, in, § 715.
Time for filing, extension of time for, § 1054.

UNITED STATES.
Includes District of Columbia and the territories, § 17.
Judgment in suit to quiet title does not bind, § 751.

UNITED STATES COURTS.
Proceedings in, not stayed by injunction, § 526.

UNIVERSITY OF CALIFORNIA.
Admission to practice law on diploma from, § 280b.

UNIVERSITY OF SANTA CLARA.
Admission of graduates to practice law without examination, § 280b.

UNIVERSITY OF SOUTHERN CALIFORNIA COLLEGE OF LAW.
Diploma admits to practice law without examination, § 280b.

UNLAWFUL DETAINER. See Forcible Entry and Unlawful Detainer.

UNMARRIED FEMALE.
May recover for own seduction, § 374.

USAGE. See Evidence.
Local, governs actions concerning mining claim, § 748.

USURPATION OF OFFICE AND FRANCHISE.
Action, attorney-general may bring, when, § 803.
Action, attorney-general, when must bring, § 803.
Action, governor may direct bringing, § 803.
Action, one may be brought against all persons claiming office, § 808.
Action to be in name of people, § 803.
Action, upon whose information brought, § 803.

USURPATION OF OFFICE AND FRANCHISE. (Continued.)
Appeal from judgment that one is usurping office does not stay, § 949.
Arrest of defendant for receiving fees, § 804.
Arrest, proceedings on, § 804.
Arrest, who may order, § 804.
Complaint in action for, § 804.
Complaint may set forth name of person entitled, § 804.
Complaint, what may state, § 804.
Corporation unlawfully exercising franchise, proceedings against, § 803.
Costs, when defendant liable for, § 809.
Damages may be recovered by claimant, § 807.
Fine for, § 809.
Information, § 803.
Judgment in favor of claimant entitles him to office, § 806.
Judgment may determine rights of either or both parties, § 805.
Judgment may determine rights of incumbent and claimant, § 805.
Judgment, where defendant guilty, § 809.
Oath and bond of claimant on taking office, § 806.
Rights of several claimants may be determined in single action, § 808.
Scire facias abolished, § 802.
Several claimants, right may be determined in single action, § 808.
Undertaking in action for, when brought on relation of private person, § 810.

USURPER. See Usurpation of Office and Franchise.

V

VACANCY.
Judge's office, effect of, § 184.
Justice's office, how filed, § 111.
Justice's office, in, § 915.
Proceedings in court not affected by, § 184.
Superior judgeship, vacancy in, § 70.
Supreme judgeship, vacancy in, § 42.

VACATION.
Arrest, vacation of, § 503.
Arrest, vacation of order for, § 504.
Judgment, of, grounds for, § 663. See Judgment.
Order refused by another judge, § 183.
Superior court may vacate its judgment in what cases, § 663.

VARIANCE.
Failure of proof, and not variance, when, § 471.
Immaterial, how provided for, § 470.
Material, how provided for, § 469.
Material, when only deemed to be, § 469.
Variance between allegation and proof, amendment, §§ 469, 470.
What not deemed to be, § 471.

VENDOR AND VENDEE.
Receiver, appointment of, in suit by vendor to vacate sale, § 564.

VENIRE. See Juror.

VENUE. See Place of Trial.

VERDICT.
Adjournment, bringing in sealed verdict during, § 617.
Affidavit of jurors to show misconduct of jurors, § 657.
Amount of recovery, jury must find, when, §§ 626, 627.
Chance, new trial, § 657.
Claim and delivery, verdict in, what to find and assess, § 627.
Clerk, duty of, § 618.
Counterclaim for money, verdict to find amount, § 626.
Courts open any day to receive, § 134.
Death after, judgment on, § 669.
Death after verdict and before judgment, § 669
Declared how, § 618.
Directing findings upon particular questions of fact, § 625.
Entry, manner of, § 628.
Entry to be made, §§ 625, 628.
Excepted to, deemed, § 647.
Exception to, for insufficiency of evidence, form of, § 648.
Findings, special, filing and entry, § 625.
Findings upon particular questions of fact, directed on request, § 625.
Form of, § 618.
General controlled by special, if inconsistent, § 625.
General, defined, § 624.
General, findings upon particular questions of fact directed upon request, § 625.
General or special, in what cases discretionary, § 625.
General or special, verdicts are, § 624.
General, when may be rendered, § 625.
Holiday, may be received on, § 134.
In actions to recover realty, § 740.
In proceedings against joint debtors, § 994.
Informal or insufficient, proceedings in case of, § 619.
Interest on, to be included in judgment, § 1035.
Is general or special, § 624.
Judgment not supported by, notice of motion to set aside, and hearing of, § 663a.
Judgment not supported by verdict, setting aside, § 663.
Judgment on, when to be entered, § 664.
Judgment roll, as part of, § 670.
Jury, discharge of, before retrial, § 616.
Justice's court, in, § 851.
Justice's court, entry of judgment on verdict in, § 891.
Money, action for, verdict to find amount, § 626.
Polling jury, § 618.
VERDICT. (Continued.)
Polling jury, proceedings where jury disagree, § 618.
Polling jury, verdict complete if no disagreement, § 618.
Prevented, retrial of cause, § 616.
Process, bringing in sealed verdict during, § 617.
Replevin, in, § 627.
Review of, on appeal, § 956.
Sealed, rendered during recess or adjournment, § 617.
Special, controls general, if inconsistent, § 625.
Special, court may direct, when, § 625.
Special, defined, § 624.
Special, entry, how to be made, § 628.
Special, entry of, to be made, § 628.
Special, filing and entry of, § 625.
Special, inconsistent with general, controls, § 625.
Special, judgment rendered in, to be entered, § 628.
Special, must be filed and entered, § 625.
Special, order reserving case to be entered, § 628.
Special, requisites of, § 624.
Special, vacation of judgment entered on, § 663.
Special, when may be rendered, § 625.
Specific personal property, in action to recover, § 627.
Three-fourths jury may render, §§ 613, 618.
Vacation of, on court's own motion, grounds for, § 662.
Written, must be, § 618.

VERIFICATION.
Accusation against attorney to be verified, § 291.
Affidavit, verification to be by, § 446.
Affidavit, what to state, § 446.
Answer to be verified where complaint verified, § 437.
Attorney, verification by, § 446.
Commissioner at foreclosure sale, verification of report of, § 729.
Complaint in action against vessel to be verified, § 815.
Corporation a party, any officer may make, § 446.
Cost-bill, verification of, §§ 1033, 1034.
County a plaintiff, not necessary, § 446.
Genuineness and execution of instrument are not admitted when, § 449.
Genuineness and execution of instrument in complaint are not admitted when, § 447.
Genuineness and execution of written instrument in answer admitted, unless denied under oath, § 448.
Injunction, complaint for, must be verified, § 527.
Injunction may be issued on verified complaint, § 527.
Manner of, § 446.
Necessary when, § 446.
Officer a plaintiff, not necessary, § 446.
Party to make, generally, § 446.

VERIFICATION. (Continued.)
Party, by one other than a, § 446.
Pleadings, verification of, § 446.
Police court, complaint in, to be verified, § 929.
State a plaintiff, no necessary, § 446.
Vessels, complaint in action against to be verified, § 815.
Where officer or state a plaintiff, § 446.
Where written instrument attached to pleading, §§ 447, 887.

VESSELS. See Shipping.

VESTED RIGHTS.
Not affected by code, § 8.

VIEW OF PREMISES.
By jury, § 610.

VOLUNTARY ASSOCIATION. See Associates; Association.

W

WAGES.
Exemption of, from execution, § 690.
Fee of attorney as costs in action for, in justice's court, § 924.
Lien for. See Lien.
Seamen's, § 825, 826. See Shipping.

WAIVER.
Action brought in wrong county, what is waiver of, § 396.
Appeal, deposit or bond on, waiver of, §§ 940, 948.
Demurrer not waived by filing answer at same time, § 472.
Disqualification of judges, waiver of, § 170.
Findings, waiver of, § 634. See Findings.
Jury in justice's court, of, how effected, § 883.
Jury, of, §§ 592, 631.
Objections to complaint, when waived, § 434.
Objections, what cannot be waived, § 434.
Summons in justice's court, of, § 841.
Summons, waiver of issuance of, by appearance, § 406.
Sureties, waiver by failure to object, §§ 513, 539.
Undertaking on appeal, of, § 940.
Undertaking or deposit on appeal, § 948.

WANT OF PROSECUTION.
Dismissal, failure to issue or serve summons, § 581.
Dismissal on court's own motion, § 583.
Failure of plaintiff to bring case to trial, § 583.
Notice of motion to dismiss, § 583.

WAR.
As cause for removal of court, § 142.
Limitation of actions, how affected by war, § 354.

WARDS. See Guardian and Ward.

WARRANT.
For salary of justice of peace, § 103.

WASTE.
Cutting or injuring trees, damages for, § 733.
Damages, treble, for, §§ 732–735.
Enjoining, pending foreclosure, § 745.
Execution sale, waste by purchaser restrained, § 706.
Execution sale, waste by purchaser, what is not, § 706.
Foreclosure, enjoining waste, § 745.
Guardians, by, § 732.
Joint tenants, by, § 732.
Public money or property, right to enjoin waste of by officer, § 526a.
Public officers, by, enjoining, § 526a.
Restraining, during time to redeem from execution, § 706.
Security against, on appeal, §§ 945, 978.
Tenant in common, by, § 732.
Tenants, by, § 732.
What is not, § 706.

WATERS.
Injunction respecting, vacation or modification of, § 532.
Injunction to prevent diversion, diminution, or increase, refusal of bond, § 530.
Offense on lake or stream in several counties, venue of action, § 393.
Running in several counties, venue of action for penalty or forfeiture, § 395.

WELLS.
Implements for putting down, exemption of, § 690.

WHARFAGE.
Vessels liable for, § 813.

WIFE. See Husband and Wife.

WILLS.
Action to quiet title involving gift or trust under, conclusiveness of determination, § 739.
Action to quiet title involving gift or trust under, will admissible, § 738.
Action to quiet title, validity of gift or trust under, may be determined, § 738.
Certificate of probate, to be sealed, § 153.
Codicil, will includes, § 17.
Legacy or devise, appealability of order refusing or allowing payment of, § 963.
Order admitting or refusing admission to probate, appealable, § 963.
Order or judgment relating to validity of will, appealable, § 963.
Orders in probate proceedings, what admissible, § 963.
Probate, certificate of, to be sealed, § 153.

WITNESSES. See Evidence; Depositions.
Absence of, postponement of trial for, § 595.
Attendance, power of judicial officer to compel, § 177.
Changing place of trial for convenience of, § 397.
Clerk to take testimony when, § 1051.
Compelling, to produce books and papers, § 1000.
Contempt in justice's court, § 906.

WITNESSES. (Continued.)
Continuance because of absence of. See Continuance.
Deposition of, on postponement of trial, § 596.
Depositions. See Depositions.
Disqualified as referee, § 641.
Docket of justice of peace must contain names of, § 911.
Evidence of. See Evidence.
Exclusion of, from courtroom, § 125.
Juror as, § 603.
Juror, trial of challenge, witnesses, § 603.
On trial of challenge of juror, § 603.
Power of court to compel attendance, § 128.
Power of judicial officer to compel attendance of, § 177.
Referee, disqualified as, § 641.
Subpœna, how served, § 1015.
Subscribing, mark, § 17.
Supplementary proceedings, at, § 718.

WORDS AND PHRASES. See Definitions.
Abbreviations, § 186.
"Action" includes special proceedings, § 363.
Affinity, § 17.
Construed according to context and approved usage, § 16.
County includes city and county, § 17.
Depose, § 17.
Joint authority, words giving, § 15.
Masculine gender, § 17.
Month, § 17.
Oath, § 17.
Person, § 17.
Personal property, § 17.
Plural number, words in, § 17.
Present tense, words in, § 17.
Process, § 17.
Property, § 17.
Real property, § 17.
Seal, § 14.
Section, § 17.
Signature, § 17.
Singular number, words in, § 17.
State, § 17.
Subscription, § 17.
Technical words and phrases, § 16.
Testify, § 17.
Typewriting, writing includes, § 17.
United States, § 17.
Will, § 17.
Writ, § 17.
Writing, § 17.

WRITINGS. See Written Instruments.
Includes what, § 17.

WRITS.
Court commissioner, power to hear motions for, § 259
Defined, § 17.
Justices' clerks and deputies in townships in counties of seventh class by, issuance and form of, § 103b.
Justices' courts in townships of two hundred and fifty thousand and over, issuance of in, § 101.
Justices' clerks in townships, power to issue, § 103a.

WRITS. (Continued.)
Particular writ. See particular title.
Power of judges to grant and discharge, at chambers, §§ 165, 166.
Scire facias abolished, § 802.
Seal, necessity of, § 153.
Service of, must be on party, § 1015.
Superior court may issue what writs, § 76.
Superior judge, power of, to issue, § 76.
Supreme court, power of, to issue, § 51.
Telegraph, service by, § 1017.

WRITS OF ASSISTANCE. See Assistance.

WRITS OF POSSESSION. See Assistance.
In suit to determine adverse claim § 380.

WRITS OF PROHIBITION. See Prohibition.

WRITS OF REVIEW. See Review.

WRITS OF SCIRE FACIAS.
Abolished, § 802.

WRITTEN INSTRUMENTS.
Adverse possession under written instruments, §§ 322, 323.
Annexed to pleadings, denial of, manner of, §§ 447, 448, 887.
Construction of, lex loci controls, § 337.
Exhibiting original and delivering copy to adverse party, § 886.
Inspection of, demand for, § 440.
Inspection of. See Inspection of Writings.
Limitation of actions on, § 337.
Lost, how supplied, § 1045.
Notice to produce. See Evidence.
Pleading, genuineness of, how admitted or controverted, §§ 447–449, 887.
Pleading, in justice's court, and admission of genuineness, §§ 886, 887.
Seal. See Seal.

WRONGFUL DEATH. See Death.
Damages for, § 377.
Guardian may sue for death of ward, § 376.
Heirs may sue for, § 377.
Limitation of action for, § 339.
Parent may sue for death of minor, § 376.
Representatives, when may sue for, § 377.
Who may be sued for, §§ 376, 377.
Who may sue for, § 377.

WRONGS. See Torts; Wrongful Death.
Definition of injury to person, § 29.
Definition of injury to property, § 28.
Joinder of actions for, § 427.
Kinds of, § 27.

Y

YOUNG MEN'S CHRISTIAN ASSOCIATION.
Admission to practice law on diploma from Law College of, § 280b.

YUBA COUNTY.
One superior judge for Yuba and Sutter counties, § 65.
Residence of superior judge, § 158.